The Withdrawal of the United States from the 1972 Anti-Ballistic Missile Treaty
The Withdrawal of the United States from the 1972 Anti-Ballistic Missile Treaty

Following President Clinton’s announcement on September 1, 2000, that the deployment of a national missile defense (NMD) would be delayed until further research had been performed effectively put an end to any discussion concerning NMD until he left office. Less than two years later, the Anti-Ballistic Missile (ABM) Treaty of 1972 that kept nuclear powers Russia and the United States from escalating the nuclear arms race was dead, killed by the announcement that the U.S. had destroyed a ballistic missile target by a sea-based missile. During much of President George W. Bush’s first year in office, there was much debate in Congress over the President’s ability to pull out of what many Democrats believed was a legally binding treaty without the consent of Congress. House Democrats went so far as to file suit against the president in order to stop him from pulling out of the ABM treaty. The ABM treaty was believed to be one of the major roadblocks to the introduction of a complete national missile defense system. In addition to background information concerning the ABM treaty, this paper examines the interplay between Congressional Republicans and Democrats, as well as the relationship between Congress and the Presidency over this topic.
I. Introduction

As the Cold War escalated in the 1960s, so did the arms race between the world’s major superpowers, the United States and the Soviet Union. An eventual stalemate was caused by what was termed as “mutually assured destruction.” The arms build-up by both nations had led to the feeling that if either used what ballistic missiles they possessed, a retaliatory strike would be ordered as soon as the aggressor’s missiles were detected by radar. Neither nation had defensive missile capability, which meant that both sets of missiles would hit their respective targets, anyway, virtually assuring both nations and possibly their neighbors of their mutual destruction.

In order to avoid the possibility of mutually assured destruction and engage in arms reduction talks, President Richard Nixon of the United States and General Secretary Leonid Brezhnev of the Soviet Union signed an anti-ballistic missile treaty on May 26, 1972. The Anti-Ballistic Missile (ABM) Treaty of 1972 “prohibits the development or deployment of space-based, air-based, or mobile land-based antiballistic missile defenses and limits the deployments of such defenses to no more than 100 interceptor missiles deployed at a single site” (U.S. House, 106th Congress, “H.R. 5066…” Section 2 (1)). The United States Senate ratified the treaty on August 3, 1972, by a vote of 88-2. This paper will discuss the fate of the ABM Treaty since 1997 and the interactions between Republicans and Democrats in the House of Representatives and the Senate, as well as their responses to actions by both Bill Clinton and George W. Bush during their presidencies.

II. Republicans fight adherence to ABM under Clinton

Even though the demise of the Soviet Union on December 25, 1991, made the ABM Treaty invalid under international law (U.S. House, 106th Congress, “H.R. 2022…” Section 2 (2)), the United States and the Russian Federation declared on numerous occasions through joint statements that both nations were committed to the defunct treaty. On May 10, 1995, U.S. President Bill Clinton and Russian President Boris Yeltsin issued a joint statement acknowledging that the ABM Treaty was a cornerstone of strategic stability. This particular statement also acknowledged the need for each side to have effective Theater Missile Defense (TMD) systems. Both Clinton and Yeltsin agreed that the construction and deployment of such systems could not lead to a breach in the terms of the ABM Treaty (Clinton, “Russia-United States Joint Statement” 799).

This meeting and others like it through 1997 led to an agreement designating the differences between ABM systems and TMD systems. Together with Belarus, Kazakhstan, and Ukraine, the United States and Russia agreed on a new Memorandum of Understanding that would allow the United States and these four successor states of the Soviet Union to continue negotiations over TMD systems in a multilateral fashion under the same guidelines and regulations as those designated in the ABM Treaty and its associated documents (“Memorandum” 210). The Memorandum, signed by U.S. Secretary of State Madeline Albright on September 27, 1997, was never submitted to the President of the Senate for that legislative body to consider, and was subsequently not legally in force. President Clinton nevertheless directed the Executive Branch to adhere to the wording of the Memorandum and that of the ABM Treaty (U.S. House, 106th Congress, “H.R. 2022…” Section 2(5-6)). In letters to Senate Appropriations Chairman Ted Stevens (R-AK) and House Appropriations Chairman C. W. Bill Young (R-FL) on February 9, 1999, Clinton was forced to “certify and affirm” that the United States was not implementing the Memorandum of Understanding in accordance with section 625 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies
Appropriations Act of 1999 contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Clinton, “Letter to Congressional Leaders” 220). The section of the appropriations bill in question, originally sponsored by Representative Harold Rogers (R-KY), prohibited any of the funds of the huge omnibus appropriations bill from being dispensed to U.S. delegates to the Standing Consultative Commission unless President Clinton certified and affirmed that the United States would not implement the Memorandum (Public Law 105-277).

