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particular country diminished the effectiveness of the international program to protect whales. The majority began by noting that, had Congress intended to deny such discretion, "it would have been a simple matter to say that the Secretary must certify deliberate taking of whales in excess of IWC limits." 102/ The Court did not accept the explanation offered by the dissent for this failure, that no amendment was required because everyone understood that quota violations would always be considered to diminish the effectiveness of the program. 103/ The majority found no inconsistency between the existence of the discretion at issue and the basic purposes of the statute, and it found that the evidence in the legislative history that supported a per se rule was insufficient to "clearly indicate" that the exercise of discretion contradicted the language of the statute or "frustrated congressional intent":

> It may be that in the legislative history of these amendments there are scattered statements hinting at the per se rule advocated by respondents, but read as a whole, we are quite unconvinced that this history clearly indicates, contrary to what we and the Secretary have concluded is a permissible reading of the statute, that all departures from IWC schedules, regardless of the circumstances, call for immediate certification. 104/

The scattered statements referred to by the Court included specific representations by the Secretary of Commerce that commercial whaling would diminish the effectiveness of the IWC, and a recognition by a prior Administrator of NOAA that certification is mandatory once a violation of IWC quotas is found. 105/ This evidence was insufficient to meet the Court's strict standard that Congress must have evidenced a will that would be frustrated by the Executive's decision. The Court will consider whether the representations of Executive branch officials are incorporated into the relevant committee report. 106/

Similarly, in Chevron U.S.A. v. Natural Resources Defense Council 107/, the Supreme Court stated that "if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 108/ It went on to say, however, that if the court "determines that Congress has not directly addressed the precise question at issue," then it will defer to the interpretation given by the relevant Executive Branch agency if it is "based on a permissible construction of the statute." 109/

The President must be afforded the full benefit of this strict standard of proof when he is interpreting treaties. The President's authority over the interpretation of treaties is an aspect of the broad responsibilities assigned to that office for the conduct of foreign affairs, including those involving the national security. Furthermore, the Senate should be required to make the terms of its advice and consent reasonably clear, so that the the President can deliberately exercise his right to decide against ratification. A treaty is, moreover, not merely a law; it is also an international contract, which can have a significant impact on the nation's security posture. Its legislative history includes not only what the Senate learns, but also what the parties have said to each other. The Senate should not lightly be found to have intended that the United States be bound to terms other than those actually negotiated in the treaty.

Practices developed over many years demonstrate the practical results of these legitimate concerns. Whenever the Senate has intended to affect the Executive's judgment or activities under a treaty, it has provided in the ratification record some clear indication of its expectations or opinions. These indications will vary in the extent to which they limit the President's authority. These practices do not establish that efforts by the Senate, however clearly intended, to limit the President under domestic law will necessarily be proper or effective as a matter of law. They do, however, reflect the measures the Senate normally takes to express an intention or understanding it wishes the Executive to follow.

Many examples can be cited of the special measures taken by the Senate to ensure that the ratification record clearly reflected its view of a matter, and that the Executive Branch would honor or consider those views even though no formal condition on the question was included in the Senate's resolution of ratification. The following are a few prominent and instructive illustrations:

Geneva Protocol of 1925. 110/ The Protocol prohibits the use in war of chemical and biological methods of warfare. During the Vietnam conflict, the Executive Branch took the view that neither the Protocol (which the U.S. had not yet ratified) nor customary international law prohibited the use in war of riot control agents or chemical herbicides. 111/ On August 11, 1970, the President transmitted the Protocol to the Senate for its advice and consent, reaffirming this Executive Branch interpretation. 112/ On April 15, 1971, the Chairman of the SFRC wrote to the President rejecting this "restrictive interpretation," while recognizing the ambiguity of the

Protocol's language and the existence of arguments on both sides. 113/ Neither side was prepared to change its position on this question of interpretation, and the Committee deferred any action on the Protocol.

In 1974, negotiations between the Committee and the Executive Branch produced a compromise. In a hearing before the Committee on December 10, 1974, ACDA Director Ikle announced that the Administration would renounce, as a matter of national policy, the first use in war of herbicides and riot control agents (except in certain limited circumstances), while reaffirming the Administration's legal view of the scope of the Protocol. The Committee's Report stated:

> Among the questions posed by the Committee to Dr. Ikle in connection with his December 10 testimony, all of which form a part of the legislative history of the Senate's action, the Committee attaches particular importance to the following:
>
> > Question. Assuming the Senate were to give its advice and consent to ratification on the grounds proposed by the Administration, what legal impediment would there be to subsequent Presidential decisions broadening the permissible uses of herbicides and riot control agents?
> >
> > Answer. There would be no formal legal impediment to such a decision. However, the policy which was presented to the Committee will be inextricably linked with the history of Senate consent to ratification of the Protocol with its consent dependent upon its observance. If a future administration should change this policy without Senate consent whether in practice or by a formal policy change, it would be inconsistent with the history of the ratification, and could have extremely grave political repercussions and as a result is extremely unlikely to happen.
>
> On the basis of this and the other Executive Branch assurances and explanations reflected in the hearing record, the Committee recommends that the Senate give its prompt advice and consent to ratification of the Geneva Protocol of 1925. 114/

Another example in which the Senate expressed its reliance upon the testimony of an Executive branch witness is the 1979 International Convention on Maritime Search and Rescue. 115/ The SFRC was concerned about the manner in which the Executive would utilize a provision of the Convention allowing technical amendments to become automatically effective. The SFRC report stated:

> The Committee allows this procedure for tacit amendments only on a treaty-by-treaty basis and only with respect to provisions dealing with technical, as opposed to policy, matters. The Committee understands, based on the testimony of Admiral Bell, that the Executive Branch will in all instances inform the Committee of amendments subject to this procedure sufficiently in advance of the time stipulated for entering an objection under the tacit acceptance procedure. 116/

Outer Space Treaty. 117/ Among other things, the Treaty provides that "[t]he exploitation and use of outer space . . . shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind." 118/ The SFRC Report states as follows with respect to this provision:

> The committee raised the question whether the language of this general principle might imply a fixed treaty obligation on the part of the United States to share the benefits and results of its space activities, particularly in the communications satellite field.
>
> After a full discussion of this point with administration witnesses, the committee was assured that no such specific treaty obligations would result. Nevertheless, the committee wishes to make its position clear on its understanding of the obligations the United States will accept under article I, paragraph 1 of the treaty. It is the understanding of the Committee on Foreign Relations that nothing in article I, paragraph 1 of the treaty diminishes or alters the right of the United States to determine how it shares the benefits and results of its space activities. 119/

Similar Committee understandings were stated in the Committee Report concerning the interpretation of the Treaty's language on liability for damage resulting from space activities and the placement in orbit of nuclear weapons. 120/

Mutual Defense Treaty with the Republic of China. 121/ This Treaty includes language by which each party "declares," in the event of an armed attack in the West Pacific Area directed against the territories of the other, that "it would act to meet the common danger in accordance with its constitutional processes." 122/ The SFRC Report on the Treaty stated the following on this question:

> The power of the United States Government to act under this treaty remains precisely as it is defined in the Constitution, without impairing either the right of the Congress to declare war, or the authority of the President to act as Commander in Chief and as director of this Nation's foreign relations. . . . The committee considered carefully the wording of article V and the nature of our commitments under that article. In order to clear up any doubt on this point, it was agreed that its report should include the following statement:
>
> > It is the understanding of the Senate that the obligations of the parties under article V apply only in the event of external armed attack; and that military operations by either party from the territories held by the Republic of China, shall not be undertaken except by joint agreement. 123/

A similar "understanding of the Senate" was included in the Committee Report on the process by which territories outside Formosa and the Pescadores could be brought within the scope of the Treaty. 124/

Tax Convention with the USSR. 125/ The Convention included language providing that the Convention would only apply to income from activity conducted in accordance with the laws and regulations of the Contracting State in question. 126/ The SFRC Report stated as follows with respect to this issue:

> During the course of the Committee's hearing, it was pointed out that Article VIII of the Soviet convention contains language which does not appear in any other tax treaty to which the United States is a party. . . . Since the Committee was concerned about the interpretation and application of this provision, the Treasury and State departments were asked for clarification. Letters from both Departments appear in the appendix to this report.

