

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

**U.S. Representative Dennis Kucinich,
et al.,**

Plaintiffs,

Civil Action No. 02-1137 (JDB)

v.

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

Defendants.

MOTION FOR SUMMARY JUDGMENT

Plaintiffs respectfully submit, pursuant to Fed. R. Civ. P. 56(c), this Motion for Summary Judgment in the above-captioned case. No genuine issues of material facts exist. The attached Memorandum and Exhibits establish that Plaintiffs are entitled to judgment as a matter of law.

Respectfully submitted,

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

By _____
James R. Klimaski
DC Bar No. 243543

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

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

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

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

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

MICHAEL VEILUVA
Western States Legal Foundation
1504 Franklin St., Suite 202
Oakland, CA 94612
510 839 5877

Counsel for Plaintiffs

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Defendants.

**STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE**

1. President Richard M. Nixon signed the ABM Treaty on May 26, 1972; the Senate consented to its ratification on August 3, 1972; President Nixon ratified the Treaty on September 30, 1972; and the Treaty entered into force on October 3, 1972.

Authority: ABM Treaty, United States Treaty Series, Exh. 1 to Declaration of James R. Klimaski (all exhibits refer to that declaration).

2. On December 13, 2001, President George W. Bush sent identical diplomatic notes to Russia, Belarus, Kazakhstan and Ukraine giving notice of the United States' withdrawal from the ABM Treaty, effective six months from the date of the notice, pursuant to Article XV, paragraph 2, of the Treaty.

Authority: December 13, 2001 Diplomatic Notes to Russia, Belarus, Kazakhstan and

Kraine, Exh. 3.

3. Prior to giving Russia the withdrawal notice on December 13, 2001, President Bush did not consult with the House of Representatives or the Senate concerning the withdrawal, nor did he provide either house with advance notice of the withdrawal prior to its announcement by Russia.

Authority: Transcript [Excerpt] of Hearing of the Senate Foreign Relations Committee, Treaty on Strategic Offensive Reductions, July 9, 2002, Exh. 7; December 12, 2001, Regular Media Availability with Senate Majority Leader Thomas Daschle [Excerpts], Exh. 5.

4. President Bush did not seek approval of the withdrawal by both houses of Congress or by the Senate, either before or after December 13, 2001.

Authority: Transcript [Excerpt] of Hearing of the Senate Foreign Relations Committee, Treaty on Strategic Offensive Reductions, July 9, 2002, Exh. 7; December 12, 2001, Regular Media Availability with Senate Majority Leader Thomas Daschle [Excerpts], Exh. 5.

5. On December 12, 2001, Representative Lynn Woolsey, with 28 original co-sponsors, introduced House Resolution 313 calling on the United States to remain a party to the ABM Treaty and stating, *inter alia*, that “the Anti-Ballistic Missile Treaty remains an important means of limiting the threat of nuclear war and the proliferation of nuclear weapons”.

Authority: H. Res. 313, Exh. 4.

6. Senator Thomas Daschle, Majority Leader, stated to the press on December 12, 2001, that the withdrawal is “going to complicate as well our relations with Russia, with China,” and expressed his unhappiness that the President did not give Congress advance notice of the

withdrawal and that the Russians knew about the administration's plan before Congress was informed.

Authority: December 12, 2001 Regular Media Availability with Senate Majority Leader Thomas Daschle (D-SD) [Excerpts], Exh. 5.

7. Senator Carl Levin, Chair of the Senate Armed Services Committee, issued a statement on December 13, 2001, calling the President's decision "a serious mistake for our national security" and listing five reasons why the withdrawal was neither wise nor necessary.

Authority: Levin Statement on President Bush's Decision to Unilaterally Withdraw from the ABM Treaty, Exh. 6.

8. Senator Joseph Biden, Chair of the Senate Foreign Relations Committee, on December 12, 2001, said on the Senate floor that the decision is "an incredibly dangerous one" and that invoking the supreme interest clause in Art. XV of the Treaty was "a bit of a stretch, to say the least," and ended with: "Today the doors to international cooperation and American leadership are wide open. But if we slam them shut too often, we will lose our chance to restructure the world and we will be condemned to repeat the experience of the last century, rather than move beyond it."

Authority: Congressional Record, December 12, 2001, S12998, 12999, 13000.

9. On June 6, 2002, on the floor of the House of Representatives, plaintiff Representative Dennis Kucinich offered a resolution that "the President should respect the Constitutional role of Congress and seek the approval of Congress for the withdrawal of the United States of America from the Anti-Ballistic Missile Treaty."

Authority: Congressional Record, June 6, 2002, H3232.

10. The Speaker of the House *pro tempore* sustained a point of order that the resolution offered by Representative Kucinich did not constitute a point of privilege. Representative Kucinich appealed the ruling, and a motion to table the appeal of the ruling was passed by a recorded vote of 254 yeas and 169 nays, 11 not voting.

Authority: Congressional Record, June 6, 2002, H3237.

11. On June 10, 2002, on the Senate floor, Senator Russell Feingold sought unanimous consent to offer resolution 282 providing that “the Senate does not approve the withdrawal of the United States from the [ABM Treaty].”

Authority: Congressional Record, June 10, 2002, S5276, S5288.

12. An objection was made to Senator Feingold’s request for unanimous consent to offer resolution 282 and the Senate did not consider the resolution.

Authority: Congressional Record, June 10, 2002, S5277.

13. On June 13, 2002, the White House issued a Statement by the President on the ABM Treaty, which stated in part: “Six months ago, I announced that the United States was withdrawing from the 1972 Anti-Ballistic Missile (ABM) Treaty, and today that withdrawal formally takes effect.”

Authority: Weekly Compilation of Presidential Documents, 2002, p.1011.

Respectfully submitted,

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

By _____
James R. Klimaski
DC Bar No. 243543

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

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

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

JULES LOBEL
MICHAEL RATNER
Center for Constitutional Rights
666 Broadway
New York, NY 10012
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EDWARD A. AGUILAR
Philadelphia Lawyers Alliance for World Security
1617 John F. Kennedy Boulevard
Suite 11520
Philadelphia, PA 19103-1815
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Western States Legal Foundation
1504 Franklin St., Suite 202
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**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, through counsel, respectively submit this Memorandum of Law in support of their Motion for Summary Judgment.

INTRODUCTION

“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.”¹ Thus wrote Thomas Jefferson, then Vice President of the United States, in 1801. How far we have departed from that original understanding is made manifest by President Bush’s decision to terminate the Anti-Ballistic Missile Treaty, regarded as the cornerstone of strategic stability, without so much as consulting Congress.

¹T. 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. No. 94-1, 94th Cong., 1st session, p. 666 (1975).

This case, however, is not about the merits of terminating the ABM Treaty, or any other treaty. It is about resolving, once and for all, a question of supreme importance to our constitutional framework and the role of the United States in this shrinking world: Whether the President, who cannot repeal a law without the approval of a majority of both Houses of Congress, can repeal a treaty, which has the force of law, without such approval or, in the alternative, whether the President, who cannot make a treaty without the advice and consent of the Senate, can unmake a treaty without such advice and consent.

Following the Statement of Facts and a discussion of the only Supreme Court case to deal with this issue,² this memorandum will demonstrate the need for joint action by the legislature and the executive in treaty termination.

STATEMENT OF FACTS

A. History and Context of the ABM Treaty

The Treaty on the Limitation of Anti-Ballistic Missile Systems (“the ABM Treaty”) was signed at Moscow, May 26, 1972, between the United States of America and the Union of Soviet Socialist Republics. 944 U.N.T.S. 13, 23 U.S.T.S. 3435, T.I.A.S. 7503. Exh. 1 to Declaration of James R. Klimaski (all exhibits are to that declaration unless otherwise stated); Material Fact 1, Statement of Material Facts as to Which There Is No Genuine Issue. The U.S. Senate consented to ratification on August 3, 1972; President M. Nixon ratified the Treaty on September 30, 1972; the United States and the Soviet Union exchanged instruments of ratification on October 3, 1972, and the Treaty entered into force on that date. Id.

