

## USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

*United States Gives Notice of Withdrawal from Treaty on Open Skies*

doi:10.1017/ajil.2020.73

On May 21, 2020, U.S. Secretary of State Mike Pompeo announced that the United States would withdraw from the Treaty on Open Skies. The treaty, which has been ratified by several former Soviet Republics and most North Atlantic Treaty Organization (NATO) members, allows states parties to conduct observation flights over each other's territory to build trust and transparency with respect to arms control. The treaty gives state parties a right to withdraw upon six months of notice, which Pompeo stated would be formally given by the United States on May 22. Pompeo described the U.S. withdrawal as a response to Russian violations of the treaty and held open the possibility that the United States would rescind its notice of withdrawal in the event of full Russian compliance. U.S. allies in Europe reaffirmed their own commitment to the treaty and to working with Russia over disputes arising from it. The announced U.S. withdrawal raises significant issues of U.S. domestic law, as the Trump administration did not comply with preconditions to withdrawal that had been established by Congress in the National Defense Authorization Act for Fiscal Year 2020.

The impetus behind the Treaty on Open Skies, commonly known as the Open Skies Treaty, originated with President Eisenhower.<sup>1</sup> His proposal sought to ease tensions between the United States and the Soviet Union by allowing the two countries to conduct observation flights over each other's territories, thus minimizing the opportunity for either country to launch surprise military attacks against the other.<sup>2</sup> The Soviet Union rejected Eisenhower's proposal, but President George H.W. Bush successfully restarted negotiations in 1989.<sup>3</sup> The Open Skies Treaty entered into force on January 1, 2002, almost a decade after the United States, Russia, and twenty-two other countries signed it on March 24, 1992.<sup>4</sup> The treaty aims to "improve openness and transparency, to facilitate the monitoring of compliance with existing or future arms control agreements and to strengthen the capacity for conflict prevention and crisis management."<sup>5</sup> Under the Open Skies Treaty, parties can conduct a predetermined number of observation flights over other parties' territories, and they must also accept a certain number of flights from other parties.<sup>6</sup> Each party has a right to withdraw from the treaty,

<sup>1</sup> David E. Sanger, *Trump Will Withdraw from Open Skies Arms Control Treaty*, N.Y. TIMES (May 21, 2020), at <https://www.nytimes.com/2020/05/21/us/politics/trump-open-skies-treaty-arms-control.html>; AP Archive, *The States Policy on Spies and Open Skies*, YOUTUBE (July 31, 2015), at <https://www.youtube.com/watch?v=4DH3e9WJMQU>.

<sup>2</sup> Sanger, *supra* note 1.

<sup>3</sup> AMY F. WOOLF, CONG. RESEARCH SERV., IN10502, THE OPEN SKIES TREATY: BACKGROUND AND ISSUES 1 (2020), available at <https://fas.org/sgp/crs/nuke/IN10502.pdf> [<https://perma.cc/XZ78-JGPB>].

<sup>4</sup> *Id.* The Open Skies Treaty currently has thirty-four states parties. Glob. Aff. Can., *Depository Status for the Treaty on Open Skies*, at <https://www.treaty-accord.gc.ca/details.aspx?id=102747> [hereinafter *Depository Status for the Treaty on Open Skies*]. All NATO members are party to the treaty except for Albania, Montenegro, and North Macedonia, as are several former Soviet Republics and several other European states. *See id.*; NATO, *Member Countries* (Mar. 24, 2020), [https://www.nato.int/cps/en/natohq/topics\\_52044.htm](https://www.nato.int/cps/en/natohq/topics_52044.htm).

<sup>5</sup> Treaty on Open Skies, pmbl., para. 6, Mar. 24, 1992, S. Treaty Doc. No. 102-37 (1993).

