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Withdrawal from the ABM Treaty: Legal Considerations

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Summary

On December 13, 2001, President Bush gave formal notice to Russia, Belarus, Kazakhstan, and the Ukraine that the United States was withdrawing from the Anti-Ballistic Missile Treaty because of the constraints it imposes on the testing of missile defense systems; and six months later, on June 13, 2002, the treaty effectively terminated. The ABM Treaty has been in force since 1972. Pertinent legal questions that have been raised about U.S. withdrawal concern whether the treaty allows it; if so, the procedure to be followed; and, finally, the constitutionality of the President doing so unilaterally without the involvement of the Senate or Congress. This report briefly discusses these issues, as well as the recent federal district court decision in *Kucinich v. Bush* dismissing a suit by 32 members of the House challenging the constitutionality of the President's action. This report will be updated as events warrant.

Summary of the ABM Treaty

On August 3, 1972, the Senate gave its advice and consent to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems.¹ President Nixon ratified the treaty on September 3, 1972; and the treaty entered into force on October 3, 1972. In 1974 the parties agreed to an amendatory protocol reducing the number of deployments of ABM systems from two to one.² As amended, the treaty bound each party

- ! “not to deploy ABM systems for a defense of the territory of its country ... [or] for defense of an individual region except as provided in Article III” (Article I);
- ! “not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based” (Article V);

¹ TIAS 7503; 23 UST 3435 (1972).

² TIAS 8276; 27 UST 1645 (1976) (entry into force).

- ! “not to give missiles, launchers, or radars, other than ABM interceptor missiles, ABM launchers, or ABM radars, capabilities to counter strategic ballistic missiles or their elements in flight trajectory, and not to test them in an ABM mode” (Article VI);
- ! “not to deploy in the future radars for early warning of strategic ballistic missile attack except at locations along the periphery of its national territory and oriented outward” (Article VI); and
- ! “not to transfer to other States, and not to deploy outside its national territory, ABM systems or their components limited by this Treaty” (Article IX).

Thus, the treaty did not bar the parties from developing, testing, and deploying a fixed land-based ABM system.³ Nor did it bar the testing, development, and deployment of non-ABM missiles, launchers, and radars useful in defense against aircraft or against short-range battlefield or theater ballistic missiles. But it did bar the parties from giving such non-ABM components and systems the “capabilities to counter strategic ballistic missiles or their elements in flight trajectory”; and it did bar the testing of such components and systems “in an ABM mode.” These were the provisions that imposed the most serious constraints on the Administration’s proposed missile defense program.

Treaty Provisions Regarding Withdrawal

Article XV of the ABM Treaty stated that “[t]his treaty shall be of unlimited duration.” But it also provided for withdrawal upon six months notice to the other party under certain “extraordinary” circumstances, as follows:

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

Such withdrawal upon notice provisions are common in treaties, both multilateral and bilateral. Except in modern arms control treaties, however, it is not common for withdrawal to be conditioned upon “extraordinary events ... [that] have jeopardized ... supreme interests.” In arms control agreements that language appears to be fairly standard and usually (but not always) includes the requirement that the withdrawing party articulate the extraordinary events justifying withdrawal.⁴

³ Article III, as amended, allowed each party to deploy one such system around either its capital or an ICBM complex. The USSR chose to deploy its system around Moscow, while the U.S. chose to defend an ABM complex in North Dakota. But the U.S. dismantled its system within a few months of its deployment.

⁴ *See, e.g.*, the Treaty on the Non-Proliferation of Nuclear Weapons, 21 UST 483 (1970) (Article X); the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 26 UST 583 (1975) (Article XIII); the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1997); the Treaty on Conventional (continued...)

On December 13, 2001, President Bush exercised the right conferred by Article XV and announced the intention of the U.S. to withdraw from the ABM Treaty. In diplomatic notes sent to Russia, Belarus, Kazakhstan, and the Ukraine, the State Department described the reasons for withdrawal as follows:

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.⁵

Constitutionality of Withdrawal by President Bush

(1) General. Although the Constitution is explicit regarding how the nation enters into treaties, it is silent with respect to the termination of, or withdrawal from, treaties. As a consequence, debate arises from time to time regarding whether the President can unilaterally exercise the right of withdrawal without the participation of the Senate or the Congress. The *Restatement of the Foreign Relations Law of the United States (Third)*⁶ concludes that the power to terminate or suspend a treaty belongs to the President. Nonetheless, it has sometimes been contended that because the Senate is a joint participant in the making of a treaty, it also ought to be involved in the termination of the treaty. It has also been contended that Congress as a whole ought to play a role at times. Given Congress' constitutional authority to declare war, it is said, that is particularly the case with respect to terminations that create a risk of war. Historically, withdrawal from a treaty has occurred most commonly as a Presidential initiative. But both the Senate and

⁴ (...continued)

Armed Forces in Europe, TIAS ____ (1992) (Article XIX) and the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water, 14 UST 1313 (1963) (Article IV) (no requirement of an accompanying statement of reasons).

