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)

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

INTRODUCTION

Thirty-one members of the United States House of Representatives have filed this suit in their official capacities challenging the President's authority to terminate unilaterally the Anti-Ballistic Missile Treaty ("the ABM Treaty"),[1] pursuant to the terms of the Treaty itself. Plaintiffs' lawsuit, however, is little more than a purely political attack on the President's established foreign relations power. As the Supreme Court and the D.C. Circuit have repeatedly held, such disputes are not the province of the judicial system but must be left to the political branches of government. Similar suits have been rejected on various justiciability grounds, and this suit should thus be dismissed. But even were this Court to reach the merits of the dispute, the President's authority to suspend or to terminate a treaty with a foreign country, pursuant to the terms of the treaty but without the concurrence of Congress, is beyond question. Indeed, where courts have reached the merits of this question, they have concluded that the Constitution affords the President the authority to terminate treaties, acting alone. See Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), vacated, 444 U.S. 996 (1979); Goldwater v. Carter, 444 U.S. 996 (1979) (Brennan, J., concurring). Thus, whether the Court decides this case on grounds of justiciability or on the merits, the result is the same. Plaintiffs' claims must be dismissed.

While the President acted well within his constitutional powers in announcing the termination of the ABM Treaty, this Court need never reach that underlying issue. For any number of reasons previously articulated by the courts, a more clear instance of a nonjusticiable question can hardly be imagined. First, plaintiffs, members of Congress complaining that the President failed to consult with Congress before terminating the Treaty, lack standing under the

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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).

doctrine of Raines v. Byrd, 521 U.S. 811 (1997). Raines held squarely that individual legislators claiming 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, who concede that the injury they have suffered is "institutional" in nature, Compl. ¶ 6, cannot demonstrate the constitutional minimum of "injury in fact" under Article III.

Second, the case or controversy requirement is not satisfied here for yet another reason – the case does not present a ripe controversy between the two Branches because the Legislative Branch has taken no definitive, official action "asserting its constitutional authority" in a manner inconsistent with the challenged conduct of the Executive Branch. Goldwater, 444 U.S. at 534 (Powell, J., concurring). Even assuming that plaintiffs could satisfy the threshold requirement of standing, it would be premature for the Court to assert its jurisdiction in the absence of an actual confrontation between the two Branches.

Third, this dispute presents a nonjusticiable political question. As case law makes clear, "matters 'vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" Holmes v. Laird, 459 F.2d 1211, 1215 (D.C. Cir. 1972) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)). Indeed, in the only previous instance where members of Congress have challenged the President's authority to terminate a treaty, a four-Justice plurality in Goldwater v. Carter concluded that the dispute presented a nonjusticiable political question "because it involves the authority of the President in the conduct of our country's foreign relations and the extent to

which the Senate or the Congress is authorized to negate the action of the President." 444 U.S. at 1002. Consequently, whether viewed through the prism of standing, ripeness, or the political-question doctrine, plaintiffs' claims cannot proceed in this Court.

Even if this Court chooses to reach the merits of this dispute, summary judgment for defendants is warranted. Analysis of the constitutional text, case law, and historical practice shows that the President's decision to withdraw from the ABM Treaty is within his constitutional powers. First, it is well established that the Constitution grants the President plenary control over the conduct of foreign affairs, including over most 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. Finally, historical practice demonstrates that the President has on numerous occasions acted unilaterally to terminate or suspend treaties, without significant objection by Congress.

In contrast, plaintiffs' arguments that either the Senate, or the full Congress, must acquiesce in a termination decision are not supported by specific textual evidence or case law. Plaintiffs' position does not take into account Congress' failure, in over 200 years, to seek to set for itself a more definite role in treaty termination. It also ignores that the ABM Treaty expressly contains a provision allowing for either party to withdraw under certain circumstances and that the Senate failed to condition its approval of the Treaty on a role for itself in termination.

At the time the ABM Treaty was ratified, the United States and the Soviet Union were engaged in a Cold War. The ABM Treaty was intended to reduce the risk of outbreak of a nuclear war by creating a state of mutually assured destruction. Now, with the dissolution of the Soviet Union and the development of cooperative relationships with the successor republics,

including Russia, the 30-year-old ABM Treaty no longer has any relevance. Instead of confronting the Soviet Union, the United States now faces threats from isolated rogue states and terrorists. In these dramatically changed circumstances, the President, in the exercise of his plenary foreign affairs powers, decided to withdraw from the ABM Treaty as permitted by the terms of the Treaty. Congress has not formally acted to seek to prevent, counteract, or take control over this decision. The present attempt by a small minority of Members of the House of Representatives to obtain the judiciary's help in interfering with the President's decision must be rejected.

BACKGROUND

1. The ABM Treaty

The ABM Treaty, which entered into force on October 3, 1972, originated as a bilateral treaty between the United States and the former Soviet Union. In general, the ABM Treaty set limits on the type, number, and location of anti-ballistic missile systems that could be deployed by the former Soviet Union and the United States. See Exh. 1. Each party undertook "not to deploy ABM systems for a defense of the territory of its country, and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region," except that each side was originally permitted to have two limited ABM-system deployment areas (later, by protocol,[2] reduced to one). Id., Arts. I, III. Quantitative and qualitative limits were set on the ABM systems that could be deployed in these areas. Id., Art. III. The Parties further agreed to

[2] Protocol to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, U.S.-U.S.S.R., Art. 1, 27 U.S.T. 1645, 1646.

limit qualitative improvements of their ABM technology and agreed not to develop, test, or deploy sea-based, space-based or mobile land-based ABM systems and their components. Id., Art. V.

The ABM Treaty formed a part of the United States' Cold-War-era policy of "mutually assured destruction" ("MAD"). MAD was based on the concept that neither the United States nor the Soviet Union would ever start a nuclear war if it knew the other side was able to respond massively without the threat of its response being overcome by a comprehensive ABM system. See Office of the Press Secretary, White House, Announcement of Withdrawal From the ABM Treaty, at 1 (Dec. 13, 2001) (Exh. 2); 148 Cong. Rec. S165-01, S165 (daily ed. Jan. 28, 2002) (statement of Sen. Kyl). As the White House has recently stated, "[o]ur ultimate security rested largely on the grim premise that neither side would launch a nuclear attack because doing so would result in a counter-attack ensuring the total destruction of both nations." Exh. 2, at 1. In the last decade, however, the global security environment has changed significantly. "The Soviet Union no longer exists [and] Russia is not an enemy, but in fact is increasingly allied with us on a growing number of critically important issues." Id.

2. The United States' Withdrawal From the ABM Treaty[3]

Article XV(1) of the ABM Treaty provides that the Treaty "shall be of unlimited duration." But this Article explicitly authorizes either party to withdraw from the Treaty in certain circumstances. Specifically, Clause 2 of Article XV provides:

> Each party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

Art. XV(2).

On December 13, 2001, President Bush gave formal notice of the United States' intention to withdraw from the Treaty, pursuant to this article. The notice was conveyed to Russia,

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[3] The dissolution of the former Soviet Union required the United States to re-evaluate its bilateral treaties with the Soviet Union, including the ABM Treaty. Letter from President William Jefferson Clinton to Hon. Benjamin A. Gilman, Chairman, Comm. on International Relations, United States House of Representatives (Nov. 21, 1997), reprinted in 144 Cong. Rec. H7276 (daily ed. Aug. 5, 1998). Prior to the current Administration's decision to withdraw from the Treaty, the United States attempted to resolve treaty succession issues with regard to the ABM Treaty by entering into a memorandum of understanding with four of the Soviet Union's "successor States" – Belarus, Kazakhstan, the Russian Federation, and Ukraine – but later abandoned that effort. See Memorandum of Understanding Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, Sept. 26, 1997 (the "MOU") (Exh. 3). The MOU was intended to constitute an acceptance by these successor States of the rights and obligations of the former Soviet Union under the ABM Treaty, subject to certain modifications. Id. However, the United States has neither implemented the MOU nor deposited its instrument of ratification as provided for by the MOU. Consequently, the MOU by its own terms has never entered into force. See United States Dep't of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2000 (June 2000) (located at http://www.state.gov/s/l/c3431.htm) (not listing MOU). We need not address here whether the dissolution of the Soviet Union at the end of the Cold War terminated the ABM Treaty, or whether the USSR's successor states automatically accepted its obligations.