² Goldwater v. Carter, *infra*. The only other case to consider the constitutional aspects of unilateral treaty termination by the President was Beacon Products Corp. v. Reagan, 631 F.Supp. 1191 (D. Mass. 1986). There, as in Goldwater, the merits were evaded on political question grounds.

The ABM Treaty prohibits deployment of missile defenses to protect each party's national territory (Art. I), as well as the development, testing, or deployment of sea-, air-, space-, or mobile land-based anti-ballistic missile systems or components (Art. V). By prohibiting space-based anti-ballistic missile systems or components, the ABM Treaty also acts as a barrier to development and deployment of space-based weapons usable against satellites and air or ground targets, as well as missiles.

A limited exception set forth in Article III permitted each party to deploy anti-missile systems and components at two fixed, ground-based sites. An amendment to the Treaty, which the Senate approved, limited the exception to one site. Protocol to the ABM Treaty, signed at Moscow July 3, 1974, ratification advised by U.S. Senate November 10, 1975, entered into force May 24, 1976. 444 U.N.T.S. 13.

The Treaty's purposes are to curb the race in strategic offensive arms and lead to a decrease in the risk of outbreak of war involving nuclear weapons, and to create more favorable conditions for further negotiations on limiting strategic arms. Preamble, paras. 3-4.

The Treaty is part of an interlocking framework of arms control agreements. In the Strategic Arms Limitation Talks (SALT), the ABM Treaty was linked at its inception with the Interim Agreement on Limitation of Strategic Offensive Arms, an executive agreement signed together with the ABM Treaty on May 26, 1972, authorized by Congress on September 30, 1972, approved by the President on that date, and entered into force October 3, 1972 along with the ABM Treaty. 23 U.S.T 3462, T.I.A.S. 7504. The ABM Treaty subsequently served as a foundation for several nuclear arms control treaties, including: 1) the Treaty on the Limitation of Strategic Offensive Arms (SALT II), signed June 18, 1979, which was largely observed but never entered into force; 2) the Intermediate-Range Nuclear Forces Treaty removing Soviet and

U.S. missiles from Europe, signed December 8, 1987, entered into force June 1, 1988, 27 I.L.M. 84; 3) the first Treaty on the Reduction and Limitation of Strategic Offensive Arms (Strategic Arms Reduction Treaty or START I), signed July 31, 1991, entered into force December 5, 1994; and 4) the second Treaty on the Reduction and Limitation of Strategic Offensive Arms (START II), signed July 31, 1991, but never entered into force. See, e.g., Joint Statement by the Presidents of the United States of America and the Russian Federation on Principles of Strategic Stability, Moscow, June 4, 2000, Exh. 2, welcoming the ratification of START II by the Russian Federation and stating, *inter alia*, that “[t]hey agree on the essential contribution of the ABM Treaty to reductions in offensive forces, and reaffirm their commitment to that Treaty as the cornerstone of strategic stability.”

The Final Document of the 2000 Review Conference of the Parties to the Treaty on the Nonproliferation of Nuclear Weapons (Nuclear Nonproliferation Treaty or NPT), adopted without objection by all participating states, including the United States, calls for "preserving and strengthening the ABM Treaty as a cornerstone of strategic stability and as a basis of further reductions of strategic offensive weapons." NPT/CONF.2000/28, Vol. 1, Part I, p. 14. The ABM Treaty preamble, paragraph 5, states that the parties are “[m]indful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons.” In Article VI of the NPT, each of the states parties “undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament” Treaty on the Nonproliferation of Nuclear Weapons, signed July 1, 1968, entered into force March 5, 1970, 729 U.N.T.S. 161, 21 U.S.T.S. 483, T.I.A.S. 6839.

B. The President's Withdrawal from the ABM Treaty

President George W. Bush, in the context of a new foreign policy designed to release the United States from treaty obligations restricting its freedom of action, on December 13, 2001 sent identical diplomatic notes to Russia, Belarus, Kazakhstan and Ukraine, giving notice of the intended withdrawal of the United States from the Treaty pursuant to its Article XV, paragraph 2.³ Exh. 3; Material Fact 2. The ABM Treaty is "of unlimited duration" (Article XV, para. 1), but Article XV, paragraph 2 gives each party the right to withdraw from the Treaty on six months notice "if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests." The diplomatic notes provide in relevant part (Exh. 3):

The United States recognizes that the Treaty was entered into with the USSR, which ceased to exist in 1991. Since then, we have entered into a new strategic relationship with Russia that is cooperative rather than adversarial, and are building strong relationships with most states of the former USSR.

Since the Treaty entered into force in 1972, a number of state and non-state entities have acquired or are actively seeking to acquire weapons of mass destruction. It is clear, and has recently been demonstrated, that some of these entities are prepared to employ these weapons against the United States. Moreover, a number of states are developing ballistic missiles, including long-range ballistic missiles, as a means of delivering weapons of mass destruction. These events pose a direct threat to the territory and security of the United States and jeopardize its supreme interests. As a result, 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.

Pursuant to Article XV, paragraph 2, the United States has decided that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests. Therefore, in the exercise of the right to withdraw from the Treaty provided in Article XV, paragraph 2, the United States hereby gives notice of its withdrawal from the Treaty. In accordance with the terms of the Treaty, withdrawal will be effective six months from the date of this notice.

³ Following the breakup of the Soviet Union, Russia, Belarus, Kazakhstan and Ukraine, as successor states to the Soviet Union, became parties to the ABM Treaty and have been so recognized by the United States, as shown by the fact that the President's notice of withdrawal from the Treaty was addressed to all four states. Exh. 3.

Similar withdrawal provisions are contained in other important security treaties, among them the Nuclear Nonproliferation Treaty; the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, 480 U.N.T.S. 43, 14 U.S.T.S. 1313, T.I.A.S. 5433; the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1015 U.N.T.S. 163, 26 U.S.T.S. 583, T.I.A.S. 8062; and the Convention on the Prohibition of the Development, Production, and Stockpiling and Use of Chemical Weapons and on Their Destruction, 31 I.L.M. 800. The NPT withdrawal provision set forth in Article X, paragraph 1, is representative:

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

Prior to giving Russia the withdrawal notice on December 13, 2001, President Bush did not consult with the House of Representatives or the Senate concerning the withdrawal, nor did he provide either House with advance notice of the withdrawal prior to its announcement by Russia. Transcript [Excerpt] of Hearing of the Senate Foreign Relations Committee, Treaty on Strategic Offensive Reductions, July 9, 2002, Exh. 7; December 12, 2001, Regular Media Availability with Senate Majority Leader Thomas Daschle [Excerpts], Exh. 5; Declaration of Representative Dennis J. Kucinich; Material Fact 3. President Bush also did not seek approval of the withdrawal by both Houses of Congress or by the Senate, either before or after December 13, 2001. Id.; Material Fact 4.

C. Congressional Opposition to the President's Withdrawal from the ABM Treaty

At the time of the announcement of the President's notice of withdrawal, several Members of Congress strongly criticized the wisdom of terminating the ABM Treaty.

On December 12, 2001, Representative Lynn Woolsey, with 28 original co-sponsors, introduced House Resolution 313 (Exh. 4) calling on the United States to remain a party to the Treaty and stating, *inter alia*, that "the Anti-Ballistic Missile Treaty remains an important means of limiting the threat of nuclear war and the proliferation of nuclear weapons." Material Fact 5.

Senator Thomas Daschle, the Majority Leader, stated to the press, also on December 12, that the withdrawal is "going to complicate as well our relations with Russia, with China," and expressed his unhappiness that the President did not afford Congress advance notice of the withdrawal and that Russia knew about the administration's plan before Congress was informed. Exh. 5; Material Fact 6.

