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Open Skies: Can the U.S. withdrawal be delayed?

EURO-ATLANTIC SECURITY
POLICY INTERVENTION

Peter Jones

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The European Leadership Network (ELN) is an independent, non-partisan, pan-European network of nearly 200 past, present and future European leaders working to provide practical real-world solutions to political and security challenges.

About the author

Peter Jones is an Associate Professor in the Graduate School of Public and International Affairs at the University of Ottawa. He spent 14 years in the Canadian Public Service, including 7 years working for the National Security Advisor to the Prime Minister in the Privy Council Office (the Prime Ministers' Department) and 7 years in the Department of Foreign Affairs. During this time, he served on the Canadian Delegation to the Ottawa, Budapest and Vienna Open Skies negotiations. He is the author of *Open Skies: Transparency, Confidence-building and the End of the Cold War*, (Stanford University Press). The author wishes to thank Professor David Koplow, Dr. Pierce Corden and others who wish to remain anonymous for their comments and suggestions on earlier drafts of the paper. The author is solely responsible for the views expressed herein.

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European Leadership Network (ELN)
8 St James's Square
London, UK, SE1Y 4JU

@theELN

europeanleadershipnetwork.org

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Summary and recommendation

The U.S. withdrawal from the Open Skies Treaty will take place on November 22, 2020, but President Trump remains in office until January 20, 2021.

Democrats, some Republicans, and all other Open Skies Treaty members, favour continued U.S. participation in the Treaty. Once he is in office President Biden could re-apply for membership, but that raises many questions: would U.S. re-admission to the Treaty require a renegotiation of such things as overflight quotas and re-certification of the U.S. Open Skies aircraft; would the Senate (which may remain in Republican hands) have to re-issue consent?

It is recommended instead that the other Treaty members agree amongst themselves to take advantage of an old and widely used diplomatic strategy; stopping the clock on the U.S. withdrawal at just before midnight on November 21. They would “re-start” the clock after the Biden Administration takes office and signals a desire to remain in the Treaty.

The primary argument that could be used to justify this action is that the Trump Administration’s withdrawal from the Treaty was, arguably, undertaken in contravention of U.S. law. The other Treaty members could therefore argue that they are stopping the clock to give the incoming Biden Administration an opportunity to clarify its position on the U.S. withdrawal.

Introduction

The United States is scheduled to withdraw from the Open Skies Treaty on November 22, 2020. The withdrawal is taking place in a way believed by many to not be in compliance with U.S. law. It is not supported by the incoming Biden Administration and does not represent the wishes of a majority in Congress. America's allies wish to see the U.S. remain within the Treaty.

Notwithstanding these facts, the Trump administration seems determined to use the lame-duck period, until the inauguration on January 20, 2021, to press ahead. If the Biden Administration wishes to re-join the Treaty, it could be complex and time-consuming. Would the U.S. have to apply to re-join under the accession formula? Would the advice and consent of the Senate (perhaps still in Republican hands) be required? Could the Treaty's accession formula rapidly accommodate a return, or would things like overflight quotas have to be laboriously re-negotiated? Would the U.S. aircraft and sensors have to be re-certified, which could take many months? The answers are not clear, and there is scope for mischief and unforeseen events.

This paper will examine the withdrawal from the perspective of a novel, and admittedly rather ambitious idea: what if the other members of the Treaty

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declined to act on the U.S. withdrawal on November 22? In such a case, the Biden Administration would, upon assuming office, signal its intention to remain part of the Treaty. A newly elected, and Democrat-majority Congress, which will be sworn in on January 3, 2021, could pass a resolution affirming continued U.S. membership in the Treaty and the Treaty would go on. Could such an audacious idea work?

The Trump withdrawal

On May 21, 2020, U.S. Secretary of State Pompeo, alleging repeated Russian non-compliance with the Treaty, announced that the U.S. would withdraw in 6 months unless Russia came into compliance.¹ The issue of whether Russia has violated the Treaty is contested. Proponents of withdrawal argue that Russia has unilaterally imposed restrictions on flights over its own territory and used the Treaty to gain various unfair advantages.² Opponents dispute these claims and note that differences over the Treaty were being addressed through consultations.³

Despite the Russian compliance issues, the U.S.'s allies, plus the other Open Skies Treaty members believe that the Treaty is useful and should be preserved. There are two reasons for this. First, the Treaty is part of a broader Trans-Atlantic cooperative security architecture. Abandoning it weakens that broader structure,

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particularly at a time when it is under strain on a variety of fronts. Second, even though the U.S. and some other Treaty members have so-called National Technical Means of information collection, the other members of the Treaty do not; for them Open Skies represents an important means of collecting information on areas of concern.