⁵ State Department, "Text of Diplomatic Notes Sent to Russia, Belarus, Kazakhstan, and the Ukraine on December 13, 2001" (December 14, 2001), available at the State Department web site: www.state.gov/r/pa/ps/2001

⁶ American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States*, Vol. 1 (1987), § 339, at 226.

the Congress have at times initiated withdrawal or approved the President's action after the fact.⁷

(2) *Goldwater v. Carter.* Prior to the present circumstance, this debate erupted when President Carter terminated the Mutual Defense Treaty with the Republic of China (Taiwan) in 1978-79. On December 15, 1978, President Carter announced that on January 1, 1979, the United States would officially recognize the People's Republic of China (PRC) as the sole government of China, that simultaneously the U.S. would withdraw recognition from the Republic of China on Taiwan (ROC) as the legitimate government of China, and that the U.S. would give notice of its intention to withdraw from its Mutual Defense Treaty with the ROC in accordance with the terms of the treaty. (The treaty provided that withdrawal could occur one year after notice was given, thus making the effective date of U.S. withdrawal January 1, 1980.) The President's action precipitated the introduction in the Senate of several resolutions on the matter,⁸ hearings by the Senate Foreign Relations Committee on the constitutional parameters governing the termination of treaties,⁹ a favorable committee report of a resolution that detailed fourteen circumstances in which unilateral termination by the President is constitutionally permissible,¹⁰ and the approval by a vote of 59-35 on the Senate floor of a substitute stating that the Senate had to be involved in the termination of mutual defense treaties.¹¹ It also precipitated a suit by Senator Goldwater (R.-Ar.) and a number of other Senators and Congressmen in federal district court claiming that the President has no unilateral power under the Constitution to abrogate treaties and that termination of the Mutual Defense Treaty required the approval of the Senate or the Congress.

The suit led to conflicting decisions by the trial and appellate courts and an eventual non-decision by the Supreme Court.¹² On October 17, 1979, the trial court agreed with the plaintiffs' contentions. It held that the case did not present a nonjusticiable political question, that the plaintiff Members of Congress had standing, and that congressional participation was necessary to terminate the Mutual Defense Treaty. The court rejected arguments that the President can unilaterally terminate treaties on the basis of his constitutional power over foreign affairs and his power to recognize (and withdraw

⁷ For a thorough examination of U.S. practice with respect to the termination of treaties, see CRS, *Treaties and Other International Agreements: The Role of the United States Senate* (S. Comm. Pr. 106-71 (January, 2001), at 198-209.

⁸ See S. Con. Res. 2, S. Res. 10, and S. Res. 15, 96th Cong., 1st Sess. (1979).

⁹ *Hearings on Treaty Termination Before the Senate Committee on Foreign Relations*, 96th Cong., 1st Sess. (April 9-11, 1979). See also *Termination of Treaties: The Constitutional Allocation of Power*, 95th Cong., 2d Sess. (Comm. Print 1978) for a useful compilation of historical precedents and constitutional arguments.

¹⁰ S. Rept. 96-119, 96th Cong., 1st Sess. (May 7, 1979). One of the bases on which the President could terminate a treaty without Congressional participation cited in S. Res. 15 was "in conformity with the provisions of a treaty."

¹¹ 125 CONG. REC. S 7015 (daily ed. June 6, 1979). The resolution never came to a final vote, however. Additional amendments were proposed, and further action on the resolution was postponed to the indefinite future.

¹² *Goldwater v. Carter*, 481 F.Supp. 949 (D.D.C.), *reversed*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

recognition from) foreign governments. Instead, it held that the Mutual Defense Treaty was part of the “law of the land,” that the President’s constitutional authority to “take care that the Laws be faithfully executed” does not include the power to unilaterally repeal such a law, and that the doctrine of separation of powers and its corollary concept of checks and balances counsel against vesting such a power exclusively in the President:

Treaty termination is a shared power, which cannot be exercised by the President acting alone [A]ny decision of the United States to terminate [the Mutual Defense Treaty] must be made with the advice and consent of the Senate or the approval of both houses of Congress.

