IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE DENNIS KUCINICH,
et al.,

Plaintiffs,

v. Civ. No. 02-1137 (JDB)

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

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Respectfully submitted,

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PRELIMINARY STATEMENT

Most of the arguments in the Memorandum in Support of Defendant's Motion to Dismiss (DM) were anticipated and answered in the Memorandum in Support of Plaintiffs' Motion for Summary Judgment (PM), prepared prior to receipt of Defendants' Motion and filed shortly thereafter. This Opposition will therefore concentrate on those aspects of Defendants' Memorandum not specifically dealt with in Plaintiffs' Memorandum.[1]

It should be noted at the outset that Defendants' position is wholly self-contradictory. On the one hand they rely on Raines v. Byrd, 521 U.S. 811 (1997), the underlying rationale of which is the availability of an alternative remedy. On the other hand, given their claim on the merits of Presidential plenary control over foreign affairs, DM 30, 34, the President has the power to terminate any treaty regardless of whatever action Congress may take. Thus they agree, albeit not intentionally, with Plaintiffs' claim that only the third branch can resolve this fundamental constitutional dispute between the other two branches, since the legislative branch is powerless to resolve it in any other way. It cannot be right that so important a constitutional question is to be left to the sole discretion of the President.

Acceptance of Defendants' position, or abstention from deciding this case on the merits, would sanction a dangerous accretion of executive power. Now, more than ever before, how the United States terminates treaties, which are solemn agreements with other

1 Filed together with this Opposition are the Declaration of Peter Weiss in Support of Plaintiffs' Opposition; the Declaration of Representative Dennis Kucinich In Support of Plaintiffs' Motion for Summary Judgment; and Plaintiffs' Motion For Leave to Amend the Complaint, to add Representative Sheila Jackson-Lee as a plaintiff. The Declaration of Rep. Kucinich was signed prior to Plaintiffs' filing of their summary judgment motion, but practical difficulties prevented its filing at that time. Attached to the declaration is a letter from Senator Russell Feingold regarding the Senate Ethics Committee's denial of his application for permission to receive pro bono legal services in order to be a plaintiff in this action.

nations, has enormous impact on the stability of the world and our standing in it. It cuts to the core of whether this country understands the ramifications of treaty formation and termination and genuinely accords to treaties the force of law. While this lawsuit is about the termination of a particular treaty, its outcome is likely to set a precedent for the termination of all treaties to which the United States now is and will in the future be a party. If Defendants are right about the President's "plenary power," what is to prevent this or future Presidents from terminating, by his or her sole decision, U.S. adherence to the North Atlantic Treaty (NATO), the Genocide Convention, the International Convention on Civil and Political Rights, various anti-terrorism conventions, the Nuclear Nonproliferation Treaty, the Chemical and Biological Weapons Conventions or, for that matter, the Charter of the United Nations?

The framers' view of the dignity to be accorded to treaties is enshrined in Article VI of the Constitution, which accords to treaties the status of supreme law. It is a dignity not to be cast aside lightly by presidential decision or judicial abstention.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE.

A. Goldwater v. Carter Is Not Controlling Here.

Defendants claim that "Goldwater controls here and requires dismissal." DM 13. No such conclusion can be drawn from Goldwater v. Carter, 444 U.S. 996 (1979), as explained at PM 14-19. The facts of the case were different, involving the President's exclusive right to recognize and derecognize foreign governments, there was no majority theory supporting dismissal in the Supreme Court, and the two lower court opinions were vacated.

B. Plaintiffs Have Standing.

If, as Defendants claim, Goldwater controls here, it must be significant that, of the nineteen judges and justices who ruled in the three instances of that case, only two, Wright and Tamm, JJ. in the D.C. Circuit, and none in the Supreme Court, found any problem with standing. Raines v. Byrd, 521 U.S. 811 (1997) may well be "the defining case on the issue of legislative standing," DM 14, but it says nothing about overruling previous cases, including Goldwater. In Allen v. Wright, 468 U.S. 737 (1984), the Court, after stating that "the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition," id. at 751, advised looking to precedent for guidance: "In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." Id. at 751-752.

Plaintiffs agree with Defendants' statement that "[t]he 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." DM 16. But they fail to explain – because they cannot – how the political branches could possibly resolve a dispute as to which the powers of one branch are plenary, *i.e.* complete or exclusive. On the contrary, they refer at DM 18 to the Raines court's emphasis on the availability of alternative remedies: "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)." Raines, 521 U.S. at 829.