> In the Committee's opinion, as a matter of tax policy, this type of provision should not be included in tax treaties. Nevertheless, in view of the Treasury Department's assurances that the provision will be narrowly construed, and the State Department's belief that favorable action would have a positive effect on United States-Soviet bilateral relations, the committee decided to recommend approval of the treaty. 127/

Convention on Liability for Damage Caused by Space Objects. 128/ The SFRC Report on the Convention stated the following:

> The Convention was considered in executive session on August 8, 1972. During that session, a question was raised concerning the meaning of "space object." Further action on this Convention was postponed pending the receipt of a comprehensive definition of this term from the Executive Branch. On September 7, 1972, the Committee received a reply from the Department of State. The text of this communication is reprinted in the appendix. 129/

The State Department communication was a letter to the Chairman of the committee, coordinated with DOD and NASA, describing at length the Executive Branch's interpretation of the phrase in question. 130/

In another example of Senate concern over definitions, the definition of "indigenous inhabitants" in the 1976 Convention with the U.S.S.R. on the Conservation of Migratory Birds 131/ led the SFRC to include in its report, "in an effort to clarify an ambiguity," a detailed excerpt from the U.S. delegation report. 132/

Supplementary UK Extradition Treaty. 133/ The SFRC recommended several amendments to the supplementary Treaty that were ultimately adopted as formal conditions to the Senate's grant of advice and consent. 134/ The SFRC Report contained a colloquy between committee members intended to establish that one of the amendments would allow otherwise extraditable individuals to challenge in U.S. courts the fairness on certain grounds of the judicial system to which he would be returned. 135/

Numerous other examples of such Senate expressions of intent could be cited. 136/ They illustrate the measures that the SFRC or the Senate as a whole take when a particular

question of treaty interpretation or implementation is deemed important enough to warrant an expression of clear intent. In several of the above examples, the Committee went back to the Executive Branch for further explanation or assurances, and included those responses in its Report as the basis on which the Committee was proceeding. In two cases, the Committee refused to proceed further until the matter in question was satisfactorily resolved. In many cases, the final result was the product of negotiation between the Committee and the Executive Branch. The results, moreover, were formally embodied in executive action, in "understandings of the Senate" recorded in the Committee Report, or in formal colloquies during Committee proceedings or on the Senate floor. The fact that the Senate often sought to pin down specific assurances of the Executive is significant; this practice reflects the Senate's view that even clear assurances of an interpretation would not necessarily bind the President in the event he determined the assurances were incorrect or inadvisable.

In all cases, the consequence of these activities is a clear expression of an aspect of the treaty, intended to influence the Executive directly, rather than authoritatively to affect the treaty's mutual obligation. As reflected in section 314 of the Restatement, quoted earlier, the evaluation of such statements in the ratification record must be undertaken by the President in good faith with a view to determining the extent to which the record can fairly be said to evidence a generally held understanding of the Senate on the specific issue involved. Other, less authoritative expressions of the Senate's intention on a specific issue may also be made. In light of established Senate practice, material which does not appear in the SFRC report, or which constitutes the views of individual members rather than a generally held understanding, is entitled to substantially less weight than the clearer expressions recounted above. In such situations, too, the President must under the Constitution consider what appropriate weight to give any specific understanding reflected in the record. Prudential considerations may well play a significant role in such a decision.

3. Application to the ABM Treaty

Under either view of the use of the ratification record in interpreting treaties, discussed above, no basis exists for the conclusion that the President is bound to the narrow view as a matter of domestic law.

The Senate did not condition its grant of advice and consent to the ABM Treaty on the basis of any particular interpretation concerning future systems. The Senate did

express concern on specific issues other than whether the development and testing of mobile OPP devices was prohibited, although it did not reflect these concerns in its resolution. In the SFRC Report, the Committee registered its strong opinion on the inadvisability of establishing an ABM defensive system for the national capital. This was not binding on the President, but it was a clear signal of the Committee's judgment. An informal understanding was also communicated through a colloquy among Senators which indicated agreement with the unilateral statement of Ambassador Smith to the Soviet ABM delegation on May 9, 1972 that: "[i]f an agreement providing for more complete strategic offensive arms limitations were not achieved within five years, U.S. supreme interests could be jeopardized. Should that occur, it would constitute a basis for withdrawal from the ABM Treaty." 137/ On August 3, 1972, Senator Buckley spoke in favor of attaching this position to the resolution of ratification as an understanding. He felt this would convey the important message that the ABM Treaty was not an end in itself, and that the Senate was accepting "not only the letter but the spirit of the treaty as it is understood by the President and his chief advisers." His proposal was supported by Senators Jackson and Thurmond, and the point was clearly made that this understanding was not intended to change the treaty itself. 138/ Senator Fulbright questioned the need for such an understanding, stating that, while he felt the notion of "parity" was too vague a concept upon which to rely in evaluating U.S. strength, he agreed in principle with Buckley's essential point that "the necessary effect of the ratification would be to incorporate that statement of Ambassador Smith." 139/ On the basis of this understanding, Senator Buckley withdrew his resolution. By contrast to these issues, nothing was said in the ratification proceedings indicating a Senate intention concerning the development and testing of mobile, OPP devices.

The Treaty's purpose, as described by the Secretary of State and Ambassador Smith, fails to provide an authoritative basis for inferring an intent, generally held by the Senate, to preclude the development and testing of mobile OPP devices. The basic purposes are stated in Article I(2): "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, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty. " These objectives are preserved under both the narrow and the broad interpretations of the Treaty; both prohibit deployment except as allowed in Article III. The Treaty bars the testing and development of mobile "ABM systems and

components," but at the same time it identifies a separate category of ABM devices that it characterizes as ABM systems "based on other physical principles and including components capable of substituting for ABM launchers, missiles and radars." Devices which qualify as OPP can be "created," but not deployed.

The President's Letter of Transmittal recites: "The ABM Treaty limits the deployment of anti-ballistic missile systems to two designated areas." (Emphasis added.) It also notes the additional objective which the Treaty was to ensure -- maintaining the "defensive capabilities of the United States. . . ." The President wrote: "The terms of the ABM Treaty and Interim Agreement will permit the United States to take the steps we deem necessary to maintain a strategic posture which protects our vital interests and guarantees our continued security." The Secretary of State's Letter of Submittal echoed these themes in greater detail. It states, in a section entitled "Development, Testing, and Other Limitations," that Article V(1) limits development and testing activities "to fixed, land-based ABM systems and components . . . ." The letter contains a different section that deals with "Future ABM Systems," however, which it treats as a separate, "potential problem." It states that the parties agreed that, if substitute devices for ABM missiles, launchers, or radars are created in the future, their deployment would be barred.

The treaty does reflect a general purpose of constraining the development of ABM technology, which the Senate can be said to have supported. This general purpose is not inconsistent with the broad interpretation. The Secretary's Letter of Submittal describes limits on development and testing in some detail, but these comments deal primarily with specific provisions limited to "ABM systems and components," and relate specifically to ABM missiles, radars and launchers. Test ranges are specified. Articles V(1) and (2) are discussed, but also in terms of "ABM systems and components," and the letter notes that such systems and components can be tested and developed only if they are fixed and land-based. Even though Article V(1) does not apply to OPP systems and components under the broad interpretation, the Treaty's effect is very meaningful. That section precludes the testing and development of all mobile, non-OPP systems and components, which was a substantial achievement in 1972, when plans for many such systems and components were being considered, and when the Administration might well have been willing to accept an ABM Treaty exclusively limited to conventional systems. The application of this provision to OPP is consistent with but is not an essential aspect of the Treaty's purpose. Early in the

treaty's history the JCS recognized that Congress' willingness to support development of future systems would be affected by their deployability. (See Part I of this study, p. 17.)

The extent of the Treaty's regulation of OPP systems beyond the non-deployment commitment was not treated with precision or clarity during the ratification proceedings. The ratification record shows that the testimony of Secretaries Rogers and Laird did not explicitly address the precise issue currently in dispute, nor did the the testimony of the chief negotiator, Ambassador Smith. In response to specific questions on whether the Treaty permits development of laser ABM systems, Ambassador Smith replied in the affirmative without qualification, saying that only deployment is restricted.

Other statements, by non-negotiators, did express the view that ABM lasers could be developed and tested in the fixed, land-based mode. In addition, a written answer by DOD on behalf of Secretary Laird conveyed this view. At least three Senators known to be experts on the subject of national defense drew the inference that mobile lasers could not be developed under the Treaty, and a JCS witness confirmed this interpretation. Senator Buckley rested in part on this understanding in announcing his opposition to the Treaty, although he was also opposed to the Treaty because it limited the right to deploy future systems.

The context of these statements, however, reflects no purpose by the Senators involved, much less by the Senate in general, to limit the President. On the contrary, these statements were made in the course of questioning by Senators who were seeking assurances that ABM laser research and development already underway would continue. No Senator at any time sought an assurance that development and testing of mobile OPP devices would not occur. While some Senators may have believed that this specific limitation added a desirable element to the Treaty, none specifically expressed that view; only a few indicated that the limitation was of any importance to them. Finally, the SFRC Report on the ABM Treaty contains no suggestion that the Senate generally had formed an intention on the specific issue now under review. The Report stresses the importance of the prohibition on deployment, specifically citing as a separate, "qualitative limitation," which is "perhaps of greater importance," the fact that "future exotic types of ABM systems, i.e., systems depending on such devices as lasers may not be deployed, even in permitted areas."

