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' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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INTRODUCTION

The heart of the issue before this Court is framed by the footnote which concludes Defendants' Opposition (D.OPP.): "Even if Congress had *not* passed the NMDA, defendants would still contend that the President had the authority to withdraw from the Treaty without first obtaining Congress' concurrence." D.OPP. 27, fn. 15. By stating that congressional action opposing treaty termination would be nugatory, Defendants undercut their position on standing and reaffirm their position on the "plenary power" of the President in foreign affairs. Both of these points have been briefed in Plaintiffs' Memorandum in Support of their Motion for Summary Judgment, 23-24, and in their Opposition to Defendants' Motion to Dismiss, 3-5, 11-16. This Reply will therefore address principally a number of points not previously raised by Defendants.

ARGUMENT

A. Standing

It is nothing short of preposterous to claim that there are only minor differences between the facts of this case and those of Raines v. Byrd, 521 U.S. 811 (1997). D.OPP. 2, 5. In Raines, as in the post-Raines cases cited by Defendants, standing was denied to congressional plaintiffs because the institutional interest of Congress could have been safeguarded by legislative action. None of these cases involved the termination of a treaty and its consequences for the supreme interest of the nation. Plaintiffs do not deny that Congress could, in principle, use the power of the purse to inhibit the construction of a national missile defense. But Congress cannot legislate what other countries may or may not do as a result of the termination of the ABM Treaty.

What if Russia's development and deployment of systems capable of overcoming missile defenses destabilizes the U.S.-Russian nuclear relationship? What if, freed from the restraints of the ABM Treaty, Russia, the country that produced Sputnik, develops an effective missile shield before the United States, placing the U.S. at a considerable strategic disadvantage? Neither Raines, nor Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000), nor Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999) has anything to say about such scenarios. Defendants admit that "the issue is not whether Congress has the power to 'change the President's mind'; rather, it is whether Congress has a 'legislative remedy' for what it perceives as Presidential action in excess of his authority." D.OPP. 7. Precisely. Absent a "legislative remedy" there is all the difference in the world between this case and Raines and its progeny.

B. Ripeness

Ripeness merges with standing in this sense: If Defendants are correct in asserting that Congress can have no effective voice in treaty termination, why should Congress bother to speak at all? That is why Plaintiffs have said, in their Memorandum In Support of Summary Judgment at 27, that the question will remain ripe *ipso facto* as long as the courts furnish no guidance with respect to it. For the reasons expounded in earlier briefs – the binding force of the Supremacy and Take Care Clauses and the symmetry inherent in the Advice and Consent Clause – the President is under an obligation to submit the proposed termination of a treaty to the consideration of Congress.[1] The scenarios described above, which do indeed affect the supreme interests of the nation, merit the fullest possible discussion by the legislative branch.

[1] Contrary to Defendants' implication, D.OPP. 21, Plaintiffs do not claim that the Necessary and Proper Clause is an "independent grant of authority." It does, however, support congressional power to participate in the termination of the "supreme law of the land," be it statutes or treaties.

Such discussion must be triggered by presidential initiative lest dangerous decisions be made by the President without the benefit of such discussion. This is particularly true in a time such as the post-September 11 period, when Congress may be reluctant to question the President on matters of national security.

C. The Framers' Intent

Defendants maintain that "the clearest statement of the Framers' intent" that the President may terminate treaties unilaterally is found in the language of the Constitution. D.OPP. 3. Plaintiffs have looked in vain for such a statement, or any statement, concerning the point at issue. Defendants' theory that silence always favors the President runs counter to the many decisions in which judges have been called upon to answer questions of checks and balances in accordance with the spirit and grand design of the Constitution,[2] in the absence of specific textual guidance. See, e.g., Justice Thomas' majority opinion in Maritime Commission v. South Carolina State Ports Authority, 122 S.Ct. 1864, 1873 (2002), based on what "the Framers would have thought," cited in Memorandum In Support of Summary Judgment at 32.