Similarly, in the second of the three cases on which Defendants primarily rely in their opposition to standing, Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999), Judge Ginsburg, as she then was, writing for this Circuit, returns repeatedly to the theme of the availability of alternative remedies. She noted that in Riegle v. Federal Open Market

Committee, 656 F.2d 873 (1981), "we dismissed the complaint of a Senator … in order to avoid an 'obvious intrusion by the judiciary into the legislative arena.' 656 F.2d at 881." Chenoweth, 181 F.3d at 114. And she went on to say:

> We did not, however, disavow the standing analysis of *Kennedy* and *Goldwater*. Instead, creating a doctrine of "circumscribed equitable discretion," we held that the court would decline to hear the complaint of a Congressman who "could obtain substantial relief from his fellow legislators" regardless whether he had standing to sue. [Riegle, 656 at 881.]

Id.

Then, after reviewing the post-*Riegle* standing jurisprudence, Judge Ginsburg said that, in Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984):

> although congressmen had standing to object to the purportedly unconstitutional origination of a revenue-raising bill in the Senate, the district court properly dismissed their complaint under Riegle because their 'rights [could] be vindicated by congressional repeal of the [offending] statute.' 733 F.2d at 956.

Chenoweth, 181 F.3d at 115.

The same alternative remedy reasoning underlies the decision of this circuit in Campbell v. Clinton, 203 F.3d 19 (D.C. Cir.), cert. denied, 531 U.S. 815 (2000), the third case in the "triumvirate" relied on by Defendants. There, as Defendants say in their brief, DM 19: "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.' [Campbell, 203 F.3d] at 24."

It will be seen that all three of the "triumvirate of controlling cases" cited by the Defendants, DM 19, share a crucial factor absent from this case: In Raines, the congressional plaintiffs could have persuaded their colleagues to repeal the Line Item Veto Law, as they eventually did. In Chenoweth, "it is uncontested that the Congress could terminate the AHRI

[the American Heritage Rivers Initiative] were a sufficient number in each House so inclined." 181.F.3d 112, 116. In Campbell, Congress could, in principle, have voted to cut off funds for the bombing of Yugoslavia.

Defendants contend that "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.'" DM 21. But this contention is itself undermined by Defendants' claims that "[t]he President has plenary control over the conduct of foreign affairs," DM 30, and that "[t]he President's plenary control over foreign affairs includes the power to terminate a treaty according to its terms." DM 34. In plain English, this means that no matter what anyone else, including the Congress of the United States, may say and no matter how it may be said, the President may, by his sole decision, terminate a treaty, whenever and for whatever reason he chooses to do so, subject only to his view of such limitations as may be contained in the treaty itself.

In this sense, the nullification rule of Coleman v. Miller, 307 U.S. 433 (1939) also applies: If the President's plenary power of treaty termination overrides any action Congress may take, then the votes of these plaintiffs and all of their colleagues have been nullified *in advance* and we are in the presence of an injury in fact affecting the entire House "in a personal and individual way." See House of Representatives v. Dept. of Commerce, 11 F. Supp. 2d 76, 86 (D.D.C. 1998) (citations and internal quotation marks omitted), appeal dismissed, Dept. of Commerce v. House of Representatives, 525 U.S. 316 (1999).

It is disingenuous, therefore, to equate Plaintiffs' ability "to prevent the expenditure of funds for ABM systems," DM 21, with the remedies available to the plaintiffs in Raines, Campbell and Chenoweth. None of these cases involved a treaty, and a treaty involves a good

deal more than what can be controlled by Congress' power of the purse. That power, as Plaintiffs have pointed out in their summary judgment brief, PM 25, does not extend to the obligations assumed by the Soviet Union when the ABM Treaty came into force in 1972, which obligations later became binding on the Russian Federation and several of the other successor states to the Soviet Union.

C. The Dispute is Ripe.

Defendants claim that the dispute is not ripe because "the Legislative Branch has not taken definitive action 'asserting its constitutional authority' in a manner inconsistent with that of the Executive Branch." DM 24, citing Goldwater, 444 U.S. at 534 (Powell, J., concurring). This is yet another example of Defendants' "heads I win, tails you lose" approach. If Congress has no role to play in treaty termination, given the President's plenary power over foreign affairs, how could this dispute ever be ripe?

Defendants base their position on the opinion of a single Justice in Goldwater. It is true that Justice Powell, in that case, 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." DM 24, citing 444 U.S. at 534. The implication is that, given such an impasse, there is a genuine question for the courts to rule on. Here, as Plaintiffs have shown, PM 26, an impasse was reached, but, more importantly, the impasse will continue to exist as long as it is not resolved by the judicial branch.

The impasse does not concern whether this or that treaty may or should be terminated; it concerns the more fundamental question whether unilateral treaty termination by the President is consistent with the language and spirit of the Constitution.

D. Plaintiffs' Claims Are Not Barred by the Political Question Doctrine.

In their summary judgment motion, PM 19-21, Plaintiffs have shown that the political question doctrine is not currently favored by the Supreme Court. Here they will argue that, even if that were not the case, the doctrine would be no bar to justiciability in this case.