In order to ensure that President Clinton was unable to use the ABM Treaty or the 1997 Memorandum of Understanding to block any measure that came out of the Republican Congress concerning the increase and proliferation of a missile defense shield, twelve House Republicans came together to cosponsor the Freedom From Mutually Assured Destruction Act of 1999, which was a bill to prohibit the executive branch of the United States from complying with either the 1972 ABM Treaty or the 1997 Memorandum of Understanding relating to that treaty. The cosponsors, later joined by one House Democrat, Michael Forbes (D-NY) cited in their bill that the adherence to the two treaties had prevented the nation from being able to “provide for the common defense” of its citizens and had sought to place barriers in the way of any anti-missile program in the United States (U.S. House, 106th Congress, “H.R. 2022…” Section 2(7)). The bill was referred to the House Committee on International Relations on June 8, 1999, and did not emerge. Just two weeks later, however, President Clinton signed into law the National Missile Defense Act of 1999, a bi-partisan act originally cosponsored by nearly one-fourth of the House of Representatives. The law, Public Law 106-38, mandated a change in federal policy towards the deployment of a limited National Missile Defense against limited forms of ballistic missile attack as soon as it was technologically feasible. It also sought to continue negotiations with the Russian Federation concerning the reduction of that nation’s supply of nuclear weapons. This result seems to be a softening on President Clinton’s part in the area of missile defense policy.

On July 27, 2000, Massachusetts Congressman Edward Markey (D) introduced a bill designed “to provide deployment criteria for the National Missile Defense system and to provide for operationally realistic testing of the National Defense system against countermeasures” (U.S. House, 106th Congress, “H.R. 5066…” Synopsis). The bill, known as the National Missile Defense Deployment Criteria Act of 2000, sought to change some of the language in P.L. 106-38, making it more difficult to deploy a national defense system, including stipulations ensuring that the deployment did not do not lead to diminished national security for the United States or threaten to complicate relations with nuclear allies, such as those in Europe, Russia, or China (Section 3(B)(3-4)). The bill was referred to three separate House committees and no action was taken on it in the Republican-controlled House. Markey re-introduced the bill in the 107th Congress under President Bush the next August, but this bill, 107 H.R. 2786, met the same fate as its predecessor (U.S. House, 107th Congress, “H.R. 2786…”).

III. Democrats fight withdrawal from ABM under Bush

Whereas most of the most vocal opposition to policy during the Clinton Administration came out of the House of Representatives, opposition to policy increasingly became part of the agendas of Democratic Senators during the Bush Administration. This became more apparent following the events of June 6, 2001, when Vermont Senator James Jeffords switched his affiliation from Republican to Independent, giving the Democrats a 50-49 majority in the Senate and September 11, 2001, the events of which seemed to spark debate in and out of Congress concerning the future of a National Missile Defense. On September 19, 2001, Michigan Senator
Carl Levin (D) introduced the Ballistic Missile Defense Act of 2001 which prohibited funds from being appropriated for any ballistic missile activity that would be inconsistent with the requirements of the ABM Treaty (U.S. Senate, 107th Congress, “S. 1439…” Section 2(a)). This measure would serve to tie the hands of President Bush much like 106 H.R. 2022 would have the hands of President Clinton had it been signed into law. Virtually deadlocked, the Democratic-controlled Senate did not refer it to any committee upon its introduction.

Democratic Senator Dianne Feinstein of California, in an attempt to express the sense of the Senate on U.S. adherence to the ABM Treaty, introduced 107 S. 1565 on October 18, 2001. Cosponsored by such liberals as Jon Corzine (D-NJ) and Russell Feingold (D-WI), 107 S. 1565 expressed that the United States should continue to research, develop, test and evaluate programs for missile defense purposes as long as they remain in line with prior commitments by the United States and adhere to the ABM Treaty (U.S. Senate, 107th Congress, “S. 1565…” Section 2(1)).

The bill also expressed, like many others before it, that if the United States ever completely changed its policy concerning missile defense in relation to the ABM Treaty, it should seek to reconcile any differences using the structures provided in the treaty as well as its protocol (Section 1(5)). In her remarks to the Senate Armed Services Committee, Feinstein was critical of how the Bush Administration handled the issue of a national missile defense until that point. The United States, in her eyes, should pursue “good faith” negotiations with Russia to make modifications to the ABM Treaty as needed. She cites the Russians as the only nation able to overwhelm what she called the “proposed U.S. defensive umbrella” with intercontinental ballistic missiles. Given that there is only one nation currently capable of such an attack, Feinstein noted that the Bush Administration has no real reason to rush the deployment of a National Missile Defense. The Senator also implored the Bush Administration to pursue a more “balanced” strategy of national security with equal weight on development, “prevention, intelligence, rollback, and management.” Feinstein sought no vote on the bill, but wanted to use it as a platform to create awareness in a time of chaos (Feinstein, “Statement” S10836-S10638).

