IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAN L. BURTON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	89-2029 (TPJ)
JAMES A. BAKER III, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this action, four Members of Congress ask the Court to declare that a "side agreement" between the Bush Administration and certain congressional leaders regarding aid to the Nicaraguan Resistance is unconstitutional and of no effect. Plaintiffs allege that defendants reached this agreement as a "precondition" to the enactment of Public Law 101-14, which authorizes the President to obligate up to $49,750,000 in humanitarian assistance to the Nicaraguan Resistance. According to the complaint, the agreement provides that defendants will not obligate the assistance after November 30, 1989, without the unanimous written consent of designated congressional leaders.

Plaintiffs, two of whom voted in favor of the authorization bill and two of whom voted against it,[1] contend that the

[1] According to the complaint, ¶ 5, plaintiffs Douglas and Smith voted against the bill. Plaintiffs' summary judgment motion, however, indicates that only plaintiff Douglas voted against the bill. Plaintiffs' Motion at 25, ¶ 33. As this motion seeks primarily dismissal, defendants will assume the truth of the complaint's allegations.

agreement amounts to legislation enacted without compliance with constitutionally-mandated procedures. Specifically, they maintain that the agreement creates a "legislative veto," in violation of the Constitution's provisions requiring consideration of legislation by both Houses of Congress and presentment to the President.[2]

Plaintiffs' claim cannot overcome a number of hurdles. First, plaintiffs lack standing to bring the action. While they assert that their votes in connection with P.L. 101-14 have been nullified, their allegations belie this conclusion and reveal that they have suffered no cognizable injury. Second, even if plaintiffs had standing, their claim represents a nonjusticiable political question. They seek judicial review of a purely political agreement in an area -- foreign policy -- traditionally committed to the responsibility of the political branches.

Finally, even if the claim were reviewable, it fails on the merits. The authorization statute and its legislative history demonstrate that what plaintiffs refer to as a "side agreement" is not, and does not purport to be, a legislative enactment with the force and effect of law. Rather, it is a political accommodation in which the Executive Branch has voluntarily

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[2] Plaintiffs do not request a declaration that the entire authorization act is unconstitutional. Rather, they seek only to invalidate the "side agreement." Complaint ¶ 12.

Defendants also note that plaintiffs' motion for summary judgment fails to comply with Local Rule 108(h), which requires the filing of a separate concise statement of material facts not in dispute.

represented to Congress that it will consult with, and defer to, designated congressional leaders on certain issues within the President's discretion. Since this representation is not legally binding -- indeed, it has no legal effect -- it cannot possibly constitute a "legislative veto." In short, there is no law to challenge here.

BACKGROUND

On April 18, 1989, Congress enacted P.L. 101-14 ("the Act") "to implement the Bipartisan Accord on Central America between the President and the Congress signed on March 24, 1989." Pub. L. 101-14, § 1. 103 Stat. 37 (1989). The Act provides that "[t]he President may transfer to the Agency for International Development, from unobligated funds . . . up to $45,750,000, to provide humanitarian assistance to the Nicaraguan Resistance, to remain available through February 28, 1990." [3] Id. § 2(a)(1). Section 11 of the Act obligates the Secretary of State to "consult regularly with and report to the Congress" in connection with the use of the authorized assistance and other peace efforts in Central America. Id. § 11.

The Bipartisan Accord referred to in the statute is not part of the Act itself. The Accord is set forth in the House Report accompanying the bill that became P.L. 101-14. H. R. Rep. No. 23, 101st Cong., 1st Sess., Pt. 1, at 2. In general, the Accord

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[3] The Act also authorizes the President to obligate up to $5,000,000 for operating expenses necessary to carry out the Act. Those funds will remain available through March 31, 1990. Id. § 2(a)(3).

states the broad objectives of "[t]he Executive and the Congress" in achieving peace and democratization in Central America, and provides that the Executive will propose and congressional leaders will act to extend current levels of humanitarian assistance to the Nicaraguan Resistance. Signed by the President and several congressional leaders, the Accord includes the following paragraph:

> We also endorse an open, consultative process with bipartisanship as the watchword for the development and success of a unified policy towards Central America. The Congress recognizes the need for consistency and continuity in policy and the responsibility of the Executive to administer and carry out the policy, the programs based upon it; and to conduct American diplomacy in the region. The Executive will consult regularly and report to the Congress on progress in meeting the goals of the peace and democratization process, including the use of assistance as outlined in this Accord.

