Star Wars Meets the ABM Treaty: The Treaty Termination Controversy

Mark Anderson Finklestein

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Part of the Commercial Law Commons, and the International Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncilj/vol10/iss3/8

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Star Wars Meets the ABM Treaty: The Treaty Termination Controversy

I. Introduction

Powerful forces are eroding the nuclear arms control structure only a decade after the Nixon administration originally negotiated the structure. Technological advances make it both increasingly difficult to verify compliance with treaty limits and increasingly tempting to employ new technologies that circumvent or violate arms control agreements. Alleged violations of arms control agreements by the Soviet Union and an avowed intention of the United States to take actions in the future that currently are prohibited by treaty further endanger the arms control structure.

Many reputable and influential experts now question whether arms control is an effective means of enhancing American national security. Many believe that the arms control process creates inflated public expectations that require unwise concessions and erode the will of Western nations to expend adequate sums for defense. The slow but steady growth of the strategic forces of the People's Repub-

---

1 The advent of the modern cruise missile typifies the verification problem. The Tomahawk sea-launched cruise missile now being deployed on the U.S. fleet is a long-range missile, sized to be fired from torpedo tubes, capable of deployment on a variety of air, surface ship, submarine, and land platforms, and designed to carry either nuclear or conventional warheads. H.R. REP. No. 353, 96th Cong., 2d Sess. 789 (1980). Counting such a small, long-range, and versatile weapon poses a grave problem.

2 Most prominent among these temptations is President Reagan's strategic defense initiative (the "Star Wars" plan). The prospect of an effective ballistic missile defense makes compliance with the Anti-ballistic Missile Treaty, which impedes ballistic missile defense, particularly onerous. President Reagan takes what is at least the rhetorical high ground when he states that "mutual assured survival" through ballistic missile defense is better than the mutual assured destruction enshrined in the Anti-ballistic Missile Treaty. On February 1, 1985, the United States officially accused the Soviet Union of violating the ABM Treaty by constructing a phased-array radar near Krasnoyarsk. Washington Post, Feb. 2, 1985, at A1, col. 1.

For a discussion of the radar, see infra notes 158-65, 173-77 and accompanying text.


For a discussion of the radar, see infra notes 158-65, 173-77 and accompanying text.

4 Wall St. J., Feb. 13, 1985, at 64, col. 1 (reporting President Reagan’s desire to develop space-based missile defense regardless of any new limitations on offensive arms, and quoting Assistant Secretary of Defense Richard Perle’s opinion regarding space-based missile defense: “I am absolutely convinced it can be done; I know it must be done.”).

lic of China further complicates the future of arms control. Soon, complicated bilateral negotiations will become even more complicated trilateral negotiations or will terminate. Against this background, the second Reagan Administration is debating whether to scrap the present arms control regime. The funding and direction of President Reagan’s strategic defense initiative—"Star Wars"—is the focal point of this debate.

On May 31, 1982, President Reagan announced that the United States would refrain from actions that undercut existing strategic arms agreements so long as the Soviet Union shows equal restraint. This announcement amounted to a reaffirmation of the Anti-ballistic Missile Treaty (ABM Treaty) and a political commitment to refrain from “undercutting” the expired SALT I agreement and the unratified SALT II accords.

Current events put in question the United States commitment to abide by the ABM Treaty and to restrain production of strategic offensive weapons. The deployment of the next Trident Submarine in late 1985, without significant dismantling of other strategic weapons, will put the United States over the limit on ballistic missile launchers on submarines delineated in the Protocol to SALT I, and leave the United States above the limit on Multiple Independently-targeted Reentry Vehicles (MIRVs) provided in SALT II. Testing or deployment of the space-based ballistic missile defense technologies, currently under study pursuant to the Strategic Defense Initiative, probably constitute a violation of Article V of the ABM Treaty.

---

6 Few analyses exist of China’s growing ICBM force’s effect on the relationship between the United States and the Soviet Union. For one such analysis, see Strode, Arms Control and Sino-Soviet Relations, ORBIS, Spring 1984, at 163.


12 SALT II, supra note 10, at art. V.

13 See infra notes 67-77, 83-91 and accompanying text.
In the light of the erosion of the consensus behind the present arms control structure, five issues are addressed in the pages that follow:

1. What does the strategic defense initiative ("Star Wars") entail?
2. How does current international law constrain the development of anti-ballistic missile systems?
3. Would deployment of a ballistic missile defense similar to the system envisioned by the strategic defense initiative require termination, suspension or renegotiation of the ABM Treaty?
4. Does the President have the constitutional authority to terminate the ABM Treaty without legislative consent?
5. How may the United States justify termination of the ABM Treaty under international law?

II. The Strategic Defense Initiative ("Star Wars")

In response to President Reagan's "Star Wars" speech of March 1983, a team of scientists under the direction of Dr. James Fletcher conducted a study of technologies for ballistic missile defense. The Fletcher Report identified six broad technological areas that require development to deploy a high technology ballistic missile defense. These areas are: (1) surveillance, target acquisition, and tracking of Soviet missiles; (2) directed energy weapons for missile interception; (3) conventional projectile weapons for missile interception; (4) control and coordination of battle (communications and data processing); (5) integrated defensive systems (use of several layers of different kinds of interceptors); (6) Soviet countermeasures and tactics.

The general outlines of the strategic defense initiative are contained in unclassified sources. Because only conventional interceptor systems, directed energy interceptor systems, and tracking systems have significant arms control implications, only these systems will be discussed.

Conventional interceptor research programs currently emphasize the development of an exoatmospheric, nonnuclear, infrared homing missile. In June 1984 a Homing Overlay Experiment (HOE)
missile with these characteristics destroyed a dummy warhead over one hundred miles above the earth by unfurling a fifteen foot metal impact net in the warhead’s path.\textsuperscript{18}

Two other “conventional” programs also are heavily funded. The Defense Department is developing a low altitude interceptor missile to complement the HOE missile.\textsuperscript{19} The most exotic conventional program involves developing electromagnetic guns capable of delivering a projectile at speeds of up to six miles per second.\textsuperscript{20}

Current directed energy weapons\textsuperscript{21} research explores four broad concepts for ballistic missile defense: laser weapons,\textsuperscript{22} particle beam weapons,\textsuperscript{23} electromagnetic pulse weapons,\textsuperscript{24} and microwave weapons.\textsuperscript{25} The laser weapons program is the most advanced of the four programs.

Because lasers are the most promising directed energy weapons technology, they will continue to be the primary focus of the technical and policy controversies relating to arms in space for the next two decades.\textsuperscript{26} The Navy and TRW Corporation dramatically demonstrated the effectiveness of laser technology in 1978 when a chemical laser was used to destroy two TOW antitank missiles in flight.\textsuperscript{27} Research continues on both land-based and space-based laser weapons designed for both anti-satellite and anti-ballistic missile roles.

Many technical problems stand in the way of an effective laser-based ballistic missile defense. The laser power levels necessary for efficient ballistic missile defense have not yet been demonstrated.\textsuperscript{28} Atmospheric conditions, such as fog, rain, snow, clouds, and air pollution, absorb and deflect beams, thereby limiting the effectiveness of ground-based lasers.\textsuperscript{29} Electrical generators and high-powered optics necessary for laser-based missile defenses are large, and therefore, vulnerable to attack and difficult to launch into space.\textsuperscript{30} Lasers...
also are prone to countermeasures such as clading targets with reflective material designed to deflect the beam's energy.

