

March 11, 1996

## THE SENATE SHOULD BLOCK THE WHITE HOUSE'S END RUN ON THE ABM TREATY

The Clinton Administration is treading softly as it tries to bypass the Senate and sign two new agreements that effectively alter the 1972 Anti-Ballistic Missile (ABM) Treaty. On November 29, 1996, White House Special Assistant William C. Danvers sent a report to Congress advising the leadership of the President's intention to sign and implement these new agreements without the Senate's advice and consent.<sup>1</sup>

A refusal by the Clinton Administration to submit these new ABM Treaty agreements to the Senate for review raises questions about both the intent and the constitutionality of these actions. Congress passed legislation in 1994<sup>2</sup> to require that all agreements modifying the ABM Treaty be submitted to the Senate for "advice and consent." Because of this, the White House plan appears to be a direct challenge to the Senate's constitutional authority as one of the government's treaty-making institutions. The approach put forth in the November 29 report raises questions about the President's commitment to the constitutional mandate that he ensure that the laws of the land are "faithfully executed." Although Senators may disagree about the strategic implications of these new agreements, they all should agree that the refusal to submit them to the Senate for ratification violates their prerogative to review treaties.

To respond to this direct challenge from the White House, the Senate should ask the Clinton Administration to debate its proposition that there is no need for the Senate to review the new ABM agreements. A respected member of the Senate should be asked to

- 1 White House, "Report on the Livingston ABM Amendment," November 25, 1996, as sent to Speaker of the House Newt Gingrich.
- 2 National Defense Authorization Act Fiscal Year 1996 (P.L. 103-337). For more information, see the discussion of legislative history that follows.

present arguments, in a series of floor statements, as to why the "Clinton Doctrine" outlined in the November 29 report threatens both the Senate's treaty-making authority and Congress's legislative authority. In addition, the Senate should schedule a series of hearings before the Foreign Relations Committee and Judiciary Committee, both to examine the merits of the Administration's arguments and to provide an opportunity to debate the issue with the Administration in a formal setting. Each of the Administration's arguments is faulty, and debating the issue will allow Senators to examine them closely.

## THE NEW ABM TREATY AGREEMENTS

The Clinton Administration has been negotiating two new agreements pertaining to the ABM Treaty with several republics of the former Soviet Union. The first, known as the successorship agreement, concerns establishing successor states to the Soviet Union as partners with the United States under the terms of the ABM Treaty. The second concerns clarifying the difference between defenses against strategic (long-range) missiles, which are subject to ABM Treaty restrictions, and defenses against theater (shorter-range) missiles, which are not. This latter agreement is frequently referred to as the demarcation agreement.

The Clinton Administration reached both of these agreements with representatives of Belarus, Kazakhstan, Russia, and Ukraine in Geneva on June 24, 1996.<sup>3</sup> Although the agreements have not been signed officially by any government, the Clinton Administration is committed to finalizing them.

### Intents and Purposes

**The successorship agreement** to the ABM Treaty owes its existence to the demise of the Soviet Union in 1991, an event that left the United States without an official partner in the ABM Treaty. Although the still-unsigned successorship agreement names Belarus, Kazakhstan, Russia, and Ukraine to replace the Soviet Union in the treaty,<sup>4</sup> these states will not share equally in the rights and obligations afforded the former Soviet Union. For instance, only one of the four would be allowed to deploy ABM interceptors under the 1974 Protocol to the Treaty, and that one site already is located in Moscow.

**The demarcation agreement** is meant to resolve ambiguity in the ABM Treaty over the difference between strategic defenses (which are subject to its restrictions) and theater defenses (which are not). As long as the difference between these systems remains undefined, the ABM Treaty may be interpreted in ways that impose unwarranted restrictions on the testing and deployment of theater defenses. The tentative demarcation

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- 3 Two other as yet unsigned agreements related to the ABM Treaty were reached on June 24, 1996. These agreements have to do with the rules governing the Standing Consultative Commission (SCC) and confidence-building measures regarding future compliance with the ABM Treaty. Congress has not shown as much interest in these two side agreements as it has in the successorship and demarcation agreements.
  - 4 The ABM Treaty imposes severe limitations on the ability of the United States to defend its own territory against missile attack, whether the attack is from rogue states, terrorists, or even accidental firings. The successorship agreement will extend the life of this treaty, which at present is of questionable legal standing because one of the two partners no longer exists. The successorship agreement, therefore, gives life to a treaty that does not serve U.S. interests.

