

Background

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President Obama Should Give the Senate Access to the Negotiating History of New START

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Abstract: *Ambiguous language on strategic missile defense in the preamble of the recently signed strategic arms reduction treaty (New START) has prompted some Senators to request access to the negotiation records for the treaty. However, the Obama Administration and Democrat Members of the Senate Foreign Relations Committee have denied all such requests, claiming precedent for not providing such access. In fact, Senate precedent supports granting the request because the language in question is ambiguous and has already prompted dueling statements from the U.S. and Russian governments. To enable the Senate to fulfill its constitutional duty to provide “advice and consent” on New START, the Obama Administration should give the Senate access to the negotiation records.*

On May 6, 2010, six Members of the Senate Foreign Relations Committee delivered a letter to President Barack Obama requesting access to the negotiating records for the “New START” arms control treaty, which President Obama and Russian President Dmitry Medvedev signed on April 8, 2010, in Prague. In subsequent committee hearings on the treaty, Senator Jim DeMint (R–SC) made repeated requests to review the records.

To date, the Obama Administration and Democrat Members of the Foreign Relations Committee have denied all such requests. Given the ambiguous language on strategic defensive weapons in the treaty’s preamble, Russia’s unilateral statement on the meaning and legal force of the preambular language, and

Talking Points

- Since George Washington, U.S. Presidents have occasionally provided the Senate with access to the negotiating records of treaties that have been transmitted to the Senate for its advice and consent.
- The Senate has sought and received access to the negotiating history for major arms control treaties between the United States and the Soviet Union, such as the 1972 Anti-Ballistic Missile (ABM) Treaty and the 1987 Intermediate-Range Nuclear Forces (INF) Treaty.
- Under Senate precedent on arms control treaties, Senators may rightfully access the negotiating record for New START if such access “can be useful in explaining the effect of treaty provisions which may appear ambiguous.”
- The ambiguity of New START’s preamble with respect to strategic defensive weapons and the dueling statements issued by the United States and Russia on the meaning and legal force of that language clearly justify concerned Senators in gaining access to the treaty’s negotiating history.

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the reported circumstances surrounding the interchange between negotiators on missile defense, the Administration should reverse its position.

The Senate should be given access to New START's negotiating history to permit concerned Senators to become fully informed as part of fulfilling their "advice and consent" role under the U.S. Constitution.¹ While Senate requests for treaty negotiating records should not become routine or institutionalized, the circumstances surrounding the negotiation of New START justify access in this particular case.

A Historical Note on Treaty Negotiating Records

At the committee hearing on the New START treaty on May 18, 2010, Senator DeMint stated that the Senate had been granted access to the negotiating history for the original Strategic Arms Reduction Treaty (START) and asked Secretary of State Hillary Clinton whether the State Department would give the Senate Foreign Relations Committee access to the negotiating history for New START. Secretary Clinton responded, "I do not believe that the negotiating record was provided with the original START treaty, because negotiating records going back to, I think, President Washington...have not been provided."²

Secretary Clinton is mistaken. In 1796, President George Washington negotiated a treaty with the King of Great Britain that became known as the Jay Treaty. The House of Representatives requested access to President Washington's instructions to his negotiator "together with the correspondence and other documents relative to that treaty." President Washington denied that request but informed the House that "all the papers affecting the negotiation with Great Britain were laid before the Senate when the treaty

itself was communicated for their consideration and advice."³

In his message, President Washington expressed concern that turning over treaty negotiation records to the House of Representatives would set a dangerous precedent:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.... To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.⁴

However, Washington's concern did not apparently extend to turning over such documents to the Senate: "The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members."⁵ In other words, the Senate is in a better position to gain access to sensitive materials such as treaty negotiation documents and, unlike the House, has a constitutional role in giving its advice and consent to treaties.

Negotiating Records for Arms Control Treaties

More important—and much more recently—the Senate has sought and received access to the nego-

1. U.S. Constitution, art. II, § 2, cl. 2.

2. Hearing, *The New START Treaty*, video file, Committee on Foreign Relations, U.S. Senate, 111th Cong., 2nd Sess., May 18, 2010, at <http://foreign.senate.gov/hearings/hearing/?id=f4516bd0-5056-a032-52a1-76a7b9b0184d> (June 18, 2010).

3. George Washington, "Message to the House Regarding Documents Relative to the Jay Treaty," March 30, 1796, at http://avalon.law.yale.edu/18th_century/gw003.asp (June 18, 2010).