Senator Carl Levin, Chair of the Armed Services Committee, issued a statement on December 13 calling the President's decision "a serious mistake for our national security" and listing five reasons why withdrawal from the Treaty is neither wise nor necessary. Exh. 6; Material Fact 7.

Senator Biden, Chair of the Foreign Relations Committee, on December 12 said on the Senate floor that the decision is "an incredibly dangerous one" and that invoking the supreme interest clause in Art. XV of the Treaty is "a bit of a stretch, to say the least." Congressional Record, December 12, 2001, S12998, S12999; Material Fact 8. He ended with: "Today the doors to international cooperation and American leadership are wide open. But if we slam them shut too often, we will lose our chance to restructure the world and we will be condemned to repeat the experience of the last century, rather than move beyond it." *Id.* at S13000; Material Fact 8.

On June 6, 2002, on the floor of the House of Representatives, the lead plaintiff in this action, Representative Dennis Kucinich, offered a resolution concerning "the Privileges of the House," as follows:

Whereas the President's constitutional duty is to faithfully execute the laws of the United States, and

Whereas, under the Constitution, treaties have the status of "supreme law of the land," equally with other laws, and

Whereas, the President does not have the authority to repeal laws, and

Whereas, the President is not authorized to withdraw unilaterally from treaties in general, and the Anti-Ballistic Missile Treaty in particular, without the consent of Congress, and

Whereas, the President unilaterally withdrew the United States of America from the Anti-Ballistic Missile Treaty of 1972 without seeking or obtaining the consent of either House of Congress; therefore be it

Resolved, That the President should respect the Constitutional role of Congress and seek the approval of Congress for the withdrawal of the United States of America from the Anti-Ballistic Missile Treaty.

Congressional Record, June 6, 2002, H3232; Material Fact 9.

In his remarks explaining the resolution, Representative Kucinich said, *inter alia*:

The world's geopolitical trash bin is already littered with treaties and agreements unilaterally discarded by the United States under this administration. Congressional requests for testimony and information are routinely ignored. Our insistence on our oversight role is scoffed at. We must assert our role in this treaty withdrawal in order to prevent further erosion of constitutional authority.

Id. at H3233.

In the ensuing debate, Representative Henry Hyde, arguing against the resolution, said, *inter alia*:

I could understand someone in the Senate making such an argument about the prerogative of the Senate in such matters, but I am mystified how anyone could read such a prerogative into the Constitution for the House of Representatives[.]

and,

More to the point, the Supreme Court has told us that not even the Senate has such a prerogative[.]

and further,

It is a matter of fact that the treaty itself provided a means for revocation and the Senate ratified the treaty in all its verbiage.

Id. at H3232, H3233, H3234.

Other Members participated in the debate on both sides of the question. At its end, the Speaker *pro tempore* sustained a point of order that the resolution did not constitute a point of privilege. Id. at H3237. Representative Kucinich appealed the ruling, and a motion to table the appeal passed by a recorded vote of 254 yeas and 169 nays, 11 not voting. Id.; Material Fact 10. The resolution therefore was not considered on the merits, contrary to the wishes of 169 Members of the House.

On June 10, 2002, on the Senate floor, Senator Russell Feingold sought unanimous consent to offer Resolution 282, which provides:

Resolved, That—

- (1) it is the sense of the Senate that approval of the United States Senate is required to terminate any treaty between the United States and another nation;
- (2) the Senate shall determine the manner by which it gives its approval to such proposed termination; and
- (3) the Senate does not approve the withdrawal of the United States from the 1972 Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty), signed in Moscow on May 26, 1972 (Ex. L. 92-2).

Congressional Record, June 10, 2002, S5276, S5288; Material Fact 11.

An objection was made and the Senate did not consider the resolution. Id. at S5277; Material Fact 12. It has been referred to the Senate Committee on Foreign Relations. Id. at S5288.

The complaint initiating this action was filed on June 11, 2002.⁴

On June 13, 2002, the White House issued a Statement by the President on the ABM Treaty, which stated in part: “Six months ago, I announced that the United States was withdrawing from the 1972 Anti-Ballistic Missile (ABM) Treaty, and today that withdrawal formally takes effect.” Weekly Compilation of Presidential Documents, 2002, p.1011; Material Fact 13.

ARGUMENT

I. GOLDWATER V. CARTER DID NOT REACH THE MERITS OF THE CONSTITUTIONAL ISSUE.

Because Goldwater v. Carter, 481 F.Supp. 949 (D.D.C. 1979), rev’d, 617 F.2d 697, vacated and remanded with direction to dismiss complaint, 444 U.S. 996 (1979), the only Supreme Court case so far to deal with unilateral⁵ presidential treaty termination, let stand a President’s decision to have done so, many believe that *stare decisis* bars the present action. As the following discussion shows, nothing could be further from the truth.

A. Goldwater Background

The Mutual Defense Treaty of 1954 between the United States and the Republic of China (ROC or Taiwan), 6 U.S.T. 433, T.I.A.S. 3178, provided in Article X that the Treaty was to

⁴ Senator Feingold intended to join the lawsuit as a co-plaintiff once the Senate Ethics Committee approved his application to receive *pro bono* legal services, but decided not to do so after the Committee denied the application.

⁵ In international law, the term “unilateral treaty termination” refers to one party’s withdrawal from a bilateral or multilateral treaty. In the present context, for the sake of brevity, “unilateral” is used to denote the President’s withdrawal from a treaty without the consent of two thirds of the Senate or a majority of both Houses of Congress. It has been so used by others, including District Judge Gasch in Goldwater.

remain in force indefinitely, but that “[e]ither party may terminate it one year after notice has been given to the other party.”

In the context of his decision to recognize the Peoples’ Republic of China (PRC) as the sole government of China, President Carter notified the ROC on December 23, 1978 that the Mutual Defense Treaty would terminate on January 1, 1980. In the belief that this action was incident to his exclusive constitutional prerogative to recognize foreign governments,⁶ he did not seek nor did he receive the approval of Congress. Disagreeing with this view, eight senators, a former senator and sixteen members of the House of Representatives asked this Court to declare that the President could not legally terminate the Taiwan Treaty without the advice and consent of the Senate or the approval of both Houses of Congress.

B. The Goldwater District Court Opinion

In a Memorandum-Order dated June 6, 1979, Judge Gasch of this Court dismissed the Goldwater plaintiffs’ complaint without prejudice on the ground that, “under the circumstances then presented ... plaintiffs had not suffered the requisite injury in fact to support standing.” 481 F.Supp. at 950. At that time, three pertinent resolutions were pending in the Senate, and the Court was “concerned that a premature judicial declaration might circumvent legislative action directed at either approving or rejecting the President’s notice of termination.” Id. at 953.

Immediately following that decision, the Senate voted 59 to 35 to adopt Senator Harry F. Byrd's amendment to his own earlier introduced resolution. The amendment provided, “That it is the sense of the Senate that approval of the United States Senate is required to terminate any

⁶ The President’s power of recognition and derecognition of foreign governments arises from his power “to receive ambassadors and other public ministers,” in Art. II, Sec. 3 of the Constitution. Cf. Moore, International Law Digest, I, 243-244. Before the Supreme Court, the President noted that the D.C. Circuit opinion was explicitly limited to the circumstances of the case and argued that “[a]s the court of appeals correctly recognized, one important ingredient in the justification for the President’s Termination of the Mutual Defense Treaty is that it occurred in the context of a transfer of diplomatic recognition from one government of China to another.” Brief for the Respondents in Opposition to Petition for a Writ of Certiorari, Goldwater v. Carter, No. 79-856, Supreme Court, October Term, 1979, pp. 8, 10-11.

mutual defense treaty between the United States and another nation.” Id. at 954. Additional amendments were introduced but not voted on and the resolution itself was returned to the calendar without further action. Id.