Defendants seek to escape the import of the Supremacy Clause by arguing that treaties are supreme while they last, but can be abrogated by a President's stroke of the pen. Apart from the fact that this rather severely devalues the meaning of "supreme", it should be noted that the Constitution is silent on the procedure for repealing laws. Should we infer from this that the President, whose signature is required for a law to take effect, has unilateral power to repeal laws? As to the framers' expressed views, they form a more coherent picture in favor of legislative participation in termination than Defendants suggest, D.OPP. 23-24, as

[2] Plaintiffs are not alone in invoking the design of the Constitution. Defendants do the same at D.OPP. 3, 4.

demonstrated in Plaintiffs' Opposition to Defendants' Motion to Dismiss at 13-16. Jefferson's statement that the "transaction of business with foreign nations is executive altogether," quoted at D.OPP. 24, is consistent with the well-established view that the President is the voice and instrument of the United States in foreign relations, but not the sole maker of foreign policy. See Plaintiffs' Opposition at 12; E. Corwin, The President: Office and Powers (1957) 178 ("Clearly, what Marshall had foremost in mind was simply the President's role as instrument of communication with other governments"), cited in Michael Glennon, Constitutional Diplomacy 24 (1990).

D. Judicial Precedent

Plaintiffs stand accused of citing "no convincing case law supporting their position." D.OPP. 3. How could they, since the question before the Court has never been decided, except in two vacated opinions, one supporting plaintiffs, the other defendants, in Goldwater? That, and the singular importance of the ABM Treaty, are what gives this case the hue of a constitutional crisis, Defendants' view to the contrary. D.OPP. 1.

E. The National Missile Defense Act

The National Missile Defense Act, Public Law No. 106-38 (1999) did indeed contemplate "amending or even withdrawing from the ABM Treaty" D.OPP. 6. But to construe this as preauthorization for unilateral presidential withdrawal at any time in the future is to read a great deal more into the Act than it contains.

In the first place, the Committee Reports cited by Defendants at D.OPP. 6-7 show a preference for revision or amendment over withdrawal.

In the second place, the time frame of the Act – "as soon as technologically possible" – leaves room for a great many things to happen before revision or withdrawal becomes

necessary. Upon signing the Act, President Clinton did not mention withdrawal and observed regarding amendment only that "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, 199 Statement on Signing the National Missile Defense Act of 1999, Weekly Compilation of Presidential Documents, Week Ending July 30, 1999; see also Plaintiffs' Opposition at 22-23.

In the third place, the opinions of members of Congress cited at D.OPP. 7, fn. 7, are less impressive than the opinions of technical and legal experts on the compatibility of the ABM Treaty with progress on NMD. As noted in Plaintiffs' Opposition at 23-24, in testimony before the Senate Armed Services Committee, Hearing on Missile Defense and Defense Authorization FY 2002, July 19, 2001 (www.clw.org/coalition/coyle071901.htm), Philip E. Coyle III, former Assistant Secretary of Defense and Director, Operational Test and Evaluation, stated: "[T]he treaty is not now an obstacle to proper development and testing of a National Missile Defense System…. 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." Similarly, John B. Rhinelander, legal adviser to the SALT I delegation that negotiated the ABM Treaty and former deputy legal adviser, Department of State, stated that the "new test range … should not present any significant legal issues." Testimony before the Senate Armed Services Committee, Hearing on Missile Defense and the Anti-Ballistic Missile Treaty, July 24, 1901 (www.clw.org/pub/clw/coalition/rhinelander072401.htm).

Contrary to Defendants' contention (D.OPP. 26-27), the NMDA is not comparable to past statutes that authorized presidential actions that would violate earlier treaties if they

remained in force. The 1933 National Industrial Recovery Act, the 1934 Trade Agreement Acts, and the 1977 International Emergency Economic Powers Act, authorized presidential actions to regulate trade that conflicted with, respectively, the 1927 Multilateral Tariff Convention, the 1871 Treaty of Commerce and Navigation with Italy, and the 1956 Treaty of Friendship, Commerce and Navigation with Italy. See Jonathan York Thomas, Abuse of History: A Refutation of the State Department Analysis of Alleged Instances of Independent Presidential Termination, 6 Yale Studies in World Public Order 27, 44-48, 52-55 (1979); Plaintiffs' Summary Judgment Memorandum at 29. Here, by contrast, the NMDA is only an aspirational statement of policy; actual development and deployment of missile defenses that would violate the ABM Treaty requires congressional funding as expressly provided in Section 2 of the NMDA. See Plaintiffs' Opposition at 21-22. In considering the sometimes murky history of treaty terminations, it is also well to remember to constitutional legitimacy cannot be created by occasional unconstitutional practice.