Military research regarding particle beam weapons began with the SEESAW program in 1958. The program initially seemed promising because many of the disadvantages of laser weapons do not pertain to particle beam weapons. Atmospheric conditions such as cloud cover have a lesser effect on particle beams. Large power generators and optics are unnecessary because particle beams transfer energy at nearly 100 percent efficiency. Particle beams are also more difficult to counter than lasers because particle beams deposit their energy inside the target rather than on the surface, as do lasers.

The difficulties with particle beams, however, are more basic than the problems facing laser weapons. The SEESAW program was discontinued in 1972 because of problems anticipated in achieving the range necessary for ballistic missile defense and because of the prohibitively high projected costs of deployment. Merely aiming particle beams presents technical problems because charged particle beams are deflected by the earth's magnetic field. Therefore, most charged particle research is directed toward tactical roles such as anti-ship missile defense. Although recently initiated neutral particle beam research ultimately should overcome the magnetic field barrier to particle beam-based ballistic missile defense, the solutions to the other technical problems are not yet in sight.

Despite their size, the technical problems related to directed energy weapons are dwarfed by the problems of providing sufficient surveillance, target acquisition, and tracking. Distinguishing between real warheads and decoys over a large area, through a nuclear explosion ionized atmosphere currently is impossible. The Defense Department has initiated several programs designed to rectify the surveillance, target acquisition, and tracking problems. The most exotic of these programs, Talon Gold, will use a special telescope to measure the accuracy of laser tracking. The first demonstration of Talon Gold currently is scheduled for mid-1987 aboard the space shuttle.

The high resolution infra red sensors of the Advanced Warning

---

31 Id. at 25.
32 Kerr, supra note 16, at 11.
33 Id.
34 Garwin, Charged-Particle Beam Weapons?, 34 BULL. ATOMIC SCIENTISTS 24 (1978) (stating that discriminating between reentry vehicles and decoys, propagating the beam through the atmosphere, correcting the aiming of the beam, and determining whether the target has been destroyed are particularly problematic).
35 Id. at 24-26.
36 Kerr, supra note 16, at 5.
37 T. LONGSTRETH & J. PIKE, supra note 16, at 27.
38 Id.
Satellite system, scheduled for deployment in the 1990s is another attempt to rectify the tracking problem. These early warning satellites will be capable of tracking ballistic missiles during the critical boost phase of their trajectories. Boost phase missile destruction is particularly important because all warheads and penetration aids lifted by a missile can be destroyed with a single shot.

Two tracking systems currently under development focus on the later stages of a ballistic missile’s trajectory. One system, known as the Airborn Optical System, tracks missiles using a modified C-135 airplane equipped with an infra red telescope. The second program involves perfecting a ground-based imaging laser “radar.”

On January 25, 1985, in response to preliminary ballistic missile defense research, Paul Nitze, the Reagan Administration’s senior arms control advisor, announced a major shift in the strategic defense policy of the United States. Before the announcement, the strategic defense initiative was merely a research program aimed at advancing the technologies identified in the Fletcher Report as necessary to deploy a space-based missile defense system if the decision to deploy such a system were made. Nitze announced that if the systems explored by the strategic defense initiative prove feasible, the United States would begin a transition away from mutual assured destruction-based deterrence policy (MAD), toward a policy of relying on defenses against offensive nuclear arms. The new policy envisions reliance on MAD-based deterrence during an initial ten-year period of intense ballistic missile defense research. Then, starting in 1995, the United States would begin deploying a nationwide anti-ballistic missile system. A gradual phase-out of nuclear weapons would follow sometime in the indefinite future.

III. The Law Constraining Development of Anti-Ballistic Missile Systems

In spite of the Nitze announcement, legal as well as technical impediments stand in the way of space-based, directed energy missile defense. Of the six ballistic missile defense technology areas identified in the Fletcher Report, surveillance, acquisition and tracking, directed energy weapons for missile defense, and conventional weapons for missile defense are regulated significantly by in-

59 Id.
60 Id. at 28.
61 Id.
63 Id.
64 Id.
65 Id.
66 Id.
67 See supra notes 14-15 and accompanying text.
international agreement. Four international conventions—the Limited Test Ban Treaty, the Environmental Modification Convention, the Outer Space Treaty, and the Anti-ballistic Missile Treaty—currently regulate ballistic missile defense.

Article I of the Limited Test Ban Treaty prohibits any nuclear explosion in the atmosphere, including outer space. This provision explicitly bans the system for converting a nuclear explosion in space into a missile killing x-ray laser beam advocated by Edward Teller.

Article I of the Environmental Modification Convention prohibits “hostile use of environmental modification techniques having widespread, long-lasting or severe effects as a means of destruction, damage or injury to any other State Party.” The Convention defines environmental modification techniques as methods for changing the dynamics, composition, or structure of the earth, atmosphere, or outer space. It is understood that the terms “widespread,” “long-lasting,” and “severe” mean encompassing an area of at least several hundred square kilometers, lasting for a period of months, and involving serious or significant disruption or harm to human life, natural and economic resources, or other assets. In its

---


51 See ABM Treaty, supra note 8.

52 Four other treaties are relevant to military activities in outer space:
   (1) Agreement on the Rescue of Astronauts, the Return of the Astronauts and the Return of Objects Launched into Outer Space, April 22, 1968, 19 U.S.T. 7570, T.I.A.S. No. 6599, 672 U.N.T.S. 119 (providing for the return of astronauts and space objects found outside the territory of a launching state);
   (2) Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762 (launching state absolutely liable for damage on earth or to aircraft in flight if caused by a space object, but liability for damage occurring in space determined by fault);
   (3) Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 U.S.T. 695, T.I.A.S. No. 8480 (requires registration with the United Nations of all objects launched into orbit or beyond including on the registration form the basic orbital parameters and the general function of the object);
   (4) Agreement on Measures to Reduce the Risk of Nuclear War Outbreak, Sept. 30, 1971, United States-USSR, 22 U.S.T. 1590, T.I.A.S. No. 7186 (obligates each party to notify the other party of detection of unidentified objects or signs of interference with missile warning systems if such occurrences create risk of nuclear war).

53 LTBT, supra note 48, at art. I.

54 See Kerr, supra note 16, at 12.

55 Enmod Convention, supra note 49, at art. I.

56 Id. at art. II.

57 Understanding Relating to Article I, reprinted in ACDA AGREEMENTS, supra note 10, at 197.
present form, the Environmental Modification Convention does not prohibit any of the ballistic missile defense programs currently contemplated by the Defense Department. Every administration since the signing of the Environmental Modification Convention, however, has studied the possibility of broadening the Convention by deleting the "widespread, long-lasting and severe" requirement. If the Convention were modified in this manner, conceivably it could constrain some future ballistic missile defense techniques.