Given these developments, plaintiffs returned to this Court with a motion to alter or amend the June 6, 1979 order. Judge Gasch granted the motion, holding that:

The action taken by the Senate has admittedly not been decisive. It does, however evidence at least some congressional determination to participate in the process whereby a mutual defense treaty is terminated, and clearly falls short of approving the President’s termination effort.

Id. at 954.

Defendants’ contention that the case presented a non-justiciable political question was rejected, principally on the ground that, given the Constitution’s silence on treaty termination, there clearly was no textual commitment of the issue to the executive branch. Rather, Judge Gasch held, the Court was “confronted with a dispute consisting of a clash of authority between the two political branches in a posture suitable for judicial resolution.” Id. at 957-58. Proceeding to the merits, Judge Gasch found that:

The great majority of the historical precedents involve some form of mutual action, whereby the President’s notice of termination receives the affirmative approval of the Senate or the entire Congress. Taken as a whole, the historical precedents support rather than detract from the position that the power to terminate treaties is a power shared by the political branches of this government.

Id. at 960.

In reply to defendants’ argument that the President’s unilateral termination authority derives from the executive power over foreign affairs, the Court pointed out that the President “is clearly not the sole maker of foreign policy.” Id. at 961. Furthermore, the Court said,

The President cannot faithfully execute [the] treaty by abrogating it any more than he can faithfully execute by failing to administer. He alone cannot effect the repeal of a law of the land which was formed by joint action of the executive and

legislative branches, whether that law be a statute or a treaty. ... The requirements imposed by the Supremacy Clause and the President's responsibility to faithfully execute the laws are further supported by the doctrine of separation of powers and its corollary concept of checks and balances, which lies at the heart of our constitutional system.

Id. at 963.

Noteworthy also is the Court's holding that:

When faced with an apparent gap in the Constitutional allocation of powers, the Court must refer to the fundamental design of the entire document and determine how its purposes would be best served in the gap area.

Id. at 965.

In conclusion, the Court declared "that the President's notice of termination must receive the approval of two-thirds of the United States Senate or a majority of both Houses of Congress for it to be effective under our Constitution to terminate the Mutual Defense Treaty of 1954." Id.

C. The Goldwater Circuit Court Opinion

Following defendants' appeal to the District of Columbia Circuit Court of Appeals, that court, *en banc*, reversed Judge Gasch's decision *per curiam*, with a powerful dissent by Judge MacKinnon. Goldwater v. Carter, 617 F.2d 697 (1979). In view of the Supreme Court's decision to vacate, the Circuit Court's opinion has no precedential value. Nevertheless, a brief review of the opinion may shed some light on the issue before this Court.

Only two judges, Wright and Tamm, would have dismissed the complaint for lack of standing, and not one would have done so on political question grounds. On the contrary, the Court's discussion of standing is instructive in that it states: "The crucial fact is that, on the record before us, there is no conceivable senatorial action that could likely prevent termination of the Treaty." Id. at 703.

The majority's decision on the merits suggests “they do protest too much.” No fewer than ten arguments are adduced to support unilateral presidential treaty termination. Judge MacKinnon, in his far more thorough and thoughtful dissent, magisterially demolishes each of them. A brief summary of this dialectic follows:

1. **The Court:** “[I]t has never been suggested that the services of Ambassadors appointed by the President, confirmed by the Senate ... may not be terminated by the President without the prior authorization of that body.” *Id.* at 703-04. The same reasoning should apply to treaties.

MacKinnon: “That this point is made in a serious vein is unbelievable and illustrates lack of depth of analysis,” *id.* at 738, since it overlooks the status of treaties as laws.

2. **The Court:** The fact that the Supremacy Clause equates treaties with laws does not provide any basis for concluding that a treaty must be unmade in the same manner as a statute. *Id.* at 704.

MacKinnon: “[S]ince the exercise of the power to terminate treaties, which have the status of law of the land, requires passage of a repealing law, it is Congress’ responsibility under the Necessary and Proper Clause to do so.” *Id.* at 718.

3. **The Court:** “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. It is not lightly to be extended in instances not set forth in the Constitution.” *Id.* at 704.

MacKinnon: Judge MacKinnon does not address this point directly, since he “would instead preserve the congressional function of treaty termination, recognizing that exercise of this power requires a majority vote of Congress and the approval of the President.” *Id.* at 739.

4. **The Court:** “The foreign affairs powers ... proceed directly from the sovereignty of the Union ... (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)). The President is the constitutional representative of the United States with respect to external affairs.” 617 F.2d at 705.

MacKinnon: “[W]hatever expansion the *Curtiss-Wright* decision occasioned in the President’s power in foreign affairs, that expansion has its limitations. The decision cannot be read to trample upon the history of treaty termination which is based on the original understanding that termination would be a power shared by the branches, nor can it undermine the fact that the Constitution provides that the ‘Constitution, and the laws ... and all Treaties ... shall be the supreme Law of the Land.’” Id. at 735.

5. **The Court:** Treaties are *sui generis* and the recognized powers of Congress to “supersede, for all practical purposes the effect of a treaty on domestic law,” do not imply that “the Senate (or Congress) must ... give its prior consent to discontinue a treaty which the President thinks it desirable to terminate.” Id. at 705.

MacKinnon: “...Congressional participation in termination has been the overwhelming historical practice. Practice may not make perfect a constitutional power. Yet a prevailing practice, especially when begun in the light provided by the dawn of the Constitution, emanates a precedential aura of constitutional significance.” Id. at 723.

6. **The Court:** “The creation of a constitutionally obligatory role in all cases for a two-thirds consent by the Senate would give to one-third plus one of the Senate the power to deny the President the authority necessary to conduct our foreign policy in a rational and effective manner.” Id. at 706.

MacKinnon: Termination should be accomplished with the consent of a majority of both Houses. Id. at 738, 739.

7. **The Court:** The President's role as "the sole organ of the federal government in the field of international relations" (again citing Curtiss-Wright) is not confined to his service as a channel of communication, "but embraces an active policy determination as to the conduct of the United States in regard to a treaty in response to numerous problems and circumstances as they arise." Id. at 707.

MacKinnon: "Neither the Curtiss-Wright decision nor the President's constitutional authority in foreign affairs should be construed to infringe upon Congress' exercise of its constitutional right to exercise 'all legislative powers ... granted' by the Constitution." Id. at 734.

8. **The Court:** "How the vital functions of the President in implementing treaties and in deciding on their viability in response to changing events can or should interact with Congress' legitimate concerns and powers in relating to foreign affairs is an area into which we should not and do not intrude.... All we decide today is that two-thirds Senate consent or majority consent in both Houses is not necessary to terminate this treaty in the circumstances before us now." Id. at 725.

MacKinnon: Judge MacKinnon's analysis makes it clear that he would not distinguish between different cases of treaty termination but would require the approval of a majority of both Houses in all.

9. **The Court:** "It is undisputed that the Constitution gave the President full constitutional authority to recognize the PRC and to derecognize the ROC. [This] remains an important ingredient in the case at bar." Id. at 707-08.

MacKinnon: “The President argues that the termination was necessary to his recognition of the People’s Republic of China. In making that argument, the President, in effect, asks the courts of this nation to choose between upholding his right to recognize foreign governments and Congress’ right to approve the termination of United States treaties.” Id. at 736.

10. **The Court:** “Finally, and of central significance, the treaty here at issue contains a termination clause.” Id. at 709.

MacKinnon: This is “an argument that is essentially based on a play on words and has no legal validity.... [This] deceptive misstatement ... which implicitly assumes the principal issue here to be decided, is repeated four times in the majority opinion.” Id. at 737. It is deceptive, says Judge MacKinnon, because the Treaty gives each party, not the President, the right to terminate, and “the sole issue in this case is who can act for the United States.” Id.