Id. Nowhere does the Accord purport to confer authority upon congressional leaders to overrule a decision by the Executive to obligate funds authorized for aid to the Resistance under the proposed legislation.

Also set forth in the House Report under the heading "background documents" is a draft letter from the Secretary of State to certain congressional leaders. It acknowledges the authorization of aid to the Nicaraguan Resistance pursuant to the Bipartisan Accord and states that the aid "will not be obligated beyond November 30, 1989, except in the context of consultation among the Executive [and designated congressional leaders] and only if affirmed via letter from [those leaders]." Id. at 4. It

is evidently this statement, in a draft letter from the Secretary of State to individual Congressmen, that forms the basis for plaintiffs' complaint.[4]

ARGUMENT

I. This Action Does Not Present A Justiciable Case Or Controversy

A. Plaintiffs' Allegations Fail To Establish "Congressional Standing."

As with any other litigants, Members of Congress may invoke the authority of the federal courts only if their claim presents a case or controversy within the meaning of Article III of the Constitution. See Moore v. United States House of Representatives, 733 F.2d 946, 950 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); Riegle v. Federal Open Market Committee, 656 F.2d 873, 877 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981); Harrington v. Bush, 553 F.2d 190, 204 (D.C. Cir. 1977). In order to meet Article III's standing requirement, "the party who invokes the court's authority [must] 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' . . . and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982) (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and

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[4] The letter was eventually finalized and sent to the designated congressional leaders. A certified copy is attached as Exhibit 1.

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976)). Applied to suits by federal legislators suing as such, the standing doctrine requires that the "alleged injury [be] 'specific and cognizable,' arising out of an interest 'positively identified by the Constitution.'" United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) (quoting Moore, 733 F.2d at 951).

Under this standard, a Congressman's allegations must demonstrate that the challenged action has effectively nullified his previously cast vote on a specific piece of legislation, depriving him of his right to participate in the legislative process.[5] In other words, standing exists only if "disposition of the substantive issue will determine the effectiveness vel non

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[5] In Vander Jagt v. O'Neill, 699 F.2d 1166, 1168 (D.C. Cir. 1983) cert. denied, 468 U.S. 823 (1984), the District of Columbia Circuit stated in dicta that the Riegle court repudiated the distinction between congressional disenfranchisement and diminished legislative effectiveness for purposes of determining whether a legislator has suffered a legally cognizable injury. However, a review of the Riegle opinion discloses no such repudiation. Indeed, the finding of standing in Riegle rested on the plaintiff's allegation that the defendants "deprive[d] him of his constitutional right to vote in determining the advice and consent of the Senate to the appointment of [certain federal officials.]" Riegle, 656 F.2d at 877. Moreover, subsequent decisions of this circuit have ignored the Vander Jagt dictum, finding injury only when the plaintiff has been disenfranchised. See, e.g., United Presbyterian Church, 738 F.2d at 1381-82 ("[s]tanding does not exist . . . where the legislator's grievance consists of a 'generalized complaint that his effectiveness is diminished by allegedly illegal activities taking place outside the legislative forum'"); Moore, 733 F.2d at 951 ("[i]t is important to note that the injury claimed here is to the members' rights to participate and vote on legislation in a manner defined by the Constitution")(emphasis added). Thus, disenfranchisement remains the standard for establishing injury for purposes of congressional standing.

of [the plaintiff's] actions as a legislator with respect to the legislation in question." Kennedy v. Sampson, 511 F.2d 430, 433 (D.C. Cir. 1974); see also Moore, 733 F.2d at 951 (allegation of "deprivation of an opportunity to debate and vote on the origination" of specific, previously-enacted legislation sufficient allegation of injury).