agreement attempts to resolve this ambiguity. It requires that all missile defense interceptors with speeds up to 3 kilometers per second fall outside ABM restrictions as long as they are not tested against target missiles with speeds in excess of 5 kilometers per second or with ranges in excess of 3,500 kilometers.<sup>5</sup>

The standard set by the demarcation agreement will impose unwarranted technical limitations on theater missile defense systems. The ABM Treaty was not intended to impose restrictions on such theater defense systems; it was written for strategic defense systems. The demarcation agreement, then, would turn the ABM Treaty into an Anti-Theater Ballistic Missile Treaty.

### **Recent Legislative Action**

Congressional interest in these new ABM Treaty agreements began in 1993. At that time, the Clinton Administration discontinued the Defense and Space Talks, which had been designed to clear the way for the cooperative deployment of missile defense systems. Instead, the Clinton Administration began negotiations on successorship and demarcation. These negotiations were conducted in Geneva during meetings of the Standing Consultative Commission (SCC), the treaty's implementing body. During that same time period, Congress enacted three laws that are relevant to the question of whether the new successorship and demarcation agreements must be submitted to the Senate for advice and consent. These laws state that (1) amendments to the ABM Treaty must be approved through the treaty-making process (P.L. 103-337, §232); (2) there are restrictions on funding the implementation of a demarcation agreement (P.L. 104-106, §235); and (3) the President must report to Congress on whether the agreements substantively change the ABM Treaty (P.L. 104-208, §406).

Section 232 of the National Defense Authorization Act for Fiscal Year 1995 (P.L. 103-337), signed by President Clinton on October 5, 1994, expresses the will of Congress that all amendments to the ABM Treaty be concluded through the treaty-making process established by the Constitution. Paragraph (a) of this law states that:

The United States shall not be bound by any international agreement entered into by the President that would substantively modify the ABM Treaty unless the agreement is entered pursuant to the treaty making power of the President under the Constitution.

Section 235 of the National Defense Authorization Act for Fiscal Year 1996 (P.L. 104-106), signed by the President on February 10, 1996, prohibits the use of funds to implement a demarcation agreement unless (1) the funding restriction established by the law is repealed or amended by a subsequent act of Congress; (2) the demarcation agreement is consistent with specific standards established by the law; or (3) the demarcation agreement is approved subsequently by Congress through statutory action or by the Senate as a treaty. This law defined treaty-limited ABM systems as only those tested against target missiles with ranges in excess of 3,500 kilometers or velocities in excess of 5 kilometers

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<sup>5</sup> This tentative demarcation agreement resolves the ambiguity only partially. The parties to the treaty would continue discussions to establish a second standard concerning interceptors with speeds in excess of 3 kilometers per second.

per second. The speed and range limitations were chosen because they fall below the slowest and shortest range of strategic missiles in the U.S. and Russian arsenals.

Section 406 of the Department of State and Related Agencies Appropriations Act for Fiscal Year 1997 (P.L. 104-208), signed by the President on September 30, 1996, requires the President to submit a report to Congress stating whether the successorship and demarcation agreements represent substantive changes in the ABM Treaty. The November 29 report represents the White House's attempt to comply with this reporting requirement.

## HOW THE SUCCESSORSHIP AGREEMENT MODIFIES THE ABM TREATY

Clinton Administration officials argue that the successorship agreement makes no substantive changes in the ABM Treaty, and therefore may be concluded by the executive branch alone through the President's power under the Constitution to interpret and implement treaties. The report makes no direct reference to the law requiring that ABM Treaty agreements be submitted to the Senate if they substantively modify the treaty. Nevertheless, the White House argument about the executive branch's power to interpret and implement treaties implies that Senate review is not required under the law.

The White House report gives five reasons why the successorship agreement does not change the substance of the ABM Treaty. Close examination, however, reveals that each of these arguments is at odds with the facts. The following excerpts from the November 29 report address the arguments; the subsequent rebuttals explain why each of the Administration's arguments is unfounded.