Significantly, the Court of Appeals, despite its repeated reliance on the now largely discredited Curtiss-Wright dictum, see Miller, Treaty Termination Under the United States Constitution: Reassessing the Legacy of Goldwater v. Carter, 27 N.Y.U. J. Int’l L. & Pol. (1995) 859, 877-880, stated that it did not wish “to be taken to minimize the role of the legislature in foreign affairs.” 617 F.2d at 709.

D. The Goldwater Supreme Court Opinions

The five opinions rendered when the Goldwater case arrived at the Supreme Court, 444 U.S. 996 (1979), reached a result without providing guidance to future contestants. The Court decided the case without deciding the issue it raised, sending a confused and largely misunderstood message to the public and the two other branches of government. The following summary illustrates the problem.

Mr. Justice Powell held the case not ripe for judicial consideration because the Senate had not taken a final vote on the Byrd Resolution, hence “...we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches.” Id. at 998. However, Justice Powell disagreed strongly with the plurality’s political question approach and declared, significantly, that “If the Congress, by appropriate formal action, had challenged the President’s authority to terminate the treaty with Taiwan, the resulting uncertainty could have serious consequences for our country. In that situation, it would be the duty of this Court to resolve the issue,” Id. at 1001 (leaving open the question of what would constitute appropriate formal action).

Mr. Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and Stevens, held the case to be non-justiciable as a political question, relying principally on Coleman v. Miller, 307 U.S. 433 (1939), but also on Curtiss-Wright, supra, distinguishing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The four justices therefore decided to vacate “the prior proceedings in the federal courts.” 444 U.S. at 1006.

Mr. Justice Blackmun, with whom Mr. Justice White joined, opined that “if the President does not have the power to terminate the treaty (a substantial issue that we should address only after briefing and oral argument), the notice of intention to terminate surely has no legal effect.” Id. Justices Blackmun and White therefore would have set the case for oral argument and given it “the plenary consideration it so obviously deserves.” Id.

Mr. Justice Brennan was the lone voice deciding on the merits. He would have affirmed the Court of Appeals judgment, but only “insofar as it rests upon the President’s well-established authority to recognize, and withdraw recognition from, foreign governments.” Id. He echoed Justice Powell in stating that the plurality “profoundly misapprehends the political question

principle as it applies to foreign relations. ... the doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of the political decision-making power.” *Id.* at 1006-1007.

Mr. Justice Marshall concurred in the result without filing a separate opinion. No justice expressed an opinion on standing, but Justices Blackmun and White considered it “indefensible, without further study, to pass on the issues of justiciability or on the issues of standing or ripeness.” *Id.* at 1006.

II. THE LESSONS OF GOLDWATER IN LIGHT OF SUBSEQUENT DEVELOPMENTS

Given the lack of a majority for a doctrinal basis for the Supreme Court’s decision to vacate the District Court and Court of Appeals judgments and the fact that only one justice rendered an opinion on the merits, on a ground clearly inapplicable to the present case, there are, strictly speaking, no lessons to be learned from Goldwater. Nevertheless, some light, however penumbral, has surely been shed by the opinions of nineteen federal judges in a case raising the same fundamental question as the motions before this Court.

A. Political Question

Of the four justices who would have dismissed Goldwater on political question grounds, only two, Rehnquist and Stevens, sit on the current Supreme Court. None of the judges in the proceedings below would have dismissed the case on political question grounds. Plaintiffs agree with Justice Brennan’s view that the Rehnquist plurality opinion “profoundly misapprehends the political question principle as it applies to matters of foreign relations.” 444 U.S. at 1006. They also submit that Justice Powell’s thorough analysis in light of traditional criteria set out in Baker v. Carr, 369 U.S. 186 (1962) leads to the correct conclusion - the courts “have the responsibility

to decide whether both the Executive and Legislative Branches have constitutional roles to play in termination of a treaty.” 444 U.S. at 1001.

In any case, the political question doctrine is now “largely out of favor with the Supreme Court, even with respect to foreign affairs controversies.” Bederman, Treaty Rights as Political Questions, 70 U.Colo.L.Rev. 1439, 1441 (1999). Another commentator has noted, very recently, that “the unmistakable trend is toward a view that all constitutional questions are matters for independent judicial interpretation” and that the Supreme Court has “become increasingly immodest when it comes to deciding how constitutional interpretive power should be allocated.” Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237, 302 (2002).

This view largely derives from cases in which the Supreme Court asserts its supremacy over congressional enactments, as in United States v. Lopez, 514 U.S. 549 (1995), striking down the Gun-Free School Zones Act of 1990, and United States v. Morrison, 529 U.S. 598 (2000), striking down the Violence Against Women Act. But there is no reason to suppose that the Court now considers itself supreme in constitutional interpretation only over the legislative branch and not the executive. Indeed, Barkow concludes that “the current Court seems to believe that it is superior to *the other branches* on virtually all constitutional questions.” 102 Colum. L. Rev. at 336 (emphasis added).

An example of the Supreme Court’s willingness to find justiciability for questions involving foreign relations is Japan Whaling Association v. American Cetacean Society, 478 U.S. 221 (1986). There the Court, citing the well-known Baker v. Carr dictum that it is “error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,” Id. at 229-230, held that the challenge to the Secretary of Commerce’s “decision

not to certify Japan for harvesting whales in excess of IWC [International Whaling Commission] quotas presents a purely legal question of statutory interpretation.” Id. at 230. In the same way the present action, also involving an international agreement, presents a purely legal question of constitutional interpretation.

At any rate, the involvement of the Supreme Court in the 2000 electoral disputes in Florida, Bush v. Gore, 531 U.S. 98 (2000), which the Court might well have evaded on political question grounds in eras past, would seem to signal a return to an absolutist interpretation of the first Justice Marshall’s famous dictum, “It is, emphatically, the province and duty of the judicial department, to say what the law is.” Marbury v. Madison, 5 U.S. (Cranch) 137, 177 (1803).

B. Standing

With the exception of Wright and Tamm, JJ., in the Court of Appeals opinion, no judge or justice ruling in Goldwater saw a standing problem in that case. As stated above, the Court of Appeals majority went out of its way to emphasize that, in the absence of judicial intervention, the Senate – and by implication, the House – have no conceivable way to prevent the President from terminating a treaty. They could at most pass a joint resolution, or a resolution in either House, urging the President to maintain the treaty in force, but so long as the President adhered to his unilateral termination position, such resolutions would have no binding effect. The President would be free to disregard them, based on his view of the Constitution and considering himself the better judge of foreign affairs than the legislators.

In at least three respects, the position in this case is fundamentally different from that in Raines v. Byrd, 521 U.S. 811 (1997), the Supreme Court's most recent pronouncement on congressional standing. There, six Members of Congress sought a declaration of unconstitutionality of the Line Item Veto Act, alleging impairment of their Article I voting

power by ceding authority to the President to cancel or defer expenditures on certain items Congress previously authorized.

(1) The Line Item Veto Act had been passed by votes of 69 to 31 in the Senate and 232 to 177 in the House. Id. at 814. In the instant case there is no indication of how either House did vote or would have voted on termination of the ABM Treaty.

(2) The Line Item Veto Act itself contains provisions for Congress to countermand a President's proposed cancellation. The President must notify Congress of a cancellation within five days of Congressional enactment of the law to which it applies. Both Houses may then follow expedited procedures to draft "disapproval bills" which, if enacted into law, render the President's cancellation "null and void." Id. at 815. Thus, this procedure assures joint action by the legislative and executive branches. Here, the very existence of such a procedure is at stake. At present, there is none of assured effectiveness. A judicial determination that the President has an obligation to notify Congress of an intent to withdraw from a treaty, similar to the notification provision in the Line Veto Act, would cure the problem.

(3) In Raines, the Supreme Court attached "some importance" to the fact that neither House authorized the six plaintiffs to bring the suit and indeed both Houses opposed it. Id. at 829. Here neither House has expressed its views concerning this suit.

By way of dictum, the Court stated:

We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if any of these circumstances were different we need not now decide.

Id. at 829.