This case contrasts sharply with Kennedy and Moore. Disposition of the substantive issue will not determine the effectiveness or ineffectiveness of plaintiffs' votes in favor of P.L. 101-14.[6] Those votes are fully effective. The authorization bill has become law, conferring upon the President discretion to obligate funds for aid to the Nicaraguan Resistance. The President retains the full measure of this legal authority; nothing in the Bipartisan Accord or the letter from the Secretary of State is to the contrary, because neither of those documents are legally binding.

A comparison of plaintiffs' allegations with the Act and its legislative history reveals that plaintiffs are challenging not an extra-constitutional attempt to control the President's actions, but the fact that the President may execute legislation in a manner they find disagreeable. By suggesting that a

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[6] The complaint alleges that the "side agreement" substantially nullified plaintiffs "votes for Public Law 101-14." Complaint at ¶ 10 (emphasis added). Presumably this is a concession that the plaintiffs who voted against the bill cannot possibly have standing. Their votes were effectively nullified at the outset, not by defendants but by the majority of their colleagues who voted against them. Obviously, these votes cannot be rendered effective by a declaration that the "side agreement" pertaining to P.L. 101-14 is unconstitutional.

"congressional veto" of any further obligation of aid to the Nicaraguan Resistance invalidates their vote, plaintiffs erroneously equate a vote for P.L. 101-14 with a vote for obligation of the authorized funds. Thus, plaintiffs imply, any failure to obligate the funding nullifies their votes. Of course, the defect in this theory is that plaintiffs voted not to obligate funding for aid to the Nicaraguan Resistance, but to confer discretion on the President to obligate funds for such a purpose. While the discretionary or mandatory nature of the duty conferred on the President is not relevant to whether the "side agreement" constitutes a legislative veto, the fact that plaintiffs voted merely to allow funding, rather than guarantee it, means that the President's exercise of statutory discretion not to obligate the funding does not nullify plaintiffs' vote.

Having participated in the process that vested discretion in the President, plaintiffs now argue that they have been injured because the President has indicated he will exercise that discretion in a particular manner. This amounts to a quarrel with the manner in which the President intends to fulfill his constitutional duty to execute the law. The cases are clear, however, that a Congressman's contention that the law is not being properly executed is insufficient to constitute an injury for purposes of standing. See, e.g., American Federation of Gov't Employees v. Pierce, 697 F.2d 303, 305 (D.C. Cir. 1982) (Congressman's interest in execution of the laws is generalized

grievance about the conduct of government insufficient to support claim of standing).

B. Even If Plaintiffs' Allegations Meet The Article III Requirements For Standing, The Court Should Exercise Its Discretion To Dismiss The Action.

In Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981), the District of Columbia Circuit acknowledged that actions by Members of Congress seeking to vindicate their governmental powers present special separation of powers concerns. The Riegle court concluded that these concerns "are best addressed independently of the standing issue." Id. at 879. The court ruled that separation of powers issues should be treated in a "doctrine of circumscribed equitable discretion." Id. at 881.

Under this doctrine, sometimes termed "remedial discretion," see, e.g., Moore, 733 F.2d at 954, a court should dismiss an action when "the plaintiff's dispute appears to be primarily with his fellow legislators." Riegle, 656 F.2d at 873. Stated another way, a court should not hear "actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process." Barnes v. Kline, 759 F.2d 21, 28 (D.C. Cir. 1985) vacated as moot sub nom. Burke v. Barnes, 107 S. Ct. 734 (1987). Such a plaintiff should seek "relief from his fellow legislators through the enactment, repeal or amendment of a statute." Riegle, 656 F.2d at 881.

While the Supreme Court has not spoken definitively on this Circuit's equitable discretion doctrine, the Court has expressed analogous principles. Just last Term, the Court reiterated that district courts should be especially exacting in applying principles of equity and justiciability when separation of powers issues are implicated:

> [W]e emphasize that the District Court should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so. Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings. On remand, the District Court should decide first whether the controversy is sufficiently live and concrete to be adjudicated and whether it is an appropriate case for equitable relief.