Two provisions of the Outer Space Treaty are central to a discussion of ballistic missile defense arms control. First, article IV of the Treaty prohibits placing nuclear weapons or any other kinds of weapons of mass destruction in orbit or stationing such weapons in outer space. Some controversy exists over what constitutes a weapon of mass destruction. The most authoritative definition is found in an August 12, 1948 resolution of the Commission for Conventional Armaments. The resolution defines weapons of mass destruction as "atomic explosive weapons, radio-active material weapons, lethal chemical and biological weapons and any weapons developed in the future which have characteristics comparable in destructive effect to those of the atomic bomb or other weapons mentioned above."58 Justice Arthur Goldberg, then Ambassador to the United Nations, reiterated the Commission's definition during Senate ratification hearings on the Outer Space Treaty.59 According to Ambassador Goldberg, all that is clear is that conventional weapons are not weapons of mass destruction.60 Ultimately, signatories of the Outer Space Treaty are left by an empty travaux-preparatoires with the difficult task of deciding for themselves which new weapons are prohibited by the Treaty. Apparently, the more indiscriminate and lethal a newly developed weapon tends to be, the more likely it will be classified as a prohibited weapon of mass destruction.61 Because directed energy missile defense systems are much more discriminate than systems they would replace, no one argues that they are weapons of mass destruction.

At one time, a controversy existed as to the point at which an object was in orbit for purposes of the Outer Space Treaty's prohibitions. Today, commentators and state practice indicate that the phrase "orbit around the earth" means a full orbit rather than a frac-


60 Id.

61 E. Fessler, supra note 22, at 56.
tional orbit or suborbital flight.  

The second provision of the Outer Space Treaty with space arms control implications brings terrestrial international law into the heavens. Article III of the Outer Space Treaty provides:

States Party to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interests of maintaining international peace and security and promoting international co-operation and understanding.  

Article III extends the terrestrial customary international law of treaty interpretation, embodied in the Vienna Convention on the Law of Treaties, to extraterrestrial situations. By extending article 2(4) of the United Nations Charter to space, the Outer Space Treaty prohibits use or threat of force in space in any manner inconsistent with the purposes of the United Nations. It is important to note that article 51 of the United Nations Charter, providing for the use or threat of force in self defense, now also extends to space.

The most significant legal impediment to the deployment of a ballistic missile defense for the entire United States is the Anti-ballistic Missile Treaty. The ABM Treaty and its Protocol limit the United States and the Soviet Union to one anti-ballistic missile system deployment area having a radius of one hundred and fifty kilometers. The Treaty limits the parties to no more than 100 ABM launchers and 100 ABM interceptor missiles. The agreement creates a complicated regime regulating the number and placement of radars capable of tracking strategic ballistic missiles. Development, testing, and deployment of ABM systems or components that are sea-based, air-based, space-based, or mobile land-based also are banned.

On its face, the Treaty appears to prohibit all space-based ABM systems. A closer reading based upon Agreed Statement D, how-
ever, has led some national security experts to a different conclusion.\textsuperscript{71} Agreed Statement D provides:

In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.\textsuperscript{72}

ABM systems based upon directed energy technologies, such as the high energy lasers under study pursuant to the strategic defense initiative, clearly constitute ABM systems based on other physical principles.\textsuperscript{73} Some proponents of space-based ballistic missile defense systems argue that all basing modes of directed energy systems are unaffected by the ABM Treaty, because these systems are merely subject to discussion and limitation under Agreed Statement D, not addressed or prohibited by the Treaty itself.\textsuperscript{74}

Fred Ikle, Under Secretary of Defense for Policy, testifying before Congress stated:

The 1972 ABM Treaty prohibits the development, testing and deployment of space-based ABM systems and components (Article V). Should future technology bring forth new ABM systems "based on other physical principles" such as lasers and particle beams, as opposed to those employed in current systems, it was agreed that limiting such systems would be discussed before deployment in accordance with the treaty's provision for amendment.\textsuperscript{75}

Although at least one student of international law seems to believe that Secretary Ikle's permissive interpretation is the strongest of closely competing alternatives,\textsuperscript{76} the Secretary's argument conflicts


\textsuperscript{72} Agreed Statements, supra note 70, at Agreed Statement D.

\textsuperscript{73} See, e.g., E. FESSLER, supra note 22, at 71.

\textsuperscript{74} See supra note 71.

\textsuperscript{75} Controlling Space Weapons, supra note 71, at 104 (statement of Undersecretary of Defense for Policy Fred Ikle).

\textsuperscript{76} E. FESSLER, supra note 22, at 70-71. Fessler states:

Agreed Interpretation [D] read in conjunction with Article II(1) of the ABM Treaty firmly implies that the original definition [of ABM system] was not intended to extend to "ABM systems based on other physical princi-
with the legislative history of the ABM Treaty ratification process.

During the ratification hearings, officials of the Defense Department\textsuperscript{77} and the State Department\textsuperscript{78} stated that the ABM Treaty prohibited any deployment of directed-energy weapons for ballistic missile defense. Chief Negotiator Gerard Smith stated that "systems employing possible future types of components to perform the functions of launchers, interceptors and radars are banned unless the Treaty is amended. [Agreed Statement D, which establishes this ban,] was initialed by Semenov and me on the day the SALT agreements were signed. As an initialed common understanding, it is as binding as the text of the ABM Treaty."\textsuperscript{79}

Several other provisions of the Treaty are important to an analysis of the current treaty termination controversy. First, the ABM agreement forbids development of ABM launchers capable of launching more than one missile at a time.\textsuperscript{80} Second, rapidly reloadable launchers,\textsuperscript{81} as well as interceptor missiles with multiple warheads, are banned.\textsuperscript{82} Finally, a complex regime regulating radar development and deployment is embodied in ten articles, four agreed statements, two common understandings, two unilateral statements, and a number of secret procedures.\textsuperscript{83}

IV. Defense Programs Versus Treaty Obligations

The ballistic missile defense system envisioned by the strategic

\textsuperscript{77} See Military Implications of the Treaty on the Limitation of Anti-ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms, Hearings Before the Senate Comm. on Armed Services, 92d Cong., 2d Sess. 275 (1972) (statement of Dr. Foster, Director of Defense Research and Engineering: "One cannot deploy a fixed land based laser ABM system which is capable of substituting for an ABM radar, ABM launcher or ABM interceptor missile."); id. at 438 (statement of Gen. Ryan, Chief of Staff of the Air Force).

\textsuperscript{78} Strategic Arms Limitation Agreements, Hearings Before the Senate Comm. on Foreign Relations, 92d Cong., 2d Sess. 20 (1972) (statement of Secretary of State William Rogers: "Under the Agreement, we provide that exotic ABM systems may not be deployed and that would include, of course, ABM systems based on the laser principle.").

\textsuperscript{79} G. Smith, supra note 70, at 344.

\textsuperscript{80} ABM Treaty, supra note 8, at art. V(2).

\textsuperscript{81} Id.

\textsuperscript{82} Agreed Statements, supra note 70, at Agreed Statement E.

