Termination of Treaties:

A Presidential Decree is Not Enough

Reissued in 2019 by the WAR and LAW League (WALL)

CONTENTS

---

*Reissued in 2006 and 2019 with additions.

War and Law League
P.O. Box 42-7237
San Francisco, CA 94142
warandlaw@yahoo.com
http://www.warandlaw.org

Termination of Treaties:

A Presidential Decree is Not Enough

Foreword to the 2019 Edition:
Nuclear and Constitutional Crises

With the "Doomsday Clock of the *Bulletin of the Atomic Scientists* at two minutes to midnight, on Feb. 1, 2019, President Donald Trump took a step toward doom by "suspending" the Intermediate-range Nuclear Forces Treaty (INF) signed by President Reagan and Mikhail Gorbachev of Russia in 1987.

INF eliminated nearly 2,700 missiles that could send 4,000 nuclear warheads to kill millions of people. Gorbachev and George Shultz, Reagan's secretary of State, both negotiators of the treaty, told media in late 2018 that abandoning INF would lead to a new nuclear arms race, risking a nuclear war that threatened human existence. They felt sure that military and diplomatic meetings could settle U.S.-Russian differences. Each nation accuses the other of not complying.

The Constitution requires consent of two-thirds of the Senate for a treaty to go into effect. INF drew 93 ayes and only five nays. Yet Trump would undo it on his own. Come August, he quits the treaty unless he finds that Russia complies. But let him comply with the Constitution: Under Article VI, a treaty is law. Like a statute, it's part of "the supreme law of the land." And per Article II, the president "shall take care that the laws be faithfully executed" (i.e. *carried out,* not *killed*).

As quotations in this paper show, presidents long accepted Congress's lead in the ending of treaties. In 1979 Jimmy Carter's notice of intention to exit a defense treaty with Taiwan on his own brought about Senate hearings and a lawsuit by 25 members of Congress. In 2002 George W. Bush's notice that he would leave the ABM missile-limitation treaty with Russia led to a suit by 33 congressmen. Both cases, Goldwater v. Carter and Kucinich v. Bush, ended inconclusively. Although courts took no action, they left the door open for Congress to assert its authority.

Based on its 2002 research, the War and Law League (WALL) disputed Bush on legal grounds. (A result was the latter suit.) In 2019, trying to save both INF and Congress's constitutional role, WALL proposes a resolution.* The House of Representatives, and ideally the Senate too, would declare:

(1) A president alone cannot repeal a treaty. (2) Until a majority of each house or two-thirds of the Senate votes to undo it, INF remains in effect.

WALL, San Francisco, warandlaw@yahoo.com, March 2019

* See http://www.warandlaw.org/files ("President's right to exit arms treaty disputed...").

Termination of Treaties:
A Presidential Decree Is Not Enough

Notes by the War and Law League

PREFACE

Is it constitutional for the President alone to withdraw from the ABM Treaty -- or any other treaty he dislikes? Without congressional action, could he order that the U.S. abandon the nuclear nonproliferation and test-ban treaties, or the chemical and biological weapons conventions, or the Geneva and The Hague conventions, or the United Nations?

Without considering the merits of the ABM Treaty, we contend that President George W. Bush's six-month notice of withdrawal, given to the Russians in December, is unconstitutional. The issue is up to the Senate or Congress as well as the President. For him alone to unmake a treaty, when he cannot make a treaty without the consent of two-thirds of the Senate, is dictatorial and perilous.

Bush's action deals a blow to our constitutional system. It is tantamount to his repealing a law, for a treaty is federal law under Article 6 of the Constitution. Further, it diminishes global security to notify the world, in effect, that treaties between America and other nations can be torn up at the whim of a president.

The Senate approved the Anti-Ballistic Missile Limitation Treaty (ABM) in 1972 by a vote of 88 to 2. Shall one man end it?

This paper summarizes arguments by U.S. founders, judges, law professors, and others that a presidential decree is not enough to terminate a treaty under the Constitution.

In 1979 the Supreme Court ducked the constitutional question when it dismissed a case brought by 25 members of Congress. A plurality of four justices left the matter to the legislative and executive branches. The issue remains open. (See pages 3 and 8.)

We believe that prompt congressional action, beginning with public hearings, will help to resolve a crisis for the Constitution and the form of government that it prescribes.

War and Law League (WALL) P.O. Box 42-7237, San Francisco, CA 94142
warandlaw@yahoo.com / http://www.warandlaw.org
415-948-9616 or 415-564-2083

Statements by U.S. founders:

John Jay, *The Federalist,* 64 (1788): "They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them."