Defendants state that the political question doctrine "counsels the courts to abstain for constitutional or prudential reasons from passing on issues reserved to the political branches." DM 26. The use of the plural – political branches – is significant. As is shown infra in Section III, questions of foreign affairs not textually committed to one of the political branches, *e.g.* recognition or derecognition of foreign governments, are committed by the Constitution to both political branches. Nowhere does the political question doctrine counsel judicial abstention in a situation in which one branch arrogates to itself exclusive dominion over a matter properly the province of both branches. In such a situation, only the judicial branch can restore the proper balance between the other two branches.

Defendants also aver that the political question doctrine is "primarily a function of the separation of powers." DM 26, citing Baker v. Carr, 369 U.S. 186, 210 (1962). Precisely so. But the genius of the separation of powers, or checks and balances, doctrine, as any student of the historical origins of the Constitution knows, lies in the proper allocation of power among the three branches so as to prevent a dangerous accretion of power in any one. What the framers sought to avoid by constructing "A Machine That Would Go Of Itself"[2] was tyranny, whether it be the tyranny of an imperial President, the tyranny of the majority or the tyranny of an unelected judiciary. This aim is served sometimes by intervention and sometimes by

[2] This is the felicitous title given to a 1993 study of the Constitution by Michael G. Kammen.

abstention. It is ill served when abstention by the third branch legitimizes the seizure by one of the other two branches of a power that should be shared between them.

Defendants cite the political question plurality in Goldwater to the effect that the dispute in that case was between coequal branches of the government "each of which has resources available to protect and assert its interests." DM 28, citing 444 U.S. at 1004. To which Plaintiffs here can only reply "would that it were so." The legislative and executive branches may be coequal in some respects, but when it comes to treaty termination, Defendants, speaking for the executive, have made it clear that equality is a sham and a delusion.

Defendants further claim that certain cases in which courts have abstained from ruling on "the continuing viability or enforceability of a treaty," DM 29, are analogous to the present case. The analogy escapes Plaintiffs. In Doe v. Braden, 57 U.S. 635 (1850), the fountainhead of the line of cases referred to by Defendants, the Supreme Court said:

> [I]t would be impossible for the executive department of the government to conduct our foreign relations with an advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

Id. at 657.

It is difficult to see what a judgment concerning the authority of a foreign official to enter into a treaty, which may well be within the exclusive province of the executive, has to do with the constitutional question whether one political branch can terminate a treaty, which has the force of domestic law, without the concurrence of the other branch.

In any case, it is wrong to suggest that courts have no business dealing with treaty questions. In Japan Whaling Association v. American Cetacean Society, 478 U.S. 221 (1986),

the Supreme Court observed that "the courts have the authority to construe treaties and executive agreements … and we cannot shirk this responsibility merely because our decision may have significant political overtones." Id. at 230.

One need not, perhaps, go as far as to agree entirely with Professor Henkin that "the 'political question' doctrine … is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than its parts." Louis Henkin, Is There a "Political Question" Doctrine?, 85 Yale L. J. 597 (1976), at 622. It is, however, a demonstrable fact that, as one commentator noted in 1999:

> The recent decisions have all but given the political question doctrine a quiet burial. With the exception of Nixon v. United States [506 U.S. 224 (1993)], in which the Court abstained in ruling on the manner of trying impeachments in the Senate, the political question doctrine has played almost no role in Supreme Court jurisprudence – and virtually none at all in the foreign affairs realm.

Bederman, Deference or Deception: Treaty Rights as Political Questions, 70 U. Colo. L. Rev. 1439 (1999), at 1445-1446 (footnotes omitted).

E. Plaintiffs Are Entitled to Declaratory Relief Against the President.

Perhaps because they are, understandably, not sure of their ground, Defendants relegate to a footnote their claim that "[i]n any event, this Court cannot grant either injunctive or declaratory relief against the President." DM 26, n 9. Plaintiffs do not seek injunctive relief against the President. They do seek, and are entitled to, declaratory relief.

That Defendants' position is a red herring is made plain by an examination of Franklin v. Massachusetts, 505 U.S. 788 (1992). Defendants cite Justice Scalia's opinion, to the effect that, since courts cannot issue injunctive relief against the President, "[f]or similar reasons I think we cannot issue a declaratory judgment against the President." Id. at 827. But they fail

to acknowledge that, in this respect, Justice Scalia was in a lonely minority of one. The opinion of the Court, written by Justice O'Connor and joined by Rehnquist, C.J., White and Thomas, JJ. and Justice Scalia himself, contains the following passage:

> Although the President's actions may still be reviewed for constitutionality, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 … (1952); Panama Refining Co. v. Ryan, 293 U.S. 388 … (1935), we hold that they are not reviewable for abuse of discretion under the APA …

Id. at 801.