\textsuperscript{83} ABM Treaty, supra note 8, at arts. I-IX, XII; Agreed Statements, supra note 70, at Agreed Statements A, B, D, F; id. at Common Understandings B-C; id. at Unilateral Statements B, D.
defense initiative clearly fails to comport with the ABM Treaty. The system envisioned includes more than 100 launchers, space-based components, and components based on directed energy principles. Article III of the ABM Treaty and the Protocol limit each party to 100 launchers. Space-based ABM components are prohibited under article V. Read together, articles II and III impose a general prohibition on all systems designed to counter ballistic missiles in flight trajectory, including directed energy systems, except systems based on the interceptor missile principle. Under Agreed Statement D, specific limitations on directed energy programs are subject to discussion and agreement.

The ABM Treaty restrains more than deployment of the systems explored by the strategic defense initiative. The Treaty also prohibits development and testing of sea-based, air-based, space-based, and mobile land-based ABM components. Therefore, ballistic missile defense programs will contravene treaty provisions before the scheduled 1995 deployment date.

During the ratification hearings for the ABM Treaty, Gerard Smith drew a line between allowable ABM research and prohibited ABM development. According to Smith, both parties agreed that development occurs when a component moves from laboratory testing to field testing using either a prototype or bread board model. Several of the ballistic missile defense programs previously discussed in this comment are of questionable legality in light of these restrictions on development.

Testing the Talon Gold target tracking laser against a target that has a flight trajectory similar to that of a ballistic missile will violate the Treaty. To the extent that the Airborn Optical System is designed for ballistic missile defense, the flight test of the modified C-135 airplane scheduled for sometime in the late-1980's will also constitute a breach.

Arguably, the Homing Overlay Experiment of June 1984 al-

---

84 See DOD Assessment, supra note 14, for the most informed vision of a future ballistic missile defense.
85 ABM Treaty, supra note 8, at art. III; ABM Protocol, supra note 66, at art. 1.
86 ABM Treaty, supra note 8, at art. V.
87 Id. at arts. II-III. See supra notes 77-79 and accompanying text. See also 1985 IMPACT STATEMENTS, supra note 9, at 251-52 (ABM Treaty prohibits deployment of even fixed, land-based directed energy systems unless the parties amend the Treaty).
88 Agreed Statements, supra note 70, at Agreed Statement D.
89 ABM Treaty, supra note 8, at art. V.
90 See Controlling Space Weapons, supra note 71, at 68 (reprint of statement by Ambassador Smith).
91 See supra notes 37-38 and accompanying text.
92 See T. LONGSTRETH & J. PIKE, supra note 16, at 27.
93 See supra note 40 and accompanying text.
95 See supra notes 17-18 and accompanying text.
ready has violated the ABM Treaty. In the experiment, the United States used a modified Minuteman I ICBM to boost an ABM warhead into space. The Soviet Union protested that this test constituted giving a non-ABM missile ABM capabilities contrary to article VI of the Treaty. Because functionally related, observable differences exist, however, between the Minuteman I ICBM and the Minuteman I ABM booster, and because Minuteman I ICBMs no longer are deployed by the United States, the Minuteman I ABM booster is best seen as a permitted new, fixed, land-based ABM missile rather than a prohibited non-ABM missile tested in ABM mode.

The only exotic weapon that may be seen as based upon allowable interceptor missile principles rather than on prohibited “other physical principles” is the electromagnetic rail gun. Instead of failing the test of legality under article III, the rail gun fails the test of article V, which bans automatic or rapidly reloadable ABM launchers.

While much is prohibited by the ABM Treaty, many very significant concepts are left untouched. For instance, there are no restrictions on the deployment of a space-based directed energy weapons systems designed to destroy missiles in their silos. Anti-satellite systems development is unrestricted by international law, although their use is constrained by several agreements. Research and laboratory development of any ABM system is permissible. The ABM Treaty permits research, development, and testing, but not deployment of fixed, land-based directed energy ABM systems. Anti-tactical missiles are unrestricted provided that they are truly designed to counter tactical as opposed to strategic missiles, and as long as they are not tested against objects with strategic ballistic missile trajectory.

Thus far, programs within the strategic defense initiative have complied with the ABM Treaty. By developing and testing subcomponents of space-based systems separately, rather than testing entire space-based ABM components, compliance with the ABM Treaty has not conflicted with progress on ballistic missile defense. If the Reagan Administration desires to meet the 1995 target date for deployment of a nationwide ballistic missile defense, tests of entire space-based ABM components must begin soon. If these tests are to be lawful, the United States must suspend, terminate, or persuade the

---

96 See T. Longstreth & J. Pike, supra note 16, at 50.
97 See supra note 20 and accompanying text.
98 Destruction of a satellite used to verify the ABM Treaty is a violation of article XII(2) of the ABM Treaty. A party at fault for destroying a satellite is liable for damages under article III of the Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762. The intentional, unjustified destruction of a satellite constitutes a prohibited use of force under U.N. Charter art. II, para. 4.
99 See, e.g., 1985 Impact Statements, supra note 9, at 251-52.
Soviet Union to modify the ABM Treaty. The Soviet Union appears unlikely to agree to modification,\(^1\) and very difficult legal questions surround the American treaty termination process.

V. Who Has Constitutional Power to Terminate the ABM Treaty

A President who decides to suspend or terminate the ABM Treaty will want clear constitutional authority to do so. Unfortunately, the 200-year-old American constitutional democracy has yet to settle whether the President may terminate a treaty without legislative consent.\(^1\) Perhaps the dual nature of treaties—they are both compacts with foreign states and part of the municipal law of the United States—best explains the unsettled state of the law.

Commentators have isolated several procedures used in the past to terminate the domestic status of treaties as the supreme law of the land.\(^2\) First, inconsistent terms in a subsequent treaty between the parties supersede the terms of a previous treaty.\(^3\) Second, Congress has used legislation and joint resolutions to "direct" the President to give notice of treaty termination to foreign governments.\(^4\) It is not settled whether the President must follow the congressional dictate,\(^5\) however, the congressional action nullifies the municipal effect of a treaty.\(^6\) The simple enactment of legislation inconsistent with the terms of a previously ratified treaty ends the domestic status of treaty terms.\(^7\)

Executive denunciation pursuant to a resolution passed by two-thirds of the Senate is the most obviously constitutional termination procedure. Interestingly, the political branches have invoked this third procedure only twice in nearly two hundred years.\(^8\) Often an exchange of notes between the President and the chief executive of another state has sufficed to terminate treaties.\(^9\) Finally, the Presi-

\(^3\) See, e.g., McDougal & Lans, Treaties and Congressional-Executive or Presidential Agreements, 54 Yale L.J. 181, 333-38 (1944-45).
\(^4\) 1 W. Malloy, Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States of America and Other Powers 782 (1910).
\(^5\) See, e.g., 1 Stat. 578 (1789) (voiding treaties with France; viewed as a partial declaration of war, and therefore, a constitutional act by several Supreme Court Justices). Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800). See also Reeves, The Jones Act and the Denunciation of Treaties, 15 Am. J. Int'l L. 34 (1921); 38 Stat. 1184 (1915).
\(^6\) See Reeves, supra note 104, at 34-35 (President Wilson signed the Jones Act but refused on constitutional grounds to give the notices of treaty termination mandated under section 34 of the Act).
\(^8\) Pigeon River Co. v. Cox, 291 U.S. 138 (1933).
dent unilaterally has denounced treaties without congressional authorization thirteen times in the past.\footnote{See Materials on Termination, supra note 108, at 397-98. The earliest case of unilateral termination was in 1815 when Secretary of State Monroe notified the Dutch Ambassador to the United States that the Treaty of 1782 with the Netherlands was terminated. McDougall & Lans, supra note 102, at 336 n.127. The most recent case of unilateral termination occurred when President Carter abrogated the United States-Republic of China mutual defense treaty. See Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979).}

Any United States president wishing to terminate a treaty with as large a domestic and international constituency as the ABM Treaty’s constituency would prefer to act pursuant to a congressional mandate. The very strength of the constituencies that make a congressional mandate particularly desirable, however, makes that mandate unlikely. The unlikelihood of a congressional mandate makes the constitutionality of the President’s power to terminate the ABM Treaty extremely important.