American Foreign Service Association v. Garfinkel, 109 S. Ct. 1693, 1698 (1989) (citations omitted).

These principles--both the Circuit's doctrine of remedial discretion and the Supreme Court's admonition to scrupulously avoid unnecessary decision of separation of powers issues--apply with particular force here. Plaintiffs' true quarrel is not with the legislation, but with a political understanding between the Executive Branch and the congressional leadership. Plaintiffs were unable to persuade their colleagues that the compromise was imprudent and now seek to have it invalidated, while preserving the legislation itself. Rather than achieve their political goals by political means, plaintiffs seek to accomplish them through litigation. This is precisely what the Riegle doctrine

seeks to avoid. "[A]n internally available remedy to Members of Congress means that it would be an abuse of discretion to entertain the action."[7] Humphrey v. Baker, 848 F.2d 211, 215 (D.C. Cir. 1988), cert. denied, 109 S.Ct. 491 (1989).

C. Plaintiffs' Claim Presents A Nonjusticiable Political Question.

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230 (1986). This doctrine, like the doctrine of "remedial discretion," is rooted in separation of powers principles. See Baker v. Carr, 369 U.S. 186, 210 (1962) ("it is the relationship between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question'").

The separation of powers concerns underlying the political question doctrine -- and therefore judicial hesitation to intervene -- are especially strong in the context of foreign affairs. As the Supreme Court has stated:

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[7] There is no doubt that an internal legislative remedy remains available to plaintiffs. Had plaintiffs been able to mobilize sufficient political support for aid legislation, unaccompanied by any political compromise, the "side agreement" would have been obviated. No legal barrier impairs plaintiffs' ability to return to the political arena to achieve this result. The fact that it may be politically difficult to enact such aid legislation simply illustrates that plaintiffs are attempting to substitute a judicial ruling for the political process.

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948); see also Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952) (matters "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [are] so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (propriety of what may be done by the political branches of government in conducting foreign affairs "is not subject to judicial inquiry or decision"); Atlee v. Laird, 347 F. Supp. 689, 696 (E.D. Penn. 1972) (three judge court), aff'd without opinion, 411 U.S. 921 (1973) ("when the conduct of foreign relations of the country is at stake, courts will be more hesitant to consider certain issues on the merits than when internal operations are involved").

These principles render plaintiffs' claim nonjusticiable. Plaintiffs are attacking the Secretary of State's letter to congressional leaders in connection with the statute and, perhaps

to lesser extent, the Bipartisan Accord on Central America between the President and Congress. It is apparent from the face of these documents, however, that they represent the type of purely political, foreign policy decision-making over which the courts may not exercise control.

The Bipartisan Accord is an expression of cooperation between the Executive and Legislative Branches of government regarding the conduct of the country's foreign policy in Central America. Indeed, the Bipartisan Accord begins with the following sentence: "The Executive and the Congress are united today in support of democracy, peace, and security in Central America." It then proceeds to set forth the aims and intentions of the United States in connection with policy in that region. Similarly, the letter from Secretary Baker to Congress manifests the intention of the Executive Branch to exercise its discretion under the Act in the spirit of the Bipartisan Accord. Nothing could be a more obvious product of the decision-making process that the Supreme Court has described as "delicate, complex and involv[ing] large elements of prophecy." Chicago & Southern Airlines, 333 U.S. at 111. And yet this, the substantive product of political foreign policy decisions, is what plaintiffs seek to invalidate. Surely this falls within realm of controversies that have "long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." Id.

II. The Challenged Agreement Is Not A Legislative Act And Therefore Cannot Constitute A Violation Of Constitutionally Mandated Lawmaking Procedures.