<sup>6</sup> *Id.* Art. 3, § 1, paras. 1–2. Observation flights conducted under the Open Skies Treaty are heavily regulated. *See, e.g., id.* Art. 4 (stipulating the types of sensors allowable for observation aircrafts and the performance limits for

but it must “provide notice of its decision to withdraw to either Depositary at least six months in advance of the date of its intended withdrawal and to all other States Parties.”<sup>7</sup>

Secretary of State Mike Pompeo announced on May 21, 2020, that the United States would withdraw from the Open Skies Treaty, remarking that a formal notice of withdrawal would be submitted the following day.<sup>8</sup> Pompeo stated in part:

While the United States along with our Allies and partners that are State Parties to the Treaty have lived up to our commitments and obligations under the Treaty, Russia has flagrantly and continually violated the Treaty in various ways for years. This is not a story exclusive to just the Treaty on Open Skies, unfortunately, for Russia has been a serial violator of many of its arms control obligations and commitments. Despite the Open Skies Treaty’s aspirations to build confidence and trust by demonstrating through unrestricted overflights that no party has anything to hide, Russia has consistently acted as if it were free to turn its obligations off and on at will, unlawfully denying or restricting Open Skies observation flights whenever it desires.

Russia has refused access to observation flights within a 10-kilometer corridor along its border with the Russian-occupied Georgian regions of Abkhazia and South Ossetia, thereby attempting to advance false Russian claims that these occupied territories are independent states. Russia’s designation of an Open Skies refueling airfield in Crimea, Ukraine, is similarly an attempt to advance its claim of purported annexation of the peninsula, which the United States does not and will never accept. Russia has also illegally placed a restriction on flight distance over Kaliningrad, despite the fact that this enclave has become the location of a significant military build-up that Russian officials have suggested includes short-range nuclear-tipped missiles targeting NATO. In 2019, Russia unjustifiably denied a shared United States and Canada observation flight over a large Russian military exercise.<sup>9</sup>

such sensors); *id.* Art. 6 (detailing the way in which observation flights are to be conducted); *id.* Art. 9 (regulating the handling of data collected from sensors).

<sup>7</sup> *Id.* Art. 15.2. The depositaries for the Open Skies Treaty are Canada and Hungary. *Id.* Art. 17.1. Once the depositaries receive a notice of withdrawal, they must notify other states parties and convene a conference among all state parties between thirty and sixty days after receipt of the notice. *Id.* Art. 15.3.

<sup>8</sup> U.S. Dep’t of State Press Release, Michael R. Pompeo, Sec’y of State, On the Treaty on Open Skies (May 21, 2020), at <https://www.state.gov/on-the-treaty-on-open-skies> [<https://perma.cc/7B7D-S5JK>] [hereinafter Treaty Withdrawal Announcement]. As of August 17, 2020, Canada has not updated its depositary status web page to reflect having received a U.S. communication regarding withdrawal. Depositary Status for the Treaty on Open Skies, *supra* note 4. Pompeo’s announcement came after many signals from the Trump administration—going back at least to the fall of 2019—that withdrawal was under consideration. *See, e.g.*, U.S. House of Representatives Comm. on Foreign Affairs Press Release, Engel Denounces Trump Administration Potential Plans to Withdraw from Open Skies Treaty (Oct. 7, 2019), at <https://foreignaffairs.house.gov/2019/10/engel-denounces-trump-administration-potential-plans-to-withdraw-from-open-skies-treaty> [<https://perma.cc/X6ST-BGYT>].

<sup>9</sup> Treaty Withdrawal Announcement, *supra* note 8 (also referring briefly to earlier violations). As part of a separate briefing, U.S. Assistant Secretary for International Security and Nonproliferation Christopher A. Ford listed various Russian violations of the Open Skies Treaty that had occurred at earlier points of time, going back to 2005. U.S. Dep’t of State Press Release, Briefing with Special Presidential Envoy for Arms Control Marshall Billingslea and Assistant Secretary for International Security and Nonproliferation Dr. Christopher A. Ford on the Treaty on Open Skies (May 21, 2020), at <https://www.state.gov/briefing-with-special-presidential-envoy-for-arms-control-marshall-billingslea-and-assistant-secretary-for-international-security-and-nonproliferation-dr-christopher-a-ford-on-the-treaty-on-ope> [<https://perma.cc/C4WF-5RMU>]. The United States had responded to certain