4. *Ibid.*

5. *Ibid.*

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During the mid-1980s, a dispute arose between certain Senators and the Reagan Administration about the ABM Treaty's potential effect on the President's Strategic Defense Initiative (SDI). In October 1985, the Administration maintained that the terms of the ABM Treaty did not prohibit its development of the SDI and that the negotiating record supported its position. Some Senators—Sam Nunn (D-GA) and Carl Levin (D-MI) in particular—disagreed with the Administration's "broad" interpretation of the ABM Treaty and demanded access to the negotiating history to rebut the Administration's interpretation and bolster their own "narrow" interpretation.⁶

Ultimately, pursuant to an agreement between the Senate and the Reagan Administration, the State Department produced the ABM Treaty negotiating documents to the Senate, which in turn created the Arms Control Treaty Review Support Office to house the records.⁷

In 1988, Senator Nunn and other Senate Democrats also sought access to the negotiating history for the INF Treaty, to which the Senate had not yet given its advice and consent. Senator Nunn's request was related to the prior dispute over the

ABM Treaty; he "wanted to ensure that future presidents would not try to repeat the Reagan administration's ABM gambit: using the lengthy, private records of the negotiations leading up to a treaty to justify a reinterpretation of the pact."⁸ As in the dispute over the ABM records, the Senate was granted access to the entire negotiating history for the INF Treaty.

The meaning of the terms of arms control treaties is significant because such treaties are international contracts that affect U.S. national security decisions. Unlike common bilateral tax treaties or international fishing agreements, the terms of arms control treaties, particularly ones dealing with nuclear weapons and missile defense systems, deserve special scrutiny by the Senate. As the ABM-SDI dispute illustrates, the terms of arms control treaties can have far-ranging effects on future national security policy.

In the aftermath of the disputes over the negotiating records for the ABM and INF treaties, the Foreign Relations Committee expressed concern that the final resolution of those disputes, particularly the production of negotiating records, would become institutionalized for future treaty deliberations, moving the Senate away from its traditional approach in considering treaties. Specifically, the committee report on the INF Treaty stated that the creation of such a precedent would "inhibit candor" and "induce posturing" in future treaty negotiations. The committee further stated: "The overall effect—of fully exposed negotiations followed by a far more complicated Senate review—would be to weaken the treaty-making process and thereby to damage American diplomacy."⁹

Indeed, Senators John Kerry (D-MA) and Ted Kaufman (D-DE) quoted this language at length during committee hearings on May 18 and June 15 in response to Senator DeMint's repeated requests for access to the New START negotiating records.¹⁰

6. Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, U.S. Senate, S. Prt. 106-71, 106th Cong., 2d Sess., January 2001, p. 128.

7. *Ibid.*, p. 128, note 32.

8. *Congressional Quarterly Almanac*, Vol. 44 (1988), p. 388.

9. *The INF Treaty*, Committee on Foreign Relations, U.S. Senate, S. Exec. Rep. 100-15, 100th Cong., 2d Sess., April 14, 1988, p. 100.

Conveniently, neither Senator Kerry nor Senator Kaufman quoted the language in the INF Treaty report that immediately followed—the language that set forth the conditions under which Senate access to treaty negotiating records would be justified:

The traditional approach does not, of course, *preclude* reference to the “record” where such reference can be useful in explaining the effect of treaty provisions which may appear ambiguous or about which questions may arise. The Executive may sometimes wish to initiate such reference to the “record”; on some occasions the Senate may request a detailed account of the interchange which resulted in a particular treaty provision.¹¹

Therefore, notwithstanding Secretary Clinton’s and Senator Kerry’s protestations, there is solid precedent for Senate access to treaty negotiating history records under certain circumstances—circumstances that would seem to apply to New START.

Senate Precedent and New START

Using the INF Treaty report as a guideline, Senate access to the negotiating record for New START is warranted “where such reference can be useful in explaining the effect of treaty provisions which may appear ambiguous” or to explain the effect of treaty provisions “about which questions may arise.” The committee report also contemplates occasions in which “the Senate may request a detailed account of the interchange which resulted in a particular treaty provision.”¹²

The controversial language in the treaty’s preamble reads as follows:

Recognizing the existence of the interrelationship between strategic offensive arms and strategic defensive arms, that this interrelationship will become more important as

strategic nuclear arms are reduced, and that current strategic defensive arms do not undermine the viability and effectiveness of the strategic offensive arms of the Parties.¹³

The language is arguably ambiguous. That is to say, the language on strategic defensive arms could be understood in two or more ways.

The ambiguous language in the preamble raises serious questions about the Obama Administration’s plans for missile defense.

The ambiguous language in the preamble raises serious questions about the Obama Administration’s plans for missile defense, a key component of U.S. national security policy in a proliferating world. The language naturally raises a number of questions:

- What is the “interrelationship” between strategic offensive and defensive arms, and in what way will that interrelationship “become more important” as offensive nuclear arms are reduced?
- To what degree must offensive arms be “reduced” before the interrelationship becomes “important”?
- How is “current” strategic defensive arms defined?
- At what point does an enhancement of current U.S. strategic defensive arms begin to “undermine the viability and effectiveness” of Russia’s strategic offensive arms?

