The 1972 U.S.-Soviet ABM Treaty: Cornerstone of Stability or Relic of the Cold War?

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NOTES

THE 1972 U.S.-SOVIET ABM TREATY: CORNERSTONE OF STABILITY OR RELIC OF THE COLD WAR?

FRAMING THE ISSUE

Background and Modern Relevance of the 1972 ABM Treaty Debate

With Cold War tensions running high in May of 1972, the United States and the Union of Soviet Socialist Republics signed a treaty limiting the development and deployment of anti-ballistic missile (ABM) systems. The ABM Treaty covered defensive systems designed to "shield" their respective nations from nuclear missile attack. In simple terms, the ABM Treaty allowed the United States and the Soviet Union to deploy missile shields only within a 150 kilometer radius of their respective capital cities—Washington, D.C. and Moscow. The thinking on both sides of the negotiation table in 1972 was that an effective missile shield for either the United States or the Soviet Union would remove the deterrent factor for the side possessing the shield, and allow that side to launch a nuclear "first strike" without fear of an effective response. This treaty


2. ABM Treaty, supra note 1, art. III (a). The treaty also allows for one "offsite" missile shield to protect intercontinental ballistic missile (ICBM) silos. Id. art. III (b).

3. See Jack Mendelsohn, History and Evaluation of the Role of Nuclear Weapons in the Cold War, 31 CASE W. RES. J. INT’L L. 609, 614 (1999) (noting that "[a]lternatively, if defenses were left unconstrained, if one side in a nuclear deterrent relationship sensed that the other
remained in effect throughout the remainder of the Cold War, and served as one of the major stumbling blocks for President Ronald Reagan’s Strategic Defense Initiative (SDI) (commonly known as Star Wars) in the 1980s. Although the Reagan Administration attempted to “reinterpret” the ABM Treaty, the conventional wisdom of the day was that the SDI program was a violation of the letter and spirit of the ABM Treaty. Ultimately, however, the ABM Treaty survived the assaults of the Reagan Administration when, for various reasons, the Administration abandoned its goal of developing the SDI.

Nearly ten years after the fall of the Soviet Union, in the waning months of the Clinton Administration, the debate over a national missile defense system for the United States resurfaced as a prominent part of America’s political landscape. President Clinton’s was attempting to neutralize its retaliatory forces, then that side would build up its retaliatory forces. In short, defenses against retaliatory forces risk provoking increases in nuclear weapons.”)


6. See David Hoffman & Charles Babington, *ABM Issue Unresolved as Summit Ends; Clinton, Putin Sign Pacts on Plutonium, Early Warning Unit*, Wash. Post, June 5, 2000, at A1 (noting that President Clinton was considering a national missile defense plan as a way of combating “the threat of missile attack by ‘rogue’ states, such as North Korea.” The Russian leadership vigorously opposed such a system as a violation of the ABM Treaty.); Roberto Suro, *Woes Undermined Missile Defense Cause; Clinton Weighed Test Failures, Development Delays in Addition to Diplomatic Costs*, Wash. Post, Sept. 3, 2000, at A4 (reporting on President Clinton’s decision to not go forward with the implementation of a national missile defense program, despite the firm support of the plan by Secretary of Defense William Cohen. Among the factors considered by the President was the unsuccessful test of the system in July of
position on the missile defense system essentially abdicated to his successor the decision concerning implementation.\footnote{Paisley Dodds, Putin, NATO Allies Praise Missile Defense Decision, WASH. POST, Sept. 2, 2000, at A15 (noting that President Clinton said that he “will leave it to the next president to decide when, or whether, to deploy a national missile defense”).}

Almost immediately upon George Walker Bush’s Inauguration as the forty-third President of the United States on January 20, 2001, his administration signaled a paradigm shift in United States policy concerning national missile defense.\footnote{See Michael R. Gordon, U.S. Tries Defusing Allies’ Opposition to Missile Defense, N.Y. TIMES, Feb. 4, 2001, at A1 (describing newly appointed Secretary of Defense Donald H. Rumsfeld’s trip to Munich, Germany to meet with European allies concerning the new administration’s defense policies).} In no uncertain terms, and only fourteen days after his inauguration, President George W. Bush’s Secretary of Defense Donald H. Rumsfeld announced that “[t]he United States intends to develop and deploy a missile defense designed to defend our people and forces against a limited ballistic missile attack, and is prepared to assist friends and allies threatened by missile attack to deploy such defenses.”\footnote{Id. (noting that Secretary Rumsfeld “described a missile defense as nothing less than a moral imperative”).} In the same breath, Secretary Rumsfeld noted “that the [G.W.] Bush Administration was determined to proceed with an antimissile defense of United States territory even if it could not overcome the objections from the Russians, the Chinese and the Europeans.”\footnote{Steven Lee Myers, Bush in First Step to Shrink Arsenal of U.S. Warheads, N.Y. TIMES, Feb. 9, 2001, at A1. The article also quotes a senior administration official who stated: You now have to manage the transition from the old world to the new world … [a]nd the new world, once we get there, would be one in which defense forces play an important role in keeping the peace, in which you have offensive forces that are properly sized and configured to deal with the new deterrent tasks, rather than the deterrent tasks of 1972.} Additionally, President Bush quickly ordered the Pentagon to devise a plan to implement a national missile defense shield, taking into account “diplomatic, technological and financial difficulties.”\footnote{Id.}

Thus, in the early months of the latter Bush Administration, national missile defense has been a priority on a scale not seen since the Reagan years. Six months after George W. Bush’s inauguration,
the Bush Administration has repeatedly declared its intention to go forward with a missile defense shield, with or without cooperation from Russia and the international community. Despite this unequivocal stance, the new administration has waffled on the question of the legal “binding/nonbinding” nature of the ABM Treaty. This question cuts to the heart of the question addressed in this Note, for if the treaty has lost its legitimate “force of law” there is no need for the United States to abrogate or withdraw from anything. As the new administration proceeds with the implementation of a national missile defense, it will be forced to deal decisively with the ABM Treaty.

This administration’s position on national missile defense has received a lukewarm reception from the larger international community, Russia and some traditional U.S. allies. French president Jacques Chirac stated publicly in January 2001 that an

12. The second Bush Administration could hardly be clearer on this issue, with top level executive officials (including the President himself) reaffirming the position publicly. See, e.g., Sharon LaFraniere, Rice Expects Russian Assent on Shield, WASH. POST, July 27, 2001, at A27 (quoting National Security Advisor Condoleezza Rice as stating “that the Bush administration will pursue its program to build missile interceptors whether or not Russia agrees to jointly withdraw from the 1972 Anti-Ballistic Missile Treaty”); David E. Sanger, A Day After Seeing Putin, A Harder-Line Bush Emerges, N.Y. TIMES, July 24, 2001, at A8 (quoting President Bush as stating that “[s]ince I feel it so strongly, if [the U.S. and Russia] can’t reach an agreement, we’re going to implement” the test for a U.S. missile defense system); Alan Sipress, U.S. Will Not Seek to Alter ABM Treaty, WASH. POST, July 25, 2001, at A13 (noting that, in the absence of an agreement with Russia regarding the implementation of a U.S. missile defense system, the United States is willing to “move ahead” unilaterally).

13. Gordon, supra note 8, at A1 (reporting that Secretary Rumsfeld “suggested that antimissile defenses could be reconciled with some arms control treaties, avoiding the bluntness of comments he made in Congressional hearings—and even on the plane flying to the conference—that the ABM treaty was an anachronism”) (emphasis added).

14. The central thesis of this Note addresses the question of whether the ABM Treaty remains viable as a matter of U.S. constitutional and international law. During the first seven months of the second Bush Administration, national missile defense has received wide treatment both by the media and by Bush officials themselves, and as a result, the issues surrounding national missile defense have evolved rapidly. This evolution will likely continue for at least the next two to three years; however, the legal status of the ABM Treaty itself will remain a crucial underlying issue for the foreseeable future. This issue would retain its importance even in the event of a unilateral U.S. withdrawal from the treaty, in that the Bush Administration would undoubtedly have to answer to a skeptical international community.