**Administration Argument #1:** "In the case of the dissolution of the Soviet Union...both the Bush and Clinton Administrations operated on the principle that the treaty rights and obligations of the predecessor passed to the successors, unless the terms or the object and purpose of the treaty required a different result."

**Rebuttal:** This is untrue. The successorship agreement does far more than simply replace one state with several new states. In fact, it alters the very terms of the ABM Treaty. In addition, the Clinton Administration's argument misstates the policies of the Bush Administration. It implies that the Bush Administration had a "one-size-fits-all" approach to deciding the successorship to arms control treaties entered into by the former Soviet Union. This was not the case. The Bush Administration adopted a policy of reviewing such treaties on a case-by-case basis. Reginald Bartholomew, Under Secretary of State for International Security Affairs in the Bush Administration, testified before the Senate Foreign Relations Committee on February 16, 1992, that "It is not necessary to use the same legal approach for all [arms control] treaties; each should be resolved on its own merits on a case-by-case basis."<sup>6</sup>

Moreover, the Administration's argument implies that successorship to the ABM Treaty is a routine matter, amounting to little more than changing the names of the

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6 *The START Treaty*, Committee on Foreign Relations, U.S. Senate, S. Hrg. 102-607, Part 1, 1992, p. 14.

countries that are subject to the treaty. This is hardly the case. In fact, the negotiations on the agreement were anything but routine, taking some four and a half years to complete, and the agreement has yet to be signed.

The successorship agreement substantially modifies the terms of the ABM Treaty. First, the agreement changes the treaty from a bilateral to a multilateral treaty. The new agreement also establishes two kinds of treaty partners to succeed the former Soviet Union: (1) Russia, which will be allowed to deploy an ABM system; and (2) Belarus, Kazakhstan, and Ukraine, none of which will be allowed to deploy such missile defense systems, even though all are "equal" partners. The 1974 Protocol to the Treaty limited each party to only one deployed ABM site. The successorship agreement would allow only one of the four successor states to possess such a site for deployment.

In addition, Article VI of the treaty defines the Soviet Union in geographic terms and limits the placement of certain early warning radar to positions "along the periphery of its national territory and oriented outward." This geographic definition of Soviet "national territory," of course, no longer applies. Therefore, the ambiguity created by this language may allow Russia to deploy early warning radar in locations that make them ideal ABM radar, which is contrary to the intent of the treaty.<sup>7</sup>

**Administration Argument #2:** "The resolution of succession questions has long been regarded as a function of the Executive Branch, and many executive agreements [which do not require Senate consent] have been concluded that recognized the succession of new States to the treaty rights and obligations of their predecessors."

**Rebuttal:** This argument is irrelevant. The law in question pertains to the ABM Treaty alone. The Administration's argument rests on the assumption that Senate review has not been required to conclude successorship agreements regarding other treaties with the former Soviet Union, such as the 1987 Intermediate-Range Nuclear Forces (INF) Treaty and the 1990 Conventional Forces in Europe Treaty.

P.L. 103-337, §232, however, specifically requires that all agreements that substantively modify the ABM Treaty be submitted to the Senate. This provision in law pertains to the ABM Treaty alone. The President's authority to enter into successorship agreements regarding other arms control treaties signed by the Soviet Union does not relieve him of the responsibility under the law to submit the ABM Treaty successorship agreement to the Senate for advice and consent.

**Administration Argument #3:** "The proposition that succession arrangements...require Senate advice and consent...could have the unfortunate effect of encouraging parliamentarians of other states to reconsider the validity of their currently settled national expressions of succession."

**Rebuttal:** This argument also is irrelevant. How foreign parliaments approve or disapprove international agreements has nothing to do with the requirements of U.S. domestic law. The Clinton Administration is concerned that Senate review of the

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<sup>7</sup> For example, a radar could be located on the Kazakh border with Russia and oriented toward Russia. Russian access to such a facility would make it ideal for use as an ABM radar—something the ABM Treaty was intended to restrict.

ABM Treaty successorship agreement may cause parliaments in successors to the Soviet Union to demand review of these successorship agreements. Foreign parliaments may or may not pass judgment on successorship agreements. They may want to get involved even if Senate review is not required by the U.S. Constitution or domestic law. The Clinton Administration's desire to exclude foreign parliaments from the review process, however, does not relieve the President or his Administration of their obligation to submit the ABM Treaty successorship agreement to the Senate. The law requires them to do so.