Pompeo also asserted that Russia has “*weaponized* the Treaty by making it into a tool of intimidation and threat,” alleging that Russia had been undertaking observation flights to map out areas in the United States and Europe for targeting in potential military campaigns.<sup>10</sup> Noting that U.S. allies “still find value in the Treaty,” he rejected remaining in the treaty “in order to maintain an empty façade of cooperation with Moscow.”<sup>11</sup>

Pompeo expressly mentioned the possibility that the United States might change course and remain in the Open Skies Treaty, should Russia “demonstrate[] a return to full compliance with this confidence-building Treaty.”<sup>12</sup> In a brief exchange with reporters that same day, President Trump similarly observed that “until they adhere, we will pull out” but that “there’s a very good chance we’ll make a new agreement or do something to put that agreement back together.”<sup>13</sup> Nonetheless, White House aides have indicated that the United States is unlikely to reconsider its planned withdrawal.<sup>14</sup>

After Pompeo’s announcement, twelve European countries issued a joint statement expressing regret over the U.S. decision.<sup>15</sup> The countries acknowledged sharing U.S. “concerns about implementation of the Treaty clauses by Russia,” but reaffirmed their commitment to the Open Skies Treaty as “functioning and useful.”<sup>16</sup> NATO Secretary General Jens Stoltenberg issued a statement observing that the United States had left the door open to revisiting its decision and that “NATO Allies and partner nations have engaged with Russia . . . to seek Russia’s return to compliance at the earliest date possible.”<sup>17</sup> German

Russian restrictions on overflights in the past by imposing its own restrictions on overflights conducted over Hawaii and prohibiting flights over two U.S. Air Force bases. WOLF, *supra* note 3, at 2. In response to Pompeo’s accusations, the Russian Ministry of Foreign Affairs issued a press release describing several U.S. violations of the Open Skies Treaty. Ministry of Foreign Affairs of the Russian Fed’n Press Release, Treaty on Open Skies: Questions and Answers (May 26, 2020), at [https://www.mid.ru/en/foreign\\_policy/international\\_safety/regprla/-/asset\\_publisher/YCxLFJnKuD1W/content/id/4138584](https://www.mid.ru/en/foreign_policy/international_safety/regprla/-/asset_publisher/YCxLFJnKuD1W/content/id/4138584) [<https://perma.cc/GY43-A3MR>].

<sup>10</sup> See Treaty Withdrawal Announcement, *supra* note 8; but see Justin Key Canfil, *The U.S. Will Exit the Open Skies Treaty and It’s Unclear Why*, LAWFARE (June 3, 2020), at <https://www.lawfareblog.com/us-will-exit-open-skies-treaty-and-its-unclear-why> (noting that, on this issue, “detailed allegations are scant, at least at the open-source level” and that in any event the treaty does not prohibit such use of observational information).

<sup>11</sup> Treaty Withdrawal Announcement, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> Remarks and an Exchange with Reporters Prior to Departure for Ypsilanti, Michigan, 2020 DAILY COMP. PRES. DOC. 387, at 1 (May 21).

<sup>14</sup> Sanger, *supra* note 1. This may be particularly true given that the U.S. announcement of withdrawal occurred despite several conciliatory signals sent by Russia in the spring of 2020. *E.g.*, U.S. Dep’t of State Press Release, James Gilmore, U.S. Ambassador to the OSCE, Briefing with U.S. Ambassador to the OSCE James Gilmore (Mar. 2, 2020), at <https://www.state.gov/briefing-with-u-s-ambassador-to-the-osce-james-gilmore> (noting that Russia had recently allowed an overflight “near Kaliningrad, which has always been somewhat of a sticking point” and that Russia had stated that it would roll back its “reluctance to let us fly over one of their major exercises”). Moreover, several of the ongoing violations described by Pompeo relate to disputes that go beyond the Open Skies Treaty, such as the status of Crimea.