American missile defense "cannot fail to relaunch the arms race in the world."\(^{17}\) German defense minister Rudolf Scharping also publicly questioned the plan, and while visiting Moscow, urged that the ABM Treaty be preserved.\(^{18}\) For its part, Russia, until recently, vehemently opposed the idea of abandoning the ABM Treaty.\(^{19}\) The head of President Vladimir Putin’s security counsel, Sergei Ivanov, originally stated that the demise of the ABM Treaty would “result in the annihilation of the whole structure of strategic stability and create the prerequisites for a new arms race.”\(^{20}\) Moscow has since softened its stance somewhat, following a short meeting between Presidents Bush and Putin at the G-8 talks in Genoa, Italy, in July 2001.\(^{21}\) Following this meeting, President Bush announced that the two presidents had agreed to hold talks concerning the possible linkage of the abrogation of the ABM treaty and bilateral reductions of nuclear stockpiles.\(^{22}\)

Despite this announcement, after parting company the two presidents swiftly reiterated that there had been no major breakthroughs on the issue of national missile defense at the G-8 meeting.\(^{23}\) Consistent with this, the United States has signaled its determination to move forward. President Bush’s plan for a national missile defense gained momentum domestically after endorsements by such political luminaries as Joseph Lieberman, John McCain, and Henry Kissinger.\(^{24}\) As for the specter of another arms race with Russia, Secretary Rumsfeld summed up the U.S. position by noting that “[t]he idea of an arms race between the United States and Russia ought not to be front and center in our thinking . . . . [i]t is something that is a leftover, a relic in our thinking.”\(^{25}\) In this vein, the G.W. Bush Administration has attempted to reframe U.S.-Russian relations by repeatedly and publicly stating that the two

17. Id. at A8.
18. Id.
19. Id.
22. Id. The Bush Administration has been explicit about the fact that these talks with Russia are not “negotiations” in the Cold War sense, but rather simply “consultations.”
23. Id.
25. Id. (quoting Secretary of Defense Rumsfeld) (emphasis added).
nations are no longer enemies.\textsuperscript{26} Despite these assurances, the legal status of the ABM Treaty is a time-sensitive issue. As for when the U.S.'s development of a national missile defense system would actually clash with the ABM Treaty, a White House national security staff member stated in July 2001 that the shield's development would conflict with the treaty "in a matter of months, not years."\textsuperscript{27}

Parameters of the Discussion

This Note first defines the legal parameters within which George W. Bush and future presidents should consider the implementation of a national missile defense system. In framing the issue properly, the applicable international law governing treaties between sovereigns,\textsuperscript{28} as well as the U.S. Constitution's distribution of the power to make treaties on behalf of the nation,\textsuperscript{29} must be examined. Of equal importance is the historical context of the ABM Treaty itself,\textsuperscript{30} the legislative history of the Senate's ratification of the

\textsuperscript{26} David S. Broder, \textit{Bush's Bet on Russia}, WASH. POST, Aug. 1, 2001, at A17 (regarding the effect of the agreement reached in Genoa between Bush and Putin, Broder states that "[m]ost of all ... Bush got through to people with the simple, oft-repeated statement that 'Russia is not the enemy of the United States"'); \textit{For the Record: Bush's Bet on Russia}, WASH. POST, July 13, 2001, at A20 (commenting on an excerpt of remarks by National Security Advisor Condoleezza Rice, in which she states, in part, that President Bush "has also made clear that he believes that [the ABM Treaty] is a treaty that is anachronistic ... a treaty that enshrines our hostile relationship with [sic] Soviet Union rather than our promising new relationship with Russia").

\textsuperscript{27} Tom Bowman, \textit{Missile Defense Test May Conflict with ABM Treaty in '02}, BALT. SUN, July 13, 2001, at 3A (quoting Lieutenant General Ronald Kadish, the head of the Pentagon's Ballistic Missile Defense Office, as stating that a ground-based missile shield could be used "to meet an emergency threat" in the 2004 to 2006 time frame. It seems logical that the G.W. Bush Administration would want tangible results on missile defense by the politically significant date of 2004.).

\textsuperscript{28} See infra notes 39-43 and accompanying text (discussing the Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 [hereinafter 1969 Vienna Convention], reprinted in \textit{Basic Documents in International Law and World Order} 93 and other applicable sources of "customary international law").

\textsuperscript{29} See infra notes 44-50 and accompanying text (providing an overview of the treaty powers of the President and the Senate, respectively).

\textsuperscript{30} ABM Treaty, supra note 1; see also infra notes 52-54 and accompanying text.

Overview of the Arguments

An analysis of the ABM Treaty debate within these parameters delivers one conclusion: the current Bush and future administrations are not legally bound by the text of the ABM Treaty. Two distinct lines of reasoning converge at this result. First, the ABM Treaty became invalid upon the dissolution of the Soviet Union as a matter of U.S. constitutional law. Related to this premise is the "clean slate" doctrine of treaty succession law, which requires both parties to certain treaties to reaffirm those treaties after the demise of one of the original parties. If the United States did not reaffirm the ABM Treaty pursuant to its own constitutional scheme, in essence the treaty has not been reaffirmed as a matter of U.S. constitutional law. The clean slate doctrine, when viewed in conjunction with the U.S. constitutional scheme for treaty ratification, is analogous to a contract law scenario, in which one of the original parties to a contract dies, and thus is unable to perform.

Second, even if the clean slate rationale is rejected in this instance, the "changed circumstances" doctrine allows the United States to revisit the ABM Treaty. The states which emerged from the Soviet Union in 1991 bear little resemblance to the powerful empire facing President Nixon in May 1972. This difference, in conjunction with the changing international nuclear threat dynamic and the rise of so-called "rogue states," makes the imposition of the original 1972 treaty terms on the United States unreasonable.
pursuant to the changed circumstances doctrine outlined in the Vienna Convention on the Law of Treaties.\textsuperscript{36}

The theory that the United States is not bound by the ABM Treaty has a basis in constitutional and international law. This, however, is not the end of the debate. Many argue that there are diplomatic and public policy reasons why the United States should abide by a treaty which it is not legally bound to recognize as legitimate.\textsuperscript{37} This Note will address these arguments, as well as offer policy reasons in favor of the United States' rejection of the ABM Treaty.\textsuperscript{38}

**Overview of International Treaty Law and U.S. Constitutional Law Governing Treaty Ratification**

**Applicable International Treaty Law**

Treaties are agreements between two sovereigns.\textsuperscript{39} In entering into a formal treaty agreement, each party must be a "sovereign," or "international person" able to properly enter into such agreements on their own behalf.\textsuperscript{40} Once two sovereigns have entered into such agreements, this section will briefly address the changed circumstances which the United States faces in the form of threats from rogue states, many of which now have nuclear capabilities.).

\textsuperscript{36} See 1969 Vienna Convention, \textit{supra} note 28.

\textsuperscript{37} See \textit{infra} notes 131-44 and accompanying text (discussing reasons why the United States, as a matter of policy, might want to abide by a treaty to which it is not legally bound, including international balance of power considerations, U.S. concern over its reputation as a trustworthy bargaining partner, and diplomatic reasons specific to the ABM Treaty).

\textsuperscript{38} See \textit{infra} notes 133-37 and accompanying text (noting some of the policy reasons the United States should disavow the ABM Treaty, including the rise of the rogue state threat, the fall of the Soviet Union as a superpower, the extreme instability of the Russian military, and the constitutional issue of the proper role of the Senate pursuant to the treaty power).

\textsuperscript{39} For a detailed discussion of the concept of treaties, see V.D. Deg\textsuperscript{a}n, \textit{Sources of International Law} 355-514 (1997). Basically, Degan indicates that "[a] treaty consists in a concordance of wills of two or more subjects of international law (i.e. international persons), intended to achieve an effect in international law by creating a legal relationship of rights and duties for its parties." \textit{Id.} at 357.