Here, an adequate remedy is nonexistent absent judicial intervention, and it is difficult, if not impossible, to think of a non-congressional party who would have standing as a result of suffering a judicially cognizable injury.

In Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000), this circuit applied a Raines analysis to deny standing to congressional plaintiffs seeking a declaration that President Clinton had violated the War Powers Resolution and the War Powers Clause of the Constitution by ordering U.S. armed forces to engage in acts of war against Yugoslavia. There again, the facts were fundamentally different from those in the case at bar.

Silberman, J., writing for a unanimous court – although one producing four separate opinions from three judges – affirmed the decision below, 52 F.Supp.2d 34 (D.D.C. 1999), denying standing to the congressional plaintiffs. Judge Silberman quoted with approval the following statement from a post-Raines decision, Chenoweth v. Clinton, 181 F.3d 112, 116 (D.C. Cir. 1999):

It is uncontested that the Congress could terminate the [contested program] were a sufficient number in each House so inclined. Because the parties' dispute is therefore fully susceptible to political resolution, we would [under circuit precedent] dismiss the complaint to avoid "meddling in the internal affairs of the legislative branch." Applying Raines, we would reach the same result.

Campbell, 203 F.3d at 21. Judge Silberman similarly concluded:

Congress has a broad range of legislative authority it can use to stop a President's war making ... and therefore under Raines congressmen may not challenge the President's war-making in court.

Id. at 23.

Here, and it cannot be repeated too often, the situation is completely different. The President takes the position that he has no obligation whatsoever to consult with, much less seek the approval of, Congress to terminate the ABM Treaty. If the Congress collectively stood on its

head to change the President's mind, it might, for purely political reasons, achieve that purpose, but then again it might not.

Friedman, J. concluded the District Court opinion in Campbell as follows:
This is not to say that members of the legislative branch never have standing to resort to the judicial branch when the executive branch flouts the law. But the courts will apply Raines and Coleman rigorously and will find standing only in the clearest cases of vote nullification and genuine impasse between the political branches.

52 F.Supp.2d at 34.

Here, the executive has flouted the law, a genuine impasse exists and vote nullification exists *in spe*, in the sense that even if a majority of both Houses voted against the treaty termination, the President could disregard the vote, in the absence of a judicial holding to the contrary.

The fact that, as the Senate Majority Leader pointed out in his remarks on December 12, 2001, Exh. 5, the President did not consult or even notify Congress before giving the notice of withdrawal also has a bearing on standing. As a matter of self-evident political reality, the legislative branch is far less likely to assert its constitutional role *vis-à-vis* the executive when faced with a *fait accompli* than when given an opportunity for *a priori* dialogue. This is particularly true in foreign affairs, where *a posteriori* confrontation could lead precisely to the kind of "embarrassment from multifarious pronouncements by different departments on the same question" contemplated in Baker v. Carr, 369 U.S. at 217. It is even more true when members of Congress misapprehend their rights. Representative Hyde, for instance, one of the House of Representative's most experienced and scholarly members, demonstrated such misapprehension in his argument against the Kucinich resolution, in three distinct ways: (1) The House, he said, had no role to play in treaty termination, although the history of treaty termination is replete with instances of the exercise of the House's role; (2) the ABM Treaty by its own words, he said, permits the President to terminate it, although the "party" permitted to terminate the Treaty is the

United States, not merely the President, and (3) most significant of all, Goldwater v. Carter, he said, disposed of the question raised by the Kucinich resolution, although the case did nothing of the kind. Congressional Record, June 6, 2002, H3232-H3235.⁷

It may be argued that Congress could, in theory, use the power of the purse to prevent the executive from doing all the things it could not do while the Treaty was in force, including erecting missile defense installations and placing weapons in space. But the U.S. Congress has no power over the purse of foreign countries. It cannot prevent Russia or the other successor states to the Soviet Union from doing the things which the Treaty forbids them to do, with the consequences which many fear. Further, there is more to a treaty than the prohibitions it contains. A treaty relationship is a long-term, legally binding framework that promotes predictability, transparency, and compliance, and that builds political confidence going beyond the terms of the treaty. Congress cannot alone create such a relationship. In these respects, treaty termination, whether of this or any other treaty, does not fit into the mold of Raines or Campbell.

Finally, interpreting Raines as shutting the courtroom door to the assertion of all “generalized grievances” is error. In a thoughtful analytical article, David J. Weiner argues that two post-Raines Supreme Court decisions belie this interpretation. See Weiner, The New Law of Legislative Standing, 54 Stan L. Rev. 205 (2001). In Federal Election Commission v. Akins, 524 U.S. 11 (1998), the court accorded standing to a group of voters challenging the FEC’s decision to permit a certain political organization to keep funding information private, over the FEC’s objection that this challenge was addressed to a generalized grievance. Justice Breyer, writing for the majority, held that the plaintiffs’ interest qualified as an “injury in fact,” even though it was shared by all voters. Id. at 24. In Vermont Agency of Natural Resources v. United

⁷ Senator Daschle also seemed to misapprehend the unsettled state of the law concerning presidential authority to unilaterally terminate a treaty. Exh. 5, p. 1.

States ex rel. Stevens, 529 U.S. 765 (2000), Justice Scalia upheld a relator's right to bring a *qui tam* suit following the government's refusal to intervene, though denying standing would have adversely affected all taxpayers.

In sum, the constitutional question raised by this suit cries out for judicial determination. The personal stake of these plaintiffs could not be clearer. As a result of defendants' actions, they have been unable to exercise their fundamental right to participate in the termination of an extremely important treaty and they have no remedy without the intervention of this Court. Their injury is particularized, concrete, and otherwise judicially cognizable. See Raines, 521 U.S. at 818-819.

C. Ripeness

Justice Powell wrote in his Goldwater opinion, "The judicial branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse." 444 U.S. 996 at 997. Here a constitutional impasse was reached in the House of Representatives on June 7, 2002 when consideration of Representative Kucinich's resolution was defeated, and in the Senate on June 10, 2002 when Senator Feingold failed to receive unanimous consent to Senate consideration of his resolution. See Statement of Facts, supra at 7-9. Neither event signified anything about either House's position on termination of the ABM Treaty, but each House was deprived thereby of its ability to consider and state its position. However, "let's not discuss it" is not the same as "I agree with you", and an injured party's failure to question an unconstitutional act or policy does not render the act or policy constitutional. Further, it is imprudent to rely on Justice Powell's opinion, or to interpret Raines, as requiring a full-blown constitutional crisis, with Congress as an institution confronting the President, before a court may fulfill its role of resolving important constitutional

issues. See generally Weiner, supra, 54 Stan L. Rev. at 228-231. Indeed, a court can best contribute to the maintenance of constitutional balance by clarifying matters in dispute before that day comes.

Most fundamentally, because of the textual lacuna concerning treaty termination, which the Court of Appeals recognized in Goldwater, 617 F.2d at 703, the constitutional impasse between the legislative and executive branches is an ever present and permanent one until resolved by the third branch.

D. Historical Precedent

A page of history, according to one of Justice Holmes' many famous sayings, is worth a volume of logic. See New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). The Goldwater case produced enough pages on the history of treaty termination to overwhelm a library of logic. The best summary of this research is found in Judge MacKinnon's dissent in Goldwater, 617 F.2d at 723-734.⁸ His scathing repartee to President Carter's alleged 13 instances of unilateral presidential termination is worth noting:

In almost 200 years of American history these are the only instances that appellant has been able to dredge up in an effort to support his claim to absolute power. Analysis of such instances, however, does not support appellant's contentions. It is almost farcical for appellant to contend that the President, acting alone, has absolute power to terminate a major United States defense treaty, and by the same token hereafter any defense treaty, because a few earlier Presidents withdrew financial support of a treaty bureau because of non-filing of trademarks by El Salvador, Honduras, Paraguay, et al., and terminated several violated treaties, or terminated treaties relating to a light House museum in Morocco, nomenclature in economic reports, smuggling with a country with whom we had no commercial treaty, or with respect to which notices of termination had been given and then withdrawn. On examination it appears that among the 13 instances upon which the President relies, there were only two minor treaties in which the President could be said to have acted alone since 1788. Reliance upon such miniscule precedent forcibly illustrates the great weakness in the President's claim to absolute power in the present circumstances involving a Defense Treaty.