<sup>15</sup> Ministry for Europe and Foreign Affairs Press Release, Statement of the Foreign Ministries of France, Belgium, Czech Republic, Finland, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, and Sweden on the Announcement by the US to Withdraw from the Open Skies Treaty (May 22, 2020), at <https://www.diplomatie.gouv.fr/en/french-foreign-policy/security-disarmament-and-non-proliferation/news/news-about-defence-and-security/article/statement-of-the-foreign-ministries-of-france-belgium-czech-republic-finland> [<https://perma.cc/5DBH-4MVV>].

<sup>16</sup> *Id.*

<sup>17</sup> NATO Press Release, Jens Stoltenberg, Sec’y Gen. of the N. Atl. Treaty Org., Statement by the NATO Secretary General on the Open Skies Treaty (May 22, 2020), at <https://nato.cmail19.com/t/ViewEmail/t/>

Foreign Minister Heiko Maas issued a separate statement criticizing the U.S. decision and urging the United States to reconsider.<sup>18</sup> Maas stated that the concerns raised about Russian compliance do not warrant U.S. withdrawal, a view he and the foreign ministers of “France, Poland and the UK have repeatedly informed US Secretary of State Pompeo.”<sup>19</sup> The Russian deputy minister of foreign affairs denied U.S. allegations that Russia had violated the Treaty and characterized the dispute as stemming from the Trump administration’s misrepresentation of “technical issues” as treaty violations.<sup>20</sup>

On July 6, 2020, a Conference of the Parties met virtually for “extensive discussions, which offered a broad range of views” related to the effects of a U.S. withdrawal.<sup>21</sup> This gathering was convened by Canada and Hungary, the depositors for the Open Skies Treaty, who have a joint obligation under the treaty to convene such a conference between thirty and sixty days of receiving a notice of withdrawal.<sup>22</sup>

In addition to prompting international debate, the Trump administration’s decision to give notice of withdrawal presents significant issues as a matter of U.S. domestic law. The United States joined the Open Skies Treaty pursuant to the process set forth in Article II of the U.S. Constitution, with the Senate advising and consenting in 1993 to U.S. participation in the treaty.<sup>23</sup> It has become “established practice” that presidents may unilaterally withdraw the United States from Article II treaties, provided the withdrawal is consistent with international law.<sup>24</sup> But historical practice “does not establish that this [unilateral power] is an exclusive presidential power,” and withdrawal could “possibly [be limited] by Congress through statute.”<sup>25</sup>

In 2019, Congress passed a statutory provision that requires the executive branch to notify Congress at least 120 days before submitting a formal notice of withdrawal from the Open Skies Treaty. Section 1234 of National Defense Authorization Act for Fiscal Year 2020 states:

- (a) NOTIFICATION REQUIRED.—Not later than 120 days before the provision of notice of intent to withdraw the United States from the Open Skies Treaty to either treaty depository pursuant to Article XV of the Treaty, the Secretary of Defense and the Secretary of State shall jointly submit to the congressional defense committees, the

2033286A5B1B26532540EF23F30FEDED/726C13780B153887419C69E1CEBE89F9 [https://perma.cc/9N5Z-8PNS].

<sup>18</sup> Federal Foreign Office Press Release, Foreign Minister Maas on America’s Announcement that It Intends to Withdraw from the Open Skies Treaty (May 21, 2020), at <https://www.auswaertiges-amt.de/en/newsroom/news/maas-open-skies/2343744> [https://perma.cc/T6UJ-ME22].

<sup>19</sup> *Id.*

<sup>20</sup> *Russia Calls U.S. Leaving Open Skies Treaty a “Blow” to European Security*, MOSCOW TIMES (May 22, 2020), at <https://www.themoscowtimes.com/2020/05/21/russia-calls-us-leaving-open-skies-treaty-a-blow-to-european-security-a70345>.

