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Mr. Chairman and Members of the Subcommittee:

I am honored to appear before you to testify on the US NMD program and the ABM Treaty. I will be frank to admit I never thought in April 1971, when I accepted Ambassador Gerard Smith's invitation to join the US SALT delegation to begin to prepare drafts of the ABM Treaty and the companion Interim Offensive Agreement, that I would continue to write and testify about the ABM Treaty twenty-eight years later. A generation has passed. My youngest, who was two years old in the summer of 1971 when my family joined me in Helsinki for the fifth negotiating session, now has a two-year old of his own.

A. Background

For background purposes, let me note I was a clerk to Justice John Marshall Harlan after Virginia Law School, have practiced in New York City and Washington, and have served in six departments and agencies of the Executive, including legal adviser to the SALT I delegation. I am now a Senior Counsel of my law firm, Shaw Pittman Potts & Trowbridge, have been active in several not-for-profit organizations focused on arms control, and taught arms control in the nuclear age for a dozen years at the Universities of Virginia and Georgetown.

I have written extensively on the ABM Treaty including chapters in two books – Willrich and Rhinelanders (eds.), **SALT — The Moscow Agreements and Beyond (1974)** (hereafter "**1974 SALT Book**") and Chayes and Doty (eds.), **Defending Deterrence (1989)**. The latter is much more detailed and sophisticated than the former, written after fifteen years experience with the Treaty. My views are also reflected in prior Congressional testimony, and in numerous articles and comments, most recently in the November/December 1998 and forthcoming March 1999 issues of *Arms Control Today*.

The most comprehensive and authoritative article-by-article analysis of the ABM Treaty contemporaneous to its negotiation and entry into force probably remains the lengthy memorandum I completed on May 24, 1972 that was classified TOP SECRET ("JBR 1972 Memorandum"). I understand that it is in the process of being de-classified, but I have not read a complete copy since I left the SALT world in June 1972. Declassified excerpts are printed in an article I co-authored, "Mission Accomplished", in the September 1987 issues of *Arms Control Today*, page 13.

The next best source for a contemporaneous view of the ABM Treaty is the chapter I wrote in 1973 for the **1974 SALT Book**. I did not at the time have access to the classified record, but my

memory was then quite fresh on details. I have attached the relevant pages from that chapter to this statement.

B. The Present Strategic Setting

Let me make three observations before turning to the legal issues.

First, the technological challenge of missile defense is daunting and has not been mastered in fifty years of efforts. Before any deployment decision, I hope the US will pursue a rigorous testing program under realistic conditions. This has generally not been US practice, including my experiences at White Sands in the 1950s while on active duty, and has led to false hopes and enormous wastes.

Second, the rogue states including North Korea are a fifth level threat to US security interests and are unlikely to mate an ICBM with a nuclear warhead; a terrorist delivery is more likely. The first level of threat is Russian strategic offensive missiles, the second Russian tactical offensive missiles, the third the enormous Russian inventory of highly enriched uranium and weapon-grade plutonium, and the fourth Chinese modernization programs.

Third, before any deployment decisions are made, there should be a comprehensive review of the offensive — defensive trade-offs focused on the US, its NATO allies, Japan, Taiwan, Russia and China. This by necessity will be more complex than those conducted by the Nixon Administration in 1969 which focused on the USSR before SALT I.

C. The ABM Treaty in General

The ABM Treaty is a short document. In the broadest terms and as amended in 1974, it:

(1) prohibits deployment of a nationwide defense, or base for one, or even regional BMD (Article I(2));

(2) permits the deployment of fixed, land-based ABM components (ABM radars, ABM launchers and ABM interceptor missiles) within a circle with a radius of 150 kilometers at one deployment area each in the US and USSR, including no more than 100 ABM launchers per deployment area and with particular limitations on ABM radars (Article III);

(3) permits the testing of fixed, land-based ABM components at agreed AMB test ranges, whether the technology is of the 1972 type or based on "future systems", such as lasers, that substitute for 1972-type technology (Article IV);

(4) prohibits the advanced development, the testing and the deployment of ABM components (whether 1972-type technology or "future systems") that are sea-based, air-based, space-based or mobile land-based (Article V(1));

(5) prohibits giving non-AMB systems, such as surface-to-air (SAM) systems or theatre missile defense (TMD) systems, "ABM capability" or "testing them in an ABM mode" (Article VI(a)); and

(6) limits deployment of future early warning radars to the periphery of national territory and oriented outwards (Article VI(b)).