**Administration Argument #4:** "[T]he ABM succession MOU [memorandum of understanding] works to preserve the original object and purpose of the [ABM] Treaty. For example, the MOU protects against a possible proliferation of ABM sites in the former Soviet Union...."<sup>8</sup>

**Rebuttal: The Clinton Administration has failed to achieve its goal of limiting the number of allowed ABM sites on the territory of the former Soviet Union.** The Administration argues that its attempts to maintain the ABM Treaty's limitation of a single allowed ABM site on the territory of the former Soviet Union proves that there will be no substantive change in the treaty. Trying to retain the limitation of a single deployed ABM system on Soviet territory, however, does not mean that the Administration will succeed.

As written, the successorship agreement actually will allow the construction of an *unlimited* number of ABM sites on territory formerly occupied by the Soviet Union. The ABM Treaty, as amended by the 1974 Protocol, allows the deployment of a single ABM system on Soviet territory. Because the White House report states that it seeks succession for only 4 of the 15 states that now occupy that former territory, the 11 other states would not be obligated to abide by the restrictions of the ABM Treaty and could construct any number of ABM systems on their own territories to defend against future missile attacks. Therefore, the successorship agreement directly undermines the object and purpose of the ABM Treaty, and the President must report this change to the Senate for review.

The successorship agreement changes the terms of the ABM Treaty in yet another way. The ABM Treaty requires certain large, phased-array radar systems to be located on the periphery of Soviet national territory and oriented outward. The White House's November report fails to address this issue at all. The definition of the periphery of Soviet national territory, of course, no longer applies, and the act of establishing a new definition for "national territory" in order to determine where these radar systems would be located would alter the terms of the treaty. The Administration apparently is trying to sweep this conflict under the rug.

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<sup>8</sup> The successorship agreement takes the form of a memorandum of understanding (MOU). This term provides no guidance on whether the content of the agreement alters the object and purpose or terms of an existing treaty. The Clinton Administration may have chosen to define the successorship agreement as an MOU precisely because its use would obscure the issue of whether the agreement involves substantive changes to the ABM Treaty.

**Administration Argument #5:** "The MOU will increase the number of states participating in the SCC [Standing Consultative Commission] but this does not constitute a substantive modification of obligations assumed."

**Rebuttal:** This is untrue. The multilateralization of the SCC is itself a substantive modification of the ABM Treaty. The SCC was designed to operate on the basis of consensus between two treaty partners of equal status. The multilateralization of the SCC, by its very nature, alters that central operating principle of the institution. In place of two treaty partners of equal status, the successorship agreement creates five treaty partners. The United States could become isolated in the positions it takes by the concerted opposition of the other four members. The multilateral nature of the SCC that would be established if the successorship agreement is signed will make it much more difficult for the United States to resolve ambiguities in the treaty or propose viable amendments to the treaty. The United States would have to obtain agreement from four states, not one. This is not in the best interests of the United States.

## THE WHITE HOUSE MISINTERPRETS THE LAW ON THE DEMARCATION AGREEMENT

The demarcation agreement—the second unsigned agreement modifying the ABM Treaty—is designed to distinguish between strategic missile defenses, which are subject to the treaty, and theater missile defenses, which are not. The November 29 report indicates that the White House is contemplating<sup>9</sup> a bizarre interpretation of an existing provision in the law in order to avoid submitting the agreement to the Senate.

The White House report refers to Section 235 of the National Defense Authorization Act for Fiscal Year 1996 (P.L. 104–106) as the basis for its assertion that there exists a prior authorization to conclude and implement the demarcation agreement without Senate review. Section 235 of the law prohibits the use of funds to implement a demarcation agreement unless it is consistent with the law.<sup>10</sup> In this case, however, the content of the demarcation agreement is not consistent because it creates an entirely new criterion for testing that is not stipulated in the law.