Belarus, Kazakhstan, and Ukraine in diplomatic notes and was announced publicly. See United States Dep't of State, Text of Diplomatic Notes Sent To Russia, Belarus, Kazakhstan, and Ukraine (Dec. 14, 2002) (Exh. 4); Exh. 2. In these notes, the President recognized the dissolution of the Soviet Union in 1991, the development of "a new strategic relationship with Russia that is cooperative rather than adversarial," and the beginning of "strong relationships with most states of the former Soviet Union." Exh. 4, at 1. The President then cited as "extraordinary events" justifying the withdrawal that "a number of state and non-state entities [i.e., 'terrorists and rogue states' not part of the former USSR] have acquired or are actively seeking to acquire weapons of mass destruction . . . including long-range ballistic missiles . . . [that] pose a direct threat to the territory and security of the United States." Id. Accordingly, he stated that "the United States has concluded that it must develop, test, and deploy anti-ballistic missile systems for the defense of its national territory, of its forces outside the United States, and of its friends and allies." Id.

In a press statement, the President also noted that "[t]he attacks against the U.S. homeland on September 11 vividly demonstrate that the threats we face today are far different from those of the Cold War." Exh. 2, at 1. Continued adherence to the almost 30-year-old ABM Treaty would therefore "hinder[] our government's ability to develop ways to protect our people from future terrorist or rogue state missile attacks." Office of the Press Secretary, The White House, Remarks by the President on Missile Defense (Dec. 13, 2001) at 1 (Exh. 5); see also National Intelligence Council, Foreign Missile Developments and the Ballistic Missile Threat Through 2015, Unclassified Summary of a National Intelligence Estimate, at 3 (Dec. 2001) ("Most Intelligence Community agencies project that before 2015 the United States most likely

will face [intercontinental ballistic missile] threats from North Korea and Iran, and possibly from Iraq . . . .") (Exh. 6).

Pursuant to the terms of Article XV, the withdrawal became effective on June 13, 2002. Office of the Press Secretary, The White House, Statement by the President (June 13, 2002) (Exh. 7).

3. Congressional Activity with Regard to the ABM Treaty and Reaction to the Withdrawal Notice

Even before the President's recent decision to withdraw from the ABM Treaty, Congress recognized that the restrictions of the Treaty were no longer as relevant as they had been when the Treaty entered into force in 1972.[4] Thus, in 1995, Congress enacted the comprehensive

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[4] At least since the Reagan Administration, the proper interpretation of the scope of our duties under the ABM Treaty, and compliance issues involved in developing proposed anti-ballistic missile systems, have been the subject of some interest by Congress. Interest was originally sparked over President Reagan's Strategic Defense Initiative ("SDI"), which some members of Congress believed risked violating the Treaty. In order to maintain control over Treaty compliance, in 1987, Congress passed a provision prohibiting the Secretary of Defense from deploying an anti-ballistic missile system unless such deployment was specifically authorized by a law passed after December 4, 1987. Pub. L. No. 100-180, Div. A, Tit. II, § 226, 101 Stat. 1057 (1987), repealed by Pub. L. No. 104-106, Div. A, Tit. II, § 253(3), 110 Stat. 234 (1996). In 1989, Congress enacted a law requiring the Secretary of Defense to submit an annual report to Congress on the programs and projects that constitute the SDI. This report was to include "[a] statement of the compliance of the planned SDI development and testing programs with existing arms control agreements, including the 1972 Anti-Ballistic Missile Treaty." Pub. L. No. 101-189, Div. A, Tit. II, § 224(b)(6), 103 Stat. 1398 (1989), repealed by Pub. L. No. 106-65, Div. A, Tit. X, § 1032(b)(1), 113 Stat. 751 (1999).

Congress' concern about compliance with the ABM Treaty continued into the Clinton Administration. Early in that Administration, Congress again imposed reporting requirements and limited the use of appropriated funds to "development and testing [of anti-ballistic missile systems] consistent with" an interpretation of the ABM Treaty set forth by the Arms Control and Disarmament Agency. Pub. L. No. 103-337, Div. A, Tit. II, § 231, 108 Stat. 2699 (1994); see also Pub. L. No. 103-160, Div. A, Tit. II, § 235(d), 107 Stat. 1598 (1993) (requiring the Secretary of Defense to submit a report including "a statement of how production and deployment of any

(continued...)

Ballistic Missile Defense Act of 1995, which, among other things, stated that the rationale underlying the ABM Treaty "is now questionable as a basis for stability in a multipolar world," called for a review of provisions of the ABM Treaty, and set forth legislative interpretations of the scope of the ABM Treaty restrictions. Pub. L. No. 104-106, Div. A, Tit. II, §§ 232(6), (8), 235(a), (b), 110 Stat. 228, 228-33 (1996). Then, in 1999, apparently acknowledging the full extent of the extraordinary change in circumstances that had taken place since the ABM Treaty entered into force in 1972, Congress enacted the National Missile Defense Act of 1999, 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).

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[4](...continued)
projected Theater Missile Defense program will conform to all relevant arms control agreements [and a] descri[ption of] any potential noncompliance with any such agreement"). In 1996, Congress continued the reporting requirements, enacted similar restrictions on the use of appropriations, and reaffirmed a prior requirement that "any substantive[] modif[ication of] the ABM Treaty [must be] entered into pursuant to the treaty making power of the President under the Constitution." Pub. L. No. 104-106, Div. A, Tit. II, §§ 234(f), 235(a)(1)(B), (c), 110 Stat. 228, 228-33 (1996).

Until recently, members of Congress continued to introduce bills imposing limits on the Executive Branch's development or deployment of ABM systems. See H.R. 2786, 107th Cong., § 4a (2001) (introducing a bill for "the National Missile Defense Deployment Criteria Act of 2001," which would have prohibited the President from directing deployment of a "National Missile Defense system" (in violation of the ABM Treaty) unless "a joint resolution concurring in the President's [decision] is enacted as provided for in this section"); S.1439, 107th Cong., § 2 (2001) (introducing a bill for "the Ballistic Missile Defense Act of 2001," which would have prohibited funds from being expended for any activity inconsistent with the requirements of the ABM Treaty unless one of two conditions was met). Neither of the latter two bills has been enacted into law.

Despite Congress' prior acknowledgment of the Treaty's increasing irrelevance, congressional reaction to the President's December 13, 2001, notice of withdrawal from the Treaty was mixed. Some Members in Congress expressed support for the President's decision and endorsed his authority to withdraw from the Treaty without the prior approval of the Senate or of Congress. See 148 Cong. Rec. S2640-01, S2642 (daily ed. Apr. 15, 2002) (statement of Sen. Kyl, opining that the President "acted within the authority granted by the Constitution to the Chief Executive" and citing statements by Sen. Daschle and Sen. Levin to the same effect). On the other hand, even before the formal notice was issued, on October 18, 2001, Senator Dianne Feinstein introduced a bill "[r]elating to United States adherence to the ABM Treaty," which expressed the view that the United States should not unilaterally abrogate or withdraw from the ABM Treaty and which would have prohibited funds from being expended on an activity "that would result in the abrogation of or withdrawal from the ABM Treaty." S. 1565, 107th Cong. (2001). On December 12, 2001, Representative Lynn Woolsey, one of the plaintiffs herein, joined by several of the other plaintiffs, introduced a resolution providing that "it is the sense of the House of Representatives . . . that the United States should . . . remain a signatory to the Anti-Ballistic Missile Treaty." H.R. Res. 313, 107th Cong. (2001). Neither of these proposals was ever submitted to a vote.

As noted above, pursuant to Article XV of the ABM Treaty, the United States gave notice on December 13, 2001, that its withdrawal from the ABM Treaty would become effective in six months. As this six-month notice period was coming to a close, renewed attempts were made by some in Congress to block a final withdrawal from the Treaty. On June 5, 2002, plaintiff Representative Kucinich gave notice of a resolution that he intended to introduce as a "question

of privilege" under the House rules, which would resolve that "the President should respect the Constitutional role of Congress for the withdrawal of the United States of America from the [ABM] Treaty." 148 Cong. Rec. H3203-04 (daily ed. June 5, 2002). On June 6, the Speaker of the House ruled that this resolution did not constitute a question of privilege under the House rules and so could not be considered at that time. This decision was upheld by the whole House on appeal.[5] 148 Cong. Rec. H3237 (daily ed. June 6, 2002). On June 10, 2002, Senator Russell D. Feingold submitted a resolution "[d]isappproving the withdrawal of the United States from the [ABM Treaty]." S. Res. 282, 107th Cong. (2002). On June 12, 2002, Representative Barbara Lee, one of the plaintiffs herein, introduced a bill "[t]o provide for the continued applicability of the requirements of the ABM Treaty to the United States." H.R. 4920, 107th Cong. (2002). Plaintiff Representatives Dennis J. Kucinich and Lynn C. Woolsey co-sponsored this bill, as did Representatives Sheila Jackson-Lee and Edward J. Markey. On the other hand, on June 13, 2002, Representative Don Young introduced a concurrent resolution "[e]xpressing support for withdrawal of the United States from the [ABM] Treaty." H.R. Con. Res. 420, 107th Cong. (2002). None of these proposals ever made it to a vote.

