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COMMENTS

IS THAT LEGAL?: THE UNITED STATES' UNILATERAL WITHDRAWAL FROM THE ANTI-BALLISTIC MISSILE TREATY

Emily K. Penney⁺

What was recently referred to as “the most sensitive national security issue of the day”¹ – withdrawal from the Anti-Ballistic Missile Treaty (ABM Treaty) with the implementation of the National Missile Defense Plan (NMD) – has now taken second stage to the Bush administration’s newly announced “War on Terrorism.”² Early in his administration, President George W. Bush clearly stated his commitment to the development of a National Missile Defense Plan, even though it may eventually require the United States’ unilateral withdrawal from the ABM Treaty.³ Despite these new security concerns, the Bush administration announced less than a week after the September 11th terrorist attack on the World Trade Center and the Pentagon that it planned to move forward with a unilateral withdrawal from the 1972 ABM Treaty in order to facilitate the formation of a missile defense

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1. Michael O’Hanlon, *Double Talk on Missile Defense*, WASH. POST, July 31, 2001, at A23 (detailing the Bush administration’s plan for missile defense and explaining various revisions that should be made to the plan for it to be effective).

2. See Steven Mufson, *Postponement Shows Shift in Priorities*, WASH. POST, Oct. 26, 2001, at A4. There has been a significant shift in the Bush administration’s policy on the ABM Treaty following the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001. See *id.* One commentator noted that “[j]ust two months ago, a gambling person would not have bet against the Bush administration’s determination to pursue missile defense tests, even if it meant discarding the 1972 Anti-Ballistic Missile Treaty.” *Id.* To illustrate this development regarding the ABM Treaty issue, Stanford University professor Michael McFaul, who is also an expert on Russia at the Carnegie Endowment for International Peace, noted that “[b]efore Sept. 11, this [missile defense] was the number one foreign policy issue, the place where the Bush administration wanted to leave a legacy. Before Sept. 11, that was what they thought they would be judged upon.” *Id.*

3. Sharon LaFraniere, *Kremlin Raises Doubts About Texas Summit Plan*, WASH. POST, Sept. 1, 2001, at A23 (discussing the scheduled November 2001 meeting between Russian President Vladimir Putin and President Bush and its possible implications for the ABM Treaty question).

system.⁴ Administration officials have continuously reinforced the priority of missile defense, even stating that “if anything, the likelihood of unilateral withdrawal has increased” due to the terrorist attacks.⁵

The ABM Treaty is a bilateral treaty signed by the U.S.S.R. and the United States in 1972 and has been considered a “cornerstone” of arms control for the last thirty years.⁶ The thrust of the Treaty is to facilitate reductions in nuclear stockholds and capabilities while also limiting the defense systems of both sides.⁷ Accordingly, the ABM Treaty prohibits either side from deploying a National Missile Defense System [NMD] to protect itself from a potential nuclear attack.⁸ The idea is that the fear of nuclear destruction, without the possibility of a shield or defense system, will ensure that neither nation instigates such warfare.⁹

At present, President Bush and his staff insist that the ABM Treaty is no longer an effective measure to protect the United States from nuclear attack because the dynamics of the global nuclear stage have been altered by the dissolution of the U.S.S.R.¹⁰ Instead, they assert that the NMD’s new technology is now necessary to prevent accidental launches or attacks by small, hostile states referred to as “rogue states.”¹¹ The President has continuously asserted that “we must move beyond the

4. Susan B. Glasser, *U.S. To Pursue Withdrawal from ABM Pact*, WASH. POST, Sept. 17, 2001, at A28.

5. *Id.*

6. David Edward Grogan, *Power Play: Theater Ballistic Missile Defense, National Ballistic Missile Defense and the ABM Treaty*, 39 VA. J. INT’L L. 799, 803-04 (1999) (stating that the ABM and the companion Interim Agreement, collectively known as the SALT I accords, were “viewed as promising steps to rational nuclear disarmament”); see also David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1367 (1989) (stating that “the ABM Treaty has come to be recognized as one of the most successful and important arms control agreements”). The Russian government has consistently expressed a similar view on the significance of the ABM. See Glasser, *supra* note 4, at A28. For example, President Vladimir Putin, in asserting his unwillingness to abandon the ABM Treaty, implied that withdrawal would “unravel [] ‘the entire framework of international security.’” *Id.*

7. Angela M. Bradley, *Opposing Interpretations of an International Treaty: The Anti-Ballistic Missile Treaty Controversy*, 2 CHI. J. INT’L L. 295, 295 (2001).

8. See *id.* at 295-96 (describing the utility of restricting nuclear missile defense).

9. See *id.* (“Any defense system capable of defending either side’s major cities was considered to be a negative contribution to the arms race, because once one side had such a defense capability the other side would work until it produced the technology necessary to pierce the system.”).

10. See *Bush Calls for Nuclear Cuts, Missile Defense Development*, at <http://www.fas.org/nuke/control/abmt/text/treaty-abm-010501.html> (last visited March 12, 2002) (detailing remarks by President Bush to students and faculty at the National Defense University regarding the need for a National Missile Defense system).

11. Vernon Loeb, *Russians Resolute on ABM Pact*, WASH. POST, Aug. 14, 2001, at A9.

constraints of the 30 year old ABM Treaty [because] [n]o treaty that prevents us from addressing today's threat, that prohibits us from pursuing promising technology to defend ourselves, our friends and our allies is in our interests or in the interests of world peace."¹²

Conversely, opponents of the NMD fear that withdrawal from the ABM Treaty would not only destabilize the success of three decades of arms control, but it would also instigate another arms race.¹³ Not only is there resistance to the NMD at home (mostly from Congressional Democrats), but also abroad (by many of the United States' closest allies).¹⁴ The general sentiment among these groups is one of trepidation about the effects that Bush's plan will have on global nuclear stability and the future of arms control.¹⁵ Moreover, since the terrorist attacks, there has been additional public criticism of the missile defense plan.¹⁶ Top Russian officials have gone to great lengths to indicate the irony in

12. See *Nuclear Cuts*, *supra* note 10.

13. See generally JAMES M. LINDSAY & MICHAEL E. O'HANLON, *DEFENDING AMERICA: THE CASE FOR LIMITED NATIONAL MISSILE DEFENSE 1* (Brookings Institution Press 2001) (illustrating the ABM debate through analysis of missile defense, national security, and international politics).

14. See *id.* at 1. For example, "[t]here was some sense in some European capitals that the National Missile Defense focus had an isolationist impulse to it." Jim Garamone, *DOD Seeks to Expand New Relationship with Russia*, AM. FOREIGN PRESS SERVICE, available at http://www.defenselink.mil/news/Aug2001/no8312001_200108312.html (last visited Mar. 12, 2002). Also, the Chinese fear that even though the United States insists that the missile shield is to protect against states like North Korea, Iran, or Iraq, the true purpose is to neutralize the Chinese nuclear deterrent. See O'Hanlon, *supra* note 1. See also *U.S. Denies Missile Deadline*, available at <http://www.cnn.com/2001/ALLPOLITICS/08/24/bush.defence/index.html> (last visited March 12, 2002).

15. LINDSAY & O'HANLON, *supra* note 13, at 1-2. A statement given by Senate Foreign Relations Committee Chairman Joseph R. Biden pointedly expresses the anti-missile defense sentiment: "Are we willing to end four decades of arms control agreements to go it alone, a kind of bully nation . . . and the hell with our treaties, our commitments in the world? I don't believe our national interests can be furthered, let alone achieved in splendid indifference to the rest of the world's views of our policies." Senator Joseph R. Biden, Jr., *U.S. Foreign Policy in the 21st Century: Defining Our Interests in a Changing World*, Address Before the National Press Club (Sept. 10, 2001), available at http://foreign.senate.gov/press/010910_speech.html (last visited Mar. 25, 2002). To rationalize the fear of impending global nuclear instability, Senator Biden explained how a missile defense system would invite China to attempt expansion of its nuclear arsenal by resuming nuclear testing. See *id.* China's actions would instigate its rival, India, to increase testing, which would then instigate India's rival, Pakistan, and would eventually lead to concerns with Taiwan and Japan competing against China's expanding power in Asia. *Id.*

16. See Glasser, *supra* note 4.

Washington's multi-billion dollar investment for missile defense capabilities given the lack of weaponry implemented by the terrorists.¹⁷

Centuries of international customary law define the methods by which a nation may withdraw from a treaty.¹⁸ Incorporating this international withdrawal structure into the domestic laws of the United States raises questions within the American justice system regarding the legality of unilateral withdrawal.¹⁹ The Bush administration's insistence that withdrawal is necessary for national security may be a valid policy argument, but it may not be enough to constitute a legal withdrawal in light of international custom, domestic law, and the provisions of the Treaty itself. Although the six-months notice that Bush plans to give to Russia technically satisfies the requirements for withdrawal,²⁰ the question remains: will it be enough to satisfy the Russians, our allies, or even our potential adversaries?²¹ Pursuing other options in cooperation with Russia, such as modifying the Treaty, may constitute a more effective policy decision in light of the international customary law and political turmoil surrounding the issue.²²

This Comment first details the history and development of the ABM Treaty over the last thirty years as the need for alterations have arisen

17. *Id.* (noting that Russian officials point to the "relatively low-tech nature of the attacks, insisting that it undermines Washington's stated reason for spending billions of dollars on a system of missile defense aimed at heading off a nuclear attack by small, hostile states such as North Korea").

18. *See generally* SINCLAIR, *infra* note 87.

19. *See infra* Parts I.B.1, I.B.2.

20. Treaty on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty), May 26, 1972, U.S.-U.S.S.R, art. XV, 23 U.S.T. 3435 *reprinted in* SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER 228 (3d ed. 1997) (stating that the withdrawing party "shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty").

21. *See* John Rhinelander, *The ABM Treaty: Critical Then and Now*, vol. 5, no. 12 (May 24, 2001), available at <http://www.clw.org/coalition/briefv5n12.htm> (last updated Jan. 1, 2002). For example, even though China is not a party to the ABM, the Treaty is an important factor in the relations between the United States and China. *Id.* A missile defense system in the United States would minimize China's nuclear deterrent, and thus China may respond to the NMD by expanding its strategic nuclear force to one that could overcome any U.S. NMD. *Id.*

22. *See* Ivo H. Daalder & James M. Lindsay, *Unilateral Withdrawal From the ABM Treaty Is a Bad Idea*, INT'L HERALD TRIBUNE, Apr. 30, 2001 (proposing that the United States' removal from the ABM would be "a foreign policy disaster" because Russia's response would be to abandon its commitment to arms reduction and control). *But see* *The Collapse of the Soviet Union and the End of the 1972 Anti-Ballistic Missile Treaty*, Memorandum of Law from Hunton & Williams to The Heritage Foundation (June 15, 1998) available at <http://www.nationalsecurity.org/legalbrief/legalbrief.html> (asserting that the ABM Treaty "has not deterred nuclear proliferation, and it will not enhance or promote U.S. security in the current environment").

due to changes on the international stage. Next, this Comment explains the framework for withdrawal from an international agreement as established by a provision within the Treaty itself, international customary law, and domestic laws. Additionally, this Comment identifies and describes the Bush administration's argument for withdrawal and then highlights the legal flaws in this argument. Finally, this Comment suggests that even if the Bush administration can withdraw without legal consequences, a better policy would be to retain the ABM Treaty and increase the United States' international involvement by cooperating with other nations to protect against nuclear threats.

