ing" assistant attorney general in charge of the Justice Department's Civil Rights Division in the face of the Senate Judiciary Committee's blocking his nomination.

Clinton's refusal to comply with the Vacancies Act is no mere technicality. It is a direct challenge to the Senate's constitutionally assigned role in the appointment process. The Constitution's Appointments Clause empowers the President to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint . . . Officers of the United States." If key Executive Branch officials could serve on an acting basis indefinitely, they would never need to seek Senate confirmation. As Sen. Robert Byrd (D., W.Va.) has said, "It is time for this institution to state in no uncertain terms that no agency—none, not even the Justice Department—will be permitted to circumvent the Vacancies Act or any other act designed to safeguard our constitutional duties."

3. *Usurping the Senate's Treaty Power.* Another of the Senate's constitutional duties is the ratification of treaties. Article II of the Constitution expressly provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." Thus, the treaty-making power is explicitly a shared power.

Here again, President Clinton has failed to respect the constitutional prerogatives of another branch of government. Consider the Anti-Ballistic Missile (ABM) Treaty with the Soviet Union, which has been legally void since the USSR fell apart in 1991 (see "Live Missiles and Dead Letters," below).

Since this agreement was important enough to require Senate approval in 1972, it would seem that its reimposition would also require Senate approval. In case there were any doubt, the Senate in May of 1997 required that the President submit for its advice and consent any new agreement either changing the geographical scope of or increasing the number of parties to the ABM Treaty.

Nevertheless, President Clinton is unilaterally implementing the ABM's provisions vis-à-vis four states of the former Soviet Union. What is more, he has given a bureaucrat, Stanley Riveles, a position that under the obsolete treaty required Senate confirmation, and charged him with making the new agreements binding. Information exchanges required by this unratified treaty have occurred; a review mandated by the original ABM Treaty, which the Administration claims is still in force, has been postponed; and Riveles has signed international agreements without Senate confirmation.

Clinton's approach to the ABM Treaty raises justifiable fears that he will also unilaterally implement the Kyoto global warming pact, despite a 95 to 0 non-binding Senate vote against it in its current form.

Live Missiles and Dead Letters

WITH missile threats proliferating, the issue of national missile defense, which has divided Republicans from Democrats for 15 years, is heating up. India and Pakistan have tested nuclear weapons; Iran, Iraq, China, and North Korea have nuclear and missile programs; and Russia's control over its own nuclear arsenal is deteriorating. Consequently, congressional support is growing for prompt deployment of defenses against ballistic missiles.

The Clinton Administration is blocking any such move, insisting that the Anti-Ballistic Missile (ABM) Treaty of 1972 forbids it. But the United States made that treaty with the Soviet Union, which became extinct in 1991—and the President is having a hard time explaining how the treaty survived that demise. In fact, for political reasons the Administration prefers to cast its opposition to missile defense as a treaty obligation rather than as a policy choice.

Last year, the Administration signed accords with Russia, Ukraine, Belarus, and Kazakhstan to bind these former Soviet republics to a treaty arrangement along the lines of the ABM Treaty. President Clinton promised to ask for the Senate's advice and consent on these so-called multilateralization accords. If he does so, the Senate will have to face the question: Are these accords a minor amendment adding new parties to an existing treaty, as Mr. Clinton would have it? Or are they a new treaty, prohibiting defenses that are now legal? Are they, in other words, the ABM Treaty of 1998?

The Administration has no interest in dispelling the fog surrounding this issue. The State Department's annual publication *Treaties in Force* continues to list the ABM Treaty as a two-party accord and to designate the other party as the "Union of Soviet Socialist Republics."

Rep. Benjamin Gilman (R., N.Y.), chairman of the House International Affairs Committee, has worked admirably to clarify the picture. Last year, he wrote President Clinton to ask who the other party to the treaty now is. In his reply to Rep. Gilman, on November 21, 1997, President Clinton wrote that succession arrangements are currently "unsettled." The Constitution, he implied, precludes the recognition of either Russia alone or all the newly independent states (NIS) together as a substitute for the Soviet Union: "Neither a simple recognition of Russia as the sole ABM successor (which would have ignored several former Soviet states with significant ABM interests) nor a simple recognition of all NIS states as full ABM successors would have preserved fully the original purpose and substance of the Treaty, as approved by the Senate in 1972." The President said that if the Senate were to reject the multilateralization accords, "succession arrangements will simply remain unsettled," but the "ABM Treaty itself would clearly remain in force." Clearly?