The meaning of constitutional reviewability was elucidated by a plurality of four justices – Rehnquist, C.J., White and Thomas, JJ., joining the opinion of O'Connor, J. - as follows:

> For purposes of establishing standing, …we need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary [of Commerce] alone. See Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 75, n.20 (1978); Allen v. Wright, *supra,* [468 U.S.] at 752 … [W]e may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination.

Id. at 803.

The remaining four justices, concurring with the result, expressed no opinion on the plurality's theory of constitutional reviewability, but pointedly failed to join Justice Scalia's opinion disassociating himself therefrom.

In the case at bar, Plaintiffs, as far as the President is concerned, ask for no more than a constitutional ruling which "it is substantially likely" the President would follow. Neither they nor, apparently, the Defendants, see any problem with injunctive relief against the other two Defendants, the Secretaries of State and Defense. Nor, for that matter, would Justice

Scalia, who said: "None of these conclusions, of course, in any way suggests that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." Franklin, 505 U.S. at 828 (emphasis in original; citations omitted). See also Soucie v. David, 448 F.2d 1067, 1072 n. 12 (D.C. Cir. 1991) ("'courts have power to compel subordinate executive officials to disobey illegal Presidential commands'"); American Historical Association v. Peterson, 876 F. Supp. 1300, 1316 (D.D.C. 1995).

II. THE PRESIDENT'S CONTROL OVER FOREIGN AFFAIRS DOES NOT EXCLUDE A ROLE FOR CONGRESS.

A. The Constitution Does Not Grant the President "Plenary Power" Over Foreign Affairs.

Defendants use the term "plenary" to describe the President's control over foreign affairs. DM 30 and 34. The Random House Dictionary, 1978, defines "plenary" as "complete or absolute, as power or authority." It is difficult to reconcile this view with Defendants' admission that "[t]he Constitution also grants Congress certain foreign affairs powers," including 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." DM 33.

The cases cited by Defendants hardly support their "plenary power" theory. Department of the Navy v. Egan, 484 U.S. 518 (1988), involved the question of whether the Merit Systems Protection Board has authority to review the Navy's decision to deny security clearance to a laborer. The "generally accepted view that foreign policy is the province" – but not necessarily the exclusive province – "and responsibility of the Executive," id. at 529, was extremely tangential to its *ratio decidendi* .

Justice Rehnquist's reference in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), DM 31, to the first Justice Marshall's famous dictum that "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations" is in a dissent in which he was not joined by any of his brethren. Besides, the Marshall dictum is now generally understood to refer to the President's role as communicator with foreign nations and not to his role as maker of foreign policy.

Defendants also trot out an old horse on its last legs, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), DM 31, presumably as the source of their attachment to the term "plenary" ("the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations," in the words of Justice Sutherland, 299 U.S. at 320). But, as a leading constitutional scholar specializing in foreign affairs has written, "[t]he first thing to be said of this breathtaking exegesis of 'plenary powers' is that it is sheer dicta." Michael J. Glennon, Constitutional Diplomacy (1990) at 20 [hereinafter Glennon]. As Professor Glennon explains, Justice Sutherland's theory of "extrinsic sovereignty," which would exempt the area of foreign affairs from the reach of the delegation doctrine, is incompatible with the mandates of the Constitution. Id. at 20-24, 197-199. As evidence of the continuing erosion of Curtiss-Wright, he cites the Steel Seizure Case, Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), and Kent v. Dulles, 357 U.S. 116 (1958), in which the Court invalidated a passport revocation ordered by the Secretary of State. Glennon at 199. Also noteworthy is American International Group v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981), which stated that:

> To the extent that denominating the President as the "sole organ" of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization.

Id. at 438, n.6.

The "plenary" character of the President's role is also belied by the major role played by the entire Congress in the field of foreign affairs. Myriad instances exist of laws and resolutions passed in the areas of national security, human rights, international environmental concerns and of other types of involvement of the Congress in foreign affairs. For example, at the World Summit on Sustainable Development held in Johannesburg, South Africa, from August 26 to September 4, 2002, the U.S. congressional delegation consisted of six members of the House, including two of the Plaintiffs in this suit, Representatives Dennis Kucinich and George Miller, as well as eight congressional staff members. See Exh. A to Declaration of Peter Weiss In Support of Plaintiffs' Opposition.