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- 9 In its report, the White House makes no definitive judgment as to whether the Administration would submit the demarcation agreement to the Senate, even though it does not believe Senate review is required. The report's omission of a definitive judgment on this question, however, is itself inconsistent with the requirements of Section 406 of the Department of State and Related Agencies Appropriations Act of 1997, which is a provision of P.L. 104–208. This is another example of the White House's failure to execute the law. See letter to President Clinton from Representatives Robert Livingston, Benjamin A. Gilman, and Floyd Spence, December 11, 1996.
- 10 In fact, the law allows the release of funds to implement a demarcation if any one of three circumstances exists: (1) the provision is superseded by a subsequent act of Congress; (2) the content of the demarcation agreement is consistent with the description of the same agreement provided in the law; or (3) the demarcation agreement subsequently is approved by Congress through statutory action or by the Senate as a treaty. The first circumstance, however, does not support the Administration's argument because Congress has not enacted a change in the law regarding P.L. 104–106, §235. The third circumstance is not pertinent because, according to the White House report of November 29, President Clinton wants to proceed without seeking further action either by Congress (through a change in the law) or by the Senate (through the treaty-making process). Thus, the second circumstance must be seen as the Administration's basis for concluding the demarcation agreement without Senate review.

The 1996 National Defense Authorization Act contains a specific requirement on the content of the demarcation agreement to avoid funding prohibitions. This requirement stipulates that any missile defense interceptor that is tested against a target missile with a speed in excess of 5 kilometers per second or a range in excess of 3,500 kilometers will be considered an ABM system and subject to the restrictions of the ABM Treaty. The law does not include additional definitions and restrictions on theater missile defense systems.

The demarcation agreement conflicts with P.L. 104-106 by imposing limitations on the speed of the interceptor. Specifically, the demarcation agreement states that any interceptor with a speed in excess of 3 kilometers per second may be considered an ABM system subject to the restrictions of the treaty. The authors of the White House report state that the President is prepared to interpret this law in such a way as to bypass Congress. Although no stated reason is given, the likely explanation is that the Administration believes limitations on the speed of the interceptor—something the law was not written to address—will be settled in subsequent negotiations with Russia and other successor states. The Administration's interpretation is so much at odds with the language of the law and the intent of Congress that three senior members of the House of Representatives objected in a letter to the President on December 11, 1996, that "If the Administration embraces the logic of the [November 29] report, it will be acting not only in disregard of the intent of the Congress, but also in defiance of the law."<sup>11</sup>

Perhaps aware that this interpretation is at odds with the law's requirements, the White House included as an appendix a November 25, 1996, Department of Justice memorandum that claims the President is within his constitutional authority to conclude an agreement that substantively modifies an existing treaty without Senate consent if it is done on the basis of prior congressional authorization. This appendix is an attempt at obfuscation. The Justice Department memorandum addresses only the President's constitutional authority to conclude treaty modifications under a specific circumstance: when Congress has clearly authorized the conclusion of an international agreement. It does not discuss whether the content of the demarcation agreement is consistent with the requirement established by the National Defense Authorization Act.

There is ample precedent establishing the President's authority to enter into international agreements on the basis of prior congressional authorization, just as Congress can override the provisions of a treaty through subsequent legislative action. Many postal and trade agreements have been concluded as executive agreements on the basis of prior authorization. Whether treaty-making or legislative powers under the Constitution are to be used to conclude an international agreement is not the central issue, however, in considering the merits of the demarcation agreement. Rather, the central issue is whether the President will uphold his constitutional obligation to see that the law in this case is faithfully executed by interpreting the law as it is intended. The memorandum of understanding includes neither an assessment of the proper interpretation of the law in question nor a description of the President's obligation to execute the law faithfully.

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11 Livingston, Gilman, and Spence, letter to the President, *op. cit.*

## PAST CONFRONTATIONS ON TREATY-MAKING AUTHORITY

The current debate over the scope of the Senate's treaty-making power in relation to the ABM Treaty is not without precedent. During the 1980s, the Reagan Administration and Senate opponents of missile defense squared off over the executive branch's constitutional authority to interpret treaties. Opponents argued that the Reagan Administration's interpretation of the ABM Treaty represented an attempt to circumvent the Senate and thereby limit its power as a treaty-making institution. The Clinton Administration's attempt to circumvent the Senate on the issue of these new ABM Treaty agreements, however, is a far more serious challenge to Senate prerogatives.