\textsuperscript{40} This issue was addressed by the 1969 Vienna Convention, \textit{supra} note 28. Article 6 of the 1969 Vienna Convention states that "[e]very State possesses capacity to conclude treaties," and the issue of what constitutes a "State" for treaty purposes hinges on the question of whether the State is the sovereign decision maker, empowered to enter into international agreements with other sovereigns. Deg\textsuperscript{a}n, \textit{supra} note 39, at 363-64 (explaining that sovereign states, as a matter of principal, possess general treaty-making power and
an agreement, there is no more powerful source of international law. Express treaties between two sovereigns solve, at least with respect to the parties, many of the problems created by the nebulous nature of customary international law. In regards to something as sensitive as a ballistic missile agreement, the United States and the Soviet Union were seeking the clarity of a formalized treaty.

addressing the situation of a “federal union,” (such as the United States) by noting that there is a “presumption that member States of a federation are not invested with the treaty-making power,” unless their federal constitution grants them this power).

41. PER SEVASTIK, THE BINDING FORCE OF TREATIES UNDER INTERNATIONAL LAW 21, 23 (1997) (noting that “[t]reaties are by far the most important written instruments used to regulate international transactions,” and later explaining that “[u]nder international law, a treaty creates international legal obligations, with corresponding duties of compliance and remedies, including some forms of retaliatory measures in the event of a breach”).  Id. (emphasis added).

42. In the absence of express treaties, nations are bound by what is known as “customary international law” in their dealings with other sovereigns.  E.g., DEGAN, supra note 39, at 179 (discussing the fact that while “treaties can only create rights and duties for their parties on their own, custom remains the main process in which rules of general international law arise, modify, and terminate”). Furthermore, treaties between nations can themselves “evolve” into customary international law. See Karol Wolfke, Treaties and Custom: Aspects of Interrelation, in ESSAYS ON THE LAW OF TREATIES 33 (Jan Klabbers & Rene Lefeber eds., 1998). Wolfke notes that the drafters of article 38 of the 1969 Geneva Convention, when discussing the ability of a treaty to become customary international law and therefore binding on third parties, originally included the language: “In none of these cases, however, can it properly be said that the treaty itself has legal effects for third States.”  Id. (citations omitted). The final version of article 38, however, does not include this language, instead stating that “[n]othing ... precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.” 1969 Vienna Convention, supra note 28, art. 38. Commenting on this change, Wolfke notes that it “was not felt suitable to be spelled out in the Convention.”  Wolfke, supra, at 33. In other words, the fact that treaties cannot directly bind third parties was regarded as so obvious as to not warrant inclusion in the Convention.

43. See DEGAN, supra note 39, at 186 (noting that “due to its fluctuating and unstable character it is much more difficult to establish responsibility for breach of a customary rule of international law than responsibility for violation of an obligation arising from a written treaty”). The text of the ABM Treaty, supra note 1, bears this out. Both parties demanded a clear delineation of the duties and rights of the other, as demonstrated in the unequivocal language of article I, paragraph 2 of the Treaty which states that “[e]ach Party undertakes not to deploy ABM systems for a defense ... of its country ....”  Id. art. I. Article X underscores the preeminent nature of the treaty in relation to other international law, by stating that “[e]ach Party undertakes not to assume any international obligations which would conflict with this Treaty.”  Id. art. X.
The Power to Make Treaties on Behalf of the United States Pursuant to the U.S. Constitution

A second parameter shaping the ABM Treaty debate is the way in which the U.S. Constitution allocates power to “make treaties” on behalf of the United States. In keeping with the prevailing notion of separation of powers, the Framers of the Constitution divided the power to enter into treaties on behalf of the United States between the president and the Senate.44 This constitutional power-sharing scheme seeks to be both efficient by allowing the president to act unilaterally in the arena of foreign affairs, and cautious by demanding the “Advice and Consent” of the Senate.45 Some commentators have argued that, since the 1930s, “congressional-executive agreements” have usurped the treaty-making power delegated to the Senate by the U.S. Constitution.46 Other prominent commentators have noted that congressional-executive agreements are, in effect, an improper intrusion into the Senate’s “Advice and Consent” role as set forth in the Treaty Clause.47 The issue of

44. See U.S. Const. art. II, § 2, cl. 2 (granting the president the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

45. See Louis Henkin, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 35-37 (2d ed. 1996) (noting that “[f]or the Framers, treaties were an essential element in international relations and an indispensable means for safeguarding and realizing the vital interests of the United States”). Professor Henkin further explains that in devising this power-sharing scheme the Framers sought to strike a balance between the efficiency of giving the treaty power solely to the president (which, the Framers believed, would make it “too easy” to make treaties on behalf of the United States) and the “clumsy” nature by which Congress, because of its deliberate style, would handle the sole power to make treaties. Id. For an in-depth understanding of the Framers’ original intent regarding the treaty power, see Robert T. Delvin, THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES (1996) (providing an exhaustive study of the Framers’ debates surrounding the allocation of the treaty power).

46. For a detailed discussion of congressional-executive agreement phenomenon, see Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 HARV. L. REV. 799 (1995) (explaining the modern trend, arising since the 1930s, which allows the United States to be bound, just as it would be by a treaty ratified by two-thirds of the Senate, to international agreements such as NAFTA or the WTO after only a simple majority vote of both houses of Congress and signed by the President. These agreements are commonly called congressional-executive agreements.).

47. For a response to Professor Ackerman’s analysis of the congressional-executive agreements, see Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 HARV. L. REV. 1221 (1995) (arguing that the Constitution is clear in its requirement of the vote of two-thirds of the Senate to bind the
whether congressional-executive agreements are constitutionally sound is beyond the scope of this Note, especially in light of the fact that the ABM Treaty was originally advised for ratification by the constitutionally required two-thirds of the Senate.\footnote{See ABM Treaty, supra note 1. The U.S. Senate ratified the ABM Treaty on August 3, 1972.}

When considering the ABM Treaty debate, an important distinction is that a treaty does not become "law," in the sense that it is binding on the United States, until it has been both signed by the president and ratified by two-thirds of the Senate.\footnote{HENKIN, supra note 45, at 186 (quoting Justice Holmes in Missouri v. Holland, 252 U.S. 416 (1920), in which Holmes stated that treaties are declared to be the supreme law of the land "when made under the authority of the United States"). Henkin notes that Holmes believed that a treaty becomes law if it meets the substantive requirements of the Constitution: namely, Presidential signature coupled with the advice and consent of two-thirds of the Senate. Id.} Thus, when studying the present viability of the ABM Treaty, the events and circumstances which led the President to enter into the treaty, as well as the legislative history behind the Senate's vote to ratify the treaty, must be examined.\footnote{See infra notes 51-57 and accompanying text (discussing the circumstances surrounding President Nixon's decision to enter into the ABM Treaty, and the legislative history concerning the Senate's Advice and Consent vote).}

The ABM Treaty Revisited

Circumstances Surrounding President Nixon's Decision to Enter into the ABM Treaty

In 1972, the world was in the grips of the Cold War; "mutually assured destruction" was the order of the day.\footnote{For a discussion of the international climate of this era, see RE-VIEWING THE COLD WAR: DOMESTIC FACTORS AND FOREIGN POLICY IN THE EAST-WEST CONFRONTATION 127-48 (Patrick M. Morgan & Keith L. Nelson eds., 2000). Chapter 6 of this collection of essays is by Keith L. Nelson, entitled Nixon, Kissinger, and the Domestic Side of Détente, and describes President Nixon's approach to Soviet relations during the time period leading up to the ABM Treaty. Referring to the Moscow summit which produced the ABM treaty in May of 1972, one commentator noted that "in terms of sheer complexity and scope, this summit meeting ... was an unprecedented contrast from the previous five summits following World War II." Id. at 138 (quoting JOAN HOFF, NIXON RECONSIDERED 203 (1974)).} The United States was still involved in the Vietnam conflict, and the foreign affairs...
stance of the United States centered around arresting the spread of communism, and with it the threat of Soviet dominance. The Soviet Union, for its part, had committed its entire infrastructure to achieving military and nuclear superiority over the United States. Thus, the stage upon which President Nixon and the U.S. Senate were operating in 1972 was one fraught with tension and fear of the Soviet nuclear threat.