Under the governing Supreme Court standards for evaluating legislative history, which should be applied here with a regard for the President's authority to interpret treaties and conduct

foreign affairs, this record, "read as a whole," fails to establish that the Senate generally "has directly spoken on the precise issue in question," that development and testing of mobile OPP devices would be "contrary to the will" of the Senate, or that such activities would frustrate Congressional intent. Nothing happened to alert the Senate to the need to inquire into this issue, so no factual inference should be drawn one way or the other from the Senate's silence. To find such a record binding on the President as a matter of law, however, would sharply and unacceptably restrict his authority in connection with treaties generally, especially considering the availability to the Senate of its often utilized practice of making clear generally held views on specific issues. Moreover, in this particular case it would result in a double standard, allowing the Soviets the benefits of a bargain which they rejected in 1972.

The President's concern over the ratification record should not, however, end with the application of judicial standards by which his discretion would be strictly limited. The Constitution requires him to give appropriate weight to any understanding clearly reflected in the course of adoption of a treaty. The application of governing legal standards on such issues is not a mechanical matter, but one that is inherently a matter of judgment and subject to differences of view. Differences of view are likely to be even more pronounced in connection with the application of these standards in a nonjudicial context, as in evaluating the President's duties under the ABM Treaty.

The President has already recognized the propriety of consulting fully with Congress on all aspects of this matter. In exercising his Constitutional discretion, he should consider Congress' views, and all other relevant circumstances, including the ratification record.

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FOOTNOTES

1/ Memorandum from J. Malone to Mr. Keeny (May 12, 1972), Revised Draft Letter of Submittal at 20-21.

2/ 133 Cong. Rec. S2970-71, S2979 (daily ed. Mar. 11, 1987)(statement of Sen. Nunn).

3/ Military Implications of the Treaty on the Limitations of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms: Hearing before the Senate Comm. on Armed Services, 92d Cong., 2d Sess. 44 (1972).

4/ 133 Cong. Rec. S2979-80 (daily ed. Mar. 11, 1987) (statement of Sen. Nunn).

5/ Strategic Defense Initiative: Hearings before the Subcomm. on Strategic and Theater Nuclear Forces of the Senate Comm. on Armed Services, S. Hrg. No. 933, 99th Cong., 1st Sess. 253 (1985).

6/ Interviews with Charles Van Doren, ACDA Deputy General Counsel in 1972, and Steven Nelson, Special Assistant to the State Department Legal Adviser in 1972, in Washington, D.C. (Apr. 20 and 24, 1987, respectively).

7/ Memorandum from Amb. G. Smith to Mr. Kissinger (June 6, 1972) at 1.

8/ Id. at 1-2.

9/ Strategic Arms Limitation Agreements: Hearings before the Senate Comm. on Foreign Relations, 92d Cong., 2d Sess. 25-26 (Sen. Cooper) and 44 (Sen. Fulbright) (1972).

10/ Id. at 26 and 44.

11/ Id. at 44.

12/ Senate Comm. on Foreign Relations, Treaty on Limitation of Anti-Ballistic Missile Systems, S. Exec. Rep. No. 28, 92d Cong., 2d Sess. 3 (1972).

13/ Id. at 9.

14/ House Comm. on Foreign Affairs, Agreement on Limitation of Strategic Offensive Weapons, H. Rep. No. 1324, 92d Cong., 2d Sess. (1972), reprinted in U.S. Arms Control and Disarmament Agency, 1972 Documents on Disarmament 555, 557 (1974) [hereinafter cited as 1972 Documents].

15/ 1972 Documents, supra note 14, at 560.

16/ Restatement of Foreign Relations Law of the United States (Revised) §314(1) (Tent. Final Draft 1985) [hereinafter cited as Restatement]; 14 M. Whiteman, Digest of International Law 137-39 (1970). See also Congressional Research Service, Library of Congress, Treaties and Other International Agreements: The Role of the United States Senate, prepared for the Senate Comm. on Foreign Relations, S. Prt. No. 205, 98th Cong., 2d Sess. 120 (Comm. Print 1984); E. McDowell, 1976 Digest of United States Practice in International Law 214-17 (1977).

17/ See, e.g., Convention on Double Taxation, July 1, 1957, United States-Pakistan, 10 U.S.T. 984, T.I.A.S. No. 4232.

18/ See Agreement Concerning the Treaty of Friendship, Commerce and Consular Rights, June 3, 1953, United States-Federal Republic of Germany, 5 U.S.T. 1939, T.I.A.S. No. 3062; Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057.

19/ See Treaty on the Utilization of Waters, Feb. 3, 1944, United States-Mexico, 59 Stat. 1219, T.S. No. 994.

20/ Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10029 [hereinafter cited as the Neutrality Treaty]; Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030.

21/ Resolution of Ratification, as amended, for the Neutrality Treaty, adopted Mar. 16, 1978, reprinted in Congressional Research Service, Library of Congress, Senate Debate on the Panama Canal Treaties: A Compendium of Major Statements, Documents, Record Votes and Relevant Events, prepared for the Senate Comm. on Foreign Relations, 96th Cong., 1st Sess. 410 (Comm. Print 1979) [hereinafter cited as Senate Debate]; Resolution of Ratification, as amended, for the Panama Canal Treaty, adopted Apr. 18, 1978, id. at 493.

22/ Resolution of Ratification for the Neutrality Treaty, paras. (b)(2), (d)(5), id. at 411, 413; Resolution of Ratification for the Panama Canal Treaty, paras. (a)(2), (b)(6), id. at 493, 495.

23/ Treaty on the Limitation of Strategic Offensive Arms, June 18, 1979, United States-U.S.S.R., S. Exec. Y, 96th Cong., 1st Sess. (1979) [hereinafter cited as the SALT II Treaty].

24/ The SFRC Report on the Treaty stated:

> In view of the numerous conditions to the SALT II Treaty that it adopted, the Committee deemed it advisable to make explicit in the Resolution of Ratification the intended consequences of the different kinds of Committee action. In particular, it wanted to leave no doubt as to which Senate actions required the agreement of the Soviet Union and which were intended to serve other purposes. Early in its markup of the SALT II Treaty, therefore, the Committee agreed to distinguish between three different categories of conditions to the Senate's advice and consent, embodied in three different sections in the Resolution of Ratification:
>
> Category I: provisions that do not directly involve formal notice to or agreement by the Soviet Union.
>
> Category II: provisions that would be formally communicated to the Soviet Union as official statements of the position of the United States Government in ratifying the Treaty, but which do not require their agreement.

> Category III: provisions that would require the explicit agreement of the Soviet Union for the Treaty to come into force.

Senate Comm. on Foreign Relations, The SALT II Treaty, S. Exec. Rep. No. 14, 96th Cong., 1st Sess. 28 (1979) [hereinafter cited as Comm. Rep., SALT II Treaty].

25/ Id. at 28-29.

26/ The SFRC Report stated:

> Traditionally, the Senate is concerned first with what is in the treaty itself as elaborated in the Secretary of State's Letter of Submittal, and then with the text of its own Resolution of Ratification. It usually takes no interest in the content of the documents prepared subsequent to its advice and consent. In recent years, however, the Senate has concerned itself directly with the United States "Instrument of Ratification," the document which the President signs after Senate advice and consent and subsequently exchanges with the other party to the treaty. The problem that has attracted Senate attention is that the Instrument may or may not contain the complete text of the Senate's original Resolution of Ratification.
>
> The Resolutions of Ratification to both Panama Canal Treaties contained understandings which required the President to include the entire text of the Senate's Resolution in the U.S. Instrument . . . .
>
> However, the inclusion of Senate conditions in the U.S. Instrument of Ratification may not in itself be sufficient to assure the agreement of the other party to those conditions. Some legal scholars have argued that a willingness to go forward with the exchange of the Instruments of Ratification, in the absence of some other indication of acceptance, may leave doubts as to whether the silent party has or has not agreed to the conditions contained in the other party's Instrument. . . .

> The United States has generally avoided the problem in practice through a procedure whereby both parties sign a "Protocol of Exchange" at the time the Instruments of Ratification are exchanged. It is this document . . . which specifies the effect each party gives to any conditions contained in the Instrument of Ratification of the other party. . . . So long as the Senate makes clear which conditions must have the explicit agreement of the Soviet Union, the President will have to secure explicit agreement in the Protocol or some equally effective legal instrument.

Id. at 33-34.

27/ Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, S. Treaty Doc. No. 8, 99th Cong., 1st Sess., as amended by the Senate July 17, 1986, S. Exec. Rep. No. 17, 99th Cong., 2d Sess. 15-17 (entered into force Dec. 23, 1986, with amendments and exchange of notes).

28/ Resolution of Ratification for the Supplementary Extradition Treaty with the United Kingdom, July 17, 1986, 99th Cong., 2d Sess., 132 Cong. Rec. S9120 (daily ed. July 16, 1986); id. at S9251-73 (daily ed. July 17, 1986).

29/ Notes exchanged at Washington August 19 and 20, 1986. The amendments were also included in the U.S. instrument of ratification, signed by the President November 6, 1986. The Protocol of Exchange, signed at London December 23, 1986, recited that the ratifications being exchanged were for the treaty, as amended by the said notes. The parties also exchanged notes at the same time as the exchange of ratifications, stating that the treaty would not be applicable to Hong Kong until such time as the United Kingdom gave notice that it had completed the steps necessary for implementation of the treaty in respect of Hong Kong. Documents on file in Department of State Treaty Records: Extradition--United Kingdom, Washington, June 25, 1985.