James Madison: "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 to Edmund Pendleton, Jan. 2, 1791, *The Papers of James Madison,* v. 13, University Press of Virginia.)

Thomas Jefferson in *Manual of Senate Procedure:* "Treaties are legislative acts.... 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 infringed and rescinded. This was accordingly the process in the case of France in 1798." (Written by Jefferson when he was vice-president; reprinted in Senate Manual, S. Doc. No. 94-1, 94th Cong., 1st session, 666 and 669, 1975.)

Court dicta:

Justice Iredell wrote for the Supreme Court (in *Ware v. Hylton,* 3 U.S. 199, 260-61, 1796) on the power to terminate a treaty: "... 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, on the principles I have stated.... If Congress, therefore (who, I conceive, alone have such authority under our government), shall make such a declaration [that a treaty is void], I shall deem it my duty to regard the treaty as void, and then forbear any share in executing it as a judge."

Justice Story wrote for the Supreme Court (in *The Amiable Isabella,* 19 U.S. 1, 34, 1821): "... The obligations 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."

Judge Woodruff (*Ropes v. Clinch,* 20 F. Cas. 1171, 1871) wrote that Congress may give the notice of denunciation of a treaty in any of three modes.

Judge Ray (*Teti v. Consolidated Coal Co.*, 217 F. 443, 450 [D.C. N.Y. 1914]): "This treaty [of Commerce and Navigation, with Italy] is the supreme law of the land, which Congress alone may abrogate, and the courts of the United States must respect and enforce it."

Judge Cardozo (*Techt v. Hughes,* 254 U.S. 643, 1920): "President and Senate may denounce the treaty, and thus terminate its life."

Suit by members of Congress vs. the President:

Judge Oliver Gasch, U.S. District Court, DC, wrote in *Goldwater v. Carter* (481 F. Supp. 949; 962-65, 1979) -- in which 9 senators and 16 representatives challenged President Carter's unauthorized notice of termination of the Taiwan defense treaty -- that termination of a treaty means a repeal of the law of the land: therefore congressional participation is required.

"The mere fact that the President has the authority to make an initial policy determination regarding the exercise of an option to terminate, and to notify the foreign state of termination, does not vest him with the unilateral power to complete the termination process and thereby effect the abrogation.

"This conclusion is dictated by several constitutional factors: the status of treaties as the supreme law of the land, together with the obligation of the President to faithfully execute those laws; the implications to be derived from the constitutionally delineated role of the Senate in treaty formation; and the fundamental doctrine of separation of powers. It is further bolstered by the historical experience represented by constitutional interpretation and practice."

The constitutional requirement for the advice and consent of two-thirds of the Senate in making treaties reflects the Founding Fathers' concern that no political branch possess unchecked power. A judicial ruling that the executive alone can terminate treaties "would raise the same fears and present the same possibility of abuse. It would be incompatible with our system of checks and balances.... It is undisputed that the President is without power to amend the terms of a treaty.... If the lesser power to amend treaties is denied the President, *a fortieri,* the greater power to annul should also be denied."

Either of two forms of congressional concurrence is required: (1) a majority of both houses of Congress, in accord with congressional authority to repeal a law of the land, or (2) the consent of two-thirds of the Senate, which is analogous to the treaty-making power. (The ruling enjoined the secretary of state from terminating the treaty. See also p. 4, this paper, under **Byrd**.)

Supreme Court: The DC Court of Appeals reversed the above ruling; its own judgment was "vacated" by the Supreme Court and the case "remanded to the District Court with directions to dismiss the complaint" (444 U.S. at 1002, 1979). Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and Stevens, saw a "nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches...." (Could the court of Chief Justice Rehnquist now dare to say that the 2000 election dispute was *not* "political"?) Justice Powell, finding the case "not ripe," and Justice Marshall concurred in the result. Justices Blackman, White, and (separately) Brennan dissented. The legal issue is unsettled, **Ackerman** contends (p. 8).

Hearings on treaty termination before the Senate Committee on Foreign Relations, April 9-11, 1979:

Arthur Bestor (professor of history, emeritus, University of Washington, prepared statement): "The commonsense view -- which the framers apparently took for granted save when

they specified an exception -- is that the power to rescind an action normally belongs to the same authority that is empowered to take the action in the first place.... There is a close analogy between the power to abrogate a treaty and the power to repeal a statute."