Meanwhile, since December 13, 2001, both the House and the Senate have approved Defense Department Appropriations and Authorizations Bills for FY 2003 that include funding for missile defense, without conditioning that funding in any way. H.R. 4546, S. 2514, 107th

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[5] A "question of privilege" is one dealing either with matters "affecting the rights of the House collectively, its safety, dignity and the integrity of its proceedings" or with matters "affecting the rights, reputation, and conduct of the Members, Delegate or the Resident Commissioner." Rules of the House of Representatives of the One Hundredth and Seventh Congress, Rule IX (Jan. 3, 2001). The House's vote that the proposed resolution did not raise a question of privilege thus can be taken as its determination that the issue did not raise a matter "affecting the rights of the House collectively."

Cong. (2002).

4. This Case

Having failed to obtain legislative action seeking to prevent the United States' withdrawal from the ABM Treaty, Representative Kucinich and thirty other Members of the House of Representatives turned to the courts. On June 11, 2002, acting solely in their official capacities, Compl. ¶ 6, they filed the present suit against President George W. Bush, Secretary of State Colin Powell, and Secretary of Defense Donald Rumsfeld. Plaintiffs claim that the Framers of the Constitution "intended Congress to have a role in the termination as well as the making of treaties," and that they have "sustained a grievous institutional injury by being deprived of their constitutional right and duty to participate in treaty termination." Id. ¶¶ 13, 29. They contend that the Constitution provides that the President "has a duty to seek and obtain the concurrence of two thirds of the Senate or a majority of both Houses for the termination of a treaty." Id. ¶ 12. Plaintiffs seek a declaratory judgment "that the President's proposed termination of the [ABM Treaty] is unconstitutional and of no effect because of the President's failure to seek and obtain the assent of Congress." Id. ¶ 1. Plaintiffs also seek an injunction preventing the Secretaries of State and Defense "from taking any action in violation of the ABM Treaty until its termination has received the assent of a majority of both Houses of Congress or two thirds of the Senate." Id. at 10-11.

ARGUMENT

The circumstances in this case are almost indistinguishable from those in Goldwater v. Carter, 444 U.S. 996 (1979). In Goldwater, members of Congress sought to challenge President Carter's unilateral decision to terminate the 1954 Mutual Defense Treaty Between the United

States of America and the Republic of China ("Taiwan") in accordance with the terms of the treaty, which President Carter made in order to recognize the legitimacy of the government of the Peoples' Republic of China ("PRC"). Reaching the merits of the dispute, the D.C. Circuit concluded that the President had the authority to act without the consent of Congress. Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), vacated, 444 U.S. 996 (1979). The Supreme Court vacated that decision, concluding that the dispute was nonjusticiable. A plurality of the Court (Chief Justice Burger and Justices Rehnquist, Stewart, and Stevens) found that the very issue presented here, the authority of the President to withdraw from a treaty, presented a nonjusticiable political question. 444 U.S. at 1002-06. The plurality's conclusion that the complaint should therefore be dismissed was joined by Justice Powell, who reasoned that the dispute was not ripe, and by Justice Marshall without opinion. Id. at 996. Goldwater controls here and requires dismissal.

In addition, intervening case law makes the grounds for dismissal even more compelling than in Goldwater. Since Goldwater, the Supreme Court clarified the law of "legislative standing" in Raines v. Byrd, 521 U.S. 811 (1997), holding that individual legislators claiming an injury to the institutional interests of Congress, such as plaintiffs do here, cannot satisfy Article III's case or controversy requirement. Raines thus confirms that plaintiffs' claims here are nonjusticiable: Whether this Court concludes that plaintiffs lack standing, that their claims are not ripe, or that the dispute is essentially a nonjusticiable political one, the case must be dismissed.

Nevertheless, should the Court reach the merits of the dispute, plaintiffs' claims must still fail. The President's authority to act unilaterally in terminating a treaty is confirmed by

constitutional text, case law, and historical practice. Indeed, the single Justice to reach the merits of the dispute in Goldwater agreed with the D.C. Circuit's decision that the President acted properly in terminating the treaty at issue in that case. See 444 U.S. at 1006-07 (Brennan, J., dissenting). Thus, while Goldwater requires dismissal of this case without reaching the merits, it provides further authority for the conclusion that the President's decision to terminate the ABM Treaty was proper in this case.

I. PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE

A. Plaintiffs Lack Standing

This Court lacks subject-matter jurisdiction over this case because plaintiffs, individual members of Congress seeking to vindicate the institutional interests of Congress, lack Article III standing. In Raines v. Byrd, 521 U.S. 811 (1997), the defining case on the issue of legislative standing, the Supreme Court applied a rigorous standing analysis to hold that individual Congressmen did not have standing to challenge the constitutionality of the Line Item Veto Act of 1996. The present case falls squarely within the holding of Raines. As in Raines, the plaintiff Representatives in this case are suing in their official capacities and attempting to bring a claim based on an injury that they themselves describe as an "institutional injury." Id. at 821; see Compl. ¶¶ 6, 13. This injury, the alleged deprivation of Congress' institutional right to participate in treaty termination, purportedly "damages all Members of Congress and both Houses of Congress equally," 521 U.S. at 821, and therefore "is wholly abstract and widely dispersed." Id. at 829. Plaintiffs' claim is not made "in any private capacity but solely because they are Members of Congress." Id. And, as in Raines, plaintiffs have not been authorized to represent Congress. Id. at 829. Indeed, their legislative efforts to give effect to the legal

principle they seek to vindicate here have uniformly failed to garner the support of either House of Congress. See supra at pp. 10-11. Accordingly, this case must, like Raines, be dismissed for lack of standing.[6]

Article III, Section 2 of the U.S. Constitution limits federal court jurisdiction to actual cases or controversies. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Raines, 521 U.S. at 818 (quoting Simon v. Eastern Ky. Welfare Rights

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[6] Prior to Raines, the D.C. Circuit had evaluated the justiciability of inter- and intra-branch disputes such as this one by applying "a doctrine of circumscribed equitable discretion," rather than a rigorous standing analysis. See Riegle v. Federal Open Market Comm., 656 F.2d 873, 879-81 (D.C. Cir. 1981). Raines makes the equitable discretion analysis unnecessary in a case such as this. See Chenoweth v. Clinton, 181 F.3d 112, 116 (D.C. Cir. 1999), cert. denied, 529 U.S. 1012 (2000). Regardless of the reasoning used, however, it is noteworthy that even before Raines this Circuit had routinely declined to hear cases brought by members of Congress against either their colleagues or the Executive Branch. Most of these cases were dismissed on equitable discretion grounds. See Humphrey v. Baker, 848 F.2d 211, 214 (D.C. Cir. 1988) (affirming dismissal of suit by one Senator and five Members of the House challenging the constitutionality of the Federal Salary Act of 1967); Melcher v. Federal Open Market Comm., 836 F.2d 561, 565 (D.C. Cir. 1987) (affirming dismissal of suit by Senator challenging constitutionality of method used to select five members of the Federal Reserve's Federal Open Market Committee); Moore v. United States House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984) (affirming dismissal of suit by members of the House against various Senate entities and the United States challenging constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982); Crockett v. Reagan, 720 F.2d 1355, 1356 (D.C. Cir. 1983) (affirming dismissal of suit by members of Congress challenging legality of presidential action in El Salvador); Vander Jagt v. O'Neill, 699 F.2d 1166, 1176-77 (D.C. Cir. 1982) (affirming dismissal of suit by Republican House members against Democratic members challenging assignment of committee positions); Riegle, 656 F.2d at 292-93 (same as Melcher); Lowry v. Reagan, 676 F. Supp. 333, 339 (D.D.C. 1987) (dismissing suit by House members seeking enforcement of War Powers Resolution against Executive Branch activities in the Persian Gulf). Others were dismissed on ripeness grounds. See Spence v. Clinton, 942 F. Supp. 32, 38 (D.D.C. 1996) (dismissing challenge to President's alleged failure to implement Ballistic Missile Defense Act of 1996). Indeed, until recently, it appears never to have occurred to one branch of the government to challenge the actions of another branch in court. See Raines, 521 U.S. at 826-28 (describing a history of "analogous confrontations between one or both Houses of Congress and the Executive Branch" in which "no suit was brought on the basis of claimed injury to official authority or power").