**Legislative History of the Senate Ratification of the ABM Treaty**

When the ABM Treaty came before the Senate for ratification, there was considerable discussion about what types of anti-ballistic missile systems the agreement covered. The Senators expressed concern over the types of systems which would be covered, as well as directly addressing the issue of future space-based laser programs—an issue that would resurface with President Reagan's SDI program. For purposes of analysis of the modern-day ABM Treaty debate, the principal aspect is that the Senate, in 1972, agreed to ratify the ABM Treaty in the context of the Cold War, and with the utmost consideration of the Soviet threat as they saw it at the time. Stated differently, the Senators viewed the Soviet threat through the lens of a bipolar world dominated by two opposing nuclear superpowers. American leadership of this period was only too aware of the price attached to winning the Cold War, having suffered through a decade of increasingly unpopular military involvement in Vietnam. As such, the nuclear balance-of-power between the United States and the Soviet Union was of the utmost

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52. See id. at 134 (describing the bipolar tensions and domestic factors facing President Nixon during the early 1970s that ultimately led to the ABM Treaty).
53. See id; see also infra notes 97-102 and accompanying text (outlining in detail, from previously secret CIA documents, the nuclear capabilities of the Soviet Union during this time (in the context of a discussion of the “changed circumstances” doctrine)).
54. See Kennedy, supra note 5, at 862-66 (discussing the Strategic Arms Limitation Agreements Hearings).
55. Id. at 864-65.
56. See Chayes & Chayes, supra note 5.
57. See Kennedy, supra note 5. The Senate was willing to make these concessions based in large part on the fear that the Soviet Union might develop a successful ABM system first, thus giving it the ability to launch an offensive strike against the United States, unfettered by the threat of retaliation.
concern. In 2001, ten years after the fall of the Soviet Union, it is easy to forget that, in 1972, the world was living with the very real threat of a U.S.-Soviet nuclear war.


*Executive Branch Response to the Fall of the Soviet Union*

In the context of the ABM Treaty debate, the U.S. government response to the fall of the Soviet Union in December of 1991 is critical. International law dealing with successor states hinges largely on the recognition of the duties of new states by the original parties to the Treaty. Thus, the U.S. response, coupled with the actual transition from the Soviet Union to its successor states, could determine to whom, if anyone, the ABM Treaty continues to apply in 2001.

At the end of the Cold War, the George H.W. Bush Administration sought to support the Gorbachev democratic movement within the confines of encouraging a stable transition from the former Soviet Union to the resulting independent states or federations.\(^{58}\) This was a predictable and necessary response, in that it was clearly in the best interests of the United States to have continued central leadership of the Soviet nuclear arsenal. Moreover, President George H.W. Bush had formed a personal relationship with Mikhail Gorbachev,\(^{59}\) and was interested in seeing Gorbachev's reforms result in an orderly transformation to

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58. For a first-hand account of U.S. decision making during the fall of the Soviet Union, see *George Bush & Brent Scowcroft, A World Transformed* 493-561 (1998). This book contains entries from President George H.W. Bush’s private diary concerning the fall of the Soviet Union, and accounts of telephone conversations between President Bush and Boris Yeltsin or Mikhail Gorbachev as the transformation of the Soviet Union was occurring. The book underscores the importance the United States placed on an “orderly” transfer of power from the old regime to the new, and thus explains the reasoning behind the Executive’s position on treaty succession to arms control agreements following the fall of the Soviet Union.

59. *Id.* at 531-35 (detailing telephone conversations with Soviet President Gorbachev after a failed coup attempt against Gorbachev in August 1991).
Notably, during the August 1991 coup attempt against Gorbachev, the democratic reform movement in the former Soviet Union enjoyed widespread support in the international community. Shortly after the failed coup attempt, in September 1991, the United States recognized the independence of the Baltic states (Estonia, Latvia, and Lithuania), and Byelorussia (later renamed Belarus). By September 1991, with the demise of the Soviet Union essentially assured, the U.S. national security team turned its attention to the problem of the existing Soviet nuclear arsenal. Thus, the U.S. leadership was in the difficult situation of wanting to support reform and democracy in the Soviet Union, while being deeply concerned about the strategic instability a Soviet breakup—the logical conclusion to the reform movement—could bring.

To address the dueling policy objectives of supporting the reform movement and encouraging stability, the U.S. State Department, under the leadership of Secretary James Baker, devised a six-principle scheme for the projected breakup of the Soviet Union. On

60. Id. at 527 (quoting President George H.W. Bush's personal diary from August 19, 1991) (while the coup attempt against Gorbachev was ongoing). Bush writes:

What I'd like to see is a return of Gorbachev, and a continuous movement for democracy. I'm not quite sure I see how to get there .... This new crowd [the leaders of the coup] is hard-line and they're communists .... My view is that the forces of democracy have been unleashed, they can't be set back, and so we've got to hope for and try to effect the return of Gorbachev and the forward movement of democracy.

Id.

61. Id. at 530 (quoting President George H.W. Bush as telling Boris Yeltsin, a champion of Gorbachev during the coup attempt and the future leader of Russia, that “[p]eople throughout the world are supporting you, except Iraq, Libya, and Cuba .... People are supporting you more than you can understand.”).


63. Id. at 542 (describing then-Chairman of the Joint Chiefs of Staff Colin L. Powell as being concerned about the command and control of Soviet nuclear weapons in the aftermath of a Soviet breakup).

64. See id. at 543-44. (describing a scheme of five principles plus one [hereinafter the Baker Principles], in the mold of G.H.W. Bush's earlier reaction to German reunification). Under the leadership of then-Secretary of State James Baker, these principles included: “[S]elf determination through democratic methods; respect for existing borders, with any changes made through negotiation; respect for democracy and the rule of law; respect for human rights; adherence to international law and the USSR's existing treaty obligations; .... [and] central control over nuclear weapons, [with] safeguards against internal or external proliferation.” Id. (emphasis added).
the eve of the breakup of the Soviet Union, the first Bush Administration announced that it would expect any and all states resulting from such a breakup to honor pre-existing Soviet international agreements, and that it expected centralized control of the Soviet nuclear arsenal. As discussed infra, these demands may or may not be in concert with recognized international treaty succession law. The Baker principles, however, represented a not-so-subtle admission by the first Bush Administration that the United States would also be bound by agreements made with the former Soviet Union, in the event of a breakup. Stated differently, the United States could not demand that the states resulting from the Soviet Union's breakup be bound by the Soviet Union's agreements, while contemporaneously proclaiming the United States as not bound by those agreements. On December 21, 1991, the Soviet Union officially dissolved into a Commonwealth of Independent States, and, in keeping with the Baker Principles, Russia assumed the international obligations of the former Soviet Union. The first Bush Administration had succeeded in facilitating a peaceful transition of the former Soviet Union. They were left, however, with potentially destabilizing changes in the international relations arena, the likes of which had not been seen in nearly eight decades.

65. Id. at 544.
66. See infra notes 80-91 and accompanying text (discussing the “universal” and “clean slate” succession doctrines of treaty succession).
68. BUSH & SCOWCROFT, supra note 58, at 564. G.H.W. Bush's National Security Advisor Brent Scowcroft noted that:

    The world we had encountered in January 1989 had been defined by superpower rivalry. The Cold War struggle had shaped our assumptions about international and domestic politics, our institutions and processes, our armed forces and military strategy. In a blink of an eye, these were gone. We were suddenly in a unique position, without experience, without precedent, and standing alone at the height of power. It was, it is, an unparalleled situation in history.

Id.
Treaty Succession under U.S. Constitutional Law: Is Recognition by the Executive Enough?

As a matter of international treaty succession law, the recognition of the continuing duties embodied by the Baker Principles may have been sufficient to bind the United States and the states of the former Soviet Union.69 As a matter of U.S. constitutional law, however, mere recognition of a successor state by the executive branch is not enough.70 In shaping the treaty power, the Framers, as discussed infra, sought a balance of power by demanding that treaties be ratified by the president after being "advised for ratification" by two-thirds of the Senate.71 Significantly, the Senate did not offer its "Advice and Consent" as to the binding nature of the ABM Treaty after the fall of the Soviet Union.72 That constitutional deficiency caused the ABM Treaty to effectively cease to exist upon the dissolution of the Soviet Union in 1991.73 Furthermore, at least one commentator has urged that recognition by the G.H.W. Bush executive branch was not "even close" to being adequate to bind the United States to the treaty, stating that "[o]n substantive changes

69. See discussion infra notes 80-91 and accompanying text (discussing the ways successor states to treaties are recognized pursuant to the "clean slate" doctrine).