These points were eloquently made on May 22, 2018, by then-Secretary of Defense James Mattis when he wrote to a U.S. Senator that continued American participation in the Treaty was “in our nation’s best interest” since

1. For the press release announcing this move, see, Pompeo, M.R., “Press Statement on the Treaty on Open Skies,” U.S. Department of State, May 21, 2020, at: <https://www.state.gov/on-the-treaty-on-open-skies/>

2. Morrison, T., “Russia Flouts Another Arms Control Treaty, So We’re Leaving It,” New York Times, May 21, 2020.

3. See, for example, a letter of March 5, 2020 to President Trump from former Secretary of State George Shultz, former Secretary of Defense William Perry and former Senator Sam Nunn at: https://media.nti.org/documents/Memo_from_George_Shultz_Bill_Perry_and_Sam_Nunn_on_Open_Skies_Treaty.pdf

it promoted “greater transparency and stability” and served as a “mechanism of engagement” for America’s allies.⁴ The Trump Administration consulted the allies on withdrawal via diplomatic means. The allies uniformly impressed upon the Administration their desire that the U.S. not withdraw.⁵

Treaty members required under the Treaty. The NDAA also required the Administration to certify to Congress why withdrawal is in the U.S. national interest. Interestingly, Section 1234 received some Republican support, in addition to overwhelming Democrat support.⁷

Some Treaty supporters also argue that the withdrawal is illegal because the Administration did not notify Congress 120 days before Secretary Pompeo submitted the withdrawal notice. This additional 120 days is required under the terms of Section 1234 of the National Defense Authorization Act (NDAA), 2020, passed by Congress on December 20, 2019.⁶ This extra period of notification to Congress is in addition to the six months notification of the other

Despite the requirements of Section 1234, the Administration went ahead with notification of intent to withdraw under the terms of the Treaty without providing 120 days advance notification to Congress. In so doing, the Administration argued that Congress does not have the power to interfere with a President in this matter. In his ‘signing statement’ of the NDAA Trump stated that, “I reiterate the longstanding understanding of the executive branch that these

4. The text of the letter may be found at: https://www.fischer.senate.gov/public/_cache/files/b2df2cf7-3828-4d81-aa57-2963ce8d70b0/sd-response-to-senator-fischer-regarding-the-open-skies-treaty-osd070739-18.pdf Other political leaders have also issued statements in support of the Treaty. For example, the European Leadership Network, a group of senior retired European political and military leaders issued such a statement on May 12, 2020. See, <https://www.europeanleadershipnetwork.org/group-statement/el-n-group-statement-saving-open-skies-treaty/>

5. See, for example, “NATO Allies, other nations, urge U.S. not to withdraw from Open Skies accord,” France 24, May 21, 2020, at: <https://www.france24.com/en/20200521-us-to-withdraw-from-open-skies-accord-in-trump-s-latest-treaty-pullout>

6. Section 1234 of the 2020 NDAA reads: “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 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.” See: <https://www.congress.gov/116/bills/s1790/BILLS-116s1790enr.pdf#page=451>. See also Anderson, Scott R. & Pranay Vaddi, “When Can the President Withdraw From the Open Skies Treaty?”, April 22, 2020, <https://www.lawfareblog.com/when-can-president-withdraw-open-skies-Treaty>

7. See Gould, J., “Open Skies Treaty to Get Protections Even as Trump Considers an Exit,” Defense News, December 20, 2019, at: <https://www.defensenews.com/congress/2019/12/20/open-skies-treaty-to-get-protections-even-as-trump-considers-an-exit/>

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types of provisions 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.”⁸

Though he has lost the election, Trump remains in office until January 20, 2021, and seems determined to proceed with the withdrawal. Not much appears to be possible to stop it.

8. See “Statement by the President,” December 20, 2019, at: <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-34/>

An audacious plan – to do nothing

Or does it? While proponents of the Treaty in Washington may have run out of options to stop withdrawal, the torch may have been passed to the other regime members who wish to preserve U.S. participation in the Treaty. To succeed, they must courageously agree – to do nothing.

