UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Representative DENNIS KUCINICH
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Representative JAMES OBERSTAR
2365 Rayburn House Office Building
Washington, DC 20515-2308

Representative PATSY MINK
2210 Rayburn House Office Building
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Representative TAMMY BALDWIN
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Representative PETER DEFAZIO
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Representative JOHN OLVER
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Representative SAM FARR
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Representative BARBARA LEE
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Representative MAURICE HINCHEY
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Representative HILDA SOLIS
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Civil Action No. _____

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Representative BERNARD SANDERS
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Representative LYNN WOOLSEY
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Representative WILLIAM LACY CLAY
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Representative EDOLPHUS TOWNS
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Representative MARCY KAPTUR
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Representative JERROLD NADLER
2334 Rayburn House Office Building
Washington, DC 20515-3208

Representative STEPHANIE TUBBS JONES
1516 Longworth House Office Building
Washington, DC 20515-3511

Plaintiffs,

v.

GEORGE W. BUSH, President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

COLIN POWELL, Secretary of State
Department of State
2201 C Street, NW
Washington, DC 20520

DONALD H. RUMSFELD, Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

PRELIMINARY STATEMENT

1. In this action 31 Members of Congress seek a declaratory judgment that the President's proposed termination of the Treaty on the Limitation of Anti-Ballistic Missile Systems ("the ABM Treaty") is unconstitutional and of no effect because of the President's failure to seek and obtain the assent of Congress.

2. On May 26, 1972, the United States of America and the Union of Soviet Socialist Republics signed the ABM Treaty. On August 3, 1972, the United States Senate approved the treaty. The treaty entered into force on October 3, 1972.

3. The issue of the President's authority to terminate treaties without the assent of a majority of both Houses of Congress or two thirds of the Senate has never been decided by the courts. It is one of supreme importance to the constitutional framework of this nation as well as the treaty-based system of international law.

JURISDICTION AND VENUE

4. Jurisdiction lies under 28 U.S.C. §§ 1331, 1651, 2201-2202 in that Plaintiffs' claims arise under the Constitution of the United States, Article II, Section 2, Clause 2, Article II, Section 3 and Article VI, Clause 2.

5. Venue is proper in this Court under 28 U.S.C. § 139(e) because the Defendants are officers of the United States sued in their official capacities with offices in Washington, District of Columbia.

PARTIES

6. Plaintiffs are the 31 Members of the United States House of Representatives whose names appear in the caption of this Complaint. Plaintiffs file this suit in their official capacities as members of the United States Congress.

7. George W. Bush is President of the United States. He is sued in his official capacity as President.

8. Colin Powell is Secretary of State of the United States. He is sued in his official capacity as Secretary of State.

9. Donald H. Rumsfeld is Secretary of Defense of the United States. He is sued in his official capacity as Secretary of Defense.

CONSTITUTIONAL FRAMEWORK

10. Under Article VI, Clause 2 of the Constitution, treaties have the status of "supreme law of the land," equally with federal laws. Article II, Section 3 requires the President to "take care that the laws be faithfully executed."

11. Article II, Section 2, Clause 2 of the Constitution requires the concurrence of "two thirds of the Senators present" for the making of a treaty by the President, evidencing the Framers' intent that the making, modifying and terminating of treaties be the joint prerogative of the executive and legislative branches.

12. The Constitution is silent on the role of Congress in treaty termination. However, under long-standing and well established practice since the founding of the Republic, and arising from the fundamental separation of powers and system of checks and balances imbued in the Constitution from its very origin, the President has a duty to seek and obtain the concurrence of two thirds of the Senate or a majority of both Houses for the termination of a treaty. It is particularly incumbent upon the President to discharge this duty with respect to treaties of great importance, such as the ABM Treaty. The President has not done so in this case.

STANDING

13. Plaintiffs have sustained a grievous institutional injury by being deprived of their constitutional right and duty to participate in treaty termination.

14. Given the President's mistaken view of his authority to engage in treaty termination on his own, Plaintiffs are completely without any legislative remedy to rectify the President's proposed unlawful termination of the ABM Treaty. There is no legislative action Congress could take that would compel the President to submit the matter of treaty termination to Congress for its consideration, or to nullify the notice of withdrawal the President has given.

15. Nevertheless, Plaintiffs are confident that the President, when faced with a judicial declaration of the unconstitutionality of his act, will move swiftly to seek the Congressional approval required.