In 1986, the Reagan Administration adopted a "broad" interpretation of the ABM Treaty that would have allowed the testing of ABM systems in space. Certain members of the Senate, especially Sam Nunn (D-GA), objected on the basis that the Reagan Administration's interpretation really amounted to a substantive change in the treaty. Nunn and others argued that the testing of ABM systems in space would require an amendment to the ABM Treaty; any amendment then would be subject to the advice and consent of the Senate, or would require approval by a subsequent act of Congress.<sup>12</sup>

**The Sofaer Doctrine.** If Senators were so concerned that Senate prerogatives were being undermined by the Reagan Administration's interpretation of the ABM Treaty, they should be especially concerned by the Clinton Administration's attempt to circumvent the Senate on the successorship and demarcation agreements. During the "broad versus narrow" interpretation debate, Reagan State Department Legal Advisor Abraham Sofaer argued that earlier interpretations of ABM Treaty provisions made during the ratification hearings in 1972 should not bar new interpretations of the treaty: If the evidence for the legal correctness of a new interpretation was sufficiently compelling, the new interpretation should be accepted. This argument in favor of broad authority on the part of the executive branch to interpret treaties has become known as the Sofaer Doctrine.

Senate supporters of the ABM Treaty condemned the Sofaer Doctrine as unconstitutional. The Senate Foreign Relations Committee, in a 1988 report, stated that the Sofaer Doctrine "would tend to nullify the Senate's share of the Treaty Power and thus undermine a basic provision of the Constitution."<sup>13</sup> Senator Nunn called the Sofaer Doctrine a "fundamental constitutional challenge to the Senate as a whole with respect to its powers and prerogatives in this [treaty-making] area."<sup>14</sup>

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12 For a detailed description of the objections to the broad interpretation of the ABM Treaty, see *Report of the Committee on Foreign Relations, United States Senate, on the INF Treaty*, Executive Report 100-15, U.S. Senate, April 14, 1988, pp. 87-108.

13 *Ibid.*, p. 94.

14 *Congressional Record*, March 11, 1987, p. S2967. The objections of the Sofaer Doctrine overstated the case and thus were inaccurate regarding the threat the doctrine posed to the Senate's treaty-making powers. In 1993, the Bush Administration announced a new interpretation of the ABM Treaty regarding the use of data generated by early warning radar for ABM battle management. This interpretation was inconsistent with prior U.S. (but not Soviet) interpretations of the ABM Treaty, and therefore was different from what the Senate understood to be required by the treaty. Following this announcement, however, no vocal objections were raised by Senators to this interpretation. Thus, the Sofaer Doctrine was applied in 1993. Nevertheless, under certain circumstances, the Sofaer Doctrine can present the Senate with a problem that is difficult to

Senator Nunn's scathing criticism of the Reagan Administration's interpretation was followed by the inclusion of a provision in the FY 1988 Defense Authorization Bill that barred the implementation of a broad interpretation unless it was approved by Congress. Senate supporters of missile defense began a filibuster and recommended that President Reagan veto the bill if it contained this provision. Extreme parliamentary tactics used by opponents of the broad interpretation broke the filibuster and ensured that the provision barring implementation of the broad interpretation was adopted. To get their way, opponents went so far as to threaten to reduce funding for the missile defense program.

Faced with harsh criticism and substantive threats, President Reagan signed the Defense Authorization Bill containing the Nunn provision. Then, still not satisfied, the Senators in 1988 also attached a condition to the 1987 INF Treaty to bar the executive branch from re-interpreting it at a later date in any way that was inconsistent with the ratification presentations, unless the changes in interpretation were authorized specifically by Congress.

**The Clinton Doctrine.** If the Sofaer Doctrine caused such heated debate on the sensitive issue of the Senate's treaty-making powers, the recent White House report of November 29, 1996, should be seen as a mortal threat to these same powers. The "Clinton Doctrine" put forth in this report raises a constitutional challenge to the Senate's authority by establishing the argument that the President may ignore or misinterpret the meaning of the law in order to claim exclusive authority to enter into such agreements and change existing treaties.