30/ See Restatement, supra note 16, §313 comments (c) (agreement approved subject to reservation must be accepted by other party) and (e) (reservations must be in writing and communicated to other party), §314 (reservations and understandings: U.S. law generally); 14 M. Whiteman, supra note 16, at 137-40 (reservations, understandings, declarations of intent or interpretation are incorporated in instrument of ratification in order to have international effect); McNair, The Law of Treaties 421-22 (1961).

31/ Vienna Convention on the Law of Treaties, done May 23, 1969, S. Exec. L, 92d Cong., 1st Sess. (1971).

32/ Article 31 reads in full:

> General rule of interpretation
>
> 1. 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

Id.

33/ See supra note 30.

34/ See supra note 32. Specifically, the reference to "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" would not appear to include statements in one party's internal ratification proceedings prior to the entry into force of the treaty. Sinclair states:

> It should of course be stressed that paragraph 3(b) of Article 31 of the Convention does not cover subsequent practice in general, but only a specific form of subsequent practice -- that is to say, concordant subsequent practice common to all the parties. Subsequent practice which does not fall within the narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the Convention.

I. Sinclair, The Vienna Convention on the Law of Treaties 138 (2d ed. 1984). See also T. Elias, The Modern Law of Treaties 76-77 (1974) (subsequent practice must establish "agreement" of the parties, not merely understanding regarding interpretation). McNair refers to subsequent practice as "the relevant conduct of the contracting parties after the conclusion of the treaty," citing as one example the subsequent enactment of implementing legislation. McNair, supra note 30, at 424, 426.

35/ Article 32 reads in full:

> Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the

> preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties, supra note 31.

Some of the earlier writers appear to treat ratification proceedings as "preparatory work" for a treaty. For example, Lauterpacht states that "preparatory work" may be understood in two meanings: (1) the negotiating history of the treaty; and (2) "[i]t may refer to expression of opinion of Governments or authoritative members or committees of legislative bodies during the process of obtaining parliamentary approval of the treaty." His article, however, proceeds to address preparatory work in the sense of negotiating history only. Lauterpacht, Some Observations on Preparatory Work in the Interpretation of Treaties, 48 Harv. L. Rev. 549, 552 n.3 (1935). See also McNair, supra note 30, at 421-22; notes 59-66 infra and accompanying text. Sinclair does not discuss internal ratification proceedings as such, but they might fit within the "historical background" of the treaty which he believes should be considered. I. Sinclair, supra note 34, at 141. Other commentators, e.g., T. Elias, supra note 34, at 71-84, do not mention ratification proceedings in connection with the interpretation of treaties.

36/ See supra note 16.

37/ Section 325 states:

Interpretation of International Agreements

> (1) An international agreement is to be interpreted in good faith in accordance

> with the ordinary meaning to be given to its terms in their context and in the light of its objects and purpose.
> (2) Any subsequent agreement between the parties regarding the interpretation of the agreement, or subsequent practice between the parties in the application of the agreement is to be taken into account in interpreting the agreement.

The official commentary following this text repeats the other elements of Articles 31 and 32 of the Vienna Convention concerning the "context" of a treaty and "supplementary" means of interpretation. Restatement, supra note 16, §325 comments (b), (c) and (e).

38/ Id. §325, comments (e) and (g), reporter's note 4.

39/ Id. §325, reporter's note 5.

40/ Staff of Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. (Comm. Print 1977) [hereinafter cited as SFRC Staff Memorandum].

41/ Id. at 12-13.

42/ The SALT II Treaty: Hearings before the Senate Comm. on Foreign Relations, Part 1, 96th Cong., 1st Sess. 607 (1979).

43/ See, e.g., discussion of understanding on the limitation of increases in launch-weight and throw-weight, cruise missile range and new type ICBM re-entry vehicles, where the SFRC determined that a unilateral statement by U.S. negotiators made to the Soviets in the course of negotiations was not sufficient. Comm. Rep., SALT II Treaty, supra note 24, at 56-59. Also, discussion of reservation on Soviet Backfire statement, where the SFRC, despite assurances by Administration witnesses that the statement represented legally binding commitments on the part of the Soviet Union, insisted upon a formal reservation to clarify the legal effect of the statement. Id. at 64-65.

44/ See text of the proposed Resolution of Ratification, as approved by the Senate Foreign Relations Committee, Nov. 9, 1979, categories II ("the President shall communicate ...") and III ("the President shall obtain

the agreement of the Union of Soviet Socialist Republics ..."). Id. at 72, 77-78.

45/ See Panama Canal Treaties: Hearings before the Senate Comm. on Foreign Relations, Part 1 (Administration Witnesses), 95th Cong., 1st Sess. 31-32, 55-57, 133-34 (1977) [hereinafter cited as Panama Canal Treaties: Hearings].

46/ Joint Statement of Understanding concerning the Neutrality Treaty Issued following a Meeting between President Carter and General Torrijos, Oct. 14, 1977. 13 Weekly Comp. Pres. Doc. 1547 (Oct. 17, 1977), reprinted in Senate Comm. on Foreign Relations, Panama Canal Treaties, S. Exec. Rep. No. 12, 95th Cong., 2d Sess. 291 (1978) [hereinafter cited as Comm. Rep., Panama Canal Treaties].

In response to written questions submitted by the SFRC to the State Department for coordinated Executive Branch response, the Department stated:

> The Statement of Understanding was issued by the White House on October 14 as a confirmation of the common interpretation and understanding between the governments of Panama and the United States of key provisions in the Neutrality Treaty. On October 18, the same statement was made public in Panama by the Panamanian Chief Negotiator. It was publicly confirmed by General Torrijos before the plebiscite on the treaties in Panama took place. It is now a part of the public ratification process in both countries. It is thus an authoritative interpretation of these provisions of the Treaty, and would be binding on future governments of both countries in the same manner that it would be if it were formally appended to the treaty document. We do not believe any useful purpose would be served by attempting to formally append its terms to the treaty.

Panama Canal Treaties: Hearings, supra note 45, at Part 3 (Public Witnesses) 682 (1977).

47/ Resolution of Ratification for the Neutrality Treaty, paras. (a)(1) and (2), (d)(5). Senate Debate, supra note 21, at 410, 413.

48/ Panama Canal Treaties: Hearings, supra note 45, 95th Cong., 2d Sess., at Part V (Markup) 3-4 (1978).

49/ Convention on the Prevention and Punishment of the Crime of Genocide, done Dec. 9, 1948, 78 U.N.T.S. 277. See also S. Exec. O, 81st Cong., 1st Sess. (1949), reprinted in Senate Comm. on Foreign Relations, International Convention on the Prevention and Punishment of the Crime of Genocide, S.Exec. Rep. No. 50, 98th Cong., 2d Sess. 23-34 (1984).

50/ Crime of Genocide: Hearing before the Senate Comm. on Foreign Relations, 99th Cong., 1st Sess. 172 (1985).

51/ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water [Limited Test Ban Treaty], Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433.

52/ Message from the President of the United States Transmitting the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Underwater [Limited Test Ban Treaty], S. Exec. M, 88th Cong., 1st Sess. 2, 5 (1963).

53/ Nuclear Test Ban Treaty: Hearings before the Senate Comm. on Foreign Relations, 88th Cong., 1st Sess. 28, 76-78, 169, 177-78, 201 (1963).

54/ Senate Comm. on Foreign Relations, The Nuclear Test Ban Treaty, S. Exec. Rep. No. 3, 88th Cong., 1st Sess. 5-6, 27-29 (1963).

55/ 109 Cong. Rec. 17,734-45 (1963); Congressional Research Service, Library of Congress, Fundamentals of Nuclear Arms Control: Part IX -- The Congressional Role in Nuclear Arms Control, prepared for the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs, 99th Cong., 2d Sess. 5-6 (Comm. Print 1986), reprinted in 26 I.L.M. 258, 264-65 (1987); Chayes, An Inquiry into the Workings of Arms Control Agreements, 85 Harv. L. Rev. 905, 930-32 (1972).

56/ The SFRC decided not to add certain statements of interpretation to its proposed resolution of ratification for the SALT II Treaty. For example, the Committee rejected an understanding which would have provided that any practice impeding collection of telemetric information would constitute deliberate concealment impeding verification by national technical means. Comm. Rep., SALT II Treaty, supra note 24, at 22. In rejecting the proposed understanding, the Committee Report stated that "[t]he majority of the Committee felt that the provisions of the Second Common Understanding to Article XV ... were sufficient to assure that the requisite telemetric information would continue to be available." Id. at 44.

57/ New York Indians v. United States, 170 U.S. 1, 23 (1898).

58/ 254 U.S. 433, 442 (1921).