I. POLITICS AND THE LAW SURROUNDING THE ABM TREATY

A. *The History of the Anti-Ballistic Missile Treaty*

1. *Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972*

The United States and the former Soviet Union negotiated the Treaty on the Limitation of Anti-Ballistic Missile Systems during the height of the Cold War in the hope of reducing the threat of nuclear warfare.²³ Both nations wanted to decrease the number of strategic weapons held by their opponents and limit the defense systems available to both sides.²⁴ To facilitate these goals, the nations agreed to a reduction in arms production, a scheduled disposal of a number of ballistic missiles, and a halt on any national missile defense plan.²⁵

The theory known as Mutual Assured Destruction (MAD), which ensures a mutual vulnerability to nuclear attack, operates with the ABM to secure arms control.²⁶ Under this theory, both nations' ability to shield against nuclear attack is severely restricted because neither

23. Grogan, *supra* note 6, at 803-04.

24. Bradley, *supra* note 7, at 295.

25. See generally, ABM Treaty, *supra* note 20; see also, Abram Chayes & Antonia Handler Chayes, *Testing and Development of "Exotic" Systems under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956, 1957 (1986) (detailing that the Treaty bans the "testing, development, and deployment of all ABM systems other than fixed land-based systems"). The Treaty provides: "Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." ABM Treaty, *supra* note 20, art. V(1).

26. See Grogan, *supra* note 6, at 803-05. The Treaty states: "Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense . . ." ABM Treaty, *supra* note 20, art. I(2).

possesses a National Missile Defense system.²⁷ In the event of a nuclear attack, neither nation could defend itself; thus, a nuclear war would most likely lead to virtual annihilation.²⁸ Because the two nations are aware of this imminent destruction in the event of a nuclear confrontation, it is extremely unlikely that either would instigate nuclear warfare.²⁹ Consequently, the crucial facet in the Treaty is that both countries are able to retain one interceptor site that contains sufficient nuclear capability to destroy their opponents in the event that either launched a preemptive strike.³⁰ Because both nations have this capability, there is a significant disincentive to initiate nuclear warfare.³¹

The theory of MAD is not the only consequential aspect of the ABM Treaty. The Treaty's effectiveness also centers on a timetable of arms reduction.³² The same day that the ABM Treaty was signed, the nations also signed a companion Interim Agreement in which they agreed to a moratorium on the level of certain nuclear weapons in each country's arsenal.³³ These two agreements are collectively known as the SALT I

27. See Grogan, *supra* note 6, at 804.

28. See *id.*

29. See Ambassador Thomas Graham, Jr., *International Law and the Proliferation of Nuclear Weapons*, 33 GEO. WASH. INT'L L. REV. 49, 57-58 (2000). But see Brian T. Kennedy, *MAD vs. Missile Defense: How the ABM Treaty Undermines the Security of the United States and Its Allies*, 4 NEXUS 99, 99-103 (1999) (underscoring the illogic of Mutual Assured Destruction (MAD) as a premise for national security strategy).

30. See Bradley, *supra* note 7, at 295-96. The practical function of "MAD" was accomplished through strategic bombers and submarine launched ballistic missiles (SLBMs) that had the most effective retaliatory strike capability because of their mobility and invulnerability to a first strike. Grogan, *supra* note 6, at 804.

31. See Bradley, *supra* note 7, at 295-96.

32. See Koplou, *supra* note 6, at 1366 (stating that the treaty "established a mutual and strikingly-low level of strategic defense, forestalling, for the most part, what might otherwise have developed into an expensive and destabilizing race in ABM technology").

33. See *Anti-Ballistic Missile Treaty Chronology* at <http://www.fas.org/nuke/control/abmt/chron.htm> (last visited March 12, 2002) (detailing the chronological history of the ABM Treaty from 1967 to 2001). Some of the more significant aspects of the ABM's history are stated by the authors:

1972—May 26 CONCLUSION OF SALT I TREATIES

1974—July 3 ABM TREATY PROTOCOL

1983—March 23 U.S. STRATEGIC DEFENSE INITIATIVE (SDI)

1985—March 12 NUCLEAR AND SPACE TALKS OPEN

1985—October 6 U.S. "BROAD" INTERPRETATION OF ABM TREATY

1986—October 11-12 REYKJAVIK SUMMIT

1991—January 29 GLOBAL PROTECTION AGAINST LIMITED STRIKES

1992—January 31 RUSSIAN PROPOSAL FOR JOINT GLOBAL DEFENSE SYSTEM

1992—June 17 WASHINGTON SUMMIT DECLARATION

Id.

accords and were considered a significant measure in the control of nuclear arms—then and today.³⁴ Additionally, in July of 1974, “[t]he United States and the Soviet Union sign[ed] a protocol reducing the number of ABM deployment areas permitted to each side from two to one, and the number of ABM launchers and interceptors from 200 to 100.”³⁵ These modifications, and others, were designed to reduce the stockpile of nuclear weapons possessed by the two superpowers.³⁶ Although attention often focuses on the ABM Treaty’s restrictions regarding NMD plans, the Treaty’s reduction provisions are also vital to global nuclear stability.³⁷

2. Official Interpretations

Since the Treaty’s inception in 1972, the United States and Russia have worked to restructure the ABM Treaty concurrently with the changes in global politics.³⁸ It is commonly accepted that “from time to time treaties become seriously inconvenient to one or more of the parties, prompting them to explore different approaches to the problem.”³⁹ Throughout the Treaty’s history, various administrations have suffered through dilemmas similar to those of the present Bush administration.⁴⁰ Past administrations have effectively protected the United States’ interests by retaining the Treaty and adhering to its policies, while varying its interpretation and continuing to modify its provisions.⁴¹

March 23, 1983 marked the initiation of a new “broad” interpretation of the ABM Treaty. On that date, in his now famous “Star Wars” speech, President Ronald Reagan announced to the nation the

34. See Grogan, *supra* note 6, at 804. (stating that the two agreements were “viewed as promising steps to rational nuclear disarmament”).

35. See *Treaty Chronology*, *supra* note 33.

36. See Grogan, *supra* note 6, at 803-4.

37. See Barry Kellman, *National Missile Defense in the Context of Multilateral, Multifaceted Security* 4 NEXUS 73, 78 (1999). “By preventing a destabilizing competition between offense and defense, the ABM Treaty enabled the superpowers to negotiate offensive arms limits.” *Id.*

38. See Burrus M. Carnahan & Katherine L. Starr, *Law and Policy in the Amendment of Arms Control Agreements*, 20 LOY. L.A. INT’L & COMP. L. J. 615, 616 n.4 (1998) (explaining that the ABM Treaty “underwent a series of modifications and attempted reinterpretations since 1972 while attempting to ensure the maintenance of a strategic balance between the United States and Russia in light of technological advances”).

39. Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT’L L. 313, 331 (2001).

40. See discussion *infra* Parts I.A.2, I.A.3.

41. See *id.*

implementation of the Strategic Defense Initiative (SDI).⁴² SDI was a major defense effort designed to destroy Soviet missiles in flight through space-based X-ray and laser weaponry.⁴³ The facilitation of this new defense plan required an alternate interpretation of the ABM Treaty, which was provided by Judge Abraham Sofaer, the legal advisor to the State Department.⁴⁴ In 1986, Sofaer concluded that a “broad” interpretation of the ABM would allow for testing of “exotic” technologies, such as space-based systems, which were not available when the Treaty was negotiated in 1972.⁴⁵ The administration immediately adopted Sofaer’s interpretation as policy in October 1985, even though it differed from every other presidential administration’s policy since the Treaty’s inception.⁴⁶

Similar to the international policy debates currently surrounding the ABM Treaty,⁴⁷ President Reagan’s strategy sparked opposition from Congress, international commentators, the Soviets, and our NATO allies.⁴⁸ The Soviets argued that Reagan’s broad interpretation was inconsistent with their reading of the Treaty.⁴⁹ The United States’ allies feared nuclear warfare between the two super powers and were concerned about the potential ramifications of being excluded from the

42. See President Ronald Reagan, Address to the Nation on National Security (March 23, 1983) in 19 WKLY. COMP. PRES. DOC. 442, 447-48 (1983); see also Koplów, *supra* note 6, at 1379.

43. John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 854-55 (2001) (noting that SDI was “the largest military research program since the Manhattan Project [and] would reach an eventual cost of sixty billion dollars”).

44. See generally Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986); see generally Kevin C. Kennedy, *Treaty Interpretation by the Executive Branch: The ABM Treaty and “Star Wars” Testing and Development*, 80 AM. J. INT’L L. 854 (1986).

45. See Sofaer, *supra* note 44, at 1978 (presenting the non-classified version of his conclusions that were also made available during congressional testimony).

46. See FRANCES FITZGERALD, *WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS AND THE END OF THE COLD WAR* 290-91 (Simon & Schuster 2000); see also Chayes & Chayes, *supra* note 25, at 1956 (“The new interpretation is directly contrary to the position taken by the United States since 1972, when the Treaty was signed.”).

47. See *infra* notes 213-215 and accompanying text.

48. See Koplów, *supra* note 6, at 1370-71 (explaining that “[m]ost of the senior members of the United States SALT I negotiating delegation denounced the new interpretation as a misreading of the ABM Treaty’s text and negotiations, which they said had produced a more comprehensive ban on ABM systems”); see also Monroe Leigh, *Is the President Above Customary International Law?*, 86 AM. J. INT’L L. 757, 759 (1992) (“Many in the Senate, as well as preponderant scholarly opinion, took the position that the President was offering an interpretation of the ABM Treaty wholly different from that presented to the Senate when its ‘advice and consent’ was sought and received.”).