In 1979 Goldwater \textit{v.} Carter\footnote{Goldwater \textit{v.} Carter, 481 F. Supp. 949 (D.D.C.) (enjoining the State Department from terminating the United States-Republic of China mutual defense treaty), rev’d, 617 F.2d 697 (D.C. Cir.) (even without congressional consent, the President may abrogate a mutual defense treaty in accordance with the Treaty’s termination clause if it is without conditions and without designation as to who was empowered to abrogate), vacated, 444 U.S. 996 (1979) (a deeply divided Court held that the case was not justiciable for conflicting reasons).} presented the issue whether the President may terminate a defense treaty without congressional consent. The case arose when nine Senators and sixteen members of the House of Representatives attempted to enjoin the executive from abrogating the mutual defense treaty between the United States and the Republic of China.\footnote{Mutual Defense Treaty Between the United States of America and the Republic of China, 6 U.S.T. 433, T.I.A.S. No. 3178, 248 U.N.T.S. 213 (entered into force March 3, 1955).}

The United States District Court for the District of Columbia enjoined the Secretary of State from taking any action to implement the President’s notice of termination unless and until the notice was approved by a majority of both houses of Congress or by two-thirds of the Senate.\footnote{481 F. Supp. 949, 965 (D.D.C. 1979).} Judge Gasch stated that the President may, acting alone, terminate a treaty under special circumstances.\footnote{\textit{Id.} at 959 n.46.} These special circumstances obtain when the treaty becomes impossible to perform, is affected by a fundamental change in circumstances, or is denounced or violated by the other party.\footnote{\textit{Id.} at 959, 962-65.} Because the rationale advanced by the executive was not based on any of these circumstances, the court held that legislative approval was required.\footnote{\textit{Id.} at 965.}
Circuit quashed the injunction. The court rested its holding on the existence of an abrogation provision in the Treaty and on the President's undisputed constitutional authority to derecognize the Republic of China. The court held that the President acted constitutionally because abrogation of the mutual defense treaty pursuant to the withdrawal clause was merely a step in the process of derecognizing the Republic of China.

Factors analogous to the two factors that persuaded the court of appeals in Goldwater attend the case for Presidential authority to terminate the ABM Treaty. Both treaties have termination clauses. While the abrogation in Goldwater directly related to the President's constitutional responsibility for recognizing foreign governments, withdrawal from the ABM Treaty directly relates to the President's constitutional responsibility as Commander in Chief of the armed forces.

The Goldwater case spawned two other important opinions in the court of appeals. Chief Judge Wright agreed to quash the district court injunction, but grounded his opinion on Senator Goldwater's lack of standing in the absence of legislative action in conflict with the executive. Judge MacKinnon agreed with the majority that Senator Goldwater had standing, and that the case was justiciable. Judge MacKinnon argued, however, that because the Constitution requires congressional action for ratification of a treaty, it requires congressional action in the abrogation of treaties as well. The re-
result suggested by Chief Judge Wright's opinion carried the day in the United States Supreme Court.

A deeply divided Supreme Court vacated the court of appeals decision without hearing oral argument. In the first opinion reported, Justice Powell followed Chief Judge Wright and voted to vacate, because without a legislative resolution in opposition to the President's action, the issue was not ripe. Justice Rehnquist and three other justices argued that the issue of who may terminate a treaty is a nonjusticiable political question to be resolved by the political branches alone. Justice Marshall concurred in the result without issuing an opinion, while Justices Blackmun and White argued for hearing the case on the merits.

Although no justice voted to reverse the court of appeals, only Justice Brennan wrote in favor of affirming. Justice Brennan would have affirmed on the narrow ground that abrogation of the treaty was tantamount to withdrawing recognition from a foreign government—an action clearly within the President's constitutional powers in foreign affairs. Although Justice Brennan failed to persuade his colleagues on the merits, his rebuttal to Justice Rehnquist's political question doctrine argument contributes significantly to the hope of an orderly, judicial settlement of the controversy regarding the authority to terminate treaties. In rebuttal, Justice Brennan stated:

Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." Baker v. Carr, 369 U.S. 186, 211-213, 217 (1962). But the doctrine does not pertain when a court is faced with the antecedent question whether a particular branch has been constitutionally designated as a repository of political decisionmaking power. Cf. Powell v. McCormack, 395 U.S. 486, 519-521 (1969).

The only message lower courts may discern from Goldwater is that the issue of who possesses the constitutional authority to terminate treaties becomes justiciable, if at all, only after Congress officially announces one policy, while the President attempts to execute

\[
\begin{align*}
\text{126} & \quad \text{Id. at 997 (Powell, J., concurring).} \\
\text{127} & \quad \text{Id. at 1007 (Rehnquist, J., concurring).} \\
\text{128} & \quad \text{Id. at 996.} \\
\text{129} & \quad \text{Id. at 1006 (Blackmun, J., dissenting in part).} \\
\text{130} & \quad \text{Id. at 1006 (Brennan, J., dissenting).} \\
\text{131} & \quad \text{Id.} \\
\text{132} & \quad \text{This constitutional controversy is not just the stuff of professorial musings. Treaties are not just the children of war and peace, but also their sires. It is not too difficult to conceive of a situation where lack of certainty with regard to the force of a treaty obligation could have grave national security implications.} \\
\text{133} & \quad 444 \text{ U.S. 996, 1006-07 (Brennan, J., dissenting).}
\end{align*}
\]
another. This unresolved state of affairs leaves constitutional scholars to contemplate what the Supreme Court ought to hold, should the Court reach the merits of this controversy in the future.

One potentially illuminating foreshadow of the ultimate resolution of the treaty termination controversy is *Myers v. United States.* In *Myers* the Supreme Court upheld the President's authority to unilaterally dismiss an executive official appointed with the advice and consent of the Senate. Examining article II, section 2, clause 2 of the Constitution, which authorizes the President to appoint public ministers as well as to make treaties, Chief Justice Taft stated:

The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no expressed limit was placed on the power of removal by the Executive was convincing indication that none was intended.

The grammatical analogy between the power of personnel removal and treaty termination is obvious, yet the precedential value of *Myers* is small. The Constitution rarely allows sterile grammatical logic to govern important constitutional issues.

*Charlton v. Kelly* provides more persuasive precedent. In *Charlton* it was alleged that the extradition treaty between the United States and Italy was void due to violations by the Italian Government. The Supreme Court concluded that an innocent party to a violated treaty may "waive" the right to terminate, and, in the absence of a decision to terminate, the treaty remained in force. In dicta, the Court implied that the executive may unilaterally terminate a breached treaty:

The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land.