The essence of the idea is that the Treaty members should borrow and adapt a tactic from the UN and other multilateral negotiating fora; stopping the clock. In cases where tough negotiations are making progress, but a deadline is about to run out, the members of the negotiation sometimes agree to stop the clock at one minute to midnight. This buys a few hours or days of extra time to resolve the last issues. The tactic requires the tacit consent of all involved and cannot be used to indefinitely prolong negotiations which are not making progress. But it is a useful and much-recognised manoeuvre under certain circumstances.

The variation on this tactic which is being proposed here is that the other Treaty members agree amongst themselves to “stop the clock” on the American withdrawal at one minute to midnight on November 21. In effect, they would be ignoring the Trump deadline until the Biden Administration was sworn in, and could rescind the

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withdrawal. To give added legitimacy to the process, the newly sworn-in and Democrat-controlled Congress could pass a resolution affirming continued U.S. participation in the Treaty.

The two-month period when the clock was stopped, from November 21, 2020, to January 20, 2021, would be a sensitive time. Much care would have to be exercised while the U.S. was in a form of stasis. Things such as quotas and flight rules could not be changed. Working Groups which meet regularly to address technical issues would take a pause. Activities involving U.S. equipment or personnel would have to be put in abeyance – for example, would immunity exist for U.S. personnel on Open Skies business in foreign countries during this time? Ideally, the Treaty could simply be brought to a complete stop during this period. This “down tools” period would put the regime in suspended animation until the new U.S. administration took office and signalled a desire to go on. At this time, the “clock” would be re-started, and life would go on.

A key to the success of this period would be the actions, or studied inaction, of the two Treaty Depositaries, Canada and Hungary, and the current Chair of the Open Skies Consultative Commission.⁹ Together with the Secretariat in Vienna, they would have to gently shepherd the other Treaty members, who would themselves have to agree to this, through a period of quiet inaction. The fact that work in Vienna normally takes a lengthy break over the Christmas and New Year period would assist if the other members of the Treaty could agree that the “break” should start earlier and last longer. Presumably, the Trump administration would not be pleased. But the knowledge that the incoming Biden Administration wished to remain in the Treaty would help everyone concerned to weather the storm.

9. The current Chair of the Open Skies Consultative Commission is Bosnia-Herzegovina until the end of December. Bulgaria will take over on January 1.

A precedent?

While the U.S. Constitution is clear with respect to how the country shall join a Treaty, and the respective roles of the Executive and Legislative branches, it is much less clear as to how the U.S. leaves a Treaty. Does a President require the “advice and consent” of the Senate to leave a Treaty, as is required for ratification? Only one case of a dispute between the President and some in Congress over a Treaty withdrawal has made it before the Supreme Court. President Carter’s decision to withdraw from the U.S.-Taiwan mutual defence treaty as part of the process of establishing relations with mainland China was challenged legally by some Republican Senators. After working its way through the courts, a divided Supreme Court directed the lower courts to dismiss the complaint as the matter amounted to a political difference between the Executive and Legislative Branches and should have been resolved between them.¹⁰

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However, President Trump’s aggressive policy of withdrawing from many international treaties and obligations has spawned several legal reviews of this matter which suggest that a President does not automatically have the right to terminate U.S. participation in international Treaties; as Congress was required to approve participation, so may it have some right to be consulted on withdrawal.¹¹ Furthermore, as Anderson and Vaddi noted, in the specific case of the Open Skies Treaty withdrawal, “None of this precedent, however, addresses a situation where a president seeks

10. See *Goldwater vs. Carter*, 444, U.S. 996 (1979), at: <https://supreme.justia.com/cases/federal/us/444/996/>

11. See: Koh, H.H., “Presidential Power to Terminate International Agreements,” *The Yale Law Journal*, vol. 128, November, 2018, at: <https://www.yalelawjournal.org/forum/presidential-power-to-terminate-international-agreements>; and Singh, A. and C. Amrifar, “Good Governance Papers No. 12: Treaty Withdrawal,” *Just Security.org*, 28 October, 2020, at: <https://www.justsecurity.org/73118/good-governance-papers-no-12-treaty-withdrawals/>. The Singh and Amrifar paper is a development of their article, “The Trump Administration and the ‘Unmaking’ of International Agreements,” *Harvard International Law Journal*, vol. 59, no. 2, Summer 2018.

