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More Limits on U.S. Space Systems Unacceptable

Baker Spring and Michaela Bendikova

The Obama Administration launched a push for an international Code of Conduct pertaining to activities of space-faring nations, but its activities have been cloaked in secrecy. This lack of transparency caused 37 Republican Senators to request more information about the Administration's negotiations on this issue in February 2011. According to Ellen Tauscher, Undersecretary of State for Arms Control, "We will never do a legally binding agreement because I can't do one. I can't get anything ratified."¹ It appears that the Administration is trying to circumvent the Senate's constitutional role in consenting to the ratification of international agreements that should be concluded as treaties.

Negative Implications for the U.S. Military. Arms control treaties, such as the Washington and London naval limitation treaties, are designed to limit the quantity and quality of arms in the possession of the participating states during times of peace. They cease to pertain during times of war. Laws of war treaties, such as the Geneva or Hague Conventions, on the other hand, are designed to dictate how the armed forces of participating states operate in times of war. If these restrictions are not honored, service members may be subject to courts martial as war criminals by their military justice systems.

The Code of Conduct for space will be as much about restricting how space forces are used by the U.S. military as about limiting their types and numbers. For example, participating states will have to

operate their space forces in ways that prevent the generation of space debris. In this context, a U.S. military service member who makes a split-second decision in the operation of space forces during a crisis, when an enemy has taken dangerous action but the U.S. is not yet certain of the situation, may be prosecuted by his service as a war criminal if his decision and the resulting action generate space debris. The Code of Conduct effectively means that, when seconds count, decisions will take minutes.

Even if applied only during peacetime, the Code of Conduct would jeopardize U.S. ability to engage in testing of both space weapons and space combat doctrines. These activities could be interpreted as failing to "minimize the possibility of harmful interference" and engaging in "actions that damage or destroy space objects unless reducing debris." Both of these points are likely to appear in the Administration's version of the Code of Conduct. Even cyber activities might be seen as violating the code's demand to commit to International Telecommunications Union regulations and recommendations, another attribute of the Code of Conduct as cur-

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rently drafted. If the U.S. military is going to fight the way it trains, then denial of peacetime training opportunities of weapons and doctrine is a sure path to failure.

Circumventing the Senate's Role. Section 2573 of Title 22 of the U.S. Code prohibits the Administration from taking any action, including entering into non-treaty agreements, that limit the armed forces of the U.S. in a militarily significant manner other than through treaty agreements or a specific congressional authorization. Since there is no specific authorization by Congress to limit U.S. military options in ways that will necessarily be a part of the Code of Conduct, the Obama Administration is legally required to negotiate the Code as a *treaty* document and make it subject to the advice and consent process.

Despite this clear legal requirement, Secretary of State Hillary Clinton's statement commits the Administration to negotiate the Code of Conduct as a document that is not legally binding and not subject to any level of congressional review or approval. Congress, and the Senate in particular, should make it clear to the Administration that it is unacceptable for the Administration to pursue the kinds of limitations imposed by the Code of Conduct unless it takes the form of a treaty.

Preparing to Do More Damage? Previously, the focus on using arms control to restrict space capabilities and activities was rooted in a treaty proposed by the governments of China and Russia for the Prevention of an Arms Race in Outer Space (PAROS), which would severely restrict U.S. military options and capabilities in space. This item was put on the agenda of the United Nations Conference on Disarmament (CD). On June 4, 2011, Assistant Secretary

of State Rose Gottemoeller told the CD that the U.S. had accepted this agenda.²

Implicit in this announcement was that the U.S. would accept the PAROS Treaty proposed by China and Russia if the conference would conclude the negotiations on the Fissile Material Cutoff Treaty (FMCT), which is also on the CD's agenda. The FMCT purports to ban the future production of fissile material used in the production of nuclear weapons, but it is not verifiable. Nevertheless, the Obama Administration considers the conclusion of the FMCT to be an essential step on the path toward its goal of nuclear disarmament.

Since May 2009, the CD's agenda has not advanced.³ The Secretary of State's announcement regarding the Code of Conduct says nothing about whether the U.S., as a result, has also withdrawn its support for CD's agenda and, by extension, the PAROS Treaty. In the absence of a clear statement by the Administration regarding the CD's agenda, it is impossible to avoid the conclusion that the negotiations on the Code of Conduct are designed to serve as a stalking horse for U.S. acceptance of the Chinese and Russian PAROS Treaty.

In essence, the Administration's acceptance of the CD's agenda was to trade U.S. military superiority in space, giving states like China, Iran, North Korea, and Russia an advantage over the U.S. and its allies in the nuclear arena. Congress should make it clear to the Administration that dressing up this ill-considered trade in the guise of a negotiation on a space Code of Conduct does not make it acceptable.

Protect U.S. Capabilities in Space. By accepting the code, the Administration would threaten the dominant U.S. position in military and intelligence space capabilities, which provides the U.S. with

1. Josh Rogin, "Tauscher: We Will Get a Missile Defense Agreement with Russia," The Cable, January 12, 2012, at http://thecable.foreignpolicy.com/posts/2012/01/12/tauscher_we_will_get_a_missile_defense_agreement_with_russia (January 24, 2012).
2. Rose Gottemoeller, Assistant Secretary, Bureau of Verification, Compliance, and Implementation, "Statement to the Conference on Disarmament," U.S. Department of State, June 4, 2009, at <http://www.state.gov/t/avc/rls/124463.htm> (January 24, 2012).
3. "Decision for the Establishment of a Programme of Work for the 2009 Session," Conference on Disarmament, May 29, 2009, at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/E8846993B5213D59C12575DF0029EE11/\\$file/CD+1864+English.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/E8846993B5213D59C12575DF0029EE11/$file/CD+1864+English.pdf) (January 24, 2012).

enormous advantages over the enemy in the conduct, training, and support of military operations. In addition, the Administration is trying to circumvent the Senate's advice and consent role. Congress should make it clear to the Administration that it will not tolerate an agreement that blurs the distinction between an arms control treaty and a law of war treaty.

By extension, if the U.S. enters into international negotiations on a space Code of Conduct, it should mean that the U.S. is withdrawing its support for the agenda at the United Nations Conference on Disarmament. Congress should vigorously defend its advice and consent role and demand the sub-

mission of the Code of Conduct as a treaty, rather than accepting the Administration's fiction that it is anything else.

—*Baker Spring* is F. M. Kirby Research Fellow in National Security Policy and Michaela Bendikova is Research Assistant for Missile Defense and Foreign Policy in the Douglas and Sarah Allison Center for Foreign Policy Studies, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation.

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