The original ABM Treaty, as ratified in 1972, permitted two ABM deployment areas in each county — one in defense of the national capital area and the other in an ICBM field. The USSR chose only the former around Moscow and the US only the later at Grand Forks, ND. In 1974, Article III of the Treaty was amended to limit each side to one deployment area each.

Verification of the Treaty is by national technical means (Article XII). The ABM Treaty created the Standing Consultative Commission (SCC) (Article VIII). Its term is for an unlimited duration, but permits withdrawal in exercise of national sovereignty, based on extraordinary events, upon six months' prior notice (Article XV).

After the dissolution of the USSR at the end of 1991, Russia announced in January 1992 that it was the successor to the USSR in all international treaties, explicitly including the ABM Treaty. The Bush Administration agreed. George Bunn, the first General Counsel of ACDA, and I have examined the successor state issues and arms control at length in a law review article published in *33 Virginia Journal of International Law* (Winter 1993), pages 325-350. Russia as the successor to the USSR in the ABM Treaty, the UN Charter, or any other international agreement, is not dependent on prior approval by the Duma or Senate.

In the 1979 book, **Defending Deterrence**, I explored numerous legal issues including the interpretation of treaties (pages 63-64). There is no bright line between an interpretation and an amendment, but in the most general terms an interpretation clarifies the text and an amendment changes it. Under the U.S. Constitution the Senate must give the latter its advice and consent to ratification.

D. The US NMD Program

The basic problem I and others have in analyzing the US NMD program and the ABM Treaty is that the US has not yet fixed its architecture. For purposes of this statement I am assuming the architecture summarized in BMDO Fact Sheet JN-99-06 and related charts and texts. I have not had the opportunity to discuss the NMD program with present or former government officials or other experts. Accordingly, I view this statement as an initial, once-over-lightly first effort.

The NMD program will have five major components or elements: (1) Ground-Based Interceptors (GBI); (2) X-Band Radars (XBR); (3) Upgraded Early Warning Radars (UEWR); (4) Battle Management/Command, Control and Communications (BM/C3); and (5) the Space-Based Infrared System (SBIRS). There is another element, the In-Flight Interceptor Communications System (IFICS), but I have insufficient data to comment on it.

E. The NMD Program as a Whole

If the NMD program is designed to provide nationwide coverage of the US, as it is frequently described, then its deployment would be inconsistent with Article I(2) of the Treaty, which would have to be amended.

In the **1974 SALT Book** I wrote that Article I prohibits the deployment of even a "thin" nationwide defense "even in the unlikely event that technological advances made feasible thin coverage" from the two authorized deployment sites (Attachment, page 127). While Sid Graybeal, a colleague from SALT I and our first SCC Commissioner, told me that he disagreed with this conclusion, I believe it is correct. Nevertheless, I urge the Subcommittee to seek a copy of the still-classified "JBR 1972 Memorandum" to determine whether it sheds any light on this Article I issue.

In any event, even if Article I is viewed as preambular rather than substantive, many of the technical features of the NMD program that would give it nationwide scope are inconsistent with Articles III, V, VI and IX, as discussed below.

F. The Five Major Components/Elements and the ABM Treaty

1. Ground-Based Interceptors (GBI)

If the GBI launchers are deployed only at the present Grand Forks, ND site and are limited to 100 or less, this would be consistent with present Article III. Because the GBI interceptor kill vehicle (EKV) on the missile includes its own sensors, guidance and computing functions to complete the intercept (and thereby substitute for the function of the land-based engagement radar at the last stage before intercept), this would be inconsistent with the space-based ban on ABM radars, or substitutes for them, in Article V(1). Testing as well as the deployment of the EKV would be prohibited unless Article V(1) is amended.