Senator Harry F. Byrd, Jr.: "To hold that a President can nullify a treaty is to assign to the President the power unilaterally to set aside a law, because a treaty is a law and is so recognized.... The Senate could grant consent to the President's ratification of a treaty, and within ... weeks or months, a new President, newly elected, could undo that action."

(The hearings were called to consider a resolution by Senator Byrd [D-Va.] expressing "the sense of the Senate that approval of the U.S. Senate be required to terminate any mutual defense treaty between the United States and another nation." It never came to a final vote, but the full Senate approved it, 59 to 35, as an amendment. The vote followed the District Court's initial dismissal of the Goldwater suit for lack of standing and prompted the court to reverse its ruling. The court said the vote showed "some congressional determination to participate in the process, and clearly falls short of approving the President's termination effort.")

Senator Barry Goldwater cited major defense and nuclear treaties that allowed either "party" to withdraw after notice. The Senate was an integral element of the "party" that approved them. "Now, if 'party' means 'President,' then any President will be able to wake up in the morning and decide, by himself, that the United States is withdrawing from any one of these important treaties without any power in Congress to stop him. This would be giving the President virtually a dictator's powers."

He quoted then Secretary of State James Buchanan, when cancellation of a treaty with Denmark was proposed, as saying that "an act must first pass Congress to enable the President to give the required notice." Goldwater presented a table of 52 treaties terminated with legislative action.

Michael Reisman (professor, Yale University School of Law): "My position is that the President cannot terminate these treaties on his own initiative without an authorization."

Irwin S. Rhodes (editor, *The Papers of John Marshall* and *The Papers of Roger Brooke Taney;* in a prepared statement): "Just as the power to legislate implies to the power to repeal in the same manner and the power to judge implies the power to revoke or overrule in the same manner, so the same principle applies to treaties.... [T]he revocation of a treaty by the President without the advice and consent of the Senate is unconstitutional and notice by him of intended termination is a nullity.... If regarded as an annulment of a law, it goes far beyond his duty to enforce laws and into that of legislation."

Charles E. Rice (professor of constitutional law, Notre Dame Univ.; in a prepared statement) wrote that under the Articles of Confederation, Congress had the sole power of entering into any treaty but required that nine states approve it and forbade bans on any imports or exports or on foreign duties. Fear that treaties might damage regional and state interests

carried over to the Constitutional Convention of 1787, where Art. I, Sect. 2, was approved, letting a president and 2/3 of the Senate make a treaty.

"It is wholly unrealistic to think that the framers intended by their silence [on the mode of terminating treaties] to unbalance this carefully crafted system by giving the President a blank check empowering him by his sole decree to nullify treaties, particularly since the termination of a treaty could do as much harm to the framers' jealously guarded sectional and state interests as could the making of the treaty. Since the Constitution gave treaties equal rank with statutes as 'the supreme Law of the Land,' it is reasonable to conclude that the framers' silence on termination means that they intended that treaties would be repealed in a manner similar to statutes, i.e. with legislative concurrence."

The first U.S. treaties ever terminated, the French Treaties of 1778-1788, were terminated by an act of Congress (1 Stat. 578, Act of July 7, 1798). In the discussion, Rep. Sewall of Massachusetts commented: "In most countries it is in the power of the Chief Magistrate to suspend a treaty whenever he thinks proper; here Congress only has that power." (8 *Annals of Congress,* 1851, 2120). Rep. Dana of Connecticut responded, "France has violated the faith pledged by her treaties with America; this, by the law of nations, puts it within the option of the Legislature to decide, as a question of expediency, whether the United States shall any longer continue to observe their stipulation." (Ibid., 2131.)

Must the entire Congress or only the Senate act to terminate a treaty? "This is a debatable point. James Madison, in discussing the power to terminate a treaty, regarded this as the only significant issue, since he assumed beyond question that the President could not effect such a termination by himself....

"Notice of treaty termination has usually been given by the President pursuant to a joint resolution of both Houses, though a Senate resolution has sometimes been used. It may be that a joint resolution should be used where Congress initiates the termination and that the President is strictly bound to secure approval only from the Senate to support a termination decision he initiates.... No definite answer can be given on this point. In any event, it is clear from the intent of the framers and from the historical record that some form of Congressional concurrence is required to authorize the President to give notice....

"... It would appear essential, if the separation of powers is to be preserved, that the Congressional role in treaty termination be affirmed and that the President be held to account in terms of constitutional law.... It could well be argued that a Presidential attempt to terminate a treaty without Congressional approval would be an impeachable offense.... The termination of a treaty without Congressional concurrence is a serious matter fraught with the gravest consequences for the integrity of our constitutional system....

