

NOTES

SEALING PANDORA'S BOX: THE CASE FOR THE UNITED STATES' OBSERVATION OF KEY NEW START TREATY PROVISIONS FOLLOWING ITS 2026 EXPIRATION

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ABSTRACT

On February 21, 2023, Vladimir Putin, President of the Russian Federation, announced that Russia is suspending participation in New START, the last remaining bilateral treaty limiting Russian and U.S. strategic nuclear arsenals. Over two years have passed since President Putin suspended Russia's participation in New START, and Russia has declined U.S. initiatives to commence successor treaty negotiations. Even if a successor treaty is negotiated, the U.S. Senate is unlikely to provide its advice and consent. As the Treaty's February 5, 2026 expiration quickly approaches, and the geopolitical situation centering on Ukraine continues to frustrate negotiations, the United States must adopt a unilateral policy regarding its strategic offensive limits. This Note argues that the United States should continue to observe New START's strategic offensive limitations and prohibition against interfering with National Technical Means of Verification (NTM), in addition to continuing to publicly release the aggregate numbers of its strategic offensive arms and providing Russia with notifications of intercontinental ballistic missile launches, submarine-launched ballistic missile launches, and significant military exercises. Not only is this approach grounded in successful non-binding precedent on limitations of strategic offensive arms, but this approach would provide national security benefits, such as avoiding the prohibitive costs of a nuclear arms race and laying the groundwork for future piecemeal agreements by instilling good will. Moreover, the United States can continue to deter two nuclear peers—Russia and China—while observing New START's strategic offensive limitations. Given these advantages, the United States should maintain this policy upon the expiration of New START even if Russia exceeds the strategic numerical limitations

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or interferes with U.S. NTM, unless Russia obtains a significant military advantage in doing so. By observing New START's strategic offensive limitations and additional verification measures, the United States can prevent a new nuclear arms race (or the exacerbation thereof) and the opening of Pandora's Box.

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I. INTRODUCTION

On February 21, 2023, Vladimir Putin, President of the Russian Federation, announced in a state-of-the-nation address that Russia would be “suspending” participation in New START,¹ an action that not only constitutes a violation of the Treaty,² but also threatens to

1. See Shannon Bugos, *Russia Suspends New START*, ARMS CONTROL ASS'N (Mar. 2023), <https://www.armscontrol.org/act/2023-03/news/russia-suspends-new-start>.

2. Article XIV, paragraph 3 of New START provides that each party retains the right to withdraw from the Treaty “if it decides that extraordinary events related to the subject matter of

upend half a century of hard-fought common ground between the United States and Russia (*formerly, the Soviet Union*) that resulted in the negotiation of bilateral nuclear arms control treaties, including the Strategic Arms Limitation Talks (SALT I and SALT II), the Intermediate-Range Nuclear Forces (INF) Treaty, the Moscow Treaty, START I, and New START. These bilateral efforts resulted in global nuclear warhead inventories dwindling from an apex of 69,368 in 1986 to an estimated 12,500 as of June 2023³—of which 9,600 are in military service.⁴ Yet, with Russia's suspension of New START and U.S. countermeasures, neither party can resort to the verification provisions of the Treaty to assess the opposing party's compliance with the Treaty's limitations on strategic offensive arms. In sum, "the whole arms control architecture has been dismantled."⁵

While *de facto* defunct, New START remains a legally valid treaty until its expiration on February 5, 2026.⁶ But given frustrations regarding the operation of the Treaty,⁷ Russia's ongoing war with Ukraine and nuclear saber-rattling toward Ukraine and NATO states,⁸ and the United States' continued sanctions against Russia,⁹ bilateral efforts to execute a successor treaty remain highly unlikely, with grave implications for global arms control. If New START expires without a successor

this Treaty have jeopardized its supreme interests." However, the Treaty does not provide for suspension. Russia rests the legality of suspension partly on Article 62 of the Vienna Convention on the Law of Treaties. The United States asserts the suspension is illegal, and thus Russia is still subject to the Treaty's obligations. See Rose Gottemoeller & Marshall L. Brown, *Legal Aspects of Russia's New START Suspension Provide Opportunities for US Policy Makers*, BULL. OF THE ATOMIC SCIENTISTS (Mar. 2, 2023), <https://thebulletin.org/2023/03/legal-aspects-of-russias-new-start-suspension-provide-opportunities-for-us-policy-makers/>.

3. See Kelsey Davenport & Daryl G. Kimball, *Nuclear Weapons: Who Has What at a Glance*, ARMS CONTROL ASS'N (June 2023), <https://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat>.