If 20 initial GBI launchers were to be deployed in Alaska (as one chart indicates), this would be inconsistent with Article III, which would have to be amended. (Note an Alaskan site would also not be consistent with either type of deployment area authorized by the present Treaty.)

2. X Band Radars (XBR)

If the XBRs, which are land-based engagement radars, are forward deployed (that is, outside the 150-kilometer radius of the ABM deployment area), this would be inconsistent with Article III, which would have to be amended. Based on one chart all would be forward based, and none of the XBRs would be in an ABM deployment area. Therefore, Article III would have to be amended.

3. Upgraded Early Warning Radars (UEWR)

If the present early warning radars at Beale, Clear, Cape Cod, Fylingdales and Thule are upgraded to better perform the early warning function, this would be consistent with Article VI(b). If a new UEWR were built in Korea, this would be inconsistent with Article VI(b) which requires future early warning radars to be deployed along the periphery of national territory. Therefore, Article VI(b) would have to be amended.

4. Battle Management/Command, Control and communications (BM/C3)

BC/C3 components are not limited by the ABM Treaty.

5. Space-Based Infrared System (SBIRS)

No information is provided on SRIRS (High). Assuming the High is in geo-synchronous orbit to detect missiles in boost phase, this would be consistent with the Treaty.

The SBIRS (Low) which will acquire and track ballistic missiles throughout their trajectory by providing "over-the-horizon" precision tracking data would be space-based substitutes for an ABM radar and inconsistent with Article V(1). (Note that this would be an important technical feature to provide nationwide coverage even if the ABM launchers were located at a single, authorized ABM deployment site since it "would permit interceptors to be launched before the threats come within range of the XBRs". This would require amendment of Article V(1).

G. Three Deployment Phases

One chart suggests three possible deployment phases, but without dates:

C1 = Capable against a few simple warheads

C2 = capable against a few sophisticated warheads

C3 = capable against a larger number of sophisticated warheads

C1 Phase – One chart indicates that one XBR will be deployed at Shemya, Alaska, and that 20 GBIs will be deployed in Central Alaska. This would be inconsistent with the present design of Article III which requires that both the AMB launchers and ABM radars be deployed within a ABM deployment area of 150-kilometer radius. Article III would have to be amended in any event to accommodate an Alaskan deployment area.

C2 Phase – The same chart indicates that there will be three XBRs at the location of three present early warning radars (Clear, Thule and Fylindale). The deployment of XBRs at these three sites would be inconsistent with Article III (outside the ABM deployment area, and in two cases outside US national territory). Article III and Article IX would have to be amended.

C3 Phase – The same chart indicates that an upgraded early warning radar would be deployed in South Korea. As indicated earlier, this future UEW outside national territory would be inconsistent with Article VI(b). Five XBRs would be deployed in this phase. The one at Grand Forks would be consistent with Article III. The other four (Beale, Cape Code, Hawaii and South Korea) would be inconsistent with Article III, with the South Korea site also inconsistent with Article IX (not to deploy ABM components outside U.S. national territory).

H. Conclusion

The ABM Treaty was negotiated in 1972 based on then-current ABM technology that was fixed land-based. From a US perspective, the Treaty provided a broad buffer and lengthy warning time in the event of Soviet breakout of strategic significance. The Soviets, after all, had deployed the first ABM deployment system and had extensive SAM sites that raised significant concern in DOD about covert "upgrading".

The strategic situation has obviously changed and technology has significantly evolved. The USSR has dissolved and Russia is an economic basket case. Even though not parties to the ABM Treaty, our NATO allies and China in particular, have a real and continuing interest in the ABM Treaty. Of course, the Russian and US interests are paramount.

While some aspects of the proposed NMD program would be consistent with the ABM Treaty, the main substantive Articles (III, V and VI) would all have to be amended, in addition to Article I, and the definitional Article II would almost certainly have to be rewritten. This would be a daunting challenge for negotiators, given the abysmal and worsening state of affairs between the United States and Russia. The US should know with much greater precision what it wants to do before starting such an effort.