"If the President had such a power, he could terminate by his own decree our participation in the Nuclear Test Ban Treaty or the North Atlantic Treaty Organization. Indeed, since a treaty

is the law of the land, he could claim as well the power to nullify other laws, such as the Civil Rights Act of 1964."

Eugene V. Rostow (professor, Yale University School of Law, in a prepared statement): "It cannot be constitutional to allow the President to abrogate treaties by a stroke of his pen.... The President's duty is to see that treaties and statutes are 'faithfully executed.' He has no power to repeal them. Such a doctrine would make nonsense of the separation of powers, and indeed establish an Imperial Presidency."

Alan C. Swan (professor, University of Miami School of Law): "... The policy of a treaty as a species of legislation ... cannot be reversed by the executive without congressional concurrence.... I fully subscribe to the more democratic principle that this concurrence is for the Congress, and not necessarily for a two-thirds vote of the Senate."

Other commentary:

President U. S. Grant: "It is for the wisdom of Congress to determine whether the article of the treaty [with Britain] relating to extradition is to be any longer regarded as obligatory on the Government of the United States...." (To Congress, 1876; cited in 617 F.2d 697, 726 [1979].)

President R. B. Hayes recognized "the authority of Congress to terminate a treaty with a foreign power...." (To Congress, 1879, vetoing a resolution to abrogate a treaty with China; ibid.)

Justice (and ex-President) William Howard Taft: "The abrogation of a treaty involves the exercise of the same kind of power as the making of it." (25 *Yale Law Journal,* 610. 1916.)

Edwin S. Corwin: "All in all, it appears that legislative precedent ... sanctions the proposition that the power of terminating the international compacts to which the United States is a party belongs, as a prerogative of sovereignty, to Congress alone.... [I]t flows naturally, if not inevitably, from the power of Congress over treaty provisions in their quality as 'law of the land.'" (*The President's Control of Foreign Relations,* 1917, 115, cited in Riesenfeld below 659.)

Stefan A. Riesenfeld: "The most logical view is that the power to denounce a treaty is vested in the President by and with the advice and consent of the Senate, so that the department of the government which makes the treaty can terminate it, regardless of whether the termination is by unilateral, but lawful, denunciation or by a new treaty...." (25 *California Law Review,* 660, 1937.)

Judge George E. MacKinnon: "... When the Constitution explicitly requires the vote of two-thirds of the Senators present to ratify a treaty already fully negotiated by the President, a contention that the same Constitution would vest *absolute power* in one official to terminate that treaty is clearly contrary to the constitutional design." (From dissent in *Goldwater v. Carter,* 617 F.2nd 697 [1979].

David Gray Adler:* "The Framers clearly granted treaty-making power to the President and the Senate.... The reasons which the Framers gave for their formulation of the treaty-making power, impelled them to vest the powers of treaty termination in the same bodies....

"Historians have observed that the failure of States to observe the treaties made under the Articles of Confederation was one of the principal factors leading to the Constitutional Convention." The framers worried about the reputation of the United States abroad.

Then too, Adler wrote, economic, sectional, and state interests collided in the debate on the treaty power, bringing passionate speeches and anger at the Convention and arousing antagonism at the State ratification conventions. A committee report providing that the Senate alone make treaties drew controversy. Those opposed won a compromise giving the president a role. A concession to small states and southern states provided that two-thirds of senators present must ratify any treaty. "It is not logical to presume those interests would have been satisfied by a procedure which would permit a single person to terminate, with a stroke of a pen, a treaty representing those interests."

The salient concerns in the treaty debate in 1787 were "the nation's fidelity to international obligations; accommodating the many sectional interests; the need to account for the jealousy of small states; and the need for solemn deliberation. They [the Framers] also had an overriding fear of absolute executive power."

The Framers would not have permitted giving the president alone the treaty-making power and never seriously contemplated it. Alexander Hamilton, for example, wrote that it would not be safe to entrust treaty making to one elected official, and framers Francis Corbin, William Davie, and Charles Pinckney told their respective ratifying conventions in Virginia, North Carolina, and South Carolina that the President lacked the power to make treaties.

The Framers took for granted that the power to terminate treaties belonged to the same power that made treaties: the president and Senate together. (See Jay and Madison, p. 1 above.) "It seems evident, therefore, that the Framers simply assumed what **John Calhoun** later characterized as a basic rule of legal construction: 'when a power is given to do an act, the power is also given to repeal it.'" The Constitution contains no provision for repealing statutes.

