



Executive Memorandum

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THE ABM TREATY WITH RUSSIA: A TREATY THAT NEVER WAS

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President Bill Clinton announced on June 20, 1999, while in Cologne, Germany, that he and Russian President Boris Yeltsin had agreed to negotiate amendments to the Anti-Ballistic Missile (ABM) Treaty. But there is one significant problem with this decision: Russia is not, and never was, a party to the ABM Treaty, which the United States signed in 1972 with the Soviet Union. Moreover, President Clinton's decision contradicts previous statements he and the Administration have made about whether Russia is indeed a treaty party. This contradiction is important because the Administration claims the treaty is a solemn legal obligation of the United States. It is not. As legal experts recently testified before Congress, the ABM Treaty became obsolete in 1991 when the Soviet Union dissolved.

ATTEMPTS TO AMEND A "VIRTUAL" TREATY

President Clinton's attempt to make Russia a treaty partner makes little sense. Fifteen states emerged from the former Soviet Union in 1991. None of the states, including Russia, is capable—alone, or with any of the others—of assuming the Soviet Union's ABM Treaty obligations. Nevertheless, on May 21, 1998, the President wrote to the chairmen of the House International Relations Committee and the Senate Foreign Relations Committee that the ABM Treaty remained in force because the "United States and Russia clearly are Parties to the Treaty."

On February 10, 1999, however, President Clinton apparently changed his stance. In a report to

congressional appropriations committees on the ABM Treaty, the Administration indicates that no foreign states are currently parties to the treaty. According to the report, the Administration consciously and consistently had avoided using terms that would imply that any state participating in ABM Treaty-related meetings was a party to the treaty. For example, the communiqué of the fifth periodic review of the ABM Treaty, which was conducted in October 1998,

referred to Belarus, Kazakhstan, Russia and Ukraine as the "sides participating in the ABM Treaty review" and made no reference to those sides as constituting Parties to the ABM Treaty.

Also in February 1999, the General Counsel to the Arms Control and Disarmament Agency, Mary Elizabeth Hoinkes, remarked at a forum sponsored by the University of Virginia's Center for National Security Law that the United States has "no formal state party relationship with any of the potential

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state parties at this time.” The term “potential state parties” clearly is meant to include Russia.

This inconsistent policy regarding Russia and the ABM Treaty appears to be an attempt to revive the treaty by means that are at odds with the facts. President Clinton is grappling with a problem of his own creation: The more he has searched for a group of states to replace the Soviet Union as ABM Treaty partners, the more evident it has become that none of these states—including Russia—could fulfill the obligations the ABM Treaty imposed on the Soviet Union. The joint declaration in Cologne, therefore, is only the latest in a string of attempts to find new parties to the ABM Treaty. The President apparently believes that, if he can just pretend that the ABM Treaty is in force with Russia, then Congress will acquiesce and the treaty will return to force. This approach not only misrepresents the facts, it keeps Americans vulnerable to missile attack as the Administration honors the terms of a defunct Cold War relic.

DEBUNKING THE “LEGAL OBLIGATION” ARGUMENT

During hearings before the Senate Foreign Relations Committee in May 1999, legal scholars presented evidence that the ABM Treaty no longer is valid and explained that the United States legally is free to develop and deploy any national missile defense system it chooses. For example, attorneys David B. Rivkin, Jr., and Lee A. Casey of the Washington, D.C., firm Hunton & Williams testified on May 25 that:

Based upon our review of the text of the ABM Treaty, its history, and the relevant international law and American constitutional law sources, we concluded that the ABM Treaty no longer binds the United States as a matter of international or domestic law. This is because the Soviet

Union disappeared in 1991, rendering performance of the ABM Treaty as originally agreed impossible.

Fortunately for Americans, Congress listened to the facts about missile defense. On May 20, 1999, a bipartisan majority in both houses of Congress approved legislation establishing as U.S. policy the deployment of a national missile defense system. President Clinton is expected to sign the bill in the coming days, but this action will be meaningless until he stops playing legal games with the ABM Treaty.

CONCLUSION

Members of Congress must emphasize a central fact: There are no legally binding international agreements—with Russia or any other foreign country—that limit the type and number of missile defense systems the United States may deploy to defend the homeland. The June 20 joint declaration with Russia is little more than an attempt to convince Americans that they will be branded as outlaws by the international community unless they accept their current vulnerability to missile attack as a permanent condition.

Congress and the American people should understand that Russia, which is not a party to the ABM Treaty, cannot legitimately participate in negotiations to amend it—even if it were a valid agreement. Congress should ensure that missile defense policies and programs are no longer held hostage by the baseless claims that the ABM Treaty is in force with Russia and legally binding on the United States. A missile defense for America should now proceed as quickly as the technology permits.

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