GILMAN pressed President Clinton in a follow-up letter. If the Administration cannot now in 1998 identify any country in addition to

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4. *Manipulating the Census.* The Constitution requires that an "actual enumeration" of the nation's population be undertaken every ten years so that seats in the House of Representatives may be apportioned. Indeed, for the last two hundred years, Census Bureau agents have fanned out to count every person in America they could find. However, as John J. Miller reported ["Numbers Crunch," *NR*, July 20] statisticians and the Clinton Administration don't much like the idea of an "actual enumeration." They claim that they can provide a more accurate count—especially of minorities—by estimating the total population on the basis of a random sample. As Clinton has explained, this is roughly the same process that is used in taking polls, although with a bigger sample.

Statisticians and the Clinton Administration don't much like the idea of an 'actual enumeration.'

Leave aside the political risk to Republicans from the potential manipulation of census figures. The use of sampling clearly conflicts with the constitutional requirement of an "actual enumeration." Why else would the word "actual" be used except to safeguard against precisely this sort of political skewing of the census? It cannot be a safeguard, however, against an Administration that refuses to view the Constitution as a legal constraint.

5. *Undercutting Executive Branch Accountability.* President Clinton has not limited his constitutional transgressions to the arrogation of power from other branches. Many scholars believe that this President has deeply wounded the institution of the Presidency itself.

He has repeatedly invoked novel and frivolous constitutional privileges, sure to be knocked down in court, as a delaying tactic against Independent Counsel Kenneth Starr and other investigators. But he has also, absurdly, maintained that he has nothing to do with these invocations of privilege. So, for instance, Clinton claims that he doesn't know what privileges White House lawyers have asserted. The Treasury Department, not he, has asserted a "protective-function privilege" blocking Secret Service testimony.

Worse than his rhetoric is the fact that, more than ever before, different parts of the Executive Branch have been permitted to take different positions in litigation. The Justice Department takes a narrower view of the attorney–client privilege (as applied to government lawyers) than the White House does.

All of this undercuts the notion of the unitary Executive—the idea that the Executive speaks with one voice.

the United States that is bound by the treaty, he wrote, then Congress would have to conclude that the treaty is no longer in force. Mr. Clinton's response: "The United States and Russia clearly are Parties to the Treaty" (letter of May 21, 1998). Mr. Clinton did not even try to reconcile this assertion with his November 21 declaration that the succession is unsettled and that U.S. recognition of Russia as sole successor would not fulfill the treaty's Senate-approved purposes.

Administration officials point out that the field of treaty succession is characterized by inconsistency of state practices and a lack of consensus regarding legal principles. In general, that is true. But there is broad agreement among legal scholars regarding the particular area of two-party treaties that are "personal" or "political" in nature: When a party to such a bilateral treaty ceases to exist, that treaty is extinguished.

This international legal principle is analogous to a venerable principle of the common law of contracts: If John Smith contracted with Luciano Pavarotti to sing at Mr. Smith's wedding, and Mr. Pavarotti died before the event, no executor or successor could claim the right to sing at the wedding and receive the fee. Because it is personal in nature, such a contract terminates when Mr. Pavarotti dies.

In the preeminent modern commentary, *State Succession in Municipal Law and International Law*, Professor D. P. O'Connell writes, "There has been, at least since the late nineteenth century, almost unanimous agreement that personal treaties of a totally extinguished State expire with it because they are contracted with a view to some immediate advantage, and their operation is conditional on the nice adjustment of the political and economic relations which they presuppose. When this adjustment is upset the rationale of the treaty is destroyed."

The ABM Treaty of 1972 is the quintessential "personal" or "political" treaty. The United States entered into it with a specific potential adversary that had a specific character, specific resources and capabilities, and a specific relationship to the United States. It did not enter the treaty with "whom it may concern." It did not enter into it as an indestructible commitment: each party had the right to withdraw from the agreement upon six months' notice. International law does not assume that such a treaty's aims can be fulfilled, in the event of one party's extinction, by whatever state or states may happen to arise on the dead party's territory.

Furthermore, the newly independent states that arose on the USSR's territory jointly declared at Minsk on December 8, 1991, that none of them preserved the legal personality of the Soviet Union, which "as a subject of international law and geopolitical reality no longer exists." The U.S. Government promptly thereafter acknowledged that the Soviet Union had dissolved.

TO be sure, the U.S. Government could draw upon the ABM Treaty's terms for a new agreement with another state—Russia, for example. But any such new treaty can come into force under the U.S. Constitution only if the Senate approves ratification.

President Clinton has not yet submitted the new ABM multilateralization accords to the Senate. But as recognition spreads that the President is adhering to the ban on missile defenses not as a legal obligation but as a policy choice, prospects dim for the accords' getting the necessary 67 Senate votes for ratification. Once treaty issues are out of the picture, Congress must address the heart of the matter: Should our government preserve or end the nation's vulnerability to ballistic missiles?

—DOUGLAS J. FEITH