4. *Id.*

5. See Joint Press Point with NATO Secretary General Jens Stoltenberg, the Minister of Foreign Affairs of Ukraine, Dmytro Kuleba and the High Representative of the EU for Foreign Affairs and Security Policy, Josep Borrell, NATO (Feb. 21, 2023, 4:53 PM), https://www.nato.int/cps/en/natohq/opinions_211480.htm.

6. See *New START Treaty*, U.S. DEP'T OF STATE, <https://www.state.gov/new-start/> (last visited May 10, 2024).

7. See Shannon Bugos, *Understanding the Dispute Over New START*, ARMS CONTROL ASS'N (Apr. 2023), <https://www.armscontrol.org/act/2023-04/news/understanding-dispute-over-new-start>.

8. Lauren Sukin, *Rattling the Nuclear Saber: What Russia's Nuclear Threats Really Mean*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 4, 2023), <https://carnegieendowment.org/2023/05/04/rattling-nuclear-saber-what-russia-s-nuclear-threats-really-mean-pub-89689>.

9. FACT SHEET: *On One Year Anniversary of Russia's Invasion of Ukraine, Biden Administration Announces Actions to Support Ukraine and Hold Russia Accountable*, THE AMERICAN PRESIDENCY PROJECT (Feb. 24, 2023), <https://www.presidency.ucsb.edu/documents/fact-sheet-one-year-anniversary-russias-invasion-ukraine-biden-administration-announces>.

treaty, there will be no bilateral nuclear arms control treaty constraining the world's two largest nuclear arsenals for the first time in half a century.¹⁰

Unconstrained by New START, a tit-for-tat reciprocal accumulation of strategic offensive arms by the United States and Russia to maintain nuclear supremacy threatens the opening of Pandora's Box, or, in other words, nuclear Armageddon. Given the average yield of today's strategic nuclear forces of the United States and Russia, it is estimated that a full nuclear exchange between the two countries involving 3,000 strategic nuclear weapons—100 less than the numerical limit under New START—would result in 360,000,000 near immediate deaths,¹¹ or five billion when accounting for food insecurity.¹² Absent New START's numerical limits, the resulting death toll of a full nuclear exchange between the two nations would be unparalleled. The specter of Pandora's Box is compounded by China, which is expected to possess over 1,000 nuclear warheads by 2030,¹³ and could potentially exceed this estimate if embroiled in a U.S.-Russia arms race to be considered "at least equal in status to other great powers."¹⁴

As the ratification of a successor treaty is improbable, this Note argues that the United States' best course of action following the expiration of New START is to unilaterally observe New START's limitations on strategic offensive arms and the Treaty's prohibition against interfering with or using concealment measures against Russian national technical means of verification (NTM). Additionally, the United States

10. *What If New START Expires? Three National Perspectives*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/act/2020-01/features/what-if-new-start-expires-three-national-perspectives> (last visited May 10, 2024). Following the expiration of New START, bilateral treaties that do not constrain the nuclear arsenals of the United States and Russia will still be in effect. For example, the testing of nuclear weapons will continue to be circumscribed by the Threshold Test Ban Treaty and the Peaceful Nuclear Explosions Treaty. Additional agreements will also continue, such as the Agreement on the Prevention of Nuclear War and Hotline Agreements. Lastly the United States and Russia still must adhere to multilateral treaties, such as the Nuclear Nonproliferation Treaty.

11. Francois Diaz-Mauren, *How A Nuclear War Would Kill You – and Almost Everyone Else*, BULL. OF THE ATOMIC SCIENTISTS (Oct. 20, 2022), <https://thebulletin.org/2022/10/nowhere-to-hide-how-a-nuclear-war-would-kill-you-and-almost-everyone-else/> [<https://perma.cc/KD6G-FSWU>].

12. Alan Robock et al., *Global Food Insecurity and Famine from Reduced Crop, Marine Fishery and Livestock Production due to Climate Disruption from Nuclear War Soot Injection*, 3 NATURE FOOD 586, 591 (2022).