59/ The cited provisions from McNair are as follows:

> [W]hen there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusion . . . .
>
> When one party to a treaty discovers that other parties to a treaty are placing upon it an interpretation which in the opinion of the former it cannot bear, and it is not practicable to secure agreement upon the matter, the former party should at once notify its dissent to the other parties and publish a reasoned explanation of the interpretation which it places upon the term in dispute . . . .

McNair, supra note 30, at 424, 429. See generally id. at 424-31. The McNair passages cited are from the section of his treatise under the heading "Effect of Subsequent Practice of the Parties." See also 133 Cong. Rec. S2971 (daily ed. Mar. 11, 1987) (statement of Senator Nunn).

60/ Id. at 429-31.

61/ See, e.g., I. Sinclair, supra note 34, at 135-38.

62/ McNair states:

> It is submitted that, however prudent it may be politically for one contracting party to repudiate promptly an interpretation of a treaty to which it does not assent, such action on its part, though relevant evidence, is not conclusive upon a court which is called upon later to interpret the treaty.

McNair, supra note 30, at 431.

63/ Id. at 411-23.

64/ Id. at 421 n.4; S.C.C.C. v. B.V., 2 Ann. Dig. 336 (German Reichsgericht in Civil Matters 1923).

65/ Secretary of State Hughes to Ambassador Houghton, July 30, 1923, 5 G. Hackworth, Digest of International Law 262 (1943).

66/ McNair states:

> Amongst other safeguards that might be attached to the practice of admitting evidence of preparatory work it is believed that it would be prudent to exclude evidence of unilateral preparatory work. Surely whatever value there may be in preparatory work is that it may afford evidence of the common intention of the parties, as might in some circumstances be said of an earlier draft discussed by both parties or an exchange of letters between them. It is quite another thing to permit one party to produce, for instance, a report made by its own representatives to their own Government during the negotiations as to what they understood a provision in the treaty to mean, or indeed a report made by the representatives of the other party to their own Government, unless such reports were contemporaneously communicated to the other party.

McNair, supra note 30, at 421-22.

67/ See, e.g., Vienna Convention, supra note 31, arts. 11-16, 23, 65 and 67.

68/ See, e.g., exchange between Senator Baker and Ambassador Linowitz concerning statements by Mr. Escobar, chief Panamanian negotiator, at news conference of August 22, 1977, Panama Canal Treaties: Hearings, supra note 45, at Part 1 (Administration Witnesses) 55-57.

69/ See, e.g., 1 L. Oppenheim, International Law 4-5 (H. Lauterpacht 8th ed. 1955) (law of treaties is part of universal international law, which is "binding upon all States without exception . . . .").

70/ See Part II. B of the text, "Analysis of Ratification Record."

71/ 133 Cong. Rec. S2971 (daily ed. Mar. 11, 1987) (statement of Sen. Nunn).

72/ A Memorandum of Conversation on this discussion is among the classified documents provided to the Senate.

73/ Briefing on SALT I Compliance: Hearing before the Senate Comm. on Foreign Relations, 96th Cong., 1st Sess. 13 (1979).

74/ U.S. Const. art. II, §2, cl. 2.; Restatement, supra note 16, §326 (1), comment (a); L. Henkin, Foreign Affairs and the Constitution 167 (1972).

75/ Restatement, supra note 16, §326(1), comments; L. Henkin, supra note 74, at 167. The SCC was established under article XIII of the ABM Treaty. See also Memorandum of Understanding regarding the Establishment of a Standing Consultative Commission, Dec. 21, 1972, United States-U.S.S.R., 24 U.S.T. 238, T.I.A.S. No. 7545.

76/ See, e.g., Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 863-64 (1984), where the Supreme Court discussed the Environmental Protection Agency's varying interpretations of a term in the Clean Air Act:

> The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

With respect to changed interpretations of treaties, see Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184 n.10 (1982) (noting reversal by State Department, "the agency of the United States charged with interpreting and enforcing" treaties, of interpretation of U.S.-Japan Treaty of Friendship, Commerce and Navigation).

See also the different interpretations with respect to the Treaty of Guadalupe Hidalgo by the Polk and Taylor administrations, 5 H. Miller, Treaties and Other International Acts of the United States of America 207-405 passim (1937).

77/ Panama Canal Act, ch. 390, §5, Pub. L. No. 337, 37 Stat. 560, 562 (1912).

78/ Treaty to Facilitate the Construction of a Ship Canal (Hay-Pauncefote Treaty), Nov. 18, 1901, United States-United Kingdom, 32 Stat. 1903, T.S. No. 401.

79/ Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1828); Restatement, supra note 16, §131(4), comment (h), note 5 (citing cases); L. Henkin, supra note 74, at 156-62; 14 M. Whiteman, supra note 16, at 302-03, 309-10, 313-14.

80/ Restatement, supra note 16, §135(1)(a), comment (a), note 1. The superseding law does not relieve the United States of its international obligation or of the consequences of a violation. Id. §135(1)(b), comment (b), note 2. See also L. Henkin, supra note 74, at 163-64; 14 M. Whiteman, supra note 16, at 316-18. Courts have held that the President is bound to carry out the later-enacted statute. See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 720

(1893); The Chinese Exclusion Case, 130 U.S. 581, 600 (1889); Whitney v. Robertson, 124 U.S. 190, 193-95 (1888); The Head Money Cases, 112 U.S. 580, 597-99 (1884); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-21 (1870); Diggs v. Shultz, 470 F.2d 461, 465-67 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973).

81/ See Speech of Senator Root, 51 Cong. Rec. 8944-45 (1914), reprinted in 5 G. Hackworth, supra note 65, at 259-60. See also T. Yu, The Interpretation of Treaties 121-27 (1927).

82/ Restatement, supra note 16, §314, comments (b) and (d).

83/ Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869); Fourteen Diamond Rings v. United States, 183 U.S. 176, 183 (1901) (Brown, J., concurring); Hidalgo County Water Control and Improvement District v. Hedrick, 226 F.2d 1, 8 (5th Cir. 1955), cert. denied, 350 U.S. 983 (1956).

84/ See J. Boyd, 1977 Digest of United States Practice in International Law 375-77 (1979); See also L. Henkin, supra note 74, at 133-36; K. Holloway, Modern Trends in Treaty Law 489-95 (1967).

85/ Comm. Rep., SALT II Treaty, supra note 24, at 28-29.

86/ Id. at 29-32.

87/ Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, as amended by the Protocols done at the Hague, September 28, 1955, and at Guatemala City, March 8, 1971; Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, as amended by the Protocol done at the Hague, September 28, 1955; S. Exec. B, 95th Cong., 1st Sess. (1977). The Senate on March 8, 1983, by a vote of 50-42, 7 not voting, 1 present, declined to give advice and consent to ratification of the protocols. 129 Cong. Rec. S2279 (daily ed. Mar. 8, 1983). The protocols were automatically rereferred to the SFRC under the standing rules of the Senate.

88/ Senate Comm. on Foreign Relations, Montreal Aviation Protocols Nos. 3 and 4, S. Exec. Rep. No. 45, 97th Cong., 1st Sess. 8 (1981).

89/ Restatement, supra note 16, §314(2).

90/ Id. §314 comment (d).

91/ SFRC Staff Memorandum, supra note 40, at 13.

92/ U.S. General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law 2-47 (1982).

93/ Id. See, e.g., National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453, 458 (1974); United States v. Donruss Co., 393 U.S. 297, 303-07 (1969); Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928); 2A Sutherland, Statutory Construction §§ 45.05, 48.01 (N. Singer 4th ed. 1984).

94/ As the Supreme Court noted in Garcia v. United States, 469 U.S. 70, 76 (1984):

> In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Zuber v. Allen, 396 U.S. 168, 186 (1969). We have eschewed reliance on the passing comments of one Member, Weinberger v. Rossi, 456 U.S. 25, 35 (1982), and casual statements from the floor debates. . . . Committee Reports are "more authoritative" than comments from the floor, and we expressed a similar preference in Zuber . . . .

A conference report would appear to be assigned the greatest weight of committee reports. National Association of Greeting Card Publishers v. United States Postal Service, 462 U.S. 810, 832 n.28 (1983) (dictum). See also Monterey Coal Company v. Federal Mine Safety and Health Review Comm'n, 743 F.2d 589, 598 (7th Cir. 1984) ("Such reports are, apart from the language of the statute itself, generally the most reliable indicators of congressional intent.");

American Jewish Congress v. Kreps, 574 F.2d 624, 629 n.36 (D.C. Cir. 1978) ("Since the conclusions in the conference report were commended to the entire Congress, they carry greater weight than other of the legislative history.").

The report of the principal committee or committees ranks just below that of the conference committee in importance. See Blum v. Stenson, 465 U.S. 886, 893-94 (1984) (in interpreting the Civil Rights Attorneys Fees Award Act of 1976, Court places heavy reliance upon Senate Committee report provisions containing phrase "It is intended that."); Miller v. Federal Mine Safety and Health Review Commission, 687 F.2d 194, 195 (7th Cir. 1982) ("In the absence of any contrary legislative history, so clear a statement in the principal committee report is powerful evidence of legislative purpose. . . ."). See also 2A Sutherland, supra note 93, §48.06 (such reports "highly persuasive").