IV. The Death of the ABM and the Moscow Treaty of 2003

On December 11, 2001, news was leaked to Capitol Hill that President Bush was officially planning to withdraw the United States from the ABM Treaty, effective six months from the day the withdrawal was announced, as was designated in the Treaty’s termination clause. House Democrats scrambled to introduce a resolution the next day expressing the sense of the House of Representatives regarding the continued importance of the Anti-Ballistic Missile Treaty. The resolution, 107 H. Res. 313, noted that withdrawing from the ABM Treaty could have long-lasting unintended effects, such as weakening ties with and alienating friendly, non-nuclear countries, and could lead to a new arms race due to the destabilization of international relations that could occur as a result. The move could also be viewed as a move to undermine deterrence, hindering attempts to reduce existing nuclear arsenals. The recommendation of the minority party in the House was to remain a signatory to the ABM Treaty, not encourage Russia to transgress in order to invalidate the treaty, and continue to work with all nuclear powers to facilitate disarmament (U.S. House, 107th Congress, “H. Res. 313…”). President Bush formally announced his intentions on December 13, 2001.

On June 10, 2002, just three days before the United States was to withdraw officially from the ABM Treaty, Wisconsin Senator Russell Feingold, a Democrat, introduced a resolution in the Senate expressing his disapproval of President Bush’s withdrawal from the ABM Treaty. In this resolution, 107 S. Res. 282, Feingold argued that:
“1) the approval of the United States Senate is required to terminate any treaty between the United States and another nation, 2) the Senate shall determine the manner by which it gives its approval to such proposed termination; and 3) the Senate does not approve the withdrawal of the United States from the 1972 Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty), signed in Moscow on May 26, 1972” (U.S. Senate, 107th Congress, “S. Res. 282…”).

Seeking unanimous consent to debate the resolution, Feingold met an objection from Utah Republican Orrin Hatch, the ranking Republican on the Senate Judiciary Committee, ending any hope for a Senate challenge. Majority Leader Tom Daschle and Democratic leadership had already passed on an opportunity to take up the fight. In remarks made on the floor of the Senate, Feingold made comments seeking to remind his colleagues of the theory of the Founders’ intent, quoting Thomas Jefferson’s Manual of Parliamentary Practice: For the Use of the Senate of the United States—that:

‘Treaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of legislature alone can declare them infringed and rescinded.’

Feingold believed that if the advice and consent of Congress was needed to get into a treaty, it should at least be consulted when withdrawal from a treaty is considered, especially one as important as the ABM Treaty (Feingold, “Unanimous Consent” S5276).

The next day, June 11, 2002, a group of thirty-two members of the House of Representatives, led by Representative Dennis Kucinich (D-OH), took up Feingold’s lead and filed suit in the District Court of the District of Columbia against President George W. Bush, Secretary of State Colin Powell, and Secretary of Defense Donald Rumsfeld. Kucinich cited that the president “failed to submit the question of treaty termination to either house, nor did he seek congressional consent for the withdrawal” (Kucinich, et al. v. Bush 3). A result in favor of the group led by Kucinich would have retroactively forced President Bush to seek Congressional approval in order to withdraw from the treaty. Senator Feingold sought Senate approval to accept legal assistance pro bono in order to add his name to the Kucinich suit, but was unable (“Advice and Consent” 8). In comments on the floor of the House that day, Kucinich entered into a grey area of constitutional interpretation. The representative from Ohio noted that article VI, clause 2 of the Constitution handles treaties as supreme law of the land and emphasized that the president has no authority to repeal laws. Kucinich added that he perceived the President’s termination of the ABM Treaty as an unconstitutional repeal of a law enacted by Congress (Kucinich, “Protect the Constitution” H3421). He refers to this perceived overstepping of the President’s powers again six weeks later in a speech debating whether the United States should go to war in Iraq:

“The American constitutional experience relies on a separation of power. It depends upon Congress being willing to check the raw exercise of power by the executive. Wake up, Congress. We are on the verge of a major war in Iraq and the administration is ignoring our Constitution (Kucinich, “Congress Must Check” H5460).”

Kucinich also helped lead the charge for one last bill in the House of Representatives on the matter. Entered as “a bill to provide for the continued applicability of the requirements of the ABM Treaty to the United States,” 107 H.R. 4920, introduced June 12, 2002, was a last ditch effort to extend the spirit, if not the life, of the ABM Treaty. It was referred to the House
Committee on International Relations where it was tabled (U.S. House, 107th Congress, “H.R. 4920…” Synopsis).