Org., 426 U.S. 26, 37 (1976)). One core element of Article III's case-or-controversy requirement is that a plaintiff must establish that he or she has standing to sue. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). To satisfy this burden of establishing standing, "[a] plaintiff must allege a personal injury fairly traceable to the defendant's allegedly illegal conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984). With regard to the injury requirement, the Supreme Court has "consistently stressed that a plaintiff's complaint must establish that he has a '*personal* stake' in the alleged dispute, and that the alleged injury is *particularized* as to him." Raines, 521 U.S. at 819 (emphasis added). In addition, the alleged injury "must be legally and judicially cognizable," which means, "among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized,' . . . and that the dispute is 'traditionally thought to be capable of resolution through the judicial process.'" Id. (citations omitted).

These standing requirements must be particularly adhered to in a suit, such as this one, brought to vindicate Congressional interests at the expense of the Executive Branch. See Raines, 521 U.S. at 818-20. The Supreme Court has explained that Article III's standing doctrine stems from a concern for preventing courts from wading into disputes that are better resolved by the political branches of government. "[T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers." Allen v. Wright, 468 U.S. at 752; see Chenoweth v. Clinton, 181 F.3d at 114 (explaining that after Flast v. Cohen, 392 U.S. 83 (1968), "the Supreme Court began to place greater emphasis upon the separation of powers concerns underlying the Article III standing requirement"). This separation-of-powers concern is heightened where the courts are asked to resolve a dispute *between* the co-ordinate political branches, such as here. The

"standing inquiry is especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Raines, 521 U.S. at 819-20 (citations omitted).

The Raines Court held that a party suing in its legislative capacity must assert an injury that is "personal, particularized, concrete, and otherwise judicially cognizable" and that allegations merely that his or her legislative authority has been diminished do not constitute a particularized injury that can confer standing. 521 U.S. at 820. 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. The Supreme Court found that the members had thereby only alleged "institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." Id. at 821. The Court further found that plaintiffs did not claim "that they have been deprived of something to which they *personally* are entitled . . . . Rather, [plaintiffs'] claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete." Id. (emphasis in original). The Raines Court reasoned that "the injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are members of Congress . . . [and] thus runs (in a sense) with the Member's seat . . . ." Id.[7]

[7] The Court thus contrasted Raines with Powell v. McCormack, 395 U.S. 486 (1969), in which it recognized the standing of an individual congressman to challenge his *individual* exclusion by the House. There, the injury to the individual congressman related to his personal entitlement to a seat, not to his institutional right to any power or privilege incident to the office. Raines, 521 U.S. at 820-21.

The Supreme Court concluded that, because plaintiffs "have alleged no injury to themselves as individuals . . . [and] the institutional injury they allege is wholly abstract and widely dispersed," they lacked standing. 521 U.S. at 829. In doing so, the Court emphasized that Congress itself had taken no action to press the dispute and that individual members of Congress had alternative remedies they could pursue:

> We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action . . . . We also note that our conclusion [does not] deprive Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach) . . . .

Id. at 829 (footnote omitted).

In two subsequent cases, the D.C. Circuit has applied Raines to claims very similar to those alleged here to preclude challenges by individual members of Congress alleging institutional injuries. In Chenoweth v. Clinton, the court found that individual members of Congress lacked standing to challenge an Executive Order when the claimed injury was that the Order denied Congress the opportunity to vote on the Order's subject matter. The court found that the plaintiffs' claimed injury – the "dilut[ion] of their authority as members of Congress," 181 F.3d at 117 – was "indistinguishable from the claim to standing the Supreme Court rejected in Raines." Id.

In a case even more closely analogous to this case, Campbell v. Clinton, 203 F.3d 19 (D.C. Cir.), cert. denied, 531 U.S. 815 (2000), the court found that congressmen lacked standing to challenge the President's alleged noncompliance with the War Powers Resolution, 50 U.S.C. § 1541 et seq., and his alleged violation of Article I, Section 8 of the Constitution, which gives Congress the power to "declare war." There, several members of Congress challenged the

President's decision to direct United States armed forces' participation in airstrikes in Yugoslavia. Like the plaintiffs here, the Campbell plaintiffs contended that the President's action was invalid because he lacked specific congressional authorization. Id. at 20. Following Raines, the D.C. Circuit confirmed that those individual members did not have standing to assert Congress' institutional interests in an inter-branch dispute because "political self-help [is] available to congressmen." Id. at 24. "Indeed," the court reasoned, "Raines explicitly rejected [the] argument that legislators should not be required to turn to politics instead of the courts for their remedy." Id. Consequently, the court concluded that "congressmen may not challenge the President's war-making powers in federal court." Id. at 23.

This triumvirate of controlling cases, Raines, Chenoweth, and Campbell, dictates the result here. As in those cases, plaintiffs make no claim of any individualized or personal injury. Indeed, plaintiffs state outright that they are suing in their official capacities only. Compl. ¶ 6. They further freely admit their claim to standing is based on "*institutional* injury," specifically, the deprivation of their alleged right to participate in the termination of the Treaty. Id. ¶ 13 (emphasis added). This injury is exactly the same type of injury found to be insufficient in Raines, Chenoweth and Campbell. See Raines, 521 U.S. at 816 (plaintiffs claimed that Line Item Veto Act "divest[ed] the[m] of their constitutional role" in the legislative process) (internal quotation marks omitted); Chenoweth, 181 F.3d at 113 (plaintiffs complained that they had been "deprived . . . of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation"); Campbell, 52 F. Supp. 2d at 43 (plaintiffs claimed that they were deprived of their right to decide whether to commit the country to war and that the President had ignored or "nullified" congressional votes against authorizing his ongoing military operations).

Plaintiffs' claim to standing is further undermined by the fact that they "have not been authorized to represent" either House of Congress in this action. Raines, 521 U.S. at 829. Plaintiff are a small minority of House members who have not been authorized to act for the entire House, as they must be to sue on the House's behalf. See Reed v. County Commissioners, 277 U.S. 376, 388 (1928) (holding that a committee (or subcommittee) must have specific authority from the appropriate House in order to undertake any court action); see also Bender v. Williamsport Area School Dist., 475 U.S. 534, 544 (1986) ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take."); United States v. Ballin, 144 U.S. 1, 7 (1892) ("Power [in the two houses of Congress] is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or numbers of members but the action of the body as a whole."). Nor, of course, have they been authorized to represent the Senate.

Indeed, as members of the House of Representatives, plaintiffs' claims to represent the *Senate's* interests in this suit are particularly ill founded. Under well-established principles of standing, a plaintiff "must show that he himself is injured by the challenged action of the defendant." Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261 (1977). Plaintiffs' first cause of action – which asserts that the President must first obtain the concurrence of two-thirds of the members of the *Senate* before withdrawing from the Treaty – could never be asserted by members of the House of Representatives, who do not possess even an *institutional* stake in such a dispute, even if expressly authorized by that House. See U.S. Const., Art. II; Notes of Debates in the Federal Convention of 1787, Reported by James Madison 597 (Adrienne Koch ed., 1966) (debate in Constitutional Convention on motion, subsequently

defeated, by Mr. Wilson to add the House to the Treaty Clause). In this regard, the present case does not present even as strong a case for justiciability as did Goldwater v. Carter, where nine of the plaintiffs were Senators and therefore plaintiffs had at least a more facially plausible (though still legally insufficient) claim to a right to vindicate the Senate's treaty powers. See 617 F.2d at 709 (Wright, C.J., concurring).

That there is in fact no valid institutional interest at all in this case is further confirmed by the fact that the institution that was allegedly injured and whose interests plaintiffs seek to represent (the House of Representatives) has taken no official action with regard to the President's withdrawal decision, despite numerous attempts by plaintiffs and others to initiate such action. See discussion supra at pp. 10-11. Congress' failure to act in this instance is particularly telling, giving its extensive history of legislating with regard to ABM systems. Moreover, as explained above, in 1999, Congress passed a resolution specifically approving development of ABM systems to counteract the types of attack with which the United States is now concerned. See Pub. L. No. 106-38, § 2, 113 Stat. 205 (1999).

