LAW, POLITICS AND THE ABM TREATY

Presentation by

Ambassador Thomas Graham, Jr.

President,

Lawyers Alliance for World Security

to a debate on

The Legal Status of the ABM Treaty

Sponsored by the

National Institute for Public Policy

Washington, DC

June 7, 2000

LAWYERS ALLIANCE FOR WORLD SECURITY
1901 PENNSYLVANIA AVENUE, N.W.
SUITE 201
WASHINGTON, D.C. 20006
TEL: 1.202.745.2450
FAX: 1.202.667.0444

Law, Politics and the ABM Treaty

Remarks by
Ambassador Thomas Graham, Jr.
President, Lawyers Alliance for World Security
Debate on the Legal Status of the ABM Treaty
National Institute for Public Policy
June 7, 2000
Washington, DC

I am pleased to be here today to address this conference on the legal status of the 1972 Antiballistic Missile (ABM) Treaty. The question of whether to develop and deploy national ballistic missile defenses is a legitimate topic of national debate, as it has been for the last 40 years. The current debate on national missile defense (NMD) has largely focused on questions of whether or not to deploy the proposed NMD system, the timing of such a deployment, and whether to amend the 1972 Antiballistic Missile (ABM) Treaty to do so, but there also exists a legal undercurrent to the debate, principally the question of state succession as it relates to the former Soviet Union.

In the fall of 1998, several prominent Republican Senators wrote a letter to President Clinton asserting that the ABM Treaty had in effect disappeared because the Soviet Union had dissolved. A New York Times article of April 29, 2000 states that a condition in the Resolution of Ratification for the Conventional Armed Forces in Europe (CFE) Treaty Flank agreement "allows the Senate to decide whether Russia is a party to the ABM Treaty and therefore whether the Treaty still exists." The article also said that "the State Department has been unable to treat Russia as a legal partner" and that "Russia still does not have a full voice at the yearly ABM talks in Geneva." Without exception, these assertions and implications are in error.

It is recognized in the Constitution and has been recognized in our national life for over two hundred years that the Congress has the power to declare war, but the President is the

supreme national authority in foreign policy. Treaties are made by the President with the advice and consent of the Senate, but the Senate's role – minus, of course, the power of the purse as it relates to treaty implementation – ceases after its consent is given. The exclusive power of the President to suspend or terminate international agreements for the United States has been recognized in the *Restatement of Foreign Relations Law*. Likewise it is part of the foreign policy power of the President to recognize states and governments, to recognize successor states and governments, and to recognize successor states as treaty parties for the United States. Over the history of the republic, Presidents have done this many, many times for both bilateral and multilateral treaties.

Determination of succession is part of the foreign policy power of the President. The Vienna Convention of the Law of Treaties does provide that a state may withdraw from a treaty on, among other grounds, fundamental change of circumstance or impossibility of performance, and as stated before the ABM Treaty has a withdrawal clause permitting a party to withdraw on six months notice if it judges its supreme interests to be threatened. But treaties do not just vanish or go away, a party must declare that it is withdrawing or that it regards itself as no longer bound for one of the above or some other legitimate reason. It is the head of a state or of its government that makes this decision and declaration -- in our case the President.

President Bush conditioned U.S. acceptance of the NIS on their willingness to adhere to existing arms control treaties, including the ABM Treaty. This was followed up by a mid-January trip to Russia, Ukraine, Belarus and Kazakhstan by a senior interagency delegation carrying the President's message. And the United States formally recognized Russia as one of the successors to the Soviet Union for the ABM Treaty on January 29, 1992 when in a meeting between President Boris Yeltsin and U.S. Secretary of State James Baker, Yeltsin said "Russia

regards itself as the legal successor to the USSR in the field of responsibility for fulfilling international obligations. We confirm all obligations under bilateral and multilateral agreements in the field of arms limitation which were signed by the Soviet Union and are in effect at present." In reply Secretary Baker said, "I made the point to the President that the United States remains committed to the ABM Treaty...[T]he fact of the matter is we have made the point that we expect the states of the Commonwealth to abide by all of the international treaties and agreements that were entered into by the former Soviet Union, including the ABM Treaty."

This exchange settled the succession issue for Russia and the United States subsequently began discussions at the Standing Consultative Commission (SCC) in Geneva to determine how many others of the Newly Independent States (NIS) should be ABM Treaty successors. Rather quickly in 1993 Belarus and Ukraine were in effect so accepted by the United States and Russia, and Kazakhstan was similarly accepted within the year in accordance with normal diplomatic practice. A Memorandum of Succession reflecting the fact that succession has occurred, that these four states are the duly recognized successors and that no other NIS state would be an ABM Treaty successor was subsequently developed. During this process the United States treated Russia as a full legal ABM Treaty partner, as it continues to do in the ongoing discussions about the ABM Treaty amendments. And Russia has always had and still has a full voice in SCC proceedings. Also, as of January 1, 1999 the ABM Treaty was included by the State Department on its list of treaties in force.

I want to be clear, as this is an important distinction; the Memorandum of Succession did not itself effectuate Russian succession to the ABM Treaty. Succession had already been accomplished by 1994 as a result of Executive Branch statements and subsequent actions. The Memorandum simply recorded the fact that this succession had occurred.