In addition to the preamble’s ambiguity, and perhaps more significantly, the United States and the Russian Federation have interpreted the language differently. The Russian Federation released a unilateral statement on April 8 that interprets the preambular language in a way that would restrict future U.S. missile defense capabilities:

10. Hearing, *The New START Treaty*, and hearing, *The New START Treaty (Treaty Doc. 111–5): The Negotiations*, video file, Committee on Foreign Relations, U.S. Senate, 111th Cong., 2nd Sess., June 15, 2010, at <http://foreign.senate.gov/hearings/hearing/?id=3671a6a5-5056-a032-52e4-7100ea0b32eb> (June 18, 2010).

11. *The INF Treaty*, Committee on Foreign Relations, p. 100 (original emphasis).

12. *Ibid.*

13. Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, April 8, 2010, at <http://www.state.gov/documents/organization/140035.pdf> (June 18, 2010).

The Treaty... may be effective and viable only in conditions where there is no qualitative or quantitative build-up in the missile defense system capabilities of the United States of America. Consequently, the extraordinary events referred to in Article XIV of the Treaty [regarding the right to withdraw from the treaty] also include a build-up in the missile defense system capabilities of the United States of America such that it would give rise to a threat to the strategic nuclear force potential of the Russian Federation.¹⁴

The Obama Administration responded with an entirely different interpretation in which it reaffirmed that the United States intends to improve its missile defense capabilities:

The United States of America takes note of the Statement on Missile Defense by the Russian Federation.... The United States intends to continue improving and deploying its missile defense systems in order to defend itself against limited attack and as part of our collaborative approach to strengthening stability in key regions.¹⁵

The ambiguity of the preamble language extends beyond the strict meaning of the terms, since the Obama Administration and the Russians also disagree about the preamble's legal force and effect. For instance, on April 6, Russian Foreign Minister Sergei Lavrov stated that the "[l]inkage to missile defense is clearly spelled out in the accord and is legally binding."¹⁶ In contrast, the State Department fact sheet released on April 21 states that the preamble is *not* legally binding:

The Preamble of the Treaty contains a statement acknowledging the interrelationship of

strategic offensive and strategic defensive arms, as President Obama and President Medvedev agreed in their Joint Statement of July 2009, and recognizes that this relationship will become more important as strategic offensive arms are reduced. But the Preamble also affirms that currently deployed strategic defensive arms do not undermine the viability and effectiveness of either Party's strategic offensive arms. *This preambular language is not legally binding.*¹⁷

It would therefore appear that the preambular language about the U.S. missile defense program qualifies as language that "may appear ambiguous" and "about which questions may arise." Not only is the language ambiguous on its face, but the United States and Russia have offered divergent interpretations of the language and its legal force. Since the fate of U.S. missile defenses and future bilateral relations with Russia hang in the balance, it is imperative that the Senate resolve any ambiguity in the treaty's terms in favor of U.S. national security. Otherwise, the Obama Administration is effectively granting Russia a *de facto* veto over U.S. policy because Russia will likely threaten to withdraw from New START if the U.S. improves, enhances, or deploys missile defenses in Europe and elsewhere.

Moreover, the circumstances surrounding the agreement between U.S. and Russian negotiators, particularly in regard to the preambular language, are such that Senate access to the negotiating history is warranted. Such a review is consistent with the INF Treaty report, which stated that "on some occasions the Senate may request a detailed account of the interchange which resulted in a particular treaty provision."¹⁸

14. Office of the President of Russia, "Statement of the Russian Federation Concerning Missile Defense," April 8, 2010, at http://eng.news.kremlin.ru/ref_notes/4 (June 18, 2010). For the official U.S. translation, see U.S. Department of State, "Statement of the Russian Federation Concerning Missile Defense," at <http://www.state.gov/documents/organization/140408.pdf> (June 18, 2010).

15. U.S. Department of State, Bureau of Verification, Compliance, and Implementation, "Statement by the United States of America Concerning Missile Defense," April 7, 2010, at <http://www.state.gov/t/vci/rls/140184.htm> (June 18, 2010).

16. Lyubov Pronina, "Russia May Exit Accord If U.S. Pursues Missile Plan (Update 1)," *Bloomberg Businessweek*, April 6, 2010, at <http://www.businessweek.com/news/2010-04-06/russia-may-exit-new-arms-deal-if-u-s-boosts-missile-defense.html> (June 18, 2010).