In December 1854, **President Pierce** recommended giving the required notice to terminate a treaty of commerce and navigation with Denmark. In March 1855, the Senate adopted a resolution to do so, pursuant to which the president gave notice to Denmark. **Senator Sumner** questioned the authority of the termination; he said it would be equivalent to the repeal of the law by the Senate alone. The question was referred to the **Senate Committee on Foreign Relations**, which reported (April 7, 1856) that "the committee entertains no doubt that where the right to terminate a treaty ... is reserved in the treaty itself, such discretion resides in the President and Senate."

* In "The Framers and Treaty Termination: A Matter of Symmetry," *Arizona State Law Journal,* 1981:891. Adler also wrote the book *The Constitution and the Termination of Treaties,* University of Utah, 1982. He was then a teaching fellow there and more recently has been a professor of political science at Idaho State University.

In Adler's view, "If we are to understand the meaning of the Constitution, the intent of the Framers must be our guide.... To secure the ratification of the small states it was essential that all states had an equal voice in the treaty power, so that their interests would not be ignored or sacrificed.... It seems then wholly unrealistic to believe that the Framers would have unbalanced this carefully drafted system by not providing that the treaty-making power included the power to terminate treaties."

Adler said the Supreme Court's inaction in *Goldwater v. Carter,* which challenged the President's unilateral termination of the Taiwan treaty, repudiated the Framers' concerns and disregarded the court's duty, expressed in *Marbury v. Madison* (1803), "to say what the law is."

Bruce Ackerman* says President George W. Bush is on weak constitutional ground in terminating a treaty (ABM Treaty) under his supposed power to conduct foreign affairs, though "no such power is explicitly delegated to him by the constitution."

The question first came up in 1798, when war with France threatened. Congress passed and President John Adams signed an act of Congress to "Declare the Treaties Heretofore Concluded with France No Longer Obligatory on the United States." The next case was in 1846, when President James K. Polk asked Congress for authority to withdraw from the Oregon Territory Treaty with Britain, and Congress responded with a joint resolution.

A big change came in 1978: President Jimmy Carter unilaterally declared the treaty between the U.S. and the Republic of China (Taiwan) ended. In a legal brief against Carter's action, Senator Goldwater warned against "a dangerous precedent for executive usurpation of Congress's historically and constitutionally based powers." The statement was co-signed by Senators Orrin Hatch, Jessie Helms, and Strom Thurmond, all of whom still serve. The Supreme Court, by 6-3, declined to decide the merits. But it did not endorse unilateral presidential action, and Justice (now Chief Justice) Rehnquist expressly left the matter for resolution "by the executive and legislative branches." Seven new justices have since joined the nine-member court, so no one can tell how a new case would turn out.

"... The Constitution makes it [a treaty] part of the 'supreme law of the land' just like a statute. Presidents can't terminate statutes they don't like. They must persuade both houses of Congress to join in a repeal. Should the termination of treaties operate any differently?

"... For American's friends, the crucial question is how this country will exercise its dominance. Will its power be wielded by a single man, unchecked by the nation's international obligations or the control of Congress?...

"Congress should proceed with a joint resolution declaring that Mr. Bush cannot terminate treaty obligations on his own."

* Professor of constitutional law, Yale University, in "Treaties Don't Belong to Presidents," *The New York Times* op ed, Aug. 29, 2001; and "Bush Can't Operate as a One-Man Act," Internet commentary, Dec. 2001, from Yale.

2-1-02

From the transcript of the 1979 hearings:

TREATY TERMINATION

HEARINGS

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. RES. 15, RESOLUTION CONCERNING MUTUAL DEFENSE TREATIES

APRIL 9, 10 AND 11, 1979

Printed for the use of the Committee on Foreign Relations

U.S. GOVERNMENT PRINTING OFFICE

43-966 O WASHINGTON : 1979

5381-13

ABM Treaty still lives, say congressmen who sue to undo its 'unconstitutional' knifing by Bush without OK of Congress

A WALL news report

Although President George W. Bush may consider the Anti-Ballistic Missile Limitation Treaty of 1972 (ABM Treaty) dead as of the 13th of June, 33 members of Congress headed by Rep. Dennis J. Kucinich (D-OH) maintain that it is still legally alive.

A lawsuit was filed against President Bush, Secretary of State Colin L. Powell, and Secretary of Defense Donald H. Rumsfeld on June 11. Congressmen asked the U.S. District Court in Washington, DC, to declare Bush's action in terminating the treaty without congressional authorization unconstitutional. Bush's six-month termination notice to Russia expired as June 13 arrived.