The thrust of plaintiffs' claim is that the agreement between the Executive Branch and Congress violates separation of powers principles. Specifically, plaintiffs contend that the agreement creates an unconstitutional "legislative veto;" an exercise of legislative power through procedures outside those prescribed in Article I, section 7 of the Constitution. Complaint ¶ 9.[8] Controlling decisions of the Supreme Court and

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[8] In their motion for summary judgment, plaintiffs also suggest that the agreement is an illegal impoundment of funds. Plaintiffs' Motion for Summary Judgment at 21, ¶ 28. With virtually no elaboration, they contend that the agreement violates the Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 681, et seq., and impoundment principles developed in the case law.

This contention is easily refuted. First, plaintiffs' Impoundment Control Act claim is in error because no private right of action exists under that statute. See Public Citizen v. Stockman, 528 F. Supp. 824, 827 (D.D.C. 1981) ("Congress did not intend to create a private right of action to police transgressions of the [Impoundment Control] Act by the executive"); Rocky Ford Housing Authority v. United States Department of Agriculture, 427 F. Supp. 118, 134 (D.D.C. 1977) ("Congress did not intend the Act to create a claim upon which relief can be granted to individuals").

Second, a cursory examination of the aid authorization statute demonstrates the fallacy of plaintiffs' suggestion that the agreement here falls afoul of principles applied in State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973), and Local 2677 v. Phillips, 358 F. Supp. 60 (D.D.C. 1973). Those cases, like all impoundment cases, stand for the simple proposition that the Executive may not withhold funds in defiance of a mandatory legislative directive to expend them. Thus, any claim of illegal impoundment turns on whether the particular spending legislation in question confers discretion on the Executive to withhold expenditure of the authorized funds. See, e.g., Train v. City of New York, 420 U.S. 35 (1974); International Union v. Donovan, 746 F.2d 855 (D.C. Cir. 1984), cert. denied, 474 U.S. 825 (1985);

(continued...)

this Circuit, however, unequivocally refute plaintiffs' conclusion as a matter of law.

The leading Supreme Court decisions in this area are Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1982), and Bowsher v. Synar, 478 U.S. 714 (1985). In Chadha, the plaintiff challenged a statutory provision empowering either house of Congress, acting alone, to nullify a decision by the Attorney General, made pursuant to duly delegated authority, not to deport a particular alien. Like plaintiffs here, the plaintiffs in Chadha argued that the congressional action violated the Constitution's command that legislation may be enacted only through consideration and approval by both houses of Congress and presentment to, and approval by, the President.

The Chadha Court affirmed that the bicameral requirement and Presentment Clauses "serve essential constitutional functions." Chadha, 462 U.S. at 951. Accordingly, the "legislative power of the Federal Government [must] be exercised in accord with a single, finely wrought and exhaustively considered, procedure."

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[8](...continued)
Planned Parenthood Federation of America v. Agency for Int'l Development, 670 F. Supp. 538 (S.D.N.Y. 1987) aff'd in part, rev'd in part on other grounds, 838 F.2d 649 (2d Cir. 1988); Housing Authority v. U.S. Dep't of Housing and Urban Development, 340 F. Supp. 654 (N.D. Cal. 1972).

Here, the language of the Act leaves no doubt that the aid legislation empowers the Executive to exercise discretion over whether to obligate some, all or none of the authorized funding: "The President may transfer to the Agency for International Development . . . up to $49,750,000." Pub. L. 101-14 § 2, 103 Stat. 37 (emphasis added). The statute thus unmistakably delegates authority to the President to refrain from obligating the aid. Consequently, there can be no illegal impoundment.

Id. That is, legislative actions are valid only if they are considered and approved by both the House and Senate, and presented to, and signed by, the President.

Of course, implicit in this principle is the notion that only the exercise of federal legislative power is subject to the strictures of the bicameralism requirement and the Presentment Clauses.[9] As the Chadha Court put it, "we must . . . establish that the challenged action . . . is of the kind to which the procedural requirements of Art. I, § 7 apply." Id. at 952. The test for making this determination is whether the challenged action "had the purpose and effect of altering the legal rights, duties and relations of [parties within the executive branch and private parties], all outside the Legislative Branch." Id. Because the action at issue in Chadha "operated . . . to overrule the Attorney General and mandate Chadha's deportation," it qualified as an exercise of legislative power.