*Charlton* stands as a beacon of settled law in a sea of controversy. The obligatory pilgrimage to the writings of the framers provides little assistance. Predictably, Federalist James Madison would give

---

134 272 U.S. 52 (1926).
135 Id. at 118. *But see* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (limiting the *Myers* grant of Presidential power to purely executive appointments as opposed to those appointments involving quasi-judicial or quasi-legislative duties such as Federal Trade Commissioners).
136 *Goldwater,* 481 F. Supp. at 960; 617 F.2d at 703-04 (questioning the precedential value of *Myers* in treaty termination cases).
137 Id.
138 229 U.S. 447 (1913).
139 Id. at 452-53.
140 Id. at 476.
141 Id. *See also* Terlinden v. Ames, 184 U.S. 270 (1902) (President has discretion to determine when changed circumstances justify abrogating a treaty).
the executive termination power, while Jefferson would not. The commentators are also split, with some being more solicitous of Presidential power and others being less so. Some commentators urge Congress to require that treaties contain precise termination procedures, while others recommend settling the controversy through a case-by-case judicial balancing test, comparing the interests of the political branches in the subject matter of the treaty, the importance of the treaty, and the domestic effect of ending the treaty.

The greatest weight of authority seems to support the rule advanced by the Restatement (Second) of Foreign Relations Law. Under the Restatement, the President may unilaterally denounce an international agreement if it is done in accordance with a withdrawal provision included in the agreement, in response to treaty violations by another party, or in recognition of the legal dis-establishment of another state. In the absence of one of these three conditions, the Restatement requires approval by two-thirds of the Senate.

Because Soviet violations are both easily trumped up and readily apparent, Charlton should be sufficient authority for the constitutionality of unilateral Presidential denunciation of a breached treaty. The withdrawal provision in the ABM Treaty only strengthens the executive's municipal law case.

---

142 I Letters and Other Writings of James Madison 524 (J. Lippincott ed. 1865) (Madison earlier had expressed a contrary view).
143 Manual of Procedure, reprinted in Senate Manual, S. Doc. No. 1, 94th Cong., 1st Sess. 668 (1975) ("Treaties being declared equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded.").
146 Scheffer, supra note 145, at 995-1005.
148 Restatement (Second) of Foreign Relations Law § 163 (1962).
149 Id. at § 163(i).
150 Id. at § 163(ii) comment e (except in special cases listed in clause (i), modification, suspension, and termination are in effect new agreements).
151 See supra notes 138-41 and accompanying text.
152 Clearly, the existence of a treaty violation is a nonjusticiable political question, cf. Goldwater v. Carter, 444 U.S. 996 (1979), and reserved for the President, Charlton v. Kelly, 229 U.S. 447 (1913). Furthermore, the Executive has already determined that the Soviet Union has violated the ABM Treaty. See infra note 174 and accompanying text.
153 For the text of the withdrawal provision of the ABM Treaty, see supra note 121.
VI. Justifying Termination of the ABM Treaty Under International Law

Proper termination of a treaty under United States municipal law does not ensure that the termination comports with international law. Unless a party finds justification for abrogating a treaty under international law, termination, though legally effective under municipal law, constitutes a breach of international law.

The Vienna Convention on the Law of Treaties generally codifies the customary international law of treaty termination. Part V, section 2 of the Convention enumerates the conditions that make treaties void or voidable at formation. None of these conditions were present at the formation of the ABM Treaty. Termination and suspension of treaties in response to conditions arising after formation are governed by part V, section 3 of the Vienna Convention. Arguably, three of these post-formation conditions currently prevail with respect to the ABM Treaty.

First, the United States could attempt to justify termination of the ABM Treaty on the ground that the emergence of directed energy technology constitutes a "fundamental change of circumstances" under article 62 of the Vienna Convention. For a change of circumstances to be fundamental, it must be unforeseen, relate to

---

154 Vienna Convention on the Law of Treaties, supra note 64, at art. XXVII.
155 Id.
156 Id.
158 Vienna Convention, supra note 64, at part V, § 2. The conditions making a treaty void at formation are: (1) Acquisition of a state's consent to be bound by coercion through acts or threats against the state's representative. Id. at art. 51; (2) Acquisition of a state's consent to be bound through unlawful threat or use of force. Id. at art. 52; (3) Conclusion of a treaty in conflict with a peremptory norm of international law. Id. at art. 53.

The conditions making treaties voidable at formation are: (1) Consent provided through an objectively evident violation of a fundamental internal law of the voiding party. Id. at art. 46; (2) Parties previously notified that the representative giving consent lacked authority to consent. Id. at art. 47; (3) Innocent mistake of fact at the time of formation going to the essential basis of the consent of the voiding state. Id. at art 48; (4) Fraud in the inducement. Id. at art. 49; (5) Consent procured through corruption of the voiding state's representative. Id. at art. 50.

159 Id. at part V, § 3. The post-formation conditions that void bilateral treaties are: (1) Conclusion of a subsequent agreement that is intended to supersede the prior treaty or is incompatible with the prior treaty. Id. at art. 59; (2) Emergence of a new peremptory norm of international law in conflict with the treaty. Id. at art. 64.

The post-formation conditions that make voidable bilateral treaties are: (1) Consent of the other party to termination. Id. at art. 54(b); (2) An express or implied right to suspend or terminate a treaty unilaterally. Id. at arts. 54(a), 56; (3) Material breach by the other party. Id. at art. 60; (4) Supervening impossibility of performance. Id. at art. 61; (5) Innocent unforeseen fundamental change of circumstance. Id. at art. 62.

160 See infra notes 161-72.
161 Vienna Convention, supra note 64, at art. 62(1).
an essential basis of the consent to be bound by the treaty, and radically transform the extent of the obligations still to be performed under the treaty.

This justification is at best very weak. Not only was the emergence of directed energy weapons foreseen, but Agreed Statement D to the ABM Treaty explicitly deals with "ABM systems based on other physical principles," such as directed energy systems. Furthermore, although progress in directed energy technology has made ballistic missile defense more tempting, that progress has not radically transformed the magnitude of the obligation not to deploy prohibited ballistic missile defenses. The Soviet Union's military build up also fails to establish a legally sufficient fundamental change of circumstance. As a general principle of international law, mere changes in the balance of power between parties are insufficient to justify terminating treaty obligations.

The Soviet phased-array radar located near Krasnoyarsk provides a more promising legal justification for those advocating termination of the ABM Treaty. Agreed Statement F to the ABM Treaty prohibits phased-array radars of the size and location of the Krasnoyarsk radar, unless the phased array is "for the purposes of tracking objects in outer space or for use as national technical means of verification." The difficulty in determining whether the radar establishes a violation is that the determination turns on the intended purpose of the radar. This type of problem is hardly new to the law. Municipal law fact finders often draw conclusions of intent from circumstantial evidence.