Finally, plaintiffs' claim to injury is further undermined by the fact that, as in Raines, plaintiffs possess political remedies "with which to remedy their purported injury." Campbell, 203 F.3d at 24. For example, plaintiffs can vote to pass legislation (similar to that enacted in previous years) that would seek to prohibit the development or deployment of ABM systems or to prevent the expenditure of funds for ABM systems. This factor was also important to the Supreme Court in Raines, where the Court noted that "a majority of Senators and Congressmen can vote to repeal the [Line Item Veto] Act, or to exempt a given appropriations bill (or a given provision of an appropriations bill) from the Act." See also Chenoweth, 181 F.3d at 115 ("It is

uncontested that the Congress could terminate the [contested program] were a sufficient number in each House so inclined."). To be sure, unlike in the statutory context of Raines, Congress cannot here enact a law that could "restore" or reenact a treaty. Nevertheless, even in areas in which Congress cannot constitutionally reverse unilateral Executive Branch action, the D.C. Circuit has followed the Raines rule by requiring that Congress first attempt to employ its own extensive powers to frustrate the President's actions. Campbell, 203 F.3d at 23 ("Congress has a broad range of legislative authority it can use to stop a President's war making").

Thus, in Campbell, the court found that Congress could use its funding powers in an effort to frustrate the President's war-making authority, even though it could not act as Commander-in-Chief and interfere with the President's strategic and tactical control of the military. Similarly, here Congress could use its funding and other powers to require the United States to conduct itself in accordance with the norms of the ABM Treaty, even if it could not restore the ABM Treaty as a binding international agreement. The fact that plaintiffs have already made such an effort but failed is irrelevant as plaintiffs can just as well "fight again tomorrow" in the legislature. See 203 F.3d at 24 (internal quotation marks and citation omitted).[8]

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[8] The Supreme Court thus distinguished the Raines situation from that in Coleman v. Miller, 307 U.S. 433 (1939), in which the executive action at issue had "completely nullified" the legislators' vote and left the legislators with no meaningful remedy. Raines, 521 U.S. at 823-24. In Coleman, 20 of Kansas's 40 State Senators voted not to ratify the proposed "Child Labor Amendment" to the Federal Constitution. With the vote deadlocked 20 to 20, the amendment ordinarily would not have been ratified. However, the State's Lieutenant Governor, the presiding office of the State Senate, cast a deciding vote in favor of the amendment, and it was deemed ratified (after the State House of Representatives voted to ratify it). The Supreme Court held that the members of the state legislature who voted against ratification, who were suing as a group, had standing, emphasizing "their votes not to ratify the amendment were deprived of all validity[,] . . . 'overridden and virtually held for naught'" when the amendment was deemed ratified through executive action. Id. at 822-23 (emphasis and citation omitted). The Court

(continued...)

Accordingly, plaintiffs' claims should be dismissed for lack of Article III standing.

B. The Dispute Is Not Ripe

A related element of Article III's "case" or "controversy" requirement is that a dispute must be ripe for judicial consideration, that is, a controversy must have "matured sufficiently to warrant judicial intervention." Warth v. Seldin, 422 U.S. 490, 499 n.10 (1975); see also Regional Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974). In the present case, there is not yet a dispute between the Executive Branch and the Legislative Branch over the power to

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[8](...continued)
appears to have concluded that their votes were "held for naught" because the ratification was irreversible and the plaintiff legislators were "powerless to rescind a ratification of a constitutional amendment" through further legislative action. See Campbell, 203 F.2d at 23.

In contrast, in Raines, the Court found that plaintiffs' votes on the Line Item Veto Act were given full effect but "[t]hey simply lost that vote." 521 U.S. at 824. As to the Raines plaintiffs' claims that the Line Item Veto Act rendered their future votes on appropriations bills "less effective," the Court found a "vast difference between the level of vote nullification at issue in Coleman and the abstract dilution of institutional legislative power" alleged by the Raines plaintiffs. Id. at 826. As this Circuit has explained, the difference between the "complete nullification" in Coleman and the injury in other legislative standing cases is that in Coleman plaintiffs were left with no legislative remedy, being powerless to reverse a constitutional ratification. Campbell, 203 F.3d at 23. In contrast, the Raines plaintiffs, for example, "continue[] . . . to enjoy ample legislative power to" counter the executive action at issue. Id. The Raines Court concluded that Coleman stands only for the proposition "that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U.S. at 823; see also Chenoweth, 181 F.3d at 115 (describing Coleman as announcing a "narrow rule"). The present case simply does not fit within this narrow category but rather follows Chenoweth and Campbell. Plaintiffs here have any number of political weapons at their disposal; and, even if those weapons fail because they cannot muster sufficient votes, they cannot properly invoke the courts to resolve what are fundamentally political-branch disputes between them and the majority of the House, and between them and the Executive Branch. Furthermore, Coleman did not even raise the precise separation-of-powers concerns present here, as Coleman involved federal review of a dispute between the branches of a *state* government, not the federal judicial review of a coordinate branch of the *federal* government.

terminate treaties 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 534 (Powell, J., concurring). The dispute is therefore not ripe enough for judicial intervention.

In his separate concurring opinion in Goldwater, Justice Powell stated that "[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the branches reach a constitutional impasse. Otherwise, we would encourage small groups of even individual members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict." Id. at 996. Justice Powell concluded that he would dismiss the complaint "as not ripe for judicial review." Id.

Similar considerations caused the court in United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983), to decline to entertain a declaratory judgment action by the Executive Branch concerning the rights of a House committee to subpoena documents over which the President asserted executive privilege:

> When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted. . . . Judicial restraint is essential to maintain the delicate balance of powers among the branches established by the Constitution.

Id. at 152 (citation omitted). See also Spence v. Clinton, 942 F. Supp. at 38 (challenge to President's alleged failure to execute Ballistic Missile Defense Act of 1996 was not ripe as "the two branches of government may yet have a meeting of the minds" and the "Court believes prudence requires that the executive and legislative branches be given further opportunities to resolve their differences before the third branch of government is brought into the dispute").

Plaintiffs' claims here suffer from the same fatal flaws. The full Congress has not yet acted to countermand, counteract, or assert control over the President's decision to withdraw from the ABM Treaty. More generally, the full Congress has not acted in any way to assert that it has exclusive power over – or even any role in – decisions to terminate treaties. On the contrary, subsequent to the President's notice of withdrawal, Congress has continued to vote to fund missile defense programs, knowing that the withdrawal will be taking effect but without attempting to restrain the Executive Branch from acting on that withdrawal. See supra at pp. 11-12. In the absence of Congress' assertion of authority over the ABM Treaty and of an ensuing direct conflict between the two Branches, it is simply premature for this Court to insert itself into this essentially political dispute between the Executive Branch and a minority group of legislators, or, indeed, an *intra*-Branch dispute among legislators, with plaintiffs seeking redress for their failure to get Congress to assert authority over treaty termination. As this Circuit recognized in the equitable discretion line of cases, it is inappropriate for this Court to interject itself into such a dispute among legislators.[9] See note 6 supra.

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[9] Plaintiffs' case also suffers from mootness problems. Where there is no effective relief that a court can grant, a case is moot and must be dismissed. Mills v. Green, 159 U.S. 651, 653 (1895). According to the terms of the ABM Treaty, the President gave notice of his intention to withdraw from the Treaty six months before the effective date of that withdrawal. Plaintiffs took no action to seek judicial relief during that six-month period; thus unchallenged, the withdrawal took effect on June 13, 2002. Plaintiffs now ask the Court to declare that this withdrawal is without force and effect. Compl. at 10. To the extent that plaintiffs intend this declaration to reach the *international* consequences of the President's withdrawal, this Court is powerless, via a declaratory judgment or otherwise, to affect such consequences once the decision has taken effect, as it has no authority to represent the United States with its treaty partners and cannot entertain an action for enforcement of the treaty. See The Head Money Cases, 112 U.S. 580, 597 (1884) (with regard to enforcement of the provisions of a treaty as between the parties, "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress").

(continued...)

C. Plaintiffs' Claims Present a Nonjusticiable Political Question

Plaintiffs' claims are also nonjusticiable under the political-question doctrine. Plaintiffs are certain members of the Legislative Branch who seek to challenge the Executive Branch's decision to terminate a treaty. As recognized by the plurality in Goldwater, this issue presents a nonjusticiable political question "because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President." 444 U.S. at 1002.