B. The President's "Plenary Power" Over Foreign Affairs Is Not Supported by the Views of the Framers.

When the treaty power was first considered by the Federal Convention of 1787, the President was given no role. The August 6, 1787 final draft of the Committee on Detail contained the following provision: "The Senate of the United States shall have the power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court." Max Farrand, II The Records of the Federal Convention of 1787 (1966) at 183. Given this origin, the subsequent grant of the treaty power to the President "by and with the Advice and Consent of the Senate" represents a decision that the treaty power would be shared. Nothing better illustrates the point than the following statement in support of ratification of the Constitution by that great advocate of executive power, Alexander Hamilton:

> Though several writers on the subject of government place that power [the treaty power] in the class of executive authorities, yet this is evidently an arbitrary disposition: For if we attend carefully to its operation, *it will be found*

> *to partake more of the legislative than of the executive character*, though it does not seem strictly to fall within the definition of either of them.

The Federalist No. 75, later quoted by James Madison in Helvidius No. 1 (emphasis added).

In his in-depth study, historian Jack Rakove states regarding the debate at the Federal Convention over the treaty power:

> Nothing in this debate suggests that the framers viewed the president as the principal and independent author of foreign policy … [The framers] could readily appreciate the diplomatic and political advantages of allowing the president a significant initiative in the conduct of foreign relations. ... [The debate] suggests that the placement of the treaty power in Article II was more than a quirk of draftsmanship but less than a complete endorsement of the idea that the general conduct of foreign relations was an inherently executive function ...

Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996) 266-267 [hereinafter Rakove].

While the framers of the Constitution excluded the House of Representatives from participation in the *making* of treaties, it soon emerged that their *implementation* as part of the law of the land very much involved the House. The occasion was President Washington's demand that the House appropriate funds to execute the controversial Jay Treaty resolving outstanding issues of relations with Britain. While the House eventually complied, it also adopted a resolution regarding any treaty requiring implementing legislation stating its right to deliberate "on the expediency of carrying such treaty into effect, and to determine and act thereon, as, in their judgment, may be the most conducive to the public good." 5 Annals of Congress 770, 771 (1796), reaffirmed in 1871, Cong. Globe, 42d Cong., 1st Sess. 835. Madison supported the House in this matter, arguing that acknowledging a role for the House

with respect to treaties is the only way to give "signification to every part of the Constitution." Rakove 358.

There is no definitive evidence from debates at the Convention or arguments made in support of ratification of a clear intent of the framers or ratifiers concerning the proper mechanism or mechanisms for treaty termination. But there is ample evidence of a general assumption of the framers and of participants in early governments that Congress would have a role in treaty termination.

Jefferson, for one, was quite explicit about the matter. When serving as Vice-President and thus as President of the Senate, he wrote: "Treaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them to be infringed or rescinded." T. Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States, Sec. LII (1801), reprinted in Rules of the House of Representatives, 107th Congress, H. Doc. 106-320, § 599, p. 306 (2001), and in Senate Manual, S. Doc. 94-1, 94th Cong., 1st session, p. 666 (1975).

In a similar vein, Madison wrote as follows on the option to terminate a treaty in response to a breach by the other party:

> In case it should be adviseable to take advantage of the adverse breach a question may perhaps be started, whether the power vested by the Constitution with respect to Treaties in the President & Senate, makes them the competent Judges, or whether as the Treaty is a law the whole Legislature are to judge of its annulment.

Letter from James Madison to Edmund Pendleton, January 2, 1791, in Charles F. Hobson and Robert A. Rutland, eds., 13 The Papers of James Madison (1981) 342, at 343-44.

John Jay, while not discussing directly the mode of treaty termination, waxed eloquent on the need not to make treaties "repealable at pleasure," precisely because they are "the supreme laws of the land":

> Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* laws of the land. They insist and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this nation, but new errors as well as new truths often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain; and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.

The Federalist No. 64.

A simple notice of withdrawal by a President may justly be viewed as "a repeal at pleasure." Such a description would not apply to the kind of extensive debate on the merits or demerits of termination which Plaintiffs believe must take place within the halls of Congress and between Congress and the President concerning withdrawal from a treaty affecting the nation's "supreme interests."

The passage from Hamilton cited by Defendants, DM 31-32, as to the Constitution's "comprehensive grant" of the executive power to the President is unobjectionable but irrelevant. Giving notice of withdrawal pursuant to congressional authorization would be an executive function. Doing so without such authorization is overstepping the bounds of executive power.

III. HISTORICAL PRACTICE DOES NOT SUPPORT THE PRESIDENT'S POWER UNILATERALLY TO WITHDRAW FROM THE ABM TREATY.

Plaintiffs agree with Defendants' assertion that "governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers." DM

40. They disagree strongly, however, with Defendants' analysis of the relevant historical practice. The matter is dealt with at PM 27-29, but Defendants' claim that "the historical record clearly supports the view that the President has the constitutional authority to terminate a treaty," DM 40, calls for further comment.