<sup>21</sup> Organization for Security and Co-operation in Europe Press Release, Conference of State Parties to the Open Skies Treaty Discusses U.S. Intent to Withdraw from the Treaty (July 7, 2020), at <https://www.osce.org/oscc/456646>.

<sup>22</sup> *Id.*; see also Treaty on Open Skies, *supra* note 5, Art. 15.3.

<sup>23</sup> See U.S. CONST. Art. II § 2; 139 Cong. Rec. 19913 (1993) (documenting the Senate’s resolution of advice and consent).

<sup>24</sup> RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 313.1 (2018).

<sup>25</sup> *Id.* § 313 Reporters’ Note 6 (noting that such a limitation could occur if the power to withdraw the United States from treaties is shared between Congress and the president rather than exclusive to the president).

Committee on Foreign Affairs of the House of Representatives, and the Committee on Foreign Relations of the Senate a notification that—

- (1) such withdrawal is in the best interests of the United States national security; and
- (2) the other state parties to the Treaty have been consulted with respect to such withdrawal.<sup>26</sup>

Prior to the enactment of this statutory provision, and also in a presidential signing statement, the Trump administration signaled that it would not view this provision as a constitutional limit on presidential power.<sup>27</sup>

The Trump administration did not provide Congress with notification pursuant to Section 1234(a) before giving notice of the U.S. withdrawal from the Open Skies Treaty.<sup>28</sup> It thus ignored the additional four-month period that the statute sought to embed into the withdrawal process—and, in the process, the administration ensured that withdrawal would be complete before the start of the next U.S. presidential term in January of 2021. In a letter to Pompeo on May 28, 2020, the House Foreign Affairs Committee “strongly condemn[ed] the Administration’s decision to submit the notice of intent to withdraw from the Open Skies Treaty” and objected to its “violation of the law under section 1234 of the Fiscal Year 2020 National Defense Authorization Act.”<sup>29</sup> The letter observed:

[W]e reject the Administration’s claim that the Constitution entitles the President to violate statutory law by refusing to submit advance notification of this withdrawal to Congress. The House and Senate rejected this claim of unchecked executive authority through bipartisan passage of section 1234. . . . With the passage of this law, Congress made clear that it would need adequate notice of withdrawal from this long-standing treaty to effectively carry out its responsibilities under Article I of the Constitution. The Administration’s lack of transparency with Congress only underscores

<sup>26</sup> National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1234, 133 Stat. 1198 (2019) [hereinafter 2020 NDAA].

<sup>27</sup> Prior to the statute’s enactment, the Department of Justice sent a letter stating, with respect to a closely related provision that did not end up in the final statute, that “[w]e are aware of no legal precedent holding that Congress may prevent the President from withdrawing the United States from a treaty. We regard the absence of any historical precedent of this nature as significant evidence that Congress may not restrict the President in this manner.” Letter from Prim F. Escalona, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Adam Smith, Chairman, U.S. House Comm. on Armed Servs. 9 (Nov. 27, 2019) (citations omitted), at <https://www.justice.gov/ola/page/file/1222061/download> [<https://perma.cc/QH7T-5B4U>]. When Trump signed the statute into law, he asserted in a signing statement that notification provisions like the one in Section 1234(a) “encompass only actions for which such advance certification or notification is feasible and consistent with the President’s exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs.” Statement on Signing the National Defense Authorization Act for Fiscal Year 2020, 2019 DAILY COMP. PRES. DOC. 880, at 1 (Dec. 20).