The "political question" doctrine counsels the courts to abstain for constitutional or prudential reasons from passing on issues reserved to the political branches. See Baker v. Carr, 369 U.S. 186, 210 (1962); South African Airways v. Dole, 817 F.2d 119, 123 (D.C. Cir. 1987). The doctrine is "primarily a function of the separation of powers." Baker v. Carr, 369 U.S. at 210. In determining its applicability, "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Coleman v. Miller, 307 U.S. at 454-55; see also United States v. AT&T Co., 567 F.2d 121, 126 (D.C. Cir. 1977) (application of the political question doctrine is pragmatic and "focus[es] on whether the questions involved

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[9](...continued)

In any event, this Court cannot grant either injunctive or declaratory relief against the President. It is well established that courts cannot issue injunctive relief against the President, see Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992), and "[f]or similar reasons," they also "cannot issue a declaratory judgment against the President." Id. at 827 (Scalia, J., concurring in part and concurring in judgment); see Swan v. Clinton, 100 F.3d 973, 977 n.1 (D.C. Cir. 1996) (request for declaratory relief against President, like request for injunctive relief, raises concern that "in general, this court has no jurisdiction . . . to enjoin the President in the performance of his official duties") (quoting Mississippi v. Johnson, 71 U.S. (4 Wall) 475, 501 (1866)). "It is incompatible with [the President's] constitutional position that he be compelled personally to defend his executive actions before a court." Id.

at any stage present 'judicially discoverable and manageable standards' . . . and thus are susceptible to competent adjudication by the Courts") (quoting Baker v. Carr, 369 U.S. at 217). In Baker v. Carr, the Supreme Court found a variety of circumstances in which a controversy involves a nonjusticiable political question, including where there is

> 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 the 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.

369 U.S. at 217.

For many of the above reasons, the courts have recognized that disputes regarding the conduct of foreign relations often present nonjusticiable political questions. "[M]atters 'vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" Holmes v. Laird, 459 F.2d 1211, 1215 (D.C. Cir. 1972) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)); see also 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"). As the Supreme Court explained:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility

> and have long been held to belong in the domain of political power not subject to judicial intrustion or inquiry.

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

Courts have been particularly careful to abstain from deciding questions arising in connection with the validity or status of treaties. See Holmes, 459 F.2d at 1211 & n. 26. As exemplified in Goldwater, resolution of such issues "frequently turn[s] on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature, [or] uniquely demand single-voiced statement of the Government's views." Baker v. Carr, 369 U.S. at 211.

Thus, in Goldwater, a plurality of the Supreme Court found that the very issue presented here, the authority of the President to withdraw from a treaty, was "a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government." 444 U.S. at 1003. The plurality cited "the absence of a constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties," the fact that the dispute was between coequal branches of the government "each of which has resources available to protect and assert its interests," and the fact that the effect of the action was "entirely external to the United States and [fell] within the category of foreign affairs.'" 444 U.S. at 1003-04 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936)).

Similarly, a constitutional challenge by private litigants to President Reagan's unilateral termination of the Treaty of Friendship, Commerce, and Navigation with Nicaragua was also ruled to present a nonjusticiable political question. See Beacon Prods. Corp. v. Reagan, 633 F.

Supp. 1191, 1198-99 (D. Mass. 1986), aff'd on other grounds, 814 F.2d 1 (1st Cir. 1987).[10] The court found that the plurality opinion in Goldwater was controlling even though the plaintiffs were private parties. 633 F. Supp. at 1199. In concluding that it was bound by the Goldwater plurality's views, the court noted that, "[o]f those justices who expressed an opinion regarding whether the treaty termination issue raised a political question, four of the six found that it did." Id. at 1198 n. 11. The court then focused on the Goldwater plurality's statement that "[i]n the light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties . . . , the instant case . . . 'must surely be controlled by political standards.'" Id. (citing Goldwater, 444 U.S. at 1003).

Finally, the courts have long refused to entertain claims regarding the continuing viability or enforceability of a treaty, to which the decision to withdraw from a treaty is analogous. Thus, in 1853, the Supreme Court held that questions regarding the validity of a treaty provision between Spain and the United States "are political questions, not judicial. They belong exclusively to the political department of the government. . . . [T]he courts of justice have no right to annul or disregard any of [the treaty's] provisions, unless they violate the constitution of the United States." Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853). In 1902, the Supreme Court held that "whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and the courts ought not to interfere with the conclusions of the political department in that regard." Terlinden v. Ames, 184 U.S. 270, 288 (1902). And, in

[10] Beacon Products was affirmed on the ground of mootness after intervening legislation removed the purportedly unconstitutional part of the challenged statute. 814 F.2d at 3-4.

1913, the Supreme Court refused to entertain a claim that a bilateral treaty with Italy was not binding on the United States because Italy had refused to honor it, finding that the executive department had not elected to abrogate its obligations. Charlton v. Kelly, 229 U.S. 447, 469-76 (1913); see also Kwan v. United States, 272 F.3d 1360, 1364 (Fed. Cir. 2001) (question of compliance with executive agreement "remains in the area of foreign policy and foreign relations" and "do[es] not meet the criteria of judicial resolution"); Then v. Melendez, 92 F.3d 851, 854 (9th Cir. 1996) (question of the validity of extradition treaty "presents a political question, and we must defer to the State Departments of the two countries").

For all of these reasons, the issues in this case concerning the President's authority under his foreign affairs and treaty-making powers to terminate the ABM Treaty present a nonjusticiable political question. That this case presents uniquely political issues is further borne out by the history of Congressional actions regarding the ABM Treaty and the development of ABM systems. See discussion supra at pp. 8-12. This area is one in which both Congress and the President have been extremely active over the years. The Court should decline to insert itself into the middle of this matter, which is best left in the hands of these political branches.

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

A. The President Has Plenary Control Over the Conduct of Foreign Affairs

Even if this Court were to reach the merits of this dispute, plaintiffs' claims must be dismissed. The Supreme Court has consistently "recognized 'the generally accepted view that foreign policy [is] the province and responsibility of the Executive.'" Department of the Navy v. Egan, 484 U.S. 518, 529 (1988) (quoting Haig v. Agee, 453 U.S. 280, 293-94 (1981)). As future Chief Justice John Marshall famously declared when the republic was only a few years old,

"[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Nixon v. Administrator of General Servs., 433 U.S. 425, 552 (1977) (Rehnquist, J., dissenting) (internal quotation marks and citations omitted). The foreign affairs power has been described as "the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress." United States v. Curtiss-Wright Export Corp., 299 U.S. at 320; see also Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1982) (responsibility for the conduct of foreign affairs and for protecting the national security are "'central' Presidential domains"); Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. at 111 (referring to the President as "the Nation's organ for foreign affairs").

The President's wide-ranging powers in the foreign affairs area flow, first of all, from his unique constitutional position as the Chief Executive of the nation, in charge of "the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." Nixon v. Fitzgerald, 457 U.S. 731, 749-50, 752 (1982). Article II, Section 1 of the Constitution declares that "[t]he executive Power shall be vested in a President of the United States of America." This Section, unlike the corresponding vesting provisions for the Legislative and Judicial Branches, does not limit the President's powers to those "herein granted," but vests in the President the entire "executive Power." See Myers v. United States, 272 U.S. 52, 110-19 (1926) (discussing the "general grant of executive power" in the President).[11] As Alexander

[11] Although the Supreme Court has since qualified the holding of Myers - that Congress could not infringe on the President's authority to remove subordinate executive branch officials - it has not done so by rejecting this theory of the executive power. See, e.g., Bowsher v. Synar, 478 U.S. 714, 725-26 (1986) (reaffirming its holding that Congress may not constitutionally (continued...)

Hamilton explained, after referring to the general clause as containing a "comprehensive grant" which "completely lodged" the executive power in the President, "[t]he general doctrine then of our Constitution, is that the Executive Power of the Nation is vested in the President, subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument." 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).

As the cases cited above illustrate, courts have accordingly held that foreign affairs powers generally belong to the President, unless otherwise specified.[12] As the Supreme Court

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[11](...continued)
participate in the removal of officials charged with the execution of the laws and reiterating Myers' concern with "the crucial role of separated powers in our system" and "[t]he dangers of congressional usurpation of Executive Branch functions"). Instead, it has found that Congress could qualify the conditions of removal where the officials were not truly executive in nature, Humphrey's Executor v. United States, 295 U.S. 602, 632 (1935), or where the conditions did not interfere with the Executive Branch's full control and authority over the official. Morrison v. Olson, 487 U.S. 654, 696 (1988).