13. U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 111 (2023).

14. John Erath, *The China Dilemma*, CTR. FOR ARMS CONTROL AND NON-PROLIFERATION (Nov. 13, 2023), <https://armscontrolcenter.org/the-china-dilemma/> [<https://perma.cc/27PZ-X2LM>].

should continue to publicly release the aggregate numbers of its strategic offensive arms and provide Russia with notifications of intercontinental ballistic missile (ICBM) and submarine-launched ballistic missile (SLBM) launches and significant military exercises. This unilateral approach is grounded in successful non-binding nuclear arms control precedent, would confer on the United States national security benefits, and would not impede the United States' ability to deter Russia and China. Unless Russia garners a significant military advantage, this unilateral approach should be adhered to even if Russia exceeds the strategic numerical limitations or interferes with U.S. NTM. By observing these key New START provisions, the United States can prevent a new nuclear arms race—or the exacerbation thereof—and the opening of Pandora's Box.

This Note proceeds in six parts. Part II refreshes readers with New START and offers an overview to those unfamiliar with the Treaty. Part III examines Russia's suspension of New START and ongoing tensions thwarting the negotiation of a successor treaty. Part IV discusses the hurdles of the parties' domestic constitutional ratification processes, further thwarting a successor treaty. Part V discusses why, in the absence of a bilateral treaty, it is imperative to unilaterally pursue a U.S. policy of observing New START's limitations on strategic offensive arms and prohibition against interfering with NTM or using concealment measures, in addition to publicly releasing aggregate data on strategic offensive arms and providing certain notifications. Part VI concludes, emphasizing that although the arms control architecture has been dismantled, this approach provides the foundation for the U.S.-Russian bilateral nuclear arms control architecture to be rebuilt.

II. THE NEW START TREATY: AN OVERVIEW

New START was signed by U.S. and Russian Federation Presidents Barack Obama and Dmitry Medvedev on April 8, 2010.¹⁵ Via its sixteen Articles, attached Protocol, and three Annexes, the Treaty continues a bipartisan process of verifiably reducing U.S. and Russian strategic nuclear arsenals, a process which has its origins in the dialogues of the

15. Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Arms, RF-U.S., Apr. 8, 2010, S. TREATY DOC. No. 103-1 [hereinafter New START Treaty]. For a detailed description of the negotiation process, timeline, and tribulations of New START from the United States perspective, *see generally* ROSE GOTTEMOELLER, *NEGOTIATING THE NEW START TREATY* (2021).

Strategic Arms Limitation Talks and was pursued by U.S. Presidents Ronald Regan and George H.W. Bush under START I.¹⁶

New START is set to expire on February 5, 2026. Although Article XIV(2) provides that New START shall remain in force for ten years after the Treaty takes effect—i.e., February 5, 2021¹⁷—the parties included a provision that allows the parties a single opportunity to extend the Treaty.¹⁸ Two days prior to expiration, the parties extended New START until February 5, 2026.¹⁹ Former U.S. Secretary of State, Antony Blinken, declared that “[e]xtending the New START Treaty makes the United States, U.S. allies and partners, and the world safer. All unconstrained nuclear competition would endanger us.”²⁰ The Russian Foreign Ministry similarly emphasized that “the decision taken is important as it guarantees a necessary level of predictability and transparency in this area, while strictly maintaining a balance of interests.”²¹

A. Numerical Limitations on Strategic Offensive Arms

Article II of New START places numerical limits on the parties’ strategic offensive arms. According to then-Senator and Chairman of the Senate Foreign Relations Committee John Kerry,²² New START builds upon the Treaty’s predecessors, START I of 1991 and the Moscow

16. *Strategic Arms Reduction Treaty (START I)*, CTR. FOR ARMS CONTROL AND NON-PROLIFERATION (Nov. 16, 2022), <https://armscontrolcenter.org/strategic-arms-reduction-treaty-start-i/> [<https://perma.cc/T6B4-YP3Q>]; Shannon Bugos, *New START at a Glance*, ARMS CONTROL ASS’N (Apr. 2022), <https://www.armscontrol.org/factsheets/NewSTART> [<https://perma.cc/T7MS-W3UQ>].

17. See U.S. DEP’T OF STATE, *supra* note 6.

18. Article XIV(3) states, “[t]his Treaty shall remain in force for 10 years unless it is superseded earlier by a subsequent agreement on the reduction and limitation of strategic offensive arms. If either Party raises the issue of extension of this Treaty, the Parties shall jointly consider the matter. If the parties decide to extend this Treaty, it will be extended for a period of no more than five years unless it is superseded earlier by a subsequent agreement on the reduction and limitation of strategic offensive arms.” New START Treaty, *supra* note 15, art. XIV(3).

19. See Kingston Reif & Shannon Bugos, *U.S., Russia Extend New START for Five Years*, ARMS CONTROL ASS’N (Mar. 2021), <https://www.armscontrol.org/act/2021-03/news/us-russia-extend-new-start-five-years>.