95/ Garcia, 469 U.S. at 76; Blitz v. Donovan, 740 F.2d 1241, 1247 (D.C. Cir. 1984); 2A Sutherland, supra note 93, §48.06 (citing cases); See also Regan v. Wald, 468 U.S. 222, 237 (1984) ("Oral testimony of witnesses and individual Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself."). Cf. S & E Contractors, Inc. v. United States, 406 U.S. 1, 13 n.9 (1972) ("In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws.").

96/ Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 581 n.14 (1984) (recognizing "authoritative nature" of interpretative memorandum prepared by bipartisan captains of Title VII); Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976); Population Institute v. McPherson, 797 F.2d 1062, 1080 (D.C. Cir. 1986) ("critical legislators' statements are typically afforded an appropriate role"); 2A Sutherland, supra note 93, §48.14-.15.

At the same time, the Supreme Court has recognized the dangers of overreliance on the

statements of such legislators. See Consumer Products Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980) (remarks of a bill's sponsor "not controlling"). See also Monterey Coal, 743 F.2d at 596-98 (refusing to consider dispositive the remarks of Congressman who served as the principal sponsor, principal conferee, and chairman of the committee that marked up bill, noting "risk of permitting one member to override the intent of Congress as expressed in the language of the statute").

97/ See United States v. Postal, 589 F.2d 862, 881-82 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1979) (placing great weight on Senate testimony of chief U.S. negotiator to 1958 Law of the Sea Conference in interpreting 1958 Convention). Cf. United States v. Vogel Fertilizer Co., 455 U.S. 16, 31 (1982) ("we necessarily attach 'great weight' to agency representations to Congress when the administrators 'participated in drafting and directly made known their views to Congress in committee hearings.'[citation omitted]"). See also Office of Legal Counsel, Department of Justice, Relevance of Senate Ratification History to Treaty Interpretation 11 (Apr. 9, 1987) (memorandum to the Legal Adviser) (attached at Appendix B).

98/ 54 U.S.L.W. 4929 (1986).

99/ Id. at 4932.

100/ Id. See also Chevron, 467 U.S. at 842, 843 & n.9.

101/ 54 U.S.L.W. at 4932.

102/ Id.

103/ Id. at 4936 (Marshall, J., dissenting).

104/ Id. at 4934.

105/ Id. at 4935-36 (Marshall, J., dissenting).

106/ See United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982), where the Court invalidated Treasury Regulations inconsistent with explanations offered by the Department during the passage of a tax reform act. These explanations had been explicitly incorporated into the report of the House Ways and Means Committee. Id. at 31-32.

107/ 467 U.S. 837 (1984).

108/ Id. at 843 n.9.

109/ Id. at 843.

110/ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65.

111/ See U.S. Arms Control and Disarmament Agency, Arms Control and Disarmament Agreements 10-11 (1982) (discussion of history of interpretation of Protocol).

112/ Message from the President of the United States Transmitting the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases, and of Bacteriological Methods of Warfare, S. Exec. J, 91st Cong., 2d Sess. vi (1970). See also Senate Comm. on Foreign Relations, The Geneva Protocol of 1925, S. Exec. Rep. No. 35, 93d Cong., 2d Sess. 4 (1974).

113/ The Geneva Protocol of 1925, supra note 112, at 4.

114/ Id. at 5. The Senate adopted the Resolution of Advice and Consent by a vote of 90-0. 120 Cong. Rec. 40,068 (1974).

115/ International Convention on Maritime Search and Rescue, Apr. 27, 1979, S. Exec. J, 96th Cong., 2d Sess. (1980).

116/ Senate Comm. on Foreign Relations, International Convention on Maritime Search and Rescue, 1979, with Annex, S. Exec. Rep. No. 40, 96th Cong., 2d Sess. 2 (1980).

117/ Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

118/ Id. art. I.

119/ Senate Comm. on Foreign Relations, Treaty on Outer Space, S. Exec. Rep. No. 8, 90th Cong., 1st Sess. 4 (1967).

120/ Id. at 4-5.

121/ Mutual Defense Treaty, Dec. 2, 1954, United States-Republic of China (Taiwan), 6 U.S.T. 433, T.I.A.S. No. 3178 (terminated by the United States, effective Jan. 1, 1980).

122/ Id. art. V.

123/ Senate Comm. on Foreign Relations, Mutual Defense Treaty with the Republic of China, S. Exec. Rep. No. 2, 84th Cong., 1st Sess. 4 (1955).

124/ Id. at 4-5.

125/ Convention on Matters of Taxation, June 20, 1973, United States - U.S.S.R., 27 U.S.T. 1, T.I.A.S. No. 8225.

126/ Id. art. VIII.

127/ Senate Comm. on Foreign Relations, Tax Convention with U.S.S.R., S. Exec. Rep. No. 19, 94th Cong., 1st Sess. 3-4 (1975).

128/ Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762, 961 U.N.T.S. 187.

129/ Senate Comm. on Foreign Relations, Convention on International Liability for Damage Caused by Space Objects, S. Exec. Rep. No. 38, 92d Cong., 2d Sess. 4 (1972).

130/ Id. at 8-10.

131/ Convention Concerning the Conservation of Migratory Birds and their Environment, Nov. 19, 1976, United States-U.S.S.R., 29 U.S.T. 4647, T.I.A.S. No. 9073.

132/ Senate Comm. on Foreign Relations, Convention with the Union of Soviet Socialist Republics on the Conservation of Migratory Birds and Their Environment, S. Exec. Rep. No. 26, 95th Cong., 2d Sess. 3-4 (1978).

133/ Supplementary Extradition Treaty, supra note 27.

134/ Senate Comm. on Foreign Relations, Supplementary Extradition Treaty with the United Kingdom, S. Exec. Rep. No. 17, 99th Cong., 2d Sess. 9-10 (1986).

135/ Id. at 4-5.

136/ See, e.g., Senate Comm. on Foreign Relations, Prisoner Transfer Treaty with Thailand, S. Exec. Rep. No. 38, 98th Cong., 2d Sess. 2 (1984); Extradition Treaty with Costa Rica, S. Exec. Rep. No. 30, 98th Cong., 2d Sess. 3, 5 (1984); Convention on Mutual Legal Assistance with Morocco, S. Exec. Rep. No. 35, 98th Cong., 2d Sess. 3-4 (1984); Intellectual and Industrial Property Conventions, S. Exec. Rep. No. 13, 91st Cong., 2d Sess. 2 (1970); Statute of the International Atomic Energy Agency, S. Exec. Rep. No. 3, 85th Cong., 1st Sess. 11 (1957).

137/ See Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3435, 3460, T.I.A.S. No. 7503 (unilateral statement on withdrawal from the ABM Treaty). See also 118 Cong. Rec. 26,699-701 (1972).

138/ 118 Cong. Rec. 26,699 (1972).

139/ Id. at 26,700-01.

APPENDIX A

EXECUTIVE BRANCH PREPARATION FOR ABM TREATY RATIFICATION PROCEEDINGS

In his draft dated May 24, 1972, two days before the ABM Treaty was signed, Rhinelander described Article V(1) of the Treaty, without qualification, as applying to "devices" that could substitute for known components:

> Paragraph 1 of Article V prohibits the development, testing or deployment of:
>
> - an ABM system that is sea-based, air-based, space-based, or mobile land-based.
>
> - an ABM interceptor missile, ABM launcher, or ABM radar that is sea-based, air-based, space-based, or mobile land-based.
>
> - a device capable of substituting for an ABM interceptor missile, ABM launcher or ABM radar that is sea-based, air-based, space-based, or mobile land-based (such as an air-based "killer" laser).
>
> The deployment (as well as the testing or development) of ABM components for three environments -- sea, air and space -- as well as mobile ABM components on land, is prohibited. Accordingly, the testing, development or deployment of ABM systems or ABM components other than those which are fixed, land-based is prohibited. 1/

This description departed from the Treaty text, which reads "systems or components." Rhinelander provided no explanation based on the record for his position that "devices" were covered by Article V even though that word was specifically deleted at Soviet insistence from what became Article V(1) of the U.S. draft. (His earlier drafts, discussed in Part I of this study, raised doubts about this conclusion, and suggested that the U.S. position needed to be made clear to the Soviets.)

Rhinelander also concluded that "ABM system" in Article II(1) extends to all "future systems" based on other physical principles and capable of substituting for current components.