[12] Aside from certain specific powers discussed infra, "the Constitution is largely silent on the question of allocation of powers associated with foreign affairs and national security." United States v. AT&T Co., 567 F.2d at 128 (citing L. Henkin, Foreign Affairs and the Constitution 16-17 (1972)). However, foreign affairs powers have been seen as inherently "executive" in nature. As Secretary of State Thomas Jefferson observed during the first Washington Administration, "[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." Thomas Jefferson, Opinion on the Powers of the Senate (1790), reprinted in 5 The Writings of Thomas Jefferson 161 (Paul Leicester Ford ed., 1895) [hereinafter Jefferson's Opinion on the Powers of the Senate]. In defending President Washington's authority to issue the Neutrality Proclamation of 1793, Alexander Hamilton likewise agreed that the President was "[t]he constitutional organ of intercourse between the UStates & foreign Nations." Alexander Hamilton, Pacificus No. 7 (1793), in 15 The Papers of Alexander Hamilton at 130, 135. See generally Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L.J. 231, 265-72 (2001) (discussing the general eighteenth century understanding that directing a Nation's foreign affairs was an executive function).

stated recently, the "'grant of authority [in Article II, section 1] establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity [including] the conduct of foreign affairs . . . .'" Clinton v. Jones, 520 U.S. 681, 699 n.29 (1997) (quoting Nixon v. Fitzgerald, 457 U.S. at 749-50).

The President also derives foreign affairs powers from certain specific grants of authority in the Constitution. Nixon v. Fitzgerald, 457 U.S. at 749-50, 752. With regard to foreign affairs, Sections 2 and 3 of Article II specifically provide that the President "shall be Commander in Chief," that he shall appoint, with the advice and consent of the Senate, and receive ambassadors, and that he "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; id. § 3. The Constitution also grants Congress certain foreign affairs powers, primarily those of declaring war, raising and funding the military, and regulating international commerce, as well as providing the Senate a limited role in the making of treaties. Id. Art. I, § 8; art. II, § 2, cl. 2.

This allocation of powers does not disturb the conclusion that it is the President who is responsible for the bulk of the nation's foreign affairs, however. The fact that Sections 2 and 3 enumerate specific powers does not imply that the "executive Power" granted in Section 1 is limited to those specified. "The words of section 2, following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the executive, not all inclusive, or were limitations upon the general grant of the executive power, and as such, being limitations, should not be enlarged beyond the words used." Myers v. United States, 272 U.S. at 118 (citing Madison, 1 Annals, 462, 463, 464). Article II "ought . . . to be

considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power." Id. Second, the fact that some powers are allocated to Congress does not derogate from the President's powers. "The transaction of business with foreign nations belongs [to the head of the Executive Department] except as to such portions of it as are specially submitted to the senate." Jefferson's Opinion on the Powers of the Senate at 161.

In any event, to the extent that any ambiguity remains in the allocation of foreign affairs powers, any such ambiguity is to be resolved in favor of the Executive Branch. Limitations on the general grant of the executive power are to be strictly construed and not extended by implication. Myers v. United States, 272 U.S. at 164; see also Jefferson's Opinion on the Powers of the Senate at 161 ("[e]xceptions are to be construed strictly"). Particularly as to military or diplomatic affairs, therefore, "the courts have traditionally shown the utmost deference to Presidential responsibilities." United States v. Nixon, 418 U.S. 683, 710 (1974).[13]

B. The President's Plenary Control Over Foreign Affairs Includes the Power to Terminate a Treaty According to Its Terms

As stated above, Article 2, Section 2, of the Constitution gives the President the explicit power to "make" treaties, and specifically limits the Senate's role to providing "Advice and Consent." This text, and the placement of this provision in Article II, suggest that the President is intended to have all other powers regarding treaties, including powers to negotiate, interpret, and terminate or modify them. Because of its location in Article II, the treaty power remains

[13] Even in the cases in which the Supreme Court has limited executive authority, it has also emphasized that legislative prerogatives should not be construed to prevent the Executive Branch "from accomplishing its constitutionally assigned functions." Nixon v. Administrator of General Servs., 433 U.S. at 443.

primarily an *executive* one. Moreover, the Clause specifically states that it is the President who "shall have the Power . . . to make treaties," not the Senate, and not the Senate and President. The Senate's advice and consent role merely acts as a check on the President's otherwise plenary power and does not imply that the Senate has other, independent powers with regard to treaties.

In practice, the President has in fact exercised the dominant role in the creation and administration of treaties, and the courts have endorsed this practice. Thus, it has been recognized that the President alone has the power to decide whether to negotiate an international agreement, and alone controls the subject, course, and scope of negotiations. See Curtiss-Wright Export Corp., 299 U.S. at 319 (the President "alone negotiates" treaties); Congressional Research Service, Library of Congress, Treaties and Other International Agreements: The Role of the United States Senate, Sen. Print No. 106-71, at 6-7 (Comm. Print 2001) [hereinafter Treaties and Other International Agreements]; see also United States Military and Naval Bases in the Philippines, 41 Op. Att'y Gen. 143, 163 (1953) ("the President is authorized by the Constitution to negotiate on any appropriate subject for negotiation with a foreign government"). As a practical matter, the President can more easily speak with the "single voice" required in negotiations and can react with more "dispatch and secrecy" to events. See Curtiss-Wright Export Corp., 299 U.S. at 321-22 ("'interference of the Senate in the direction of foreign negotiations calculated . . . to impair the best security for the national safety [because] [t]he nature of transactions with foreign nations . . . requires caution and unity of design, and their success frequently depends upon secrecy and dispatch'") (quoting 8 U.S. Senate Reports Comm. on Foreign Relations p. 24).

Our system also recognizes that the President has the sole discretion whether to sign a treaty and whether to choose to submit it for Senate consideration. The President may even choose not to ratify a treaty after the Senate has considered and approved it. See Louis Henkin, Foreign Affairs and the United States Constitution 184 (2d ed. 1996); Treaties and Other International Agreements at 12, 152-53 ("U.S. law does not impose any legal obligation on the President to ratify a treaty after the Senate has given its advice and consent."); see also Goldwater, 617 F.2d at 705 ("[E]ven after [the President] has obtained the consent of the Senate it is for him to decide whether to ratify a treaty and put it into effect. Senatorial confirmation of a treaty concededly does not obligate the President to go forward with a treaty if he concludes that it is not in the public interest to do so.").[14]

Finally, the President is acknowledged to have the power to decide whether a treaty remains valid. See TWA v. Franklin Mint Corp., 466 U.S. 243, 253 (1984) (court "unwilling to impute to the political branches an intent to abrogate a treaty" when "the Executive Branch continues to maintain that [the treaty] remains enforceable"); Charlton v. Kelly, 229 U.S. 447, 469-76 (1913) (accepting the Executive Branch's recognition that its treaty obligations with Italy were still existing); Terlinden v. Ames, 184 U.S. 270, 288 (1902) (accepting the "decision[] of the Executive Department" that extradition treaty with Prussia was valid as to successor German Empire) . Thus, federal courts will treat the Executive Branch's declaration as to whether a treaty remains in effect as dispositive in litigation. See, e.g., TWA, Inc. v. Franklin Mint Corp.,

[14] For example, the Senate approved a treaty of amity, commerce, and extradition signed with Venezuela on July 10, 1856, with one amendment. The President decided not to ratify the treaty and instead renegotiated it. Treaties and Other International Agreements at 152.

466 U.S. at 253.[15]

It therefore follows that the President also has the power to determine that a treaty is no longer valid as to the United States and hence to terminate or withdraw from the treaty. The Restatement of Foreign Relations Law states so unequivocally, basing its conclusion on "the constitutional authority of the President to conduct foreign relations" and the nature of "his office as it has developed over almost two centuries." Restatement (Third) of the Foreign Relations Law of the United States, § 339 comment a & Reporters' Note 1 (1987). Section 339 of the Restatement provides:

> Under the law of the United States, the President has the power
>
> (a) to suspend or terminate an [international] agreement in accordance with its terms;
>
> (b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or
>
> (c) to elect in a particular case not to suspend or terminate an agreement.