F. Political Question

Defendants misstate Plaintiffs' position on the political question doctrine as speculating about what "the Supreme Court might *in the future*" do with respect to that doctrine. D.OPP. 13. In suggesting that the political question in the Supreme Court is not what it used to be, Plaintiffs mean to talk about where the Supreme Court is, not where it may be going. Baker v. Carr, 369 U.S. 186 (1962) may be cited by the Supreme Court and lower courts until the end of time; the question is how the teachings of that seminal case are applied. Defendants' reference to n.34 in Clinton v. Jones, 520 U.S. 681, 700 (1997) hardly makes their point: After citing authority that federal courts are not entitled to resolve non-justiciable questions, id., the Court proceeds to consider the case justiciable because, while "the lines

between the powers of the three branches are not always neatly defined … [r]espondent. is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies." Id. at 701.

Nixon v. United States, 506 U.S. 224 (1993), as Plaintiffs recognized in their Opposition at 9, is the one case in recent memory in which the Supreme Court invoked the political question doctrine to find non-justiciability. But this case, a challenge to the impeachment of a federal judge, turned on the Constitution's delegation of "the sole power to try impeachments" to the Senate. Art. I, 3, cl. 6. A clearer case of textual commitment could hardly be imagined. It bears no resemblance to the case at bar.

The one case from this Circuit cited by Defendants as holding a case non-justiciable on political question grounds, Mojahedin Org. of Iran v. U.S. Dept. of State, 182 F.3d 17 (D.C. Cir. 1999) is a classic case of judicial abstention from interfering with a question falling within the exclusive competence of the Department of State and raising no serious constitutional issues.

Defendants' references to Greenberg v. Bush, 150 F. Supp. 2d 447, 453 (E.D.N.Y. 2001) and Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990) are inapposite. The former held, *inter alia,* that whether the current Middle East policy of this administration violated a 1922 Joint Senate and House Resolution favoring "the establishment in Palestine of a national home for the Jewish people" was a non-justiciable question. Plaintiffs agree but fail to see the relevance of Greenberg to the case at bar.

Plaintiffs do not agree with the holding of the Eastern District Court of New York in Ange which refused to entertain, on political question grounds, a challenge to the Gulf War based on the War Powers Clause of the Constitution and the War Powers Resolution.

Plaintiffs submit, however, that *this* Court's decision in Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) which, after extensive analysis, found no political question problem as to substantially the same issue,[3] is of considerably greater relevance for present purposes.

Defendants' attempt to squeeze this case within the confines of Baker v. Carr, D.OPP. 15 ff., falls short of the mark. With respect to textual commitment, they cite Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) as stating that "decisions regarding foreign policy 'are wholly confided by our Constitution to political departments of the government, Executive and Legislative'." How to square this with their position that the executive's power in foreign policy is plenary, i.e. excludes any role for the legislature? And if both political branches are competent to deal with foreign policy, as indeed they are, who better to intervene than the third branch when one of the other two seeks to exclude the other?

As for "judicially manageable and discoverable standards," it requires no special expertise or resources for this Court to answer the question before it. The Court will either agree with Plaintiffs' constitutional argument or not, but in the latter case it will not be for lack of expertise or access to relevant information.

Defendants would have this Court believe that the fact that legislators and Presidents have worked well together in the past to achieve treaty termination, D.OPP. 16, makes it unnecessary for the Court to intervene now that the President has failed to seek approval of Congress for termination of the ABM Treaty and, to boot, takes the position that he has no obligation to do so. But all that proves is that, despite their "plenary" power, Presidents have

[3] Dellums was based only on the War Powers Clause, not on the War Powers Resolution.

been quite willing to involve Congress in treaty termination on any number of occasions; it does not prove that they are not obliged by the Constitution to do so.