49. See Koplów, *supra* note 6, at 1370-72.

missile defense shield.⁵⁰ Legal commentators argued that Reagan's interpretation exceeded his executive powers and thereby violated constitutional law.⁵¹ The Reagan administration's policy on the ABM Treaty was exceedingly controversial, and "[i]n classrooms since, the ABM Treaty reinterpretation controversy has been taught as an example of executive constitutional over-reaching."⁵²

The ABM Treaty's significance to the stability of arms control and reduction is evident given its considerable role in international politics throughout the 1980s and into the 1990s.⁵³ One commentator noted that in both decades there was "a contest between conflicting interpretations of the ABM Treaty, [which] served as proxies for deeper disagreements concerning strategic nuclear weapons policy in the post-Cold War world."⁵⁴ During the early 1990s, the Bush I administration continued to adhere to the ABM Treaty even in light of the radically changing political circumstances.⁵⁵ The Bush I administration continued with a similar interpretation of the ABM Treaty as its predecessor, but it slightly altered the SDI program to protect against a few dozen warheads.⁵⁶ Thus, the same conservative "broad" interpretation was followed by the Bush I administration, though with a less radical implementation than the SDI program under Reagan.⁵⁷ As the 1990s

50. *See id.*

51. *See generally* Chayes & Chayes, *supra* note 25 (1986); Koplów, *supra* note 6.

52. *See* Yoo, *supra* note 43, at 860 (noting that Senator Biden's proposed "ABM Treaty Interpretation Resolution," which meant to restrict the treaty's interpretation to that which was construed by the Senate in 1972, was never approved by the full Senate). Due to the controversy surrounding the ABM Treaty's interpretation, the so-called "Biden condition" was attached to the subsequent INF Treaty, whereby the Senate required that the Treaty be interpreted in the original manner of the Senate and President during ratification. *See id.* Any further reinterpretation would require the consent of the Senate. *See id.*

53. *See id.* at 902 (asserting that "[i]t is more than merely coincidental that the primary treaty controversy of the 1990s should involve the very same treaty as that of the 1980s"). Additionally, the key element to the ABM Treaty, national missile defense, has also played a divisive role in international politics. *See* Kellman, *supra* note 37, at 73 (stating that national missile defense "has been the most controversial weapons system over the last 30 years").

54. *See* Yoo, *supra* note 43, at 902.

55. *See id.*; *see also* Grogan, *supra* note 6, at 826 (explaining that in September 1991, when the Soviet Union was on the brink of collapse, President George Bush initiated a dialog with Soviet President Mikhail Gorbachev to loosen some of the restrictions of the ABM). In this Comment, the "Bush I administration" refers to the presidency of George H. Bush; the "Bush administration" refers to the presidency of George W. Bush.

56. *See* President George Bush, Address Before a Joint Session of the Congress on the State of the Union, 27 WKLY. COMP. PRES. DOC. 90, 94 (Feb. 4, 1991).

57. Yoo, *supra* note 43, at 860.

progressed, however, the new Democratic administration would cause the pendulum to swing back toward the original interpretation.

The official position of the Clinton administration represented a restrictive or traditional interpretation of the ABM Treaty.⁵⁸ In contrast to the policies of the Bush I and Reagan administrations, Clinton's restrictive interpretation meant that any National Missile Defense program must strictly adhere to the guidelines established under the ABM Treaty.⁵⁹ The Clinton administration's goal was to strengthen the ABM Treaty and, in the process, strengthen relations with Russia.⁶⁰ As a result, the Clinton administration shifted the focus of the SDI to a Limited National Missile Defense system (LDS) that was focused on protecting U.S. forces abroad from the threat of theater ballistic missiles.⁶¹ This interpretation guided the ABM Treaty policy and modification decisions as they were needed in the late 1990s.⁶²

3. Modifications

In addition to offering various interpretations of the ABM Treaty, each administration played a role in modifying the Treaty as required by changes in global politics. This fact was particularly relevant during the early 1990s as Cold War tensions began to ease with the disintegration of the Soviet Union.⁶³ The strategic theories of the ABM Treaty, like MAD, were less viable absent a clear threat from a nuclear superpower.⁶⁴

58. See Riveles, *infra* note 61.

59. See *id.*

60. See Baker Spring, *Why the ABM Treaty Is Already Dead and What It Should Mean for United States Security*, 4 NEXUS 31, 31 (1999) (describing the Clinton administration's goal for the future of the ABM as a three-step process: "1) preserve the treaty by establishing state succession; 2) strengthen it by clarifying ambiguous treaty language exempting defenses against shorter-range missiles from any restrictions; and 3) broaden its scope by bringing certain types of defenses for countering shorter-range missiles under treaty limits").

61. See Dr. Stanley Riveles, Acting Commissioner, U.S. Standing Consultative Commission, U.S. Arms Control and Disarmament Agency, Address to the Seventh Multinational Conference on Theater Missile Defense 2 (June 21, 1994) at <http://dosfan.lib.vic.edu/acda/speeches/riveles/riveltmd.htm> (last modified Mar. 9, 2001).

62. See *infra* Part I.A.3.

63. See *generally* Collapse, *supra* note 22 (examining whether the ABM Treaty is still binding on the United States following the fall of the Soviet Union and the legal impact of modification of the treaty without the advice and consent of the Senate).

64. See *id.* The MAD theory was effective due to the underlying theory that "a single government controlled the nuclear arsenal and could be held responsible for its use." *Id.*

Instead of a single threat from one nation, there was an increase in nuclear threats from various other nations.⁶⁵

The Bush I administration was the first to confront this shift of strategic control of global nuclear arms.⁶⁶ The fall of the Soviet Union on December 25, 1991 “dashed any hope of a clean, swift negotiated solution on NMD.”⁶⁷ Bush chose to retain the Treaty, with some modifications, as the foundation for arms control rather than exercise the option to eliminate the ABM Treaty under its Extraordinary Events Clause.⁶⁸ Working within the paradigm of a broad interpretation of the ABM Treaty, the Bush I administration initiated a cooperative program with the U.S.S.R. whereby the two nations would work together on the “Star Wars” program.⁶⁹ On December 5, 1991, Congress passed the Missile Defense Act of 1991⁷⁰ with the stated goal of preventing “accidental or unauthorized launches or third world attacks” against the United States.⁷¹ Congress explicitly stated that the act would not upset the strategic balance that was secured by the provisions of the ABM Treaty between the United States and the Soviet Union.⁷² In order to further clarify that the goal of the act was not to “obtain relief from” the ABM Treaty, Congress amended the Missile Defense Act in 1993.⁷³ This

65. See Yoo, *supra* note 43, at 903. Fifteen independent states emerged from the former U.S.S.R., four of which (Russia, Belarus, Kazakhstan, and Ukraine) possessed a portion of the Soviet nuclear arsenal. *Id.*

66. See *id.*

67. See *id.* The fact that the United States was not simply negotiating with one nuclear superpower “undermined the theory of mutually assured destruction between the two superpowers, [and] also destabilized the bargain struck in the ABM Treaty that the superpowers would limit themselves to a single ABM system each.” *Id.*

68. See *id.*

69. See *id.*

70. Missile Defense Act of 1991, Pub. L. No. 102-190, §§ 231-240, 105 Stat. 1321-26 (repealed 1996). The United States’ goal under the act was “to deploy an anti-ballistic missile system, including one or an adequate additional number of anti-ballistic missile sites and space-based sensors, that is capable of providing a highly effective defense of the United States against limited attacks of ballistic missiles.” *Id.*

71. *Id.* § 233(b)(2).

72. *Id.* § 236(a); see Yoo, *supra* note 43, at 903.

73. Compare Missile Defense Act of 1991, Pub. L. No. 102-190, 105 Stat. 1321-26 § 232 (repealed 1996), with National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2356 § 234(a)(1992) (amending § 232(a) of the Missile Defense Act of 1991). The original version of the Missile Defense Act states:

(a) Missile Defense Goal. It is a goal of the United States to – deploy an anti-ballistic missile system, including one or an adequate additional number of anti-ballistic missile sites and space-based sensors, that is capable of providing a highly effective defense of the United States against limited attacks of ballistic missiles; maintain strategic stability; and provide highly effective theater missile

was done as an attempt to “soften” the language of the Missile Defense Act of 1991 and demonstrate that the U.S. was planning to comply with the ABM Treaty—at least overtly.⁷⁴

Throughout the 1990s, a new threat of nuclear capable “rogue states” emerged from the fading Cold War system.⁷⁵ In an attempt to deal effectively with the newly independent nations of the former Soviet Union, the Clinton administration proposed a modification to the ABM Treaty.⁷⁶ In 1993, the administration announced a plan to multilateralize the ABM Treaty to formally bind the new nations to the policies of the ABM.⁷⁷ During this time period, Congress enacted the National Defense Authorization Act for Fiscal Year 1994 which further amended the Missile Defense Act of 1991.⁷⁸ Similar to the amendment in 1993, this modification diminished the advancement of an NMD system.⁷⁹ The

defenses (TMDs) to forward-deployed and expeditionary elements of the Armed Forces of the United States and to friends and allies of the United States.

Missile Defense Act of 1991, Pub. L. No. 102-190, 105 Stat. 1321-26 § 232(a) (repealed 1996). The amendment strikes out:

“(a)” and all that follows through the end of paragraph (1) and insert[s] . . . the following: . . .

(a) Missile Defense Goals of the United States. It is a goal of the United States to – comply with the ABM Treaty, including any protocol or amendment thereto, and not develop, test, or deploy any ballistic missile defense system, or component thereof, in violation of the treaty, as modified by any protocol or amendment thereto, while deploying an anti-ballistic missile system that is capable of providing a highly effective defense of the United States against limited attacks of ballistic missiles.

National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2356 § 234(a)(1992) (amending § 232(a) of the Missile Defense Act of 1991).

74. See Grogan, *supra* note 6, at 829-30 (explaining that “[a]lthough Congress paid lip service to complying with the ABM Treaty, it still made it a goal of the U.S. to *deploy* an ABM system capable of defending the territory of the U.S.”).

75. See *infra* notes 176-182 and accompanying text.

76. See Riveles, *supra* note 61.

77. *Id.*

78. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547 (1993).

79. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992). Section 234(a) amended § 232(1) of the Missile Defense Act of 1991 to state that the United States would

comply with the ABM Treaty, including any protocol or amendment thereto, and not develop, test, or deploy any ballistic missile defense system, or component thereof, in violation of the treaty, as modified by any protocol or amendment thereto, while deploying an anti-ballistic missile system that is capable of providing a highly effective defense of the United States against limited attacks of ballistic missiles.