Several circumstances make it more probable than not that the Krasnoyarsk radar complex is a prohibited early warning or ABM battle management radar rather than an allowable space tracking or

---

162 Id. at art. 62(i)(a).
163 Id. at art. 62(i)(b).
164 Agreed Statements, supra note 70, at Agreed Statement D. See also Strategic Arms Limitation Agreements, Hearings Before the Senate Comm. on Foreign Relations, 92d Cong., 2d Sess. 20 (1972).
165 See infra note 192.
166 A. McNair, THE LAW OF TREATIES 376 (1938) (McNair's opinion is subject to criticism because the three criteria under the Vienna Convention for termination due to changed circumstances may be met by the combination of the Soviet Union's arms build up and the emergence of new ABM technologies).
167 Phased-array radars are electronically steered radars pointed in various directions to produce a widespread image.
168 Agreed Statements, supra note 70, at Agreed Statement F. See also OFFICE OF TECHNOLOGY ASSESSMENT, ARMS CONTROL IN SPACE: WORKSHOP PROCEEDINGS 51 (1984) (large phased-array radars are permissible at the designated ABM cite, the designated ABM test ranges, and along the national boarders pointed outward, but the Krasnoyarsk radar does not meet any of these exceptions) [hereinafter cited as ARMS CONTROL IN SPACE].
169 Consider the requirements of an intent to kill for first degree murder, an intent to permanently deprive a person of property for larceny, and an intent to cause emotional distress for intentional infliction of emotional distress.
treaty verification radar. First, the positioning of the radar makes it nearly useless as a verification radar. Second, although the radar would be useful for space tracking, it does not appear to be optimally placed for such purposes. Third, the location of the radar complex enables the radar to fill an important gap in the Soviet Union's early warning system. The four most eminent American supporters of the ABM Treaty and critics of ballistic missile defense admit that the most likely purpose of the Krasnoyarsk radar is to give early warning of an attack by submarine-launched missiles on Siberian missile fields. The United States Government also has determined that the Krasnoyarsk radar is a violation of the ABM Treaty.

In addition to the Krasnoyarsk phased-array radar, inconclusive evidence indicates the existence of other possible violations by the Soviet Union. In contravention of the ban on mobile ABM systems, the SA-X-12 anti-tactical missile may be designed to counter strategic ballistic missiles and may be mobile. Concealment of test data may constitute a prohibited deliberate interference with United States verification of Soviet treaty compliance. Some elements of the arms control establishment even allege that the piece-by-piece relocation of an ABM radar from Sary Shagan to Kamchatka constitutes a breach of the mobile radar proscription.

Under customary international law, a breach of a treaty obligation does not justify termination of the treaty unless the breach is material. The Vienna Convention limits material breach to unjustified repudiation and violations of provisions essential to the accomplishment of the object and purpose of a treaty. To justify termination of the ABM Treaty on the grounds of material breach, the United States would have to argue that the provisions prohibiting the construction of the phased-array radar at Krasnoyarsk are

---

170 ARMS CONTROL IN SPACE, supra note 168, at 51.
171 Id.
172 Bundy, Kennan, McNamara & Smith, The President's Choice: Star Wars or Arms Control, 63 FOREIGN AFF. 264, 275 (1985).
173 Id. (the Krasnoyarsk radar is "a violation of the express language of the Treaty" but "is of only marginal importance").
175 ABM Treaty, supra note 8, at art. V.
177 ABM Treaty, supra note 8, at art. XII (the Soviet Union insists that the data denied has nothing to do with the tested missile's ABM capability).
178 Washington Times, July 10, 1984, at 1, col. 6. Following this construction of the term mobile, the White House is a mobile home and the President is violating the District of Columbia zoning code.
179 VIENNA CONVENTION, supra note 64, at art. 60(1); B. SINHA, UNILATERAL DENUNCIATION OF TREATY BECAUSE OF PRIOR VIOLATIONS OF OBLIGATIONS BY OTHER PARTY 19 passim (1966).
180 Id. at art. 60(3)(a).
181 Id. at art. 60(3)(b).
essential to the accomplishment of the object or purpose of the ABM Treaty. Although it is often difficult to demonstrate whether a provision is or is not essential to the accomplishment of the purpose of a treaty, an unusually strong case can be made for the materiality of the radar restricting provisions of the ABM Treaty.

The ABM Treaty achieves its basic purpose of preventing a nationwide ballistic missile defense through limitations on three crucial ballistic missile defense components. The treaty restricts the number and placement of ABM missiles, launchers, and radar. A violation of any of the provisions creating these basic restrictions constitutes a breach of an essential provision. The Krasnoyarsk radar violates two of the basic restrictions on radar placement.182

Furthermore, large phased-array radars have the longest lead time of any component necessary to accomplish full-scale break out from the constraints of the ABM Treaty. The restrictions on large phased-array radars are the most effective provisions for preventing secret deployment of a nationwide ballistic missile defense. Therefore, the provisions violated are among the most essential provisions of the Treaty.

Although the Krasnoyarsk violation is material under the test enunciated in the Vienna Convention, the Convention’s test is logically suspect. The Convention’s test focuses on whether the provision breached is essential, rather than whether the violation itself is grave. Apparently, an extreme violation of a nonessential provision may not be material under the Convention, while a relatively insignificant violation of an essential provision is material. The consensus of American international lawyers, however, is that only violations having the effect of depriving the aggrieved party of an essential benefit of the agreement justify termination.183

The breach represented by the Krasnoyarsk radar is less important if the materiality of the breach is measured by the effect of the violation rather than the importance of the breached provisions.184 Unfortunately, the less logical Vienna Convention rule, not the more logical American consensus rule, has the force of customary international law.185 An innocent party to a violated treaty, however, forfeits the right to terminate in response to a violation if the party fails to exercise its right within a reasonable time after discovering the

182 ABM Treaty, supra note 8, at art. VI(b) (deployment of early warning radar not on national boundary oriented out); Agreed Statements, supra note 70, at Agreed Statement F (large phased-array radar not for space tracking or verification).
183 Restatement (Second) of Foreign Relations Law § 163 (1962).
184 Cf. Bundy, Kennan, McNamara & Smith, supra note 172, at 275.
185 See The Namibia Case, 1971 I.C.J. 16, 47 (advisory opinion); B. Sinha, supra note 179, at 31.
violation.  

A more easily justified alternative to termination for breach under customary international law is withdrawal under the ABM Treaty’s withdrawal provision. Article 54 of the Vienna Convention permits termination of a treaty in conformity with the provisions of the treaty.  

The ABM Treaty permits withdrawal if a party “decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests.” The standard applied is the withdrawing party’s subjective perception of events related to ballistic missile defense, limited only by good faith.

Unilateral Statement A to both the ABM Treaty and the SALT I agreement helps explain the requirements of the ABM Treaty’s withdrawal provision. Unilateral Statement A, made by the United States during the treaty negotiations, states:

The U.S. delegation has stressed the importance the U.S. Government attaches to achieving agreement on more complete limitations on strategic offensive arms, following agreement on an ABM Treaty and on [SALT One] . . . . The USSR delegation has also indicated that the objectives of SALT would remain unfulfilled without the achievement of an agreement providing for more complete limitations on strategic offensive arms . . . . If an agreement providing for more complete strategic offensive arms limitations were not achieved within five years, U.S. supreme interests could be jeopardized. Should that occur, it would constitute a basis for withdrawal from the ABM Treaty.

It is now thirteen years after the Unilateral Statement, and the parties are far from reaching a more complete agreement for limiting offensive arms.