20. Press Statement, Antony J. Blinken, Secretary of State, On the Extension of the New START Treaty with the Russian Federation (Feb. 3, 2021), <https://ru.usembassy.gov/on-the-extension-of-the-new-start-treaty-with-the-russian-federation/>.

21. *Statement by the Ministry of Foreign Affairs of the Russian Federation on the Extension of the Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms*, THE MINISTRY OF FOREIGN AFF. OF THE RUSSIAN FED’N (Feb. 3, 2021), <https://mid.ru/en/maps/us/1414980/>.

22. See John Kerry, U.S. DEP’T OF STATE, <https://2009-2017.state.gov/r/pa/ei/biog/203657.htm> (last visited Sep. 20, 2024).

Treaty of 2002.²³ START I limited each party to 6,000 strategic warheads attributed to 1,600 deployed delivery vehicles, and the Moscow Treaty limited each party to 1,700–2,200 deployed strategic nuclear warheads.²⁴

New START further reduces how many strategic nuclear warheads and deployment vehicles each party can maintain and imposes additional limitations.²⁵ Article II of New START stipulates that the parties may not exceed 700 deployed ICBMs, deployed SLBMs, and deployed heavy bombers; 1550 warheads on deployed ICBMs, warheads on deployed SLBMs, and nuclear warheads counted for deployed heavy bombers; and 800 deployed and non-deployed ICBM launchers, deployed and non-deployed SLBM launchers, and deployed and non-deployed heavy bombers.²⁶ Despite these constraints, New START does not leave the arsenals of the parties out to languish and rust; Article V (1) permits “modernization and replacement of strategic offensive arms.”²⁷ The aggregate limits implicated by Article II ensure that neither party has a significant nuclear advantage.²⁸

B. *Monitoring, Verification, Inspection, and the Bilateral Consultative Commission*

New START contains an extensive monitoring, verification, and inspection regime, which focuses on maintaining transparency, cooperation, and openness, as well as on deterring and detecting potential violations.²⁹ Broadly, these verification and transparency provisions govern the conversion and elimination of strategic offensive arms (Article VI), the establishment and operation of a database of treaty-required information (Article VII), transparency measures (Article VIII), a commitment not to interfere with national technical means of verification (Article X), the exchange of telemetric information (Article IX), the conduct of on-site inspection activities (Article XI), and the operation of the Bilateral Consultative Commission (BCC) (Article XII).³⁰

23. John Kerry, *Treaty with Russia on Measures for Further Reduction and Limitations of Strategic Offensive Arms (The New START Treaty)*, in *THE NEW START TREATY BETWEEN THE U.S. AND RUSSIA* 63, 63 (Alisa L. Rebane ed., 2011).

24. *Id.*

25. *Id.*

26. New START Treaty, *supra* note 15, art. II(1)(a)–(c).

27. *Id.* art. V(1).

28. See Kerry, *supra* note 23, at 66.

29. See Amy F. Woolf, *The New START Treaty: Central Limits and Key Provisions*, in *THE NEW START TREATY BETWEEN THE U.S. AND RUSSIA* 1, 14 (Alisa L. Rebane ed., 2011).

30. See U.S. DEP’T OF STATE, *supra* note 6.

The bilateral exchange of data is regulated by Article VII and Part Four of the Protocol.³¹ Biannually, the United States and Russia are required to provide the other “with a declaration of its deployed strategic delivery vehicles, launchers, and warheads.”³² Separately, Article IX permits the parties to exchange, on a parity basis, telemetric information on launches of ICBMs and SLBMs.³³ Moreover, the United States and Russia must provide notifications on the launch of treaty-accountable ballistic missiles,³⁴ on major strategic exercises,³⁵ and on the deployable status and facility assignment of all strategic delivery vehicles and launchers.³⁶ Per Article X, the parties are prohibited from interfering with or using deliberate concealment measures to impede NTM, unilateral information gathering with a country’s own satellites and remote sensing equipment.³⁷

Article XI grants the United States and Russia the right to conduct inspection activities at the facilities of the opposing party.³⁸ Parties may conduct up to eighteen inspections each year.³⁹ To promote the implementation of the provisions of New START, Article XII establishes the BCC,⁴⁰ composed of a Commissioner and Deputy Commissioner chosen by each party, and their alternates, members, and advisors.⁴¹ The BCC serves as New START’s implementation body, through which the parties can raise questions regarding compliance and implementation of New START.⁴²

31. See New START Treaty, *supra* note 15, art. VII, Protocol, Part IV.

32. See U.S. DEP’T OF STATE, *supra* note 6.

33. New START Treaty, *supra* note 15, art. IX. (Telemetric information provides information about “the launch weight and throw weight of the missile . . . and the number of times the missile maneuvered to release reentry vehicles, that, during an operational launch, would contain a nuclear warhead.”); Amy F. Woolf, *Monitoring and Verification in Arms Control*, in THE NEW START TREATY BETWEEN THE U.S. AND RUSSIA 37, 49 (Alisa L. Rebane ed., 2011).