There are numerous important multilateral and bilateral international arms control agreements to which Russia -- and, as appropriate others of the NIS – have succeeded in place of the former Soviet Union; to begin with Russia assumed the former Soviet Union's position as a party to the United Nations Charter with a permanent seat on the Security Council. The United States never recognized the Baltic States as being incorporated into the former Soviet Union, so the U.S. regards the Soviet Union as having been replaced by 12 new states, collectively referred to as the NIS. As for arms control agreements, with respect to the NPT, Russia has been recognized as the sole successor to the Soviet Union -- because we wanted to recognize only one nuclear weapon state successor -- and the other NIS joined the NPT as separate non-nuclear weapon state parties to the NPT. For the Intermediate Range Nuclear Forces Treaty, a bilateral Treaty like the ABM Treaty, the U.S. has recognized all 12 of the NIS as successors, six active in its continued implementation and six inactive-because while there were INF bases only on the territory of the active six, the U.S. judged it important that the prohibition on INF systems run to all twelve. The legality of none of these has been challenged, nor has it been necessary to amend or renegotiate these arrangements. In each case, succession was agreed, finalized, and implemented without any documentation. No Memorandum of Understanding, no formal official U.S. Government action, and certainly nothing approved by the Senate was thought necessary to reach the results for succession in these other treaties. This reflects the fact that the Senate has no role in treaty succession regardless of the number of parties involved.

The succession arrangement agreed to by the United States for the ABM Treaty is appropriate. While it is true that the former Soviet Union posed a unique threat to the United States, its dissolution did not alter the potential for a strategic situation that it is the purpose of the Treaty to avoid. Strategic instability stemming from concern that a potential opponent with a

massive nuclear arsenal might acquire a first-strike capability by building a nationwide NMD system remains a valid concern today. At least as long as Russia has thousands of nuclear weapons and strategic delivery vehicles, it remains a unique partner in maintaining strategic stability. It is the mutual stability of the two superpower strategic arsenals – both of which still exist nearly ten years after the end of the Cold War – that was and is the object and purpose of the ABM Treaty and this remains an essential objective today. And it is appropriate that, in addition to Russia, Belarus, Ukraine, and Kazakhstan are successor states for the ABM Treaty as it was on their territory that the Soviet Union deployed strategic offensive nuclear systems as well as ABM components and these four states became successors to the Soviet Union for the START I Treaty before it entered into force. Thus, the dissolution of the former Soviet Union did not establish impossibility of performance of the ABM Treaty.

The Memorandum on Succession was signed in September 1997 reflecting the fact that succession for the ABM Treaty had already occurred as a matter of executive branch decision. It was this document that the President agreed to send to the Senate in the CFE Treaty Resolution of Ratification. The ABM Treaty remains in force and neither action nor inaction by the U.S. Senate on the Memorandum of Succession for the ABM Treaty, nor a declaration by the Senate or the Congress that the ABM Treaty is null and void, will affect the legal standing of the Treaty (as the President makes clear in his December 1998 letter to Chairman Gilman of the House International Relations Committee). Further, while the President has authority to withdraw from a treaty, once state succession has been recognized, such recognition, if the international treaty system is to remain viable, cannot as a legal matter be withdrawn from the succeeding state by that President or future Presidents. Thus, the Treaty will remain in force until the President, and only the President, declares that he is withdrawing the United States from the Treaty.

Again, we cannot have a system where the legislative branch can declare a treaty to be no longer in existence or where a decision on treaty succession by the president can be reversed years later. If this were so, why wouldn't Russia say, for example, that it had discovered that it had not really succeeded to the obligations of the Soviet Union for international copyright agreements or state debt? Or perhaps the United States could say that Russia had not succeeded to the Soviet seat on the UN Security Council or its status under the Nuclear Non-Proliferation Treaty. One cannot simply wave a wand and say a treaty has disappeared. This is not only an improper way to change the rules, the United States of all countries should not be searching for legal loopholes to wriggle free from its most solemn international obligations. For the United States, as the world's foremost proponent of the international rule of law, setting such a precedent would be contrary to our interests and have a pernicious effect on international treaty relations. If the United States believes that its national interest requires the deployment of a national missile defense not permitted under the Treaty, then it should exercise the legal option included in the Treaty.

In conclusion, the issue of whether to deploy a nationwide NMD system is a matter of policy not law. The issues are, therefore, whether or not such decision would be politically and strategically wise, whether there is a system demonstrably capable of defeating real threats to the national security, how much deployment of this system would cost, and what is the likelihood that potential adversaries could circumvent such a system by foregoing ballistic missile delivery in favor of alternative means of delivery. If after considering these issues and taking into account the effect on the effort to reduce nuclear arsenals and avoid a renewed arms race as well as any attempt at treaty amendment, deployment of a NMD system not compliant with the ABM Treaty

appears to be the correct course for U.S. security, withdrawal from the ABM Treaty would be the appropriate action.

In the meantime, the object and purpose of the ABM Treaty remains valid. Treaty succession has been established as a matter of law and the Treaty continues in force. And all of this should be subordinated to the fundamental objective of reducing nuclear weapons to the lowest practical level in the shortest possible period of time, so as to safeguard the security of future generations. Whatever course we select, we should pursue it in a fashion that demonstrates and reinforces the model for other countries of respect for the rule of law and sanctity of contract, basic principles for the United States of America.