70. See supra notes 44-50 and accompanying text (discussing the framework and allocation of the "treaty power" pursuant to the U.S. Constitution).

71. Id.

72. R. James Woolsey, What ABM Treaty?, WASH. POST, Aug. 15, 2000, at A23. The author is an attorney with Shea & Gardner in Washington, D.C. Additionally, Director Woolsey was a member of the SALT I delegation staff, and the former Director of the Central Intelligence Agency. In the article, he noted that the Senate did not vote to re-ratify the ABM Treaty in regards to the Russian Federation after the fall of the Soviet Union. Director Woolsey reiterated this position at a lecture at the Marshall-Wythe School of Law at the College of William and Mary on February 12, 2001, and again in a July 2001 editorial for USA Today, in which he stated that “[t]he 1972 treaty is worse than irrelevant to the strategic needs of this new world; it is harmful . . . .” R. James Woolsey, Let’s Just Move Ahead, USA Today, July 24, 2001, at 11A.

73. Woolsey, What ABM Treaty?, supra note 72, at A23. Director Woolsey notes that, although the President should consider the views of Russia as well as U.S. allies concerning the implementation of a national missile defense system, the President need not, indeed he should not, do so from the disadvantaged position that he will have to abrogate [the ABM Treaty] before he proceeds to deployment. ... Unless some president submits the 1972 ABM Treaty, with its new parties, to the Senate and obtains its consent to the substantive changes, there is nothing to abrogate.

Id. (emphasis added).
in treaties, the executive cannot act for the United States by itself. The Constitution requires the consent of two-thirds of the Senate," and that "it is impossible to make the argument with a straight face that the changes (following the downfall of the Soviet Union) are not 'substantive.'"

The importance of the Senate's role in the treaty power has been widely discussed. In discussing the ongoing debate concerning congressional-executive agreements, one commentator noted that:

[T]he Treaty Clause ... provides Article II authority for the President and the Senate together to exercise broader foreign affairs power than that delegated to Congress in Article I, section 8 [of the U.S. Constitution]. There is thus no reason to imagine ... that Congress may effectuate ... the sorts of alterations in the relationships between the United States and foreign sovereigns that the President and the Senate may effectuate [by treatymaking] under Article II [the treaty power].

Here, Professor Tribe addressed the limits on congressional power due to the plain meaning of the treaty power. These same limitations apply to the executive branch, in that the president cannot act, pursuant to the plain meaning of the Treaty Clause, without the consent of a supermajority of the Senate.

Implicit in these constitutional arguments is that the ABM Treaty is somehow "different" after the fall of the Soviet Union, and thus, should be subject to a vote by the Senate. The reinterpretation efforts of the Reagan Administration shed light on this issue. With the Reagan Administration pushing for a broad interpretation of the ABM Treaty, the Senate defended its earlier understanding of the treaty. This defense was a recognition that, if the executive has the ability to reinterpret the treaty ratification of the Senate, the Senate's treaty power is largely vitiates. Similarly, under G.H.W. Bush, the executive strayed from the original intent of the Senate's

74. Id.
75. Tribe, supra note 47, at 1260-61.
76. Chayes & Chayes, supra note 5.
77. HENKIN, supra note 45, at 183 (noting that "[t]he ABM confrontation was unprecedented, but it was perhaps an inevitable consequence of our unique, complex treaty process, involving independent, powerful, constitutionally-based institutions").
ratification of the ABM Treaty by recognizing the successor states to the Soviet Union.

APPLICATION OF INTERNATIONAL TREATY SUCCESSION LAW TO THE POST-1991 ABM TREATY

The above analysis demonstrates that the validity of the ABM Treaty, as a matter of U.S. constitutional law, is questionable in the post-1991 setting. In addition to the constitutional concerns, there are two applicable international law theories that apply to the ABM treaty debate. These theories are the clean slate doctrine of state treaty succession law, and the doctrine of changed circumstances embodied in the 1969 Vienna Convention on the Law of Treaties.

The Clean Slate Doctrine of Treaty Succession Law

International treaty succession law addresses the issue of whether an agreement between two sovereigns should have effect beyond the life of one of its parties. This relates to the view of a sovereign nation as an international person, with the inherent ability to make agreements on its own behalf. What happens when one of these international persons ceases to exist?

The principle of treaty succession law known as the clean slate doctrine addresses the death of the sovereign state. This principle holds that "when part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state was party, unless, expressly or by implication, it accepts such agreements and the other party or parties thereto agree or acquiesce." This definition makes sense in that it would not bind a predecessor state's treaty partner (in the case of the ABM Treaty, the United States) to a pre-existing treaty once the predecessor state no longer exists. Although it has not been widely adopted, the

78. See infra notes 80-91 and accompanying text.
79. See infra notes 92-124 and accompanying text (discussing the doctrine of "changed circumstances" as it applies to the break-up of the Soviet Union).
80. See supra notes 39-43 and accompanying text (describing the sovereign nation as an "international person" with the inherent authority to enter into treaties and other agreements).
1978 Vienna Convention on Succession of States in Respect of Treaties attempted to make two exceptions to the clean slate doctrine. Namely, the 1978 Vienna Convention excepted treaties establishing boundaries and territorial regimes, and those imposing restrictions on a territory for the benefit of another State. It is important to note that neither the United States nor the former Soviet Union signed the 1978 Vienna Convention, and in any event its purported exceptions are not directly applicable to the ABM Treaty debate.

The above explanation of the clean slate doctrine leads to the question of whether the United States agreed or acquiesced to the succession to the ABM Treaty by the successor states to the Soviet Union. An analysis of the G.H.W. Bush response to the fall of the Soviet Union indicates that the executive branch did agree to such a succession, and in fact encouraged such succession through the Baker Principles. As discussed infra, this recognition by the executive branch is not per se sufficient under the U.S. Constitution to bind the United States to the post-1991 ABM treaty. The constitutional issue, however, is separate and distinct from whether recognition by the executive (here, G.H.W. Bush) has binding effect in an international sense. The international community does not necessarily care about the nuances of U.S. constitutional law, but rather whether the United States has effectively recognized the succession of the states emerging from the former Soviet Union to Soviet treaty obligations. As a matter of international law generally, an executive's recognition of a successor state to a treaty would be sufficient for the continued existence of the treaty with its reciprocal duties. In the international arena, "a state representative may conclude a treaty on behalf of a state if he possesses 'full powers.'"
"Heads of State, governments and foreign affairs ministers are regarded as possessing by virtue of their office 'full powers.' Thus, George H.W. Bush, or even his Secretary of State, James Baker, could unilaterally recognize the existence of the successor states to the Soviet Union and their continuing duties under the ABM Treaty. This situation illuminates a tension between U.S. constitutional law and international law concerning the binding effect of treaties. Although there has been much debate on this subject, the prevailing notion is that "the Treaty Power does not extend 'so far as to authorize what the Constitution forbids.'" 

Professor Henkin further notes that "Congress has always assumed that there were limits on the Treaty Power," and that even "[t]he treaty-makers themselves [executive branch officials] have thought they were subject to limitations." 

The defining statement on the tension between the U.S. Constitution and the treaty power came from Justice Hugo Black in *Reid v. Covert* in 1957. In *Reid*, Justice Black noted that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." 

Although Justice Black was concerned with the content of treaties as related to the U.S. Constitution, his reasoning is equally applicable to the creation of treaties. Justice Black recognized that, as in the case of the ABM Treaty, the executive, as well as Congress, must play inside the lines drawn by the Framers concerning the treaty power.