34. See New START Treaty, *supra* note 15, Protocol, Part IV, § IV(1).

35. See *id.*, Protocol, Part IV, § III(5).

36. See U.S. DEP’T OF STATE, *supra* note 6.

37. See Woolf, *supra* note 29, at 14.

38. New START distinguishes between two different types of inspections, Type One and Type Two inspections. Type one inspections permit inspection teams to inspect the opposing party’s ICBM bases, submarine bases, and air bases that house deployed or non-deployed launchers, missiles, and bombers. Type Two inspections occur at the opposing party’s facilities that house non-deployed or converted launchers and missiles. A maximum of ten Type One inspections and eight Type Two inspections may occur per year. See New START Treaty, *supra* note 15, art. XI; see also Woolf, *supra* note 29, at 15.

39. See U.S. DEP’T OF STATE, *supra* note 6.

40. See New START Treaty, *supra* note 15, art. XII.

41. See New START Treaty, *supra* note 15, Protocol, Part VI.

42. See U.S. DEP’T OF STATE, *supra* note 6.

Taken together,⁴³ these provisions limit what the parties can legally do with their nuclear arsenals and ensure predictability, “so that each Party can base its military planning on reliable data regarding the other Party’s strategic offensive arms and avoid estimates based on guesses that can lead to destabilizing strategic competition.”⁴⁴ The Treaty’s impending expiration in 2026 forecloses this predictability and upends the legal restraints imposed on the parties’ arsenals.

III. THE EMPTY NEGOTIATING TABLE: RUSSIA’S SUSPENSION OF NEW START

Ongoing tensions between the United States and Russia will likely thwart the conclusion of any successor treaty to New START. After all, the Russian Foreign Ministry followed President Putin’s announcement that Russia will be suspending New START by declaring, “it is no longer possible to maintain business as usual with the United States and the West in general, both as a matter of principle and regarding arms control, which is inseparable from the geopolitical, military and strategic reality.”⁴⁵

This tension between the United States and Russia originates in difficulties regarding the operation of New START. Following a cessation of on-site inspections during the onset of COVID-19, the parties were unable to convene the BCC to ameliorate the incapacity of the parties to resume on-site inspections.⁴⁶ Frustrations grew into accusations; the United States accused Russia of noncompliance for its refusal to resume inspections and failure to reschedule the BCC consultation it cancelled.⁴⁷ Conversely, Russia accused the United States of material breach by not converting fifty-six Trident SLBM launchers and forty-one B-52H Stratofortress bombers from nuclear to conventional roles, thus exceeding numerical limits.⁴⁸ Russia suspended the Treaty less than two weeks following the United States’ assessment that Russia failed to comply with New START.⁴⁹

43. The provisions discussed in Part II are vital to the Treaty but are not an exhaustive list of all provisions. See generally New START Treaty, *supra* note 15.

44. Kerry, *supra* note 23, at 66.

45. *Foreign Ministry Statement in Connection with the Russian Federation Suspending the Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (New START)*, THE MINISTRY OF FOREIGN AFF. OF THE RUSSIAN FED’N (Feb. 21, 2023), https://mid.ru/en/foreign_policy/news/1855184/.

46. See Bugos, *supra* note 7.

47. *Id.*

48. *Id.*

49. *Id.*

Ongoing hostilities reinforce Russia's unwillingness to resume treaty activities or negotiate a successor treaty. These hostilities stem from the elephant in the negotiating chamber: Russia's war in Ukraine. According to Heather Williams, Director of the Project on Nuclear Issues at the Center for Strategic and International Studies, "[t]he fate of New START is really about Ukraine. Russia likely (unsuccessfully) attempted to use New START as leverage against the [United States] to cease its support for Ukraine."⁵⁰ Indeed, the U.S. Department of State has reported that since the start of the war, the United States has provided USD 69.2 billion in military assistance to Ukraine.⁵¹ Moreover, the United States and the West have issued sanctions and restrictions against Russia, which, according to Russia, obstructs Russian inspectors from securing the necessary visas and travel arrangements to inspect U.S. nuclear facilities.⁵²