National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992).

multi-nationalization of the ABM Treaty was formally introduced in 1997 when the Memoranda of Understanding (MOUs) were negotiated with the Russian Federation, Belarus, Kazakhstan, and Ukraine.⁸⁰ The MOUs were introduced as part of the Helsinki Summit between Presidents Clinton and Yeltsin, in which the two leaders reaffirmed their commitment to the Treaty.⁸¹ Under the MOU on Succession, the four new republics would assume the same ABM Treaty rights and obligations as the Soviet Union.⁸² However, given the political tension surrounding the issue, the agreement was never formalized because it was never forwarded to the Senate for advice and consent.⁸³

Issues concerning modifications and interpretation have enveloped the ABM Treaty for the last three decades.⁸⁴ It is not surprising, therefore, that the current administration must cope with a similar dilemma. The issue now is whether the United States can legally withdraw in light of the global politics of the moment. An analysis of the legal implications of withdrawal in both international and domestic law is required in order to answer this question.⁸⁵

B. When Can a Nation Legally Withdraw?

Because the ABM Treaty “represents an effort to employ legal instruments to contain the arms race,”⁸⁶ it is necessary to follow the established method of withdrawal from international agreements that has been codified through hundreds of years of international custom and codified law.⁸⁷ Withdrawal from the ABM Treaty is first conditioned

80. Memorandum of Understanding Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, Sept. 26, 1997, U.S.-Belr.-Kaz.-Russ.-Ukr. at <http://fas.org/nuke/control/abmt/text/ad-mon.htm> (last visited Mar. 18, 2002).

81. See Kellman, *supra* note 37, at 78.

82. See *id.*

83. See Spring, *supra* note 60, at 33 (hypothesizing that the reason President Clinton did not send the MOU to the Senate for advice and consent was because of the possibility that the agreement would lose and that it would attract critical attention to the validity of the ABM Treaty).

84. See discussion *supra* Parts I.A.2, I.A.3

85. See Graham, *supra* note 29, at 57-58.

86. See *id.* at 58.

87. See Kopolow, *supra* note 6, at 1381 (explaining that the modern system of international law “embraces and promotes certain important shared principles, and consistently affects the way countries act and communicate in the international arena . . . [and also] provides a network of standards, as well as mechanisms for resolving disputes regarding international treaty obligations”). See generally I.M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (Manchester University Press 1973) (explaining the significance of the codification on the law of treaties in the Vienna Convention).

upon its article XV provision for withdrawal, the “Extraordinary Events Clause.”⁸⁸ There is no bright-line test to determine whether an event is either extraordinary or threatens national security.⁸⁹ Consequently, basic concepts of international treaty interpretation must be examined to effectively analyze the limitations of the Extraordinary Events Clause under the ABM Treaty.⁹⁰ Two concepts of customary international law that are utilized by nations to guide their judgment in interpretation of international agreements, *pacta sunt servanda* and *rebus sic stantibus*, are fundamental to a discussion on treaty withdrawal.⁹¹ These withdrawal concepts have been codified in the Vienna Convention on Treaties through the “fundamental change in circumstances” and “good faith” provisions.⁹²

The Vienna Convention renders a more objective framework as opposed to the subjective interpretation of international customary law.⁹³ Nevertheless, the concepts on withdrawal still remain ambiguous, even in codified form, because international law experts agree that the guidelines set forth by the Vienna Convention are not black letter law, but only general principles to follow in the interpretation of international treaties.⁹⁴ As a result, to effectively assess withdrawal under the

88. ABM Treaty, *supra* note 20, art. XV; see MALCOLM N. SHAW, INTERNATIONAL LAW 666 (4th ed. 1997) (stating that “[a] treaty may be terminated or suspended in accordance with a specific provision in that treaty, or otherwise at any time by consent of all the parties after consultation”).

89. See Cindy A. Cohn, Note, *Interpreting the Withdrawal Clause in Arms Control Treaties*, 10 MICH. J. INT’L L. 849, 855 (1989) (noting that “[o]nly limited interpretative information regarding the Extraordinary Events Clause is available”).

90. *Id.* (stating that the issue surrounding unilateral withdrawal is not new). A significant source of guidelines for treaty interpretation on withdrawal is the Restatement of Foreign Relations Law, which states: “The termination or denunciation of an international agreement, or the withdrawal of a party from an agreement, may take place only (a) in conformity with the agreement or (b) by consent of all the parties.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 332 (1986).

91. See Cohn, *supra* note 89, at 855 (explaining that the customary doctrine *rebus sic stantibus* is useful in defining when withdrawal is allowed under the extraordinary events clause).

92. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 62, 1155 U.N.T.S. 331, 339, 347.

93. See Cohn, *supra* note 89, at 857 (explaining that “[a]lthough neither the U.S. nor the Soviet Union have ratified the Vienna Convention, both acknowledge its use as a codification custom”); see also J.F. O’CONNOR, GOOD FAITH IN INTERNATIONAL LAW 108 (Dartmouth Publishing Company 1991) (explaining that the Vienna Convention “codified and ‘progressively developed’ the customary rules on the law of treaties”).

94. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 424 (2000); see also John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and*

Extraordinary Events Clause, interpretation of the context, object, and purpose of the Treaty itself must be considered in addition to the various concepts of international withdrawal.⁹⁵

1. *The Treaty Text: The Extraordinary Events Clause*

Most treaties include provisions that allow nations to withdraw when it is necessary to protect their sovereignty or supreme interests.⁹⁶ Article XV of the ABM Treaty includes such a withdrawal clause: "Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized its supreme interests."⁹⁷ This Extraordinary Events Clause is consistently used within various bilateral and multilateral arms control agreements.⁹⁸ Although this clause is prevalent throughout arms control negotiations, it has never been explicitly defined in international law.⁹⁹ Additionally, the clause has been invoked as a justification for withdrawal in only one instance.¹⁰⁰

International Law, 37 HARV. INT'L L.J. 139, 147 (1996) ("An international treaty, like other legal documents, is a textual specification of legal obligations.").

95. See O'CONNOR, *supra* note 93, at 109 (stating that "it becomes necessary to interpret the treaty 'in good faith', having regard to its context and in the light of its object and purpose, and in this exercise, the essence of good faith comes to the fore"); see also Vienna Convention, *supra* note 92, art. 31(1) (declaring that "[a] treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

96. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 332, cmt. a (1987) (stating that "[m]odern agreements generally specify either a term for the agreement [] or procedures whereby a party may withdraw").

97. ABM Treaty, *supra* note 20, art. XV(2) (declaring that "[s]uch notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests").

98. Cohn, *supra* note 89, at 851 (1989) (explaining that since this clause was first used in the 1963 Test Ban Treaty, "this language has been included in all bilateral arms agreements between the U.S. and the Soviet Union and almost all multilateral arms treaties").

99. *Id.* at 855 (noting that "[o]nly limited interpretative information regarding the Extraordinary Events Clause is available") (footnote omitted).

100. See Antonio F. Perez, *Survival of Rights under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards*, 34 VA. J. INT'L L. 749, 750 (1994) (detailing North Korea's notice of withdrawal in March 1993 from the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) under the Extraordinary Events Clause). In this instance, North Korea presented two grounds for withdrawal: (1) a joint U.S.-South Korea military exercise which, as North Korea claimed, renewed a nuclear threat by the U.S., and (2) a 1993 International Atomic Energy Agency (IAEA) Board of Governors resolution, which demanded access to inspect certain military sites. *Id.* at 762-64. However, this endeavor to utilize the Extraordinary Events Clause was not fully realized because North Korea suspended its

These examples demonstrate the absence of judicial interpretation or any legal test to determine when withdrawal is deemed valid under the Extraordinary Events Clause.¹⁰¹

Legislative intent during the first use of this withdrawal clause in 1963 suggests that withdrawal would only be justified in the case of an extreme interest of national security.¹⁰² Thus, the “country could not withdraw for simply frivolous or unrelated matters as a matter of whim and still pretend that it is legal within the treaty to do so.”¹⁰³ On the other hand, the nature of the clause allows for self-judgment by the nation as to what would be considered “extraordinary” or a “supreme national interest.”¹⁰⁴ Consequently, if the withdrawing state presents sufficient justification for interpreting an event as “extraordinary,” the nation’s entitlement under article XV to withdraw unilaterally “should be given the maximum deference possible.”¹⁰⁵ Given the ambiguity in interpreting withdrawal under the Extraordinary Events Clause, consideration must be given to similar, related concepts within international law.¹⁰⁶

a. Rebus Sic Stantibus and Fundamental Change of Circumstances

In deciphering valid, good faith withdrawal under the Extraordinary Events Clause, it is useful to examine a parallel concept in international law to clarify the ambiguities in the interpretation process.¹⁰⁷ *Rebus sic stantibus* is a concept of ancient customary law that literally means “things standing thus.”¹⁰⁸ The concept is further defined in international law as the “principle that all agreements are concluded with the implied condition that they are binding only as long as there are no major changes in circumstances.”¹⁰⁹ One of the significant aspects of this

withdrawal following intense negotiations with the United States in June of that year. *See id.* at 751.

101. *See* Cohn, *supra* note 89, at 855-56.

102. *See id.* at 851.

103. *Nuclear Test Ban Treaty: Hearings Before Senate Comm. on Foreign Relations*, 88th Cong. 50 (1963) (statement of Dean Rusk, Secretary of State).

104. *See* Perez, *supra* note 100, at 776 (describing “[t]his kind of clause [as one which] implies acceptance by the parties of self-interpretation as the applicable standard for measuring performance of the rights and obligations subject to the clause”).

105. *Id.* at 778.

106. *See* Cohn, *supra* note 89, at 855-56 (considering that although there is no clear test for the extraordinary circumstances provision, the legal interpretations of *rebus sic stantibus* are useful in giving some objective criteria to analyze withdrawal under this clause).

107. *See id.*

108. BLACK’S LAW DICTIONARY 514 (7th ed. 1996).

109. *Id.*

concept is its focus on profound changes that would frustrate both nations' expectations of the treaty, thereby impeding the original objectives of the agreement.¹¹⁰

Although the doctrine has been relied on since the 16th century, interpretation in the past has been mostly subjective.¹¹¹ Now the concept is codified in Article 62 of the Vienna Convention on the Law of Treaties as the Fundamental Change of Circumstances, which sets more objective parameters as to when the doctrine may be invoked.¹¹² The commission specifically defined situations in which a change of circumstance would permit withdrawal from a treaty, thereby setting a more objective basis for the analysis of withdrawal.¹¹³ During the conference debates on proposals for Article 62, it was determined that a state could not refer to its own acts or omissions as a fundamental change in circumstances that would invoke a withdrawal.¹¹⁴ Additionally, the commission concluded

110. See Michael E. Dickstein, *Revitalizing the International Law Governing Concession Agreements*, 6 INT'L TAX & BUS. LAW. 54, 76-77 (1988) (describing various circumstances that may or may not be considered a fundamental change). In detailing the significance of *rebus sic stantibus* in international agreements, the author explains that loss of expected profit, profound economic hardship, or change of government or government policy are all sufficient to warrant an exception under *rebus sic stantibus*. *Id.* at 76. Furthermore, the author states that because "a change in the nationality of a territory is insufficient to justify the application of [r]ebus [s]ic [s]tantibus, it is not surprising that a change in the party in power, or even a revolutionary change in the form of a state's government, is also considered insufficient by most commentators." *Id.* at 77.