Turning next to the "unusual need for unquestioning adherence to a political decision already made," this has always been something of a puzzle. Presumably, a court would not uphold "a political decision already made" if it found the decision to be clearly unconstitutional. Indeed, the case that established judicial review, Marbury v. Madison, 5 U.S. 137 (1803), was only the first in a very long line of cases in which courts overturned political decisions. Since courts under our system do not render advisory opinions, most instances of judicial review involve judgments upon decisions already made. The fifth Baker factor, then, must turn upon the words "unusual need" rather than "unquestioning adherence." Here, Defendants have made no case for "unusual need" and indeed there is none. All that is required is for the question of ABM Treaty termination to be submitted to Congress for an up or down vote. If billions had already been spent on building the much vaunted national missile defense system, the situation might be different. That is not the case.

Finally, there is the question of "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." The scheme endorsed by Defendants – unilateral termination by the President, regardless of congressional views or actions – is a prescription for just such embarrassment, since it allows for divergent views by the legislative and executive branches, with the executive having the sole and final say. Under the scheme proposed by Plaintiffs, which they believe to be mandated by the Constitution, the

United States would have to speak with one voice. Hence no multifariousness, no embarrassment.[4]

In sum, Plaintiffs are not asking this Court to preside over the interment of the political question doctrine. They are saying that recent Supreme Court practice seems to point to a greater willingness to deal with constitutional questions from which the Court might in the past have shied away on political question grounds. In any case, they believe that, for the reasons enunciated above, the political question doctrine does not justify non-justiciability in this case.

G. Goldwater Is Not Controlling

In Assoc. of Bituminous Contractors v. Apfel, 156 F.3d 1246 (1998), the D.C. Circuit, in determining the precedential effect of Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), addressed the problem of splintered Supreme Court opinions. Bituminous Contractors concerned application of the Coal Industry Retiree Health Benefit Act of 1992 to coal mine construction contractors. In Eastern Enterprises, four Justices found that the Coal Act as applied to Eastern Enterprises, a company that had sold its coal business decades prior to the adoption of the Coal Act, effected an unconstitutional taking. 524 U.S. at 537. Justice Kennedy concurred in the judgment of unconstitutionality on due process grounds, and dissented from the takings analysis. Id. at 547, 550. In Bituminous Contractors, the D.C. Circuit held that Justice Kennedy's concurrence did not control its decision with respect to the due process question before it, stating:

> We also agree with the government that Justice Kennedy's concurrence in the judgment is of no help in appellant's efforts to cobble together a due process

[4] It may be noted in passing that in this case the Russian Federation would have been delighted had Congress persuaded the President to maintain the ABM Treaty in force, subject, perhaps to certain amendments. In the words of the old saw, "it takes two to be embarrassed."

> holding from Eastern Enterprises ' fragmented parts. We have previously held that *the rule of Marks v. United States, 430 U.S. 188 (1977), under which the opinion of the Justices concurring in the judgment on the "narrowest grounds" is to be regarded as the Court's holding, does not apply unless the narrowest opinion represents a "common denominator of the Court's reasoning" and "embodies a position implicitly approved by at least five Justices who support the judgment."* King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991). Justice Kennedy's due process analysis clearly does not meet this standard because he alone was willing to invalidate economic legislation on the ground that it violated the Due Process Clause. And, as should be obvious, Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's takings analysis. In short, the government is correct in stating that *the only binding aspect of Eastern Enterprises is its specific result--holding the Coal Act unconstitutional as applied to Eastern Enterprises.*

156 F.3d at 1254-1255 (emphasis added).

The application of Bituminous Contractors to Goldwater v. Carter, 444 U.S. 996 (1979) is straightforward. There is no "common denominator" among the four-justice plurality relying on political question doctrine, id. at 1006, Justice Powell relying on ripeness doctrine, id. at 998, and Justice Marshall concurring in the result without stating a rationale. Justice Powell trenchantly criticized the plurality's invocation of political question doctrine. Id. at 998 - 1002. Nor is the "specific result" in Goldwater applicable here, as no challenge is made to the withdrawal from the Taiwan Mutual Defense Treaty at issue in Goldwater. In short, Goldwater is not controlling.