This, despite the U.S. assurance during the negotiations that Article II(1) would be drafted to avoid prejudicing the position of either party on future systems, which would be settled elsewhere. He thus incorporated in his analysis of Article II(1) language the Soviets specifically rejected elsewhere and agreed to use only in Agreed Statement D:

> An ABM system is described in paragraph 1 of Article II in terms of "current" ABM components. This does not, however, limit the generality of the term ABM systems as used in the Treaty to systems composed of "current" ABM components, but would also include "future systems" based on physical principles other than those used for "current" ABM components and capable of substituting for a "current" ABM component. See discussion of future ABM systems under Article III. 2/

In his description of Article III, Rhinelander stated that it limits deployment of ABM systems only to systems with current components, and that systems with substitute components can be deployed only after consultation and agreement on limitations under Agreed Statement D. 3/

While Rhinelander was preparing his legal analysis, the ACDA General Counsel's office prepared a package of materials to transmit the ABM Treaty and the Interim Agreement to the Senate. Rhinelander commented on May 11, 1972, on the first draft of the transmittal papers, recommending annexes to the Secretary of State's report that would constitute "article-by-article" analyses of each agreement. He wrote:

> They would be considerably more detailed, closely reasoned (a "legal" analysis) than the text of the Secretary's Report itself. A model for this approval [sic] is the transmittal papers for the Vienna Law of Treaties Convention. 4/

Rhinelander thereafter apparently played a role in preparing the transmittal package. 5/ In any event, a draft package which has been located draws heavily in its language from Rhinelander's memorandum.

In his cover memorandum dated May 12, 1972, transmitting the draft package to Spurgeon Keeny, ACDA Assistant Director for Science and Technology, ACDA Assistant General Counsel James L. Malone included what he called the "second revised drafts of a model President's Transmittal Letter and Secretary's Letter of Submittal for the ABM Treaty and the

Interim Agreement." With respect to the language used he stated: "The U.S. version of all articles has been used." The memorandum states in several, separate places that the treaty covers "devices capable of substituting" for ABM systems and ABM components.

In describing the "broadest outline" of the Treaty, the draft Secretary's Letter of Submittal states that it

> (c) permits the development and testing at test ranges of ABM systems and ABM components which are fixed and land-based or devices capable of substituting for such ABM systems and ABM components (Articles IV and V); (d) prohibits the development, testing or deployment of ABM systems and ABM components or devices capable of substituting for them which are sea-based, air-based, space-based, or mobile land-based. . . (Article V); . . . (g) provides against the transfer to other countries, and the deployment outside the national territory of the Parties, of ABM systems or ABM components or devices capable of substituting for them (Article IX). . . ." [emphasis added]. 6/

The same draft Letter of Submittal dealt with the deployability of "other devices" as follows:

> In conjunction with the provisions in Article III and Article IV, and the Treaty as a whole, the deployment of ABM systems or ABM components based on devices capable of substituting for ABM interceptor missiles, ABM launchers or ABM radars would be prohibited unless and until the Treaty is amended. [emphasis added] 7/

This explanation is consistent with the view that Agreed Statement D is superfluous with respect to the nondeployability of substitute "devices."

In describing Article II(1), the draft states unequivocally that it is intended to cover both "current" systems and components as well as "future systems" based on other physical principles:

> An ABM system is described in paragraph 1 of Article II in terms of "current" ABM components. This does not, however, limit the meaning of the term ABM systems, as used in the Treaty, to systems composed of "current" ABM components, but

> would also include "future systems" based on physical principles other than those used in "current" ABM components. 8/

The draft states, with respect to Article III:

> Article III is intended to limit the deployment of ABM systems to those based on "current" ABM components. The deployment, of ABM systems or ABM components other than ABM interceptor missiles, ABM launchers or ABM radars capable of substituting for these components would be permitted only after consultation under Article XIII and after this Treaty has been amended in accordance with Article XIV. 9/

The discussion of Article V(1) was similarly explicit on the issue of substitute "devices":

> Article V, paragraph 1, prohibits the development, testing or deployment of an ABM system or ABM component that is sea-based, air-based, space-based, or mobile land-based, or a device capable of substituting for an ABM interceptor missile, ABM launcher or ABM radar in an ABM system that is sea-based, air-based, space-based or mobile land-based. This provision, when read with Articles III and IV, makes clear that only fixed, land-based ABM interceptor missiles, ABM launchers and ABM radars may be deployed at operational sites, or located at test ranges. The deployment, as well as the testing or development, of "current" or "future" ABM components for three environments -- sea, air and space -- as well as mobile ABM components on land, is prohibited. Mobile land-based in this context means any ABM system or ABM component that is not a permanent, fixed type . . . . [emphasis added] 10/

The concept of other "devices" was also read into Article IX.

On May 31, 1972, ACDA circulated a drastically revised draft Letter of Submittal for the SALT agreements. The revised draft much more closely tracked the Treaty's language, and eliminates all references to "other devices." Describing the Treaty generally at the outset, the draft states that "[b]oth development and deployment of ABM systems or ABM components that are sea-based, air-based, space-based or mobile land-based are prohibited" and that "[d]eployment of ABM systems involving new types of basic components (such as lasers) is

prohibited. . . ." 11/ Focussing on Article II, the draft incorporates a cross reference to a subsequent section on "future ABM systems":

> Article II defines an ABM system as "a system to counter strategic ballistic missiles or their elements in flight trajectory." It indicates that such systems currently consist of ABM interceptor missiles, ABM launchers and ABM radars. (But see "Future ABM Systems" in subsection (3), below). 12/

In its discussion of Article III, the draft notes that "[i]n view of Article V(1) . . . only fixed, land-based ABM components may be deployed." 13/ The draft describes Article V(1) as follows:

> Article V limits ABM development and testing, as well as deployment, of certain types of ABM components. Paragraph V(1) limits such activities to fixed, land-based ABM systems and components, by prohibiting the development, testing or deployment [of] ABM systems or components which are sea-based, air-based, space-based, or mobile land-based. It is understood that the prohibitions on the deployment of mobile ABM systems would rule out the deployment of ABM launchers and ABM radars which were not permanent fixed types. 14/

The draft also includes a separate section on "Future ABM Systems":

> A potential problem dealt with by the treaty is that which would be created if an ABM system were developed in the future which did not consist of interceptor missiles, launchers and radars. (For example, a system utilizing lasers might conceivably be developed.) The Treaty would not permit the deployment of such a system or of components thereof capable of substituting for interceptor missiles, launchers or radars: Article II defines an ABM system in terms of its function as "a system to counter strategic ballistic missiles or their elements in flight trajectory", noting that such systems "currently" consist of ABM interceptor missiles, ABM launchers and ABM radars. Article III contains a prohibition on the deployment of ABM systems or their

components except as specified therein, and it permits deployment only of ABM interceptor missiles, launchers and radars. . . . 15/

The section on future systems also quotes Agreed Statement D, with a lead-in phrase stating: "Finally, in the course of the negotiations, the parties noted that. . . ." 16/ The enclosure set out the Agreed Statement with the heading: "Future Systems (relates to Articles I, II, III, IV, V, XIII and XIV)." 17/

On June 5, ACDA circulated "Draft No. 2" of the Letter of Submittal, reflecting various changes. 18/ The general overview of the Treaty at the beginning of the letter adds a reference to "testing" in its description of the Article V prohibitions. The last sentence of the discussion of Article V(1) is revised to read: "It is understood that the prohibitions on mobile ABM systems apply to ABM launchers and ABM radars which are not permanent fixed types." 19/ In the section on "Future ABM Systems," the parenthetical reference to lasers is revised to read: "(For example, a system utilizing lasers in substitution for a current ABM component.)" 20/ The section also adds the following sentence: "Devices other than ABM interceptor missiles, ABM launchers, or ABM radars could be used as adjuncts to an ABM system, for example an optical telescope, provided that such devices were not capable of substitution for one or more of these components." 21/ In the phrase leading into the quotation of Agreed Statement D, the word "noted" is changed to "specified": "the Parties specified. . . ." 22/ In this draft, moreover, the enclosure sets forth the Agreed Statements without headings.

Another "final draft" of the Letter of Submittal was circulated by ACDA on June 7. 23/ This draft incorporates several additional changes in the pertinent sections. In the overview section, the reference to new types of basic components is revised, so that the sentence reads: "Deployment of ABM systems involving new types of basic components to perform the current functions of ABM launchers, interceptors, or radars is prohibited. . . ." 24/ The description of Article II is changed to delete the cross reference to the section on "Future ABM Systems." In the description of Article V, a reference to ABM "systems" is added, so that the first sentence reads: "Article V limits development and testing, as well as deployment, of certain types of ABM systems and components." 25/ Finally, the section on "Future ABM Systems" deletes the parenthetical reference to lasers, the reference to optical telescopes, and the underscoring of the word "currently". 26/ Overall, the drafts represent, irrespective of intent, a steady, dramatic and conscious shift

from a clear exposition of the restrictive interpretation to one that avoids stating this interpretation and does not even raise the issue.