Bowsher presented a similar issue arising in a somewhat different posture. There, the plaintiff challenged a provision in the Gramm-Rudman-Hollings Act authorizing the Comptroller General to make decisions that would result in statutorily-mandated cuts in the federal budget. The plaintiffs argued that the provision violated separation of powers principles because it conferred executive power on an agent of the Legislative Branch.

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[9] "Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I." Id.

After concluding that Congress' removal power over the Comptroller General rendered him an officer of the Legislative Branch, the Court turned to whether the Comptroller General's functions under the statute represented "execution of the law in constitutional terms." Bowsher, 478 U.S. at 732-33. The Court answered this question in the affirmative:

> Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law. Under [the challenged statutory provision], the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.
>
> . . . [the statute] gives the Comptroller General the ultimate authority to determine the budget cuts to be made.

Id. Relying on Chadha, the Court then concluded that this assignment of the executive function to an agent of the legislative branch violates separation of powers principles:

> [A]s Chadha makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly--by passing new legislation. By placing the responsibility for execution of [the statute] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded in the executive function. The Constitution does not permit such intrusion.

Id. at 733-34.

Applying the principles developed in Chadha and Bowsher, plaintiffs' allegations fail to support their contention that the

agreement between the Executive Branch and Congress violates the separation of powers doctrine. Neither the Bipartisan Accord nor the letter from the Secretary of State comprises a "legislative act" within the meaning of that term in Chadha. Neither document has the "purpose and effect of altering the legal rights, duties and relations of persons . . . outside the Legislative Branch." Rather, these documents are purely political instruments.

That these documents were never intended to carry legally binding effect is demonstrated by the fact that they are not part of the statute.[10] Indeed, this distinguishes the present case from Chadha, Bowsher and every other case addressing an attack on governmental conduct as violative of separation of powers. Unlike this case, all such cases present a challenge to the constitutionality of a statute or actions taken pursuant to statute. See, e.g., Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1433 (9th Cir. 1989) (challenge to legislation exempting specific highway project from certain executive branch determinations); Pierce, 697 F.2d 303 (challenge to statute conferring powers on congressional committees); Consumer Energy Counsel v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982), aff'd, 463 U.S. 1216, reh. denied, 463 U.S. 1250 (challenge to

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[10] While the authorization act does state that its purpose is to implement the Bipartisan Accord, it does not purport to codify the terms of that agreement. In any event, the Accord contains no provision of the type plaintiffs describe and attack as constitutionally defective. While the Accord expresses an intention that the Executive will consult with Congress, it does not confer any authority upon individual legislators to overrule Executive decisions.

statutory one-house veto provision). Here, plaintiffs question authority purportedly created by a "side agreement." They mount no assault on any statutory provision at all.[11] Since plaintiffs do not challenge the exercise of legislative power, the mandatory constitutional procedures addressed in Chadha simply have no relevance. Consequently, the agreement does not run afoul of the teachings of Chadha.

Application of the analysis set forth in Bowsher leads to the same conclusion. For the same reason that they are not legislative acts, the Bipartisan Accord and the letter from the Secretary do not represent the retention by Congress of the power to execute legislation. As legally nonbinding, political accommodations, these instruments cannot confer on any official of the Legislative Branch the authority to "interpret[] a law enacted by Congress to implement the legislative mandate."

While political considerations might counsel the President to defer to congressional concerns, no legislative officer wields legal authority to constrain the exercise of the President's discretion to obligate funds pursuant to the aid legislation. As a matter of law, then, the President's executive discretion remains unfettered. Unlike the statute in Bowsher, the challenged agreement gives no legislative officers ultimate legal

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[11] As noted above, section 11 of the aid authorization act does impose upon the Secretary of State obligations to report and consult with Congress. But plaintiffs do not challenge this provision, nor could they. "[F]ormal reporting requirements . . . lie well within Congress' constitutional power." Chadha, 462 U.S. at 955 n. 19.

authority over the disposition of particular issues. And unlike Bowsher, therefore, the challenged conduct here is well within constitutional boundaries.