"This is a case arguing that the president does not have the authority under the Constitution to terminate a treaty without a majority of both houses of Congress or two-thirds of the Senate," said Peter Weiss, the lead attorney, a constitutional lawyer of New York City, in a telephone conversation.

The 33 plaintiffs, all representatives, include nine from California, four from New York, and three each from Illinois and Ohio. All are Democrats except for one independent, from Vermont.

The Californians are Rep. Bob Filner of Chula Vista; Reps. Hilda Solis, Maxine Waters, and Dianne Watson, all of Los Angeles; Rep. Lynn Woolsey of Marin and Sonoma Counties; Rep. Sam Farr of Monterey, Salinas, and Santa Cruz; and Reps. Barbara Lee, George Miller, and Fortney H. (Pete) Stark, all from the Oakland-East Bay area. (Others are listed below.)

Rep. Kucinich, the lead plaintiff, from Cleveland, Ohio, has introduced bills to ban "the weaponization of space" and to establish a U.S. "Department of Peace."

Senators such as Russell D. Feingold (D-WI) who had thought of joining the suit were forbidden to do so by the Senate Select Committee on Ethics, headed by Senator Harry Reid (D-NV). The reason given had to do with legal services that the lawyers had offered without charge

The complaint

Pointing out that the issue of presidential termination of treaties has never been decided by the courts, the "Complaint for Declaratory Relief" calls the issue "of supreme importance to the constitutional framework of this nation as well as the treaty-based system of international law."

The complaint refers to "ample evidence that the Framers intended Congress to have a role in the termination as well as the making of treaties."

It charges that President Bush's "proposed termination" of the ABM Treaty on his own violates the treaty power in Article II, Section 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."

Furthermore, the complaint charges, "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."

The plaintiffs seek a court order with two main parts:

"(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."

Groups in California initiated movement

The suit is the latest development in a movement spearheaded by two groups in northern California. The War and Law League (WALL -- www.warandlaw.homestead.com) had taken a position identical to that of the plaintiffs in communications with Congress, starting in mid-December. WALL and the Nuclear Peace Action Group, centered in San Francisco and Mendocino respectively, secured nearly 5,000 names on petitions.

Most of WALL's petitions, addressed to Senators Barbara Boxer and Dianne Feinstein (an ABM Treaty supporter), were delivered to them in Washington June 5 by Harry A. Scott of Hayward, Calif., WALL's treaty committee chairman. They were headed, "Stop Bush's bid for one-man rule! A president cannot lawfully scrap treaties on his own." Seeking a resolution affirming congressional treaty authority, or at least Senate hearings, WALL argued:

- The Constitution would not vest absolute power in one man to disapprove a treaty when it requires a two-thirds vote of the Senate to approve the treaty.
- For a president alone to do away with a treaty is like repealing a statute without an act of Congress, because a treaty is federal law under Article 6 of the Constitution.
- If Bush withdraws from the ABM Treaty on his own, what stops him from withdrawing from any other treaties, and of what value will America's word be any more?

The Mendocino group, headed by Dr. Carol Wolman, a psychiatrist, issued unaddressed petitions, both on line and on paper, that called for the Senate to vote on the ABM Treaty.

GOP senators sued "dictatorial" president

The Constitution is silent on termination of treaties -- but then it says nothing about repeal of statutes either, something no president could get away with.

Pursuant to acts of Congress, or sometimes, Senate resolutions, presidents declared some 50 treaties terminated, starting in 1798 when Congress passed and President John Adams signed a bill to abrogate the treaties with France. Jefferson, Madison, and seven federal judges agreed that some congressional action was needed to end a treaty.

In 1979, 25 members of Congress headed by the late Senator Barry Goldwater sued President Jimmy Carter over his termination of the mutual defense treaty with Taiwan after he recognized the Communist government of China.

The District Court in Washington, DC, agreed with Goldwater that some congressional action -- either a majority vote of both houses or two-thirds of the Senate -- was needed to terminate a treaty. The Court of Appeals there reversed the ruling. The Supreme Court, evading the constitutional question and issuing no majority opinion, vacated both decisions and ordered the District Court to dismiss the case. The legal issues remain unsettled.

Goldwater said, at a hearing in 1979, that to allow a president to withdraw from a treaty on his own was giving him "virtually a dictator's power." Senators Hatch, Helms and Thurmond were plaintiffs in Goldwater vs. Carter and still serve in the Senate today -- but they support now what they opposed then.

Is Bush a "Party"?