*The Fundamental Changes in the Former Soviet Union, As Well As the Rising Threat from 'Rogue' States, Allow the United States to Revisit the ABM Treaty.*

The authors of the Vienna Convention on the Law of Treaties accepted the premise that, in some instances, evolving circumstances would make it untenable for one party to a treaty to

87. *Id.*
88. HENKIN, supra note 45, at 187 (quoting Geoffroy v. Riggs, 133 U.S. 258, 267 (1980)). Professor Henkin, in addition to writing widely on the interrelationship of international law and the U.S. Constitution, was the Chief Reporter of the Restatement (Third) of the Foreign Relations Law of the United States.
89. *Id.*
90. 354 U.S. 1 (1957).
91. *Id.* at 16.
remain bound by the treaty. In the twenty-nine years since the implementation of the ABM Treaty, numerous changes in the international nuclear and military balance of power have occurred. These changes have effectively rendered the rationale for the ABM Treaty obsolete.

Status of the Soviet Threat in 1972

The late 1960s and early 1970s saw an expansion of Soviet military and political strength under the leadership of Leonid Brezhnev. While expanding the influence of the Soviet Union, along with its military might, Brezhnev’s regime maintained strict civilian control over the military by utilizing both the Ministry of Internal Affairs and the KGB. Documentation prepared by the U.S. Central Intelligence Agency (CIA) from the period leading up to the ABM Treaty showed that “in the course of the past 10 years [1960-1970], the Soviets have engaged in a vigorous and costly buildup” of their “intercontinental attack forces”—that is, weaponry capable of reaching the U.S. mainland. The CIA determined the
reasons for the Soviet buildup of the intercontinental attack forces in general and the intercontinental ballistic missiles (ICBMs) specifically was to match and surpass the number of U.S. ICBMs, in the hopes that many would survive an initial U.S. attack.\textsuperscript{7}

Although the raw numbers from this period representing the Soviet ability to deliver a nuclear strike to the continental United States might seem uninformative when viewed out of context, they are nonetheless staggering. According to CIA documents, the Soviet Union had "an estimated 1,527 ICBM launchers ... 516 submarine-launched ballistic missile (SLBM) launchers, and 195 heavy bombers and tankers" in 1971.\textsuperscript{8} Each of these weapon systems could potentially deliver a nuclear warhead to the continental United States, thus triggering the beginning of the "Mutually Assured Destruction" scenario.\textsuperscript{9}

The Soviet Union saw primacy in the arms race with the United States in the early 1970s as vital to its very existence.\textsuperscript{10} This attitude manifested itself in a massive Soviet nuclear arsenal

\textsuperscript{7} Id. at 263-64.

\textsuperscript{8} Id. at 268. This Soviet buildup was a result of classic arms race mentality of the two hegemonic superpowers during this era. As the CIA report noted, the Soviet leaders perceived that... their military forces [and particularly their ICBM capabilities] were conspicuously inferior to those of their most dangerous rival, the U.S. Consequently, they set themselves to rectify the imbalance—to achieve at a minimum a relation of rough parity. Parity in this sense cannot be objectively measured; it is essentially a state of mind.

\textsuperscript{9} Id. at 267 (emphasis added).

The doctrine of Mutually Assured Destruction, see John Yoo, \textit{Review Essay: Politics as Law?: The Anti-Ballistic Missile Treaty, The Separation of Powers, and Treaty Interpretation}, 89 CAL. L. REV. 851, 852 (2001), explains why the CIA refers to "parity" of this nature as a "state of mind." If, for instance, the Soviet Union had the ability to launch either a first strike or a counterattack that would destroy the North American continent, this is "actual parity," despite the fact that the United States may have had more pure numbers of ICBMs.

\textsuperscript{10} Id. at 267 (emphasis added).
during an era in which over one-third of all Soviet citizens lived below the poverty line. Not surprisingly, the Cold War Soviet military dominated the Soviet domestic policy landscape.

The United States Would Not Have Signed the ABM Treaty in 1972 had the Soviet Union Resembled the Modern Russian Federation.

The Russian transition to democracy since December 1991 has been a rocky one. When considering the changed circumstances contemplated by the 1969 Vienna Convention on the Law of Treaties as applicable to the ABM Treaty, the changes in the Russian military are of paramount importance. At present, there is great concern about the level of control Russia has over the nuclear arsenal of the former Soviet Union. Outward signs substantiate these concerns, as several high-profile accidents have befallen the Russian military in recent years. In May of 1998, a Russian nuclear submarine suffered a serious accident and caught fire in the

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101. See MARTIN McCauley, supra note 94, at 297 (noting that "[i]f a per capita income of 50 rubles per month was needed in 1967 to stay above the poverty line in the Soviet Union then 37.7 percent of individuals and 32.5 percent of families in that year failed to attain this level and hence were in need") (citing ALASTAIR McCauley, ECONOMIC WELFARE IN THE SOVIET UNION: POVERTY, LIVING STANDARDS, AND INEQUALITY 58 (1979)).

102. Id. at 373 (noting that the "Brezhnev economy was one in which thousands of sub-economies functioned .... The major force was the military-industrial complex, which had first call on resource allocation.").


104. 1969 Vienna Convention, supra note 28, art. 62.

105. The Future of the ABM Treaty, supra note 93 (statement of John B. Rhinelander, Former Legal Advisor to the SALT I delegation). Mr. Rhinelander notes that the single most important threat now is the Russian strategic systems. These are the only ones that could destroy the United States. They could destroy us utterly, we know that, with only a fraction of the ones they still have working. ...

... The loose nuke problem with the Russian tactical system is very real. I think our people aren't sure the Russians know where all their systems are.

Id. at 14.
Barents Sea carrying 12 ballistic missiles.\textsuperscript{106} In 2000, the unexplained sinking of the Russian submarine "Kursk," caused some to again question the ability of Russia to "protect itself against its own weapons and an incompetent leadership."\textsuperscript{107} In June of 2000, President Clinton, due to Russia's inability to properly convert "highly enriched uranium," which had been extracted from its nuclear weapons, into "low enriched uranium," for use in commercial reactors, issued an Executive Order declaring a national emergency in order to deal with the situation.\textsuperscript{108} One particularly shocking report described a Russian submarine base where, for various reasons, unused nuclear fuel could not be removed from dormant submarines.\textsuperscript{109} This created a situation where the nuclear fuel had to be constantly cooled via an "air conditioner-like device."\textsuperscript{110} A crisis ensued after a Russian power company turned off the Navy's power supply to the base because of past due bills.\textsuperscript{111} A catastrophic nuclear event was averted, however, by the local Russian Navy commander, who visited a local power company official and threatened him at gunpoint, forcing the power company to reactivate the Navy's power.\textsuperscript{112} The crumbling of Russia's infrastructure has been well documented in the United States and international press.\textsuperscript{113} In a recent special report entitled "A Survey of Russia," The Economist described these bleak conditions, stating that "[m]ost of what the Soviet Union built was shoddy to start with, but modern Russia lacks the money and willpower to sustain even

\textsuperscript{106} Leonard M. Salter, Predictions For the Next Millenium, 42 FEB. ORANGE COUNTY LAW. 16 (noting that the aging Russian submarine fleet is "deteriorating rapidly, improperly maintained by an increasingly poor and hungry Russian Navy").

\textsuperscript{107} Jim Hoagland, The Wrong Debate on the Military, WASH. POST, Aug. 24, 2000, at A25 (further noting that the "Russians [are] ... grappling with the reality of a military truly in decline").

\textsuperscript{108} See H.R. Doc. No. 106-259, at 1 (2000) (containing a message to Congress from former President Clinton explaining the gravity of the situation, as well as a copy of the Executive Order).