Like any other political compromise, the agreement plaintiffs attack is not legally binding. It is unenforceable, except politically.[12] Admittedly, a political understanding may have significant practical consequences. Indeed, political give-and-take is an integral part of the process by which the collective national will is translated into law.[13] By the same token, however, it is beyond question that the province of the judiciary does not extend to adjudication of the purely political aspects of the lawmaking process.

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[12] The particular political compromise challenged here may be distinguishable from many similar agreements in that certain representations are in writing. Obviously, however, that alone cannot give it the force of law. If this agreement is subject to constitutional attack, then so is every political understanding, written or otherwise.

[13] As commentators have recognized, this give-and-take process is itself the product of shared governmental power:

> Every textbook states and every legislative session demonstrates that . . . a President will often be unable to obtain congressional action on his terms or even halt action he opposes. The reverse is equally accepted: Congress often is frustrated by the President. Their formal powers are so intertwined that neither will accomplish very much, for very long, without the acquiescence of the other.

R.E. Neustadt, Presidential Power at 29 (1960)(emphasis added). Thus, far from vindicating separation of powers principles, plaintiffs' argument attacks a natural consequence of tripartite government-- political compromise.

Justice Scalia, then sitting on the District of Columbia Circuit, made precisely this point in rejecting a challenge to spending decisions made by the Secretary of Labor:

> The issue here is not how Congress expected or intended the Secretary to behave, but how it required him to behave, through the only means by which it can **(as far as the courts are concerned, at least)** require anything--the enactment of legislation. Our focus, in other words, must be upon the text of the appropriation.
>
> . . . .
>
> Since, as the above discussion shows, the Secretary was not restricted by law--**however much he may have been restricted by political practicality**--in allocating the funds in this appropriation among the various programs it covered, we have no jurisdiction to review his determinations.

International Union v. Donovan, 746 F.2d 855, 861-63 (D.C. Cir. 1984) (boldface added).[14]

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[14] In the omitted portion of the quoted passage, the court quoted with approval reports by the General Accounting Office ("GAO") and the House of Representatives explicitly acknowledging the distinction between legal and political restraints on the Executive's spending discretion. Of particular note was the GAO's observation that Congress may make the deliberate decision, as it has done in this case, to leave constraints on spending discretion out of the legislation:

> This is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in Committee reports. However, in order to preserve spending flexibility, it may choose not to impose these particular restrictions as a matter of law, but rather to leave it to the agencies to "keep the faith" with the Congress.

Id. at 861.

Similarly, this Court's jurisdiction in the present action is limited to an examination of the Executive's legal authority under the aid legislation. And that inquiry must end almost as soon as it begins because the statute unambiguously grants the Executive discretion to control obligation of the authorized funds. Any political limitation on that discretion is beyond this Court's power of review.

In effect, plaintiffs' argument would have the consequence of eliminating the distinction between legislation and political compromise. It is easy to imagine a multitude of circumstances in which the President, to persuade Congress to pass legislation he supports, would represent to congressional leaders his intentions with respect to execution of such proposed legislation. Plaintiffs would put the courts in the business of examining the validity of every such representation. In short, plaintiffs would extend the province of the judiciary beyond the role of saying what the law is, to the role of apportioning political power. Such a view is a radical departure from established separation of power principles.

CONCLUSION

Plaintiffs' objection to the "side agreement" between the Executive Branch and Congress is political, purely and simply. It arises from dissatisfaction over distribution of political power within the Legislative Branch. Not surprisingly, therefore, plaintiffs have suffered no legally cognizable injury. At bottom, they ask this Court to resolve a nonjusticiable

political question, and attack as unconstitutional a political understanding that does not carry the force and effect of law. The Court should therefore dismiss the action for lack of jurisdiction or for failure to state a claim upon which relief may be granted. Alternatively, defendants request summary judgment in their favor.

Respectfully submitted,

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