111. Cohn, *supra* note 89, at 855-56.

112. See *id.* But see SINCLAIR, *supra* note 87, at 108 (stating that "the vagueness of the language employed in formulating this series of articles presents a potential danger to the stability of treaty relations").

113. Vienna Convention, *supra* note 92, art. 62. The Convention states:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
 - (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
 - (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
 - (a) If the treaty establishes a boundary; or
 - (b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Id.

114. See SINCLAIR, *supra* note 87, at 107.

that any changes in government policy that were subjective in nature could never be invoked as justification for treaty withdrawal.¹¹⁵

This framework for treaty withdrawal, in light of national security interests, has been regarded as inconsistent with the fundamental doctrine *pacta sunt servanda*.¹¹⁶ Because treaties cease to bind nations when there is a fundamental change of circumstances, the requirement that a nation adhere to the treaty in good faith becomes less significant.¹¹⁷ A resolution to this dilemma would require nations to explicitly abide by the provisions of good faith when deciding whether to withdraw from a treaty.

b. Pacta Sunt Servanda

When analyzing whether an event is “extraordinary” as defined by international law, circumstances must be viewed with consideration of the nation’s good faith performance of the treaty.¹¹⁸ The rule of *pacta sunt servanda* is a basic norm of international law and custom committing nations to the fundamental ethical rule of being bound to one’s promises.¹¹⁹ This theory of international law holds that agreements undertaken must be kept.¹²⁰ This fundamental aspect of treaty interpretation is reflected in the American Law Institute’s Restatement (Third) of the Foreign Relations Law of the United States as well as the

115. *Id.*

116. See generally David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, 82 AM. J. INT’L L. 1, 1-4 (1988) (querying how “can the notion that fundamental changes in circumstances can terminate treaties be reconciled with the promise of good faith made by countries when signing?”). But see Cohn, *supra* note 89, at 855 (stating that the evaluation of the fundamental change in circumstances in light of the shared expectations and intentions of the parties is “consistent with the goal of stability in treaty relationships and with the principle of *pacta sunt servanda*”).

117. See Bederman, *supra* note 116, at 2 (asserting that the tension between the concepts of *pacta sunt servanda* and *rebus sic stantibus* has been an enduring issue in international law).

118. See Vagts, *supra* note 39, at 323-24 (assessing the binding quality of treaties in light of the “sanctity of treaty obligations” encompassed in the doctrine of *pacta sunt servanda*).

119. See BLACK’S LAW DICTIONARY 1133 (7th ed. 1999) (defining *pacta sunt servanda* as “agreements [that] must be kept[:] [t]he rule that agreements and stipulations, esp. those contained in treaties, must be observed”); Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT’L L. 405, 406 (1994) (expressing that *pacta sunt servanda* is not only a legal norm, but also an ethical standard).

120. See Dickstein, *supra* note 110, at 71-73 (noting the significance of *pacta sunt servanda*, specifically in the process of internationalizing contracts).

Vienna Convention on the Law of Treaties.¹²¹ The concept was codified in the Vienna Convention as “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹²² Both the Permanent Court of International Justice and its successor, the International Court of Justice, have recognized the importance of the rule of *pacta sunt servanda* in international law.¹²³

Pacta sunt servanda has been referred to as a concept that encompasses principles of stability, balance, certainty, and trust.¹²⁴ The doctrine represents the center of international custom; nations must observe treaties in good faith in order to keep stability within the global structure.¹²⁵ The concept may be invoked to determine if any positive rule of law, such as the right of withdrawal, has been applied honestly, fairly, and reasonably.¹²⁶ States are not only required to *perform* a treaty in good faith, but treaty *withdrawal* must also follow the guidelines of this concept.¹²⁷ In sum, although withdrawal is a right given by the Extraordinary Events Clause, this right must be practiced in good faith.¹²⁸ Thus, in analyzing whether there is a basis for withdrawal under the

121. Vienna Convention, *supra* note 92, art. 26. “The doctrine of *pacta sunt servanda* . . . lies at the core of the law of international agreements and is perhaps the most important principle of international law.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 cmt. a (1986).

122. Vienna Convention, *supra* note 92, art. 26.

123. Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12 (Apr. 26) (ruling that the United States could not avoid its treaty obligation, which required the Palestine Liberation Organization to maintain an office in the United Nations in New York, by enacting domestic legislation that contradicts the treaty); Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20) (stating that “[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential”).

124. Bederman, *supra* note 116, at 2.

125. *Id.* Various rules of modern international law codified in the Vienna Convention of Treaties are derived from the concept of “good faith,” including: *pacta sunt servanda* (Article 26); refraining from acts frustrating the object of the treaty (Article 18); avoiding fraud, corruption, and coercion (Articles 49, 50, 51); and the fundamental change in circumstances, *rebus sic stantibus* (Article 62). Vienna Convention, *supra* note 92 at art. 18, 26, 49, 50, 51, 62; *see also* O’CONNOR, *supra* note 93, at 110.

126. *See* O’CONNOR, *supra* note 93, at 110 (explaining that when interpreting a treaty, the court should take note of what the parties fairly and reasonably intended when negotiating the treaty by observing subsequent conduct and practice of those parties).

127. *See id.* at 110-11.

128. *See id.* at 111 (stating that rights under a treaty are often practiced in bad faith, as when one party to an agreement repudiates due to a less than material breach by the other party).

Extraordinary Events Clause, one must view the party's good-faith need to be released against the purposes of the treaty.¹²⁹

Alternatively, as a general rule, states can require other signatories of the treaty to retain a good faith commitment to the treaty terms.¹³⁰ However, this requirement to remain committed to an agreement becomes complicated when there is a need to withdraw due to a change in circumstances or a threat to the sovereignty of a nation.¹³¹ As such, the right to demand compliance with a treaty must also be exercised in good faith where compliance may be unreasonable in light of changing circumstances.¹³²

2. Domestic Laws

The interplay between domestic law and international law is a significant factor in assessing when the United States may legally withdraw from a bilateral treaty.¹³³ Analyzing the domestic laws of the United States aids in the determination of whether the President is prohibited from violating international law.¹³⁴ For example, it is possible to legally invalidate an international agreement under domestic law even when the international protocol for withdrawal has not been met.¹³⁵ In such circumstances, the President would be free from legal accountability

129. *See id.* (explaining that where the words are ambiguous, it is often necessary to look beyond the plain meaning of the text, to the object and purpose of the treaty or the "spirit" of the treaty).

130. *See id.* at 110.

131. *See id.* (indicating that the good faith requirement becomes complicated "in the nature, scope and function of the *principle* of good faith in the law of treaties").

132. *See id.* at 112. The International Court of Justice explains that it may be unfair to require adherence to a treaty where there is "a radical transformation of the extent of the obligations still to be performed. The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken." *Fisheries Jurisdiction Case* (U.K. & N. Ir. v. Ice.), 1973 I.C.J. 3, 21.

133. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 339, note 1 (1987) ("The President's authority to terminate or suspend international agreements is implied in his office as it has developed over almost two centuries.").

134. *See generally* Monroe Leigh, *Is the President Above Customary International Law?* 86 AM. J. INT'L L. 757, 757 (confronting the issue of "whether the President has the authority under domestic law to commit or order a violation of customary international law").

135. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, cmt. b (1987) (explaining that "although a subsequent act of Congress may supersede a rule of international law or an international agreement as domestic law, the United States remains bound by the rule or agreement internationally").

under the United States judicial system and would only be responsible internationally.¹³⁶

a. Constitutional Law and Judicial Deference

Because the United States Constitution confers the power to make international decisions upon both the executive and legislative branches, the judiciary often defers to the decisions of those branches.¹³⁷ Even though it is not explicitly detailed in the Constitution, the Supreme Court has consistently interpreted the Constitution as delegating broad foreign relations powers to the President, which has led to judicial deference in the area of international affairs.¹³⁸ Due to the broad deference given to the executive branch, actions taken by the President often go unquestioned, even if there is a violation of international customary law.¹³⁹

In declaring that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction,” the Supreme Court, in *The Paquete Habana*, made clear the significant relation between domestic and international law.¹⁴⁰ Although

136. *See id.*

137. U.S. CONST. art. II, § 2 (declaring that the President may make treaties with the advice and consent of the Senate).

138. *See, e.g.,* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (concluding that an unconstitutional congressional delegation can be sustained on the ground that it involved foreign affairs). The Court described the President’s authority as: the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations Negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

Id. at 320; *see also* United States v. Belmont, 301 U.S. 324 (1937) (stating that “the conduct of foreign relations was committed by the U.S. Constitution to the political departments of the government, and the propriety of what could be done in the exercise of this political power was not subject to judicial inquiry or decision”); United States v. Pink, 315 U.S. 203 (1942) (holding that the President could enforce a foreign decree confiscating bank deposits and other property held in New York, even though it violated New York law); *Ex parte Peru*, 318 U.S. 578 (1943) (stating “that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings”); Mexico v. Hoffman, 324 U.S. 30 (1945) (declaring that courts are bound by executive determinations on sovereign immunity).

139. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, rptr. note 3 (1987) (stating that “the [fact that] courts will not compel the President to honor international law may be implied in Supreme Court statements . . .”).

140. *The Paquete Habana*, 175 US. 677, 700, 706 (1900) (concluding that it is an established rule of international law that coastal fishing vessels are exempt from capture as prizes of war). *The Paquete Habana* is the leading case concerning the incorporation of

The Paquete Habana recognized the incorporation of international law into United States domestic law, there has been no additional clarification by the Supreme Court in this area.¹⁴¹ Thus, ambiguity arises because the President is constitutionally bound to “take [c]are that the [l]aws be faithfully executed”¹⁴² even though he may disregard a rule of international law.¹⁴³ Various commentators have developed arguments for and against requiring the President to follow international law, each relying on similar legal sources, such as the United States Constitution.¹⁴⁴ This is a seeming contradiction if, in fact, international law is part of the domestic law of the United States.¹⁴⁵

One argument supporting Presidential compliance with international law is that all executive branch officials are bound to follow international law because it is part of federal common law.¹⁴⁶ Consequently, if there is a breach of international customary law, the President could be held accountable by both the global community and the United States.¹⁴⁷ Others argue that the President has the constitutional authority to unilaterally terminate a treaty.¹⁴⁸ Even in the silence of the constitutional

international law into United States domestic law. See Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 322 (1985).

141. See Glennon, *supra* note 140.

142. U.S. CONST. art. II, § 3.

143. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, rptr. note 3 (1987) (“There is authority for the view that the President has the power, when acting within his constitutional authority, to disregard a rule of international law or an agreement of the United States, notwithstanding that international law and agreements are law of the United States . . .”).