\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} Id.

that unimpressive standard. As a result, the country is falling apart."114 Such is the current situation in Russia; it has been described as having the "infrastructure of a third-world nation" while attempting to deal with the nuclear legacy of a superpower.115

Having established that the Russian military is, at the least, more unstable and unpredictable than at the time of the signing of the ABM Treaty, the issue becomes whether this instability is sufficient as a matter of law to allow the United States to withdraw from the treaty pursuant to the changed circumstances doctrine.116 The changed circumstances doctrine has two requirements. First, the existence of the original circumstances must constitute an essential basis of the consent of the parties to be bound by the treaty; stated differently, the parties would not have entered into the treaty had the original conditions not existed.117 The second requirement is that the effect of the changed circumstances must radically transform the extent of obligations still to be performed under the treaty.118

The first requirement is relatively easily satisfied, if one accepts the premise that President Nixon and the United States agreed to forego a national missile defense program in return for the assurance that the Soviet Union, in all of its military splendor of the early 1970s, would do the same. Since the change here involves the very existence of the Soviet Union, the first prong of the changed circumstances doctrine is satisfied. What could be more of an essential basis of the consent of the United States to be bound by the ABM Treaty than the very existence, in its 1972 form, of the Soviet Union?119

The second requirement of the changed circumstances doctrine is a closer question. Have the changed circumstances "radically ... transform[ed] the ... obligations" of the United States under the

114. Edward Lucas, A Survey of Russia, ECONOMIST July 21, 2001, at 3 of special report beginning after page 46. Lucas notes that "[t]o reach the level of prosperity that even one of the poorer members of the European Union ... enjoys today, on a crude calculation Russia would need to grow by 8% a year for the next 15 years." Id. at 4 of special report.
116. See 1969 Vienna Convention, supra note 28, art. 62 (1).
117. Id. art. 62(1) (a).
118. Id. art. 62(1) (b).
119. Id. art. 62(1) (a).
ABM Treaty? To determine this, the text of the ABM treaty must be revisited to discern the obligations of the United States under the treaty. The ABM Treaty places several obligations on its parties. Specifically, neither party to the treaty could deploy anti-ballistic missile systems for a defense of the territory of its country, with the exception of a limited ABM capability in the 150-kilometer radius around the respective capital cities of the two nations (Moscow and Washington, D.C.) or around a single ICBM site. The United States could undoubtedly physically continue to comply with these terms. Thus, the issue turns on the meaning of the phrase "radically ... transform" in the second requirement of the changed circumstances doctrine. The International Court of Justice addressed this issue in Fisheries Jurisdiction, in which the court held that "[t]he change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken." Framed in this fashion, U.S. compliance with the ABM Treaty in the twenty-first century does look like "rendering the performance" of "something essentially different" than U.S. compliance with the ABM Treaty in 1972 (and arguably up to the fall of the Soviet Union in 1991).

This essential difference arises not directly out of the United States' physical compliance with the ABM Treaty, but from its compliance in the context of the changes in the former Soviet Union and in the modern international community. The world is no longer dominated by two hegemonic nuclear powers in opposition; rather, in the modern international community, many more nations have or are working towards nuclear weapons capabilities. As noted by Jeane J. Kirkpatrick, the former U.S. Ambassador to the United Nations,

in addition to the ballistic missile threats posed by Russia and ... China, such states as Iran, Iraq and North Korea will

120. Id. art. 62(1) (b).
121. ABM Treaty, supra note 1, art. III (a)(b).
122. 1969 Vienna Convention, supra note 28, art. 62(1) (b).
124. Id. at 119.
125. Id.
probably be able to inflict major damage on the United States within about 5 years of a decision to acquire such a capability....

What makes the recent spread of nuclear and missile technology especially serious is that it puts weapons of mass destruction in the hands of repressive one-party states—the very governments that are most likely to use such weapons aggressively.\(^{126}\)

This rise of the rogue state nuclear threat is clearly a major concern with the G.W. Bush Administration, and is one of the administration’s main selling points of its missile defense plan. Administration officials and commentators have voiced concerns in which they are, in essence, arguing that the rise of the rogue state nuclear threat constitutes a change in circumstances so great as to require the United States to move forward with a missile defense system.\(^{127}\)

\(^{126}\) The Future of the ABM Treaty, supra note 93, at 4.

\(^{127}\) Id.; see also Bush Team Sees U.S. Withdrawal From ABM Pact, L.A. TIMES, July 12, 2001, at A1, A11 (quoting “White House officials” as stating that they “intend to develop antimissile systems that will protect the United States from a small-scale attack by ‘rogue’ nations”); For the Record, WASH. POST, July 26, 2001, at A24 (quoting from testimony of William Schneider, Jr., chairman of the Defense Science Board at the Department of Defense, before the Senate Foreign Relations Committee:

The ABM Treaty was developed to regulate the strategic nuclear competition between the United States and the former Soviet Union in a bipolar policy environment of intense reciprocal animosity.

At the time... (i) the shared nonproliferation interests of the major nuclear states imparted a powerful disincentive to the transfer of ballistic missile technology to other nations.

None of these conditions [exists] today. ... Containing the proliferation of ballistic missiles is now out of reach using the diplomatic instruments of the Cold War. New instruments must be found.

Ballistic missiles can be found in the arsenals of many of the states with the most profoundly hostile relationship (sic) with the United States, including North Korea, Iraq, Iran, Syria and Libya.

Frank J. Gaffney, Does the U.S. Need to Build a Missile Defense? Yes: Nation Needs Insurance Against A Surprise Attack, DALL. MORN. NEWS, July 22, 2001, at 1J (author was the head of missile defense policy during the Reagan Administration, and notes that an American missile defense system would target the increasing missile capabilities of “such rogue states as Iran, Iraq, Libya, Syria, Pakistan and Sudan,” as well as China and North Korea); R. James Woolsey, Let’s Just Move Ahead, supra note 72, at 11A (noting that “the technology and components for ballistic missiles and weapons of mass destruction are continuing to spread rapidly to a substantial number of nations, several of them bitter U.S. enemies,” and later specifying these nations: “North Korea, Iraq, and Iran”).
Requiring the United States to continue to comply with the ABM Treaty within the context of the current international climate, with special emphasis being placed on the dissolution of the Soviet Union and the poor state of the Russian military in combination with the rise of the rogue state nuclear threat, constitutes an essential difference of the type contemplated by the International Court in *Fisheries Jurisdiction.*

**POLICY DEBATE**

The above analysis makes the case that the United States is not legally bound by the ABM Treaty, for either U.S. constitutional law reasons in conjunction with the clean slate doctrine of treaty succession law, or the doctrine of changed circumstances, as set forth in the 1969 Vienna Convention on the Law of Treaties. However, this is not the end of the ABM debate. There are factors that might lead the United States to acquiesce to a treaty that is not legally binding. This section will discuss some of these reasons, as well as introduce policy reasons in favor of a U.S. missile defense shield.

In June of 2000, as President Clinton was considering whether to go forward with implementation of a national missile defense program, a group of prominent international scholars made public a letter to the President urging him not to go forward with the plan. The group voiced their concern that the missile defense system would "pose an implicit threat to Russia's deterrent force," and they noted that "Russian military analysts consider this an unacceptable risk." Russia, for its part, sees implementation of a U.S. missile defense system as a blatant violation of the letter and

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128. WALLACE, *supra* note 123.

129. *See supra* notes 80-91 and accompanying text (analysis concerning why the clean slate doctrine of treaty succession should apply to the ABM Treaty following the fall of the Soviet Union).

130. *See supra* notes 92-128 and accompanying text (discussing the profound changes in the circumstances surrounding the signing of the ABM Treaty and the current international climate).


132. *Id.*
spirit of the ABM Treaty, 133 although, as noted supra, they have recently softened this stance somewhat. 134

Another concern with the United States implementing a national missile defense plan is that it would cause a nuclear power vacuum as to all other states, with the United States impervious to nuclear attack. Domestic political concerns include threats from prominent Congressional Democrats, including the Chairman of the Senate Armed Services Committee, Carl Levin, to use Congress's power of the purse to disallow spending for research and testing for national missile defense, which they determine to be in violation of the ABM Treaty. 135 Other commentators have argued that the ABM Treaty should not be scrapped because it is an intricate part of an arms-control regime that "prevented nuclear war and helped create conditions that led to the collapse of the Soviet Union." 136 Recent evidence shows that the decision to go forward with the national missile defense plan will likely be unpopular in the international community, many nations will undoubtedly not make the determination that the United States is not bound by the ABM Treaty, and instead would view a U.S. missile defense plan as an instance of the United States breaking an international treaty.

Finally, there are selfish reasons why the G.W. Bush Administration may eventually decline to go forward with a national missile defense plan. Since the end of the Gulf War in 1991 and the fall of the Soviet Union later that same year, the United States had, until the attacks on September 11, 2001, been enjoying what is commonly referred to as a "peace dividend." Since

133. David Hoffman, Russian Criticizes U.S. Missile Plans: General Rejects ABM Treaty Changes, WASH. POST, May 5, 2000, at A21 (noting that "Russia has repeatedly expressed opposition to ABM changes, saying they would undermine the entire arms control regime").