Across the aisle from Kucinich, House Republicans celebrated the death of the ABM Treaty by introducing a concurrent resolution expressing support for the withdrawal of the U.S. from the treaty. Sponsored by Representatives Donald Young (R-AK), James V. Hansen (R-UT), and Bob Stump (R-AZ) the concurrent resolution makes note of the increased threat to national security due to the proliferation of biological weapons and weapons of mass destruction and in order to contain that threat, the United States must develop and deploy a national missile system with the cooperation of friendly nations (U.S. House, 107th Congress, “H. Con. Res. 420…”).

In his statement of formal withdrawal, President Bush characterized the ABM Treaty as out-of-date considering the types of threats the United States now faces. Bush also acknowledged that he and Russian President Vladimir Putin would be working closely on developing missile defense technologies and the reduction of both nations’ nuclear arsenals to their lowest levels in decades. New times call for new strategies and bold action (Bush, “Statement” 1011).

Kucinich, et al. v. Bush was decided on December 30, 2002, in favor of the President, Secretary of State and Secretary of Defense. In the opinion offered by United States District Court Judge John D. Bates, based on a 1997 ruling, the court found that the thirty-two congressmen “have not alleged the requisite injury to establish standing to pursue their claim,” and according to the United States Supreme Court’s 1979 dismissal of Goldwater v. Carter, the court “concludes that the treaty termination is a nonjusticiable ‘political question’ that cannot be resolved by the courts” (Kucinich, et al. v. Bush 18). The Goldwater case revolved around President Jimmy Carter’s 1979 unilateral withdrawal from the Taiwan Mutual Defense Treaty. Carter performed the action as a precondition for formally recognizing the People’s Republic of China and was sued by eight senators, one former senator, and sixteen members of the House. The Supreme Court refused to offer an opinion in the Goldwater case as to whether a president can withdraw from a treaty without Congressional consent and remanded it back to District Court (12).

On March 6, 2003, the United States and the Russian Federation agreed to the Strategic Offensive Reductions Treaty, also known as the Moscow Treaty. The treaty, which called for the reduction in the nuclear stockpiles of both nations by 2012, set out no protocols by which those means could be accomplished. An amendment to the treaty proposed by Sen. Carl Levin (D-MI), which would have required the administration to give Congress 60 days’ notice if it decided to change or withdraw from the treaty, was defeated by the Senate, 50-44 (Eisendrath 20). The treaty passed the Senate the same day by a 95-0 vote. Despite much debate from Democrats, only two amendments, Levin’s and one by John Kerry (D-MA), were proposed. Both were defeated. Many Democrats see the Moscow Treaty as a sham, calling for countries only to disarm some of their nuclear weapons, not completely destroy them. They believed that war could easily and quickly escalate (Sorrells 574).

V. Conclusion

Since September 11, 2001, the United States has reasserted itself as one of, if not the, major policy maker on the planet. Under Clinton, the Democratic Party was beginning to move closer to the realization of a National Missile Defense. Some of this change was forced by circumstance, but much of it was forced by the Republican majority in Congress following the
1994 mid-term elections. Clinton adeptly found ways of disguising the unpalatable to make it seem pleasant, or at least tolerable, to Democrats in Congress. The gradual move towards the National Missile Defense was one of those unpalatable items for Democrats. While some Republicans accused Democrats of dragging their feet on some important features, the Democrats accused the Republicans of moving too fast on other features. This sounds much like six of one thing and half-a-dozen of another, but following the 2000 election, tensions remained. Although there was now a Republican in the White House, Democrats controlled the Senate throughout much of the 107th Congress. Through the change in administrations, the Executive Branch continued to enjoy and exploit a slight edge in policy-making power. Bush used this edge to negotiate terms to the Moscow Treaty and also his way out of the ABM. Withstanding a slight legal challenge, Bush accomplished what Republicans in Congress had been trying to do for the past ten years.

The actions of both Bush and Clinton help to demonstrate the awesome powers of the Executive Branch in relation to foreign policy. Whereas, Congress is able to hold court and forcefully determine domestic policy, the President has the ability to enforce his foreign policy goals regardless of the party controlling Congress. To this point, given the rulings in the Goldwater and Kucinich cases, the Supreme Court has allowed the Chief Executive to do so or, at the very least, not stand in the President’s way. Another example of the President circumventing Congress’ role in foreign relations would be the President’s reluctance to ask the Senate to declare war. Recent presidents have found it easier to send troops and answer questions later, rather than risk losing a vote in the Senate. Through actions such as these an Executive Order or Agreement from the President has gained an elevated status in the United States government and legal system, having the influence of law if not the legal standing.
Works Cited

“Advice and Consent.” *Nation* 1 July 2002: 8