17. U.S. Department of State, Bureau of Verification, Compliance, and Implementation, "Ballistic Missile Defense and New START Treaty," April 21, 2010, at <http://www.state.gov/t/vci/rls/140624.htm> (June 18, 2010) (emphasis added).

Reportedly, certain assurances were given regarding missile defense during the interchange between U.S. and Russian negotiators. Dimitri Simes, president of the Nixon Center, reported in *Time* that

“Russian experts and officials...believe that America made a tacit commitment not to develop an extended strategic missile defense.”

Obama Administration negotiators assured the Russian negotiators that the U.S. had no intention of developing an “extended strategic missile defense” or placing such defenses in Europe:

Russian experts and officials...believe that America made a tacit commitment not to develop an extended strategic missile defense. As a senior Russian official said to me, “I can’t quote you unequivocal language from President Obama or Secretary Clinton in conversations with us that there would be no strategic missile defenses in Europe, but everything that was said to us amounts to this.” In this official’s account, the full spectrum of U.S. officials from the President to working-level negotiators clearly conveyed that the reason they rejected more explicit restrictions on missile defense was not because of U.S. plans, but because of fear that such a deal could not win Senate ratification. A senior U.S. official intimately familiar with the talks has confirmed that the Russians were advised not to press further on missile defenses because the Administration had no intention to proceed with anything that would truly concern Moscow.¹⁹

Another report in *The Washington Times* maintains that, according to U.S. officials involved in arms control issues, the Obama Administration “is secretly working with Russia to conclude an agree-

ment that many officials fear will limit U.S. missile defenses” and that “the first linkage between missile defenses and strategic offensive arms is contained in the preamble to the new Strategic Arms Reduction Treaty.”²⁰

Given these circumstances, Senate access to a detailed account of negotiations between the United States and Russia, particularly the negotiations that produced the preambular language on missile defense, is entirely justified. If the Senate fails to pursue this matter, it will be derelict in its constitutional duty to provide its advice and consent on the treaty because it will not have fulfilled that duty in a fully informed manner.

Access Should Be Granted

The Senate has only this one opportunity to provide its consent to ratification of New START. In the end, Senators must decide for themselves whether access to the treaty negotiating history to clarify the ambiguity about missile defense in the preamble is a necessary condition to giving their consent. Conversely, the Obama Administration must decide whether granting the Senate access to the negotiating history of the treaty is required to secure the 67 votes needed to ratify the treaty.

The INF Treaty report issued by the Senate Foreign Relations Committee sets forth a fair and workable standard regarding Senate access to treaty negotiating records. Access to the negotiating history is warranted when it may be useful in explaining the effect of ambiguous treaty provisions or other treaty provisions “about which questions may arise.” Moreover, the report continues, “on some occasions the Senate may request a detailed account of the interchange which resulted in a particular treaty provision.”²¹

Using the INF Treaty report as a guideline and based on (1) the ambiguity of the preambular language relating to strategic defensive weapons; (2)

18. *The INF Treaty*, Committee on Foreign Relations, p. 100.

19. Dimitri Simes, “Is Obama Overselling His Russia Arms Control Deal?” *Time*, April 27, 2010, at <http://www.time.com/time/world/article/0,8599,1984882,00.html> (June 18, 2010).

20. Bill Gertz, “Inside the Ring,” *The Washington Times*, June 16, 2010, at <http://www.washingtontimes.com/news/2010/jun/16/inside-the-ring-382424672> (June 18, 2010).

21. *The INF Treaty*, Committee on Foreign Relations, p. 100.

the dueling unilateral statements issued by the United States and Russia on the meaning and legal force of the preamble; and (3) the reported circumstances surrounding the U.S.–Russian negotiations on missile defense, concerned Senators are clearly justified in seeking and gaining access to some or all of the negotiating history for the New START treaty.

Of course, the Senate is not bound by the standard set forth in the INF Treaty report or the fact that the Senate was given access to the negotiating records for the ABM and INF treaties. Nor is the Senate bound by the fact that it was not provided access to the negotiating records for all treaties or for other arms control agreements, such as the Strategic Arms Limitation Talks (SALT) treaties.

The negotiating history would provide the Senate with a full and complete understanding of the agreement struck between the Obama Administration and the Russian Federation. That understand-

ing will permit the Senate to determine whether to give its consent to ratification, to give its consent with a reservation regarding the preamble language, or to reject the treaty.

Finally, granting the Senate access will not place an undue burden on the Administration, as was arguably the case with the ABM and INF treaty disputes in which there was no designated negotiating record. A statute passed by Congress and signed into law in 1994 requires the Secretary of State to establish and maintain the complete negotiating record for all arms control treaties.²²

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22. 22 U.S. Code § 2578.