A. Historical Practice With Respect to Termination of Treaties Containing Notice Provisions.

Defendants assert that "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." DM 42. While noting in passing that this suggests that the President's unilateral termination authority may be less, or at its nadir - rather than "plenary" - with respect to other treaties, it will be useful to examine instances – including the first – when presidents sought congressional authorization for withdrawal pursuant to notice provisions.

The first termination of a treaty pursuant to a notice provision occurred in 1846. At the request of President Polk "that provision be made by law for giving" the notice, Annual Message, December 2, 1845, 5 J. Richardson, A Compilation of the Messages and Papers of the Presidents (1897) 2235, att 2242-2245 [hereinafter Richardson], Congress passed a joint resolution. 9 Stat. 109, 110. It directed the President, at his discretion, to convey the required notice for the termination of the Convention on Boundaries with Great Britain of August 6, 1827, 12 Bevans, Treaties and Other International Agreements of the United States of America (1974) 40 [hereinafter Bevans], concerning the joint occupation of the Northwest Territory.

In 1854, President Pierce declared the need to provide notice of termination of the Treaty of Commerce and Navigation with Denmark of April 26, 1857, 7 Bevans (1971) 1. 6

Richardson 2806, 2812. The Senate then unanimously adopted a resolution authorizing such a notice, S. Res. of March 3, 1855, 33d Cong., 2d Sess., and President Buchanan gave the notice in 1858, stating he had acted "in pursuance of the authority" of the resolution. Memorandum to the Secretary of State, Legal Adviser, State Department, December 15, 1978, reprinted in Treaty Termination Hearings Before the Senate Committee on Foreign Relations, 96th Cong., 1st Sess. (1979) 147, at 160.

In 1921, President Wilson sought the Senate's advice and consent to the denunciation of the International Sanitary Convention of 1903, 1 Bevans (1968) 359, pursuant to a right to do so preserved in the deposit of ratification. David Gray Adler, The Constitution and the Termination of Treaties (1986) 176 [hereinafter Adler]. By resolution adopted by a two-thirds majority, S. Res. of May 26, 1921, 61 Cong. Rec. 1793, the Senate authorized the denunciation, and the Secretary of State communicated the notice of denunciation to the depositary. Congressional Research Service, Treaties and Other International Agreements: The Role of the United States Senate, S. Prt. 106-71 (January 2001) 205 [hereinafter Treaties and Other International Agreements].

B. Historical Practice With Respect to Treaty Termination Generally.

While not denying the historical role of Congress in treaty termination, Defendants also state that "the consensus is that termination by the President acting alone has been practiced on numerous occasions, by Presidents from Taft to Carter to Reagan." DM 41. The flimsiness of this position becomes apparent upon close examination, beginning with the references to Presidents Taft, Carter, and Reagan.

In 1911, the United States and Russia disputed how the 1832 Treaty of Commerce and Navigation, 11 Bevans (1974) 1208, should be applied to a number of American Jews who

were doing business in Russia. Adler at 181. In response, the House of Representatives passed a harshly worded joint resolution demanding abrogation of the treaty. H.R. J. Res. 166, 62d Cong., 2d Sess., 48 Cong. Rec. 353 (1911). The Senate was expected to pass the same resolution in the near future. Adler at 181. Seeking to avoid a severe congressional condemnation of Russia, President Taft gave notice of termination of the treaty. Id. at 181-182. He then sought approval of the action from the Senate. Id. A joint resolution was adopted by both Houses and signed by President Taft by which the notice of termination was "adopted and ratified." Id. at 182; 37 Stat. 627. In 1925, when Chief Justice of the Supreme Court, Taft wrote that "[t]he abrogation of the treaty involves the same exercise of the same kind of power as the making of it." Taft, The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government, 25 Yale L. J. 599 (1925), at 610.

Nor can President Carter's termination of the Taiwan Mutual Defense Treaty stand as any kind of precedent, as the saga of Goldwater v. Carter demonstrates. See PM at 10-19. Two points can be highlighted here. First, on June 6, 1979, the Senate voted 59 to 35 to amend a resolution concerning treaty termination. Goldwater, 481 F. Supp. at 954. The amendment provided: "That it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation." Id. While the Senate leadership never allowed the resolution as amended to be voted upon, the adoption of the amendment demonstrates that the Senate was not prepared to accept a categorical presidential authority to unilaterally terminate treaties pursuant to their terms. Second, according to Justice Rehnquist speaking for the four judge plurality of the Supreme Court in Goldwater, the Court of Appeals decision holding the termination

constitutional was vacated to ensure that it "does not 'spawn any legal consequences.'" 444 U.S. at 538.

President Reagan's termination of a commercial treaty with Nicaragua was done pursuant to statutory authorization under the International Emergency Economic Powers Act. See PM at 29.