The ABM Treaty provided that either "Party" might give a six-month notice of termination if "extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests." But it specified "The United States of America" -- not the president of the USA -- as one of the two "Parties." Indeed, it provided that the treaty would be subject to ratification "in accordance with the constitutional procedures of each Party."

In 1972 the ABM Treaty was signed by President Richard Nixon and Leonid Brezhnev and approved by the Senate by a vote of 88 to 2. George W. Bush gave notice of termination on Dec. 13, 2001, without a vote of either the Senate or the House of Representatives.

The new treaty on nuclear weapons stockpiles that Bush recently signed with President Putin of Russia permits termination on only three months notice and fails to specify who in the U.S.A. decides. The Nuclear Peace Action Group and WALL want the Senate to insist on a change in that provision when it receives the treaty for its consent.

Other plaintiffs and lawyers

The other 23 members of the House of Representatives participating in the lawsuit are listed below by state.

ALABAMA -- Earl F. Hilliard

FLORIDA -- Alcee L. Hastings

GEORGIA -- Cynthia McKinney

HAWAII -- Patsy T. Mink

ILLINOIS -- Lane Evans, Jesse Jackson, Jr., Janice D. Schakowsky

MASSACHUSETTS -- John W. Olver

MICHIGAN -- John Conyers, Jr., Carolyn C. Kilpatrick

MINNESOTA -- James L. Oberstar

MISSOURI -- William L. Clay, Jr.

NEW YORK -- Maurice D. Hinchey, Gregory W. Meeks, Jerrold Nadler, Edolphus Towns

OHIO -- Stephanie Tubbs Jones, Marcy Kaptur

OREGON -- Peter A. De Fazio

TEXAS -- Sheila Jackson Lee

VERMONT -- Bernard Sanders (ind.)

WASHINGTON -- Jim McDermott

WISCONSIN -- Tammy Baldwin

There were 31 plaintiffs when the suit was filed. Reps. Dianne Watson of California and Sheila Jackson Lee of Texas joined later.

Weiss, the attorney, and colleague John Burroughs belong to the Lawyers Committee on Nuclear Policy, sponsor of the lawsuit along with the Center for Constitutional Rights; both groups have headquarters in New York City. Julius Lobel and Michael Ratner of the center are assisting in the suit.

Other attorneys for the plaintiffs are Bruce Ackerman, professor of law and political science at Yale University; Edward A. Aguilar of Philadelphia, with the Lawyers Alliance for World Security; James R. Klimaski of the DC bar; and Jeremy Manning of New York City.

June 21, 2002

FOR IMMEDIATE RELEASE: JANUARY 1, 2003

CONTACT: John Burroughs, Lawyers' Committee on Nuclear Policy (212) 818-1861
Jacqueline Cabasso, Western States Legal Foundation (510) 839-5877

JUDGE ALLOWS BUSH'S WITHDRAWAL FROM ABM TREATY TO STAND; LEAVES OPEN POSSIBILITY OF FUTURE CONGRESSIONAL ROLE IN TREATY TERMINATION

WASHINGTON, DC -- In a December 30, 2002 decision, Judge John Bates of the U.S. District Court ruled that lead plaintiff Representative Dennis Kucinich and 31 other Members of the House of Representatives have no standing to challenge President Bush's withdrawal from the Anti-Ballistic Missile (ABM) Treaty without congressional approval. He also ruled that the case presents a "political question" not suitable for resolution by the courts.

In a 31-page written opinion, Judge Bates left open the possibility that in the future, Congress as a whole may be able to invoke the aid of the judiciary in a constitutional dispute with the President, noting that in this case, "there is no claim that Congress, as an institution, has asserted its role in the treaty termination process."

Judge Bates did not rule on the merits of whether the Constitution requires a president to obtain congressional approval of termination of a treaty, holding that this is a matter to be resolved by the executive and legislative branches through the political process with courts only a possible "last resort."

According to plaintiffs' lead counsel, **Peter Weiss** of the Lawyers' Committee on Nuclear Policy in New York City, "Judge Bates' decision in the ABM Treaty termination case was foreshadowed by his recent decision in *Walker v. Cheney* holding that a congressional agency, the General Accounting Office, has no standing to obtain a court order compelling disclosure of information concerning meetings of the energy task force chaired by the Vice-President." Weiss continued, "The ABM Treaty case indicates that, contrary to the opinion of many members of Congress, the President does not necessarily have an absolute right to terminate treaties on his own. However, both decisions place a heavy burden on Congress to provoke full-blown political crises in order to obtain from the courts rulings interpreting the Constitution, which is, after all, the business of the courts. Such 'institutional' challenges are unlikely to occur at any time; they are virtually impossible when, as now, the President's party controls Congress." Weiss concluded, "Thus both decisions represent a considerable advance toward the imperial presidency and a commensurate retreat from constitutional government."