The magnitude of the unchecked strategic nuclear buildup by both superpowers jeopardizes the supreme interests of all nations, including the United States. The growth of the Soviet Union’s strategic forces, both in comparison to United States forces and in absolute terms is particularly threatening.

---

186 See, e.g., B. SINHA, supra note 179, at 81. This is the international law principle of extinctive prescription, which is similar to the municipal law rule of equitable estoppel.

187 Vienna Convention, supra note 64, at art. 54(a).

188 ABM Treaty, supra note 8, at art. XV(2). For the text of the Treaty’s withdrawal provision, see supra note 121.

189 See Agreed Statements, supra note 70, at Unilateral Statement A (statement made by Ambassador Smith on May 9, 1972).

190 According to the Reagan Administration, the SALT II accords do not satisfactorily protect U.S. interests. Because the accords were not ratified and did not enter into force, it is unlikely that they constitute an “agreement” within the meaning of Unilateral Statement A. See Note, The Legality of a High Technology Missile Defense System: The ABM and Outer Space Treaties, 78 AM. J. INT’L L. 418, 421 (1984).


192 At the time the ABM Treaty was signed, the Soviet Union had approximately 2100 strategic nuclear delivery vehicles (SNDVs), while the United States had approximately
eral Statement A and the express purpose of the ABM Treaty to further strategic offensive arms limitations, the Soviet Union's strategic arms build up, coupled with its probable material breach of the ABM Treaty, constitute extraordinary events related to the subject matter of the ABM Treaty that jeopardize United States supreme interests and legally justify withdrawal from the ABM Treaty.

The conclusion that the United States reasonably may justify, in legal terms, withdrawal from the ABM Treaty is a limited conclusion. Neither termination under the treaty's withdrawal provision nor termination for material breach requires that termination redress either the jeopardized national interests or the material breach. In other words, withdrawal from the ABM Treaty may be legally justifiable yet harmful to national security and peace.

VII. Conclusion

The ABM treaty prohibits deployment of a ballistic missile defense system similar to that envisioned by President Reagan's strategic defense initiative. Development of all space-based ABM components and deployment of all directed energy systems capable of substituting for ABM missiles, launchers, or radar are banned by the Treaty. If the United States deploys a nationwide ballistic missile defense system, termination, suspension, or modification of the ABM Treaty will be required.

The President has the constitutional authority to terminate a defense treaty such as the ABM Treaty, without legislative consent, in accordance with a withdrawal provision or in response to a treaty violation. All other unilateral treaty terminations probably are unconstitutional. The absence of a constitutional requirement of legislative consent, however, should not be mistaken for the absence of a political requirement of legislative consent.

Under international law, the United States may legally justify terminating the ABM treaty on two grounds. First, the Soviet Union has materially breached the Treaty. The construction of the phased-array radar near Krasnoyarsk violates treaty provisions essential to the accomplishment of the object of the Treaty. Second, the Soviet Union's strategic forces build up, coupled with its breach of the ABM

1900. Gen. George S. Brown, Fiscal Year 1975 United States Military Posture Statement (1975). As of January 1, 1985, the number of SNDVs in the Soviet Union's arsenal had grown to 2367, while the number of SNDVs in the United States' arsenal had fallen to 1646. Organization of the Chairman of the Joint Chiefs of Staff, Fiscal Year 1986 United States Military Posture Statement (1985). The decline in U.S. forces is due to the obsolescence of B-52 bombers, Poseiden submarines, and Titan ICBM's.

193 See Preamble to the ABM Treaty, supra note 8.
194 See supra notes 167-82 and accompanying text.
Treaty, constitute extraordinary events related to the subject matter of the Treaty that jeopardize the supreme interests of the United States. These events, therefore, legally justify withdrawing from the Treaty under the Treaty's withdrawal provision upon six months written notice. Whether terminating the ABM Treaty is a wise course of action for United States policymakers turns on issues other than the mere legality of termination or feasibility of ballistic missile defense.

The key issue in the brewing ABM Treaty termination controversy is whether terminating the ABM Treaty is more beneficial for the national security of the United States than continuation of the Treaty. Currently, the consensus is that continuation, at least for the near future, furthers national security more than termination.

The extreme disadvantages of withdrawal from the ABM Treaty make it difficult to imagine any situation short of widespread Soviet violations warranting withdrawal. The American people expect arms control. Frustration of this expectation will have an effect on the willingness of the American people to support strong defense and active participation in world affairs.

The commitment between the United States and her allies is central to American national security. This commitment will be weakened by the political repercussions of withdrawal. Moreover, deployment of ballistic missile defenses may nullify the small but important deterrent power of the Chinese, French, and British strategic forces.

Many of the systems envisioned by the strategic defense initiative may prove unfeasible. If these systems are feasible, the Soviet Union could, through greater sacrifice and commitment of resources, beat the United States to deployment. Because air defense and anti-tactical missile systems are better developed in the Soviet Union, protection from intercontinental ballistic missiles and sub-launched ballistic missiles may prove more beneficial to the Soviet Union than to the United States.

Deployment of ballistic missile defenses will cost a great deal of money. Currently, the offensive weapons needed to overwhelm ballistic missile defenses are cheaper than defensive systems. Furthermore, the money earmarked for deployment of defensive systems

195 ABM Treaty, supra note 8, at art. XV.
196 Even the Reagan Administration currently favors continuation of the Treaty, as evidenced by the absence of a denunciation.
ABM Treaty 

may be better used by taxpayers or better spent on other government programs including conventional defense projects.

Strong arguments also support the strategic defense initiative. The chance of nuclear war in any particular year is very small. If that small yearly probability is analyzed over many years, however, the long-term probability of nuclear war becomes large. If ballistic missile defense neutralizes the effectiveness of nuclear weapons, as its architects hope, nuclear disarmament may become more likely. Only disarmament derailed the “statistical inevitability” of nuclear disaster. Even a “leaky” ballistic missile defense could prove useful. Such a system could provide an effective shield against an accidental missile launch or a terrorist missile attack. Arguably, a ballistic missile defense also could bolster deterrence by increasing the uncertainty of destroying targets and by creating in space what amounts to a fourth leg of the strategic triad. Terminating the ABM Treaty also would alleviate the fear that the Soviet Union might secretly violate the ABM Treaty and catch a treaty-constrained United States unprepared.

Ultimately, Americans must realize that they live in a risky world. Both deployment of a ballistic missile defense and adherence to the ABM Treaty involve risk and uncertainty. The American people can at any time in the future decide to build a ballistic missile defense. Once Americans decide to scrap the ABM Treaty, however, there is no going back.

MARK ANDERSON FINKELSTEIN*

---

198 For discussions of the arguments in favor of ballistic missile defense, see DOD Assessment, supra note 14; J. SCHELL, THE ABOLITION 112-18 (1984) (America’s most famous disarmament proponent arguing for space-based ballistic missile defense); D. GRAHAM, supra note 71; Inglis, Minimum Deterrence, Maximum Stability, 41 BULL. ATOMIC SCIENTISTS 42 (1985).

* Former summer clerk in the Office of the General Counsel, United States Arms Control and Disarmament Agency. The opinions expressed are not necessarily those of the United States Government.