Plaintiffs agree that treaties have been terminated by presidents pursuant to prior or subsequent authorization or direction by Congress or the Senate or "by the President alone." DM 41. But the Congressional Research Service report Defendants cite, Treaties and Other International Agreements, supra, lists only eight instances of unilateral presidential termination. Id. at 206-207. Except for the episodes involving the treaties with Taiwan and Nicaragua discussed above, they are included among the 13 instances cited by the Solicitor General in Goldwater and referred to by Defendants at DM 41.[3] The only thorough judicial analysis of these 13 instances – all that the Solicitor General was able to scrape up in Goldwater – is that by Judge MacKinnon in his dissent from the Circuit Court opinion, 617 F. 2d at 727-732, which he summed up as follows:

> To summarize the 13 instances in which the appellant asserts that Presidents acted alone to such an extent that the courts should recognize that the President now has absolute power alone to terminate the Taiwan Treaty, the North Atlantic Treaty, the SALT Treaty, the Japanese Security Treaty and other treaties of similar magnitude: In five instances Congress by direct authorization, or inconsistent legislation supplied the basis for the President's action; in two instances the putative abrogation was withdrawn and no termination resulted; one treaty was already terminated by the demise of the country; one treaty had become void by a change in the basic facts upon which

[3] Defendants also cite Adler's study in support of their position. DM 41. However, Adler concludes that "there is no support for President Carter's contention that 'history' … 'suggests an acknowledgement that the President has the constitutional authority to act on his own initiative' in treaty termination." Adler at 190.

> the treaty was grounded;[4] four treaties had already been abrogated by the other party; and of the other two that were non-functioning the Trademark Treaty was not terminated.

Id. at 733 (original footnotes omitted).

It is not too much to say that, on this record, Defendants are grasping at straws when they maintain that historical practice supports their position.

IV. CONGRESSIONAL ACTIVITY WITH REGARD TO THE ABM TREATY DOES NOT CONSTITUTE DIRECT OR INDIRECT AUTHORIZATION FOR ITS TERMINATION.

Defendants provide a helpful summary of congressional activity concerning the ABM Treaty, DM 8-11, which can best be characterized as "let's explore the feasibility of limited missile defense without abandoning the ABM Treaty." At most, this history points to the possibility of amending the treaty; nothing in this history, including the National Missile Defense Act of 1999, Public Law No. 106-38, 113 Stat. 2005 (1999), represents a congressional authorization or directive to withdraw from the Treaty.

The Act's substantive provisions provide in their entirety:

> § 2. National Missile Defense Policy.
>
> It 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) with funding subject to the annual authorization of appropriations and the annual appropriation of funds for National Missile Defense.
>
> § 3. Policy On Reduction Of Russian Nuclear Forces.
>
> It is the policy of the United States to seek continued negotiated reductions in Russian nuclear forces.

[4] Plaintiffs note that this refers to the 1923 Convention on Uniformity in Nomenclature for the Classification of Merchandise, under which the parties agreed to use the 1913 Brussels nomenclature which, by 1954, had been replaced by the International Trade Classification of the United Nations.

Id. (emphasis added).

In passing this legislation, Congress did not decide to deploy any particular anti-missile systems, and therefore did not mandate any particular activity in violation of the ABM Treaty. As stated in Section 2 of the Act, funding is subject to annual authorization and appropriation. Nor did Congress decide that the result of the stated policy would be withdrawal from the ABM Treaty. On the contrary, the relevant committee reports assume that the United States would seek to amend the Treaty. The Senate Committee on Armed Services stated in its report that "the Committee believes that once a firm commitment to NMD deployment has been announced only then will Russia seriously engage in negotiations to modify the ABM Treaty." S. Rep. No. 106-4, 106th Cong., 1st Sess. (1999). The House Committee on Armed Services stated that "an NMD architecture would require revisions to the ABM Treaty." H. Rep. No. 106-39, 106th Cong., 1st Sess. (1999).

Upon signing the Act, President Clinton observed in part:

> Section 2 of this Act states that it is the policy of the United States to deploy as soon as technologically possible an effective National Missile Defense (NMD) system with funding subject to the annual authorization of appropriations and the annual appropriation of funds for NMD. By specifying that any NMD deployment must be subject to the authorization and appropriations process, the legislation makes clear that no decision on deployment has been made. This interpretation, which is confirmed by the legislative record taken as a whole, is also required to avoid any possible impairment of my constitutional authorities.
>
> Section 3 of the Act states that it is the policy of the United States to seek continued negotiated reductions in Russian nuclear forces. Thus, section 3 puts the Congress on record as continuing to support negotiated reductions in strategic nuclear arms, reaffirming my Administration's position that our missile defense policy must take into account our arms control and nuclear nonproliferation objectives.
>
> Next year, we will, for the first time, determine whether to deploy a limited National Missile Defense, when we review the results of flight tests and other

> developmental efforts, consider cost estimates, and evaluate the threat. Any NMD system we deploy must be operationally effective, cost-effective, and enhance our security. In making our determination, we will also review progress in achieving our arms control objectives, including negotiating any amendments to the ABM Treaty that may be required to accommodate a possible NMD deployment.

