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Advice and Consent? The Senate Should START with Advice

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The debate about New START is heating up. Last week Senator John Kerry (D-MA), Chairman of the Senate Foreign Relations Committee, released the long-awaited “Chairman’s draft” of the New START Treaty Resolution of Advice and Consent to Ratification. In addition to Senator Kerry’s flawed resolution, Senator Richard Lugar (R-IN), the ranking Member of the Foreign Relations Committee, on the basis of the draft circulating in the press, has a slightly modified but still weak draft resolution.¹

The discussion draft demonstrates that even the strongest proponents of the treaty in the Senate acknowledge the numerous problems pointed out by The Heritage Foundation over the last several months. Unfortunately, it is clear that attempts to resolve these problems in the proposed resolution are inadequate.

The Senate’s Role in the Treaty Process. First, it is important to clarify the Senate’s role in the treaty process. Contrary to popular belief, the Senate does not “ratify” treaties. Its constitutional role is to give its “advice and consent” to the President. The Senate fulfills this mandate by considering a resolution of ratification. This document can contain reservations, conditions, understandings, or declarations to a treaty.

The Senate may also amend the text of a treaty. Substantive changes not accepted by the other party to the treaty have the most serious impact, as they require parties to return to the negotiating table until mutually agreeable terms are reached. Notably,

there are no reservations in Senator Kerry’s draft resolution of ratification.

Conditions are something that the Senate requires the President to do in return for the Senate giving its consent to ratification. Legally unsound and nonsensical, Section 2 of “Conditions” requires the President to consult with the Senate on reductions of strategic nuclear forces *if the treaty does not enter into force*. Yet how can this condition create a binding obligation for the President if the treaty does not enter into force? A treaty enters into force only when the instruments of ratification are mutually accepted and exchanged.

Non-Binding Declarations and How to Fix the Problem. Unfortunately, substantial portions of the draft resolution are only non-binding declarations. In addition, a review of the declarations reveals the impact of many of the issues that The Heritage Foundation has repeatedly raised: missile defense; the Bilateral Consultative Commission; U.S. commitment to ensuring the safety, reliability, and effectiveness of nuclear force; rail-mobile ICBMs; asymmetry in reductions of nuclear weapons; compliance; expanding strategic arsenals in countries other than Russia; treaty interpretation, modification, or reinterpretation; tactical nuclear

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weapons; and commitment to further strategic arms reductions.²

The treaty's most serious impact is the limitations it imposes on the U.S. ballistic missile defense systems. According to the Russian unilateral statement, New START "can operate and be viable only if the United States of America refrains from developing its missile-defense capabilities quantitatively or qualitatively." In addition, language in the preamble of the treaty links strategic offensive and defensive arms, and additional limitations on missile defense are found in the Treaty text and the Protocol.³

But given the trends in the proliferation of nuclear weapons and rapid improvements in the means to deliver them, the U.S. government has an obligation to move toward a posture based on protecting and defending the people, territory, institutions, and infrastructure of both the U.S. and its allies and friends. New START fails to do this as it limits missile defense and encourages a return to a Cold War retaliation-based policy where U.S. cities and people were held hostage. In order to protect and defend the U.S. and its allies in this new security environment, a reservation on missile defense is required. Such a reservation should state unequivocally that U.S. options for improving and expanding its missile defense capabilities in any way it chooses are preserved.

The only issue addressed in Senator Kerry's draft resolution is strategic non-nuclear weapon systems. However, there is no justifiable reason for counting conventional weapons against the numerical limits in the treaty. Since launchers, delivery vehicles, and accountable warheads are counted for both conventional and nuclear purposes, adding one conventional system would thus entail losing one nuclear

system. Because of the definitions in the treaty, the only viable solution is to amend the treaty's text and explicitly exclude conventional capabilities.

An Inadequate Verification Regime. The draft resolution of ratification does very little to address the fact that the verification regime is not even a pale reflection of that of the original START treaty.⁴ Interestingly, presidential certification and a report on national technical means (NTM) to monitor Russia's compliance are required by the draft resolution. However, according to former Assistant Secretary of State for Verification, Compliance, and Implementation Paula DeSutter, the U.S. NTM infrastructure is "broken" and the U.S. lacks the independent satellite capability it had in the Intermediate Nuclear Forces Treaty and the original START treaty.⁵

The treaty even permits concealment activities at ICBM bases. However, all experts in the arms control community agree that as numbers of nuclear weapons go down, verification becomes more important and must become more robust because the benefits of cheating increase.

The best possible solution to this serious flaw is to amend the text of the treaty as necessary. However, this would require an extensive and complex re-writing of the verification provisions of the treaty, protocol and annexes. Another solution is to attach a condition to the resolution of ratification requiring the President to negotiate a separate treaty on a strategic transparency strengthening verification regime. However, this approach has an inherent weakness: Moscow is unlikely to be interested in additional transparent verification provisions.

The Senate is helping to solve problems that the treaty has created. But even the limited effort is

1. Josh Rogin, "Kerry's Draft Resolution on New START Already Facing Hill Pushback," *Foreign Policy*, September 7, 2010, at http://thecable.foreignpolicy.com/posts/2010/09/07/kerrys_draft_resolution_on_new_start_already_facing_hill_pushback (September 13, 2010).
2. New START Working Group, "An Independent Assessment of New START Treaty," Heritage Foundation *Backgrounder* No. 2410, April 30, 2010, at <http://www.heritage.org/Research/Reports/2010/04/An-Independent-Assessment-of-New-START-Treaty>.
3. Baker Spring, "Another Limit Imposed by the New START Treaty," Heritage Foundation *WebMemo* No. 2939, June 18, 2010, at <http://www.heritage.org/Research/Reports/2010/06/Another-Limit-Imposed-by-the-New-START-Treaty>.
4. New START Working Group, "New START: Potemkin Village Verification," Heritage Foundation *Backgrounder* No. 2428, June 24, 2010, at <http://www.heritage.org/Research/Reports/2010/06/New-START-Potemkin-Village-Verification>.
5. Paula DeSutter, "Verification and the New START Treaty," Heritage Foundation *Lecture* No. 1160, July 12, 2010, at <http://www.heritage.org/Research/Lecture/Verification-and-the-New-START-Treaty>.

opposed by the Assistant Secretary of State for Verification, Compliance, and Implementation Rose Gottemoeller, who is opposed to Senator Lugar's draft language on the grounds that it will complicate treaty implementation with the Russians. This objection is understandable insofar as Gottemoeller is among those who helped create the problem.⁶

Senate Must Avoid Rubberstamping. There are no easy solutions to fixing the problems of the flawed New START treaty. Foremost, the Senate should avoid rubberstamping the treaty. The new strategic environment requires the U.S. to possess robust missile defenses and a range of conventional and non-conventional capabilities to prevent and deter attacks. The very survival of the U.S. may be at stake in these issues.

Congress is required by the Constitution to “provide for the common defense,” and the Senate must provide due diligence in its consideration of the treaty. The American people are depending on their elected leaders in the Senate to take necessary actions to ensure the U.S. is defended against attack.

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6. Eli Lake, “Lugar Adds GOP Caveats to START,” *The Washington Times*, September 13, 2010, at http://www.washingtontimes.com/news/2010/sep/13/lugar-adds-gop-caveats-to-start/?utm_source=Newsletter&utm_medium=Email&utm_campaign=Heritage%2BHotSheet (September 14, 2010).