134. See supra note 21 (discussing the post G-8 meeting between Presidents Bush and Putin at which they agreed to discuss the possible linkage between cuts in American nuclear arsenals and the mutual abrogation of the ABM Treaty).

135. James Dao, Threat from Democrats on Missile Test Plans, N.Y. TIMES, July 26, 2001, at A18 (detailing congressional opposition to the Pentagon's proposed missile defense test site at Fort Greely, Alaska, and quoting Representatives John M. Spratt (D-SC), Ike Skelton (D-MO), and Norman Dicks (D-WA) as stating in a letter to Secretary of Defense Donald Rumsfeld that they "do not believe that it will strengthen our security to pull out of the ABM treaty and rush unproven defenses to deployment"); Frank J. Gaffney, Jr., A Putin 'Set-Up on Missile Defense?, WASH. TIMES, July 24, 2001, at A18 (noting that Senator Levin has "made known [his] determination to deny President Bush funds for developmental and testing activities deemed incompatible with the ABM Treaty").

September 11, the Bush Administration has been focused almost singularly on responding to the attacks, resulting in a substantially lower profile for the Missile Shield initiative. Additionally, in an embarrassing turn of events for the Defense Department, during early tests of missile interceptors to be used in the national missile defense plan, the program failed in two of its first three tests. The testing program was buoyed, however, by a successful (if somewhat contrived) missile interception test in July of 2001.

The policy debate surrounding the ABM Treaty as it applies to a national missile defense plan is by no means one-sided. The idea that the United States is not bound by the ABM Treaty has been generally well-received in the U.S. Senate. Commentators from outside the Senate have also weighed in supporting a national missile defense plan, noting especially the increasing threat from so-

137. This was part of the calculus President Clinton used in deciding against the implementation of a missile defense plan. The President, according to a senior administration official, said that he "did not want to pay the big front-end costs if he was not sure this thing would work." Roberto Suro, Woes Undermined Missile Defense Cause: Clinton Weighed Test Failures, Development Delays in Addition to Diplomatic Costs, WASH. POST, Sept. 3, 2000, at A4.


139. The Future of the ABM Treaty, supra note 93, at 5 (testimony of Ambassador Kirkpatrick); Iran and Proliferation: Is the U.S. Doing Enough? Hearing Before the Subcommittee on Near Eastern and South Asian Affairs, 105th Cong. (1997) (containing 108 pages of testimony outlining the extent to which Russia and China are arming Iran with nuclear weapons); Urgent Need For Ballistic Missile Defense, Hearing Before Committee on Foreign Relations, 104th Cong., at 1 (1996) (statement of Senator Helms, chairman of the Senate Foreign Relations Committee, calling the ABM Treaty an "obsolete arms control agreement" and stating that it was an "absolute necessity" for the United States to withdraw from the ABM Treaty. Senator Helms further noted that many of the nations currently with operational ballistic missiles are "clearly hostile" to the United States, including Iran, Iraq, Libya, Syria, and North Korea.); id. at 8 (statement of R. James Woolsey, former director of the CIA, noting that "countries such as Iraq are no longer client states of the Soviet Union, which does not exist anymore, and they are not even client states of Russia. They are doing what they please."); S. REP. No. 106-4 (1999) (report from the Committee on Armed Services reporting favorably on the National Missile Defense Act of 1999 (S. 257)). The Republican party in the U.S. Senate is, by and large, firmly in support of the implementation of a national missile defense system, as evidenced by the statement of Senator Jim Bunning of Kentucky, who stated during a July 2001 hearing that "[s]pending money to defend the United States of America from intercontinental ballistic missiles ought to be the top priority that we have." Vernon Loeb, Senate Democrats Blast Bush's Missile Defense Plan, WASH. POST, July 13, 2001, at A5.
called rogue states,\textsuperscript{140} as well as the rise of China as a nuclear power.\textsuperscript{141} Top Pentagon officials view the ABM Treaty as not only obsolete, but dangerous to the security of the United States.\textsuperscript{142} Additionally, as previously discussed, the G.W. Bush Administration has come out strongly in favor of a national missile defense, with the backing of several well-known leaders from both sides of the aisle.\textsuperscript{143}

\textbf{A SUGGESTION TO END THE UNCERTAINTY}

Senator Thad Cochran aptly summed up the ongoing debate surrounding the ABM Treaty by stating that the Treaty is "[c]alled by some the cornerstone of strategic stability, and regarded by others as an obsolete relic of the Cold War."\textsuperscript{144} Whichever side one adopts in this public policy debate, the legal arguments on the current viability of the ABM Treaty are critical. Commentators have expressed the idea that the ABM Treaty should be amended, and that the United States should have negotiations with Russia to this effect.\textsuperscript{145} While these amendment arguments were appropriate

\textsuperscript{140} Barry L. Rothberg, \textit{Averting Armageddon: Preventing Nuclear Terrorism in the United States}, 8 DUKE J. COMP. & INT'L' L. 79, 82 (1997) (noting that "[s]ince the collapse of the Soviet empire, the likelihood of a nuclear attack at the United States has actually increased, and quite substantially," and further noting that "seven countries are listed by the U.S. State Department as sponsors of terrorism: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria," and that "all but Cuba and Sudan are heavily involved in suspicious nuclear activity").

\textsuperscript{141} Brian T. Kennedy, \textit{MAD vs. Missile Defense: How the ABM Treaty Undermines the Security of The United States and its Allies}, 4 NEXUS 99, 110 (1999) (noting that "[l]acking a missile defense, our only deterrent against these [nuclear] threats [from China, Russia and North Korea] is our own threat of annihilating millions of people in Russia, China, North Korea, and other potential nuclear aggressors").

\textsuperscript{142} E.g., Rowan Scarborough, \textit{Arms Tests to Stray From ABM Pact}, WASH. TIMES, July 13, 2001, at 4 (quoting Deputy Defense Secretary Paul Wolfowitz as stating in testimony before the Senate Armed Services Committee that "[w]hile we have been debating the existence of the threat for nearly a decade, other countries have been busily acquiring, developing and proliferating missile technology," and that "[t]hanks in no small part to the constraints of the ABM Treaty we have wasted the better part of a decade. We cannot afford to waste another one.").

\textsuperscript{143} \textit{See supra} notes 8-15 and accompanying text (noting that the G.W. Bush Administration has signaled its intention of going forward with the plan, and noting the support of Senators Lieberman and McCain, and former Secretary of State Kissinger).

\textsuperscript{144} \textit{The Future of the ABM Treaty, supra} note 93, at 1.

during the Reagan Administration's SDI efforts, they ignore the reality that, in a legal sense, the ABM Treaty has no binding effect on either post-Soviet Union Russia or the post-Cold War United States. For those who call the ABM Treaty a "cornerstone," it is imperative that this "cornerstone" have actual legal effect on its parties. For those who call the ABM Treaty a "relic," the arguments that the treaty is not legally binding could serve as additional support for a national missile defense plan.

For the reasons explained here, the ABM Treaty is not legally binding on either the United States or Russia in 2001. The proper way for the United States and Russia (with the possibility of multilateral negotiations with nations which now have or are developing intercontinental nuclear capability) to settle this dispute would be to renegotiate a new "2001 ABM Treaty," which would be subject to the President's signature and the approval of two-thirds of the U.S. Senate. By all appearances, the current Bush Administration would oppose the proposal of a treaty similar to the current ABM treaty. Thus, if the outright prohibition of missile defense technology proved to be politically impractical, this new treaty could offer alternatives, such as the international sharing of ABM technology on some level. If the ABM Treaty is in fact a "cornerstone" of international stability, a restrictive treaty of the same type would undoubtedly be approved. If, on the other hand, the treaty is a "relic" of the Cold War, a new restrictive treaty would be rejected in favor of a less-restrictive regime. On a subject as sensitive as national ballistic missile defense, the certainty which would emerge from such a debate is of paramount national and international importance.

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146. See supra notes 80-128 and accompanying text (discussions of the clean slate doctrine and the changed circumstances doctrines).