July 22, 1999 Statement on Signing the National Missile Defense Act of 1999, Weekly Compilation of Presidential Documents, Week Ending July 30, 1999.

Thus President Clinton identified the Act's only consequence for the ABM Treaty as "negotiating any amendments [to the Treaty] that may be required to accommodate a possible NMD deployment." In the remainder of 1999 and in 2000, the Clinton administration did in fact propose to the Russians that the Treaty be amended to accommodate a limited U.S. national missile defense system. See Strobe Talbot, Deputy Secretary of State in the Clinton Administration, Unfinished Business: Russia and Missile Defense Under Clinton, Arms Control Today (June 2002). Withdrawal from the Treaty was not on the agenda. It was not until the Bush administration that withdrawal became the main option. That course was driven by Bush administration policy, not by the National Missile Defense Act.

Defendants also note that the fiscal year 2003 defense authorization and appropriation bills passed separately by the Senate and the House, which the two Houses are now working to reconcile, do not condition funding on missile defense. DM 11-12. What Defendants fail to note is that currently planned activities that might violate the ABM Treaty are limited in scope and capable of being made compliant with the Treaty. Article IV of the ABM Treaty permits designation of additional test ranges. According to Philip E. Coyle, III, former Assistant Secretary of Defense and Director, Operational Test and Evaluation: "Since additional test ranges can be established under the ABM treaty, the treaty is not now an obstacle to proper development and testing of a National Missile Defense System." Testimony before the Senate

Armed Services Committee, Hearing on Missile Defense and Defense Authorization FY2002, July 19, 2001 (on-line at http://www.clw.org/coalition/coyle071901.htm). Coyle also stated that:

> The United States faces a very complex and difficult set of expensive NMD development problems - problems that abrogating the ABM treaty will not overcome. Rather than focusing on the red herring of the ABM treaty, the NMD program would do better to concentrate on crafting long-term, affordable approaches to technology development.

Id.

V. CONGRESSIONAL DELIBERATION IS REQUIRED REGARDING WHETHER EXTRAORDINARY EVENTS JEOPARDIZING THE NATION'S SUPREME INTERESTS WARRANT WITHDRAWAL FROM THE ABM TREATY.

President Bush relied upon the ABM Treaty withdrawal clause in the diplomatic notes of December 13, 2001, citing a decision of the United States pursuant to Article XV, paragraph 2 of the Treaty that "extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests." Exh. 3 to Klimaski Decl. in Support of Plaintiffs' Motion for Summary Judgment. But like any provision of a treaty, the withdrawal clause must be exercised in accordance with the Constitution, more particularly, the constitutional requirement of legislative participation in termination of a law.

The wisdom of this requirement is apparent in the case of the ABM Treaty. Whether the standard for withdrawal has been met is the subject of legitimate debate. On December 12, 2001, Senator Joseph Biden, Chair of the Foreign Relations Committee, commented that invoking the supreme interest clause is "a bit of a stretch, to say the least." Cong. Rec., December 12, 2001, S12999. Independent experts have found that the risk of a missile attack on the United States has declined. E.g., Joseph Cirincione, Director, Non-Proliferation Project, Carnegie Endowment for International Peace, The Declining Ballistic Missile Threat, presented at Annual Meeting, American Association for the Advancement of Science, February 18, 2002.

Congressional deliberation regarding withdrawal would allow the airing of expert views not necessarily represented within the administration, and stimulate public debate on a matter of the utmost importance to the country's future. Senator Majority Leader Thomas Daschle was correct in saying, on December 7, 2001, that the withdrawal "ought to have been more carefully deliberated, I think, between both the legislative and executive branch before a

commitment was made." Exh. 5 to Klimaski Decl. in Support of Plaintiffs' Motion for Summary Judgment, p. 1. Moreover, the need for congressional and public involvement in making a determination about whether continued adherence to a treaty risks the country's "supreme interests" is not restricted to the ABM Treaty. Other important security treaties, including the Nuclear Nonproliferation Treaty, the Chemical Weapons Convention, and the Biological Weapons Convention, have withdrawal clauses calling for the same determination. See PM at 5-6.

CONCLUSION

For the reasons set forth in this Opposition and in the Memorandum in Support of Plaintiffs' Motion for Summary Judgment, the Court should deny Defendants' Motion to Dismiss Or, In the Alternative, For Summary Judgment, and grant summary judgment to Plaintiffs.

Respectfully submitted,

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