144. See Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT’L. L. 377, 382 (1987) (declaring that “by 1900 . . . relevant trends in legal decision from the time of the Framers to the 20th century clearly supported the expectation that the President is bound by supreme federal law whether that law is customary or treaty-based”); Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT’L. L. 923, 924 (1986) (stating that “the President has no plenary power to act in violation of international law”). *But cf.* Yoo, *supra* note 43, at 854 (concluding that “President George W. Bush may enjoy firm constitutional authority to declare either that the ABM Treaty is terminated or that it does not prohibit a limited NMD program”).

145. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, rptr. note 3 (1987).

146. U.S. CONST. art. VI. The Supremacy Clause declares the Constitution, the laws of the United States, and treaties to be “the supreme Law of the Land.” *Id.* The courts have also inferred that treaties are authoritatively equal to United States statutes. See, e.g., *Head Money Cases*, 112 U.S. 580 (1884); *Whitney v. Robertson*, 124 U.S. 190 (1888); *The Chinese Exclusion Case*, 130 U.S. 581 (1889); see also Glennon, *supra* note 144, at 924.

147. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984).

148. See Yoo, *supra* note 43, at 873-74.

text,¹⁴⁹ interpretations by commentators, courts, and government entities support this contention.¹⁵⁰ In matters involving foreign affairs, this question should ultimately be for the executive and legislative branches, not the courts, to decide.¹⁵¹

b. Senate and Executive Understandings

Under Article VI of the United States Constitution, international treaty law is part of the supreme law of the land, therefore, the President is bound by these laws.¹⁵² Although the President does not need the consent of the Senate to terminate a treaty,¹⁵³ the specific power to terminate a treaty is not an exclusive power of the President.¹⁵⁴ The President is able to terminate the treaty on his own only "in accordance with its terms" and only if Congress does not expressly prohibit its

149. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §339, cmt. a (1987) ("The Constitution does not expressly confer on the President authority to terminate or suspend an international agreement on behalf of the United States. The rules stated in this section are based on the constitutional authority of the President to conduct the foreign relations of the United States.").

150. See Yoo, *supra* note 43, at 873-74 ("The President retains this authority due to his leadership in foreign affairs and his structural superiority in conducting international relations.") (parenthetical and footnote omitted).

151. See Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L. L. 736, 743 (1992) (explaining that "under the U.S. Constitution, it is for the President and Congress to decide whether to breach U.S. obligations under international law").

152. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, cmt. a (1987) (stating that "[a]n act of Congress and a self-executing treaty of the United States are of equal status in United States law. . .").

153. *Id.* § 339 (1987).

Under the law of the United States, the President has the power:

- to suspend or terminate an agreement in accordance with its terms;
- to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or
- to elect in a particular case not to suspend or terminate an agreement.

Id.

154. *Id.* § 339, cmt. a (1987).

termination.¹⁵⁵ Thus, the President gains more power if he receives assistance from the Senate.¹⁵⁶

Generally, the President is required to follow customary international law in times of congressional silence. Conversely, with congressional authorization –and perhaps without – he is able to disregard any norm of customary international law.¹⁵⁷ However, Congress has the right under the United States Constitution to define and punish offenses against the law of nations.¹⁵⁸ This has been interpreted to mean that Congress has the power to prohibit any or all offenses against international law.¹⁵⁹ Nevertheless, the Senate may not formally end a treaty without the participation of the President or the full Congress.¹⁶⁰

The President's authority to terminate a treaty under domestic law presents obvious ambiguities as to how that would affect the United States' obligations under international law.¹⁶¹ The law of the United States implies that the President could legally terminate a treaty under

155. *Id.* To clarify this contention, the official comments to the Restatement declare: [I]f the United States Senate, in giving consent to a treaty, declares that it does so on condition that the President shall not terminate the treaty without the consent of Congress or of the Senate, or that he shall do so only in accordance with some other procedure, that condition presumably would be binding on the President if he proceeded to make the treaty.

Id.

156. *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579, 635-637 (1952) (Jackson, J., concurring) (explaining, in his famous concurrence, the varying degrees of the President's power in relation to consent of Congress). Justice Jackson stated:

Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. . . . When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Id. (footnote omitted).

157. Glennon, *supra* note 144, at 923.

158. U.S. CONST. art. I, § 8, cl. 10.

159. Glennon, *supra* note 144, at 923-24.

160. Yoo, *supra* note 43, at 874.

161. See discussion *supra* Part I.B.2.

domestic law even if this termination would result in a breach of international law.¹⁶² Ultimately, the question revolves around issues of accountability and disputability of the President's authority.¹⁶³ With no liability under the United States judicial system, the Executive need only answer to the legal objections of the international community, and this liability is predicated upon compliance with the treaty terms for withdrawal and related international law.¹⁶⁴

II. IS THERE AN "EXTRAORDINARY CIRCUMSTANCE?"

A. *The Executive Branch's Argument for Withdrawal*

Experts within the Bush administration emphasize that withdrawal from the ABM Treaty is necessary to continue the testing and formation of the NMD plan.¹⁶⁵ If the development process continues at its present pace, the NMD program will conflict with the provisions of the ABM Treaty by the end of 2001.¹⁶⁶ President George W. Bush is scheduled to meet with Russian President Vladimir Putin in November at Bush's Texas ranch to discuss bilateral withdrawal from the Treaty or the possibility of reworking the Treaty to allow for testing of a NMD.¹⁶⁷ Regardless of the decisions or concessions made by Russia, President Bush has made it

162. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, cmt. a (1987).

163. *Id.* at § 339, note 2 (1987) (detailing the constitutional power to terminate a treaty or a Congressional-Executive agreement). This issue was first litigated in 1979 when members of Congress challenged President Carter's authority to terminate the Mutual Defense Treaty of 1954 with the Republic of China (Taiwan). *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979). Of the eight judges, four reached the substantive issue, declaring that the President had the authority to terminate the treaty and did not need the concurrence of Congress or the Senate alone. *Id.* The Supreme Court then vacated and remanded the decision, giving instructions to dismiss the complaint. *Goldwater v. Carter*, 444 U.S. 996 (1979). The one Justice that did reach the substantive issue, Justice Brennan, concluded that the power of the President to terminate the Mutual Defense Treaty was "a necessary incident to Executive recognition of the Peking Government Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes." *Id.* at 1007.

164. See discussion, *supra* Part I.B.1.

165. See Loeb, *supra* note 11.

166. *Id.* For a discussion of events subsequent to the writing of this Comment, see notes 223-232 and accompanying addendum.

167. LaFraniere, *supra* note 3.

clear that the United States will function on its own timetable for withdrawal.¹⁶⁸

1. Collapse of the U.S.S.R. and the End of the Cold War

The withdrawal policy has become a fiery issue with various legal implications because the Bush administration's justifications for withdrawal are political in nature.¹⁶⁹ The most often cited rationale for unilateral U.S. withdrawal has been that the end of the Cold War initiated major changes in the global political configuration.¹⁷⁰ President Bush expressed this view at a press conference marking the one month anniversary of the September 11th terrorist attacks.¹⁷¹ When asked whether the plan to withdraw from the ABM Treaty was still viable, President Bush responded that "the Cold War is over, it's done with and there are new threats we face."¹⁷² The President's remarks embodied the general sentiment among missile defense proponents who insist that without two obvious nuclear superpowers, nuclear deterrence through a concept such as MAD is no longer viable.¹⁷³ Generally, Republican politicians and conservatives have asserted that the treaty is no longer

168. *Bush: U.S. To Have Own Timetable For ABM Pullout*, available at <http://www.cnn.com/2001/ALLPOLITICS/08/23/bush.defense/index.html> (last visited Mar. 12, 2001).

169. See John Issacs, *Talking Points on the Case Against the ABM Treaty*, 4 NEXUS 93, 94 (1999) ("National Missile Defense proponents are using the cover of legal arguments to make what is essentially a political case for deployment.").

170. *Nuclear Cuts*, *supra* note 10. In a speech given on May 1, 2001, President Bush summarized his position, to which he has held fast even to the present date:

Today, the sun comes up on a vastly different world. The Wall is gone, and so is the Soviet Union. Today's Russia is not yesterday's Soviet Union. Its government is no longer Communist. Its president is elected. Today's Russia is not our enemy, but a country in transition with an opportunity to emerge as a great nation, democratic, at peace with itself and its neighbors. . . . To maintain peace, to protect our own citizens and our own allies and friends, we must seek security based on more than the grim premise that we can destroy those who seek to destroy us. . . . We need a new framework that allows us to build missile defenses to counter the different threats of today's world.

Id.

171. See Anne E. Kornblut and Michael Kranish, *Fighting Terror/The President Speaks*, BOSTON GLOBE, Oct. 12, 2001, at A1.

172. *Id.*

173. See generally Ariel Cohen & Baker Spring, *Strategic Defense and Cooperation Must Top the Agenda at the Bush-Putin Summit in Texas*, November 7, 2001, available at <http://www.heritage.org/library/backgrounder/bg1501.html> (outlining the need to redefine nuclear cooperation by first eliminating the ABM Treaty and then forming a cooperative framework with Russia for a system of missile defense).

valid because of the collapse of the Soviet Union.¹⁷⁴ However, since the collapse of the Soviet Union in the early 1990s, there have been varying opinions as to whether the ABM Treaty is still in effect.¹⁷⁵

2. "Rogue States" and a New Terrorist Threat

The structure of the nuclear powers in the world is no longer as clear-cut as during the days of the Cold War.¹⁷⁶ Rather than a nuclear standoff between two powerful nations, the threat of nuclear warfare is scattered throughout the globe in nations such as Iran, Pakistan, and North Korea.¹⁷⁷ These nations have developed their nuclear capabilities in the three decades following the signing of the ABM Treaty.¹⁷⁸ Concerns about random attacks from these nations, known as "rogue states," has further enhanced the appeal of a NMD.¹⁷⁹

The threat of terrorists, which came to the forefront of international politics following the events of September 11th, has produced an even more viable argument for the Bush administration.¹⁸⁰ As John Bolton,

174. Issacs, *supra* note 169, at 93. The Miron-Feith analysis, which concluded that the ABM Treaty did not survive the dissolution of the Soviet Union, was described by then Foreign Relations Committee Chairman Jesse Helms as "the most convincing and exhaustive legal analysis done on the subject to date." *Id.* at 94.

175. *See, e.g.*, Spring, *supra* note 60, at 31 (asserting that the result of the collapse of the Soviet Union is that the ABM is no longer binding on the United States, for there is not one state or group of states able to fulfill the U.S.S.R.'s obligations under the treaty.). *But cf.* Kellman, *supra* note 37, at 78-79 (proclaiming that "[i]t should be absolutely beyond serious question that the United States is currently bound by the ABM Treaty").

176. *See* Kennedy, *supra* note 29, at 99, 103-05 (submitting that the dangers of the ABM doctrine are now "amplified by the emergence of China as a nuclear superpower and the proliferation of nuclear missile technology to nations like North Korea, Iran, India, Pakistan, and Iraq").