John Burroughs, executive director of the Lawyers' Committee on Nuclear Policy and one of plaintiffs' attorneys, added: "While Judge Bates refused to decide the constitutional question before him, he did recognize that the Supreme Court's 1979 decision in *Goldwater v. Carter* concerning President Carter's unilateral withdrawal from the Taiwan Mutual Defense Treaty does not foreclose Congress from asserting its constitutional role in the treaty termination process."

Burroughs concluded: "Congress should now make clear that henceforth the President must seek its consent to termination of any treaty consistent with historical practice in the vast

majority of treaty terminations. Future decisions regarding matters as momentous as withdrawal from the ABM Treaty must involve Congress if the United States is to remain a democracy. The framers of the Constitution rejected the monarchical system of government and did not intend that a president could rule by fiat."

According to plaintiffs' co-counsel **Michael Veiluva** of the Western States Legal Foundation in Oakland, California: "The Bush administration withdrew from the ABM Treaty, refuses to seek Senate approval of the Comprehensive Nuclear Test Ban Treaty, negotiated an arms reduction 'treaty' with Russia that does not require the destruction of a single nuclear warhead or delivery system and contains no verification provisions, blocked adoption of a verification protocol to the Biological Weapons Convention, and is working to undermine the International Criminal Court. Judge Bates has passed up an important opportunity to put the United States back on the track of upholding the rule of law, at home and abroad."

In a December 30 statement responding to Judge Bates' decision, Representative Kucinich said, "The Administration is undermining both national and international security by taking a wrecking-ball to the Constitution and international agreements."

Kucinich v. Bush, filed on June 11, 2002, names as defendants President George W. Bush, Secretary of State Colin Powell, and Secretary of Defense Donald Rumsfeld. It sought a decision on whether or not the Constitution permits the President to terminate the ABM Treaty without obtaining the consent of Congress. The House Members bringing the lawsuit are: **Dennis Kucinich**, D-10-Ohio; **James Oberstar**, D-8-MN; **Patsy Mink**, D-2-HI; **Tammy Baldwin**, D-2-WI; **Peter DeFazio**, D-4-OR; **John Olver**, D-1-MA; **Sam Farr**, D-17-CA; **Barbara Lee**, D-9-CA; **Maurice Hinchey**, D-26-NY; **John Conyers**, D-14-MI; **Hilda Solis**, D-31-CA; **Janice Schakowsky**, D-9-IL; **Alcee Hasting**, D-23-FL; **Fortney (Pete) Stark**, D-13-CA; **Bernard Sanders**, I-1-VT; **Earl Hilliard**, D-7-AL; **Carolyn Kilpatrick**, D-15-MI; **Lane Evans**, D-17-IL; **Jim McDermott**, D-7-WA; **Bob Filner**, D-50-CA; **Cynthia McKinney**, D-4-GA; **George Miller**, D-7-CA; **Lynn Woolsey**, D-6-CA; **William Lacy Clay**, D-1-MO; **Edolphus Towns**, D-10-NY; **Maxine Waters**, D-35-CA; **Jesse Jackson**, Jr., D-2-IL; **Gregory Meeks**, D-6-NY; **Marcy Kaptur**, D-9-OH; **Jerrold Nadler**, D-8-NY; **Stephanie Tubbs Jones**, D-11-OH; and **Sheila Jackson-Lee**, D-18-TX.

They are represented by **James Klimaski**, Klimaski & Grill, P.C. Washington, DC; **Peter Weiss** and **John Burroughs**, Lawyers' Committee on Nuclear Policy, New York, NY; **Bruce Ackerman**, Sterling Professor of Law and Political Science, Yale Law School, New Haven CT ; **Jeremy Manning**, Esq., New York, NY; **Jules Lobel** and **Michael Ratner**, Center for Constitutional Rights, New York, NY; **Edward Aguilar**, Philadelphia Lawyers Alliance for World Security, Philadelphia, PA; and **Michael Veiluva**, Western States Legal Foundation, Oakland, CA.

Judge Bates' decision and the main papers filed in the case are available on-line, in pdf format, at http://www.lcnp.org/disarmament/ABMlawsuit/indexoflinks.htm

WALL Note: There was no appeal. The ruling stands.