⁸ For a more extensive historical account, see Emerson, The Legislative Role in Treaty Termination, 5 J. Legis. 46 (1978).

Also, practically all of the 13 instances upon which the President relies were of such minor impact, or so non-controversial and widely approved that no person would have suspected that such instances would later be claimed as precedents to support an absolute presidential unilateral power to terminate major defense treaties. An evolution of such great power from so little was never broached or envisioned. Thus does even minor usurpation gnaw away at constitutional rights.

617 F.2d at 733-34, *footnotes omitted*.

In a similar vein, Judge Gasch, in the *Goldwater* District Court opinion, had this to say:

[T]he precedents involving unilateral executive action are of only marginal utility. None of these examples involves a mutual defense treaty, nor any treaty whose national and international significance approaches that of the 1954 Mutual Defense Treaty [with Taiwan]. Virtually all of them, moreover, can be readily distinguished on the basis of some triggering factor not present here.

* * *

The great majority of the historical precedents involve some form of mutual action, whereby the President's notice of termination receives the affirmative approval of the Senate or the entire Congress. Taken as a whole, the historical precedents support rather than detract from the position that the power to terminate treaties is a power shared by the political branches of the government.

481 F.Supp. at 959-960, *footnotes omitted*.⁹

Jonathan York Thomas, the author of the one study devoted exclusively to an analysis of the instances of alleged unilateral presidential termination relied on by President Carter, concluded that none supported the President's position because:

In each instance, there had either been: (1) expressed or implied authority given to the President by one or both Houses of Congress – no instance involved the President acting *against* the majority will of Congress; (2) a material breach or requested termination of the given treaty or convention by one or more parties other than the United States; or (3) a fundamental change in circumstances such that the treaty was effectively void before the presidential notice was given.

Thomas, A Refutation of the State Department Analysis of Alleged Instances of Independent Presidential Treaty Termination, 6 Yale Studies in Public Order 27 (1979).

⁹ Judges and justices other than Gasch in the first instance and MacKinnon in the second instance of *Goldwater* said little or nothing about the historical record.

The one clear case of post-Goldwater unilateral presidential termination falls into Thomas' first category of authorization. On May 1, 1985, President Reagan, under the authority of the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq., declared a national emergency, prohibited trade with Nicaragua, and notified Nicaragua of termination of the Treaty of Friendship, Commerce and Navigation with Nicaragua. See Beacon Products Corp. v. Reagan, 633 F.Supp. 1191, 1192-1193 (D. Mass. 1986). As the Beacon Products court explained, *id.* at 1194, the Act grants the President certain powers to deal with “any unusual and extraordinary threat which has its source in whole or substantial part outside the United States to the national security, foreign policy, or economy of the United States.” 50 U.S. § 1701(a). Among these powers is that to prevent the “importation or exportation of ... any property in which any foreign country or a national thereof has any interest; by any person or with respect to any property, subject to the jurisdiction of the United States.” 50 U.S.C. § 1702(a)(1).

In sum, an examination of practice over the last two centuries, beginning with the first instance of treaty termination in 1798,¹⁰ leads to the inescapable conclusion that the vast majority of terminations were accomplished through the joint efforts of the legislative and executive branches. Unilateral presidential action has never terminated a treaty of the importance of the ABM Treaty.

III. PARADOX: THE INVERTED HIERARCHY OF INTERNATIONAL AGREEMENTS

Treaties are the only kind of international agreement the Constitution mentions. Yet since 1792, when Congress authorized the Postmaster General to enter into postal conventions with foreign countries, see Edward S. Corwin, Our Constitution and What It Means Today (1973) 136, the number of executive agreements entered into by the United States has far outnumbered treaties. The State Department has as many as six different categories for “International Agreements Other Than Treaties.” See *Id.* For present purposes we may confine ourselves to two principal ones, those made by the President alone and those made by the

¹⁰ By the Act of July 7, 1798, signed by President John Adams, Congress declared that all treaties “heretofore concluded with France ... shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.” 1 Stat. 578.

President with the approval of both Houses of Congress, usually referred to as congressional-executive agreements.

In the hierarchy of international agreements, the sole presidential agreement ranks at the bottom, dealing generally with relatively minor matters. Only these agreements have traditionally been subject to unilateral termination by presidents. The President proposes, however, to extend this unilateral authority to our most solemn agreements: treaties made with the advice and consent of the Senate. Acceptance of this claim would lead to the promotion of a third legal form traditionally intermediate between treaties and executive agreements. These are congressional-executive agreements of the type represented by NAFTA (North American Free Trade Agreement, December 17, 1992, 32 I.L.M. 296, 605; NAFTA Implementation Act, 19 U.S.C. §§ 3391 *et seq.*) and WTO (Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 UNTS 3; 19 U.S.C. 3512 *et seq.*). See generally Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 801 (February 1995). Such agreements are negotiated by the President and formally approved by both Houses of Congress, either as statutes or as joint resolutions; sometimes they are also implemented by statute, as in the case of NAFTA. Since all these congressional acts have the force of law under Article I, congressional approval is required for their termination.

Here, then, is the paradox: If unilateral presidential treaty termination becomes the norm, congressional-executive agreements will henceforth be treated as the most solemn form of agreement, since it will be the only form that cannot be terminated at the sole pleasure of the sitting President. This inversion of traditional understandings makes plain the extent to which the President's ABM Treaty decision unconstitutionally destroys the time-tested language and practice of American diplomacy.

IV. MOOTNESS

Ignoring the pendency of this action, the President on June 13, 2002 sounded the death knell of the ABM Treaty. There can be little doubt, however, that a presidential declaration cannot render an unconstitutional act constitutional. The question presented by this action therefore survives the alleged termination of the Treaty.

In City of Erie v. Pap's A.M., 529 U.S. 277 (2000), appellees sought to dismiss as moot an appeal to the Supreme Court from a holding of unconstitutionality of a municipal ordinance banning public nudity. Their basis was that the theater at which the nude dancing performances in question had occurred had been closed. Justice O'Connor, writing for the court, concluded that the case was not moot:

“ ‘[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.’ ” County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). The underlying concern is that, when the challenged conduct ceases such that “ ‘there is no reasonable expectation that the wrong will be repeated,’ ” United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953), then it becomes impossible for the court to grant “ ‘any effectual relief whatever’ to [the] prevailing party,” Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)).

* * *

The city has an ongoing injury because it is barred from enforcing the public nudity provisions of its ordinance. If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot. See 506 U.S. at 13.

Id. at 287-288.

Here, the issue is “live” and will remain so until it is put to rest by judicial determination. The plaintiffs have a cognizable interest in the outcome. See Section II(B), supra. Given the position taken by two Presidents within the past quarter century, there is every expectation that the wrong will be repeated; therefore, the injury is ongoing. Furthermore, “effective relief” is

available in the form of a holding by this Court that the termination of every treaty requires some form of congressional consent and an order that the President is obliged to seek such consent *post hoc* with respect to the ABM Treaty.

V. WHY THE ABM TREATY, OR ANY OTHER TREATY, CANNOT BE TERMINATED WITHOUT CONGRESSIONAL CONSULTATION AND CONSENT

A. The Separation of Powers Doctrine

Any argument that the President's power to terminate treaties unilaterally derives from the Constitution's silence on the subject would be disingenuous in the extreme. The history of American jurisprudence is replete, as it should be, with instances of courts, from the lowest to the highest, going beyond the letter of the Constitution to its spirit, its essence, its core values.