177. *Id.* at 99. *See Nuclear Cuts*, *supra* note 10. President Bush highlights this fact when describing the present state of affairs:

More nations have nuclear weapons and still more have nuclear aspirations Some already have developed the ballistic missile technology that would allow them to deliver weapons of mass destruction at long distances and at incredible speeds Unlike the Cold War, today's most urgent threat stems not from thousands of ballistic missiles in the Soviet hands, but from a small number of missiles in the hands of these [rogue] states, states for whom terror and blackmail are a way of life.

Id.

178. *See* Kennedy, *supra* note 29, at 99.

179. *See id.*

180. *See* Baker Spring, *Talking Points: Terrorist Attack on America Confirms the Growing Need for Missile Defense*, September 20, 2001, at <http://www.heritage.org/library/background/bg1477.html> (asserting that the "horrific events [of September 11th] have] proven beyond any doubt that terrorists will use any means, at any costs, to devastate America").

Undersecretary of State for Arms Control and International Security, clearly stated, “[t]hese horrible events demonstrated . . . that there were people in the world who didn’t adhere to classic notions of deterrence and whose value systems and respect for human life didn’t quite match Western standards.”¹⁸¹ The fear is not only that rogue states may use their nuclear capabilities, but also that these missiles could be sold to the highest bidding terrorists.¹⁸²

B. Counter-Argument: Finding the Holes

1. End of the Cold War

The Bush administration’s justifications for withdrawal may be politically valid but are questionable in light of legal analysis.¹⁸³ A nation’s entitlement to unilaterally withdraw under Article XV of the ABM Treaty allows a certain amount of deference to be given to the withdrawing state.¹⁸⁴ Nevertheless, treaty withdrawal must be undertaken in accordance with the standard of good faith set out by international law.¹⁸⁵ As such, the Bush administration’s justification for withdrawal should not consist of excuses put forth to rid itself of inconvenient treaty restrictions, but rather should be based on valid indications of threats to the national security of the United States.¹⁸⁶

To interpret whether the Bush administration’s reasons for withdrawal are valid under the Extraordinary Events Clause, the context of the Treaty in light of its object and purpose must be taken into consideration.¹⁸⁷ As noted above, the Treaty was negotiated and signed

181. Colin McMahon, *Terrorism Spurs Missile Shield Debate*, CHI. TRIB, Sept 23, 2001, at 18.

182. See Spring, *supra* note 180 (noting that “[w]ith the proliferation of ballistic missiles to rogue states like North Korea, the likelihood that terrorists and despots will use these weapons of mass destruction to attack U.S. territory has grown substantially”). Rogue nations, as well as terrorist groups, have the “capacity both to obtain and launch such missiles.” *Id.*

183. See Issacs, *supra* note 169, at 94 (“National Missile Defense proponents are using the cover of legal arguments to make what is essentially a political case for deployment.”).

184. Perez, *supra* note 100, at 778.

185. Vienna Convention, *supra* note 92, art. 26.

186. See O’CONNOR, *supra* note 93, at 110 (explaining that states right of withdrawal has “too often been used as an excuse for withdrawing from a treaty that a particular state has found inconvenient”).

187. See Vienna Convention, *supra* note 92, art. 31(1) (stating “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”).

during the Cold War in hopes of reducing nuclear arms.¹⁸⁸ The ABM Treaty was signed with a companion document, together forming the SALT I accords.¹⁸⁹ The Russians, and various international analysts, contend that the SALT limitations, and later the START reductions, were interlinked with the ABM Treaty framework.¹⁹⁰ Indeed, the Russians would not ratify the START II accords unless the United States guaranteed adherence to the ABM Treaty.¹⁹¹ Accordingly, as part of the object and purpose of the Treaty, a discussion of extraordinary circumstances and withdrawal should include the START accords.

During the early 1990s, after the fall of the Soviet Union, both the Bush I and the Clinton administrations were working toward reinstating and modifying all of their treaties with Russia.¹⁹² The United States stated its desire to maintain the ABM Treaty as a cornerstone of arms control reduction.¹⁹³ Even the Bush I administration accepted Russia as

188. Grogan, *supra* note 6, at 803-04.

189. See Graham, Jr., *supra* note 29, at 58. ("By limiting the amount of defenses either side could deploy, the ABM Treaty made the SALT limitations and START reductions of the superpower nuclear arsenals possible.")

190. See Peter W. Mason, *Arms Control and Disarmament*, 34 INT'L LAW. 609, 616 (2000) (noting the significance of the START II protocol to the discussions of the ABM). Although the Russian Duma approved the START II Treaty in April 2000, its approval was contingent on a provision indicating that Russia would withdraw from START II if the United States began to build a strategic missile defense. *Id.* See also Grogan, *supra* note 6, at 801 (explaining that the Russians were hesitant to cut back their nuclear arsenal under START II during the same time that the U.S. was fortifying with national missile defense capabilities).

191. See Mason, *supra* note 190, at 611-12 (stating that in 1999, the Russians postponed the ratification of START II in response to the United States' plan to build a national missile defense). Indeed, on the day he signed the agreement, Russian President Putin stated, "If . . . the United States Destroys [sic] the ABM Treaty . . . [we] will withdraw not only from START II but also from the entire system of treaty relations on the limitation and control of strategic and conventional armaments." *Id.* at 616.

192. See Issacs, *supra* note 169, at 95 (stating that Russia assumed the treaty obligations of the Soviet Union shortly after its dissolution). Specifically, Russian President 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 limitations and disarmament which were signed by the Soviet Union and are in effect at present.

Id.

193. See Grogan, *supra* note 6, at 838. In May of 1995, President Clinton and Russian President Boris Yeltsin gave a joint statement on the ABM following a summit in Helsinki, Finland which declared basic principles on the issue of national defense. See *id.* Although these principles were vague, both sides agreed that the ABM would remain "a cornerstone of strategic stability." *Id.*

the Soviet Union's successor state to the ABM Treaty.¹⁹⁴ There were proposals for multilateralizing the ABM Treaty (MOU) to include some of the newly established states of the former Soviet Union.¹⁹⁵ If the end of the Cold War and the fall of the Soviet bloc were to alter the ABM Treaty, then the logical timeframe for this to occur would have been during the START negotiations between Russia and the United States and within the framework of the new START formulation.¹⁹⁶

It is now too late for a new administration, at the start of the twenty-first century, to point to an event of the early 1990s as justification for unilateral withdrawal from the ABM Treaty.¹⁹⁷ This event may have been considered "extraordinary" or a threat to the supreme national interests of the United States during the early 1990s, thereby justifying withdrawal during that time, but not today.¹⁹⁸ The fall of the Soviet Union and the end of the Cold War would not be a good faith justification for withdrawal under the Extraordinary Events Clause of the ABM Treaty.¹⁹⁹ However, a valid argument for withdrawal may include the ramifications of the changes that occurred in the global political

194. See Issacs, *supra* note 169, at 95. In 1992, former U.S. Secretary of State James Baker spoke for both the first Bush Administration and the United States when he stated:

I made the point to President Yeltsin that the United States remains committed to the ABM Treaty . . . [T]he fact of the matter is, we've made the point that we expect the states of the Commonwealth [including Russia] to abide by all the international treaties and obligations that were entered into by the former Soviet Union, including the ABM Treaty.

Id.

195. See Kellman, *supra* note 37, at 78.

196. See Mason, *supra* note 190, at 613. Indeed, the reality was the exact opposite; the two nations reaffirmed their commitment during the START II negotiations in a Joint Statement Concerning Strategic Offensive and Defensive Arms and Further Strengthening Stability. See *id.* In relation to the ABM Treaty, the statement provided:

Proceeding from the fundamental significance of the ABM Treaty for further reductions in strategic offensive arms, and from the need to maintain the strategic balance between the United States of America and the Russian Federation, the Parties reaffirm their commitment to that Treaty, which is a cornerstone of strategic stability, and to continuing efforts to strengthen the Treaty, to enhance its viability and effectiveness in the future.

Id. at 613 (citing to the Joint Statement Between the United States and the Russian Federation Concerning Strategic Offensive and Defensive Arms and Further Strengthening of Stability (June 20, 1999), available at <http://www.pub.whitehouse.gov/uri-res/12R?urn:pdil/oma.eop.gov.us/1999/6/2011.text.1>).

197. See *Collapse*, *supra* note 22 (stating that the United States has attempted to resolve the issue of Soviet succession and determine whether the rights and obligations of the Soviet Union could be assumed by the various nations of the former Soviet Union).

198. See ABM Treaty, *supra* note 20, art.XV.

199. See discussion and notes *supra* Part I.B.

structure following the Cold War, in which nuclear threats from rogue states and terrorists have been introduced.²⁰⁰

2. "Rogue States" and Terrorists Threats

With the end of the Cold War, the global political reality has been altered.²⁰¹ No longer are there two superpowers whose political dilemmas represent possible nuclear fallout for all nations.²⁰² Today the threat comes from various "rogue states" and possible terrorist attacks.²⁰³ The issue now is whether these new threats, not the decade-old concern of the collapse of the Soviet bloc, constitute an extraordinary event" to justify the United States' unilateral withdrawal.

In light of the political scene, recently catalyzed by the events of September 11th, the Bush administration could frame a valid, good faith argument for withdrawal based on national security interests.²⁰⁴ Considering the "self-interpretation" characteristic of the Extraordinary Events Clause, review of these justifications must be similar to that of an appellate review.²⁰⁵ Deference must be given to this need for withdrawal because, on its face, the terrorist threat seems to present a good faith basis. There are arguments, however, that maintaining the ABM Treaty would fortify international unity, which is needed even more so during this time.²⁰⁶

200. See discussion and notes *supra* Part II.

201. See Bradley, *supra* note 7, at 296.

202. See *id.* (explaining that the global climate has changed considerably since the United States and the Soviet Union were among the only countries in the world with nuclear capability).

203. See Graham, Jr., *supra* note 29, at 57-58 (detailing the precarious situation of the nuclear tests in Pakistan and India and the missile threat from "rogue states" such as Iran, Iraq, and North Korea that "underscore the perilous condition of the Treaty regime").

204. Ariel Cohn & Baker Spring, *Strategic Defense and Cooperation Must Top the Agenda at the Bush-Putin Summit in Texas*, November 7, 2001, available at <http://www.heritage.org/>

library/backgrounder/bg1501.html. ("The attacks of September 11 made it painfully clear to world leaders that innocent Americans are being targeted by terrorists who will use any means to inflict the greatest toll.")