The universal application of the Clinton Doctrine in the future could bar the Senate from exercising its treaty-making powers with respect to new executive branch modifications of existing treaties. Such a doctrine, if not challenged effectively, would enable the President to ignore the requirements of the law that future agreements modifying existing treaties be submitted to the Senate for its advice and consent. In this case, Congress enacted legislation requiring that any agreement substantively modifying the ABM Treaty be submitted to the Senate. Further, the Clinton Doctrine would allow executive branch officials to scour the statute books in search of a provision that can be used to claim prior authorization in order to conclude an agreement without Senate consent. In this case, the Clinton Administration is misinterpreting a provision in the law restricting the release of funds to implement a demarcation agreement in order to claim that Congress authorized it to conclude such an agreement.

The Sofaer Doctrine staked a claim on behalf of the executive branch to a broad authority to interpret treaties. Nevertheless, it was limited by the necessity that the President explain to Congress the need for a new interpretation of an existing treaty. Further, the President's authority was extended only in the context of interpretation and not in regard to the modification of treaties. In the case of the demarcation agreement, the Clinton

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remedy. If, in the course of the ratification process, the Senate is presented with an interpretation of a treaty by executive branch officials that is incorrect or misleading, and if the Senate consents to ratification on the basis of this interpretation it will have little opportunity to remedy its own misinformed judgment at a later date. The response to the Sofaer Doctrine by certain members of the Senate in the 1980s is a testament to the fact that its application was perceived as a threat to the Senate's treaty-making powers.

Administration has stated the agreement "constitutes a substantive modification of the obligations [the United States] would otherwise have under the [ABM] Treaty." The Clinton Doctrine, therefore, stakes a claim to a greater level of executive authority than anything imagined by Abraham Sofaer. It would allow the President to change, not just interpret, treaties unilaterally.

## THE NEED FOR A STRONG RESPONSE BY SENATE LEADERS

The Clinton Administration's attempt to bypass the Senate review process and conclude agreements that would alter the ABM Treaty substantively should be troubling to all Senators. The Clinton Doctrine poses a direct challenge to the treaty-making powers of the Senate and to the legislative powers of Congress as a whole. In response to this threat, Senate leaders should

- **Ask a respected member of the Senate to give a series of floor statements on the ways in which the Clinton Doctrine threatens both the Senate's treaty-making authority and Congress's legislative authority.** Senator Nunn's series of floor statements in 1987 detailed his argument that the Sofaer Doctrine undermined the Senate's treaty-making powers and the Constitution. These statements played a major role in forcing the Reagan Administration to reverse its position and to agree not to implement a "broad interpretation" of the ABM Treaty. The Clinton Doctrine constitutes a much greater challenge to the Senate's powers and to the Constitution. A senior Senator with the requisite legal background should be asked by the Senate leadership to make similar arguments against the Clinton Doctrine and in favor of submitting the ABM Treaty agreements to the Senate for advice and consent.
- **Schedule hearings on the Clinton Doctrine before the Senate Foreign Relations Committee and the Senate Judiciary Committee.** Because criticizing the Clinton Doctrine on the Senate floor may not create enough pressure on the Administration to submit the ABM Treaty agreements to the Senate, the Senate leadership also should establish a forum that would compel members of the Administration to defend the Clinton Doctrine in public. The best forum for such a debate is hearings before both the Senate Foreign Relations Committee and the Senate Judiciary Committee. The Foreign Relations Committee should examine whether the Clinton Doctrine undermines the prerogatives of the Senate as a treaty-making institution. The Judiciary Committee should explore whether the Clinton Doctrine is unconstitutional and violates the legislative prerogatives of Congress.

## CONCLUSION

The Clinton Administration appears determined to preserve the ABM Treaty despite the extent to which this treaty jeopardizes U.S. territory and American troops. The Administration is attempting to skirt the Senate as well as the U.S. Constitution to achieve its goal. Senate leaders have every right to object to the Administration's attempts. In fact, failure to do so could undermine the Senate's authority to ratify treaties in the future, as well as the separation of powers doctrine established by the Constitution.

Even more important, President Clinton's policy regarding the ABM Treaty would leave Americans vulnerable to missile attack. By expressing its concern over the

implications of this policy, the Senate would demonstrate its determination to protect Americans from such attacks. Preserving the constitutional balance of power is vitally important, but so is providing for the common defense of U.S. territory, American citizens, and American troops.

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