“In short, there is an argument that Trump’s failure to obey Section 1234 of the NDAA renders his termination of U.S. participation in the Open Skies Treaty improper.”

to withdraw from an Article II treaty contrary to a statute enacted by Congress, as would arguably be the case if Trump were to disregard Section 1234.”¹²

In short, there is an argument that Trump’s failure to obey Section 1234 of the NDAA renders his termination of U.S. participation in the Open Skies Treaty improper. Moreover, an argument can be developed that resistance to Trump’s actions finds support in analogous provisions of the Vienna Convention on the Law of Treaties (see Annex 1 for a further development of this point).

Of course, it may be that proponents of withdrawal would launch a court challenge seeking to assert that a President’s power to terminate U.S.

participation in Treaties is absolute and that Trump did not have to obey Section 1234 of the NDAA, as he maintains he does not. Others might argue that the existence of Section 1234 makes this case unique in that Congress had explicitly made its views known and, therefore, not a general precedent regarding Presidential power to terminate U.S. involvement in Treaties.

In any case, these arguments are primarily, if not exclusively, applicable to the U.S. legal system. They do not raise legal issues for the other Treaty members who are the audience of this paper.

12. Anderson and Vaddi, op cit (emphasis in original). Singh and Amrifar, Good Governance, op cit, also argue this.

Conclusion – thinking outside the box

This course of action amounts to a group of countries declining to act on the wishes of a lame-duck U.S. Administration until another Administration takes its place. This is unusual, to say the least. But these are not normal times. The Trump administration may have broken U.S. law in the way it went about withdrawal; a majority in Congress do not support the withdrawal; the allies do not support it either; and the incoming Biden Administration is not in favour.

What is certain now, unless the Russian compliance issues are resolved to the Trump Administration's satisfaction, is that the U.S. will withdraw from the Open Skies Treaty on November 22, 2020. Its re-admission may be complex, time-consuming and open the door to many complications. If they value the continued viability of the Treaty, the other members may wish to wait out the Trump Administration's last two months in office until the Biden Administration takes over.

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At the end of the day, what is being proposed here is simply this: Instead of the Open Skies Treaty members being forced to sit back and watch while the Trump Administration runs out the clock on their treaty, those members should agree to sit back and watch while the clock runs out on the Trump Administration.

Annex 1

Article 46 of the Vienna Convention on the Law of Treaties¹³

The Vienna Convention on the Law of Treaties (VCLT) specifies the key international provisions regarding the making, interpretation, and alteration of treaties. The United States has not joined the VCLT, but has accepted it as binding customary international law.

Article 46¹⁴ provides that a state may not invoke, as an excuse for invalidating a treaty, the fact that the treaty is in violation of its domestic law – unless that violation is “manifest” (meaning it would be objectively evident to any other state) and concerns a rule of domestic law of fundamental importance. As stated in the VCLT, this rule is of restricted scope; it applies only to the “competence to conclude treaties,” such as a diplomatic agent exceeding lawful authority.

But one could contemplate an extended analogy toward the *withdrawal* from Open Skies. That is, the Biden Administration, and the other parties to the Open Skies Treaty, could argue that the Trump Administration’s withdrawal from the treaty was questionable because it was “expressed in violation of a provision of [U.S.] internal law” (in this case, Section 1234 of the NDAA) that “was manifest and concerned a rule of its internal law of fundamental importance” (the right of Congress to insist that it be consulted).

The argument would thus be that the statutory requirement under Section 1234 of the NDAA for a 120-day notification to Congress was “objectively evident” to the other treaty parties who are behaving “in the matter in accordance with normal practice and good faith” in waiting to see what the next Administration wishes to do about U.S. participation in the Open Skies Treaty.

This is just an analogy, and borrowing this sort of provision from one portion of the VCLT does not prove that it does, or should, apply to a different aspect of treaty practice. But the language is at least suggestive of an argument that could be used by the other Open Skies Treaty members, and particularly the Depositaries (with the support of the other Treaty members), to justify inaction until the Biden Administration comes to office and can express its views on the matter.

13. I wish to thank Professor David Koplow of the Georgetown University Law Centre, and formerly a senior advisor on legal issues pertaining to arms control to the U.S. Department of Defense and the U.S. Arms Control and Disarmament Agency (<https://www.law.georgetown.edu/faculty/david-a-koplow/>) for his suggestions on this Annex.

14. 1969 *Vienna Convention on the Law of Treaties Article 46: Provisions of internal law regarding competence to conclude treaties*

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.



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NETWORK**

European Leadership Network
8 St James's Square
London, UK, SE1Y 4JU

secretariat@europeanleadershipnetwork.org
+44 (0)203 176 2555
[@theELN](https://www.theELN.org)
europeanleadershipnetwork.org