205. See Perez, *supra* note 100, at 776-77.

206. See Daalder & Lindsay, *supra* note 22.

IV. MORE EFFECTIVE, LEGALLY VIABLE ALTERNATIVES

There is much opposition to the Bush administration's policy of unilateral withdrawal without compromise.²⁰⁷ Opponents include international law experts, the United States' allies, and of course, Russia.²⁰⁸ Even though the Bush administration may be able to avoid legal accountability for unilateral withdrawal, the strategic and political consequences could be substantial.²⁰⁹ In order to appease Russia and other opponents of the NMD plan, Bush should consider other viable alternatives that would more closely adhere to the legal structure under the ABM Treaty.²¹⁰

A. Greater Flexibility

At present, the Bush administration has made noteworthy efforts to negotiate arms reduction with the Russians; however, the administration will not relinquish its pursuit of a missile defense plan and renunciation of the ABM Treaty.²¹¹ Although the Bush administration would prefer

207. See *id.* (stating that "unilateral withdrawal from the ABM Treaty would be widely seen as definitive proof that the United States has become a rogue superpower that considers itself above the law").

208. See *id.* Although Russia has demonstrated that it may be interested in modifying the ABM, it has shown minimal interest in bilateral withdrawal and insists that the treaty remains the cornerstone of strategic stability. *Id.*

209. See Daalder & Lindsay, *supra* note 22 (highlighting that unilateral withdrawal "would severely damage American interests abroad [and] also jeopardize efforts to maintain domestic political support for missile defense"); see also Kellman, *supra* note 37, at 79 (stating that the United States can withdraw from its commitment, though the international community will take this action to mean the United States' commitments are of limited value). One commentator clearly expressed this idea:

If the most powerful nation on earth unilaterally reinterprets treaty obligations to its own advantage, other nations can only be expected to follow suit. The U.S. needs to set a clear and unequivocal example—honour your treaty commitments. In the long run, the U.S. can only stand to gain through its principled commitment to integrity and the rule of law in international relations.

Id. (quoting David E. Grogan, *Power Play: Theater Ballistic Missile Defense, National Ballistic Missile Defense and the ABM Treaty*, 39 VA. J. INT'L L. 799, 838 (1999)).

210. See generally Burrus M. Carnahan & Katherine L. Starr, *supra* note 38, at 615 (underscoring the need for treaty modification due to disputes over legal interpretations, technological advances, or changes in national security in order to keep the treaty relevant and viable).

211. See Karen DeYoung & Dana Milbank, *Bush, Putin Agree To Slash Nuclear Arms*, WASH. POST, Nov. 14, 2001, at A1. The three-day summit between President Bush and Russian President Vladimir Putin was what both president's referred to in their joint statement as "a new relationship . . . founded on a commitment to the values of democracy, the free market and the rule of law. The United States and Russia have overcome the legacy of the Cold War. Neither country regards the other as an enemy or threat." *Id.* The countries both pledged to reduce their arsenals of nuclear warheads by

bilateral withdrawal,²¹² it insists that the United States will unilaterally withdraw without Russian support and according to their own timeframe.²¹³ Instead, the United States should take a more diplomatic approach with Russia. The best way to accomplish the administration's goals is through negotiation and cooperation.²¹⁴ Russia has recently offered to amend the Treaty to avoid a complete withdrawal by the United States.²¹⁵ By negotiating reasonable and necessary changes to the ABM Treaty, President Bush could accomplish his long-term goal without disturbing the amicable relations between the United States and Russia.²¹⁶

B. Compromise: Limited Missile Defense Agreement With Russia

The Bush administration's goal of increased national security with the NMD could be effectively accomplished through a joint allied limited defense plan.²¹⁷ This alternative plan may "preserve good relations and security cooperation among the great powers while dealing with the rogue-state threat."²¹⁸ Bush could negotiate an amendment with Russia to allow for a limited NMD plan, whereby nations could have two

more than two-thirds over the next decade, which would be the lowest level since the 1960s. *Id.* Specifically, the United States would be dropping their numbers from the current total of 7,000 to between 1,700 and 2,200. *Id.* As for the question of the ABM Treaty and the actual deployment of the missile defense system, it will have to wait for another day. *Id.* Once again, the United States has made clear "its determination [to] move forward on missile defense, beyond the confines of the ABM Treaty, whether Moscow agrees or not." *Id.*

212. See Daalder & Lindsay, *supra* note 22 (explaining that "a unilateral withdrawal would be a foreign policy disaster . . . [and] would trigger a divisive political debate at home.").

213. *Timetable for ABM Pullout*, *supra* note 168.

214. See Rhinelander, *supra* note 21.

215. Colin McMahon, *Terrorism Spurs Missile Shield Debate*, CHI. TRIB., Sept. 23, 2001, at 18. Amending arms-reduction treaties is often a difficult task because of the "complexity of the negotiation process and security concerns," and there are alternative options available. See Carnahan & Starr, *supra* note 210, at 616, 632-33. Alternatives include:

- (1) a side agreement or memorandum of understanding which, unlike a protocol, would have no direct reference to the treaty *per se*;
- (2) a politically-binding agreement, which implies that it is binding in the current political context but lacks the weight of a legally-binding agreement . . . ; and
- (3) identical letters of intent, which would be sent to depositaries as an expression of parallel policies.

Id. at 630-32. Additional alternatives would be to create a protocol or come to a consensus on the interpretation of the treaty provisions. *Id.* at 632.

216. See Rhinelander, *supra* note 21.

217. See O'Hanlon, *supra* note 1.

218. *Id.*

deployment sites.²¹⁹ The fundamental ban on strategically significant defenses must remain in place; however, each side should be allowed to deploy defenses to provide protection from “rogue states.”²²⁰ This plan could make available a smaller scale defense still accepted within the structure of the ABM Treaty, which would reduce the threat of rogue states.²²¹ Additionally, this limited defense structure could encompass not only the Russians, but also European and Asian allies interested in defending against rogue states.²²²

V. CONCLUSION

International law and custom, which have been integrated into the United States’ domestic law, define when a nation may unilaterally withdraw from a treaty. Although Bush’s plan for unilateral withdrawal from the ABM Treaty nearly breaches these laws, the fact remains that the United States will likely not be held legally accountable. This reality is particularly true after the September 11th terrorist attack on the United States. Nevertheless, the international political implications to unilateral withdrawal will have significant effects on the United States’ strategic nuclear position and on global arms reduction. Thus, alternative resolutions, such as compromise with Russia and greater flexibility in negotiations, would prove more effective both in terms of international law and global policy decisions for the United States.

ADDENDUM

Subsequent to the completion of this Comment, the Bush administration announced, on December 13, 2001, the United States’ formal six-month notice of withdrawal from the ABM Treaty.²²³ In

219. See *id.* But see David A. Koplow, *When Is an Amendment Not an Amendment?: Modification of Arms Control Agreements Without the Senate*, 59 U.CHI.L.REV. 981, 984 (1992) (presenting the thesis that the “executive branch efforts to wrest additional treaty-related powers from the Congress—whether undertaken in the blatant manner of the reinterpretation escapade or in the seemingly more benign, indirect style of the current non-amendment question – are dangerous and unwarranted”).

220. See Ivo Daalder and James Lindsay, *Putting Nuclear Weapons Out of Reach*, FINANCIAL TIMES, Aug. 31, 2001, at 15. The authors note that an agreement “that allows the deployment of boost-phase defense capable of shooting down enemy missiles shortly after launch but that also strictly limits the number of mid-course interceptors and bans all space-based weaponry would strike the right balance.” *Id.*

221. See *id.*

222. Jim Garamone, *DOD Seeks To Expand New Relationship with Russia*, available at: http://www.defenselink.mil/news/Aug2001/no8312001_200108312.html.

223. See *From Bush, ‘Formal Notice’ of End of Pact*, N.Y. TIMES, Dec. 14, 2001, at A14.

stating the official justification for withdrawal, President Bush declared that “the ABM treaty hinders our government’s ability to develop ways to protect our people from future terrorist or rogue state missile attacks.”²²⁴ Bush also indicated that other factors, which were discussed previously in this Comment, were also significant in the decision to withdraw.²²⁵ These factors included the dissolution of the Soviet Union and the increasingly friendly relations between the United States and Russia, which presumably preclude the need for a system such as mutually asserted destruction.²²⁶ The official justification for withdrawal seemed to be an exercise of the United States’ rights under the Extraordinary Events Clause; however, other political factors were clearly integral to the decision.²²⁷

Rather than rendering the withdrawal issue moot, this action by President Bush instigated continued controversy. The Bush administration insists that withdrawal will have no negative effects on United States-Russian relations.²²⁸ Conversely, many critics believe that the withdrawal was not only made contrary to international law,²²⁹ but also that United States-Russian relations will suffer as a result of this decision.²³⁰ It is unclear what effect this withdrawal will have on long-term relations with Russia or on global nuclear relations.²³¹ Nevertheless, as stated previously, although withdrawal may be in violation of

224. *Id.*

225. *See id.*

226. *See id.*

227. *See id.*

228. *See* Scott Applewhite, *Bush Rips Up “Obsolete” Missile Treaty: Is This Another Case of America Riding Roughshod Over the World?*, *THE INDEPENDENT*, Dec. 14, 2001, at 3. The authors also note that “it is unclear whether Russia will be quite as unconcerned by the abandonment of the ABM pact as Mr. Bush expects.” *Id.* Russian President Putin’s response to the withdrawal was ambiguous, for he stated that the decision was “a mistake,” but that it would not harm Russia’s national security. *Id.* *See also* *U.S. Notifies Russia of Exit From 30-Year ABM Treaty*, *WASH. POST*, December 16, 2001, at A3 (highlighting the Bush administration’s satisfaction over the Russian response to the withdrawal). “Bush administration officials hailed the relatively mild Russian response as evidence that even though months of negotiations had failed to produce an agreement over missile defense tests and the 1972 Treaty, the talks had eased Russian anxieties over the effects of such missile defense systems.” *Id.*

229. *See* Robert S. McNamara and Thomas Graham, Jr., *Bush ABM Stance Endangers America*, *BOSTON GLOBE*, Jan. 13, 2002, at E11 (stating that “the administration has announced U.S. withdrawal from the Anti-Ballistic Missile Treaty despite expert testimony that there is no technological requirement to do so at this time”).

230. *See id.* Although President Putin’s initial response to the United States’ withdrawal has “wisely been muted,” there remains the possibility of increased tensions, negative responses, and issues regarding ratification for future arms reduction treaties. *Id.*

231. *See generally* Applewhite, *supra* note 228.

international law, the consequences of this act ultimately will be political in nature, not legal.²³²

232. See McNamara & Graham, Jr., *supra* note 229. Withdrawal from the treaty will have negative global and political consequences, for “[t]his unfortunate step will likely spark an arms race in Asia, with China carrying through on its threat to more rapidly expand and modernize its strategic nuclear forces, perhaps to be followed by India and Pakistan.” *Id.*