As recently as May 28 of this year, Justice Thomas, writing for the majority in Federal Maritime Commission v. South Carolina State Ports Authority, 122 S.Ct. 1864 (2002), rested his ground-breaking decision on state sovereign immunity from federal agency adjudication of a private party's complaint, not on what the Constitution said, but what "the Framers would have thought" about the issue. Id. at 1873. Justice Breyer, dissenting, said "[t]he court's principle lacks any firm anchor in the Constitution's text." Id. at 1883. To which Justice Thomas replied, at the conclusion of his opinion, "the 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" Id. at 1879.

The majority opinion in Federal Maritime Commission speaks of "a state's dignity" as requiring the result the court reached:

Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC.

Id. at 1874. Plaintiffs submit that the constitutionally mandated balance of power between the legislative and executive branches, as well as the dignity of treaties and the dignity of Congress, which the President has cavalierly bypassed in terminating the ABM Treaty, require the relief requested by plaintiffs in the present case.

B. The Constitutional Triad Affecting Treaty Termination

By virtue of the Constitution's supremacy clause, Article VI, Section 2, treaties, along with the Constitution itself and "the laws of the United States" are "the supreme law of the land." They are therefore to be equated, in every respect, to laws Congress enacts. In the words of Chief Justice Marshall:

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.

Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314-15 (1829).

Article II, Section 3 of the Constitution charges the President to "take care that the laws be faithfully executed." The President cannot faithfully execute a treaty by terminating it, any more than he can faithfully execute a law by repealing it. Should the President decide that terminating a treaty would be in the interest of the United States, he has only to so advise the Congress which, if it agrees with him, will oblige him by taking appropriate action under the necessary and proper clause of the Constitution, Article I, Section 8, Clause 18.

Congress may also take the initiative in legislating the end of a treaty, as it did in 1798, see n.10 supra, or in passing legislation which makes a treaty wholly or partly inoperative, as in Van Der Weyde v. Ocean Transport Co., 297 U.S. 114 (1935). The President is bound to respect such legislation, even if Congress passes it over his veto.

Thus, combination of the three above-mentioned constitutional provisions makes an

airtight case for mandating joint congressional-presidential action in treaty termination.¹¹ Indeed, the last-in-time rule¹² arguably invests Congress with a greater treaty terminating power than the President possesses. The President cannot unmake a treaty without the consent of Congress, while Congress can terminate or supersede a treaty against the President's wishes if it musters sufficient votes to override a veto.

C. The Intent of the Framers

While the views of the framers and their contemporaries are not necessarily controlling at a remove of more than two centuries, they are certainly entitled to a great measure of respect. See Transp. Co. v. Wheeling, 99 U.S. 273, 280 (1878). An examination of early pronouncements on treaty termination establishes that the alternative approach to congressional participation in treaty termination – consent by either two-thirds of the Senate or a majority of both Houses – dates back to the fledgling years of the Republic.

Thomas Jefferson was evidently a partisan of the approach based on the supremacy clause. “Treaties being declared,” he said, “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 infringed and 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. No. 94-1, 94th Cong., 1st session, p. 666 (1975).

James Madison, on the other hand, seems to have favored the “symmetrical” approach

¹¹ Except for treaties which become inoperative by force of circumstance, as when the other party to the treaty ceases to exist.

¹² “A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.” Boudinot v. U.S., 11 Wall (78 U.S.) 616, 620-621 (1870).

based on the advice and consent clause: “That the contracting parties can annul the Treaty, cannot I presume, be questioned; the same authority precisely being exercised in annulling as in making a treaty.” Letter from James Madison to Edmund Pendleton, Jan. 12, 1791, The Papers of James Madison, v. 13, University of Virginia Press 9. The use of the adverb “precisely” is significant.

D. Judicial Precedent

While Goldwater was the first case addressing unilateral presidential treaty termination, a number of relevant judicial pronouncements from earlier cases, mostly by way of dicta, are relevant.

In Ware v. Hylton, 3 U.S. 199, 160-161 (1796), Justice Iredell wrote for the Supreme Court:

Our judgment must be grounded on the solemn declaration of Congress alone (to whom, I conceive, the authority is intrusted), given for the very purpose of vacating the treaty ... If Congress, therefore (who, I conceive, alone have such authority under our government), shall make such a declaration, I shall deem it my duty to regard the treaty as void, and then forbear any share in executing it as a judge.

The repeated use of “alone” is significant.

In a similar vein, Judge Ray, in Teti v. Consolidated Coal Co., opined concerning termination of the Treaty of Commerce and Navigation with Italy, “This treaty is the supreme law of the land, which Congress alone may abrogate, and the courts of the United States must enforce and respect it.” 217 F. 443, 450 (N.D.N.Y. 1914).

In The Amiable Isabella, Justice Story appeared to endorse the optional approach – either the Senate or both Houses - to congressional participation in treaty termination: “The obligation of the 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.” 19 U.S. 1, 34 (1821).

E. Historical Precedent

As shown in Section II(D), supra, the overwhelming mode of treaty termination since the first in 1798 has been conjoint action by the legislative and executive branches. In Griswold v. State of Connecticut, 381 U.S. 479, 501(1965), Justice Harlan, concurring, reminds us that

judicial self-restraint ... will be achieved ... only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedom.

Here, the teachings of history point to the same conclusion as do our basic values and the doctrines of federalism and separation of powers, *i.e.* that great affairs of state are too important to be left to the judgment of one individual, even the President of the United States. What Justice Harlan said, in reply to his dissenting brothers urging self-restraint, is equally true in this case of the various factors by which judges should determine the law, so that they may tell the country what the law is. It is no accident that the first of these is “respect for the teachings of history.”

F. The Downgrading of Treaties

See Section III, supra.

CONCLUSION

In his Mideast speech of June 24, 2002, President Bush revealed his vision of democracy:

Today the elected Palestinian legislature has no authority and power is concentrated in the hands of an unaccountable few. A Palestinian state can serve its citizens with a new constitution, which separates the powers of government.

Weekly Compilation of Presidential Documents, Week Ending Friday, June 28, 2002, pp. 1088-1091.

This case is based on an old constitution, our own. But it is also about the accountability of power and the need for a government of separate, albeit coordinate, powers. This action presents a purely constitutional question of the greatest importance in a world in which the national and the international are increasingly intertwined. There are no facts to be ascertained and the matter is ripe for adjudication.

Plaintiffs do not necessarily disagree with the view that courts should abstain from deciding, for prudential or constitutional reasons, questions lending themselves to resolution by other means. But where no such means are available, judicial abstention can lead only to a serious distortion of our constitutional framework, whether abstention be grounded in doctrines of political question, ripeness, standing, mootness, prudence or anything else.

As this brief establishes, the case for a mandatory congressional role in termination of any treaty is deeply rooted in the structure of the Constitution and the history of joint executive-legislative action in terminating treaties. *A fortiori*, especially given congressional powers under the Constitution, Article I, Section 8, "To declare war, ..., To raise and support Armies, ... To provide and maintain a Navy, ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers," the President must obtain Congressional approval for termination of treaties – like the ABM Treaty – affecting U.S. security, particularly when termination, as for the ABM Treaty, is based on a judgment concerning the "supreme interests" of the United States.

For the foregoing reasons, plaintiffs respectfully request the Court to enter an order:

a) Declaring that the President's withdrawal from the ABM Treaty is without force and

effect until such time as the President has requested and received the assent of a majority of both Houses of Congress or two-thirds of the Senate

(b) Enjoining the Secretary of State, the Secretary of Defense and their subordinate officers 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; and

(c) Awarding plaintiffs their costs and reasonable attorneys' fees.

Respectfully submitted,

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

By _____
James R. Klimaski
DC Bar No. 243543

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

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

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

JULES LOBEL

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

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

MICHAEL VEILUVA
Western States Legal Foundation
1504 Franklin St., Suite 202
Oakland, CA 94612
510 839 5877

Counsel for Plaintiffs