ABM TREATY BACKGROUND

16. The ABM Treaty prohibits, with certain minor exceptions, the deployment of missile defenses to protect each party's national territory, as well as the development, testing, or deployment of sea-, air-, space-, or mobile land-based anti-ballistic missile systems or components.

17. The treaty's purpose is to prevent a nuclear arms race which would vastly increase the likelihood of intentional or accidental nuclear war, with such war's catastrophic consequences, and to create more favorable conditions for limiting and reducing strategic nuclear arms.

18. By prohibiting space-based 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.

19. The ABM Treaty is part of an interlocking framework of arms control agreements. It was linked at its inception with the first Strategic Arms Limitation Agreement (SALT), and served as a foundation for SALT II, which was largely observed but never entered into force, as well as the Intermediate Nuclear Forces Treaty removing US and Soviet missiles from Europe, and the first Strategic Arms Reduction Treaty (START).

20. The Final Document of the 2000 Review Conference for the Nuclear Non-proliferation Treaty, 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."

21. 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.

22. President Bush, in the context of a new foreign policy designed to release the United States from treaty obligations restricting its freedom of action, decided to terminate the ABM Treaty. On December 13, 2001, he 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.

23. The ABM Treaty is "of unlimited duration," 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."

24. Several Members of Congress have strongly criticized the wisdom of terminating the ABM Treaty. Some have questioned whether the criterion for withdrawal contained in Article XV, paragraph 2, has been met. However, neither a majority of both Houses of Congress nor two thirds of the Senate have assented to the termination of the ABM Treaty, nor have they been requested to do so by the President.

25. On June 6, 2002, lead Plaintiff, Representative Dennis Kucinich, offered a resolution "concerning the Privileges of the House," which stated, *inter alia*, "Whereas, the President does not have the authority to repeal laws," and concluded, "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." After debate, the Chair sustained a point of order that the resolution does not constitute a point of privilege. Representative Kucinich appealed the ruling, and a motion to table the appeal was agreed to by a recorded vote of 254 yeas and 169 nays. The resolution therefore was not considered on the merits contrary to the wishes of 169 Members of the House.

26. On June 10, 2002, on the floor of the Senate, Senator Russell Feingold sought unanimous consent to offer a resolution regarding the termination of the ABM Treaty. The resolution stated, *inter alia*, that "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" and that "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." An objection was made, and the resolution was not considered by the Senate.

TREATY TERMINATION BACKGROUND

27. The first instance of treaty termination by the United States was the Act of July 7, 1798, signed by President John Adams, by which Congress declared "the treaties heretofore concluded with France no longer obligatory on the United States." Since then,

the vast majority of treaties, and virtually all those of serious enduring significance, have been terminated by some form of mutual cooperation between the President and Congress.

28. The one salient exception was the termination of the Taiwan Mutual Defense Treaty by President Carter acting alone in 1978. In that instance, a sharply divided Supreme Court, lacking a clear majority position, let stand the President's termination on a variety of non-substantive grounds without reaching the fundamental issue of the President's authority to terminate treaties without the assent of one or both Houses of Congress. The President's position on the merits was that the termination was a consequence of his decision to transfer recognition from Taiwan to the People's Republic of China pursuant to the well established and exclusive Presidential power of recognition under the Constitution. That position was accepted by the only Supreme Court Justice to reach the merits. No such power of the President is involved in the termination of the ABM Treaty.

29. There is ample evidence that the Framers intended Congress to have a role in the termination as well as the making of treaties.

FIRST CAUSE OF ACTION

30. The President's proposed termination of the ABM Treaty without the assent of Congress violates Article II, Section 2, Clause 2 of the Constitution and is inconsistent with two centuries of practice and with the overall design of separation of powers and checks and balances of the Constitution.

SECOND CAUSE OF ACTION

31. Since treaties have the status of laws, the President's proposed termination of the ABM Treaty without the assent of Congress violates Article II, Section 3 of the Constitution, which obliges the President to take care that the laws be faithfully executed.

RELIEF

WHEREFORE, Plaintiffs pray that this Court enter an Order as follows:

(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) Ordering that the Secretary of State, the Secretary of Defense and their subordinate officers are enjoined 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;

(c) Awarding Plaintiffs their costs and reasonable attorneys' fees pursuant to 28 U.S.C. § 2412(a) and (d); and

(d) Granting such other and further relief as may be just and proper.

Respectfully submitted,

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