<sup>28</sup> Letter from Eliot L. Engel, Chairman of the U.S. House of Representatives Comm. on Foreign Affairs, et al. to Michael R. Pompeo, Sec’y of State (May 28, 2020), available at [https://foreignaffairs.house.gov/\\_cache/files/4/e/4e40c643-e16c-48a1-b659-56829784ec42/406F3B8C8449002D5B909981E306B67B.5-28-2020-hfacdem-letter-to-pompeo-on-ost-all-sigs-.pdf](https://foreignaffairs.house.gov/_cache/files/4/e/4e40c643-e16c-48a1-b659-56829784ec42/406F3B8C8449002D5B909981E306B67B.5-28-2020-hfacdem-letter-to-pompeo-on-ost-all-sigs-.pdf) [<https://perma.cc/DJV6-XSS9>].

<sup>29</sup> *Id.*

the degree to which the withdrawal decision was poorly considered and detrimental to our interests.<sup>30</sup>

It remains to be seen whether this conflict between Congress and the Trump administration will result in litigation or other further action.<sup>31</sup>

Aside from the Open Skies Treaty, Trump has already withdrawn the United States from numerous international commitments, including, with respect to arms control, the Joint Comprehensive Plan of Action and the Intermediate-Range Nuclear Forces Treaty.<sup>32</sup> These withdrawals also make it doubtful that the administration will renew the New Strategic Arms Reduction Treaty (New START), a treaty that sets limits on the maximum number of nuclear arms the United States and Russia can maintain and that expires on February 5, 2021.<sup>33</sup>

<sup>30</sup> *Id.* By contrast, the Senate Foreign Relations Committee has not released a similar statement. Instead, the Chairman of the Committee announced his support for the withdrawal, while a ranking member of the Committee denounced the decision as illegal. U.S. Senate Comm. on Foreign Relations Press Release, Chairman Risch Statement on Administration's Decision to Withdraw from Open Skies Treaty (May 21, 2020), at <https://www.foreign.senate.gov/press/chair/release/chairman-risch-statement-on-administrations-decision-to-withdraw-from-open-skies-treaty> [<https://perma.cc/5FKZ-939M>]; U.S. Senate Comm. on Foreign Relations Press Release, Ranking Member Menendez Statement on Trump Administration's Withdrawal from the Open Skies Treaty (May 21, 2020), at [https://www.foreign.senate.gov/press/ranking/release/ranking-member-menendez\\_statement-on-trump-administrations-withdrawal-from-the-open-skies-treaty](https://www.foreign.senate.gov/press/ranking/release/ranking-member-menendez_statement-on-trump-administrations-withdrawal-from-the-open-skies-treaty) [<https://perma.cc/4T9D-B53K>].

<sup>31</sup> See Scott R. Anderson & Pranay Vaddi, *When Can the President Withdraw from the Open Skies Treaty?*, LAWFARE (Apr. 22, 2020), at <https://www.lawfareblog.com/when-can-president-withdraw-open-skies-treaty> (arguing that such litigation would be fraught with justiciability issues and observing that a court might find on the merits that section 1234 “does not expressly prohibit withdrawal until [the notification] requirement is fulfilled”).

<sup>32</sup> Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 514, 517–18 (2018); Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 631, 631 (2019).

<sup>33</sup> Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Apr. 8, 2010, S. TREATY DOC. NO. 111-5 (2010); AMY F. WOOLF, CONG. RESEARCH SERV., R41219, THE NEW START TREATY: CENTRAL LIMITS AND KEY PROVISIONS 1 (2020), available at <https://fas.org/sgp/crs/nuke/R41219.pdf> [<https://perma.cc/7VEW-2TL5>]. Though the Trump administration has signaled its interest in negotiating with Russia to extend the New START Treaty, it has demanded that China be included in the negotiations. U.S. Dep't of State Press Release, Online Press Briefing with Ambassador Marshall Billingslea, Special Presidential Envoy for Arms Control, and Lieutenant General Thomas A. Bussiere, Deputy Commander, United States Strategic Command (USSTRATCOM) (June 24, 2020), at <https://www.state.gov/online+press+briefing+with+ambassador-marshall-billingslea-special-presidential-envoy-for-arms-control-and-lieutenant-general-thomas-a-bussiere-deputy-commander-united-states-strategic-command> [<https://perma.cc/4X4P-45UA>].