Bituminous Contractors is the law in this circuit and also is more recent than the two non-D.C. Circuit cases Defendants cite (D.OPP. 18-19) in an effort to show that Goldwater is controlling, Rappa v. New Castle County, 18 F.3d 1043, 1061 (3d Cir. 1994) and Beacon Products v. Reagan, 633 F. Supp. 1191, 1198-1199 (D. Mass. 1986).

In considering the opinions in Goldwater, two additional factors should be kept in mind. First, Goldwater is a *per curiam* decision, rendered without full briefing and argument. Indeed, Justices Blackmun and White dissented on the ground that it is "indefensible, without

further study, to pass on the issue of justiciability or on the issues of standing or ripeness [and] would set the case for oral argument and give it the plenary consideration it so obviously deserves." 444 U.S. at 1006. Second, the plurality opinion on political question doctrine was persuasively criticized in dissent by the author of the leading case on the doctrine, Baker v. Carr. Justice Brennan wrote:

> In stating that this case presents a nonjusticiable "political question," Mr. Justice Rehnquist, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations. Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." Baker v. Carr, 369 U.S. [at] 211-213, 217 ... But 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 political decisionmaking power. Cf. Powell v. McCormack, 395 U.S. 486, 519-521 (1969). The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.

H. The Hierarchy of Agreements

In response to Plaintiffs' argument, Summary Judgment Memorandum at 29-30, that allowing unilateral presidential termination of treaties would upset the traditional hierarchy of international agreements, Defendants profess not to understand the source of the hierarchy. D.OPP. 22. It is the Constitution. The Constitution recognizes that types of international agreements other than treaties are possible, barring any state of the Union not only from entering into "any Treaty, Alliance, or Confederation," but also from entering into "any Agreement or Compact with another State, or with a foreign Power" (Article II, Section 10, Cls. 1, 3), but requires only that "treaties" are made with advice and consent of the Senate. That is why, as Plaintiffs said (Summary Judgment Mem. 30), treaties have traditionally been understood to be the most solemn of agreements. See Congressional Research Service,

Treaties and Other International Agreements: The Role of the United States Senate, S. Prt. 106-71 (January 2001) 76-77 ("Reference to the text of the Constitution suggests the preeminent legal status of the treaty mode of agreement-making."). Plaintiffs agree with Defendants that congressional-executive agreements like NAFTA and WTO deal with "important" matters (D.OPP. 22-23), but arms control agreements, which concern the fundamental security of the nation, are dealt with as treaties. See John C. Yoo, Laws as Treaties? The Constitutionality of Congressional-Executive Agreements, 99 Mich. L. Rev. 757, 804-806 (February 2001) [hereinafter Yoo]. They should not be relegated to a lower status than economic agreements.

Defendants also complain that Plaintiffs "cite no authority (other than the Supremacy Clause argument addressed above) for the proposition that the President *cannot* unilaterally terminate congressional-executive agreements." D.OPP. 23. But under the Supremacy Clause, it seems beyond dispute that a president cannot unilaterally terminate statutes or joint resolutions approving and/or implementing an international agreement. As Professor Yoo observes, extending the claimed presidential power to unilaterally terminate treaties to congressional-executive agreements "would provide the President with the heretofore unknown power of executive termination of statutes." Yoo at 815. He further notes that "many believe that, at a minimum, the very purpose of the Take Care Clause was to prevent the President from enjoying this power" of terminating statutes, citing Steven G. Calabresi and Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L. J. 541, 549-550 (1994). Yoo at 815, n. 230.

CONCLUSION

The President's power over foreign affairs does not exclude a role for Congress. Basic notions of constitutional symmetry dictate that, if not the entire Congress, at least two thirds of the Senate must approve the termination of a treaty. This is particularly important at a time when foreign affairs are more than ever intertwined with domestic affairs and the lives and security of the American people.

Raines notwithstanding, any number of congressional plaintiffs have standing to raise a constitutional issue when they have no alternative remedy whatsoever. Defendants' scheme of no standing combined with plenary presidential power would lead to an alarming accretion of presidential power, precisely the result which the framers went to such great lengths to avoid.

" [S]ome truths are so basic that like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of government, and the courts have traditionally invalidated measures deviating from that form." Justice O'Connor, writing for the majority in New York v. United States, 505 U.S. 144, 187-188 (1992).

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

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