The United States Court of Appeals for the District of Columbia promptly reversed in an *en banc* decision. On December 5, 1979, the appellate court agreed with the trial court that the plaintiffs had standing and that the issue was justiciable. But it reversed on the merits. The majority rejected the arguments that the advice and consent role of the Senate in the making of treaties necessarily implies a similar role in their termination and that because a treaty is part of the law of the land, it requires at least a statute to terminate it. It emphasized, instead, the President’s broad constitutional authority with respect to foreign affairs and said that authority includes a number of accepted functions regarding treaties “which have the effect of either terminating or continuing their vitality.” The President, the court said, is responsible for determining whether a treaty has been breached by another party, whether a treaty is no longer viable because of changed circumstances, and even whether to ratify a treaty after the Senate has given its advice and consent. “In contrast to the lawmaking power,” the court said, “the constitutional initiative in the treaty-making field is in the President, not Congress.” To require Senate or Congressional consent to the termination of a treaty, the appellate court stated, would lock the U.S. into “all of its international obligations, even if the President and two-thirds of the Senate minus one firmly believed that the proper course for the United States was to terminate a treaty” and would deny the President the authority and flexibility “necessary to conduct our foreign policy in a rational and effective manner.” “Finally, and of central significance,” the court asserted, was the fact that the Mutual Defense Treaty with the ROC contained a termination clause. That clause, it said, “is without conditions” and spelled out no role for either the Senate or the Congress as a whole. Consequently, it stated, the power to act under that clause “devolves upon the President.”

On December 13, 1979, the Supreme Court vacated the appellate court’s decision and remanded the case with directions to dismiss the complaint. But it did so for a variety of reasons, none of which garnered a majority. Four of the Justices – Chief Justice Burger and Justices Rehnquist, Stewart, and Stevens – contended that the case should be dismissed because it presented a nonjusticiable political question. Justice Powell disagreed and said that the political question doctrine posed no constitutional barrier to judicial review of a properly presented case. But he concurred that the case should be dismissed. He stated that the case was not ripe for judicial review because a constitutional impasse had not been reached, *i.e.*, neither the House nor the Senate had taken any action formally rejecting the President’s initiative. Justice Marshall concurred in the result without opinion. Justices Blackmun and White said that because of the difficult procedural and substantive issues raised by the case, it should be set for briefing and oral argument. Only Justice Brennan addressed the merits of the case, stating that he would affirm the judgment of the appellate court on the grounds that termination of the

treaty in this instance was an aspect of the “the President’s well-established authority to recognize, and withdraw recognition from, foreign governments”:

The constitutional question raised here is prudently answered in narrow terms. Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes. (Citations omitted.) That mandate being clear, our judicial inquiry into the treaty rupture can go no further.¹³

(3) *Kucinich v. Bush*. On December 30, 2002, a federal district court dismissed a suit brought by 32 Members of the House of Representatives challenging the constitutionality of President Bush’s withdrawal from the ABM Treaty and raising the same arguments that had been made in the *Goldwater* case.¹⁴ The court dismissed the suit on the grounds that the plaintiffs lacked standing under the standards set by the Supreme Court in *Raines v. Byrd*¹⁵ and that the treaty termination issue is a nonjusticiable political question. On the standing question, the court found that the injury alleged – namely, the divestiture of the Senate and Congress from any involvement in the decision to withdraw – was to the institution of Congress and not to the individual members who brought the suit. The court further noted that the plaintiffs had numerous political remedies available to them, that neither the House nor the Congress as a whole had taken any action to register their disapproval of the President’s action or claim a role in the termination of the treaty, and that neither the House nor the Congress had authorized the plaintiffs to institute suit on their behalf. On the political question issue, the court followed the plurality’s reasoning in *Goldwater*. It noted that the Constitution is silent regarding the procedure to be followed in terminating a treaty, that constitutional authority over foreign affairs is largely relegated to the executive and legislative branches and not the judiciary, that the termination of the ABM Treaty has already been accomplished, and that a judicial ruling is particularly inappropriate where “Congress itself has not even asserted that it has been deprived of a constitutional right.”

Conclusion

In sum, then, the ABM Treaty has been terminated by President Bush in accordance with the terms of the treaty, and neither Congress nor the courts have acted to forestall or overturn that action. Moreover, both *Goldwater* and *Kucinich* have raised substantial barriers to the prospect that individual members of Congress can obtain judicial relief when they object to a particular treaty termination by the President. Each of the courts in *Goldwater* noted that the U.S. has terminated treaties by a variety of means over the course of American history, and this history suggests that there may be a variety of ways of terminating treaties that are constitutionally acceptable. Nonetheless, it remains the case that there has not been a final judicial determination of the constitutional parameters governing the termination of treaties.

¹³ *Id.* at 1007 (Brennan, J., dissenting).

¹⁴ *Kucinich v. Bush*, No. 02-1137, 2002 U.S. Dist. LEXIS 24691 (D.D.C., December 30, 2002).

¹⁵ 521 U.S. 811 (1997).