Other Executive documents have been found that bear upon the views held by agencies on the Treaty's coverage of substitute devices. Some degree of inconsistency exists in the papers thus far located. A paper dated May 6, 1972, in a notebook described by DOD as a "Workbook for the OSD/SALT Task Force," summarily described the issue as follows: "Future systems may be developed but not deployed." A June 2, 1972, memorandum from Admiral Moorer to Secretary Laird is quoted at pp. 23-24 of the text of this study. Three briefing books prepared for Dr. Foster's testimony before the Senate Armed Services Committee listed "What USSR Did Not Give up in SALT." The list included the following item: "Freedom to develop 'future' ABM Systems." On the other hand, one of the briefing books also contained a memorandum from Col. Fitzgerald to Ambassador Nitze, dated June 9, 1972, concluding on the basis of an anaylsis of the Russian language version that, if certain assumptions are made about the word "development" in Article V(1) "then all RDT&E for sea-based, air-based, space-based, and land-based mobile systems . . . is prohibited."

On May 25, 1972, a "Backgrounder for Press After Signature of SALT Agreements" was circulated by Graybeal to all Delegates. It had several interesting provisions, but failed to espouse any definitive view, and referred only to a prohibition on deployment of future systems. In contrast to Rhinelander's memorandum, the backgrounder contained the following discussion of Article II:

> Paragraph 1 describes the three major components of a "current" ABM system: missiles, launchers, and radars.
>
> You will note that paragraph 1 refers to ABM systems as "currently" consisting of three basic components. As I will note later in discussing Article III, the deployment of "future ABM systems" is not permitted. This, in my judgment, represents a noteworthy step in long-run arms limitation.
>
> The second paragraph lists states or conditions of ABM components covered by limitations. As an example, an ABM radar which is "under construction" would be subject to constraints. 27/

Article III is characterized as

> the heart of the Treaty . . . ABM systems deployed in either of these two [allowed] areas will be limited to those using missiles, launchers, and radars. The deployment of other devices capable of substituting for these ABM components would not be allowed unless the Treaty were amended. 28/

The description of Article V contained no reference to substitute devices:

> ABM systems or ABM components for three environments -- sea, air, and space -- as well as land-mobiles, are banned by paragraph 1. The prohibition includes development and testing, as well as deployment. 29/

A set of guidance, stressing strategic issues, has been located, but bears only the handwritten date "June 72." The document appears to have been prepared for the JCS, however, as it also bears the following handwritten inscription: "ACSAN [Assistant to the Chairman of JCS for Strategic Arms Negotiations -- General Royal Allison] draft for JCS staff thru svcs." The entire document contains only one Q & A of relevance, and it is consistent with either interpretation:

> Q: Are we permitted to continue our R&D efforts to maintain hedges?
>
> A: -- Modernization/replacement is not constrained except where specifically prohibited by the agreement, e.g.
>
> -- R&D on mobile ABM systems.
>
> -- R&D on rapid reloading ABM launchers. 30/

On June 5, 1972, William Baroody provided Defense Secretary Laird with a paper entitled "Summary of the Strategic Arms Limitation Agreement" which included the following:

> The following are prohibited: . . .
>
> -- development of sea, air, space or mobile land-based ABMs.
>
> -- deployment of ABM systems involving future technology (e.g. lasers).

No further guidance has thus far been found on the issue of substitute devices prior to June 6, 1972, when the first hearing on the ABM Treaty was held before the Senate Armed Services Committee. Secretary Laird testified on that day, as described below, and his oral answers were consistent with the broad interpretation. The written answer, however, submitted on his behalf and dated June 13, 1972, can be read to support the restrictive view. Possibly, the questions he was asked led in part to the preparation of interagency guidance. In any event, guidance was prepared, and a second draft was circulated on June 13, 1972 by Philip A. Odeen, Director, Program Analysis at the NSC. The document, entitled "SALT Q's and A's," was to be used "as guidance for Agency spokesmen." One question is of special relevance:

> Question: Are laser ABMs banned?
>
> Answer: Yes, replacing current ABM components by such systems is banned. R&D on fixed land based components can take place. 31/ *

On June 14, Rhinelander provided a memorandum to the ACDA Director which included the following with respect to what was to become Agreed Statement D:

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* This guidance was repeated in a draft dated June 16, 1972, in which an additional, relevant Q & A was included, perhaps by ACDA, but not necessarily cleared by the NSC staff:

> Q. Since the ABM Treaty clearly bans deployment of ABM systems using new techniques (such as lasers) what is the purpose of the so-called "interpretive statement" on this subject? What does that statement add? What precisely does it mean?
>
> A. While deployment of such systems is implicitly prohibited by Articles II and III, these systems are not explicitly addressed in the body of the Treaty. Therefore, an interpretative statement was provided to make it absolutely clear that tge deployment of such new ABM systems is prohibited. This statement provides that, as is the case for any limitation or prohibition in the Treaty, discussion in the Standing Consultative Commission and amendment of the Treaty are possible. 32/

This answer incorporated the theory adopted by Rhinelander that Agreed Statement D is legally superfluous.

> At SALT V, the US Delegation proposed that the deployment of "future systems" be prohibited in paragraph 1 of present Article V of the ABM Treaty. At SALT VI, the Soviets agreed to deployment constraints on future systems in the form of the agreed statement [E], based on a US paper containing "Five Points." At SALT VII, the US insisted, and the Soviets finally agreed, that the language in Article III make clear that only ABM systems based on current ABM interceptor missiles, ABM launchers and ABM radars could be deployed within the two permitted deployment areas.
>
> Accordingly, agreed statement [E] on future systems elaborates on the text of Article III. The agreed statement also relates to Article II, which describes ABM systems in terms of present components, Article IV which restricts development and testing to test ranges, and Article V which prohibits the development, testing and deployment of ABM components for three environments as well as land mobiles.33/

Thus, by June 16, the internal Executive Branch record contained guidance stating that "R&D" was permitted on fixed, land-based lasers; these statements can be read to imply, though they do not expressly state, that development of mobile OPP devices was prohibited.*

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* The supporting rationale for backup questions and answers prepared for Admiral Moorer, dated July 21, 1972, stated, among other things:

> -- Only a few items in the treaty are banned from development.
>
> -- They are: sea, air, space, or mobile land based ABM systems, and multiple or rapid reload ABM launchers.
>
> -- R&D or development of all other approaches is not prohibited.
>
> -- Laser R&D is allowed.

(These prepared answers were not used during congressional testimony.)

On June 21, 1972, Lt. Gen. Royal Allison, Assistant to the Chairman of the JCS for Strategic Arms Negotiations, provided a memorandum to Admiral Moorer, JCS Chairman, entitled "Future ABM Systems," which contained the following:

> As regards future ABM systems:
>
> a. Constraints in the Treaty apply to deployments only. Research and development are not constrained.
>
> b. The U.S. Delegation, under instructions, sought a clear-cut ban on deployment of future ABM systems but the Soviets would not agree. Hence the finally agreed and initialled interpretative statement: [quoting Agreed Statement D].
>
> c. Article III spells out the ABM defenses which can be deployed -- one site for NCA and one site for ICBM defense -- utilizing components described in Article III (ABM interceptor missiles, ABM launchers and ABM radars). . . .
>
> The upshot is that to be accurate we must avoid the connotation of an absolute "ban" in discussing future ABM systems. We should say that there is an obligation not to deploy such systems without taking certain specified and agreed steps; i.e., in the event such systems are created in the future, specific limitations on them would be subject to discussion and agreement.

FOOTNOTES

1/ Memorandum from J. Rhinelander to the Delegates (May 24, 1972) at 20.

2/ Id. at 8.

3/ Id. at 16.

4/ Memorandum from J. Rhinelander to Mr. Malone and Mr. Graham (May 11, 1972) at 2.

5/ ABM Treaty Interpretation Dispute: Hearing Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs, 99th Cong., 1st Sess. 92 (1985).

6/ Memorandum from J. Malone to Mr. Keeny (May 12, 1972), Revised Draft Letter of Submittal at 3-4.

7/ Id. at 7.

8/ Id. at 9.

9/ Id. at 14.

10/ Id. at 20-21.

11/ Memorandum from S. Keeny to the Verification Panel Working Group (May 31, 1972), Draft Letter of Submittal at 3-4.

12/ Id. at 8.

13/ Id. at 11.

14/ Id. at 15.

15/ Id. at 16-17.

16/ Id. at 17.

17/ Id. Enclosure C, Agreed Statement No. 5.

18/ Memorandum from S. Keeny to the Verification Panel Working Group (June 5, 1972), Draft Letter of Submittal.

19/ Id. at 15.

20/ Id. at 16.

21/ Id. at 17.

22/ Id.

23/ Memorandum from S. Keeny to the Verification Panel Working Group (June 7, 1972), Letter of Submittal.

24/ Id. at 4.

25/ Id. at 15.

26/ Id. at 16-17.

27/ Memorandum from S. Graybeal to the Delegates, Backgrounder for Press After Signature of SALT Agreements (May 25, 1972) at 2-3.

28/ Id. at 3-4.

29/ Id. at 5.

30/ Q/A Guidance (June 1972), Tab B at 3.

31/ Memorandum from P. Odeen, SALT Q's and A's (June 13, 1972) at 16.

32/ Draft SALT Questions and Answers (June 16, 1972) at 23.

33/ Memorandum from J. Rhinelander to the Director, ACDA (June 14, 1972) at 7-8.