Id. § 339.[16] Indeed, this conclusion was reached in the early days of the United States by

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[15] Indeed, because the President alone is able to communicate with foreign nations on behalf of the United States, although Congress or the Senate may take action that has the effect of abrogating a treaty as a matter of domestic law, only the President can decide to notify a foreign nation of a decision to abrogate an agreement. See Curtiss-Wright Export Corp., 299 U.S. at 319 ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

[16] Many scholars agree with this conclusion. See 1 Laurence H. Tribe, American Constitutional Law 643-44 n. 1 (3d ed. 2000) (the President "may, of course, terminate a treaty in accord with its terms") (citing Goldwater); Henkin, supra, at 214 ("it is apparently accepted that the President has authority under the Constitution to denounce or otherwise terminate a treaty, whether such action on behalf of the United States is permissible under international law or

(continued...)

Alexander Hamilton, who wrote that, although "treaties can only be made by the President and Senate [jointly], their activity may be continued or suspended by the President alone." Alexander Hamilton, Pacificus No. 1, supra, at 42.

For all of the above reasons, the Court of Appeals in Goldwater held that the President had the power to terminate the treaty with Taiwan. 617 F.2d at 703-09. The court noted that "the constitutional commitment of powers to the President is notably comprehensive" and "bespeaks no limitation" in the area of foreign relations, that the "constitutional institution of advice and consent of the Senate . . . is a special and extraordinary condition of the exercise by the President of certain specified powers under Article II [and] is not lightly to be extended," and that it "would take an unprecedented feat of judicial construction to read into the Constitution an absolute condition precedent of congressional or Senate approval for termination of all treaties . . . [that] would unalterably affect the balance of power between the two Branches." Id. And for similar textually based reasons, specifically, because of the President's executive power to "recognize, and withdraw recognition from, foreign regimes," Justice Brennan reached the same result. Goldwater, 444 U.S. at 1007.

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[16](...continued)
would put the United States in violation"); 1 Westel Woodbury Willoughby, The Constitutional Law of the United States 585 (2d ed. 1929) ("It would seem . . . that there is no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress for its approval and ratification.") (footnote omitted). See also Edwin S. Corwin, The President: Office and Powers 1787-1957, at 196 (1957) ("as a matter of fact . . . treaties have been terminated on several occasions by the President, *now on his own authority*, now in accordance with a resolution of Congress, at other times with the sanction simply of the Senate") (emphasis added); id. at 435-36. But see In re The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 75 (1821) ("the obligations of [a] treaty could not be changed or varied but by the same formalities with which they were introduced; or at least by some act of as high an import, and of as unequivocal an authority") (Story, J.).

Notwithstanding this authority, plaintiffs assert that the Senate's express role in approving the making of treaties must mean that the Senate has the parallel right of approving the withdrawal from a treaty. Compl. ¶ 30. However, the Supreme Court has recognized that the grant to the Senate of an "advice and consent" role with regard to *approval* of a course of action does not entail the same grant with regard to *terminating* the course of action. Specifically, the Supreme Court has held that the Senate does not retain any authority to terminate "Officers of the United States" even though these officers are appointed with the "Advice and Consent of the Senate" pursuant to Article II, Section 2. To give Congress such a power "'. . . would be to go beyond the words and implications of the [Appointments Clause] and to infringe the constitutional principle of the separation of governmental powers'" because it would "interfere with the President's exercise of the 'executive power.'" Morrison v. Olson, 487 U.S. at 686-90 (quoting Myers v. United States, 272 U.S. at 161); see also Bowsher v. Synar, 478 U.S. at 723 (to give Congress a role in removal of Executive Branch officials would be "inconsistent with separation of powers" principles).

Plaintiffs also allege that because treaties, like Acts of Congress, are "supreme law," the President may not terminate them unilaterally, any more than he can unilaterally repeal a statute, but that they may only be terminated by action of a majority of both Houses of Congress. Compl. ¶ 31. But, by giving the House of Representatives a role in these matters, this argument 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. Even Congress has recognized that this claim is mistaken. As the Senate Foreign Relations Committee noted in 1979, the making of treaties is unlike the making of statutes in fundamental respects:

> Although the Congress has the last word in determining whether a statute is enacted, the Senate merely authorizes the ratification of a treaty; it is the President's role that is determinative. [The President] decides at the outset whether to commence treaty negotiations. He decides whether to sign a treaty. He decides whether to . . . exchange instruments of ratification after a treaty has been approved by the Senate. At each of these stages, it is the President who has the power to determine whether to proceed – and thus whether treaty relations will ultimately exist.

S. Rep. No. 96-7, at 18 (1979), reprinted in 1979 U.S.C.C.A.N. 36, 53 (emphasis omitted). That treaties and statutes have the same status under the Supremacy Clause does not change this result. The Supremacy Clause is, as one scholar put it, "a *status*-prescribing provision, not . . . a *procedure*-prescribing provision. That it 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." Michael J. Glennon, Constitutional Diplomacy 150 (1990).

C. Historical Practice Supports the Conclusion That the President Had the Power Unilaterally to Withdraw From the ABM Treaty

The Supreme Court has also recognized that governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers; indeed, as the Court has observed, the role of practice in fixing the meaning of the separation of powers is implicit in the Constitution itself. "'[T]he Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government.'" Mistretta v. United States, 488 U.S. 361, 381 (1989) (citation omitted). Accordingly, courts give considerable weight to the practice of the branches in trying to determine the constitutional allocation of powers between them.

In the present case, the historical record clearly supports the view that the President has the constitutional authority to terminate a treaty. No single method of treaty termination has been

consistently used in U.S. history. Treaties have been terminated by the President pursuant to prior authorization or direction by Congress, by the President pursuant to prior authorization or direction by the Senate, by the President with subsequent approval by the Congress or the Senate, or by the President alone. See Treaties and Other International Agreements at 201-08. Although the analysis of scholars sometimes differs in the details, the consensus is that termination by the President acting alone has been practiced on numerous occasions, by Presidents from Taft to Carter to Reagan. Id. at 206-08; David Gray Adler, The Constitution and the Termination of Treaties 181-89 (1986). By the Solicitor General's count at the time of Goldwater, "[o]f the 26 occasions on which the President has acted to terminate a treaty, 13 involved purely Presidential action without the participation of Congress. Several of the treaties in the latter group involved matters of considerable importance." Brief for Respondents in Opposition [to Petition for Writ of Certiorari] at 21, Goldwater v. Carter, 444 U.S. 996 (1979) (No. 79-856) (Exh. 8).

The historical record demonstrates that unilateral Presidential termination of treaties has a relatively early origin, and has increasingly become a settled and accepted practice. Moreover, the record shows that Congress has acquiesced in this practice by not attempting to legislate a role for itself. The Court should decline to upset this established system by attempting a judicial reallocation of the treaty termination powers among the two Branches.[17]

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[17] Defendants do not argue that the Legislative Branch may not work with the President to terminate a treaty. Termination by the President acting together with the Senate has been sanctioned in Supreme Court dicta as a constitutionally legitimate (although of course not the only legitimate) method of termination. See Clark v. Allen, 331 U.S. 503, 509 (1947) (quoting Techt v. Hughes, 229 N.Y. 222, 242-43 (1920)). The Senate Foreign Relations Committee at one time claimed that "it is competent for the President and Senate, acting together, to terminate [a treaty] . . . without the aid or intervention of legislation by Congress." S. Rep. No. 97 at 3 (34th Cong. 1st Sess. 1856). Finally, both the Senate and Congress have been involved in some (continued...)

D. The Senate's Failure to Provide a Role for Itself or the Full Congress in Terminating the Treaty Vitiates Plaintiffs' Claim to Such a Role Here

Finally, the President's termination authority is certainly at its apex where – as is the case with the ABM Treaty – the treaty in question expressly provides the United States with a right of withdrawal. See Goldwater, 617 F.2d at 708 ("the President's authority as Chief Executive is at its zenith when the Senate has consented to a treaty that expressly provides for termination on one year's notice, and the President's action is the giving of notice of termination"). In approving the ABM Treaty, the Senate had ample opportunity to add a condition that any such termination must be with the consent of the Senate or the full Congress.[18] The Senate failed to do so. Its approval of the treaty without such a condition is therefore an endorsement of vesting that authority in the President. At a minimum, the Senate should be held to have waived any claim that it might arguably have with respect to treaty termination by failing to raise this issue at the time it gave its approval.

CONCLUSION

For the foregoing reasons, this case should be dismissed. In the alternative, there are no genuine issues of material fact and defendants are entitled to judgment as a matter of law.

Dated: August 5, 2002

[17](...continued)
treaty termination decisions throughout our history. See discussion in text.

[18] The United States does not concede, however, that such a condition would be constitutional.

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