The invitation to negotiate, however, remains open. Former U.S. Secretary of State Antony Blinken expressed, "[w]e remain ready to talk about strategic arms limitations at any time with Russia irrespective of anything else going on in the world or in our relationship."⁵³ Former National Security Advisor Jake Sullivan stated that the United States is ready to engage in nuclear arms control diplomacy with Russia without preconditions.⁵⁴ Nevertheless, in December 2023, Russia rejected a U.S. proposal to launch a dialogue "to manage nuclear risks and develop a post-2026 arms control framework," citing the "acute conflict around Ukraine."⁵⁵

Russia has maintained it will continue to abide by New START's aggregate limits on strategic offensive arms.⁵⁶ Russian Deputy Foreign

50. *Id.*

51. Bureau of Pol.-Mil. Affs., *U.S. Security Cooperation with Ukraine*, U.S. DEP'T OF STATE (Jan. 20, 2025), <https://www.state.gov/u-s-security-cooperation-with-ukraine/> [<https://perma.cc/WZR9-5CFG>].

52. See Bugos, *supra* note 7.

53. See Bugos, *supra* note 1.

54. Jake Sullivan, Nat'l Sec. Advisor, Remarks for the Arms Control Association (ACA) Annual Forum (June 2, 2023), <https://www.armscontrol.org/events/2023-06/remarks-national-security-advisor-jake-sullivan-arms-control-association-aca-annual>.

55. Russian Foreign Minister Sergey Lavrov further emphasized, "amid a 'hybrid war' waged by Washington against Russia, we aren't seeing any basis, not only for any additional joint measures in the sphere of arms control and reduction of strategic risks, but for any discussion of strategic stability issues with the United States." See Libby Flatoff & Daryl G. Kimball, *Russia Rejects New Nuclear Arms Talks*, ARMS CONTROL ASS'N (Mar. 2024), <https://www.armscontrol.org/act/2024-03/news/russia-rejects-new-nuclear-arms-talks>.

56. See Steven Pifer, *The US and Russia Must Re-Assess Their Strategic Relations in a World without New START*, BULL. OF THE ATOMIC SCIENTISTS (June 13, 2023), <https://thebulletin.org/2023/06/the-us-and-russia-must-re-assess-their-strategic-relations-in-a-world-without-new-start/>.

Minister Sergey Ryabkov confirmed that Russia would observe the quantitative limits of New START and the ballistic missile launch notification agreement to “maintain strategic stability.”⁵⁷ Nevertheless, Russia has not participated in New START’s verification regime, nor provided notifications in a “manner provided for in Part Four of the Protocol to the Treaty.”⁵⁸ Due to Russia’s noncompliance with the verification provisions, the United States was “unable to verify that Russia remains within its obligation to limit its deployed warheads on delivery vehicles subject to the New START Treaty to 1,550.”⁵⁹

While the United States announced that the nation is “committed to full and mutual implementation of the New START Treaty,”⁶⁰ it responded to Russia’s suspension with four countermeasures it claims are consistent with international law, given that they are proportionate and reversible.⁶¹ The United States further asserts Russia’s suspension is legally invalid and Russia is still bound by New START’s obligations.⁶² Pursuant to the first countermeasure, the United States has ceased its biannual provision of data to Russia.⁶³ Second, the United States has withheld notifications regarding the status or location of treaty-accountable items such as missiles and launchers—while still providing notifications on ICBM and SLBM launches.⁶⁴ Third, the United States has halted inspection activities on U.S. territory.⁶⁵ Lastly, the United States no longer provides telemetric information on ICBM and SLBM launches.⁶⁶ Nevertheless, the United States, “in the interest of strategic

57. See *Russia to Keep Observing New START Limits on Nuclear Delivery Vehicles – Top Brass*, TASS (Feb. 22, 2023, 7:19 AM), <https://tass.com/politics/1580427>.

58. BUREAU OF ARMS CONTROL, DETERRENCE, AND STABILITY, REPORT TO CONGRESS ON IMPLEMENTATION OF THE NEW START TREATY 10–11 (2024), <https://www.state.gov/wp-content/uploads/2024/01/2023-New-START-Treaty-Implementation-Report.pdf>.

59. *Id.* at 6.

60. See Bureau of Arms Control, Deterrence, and Stability, *U.S. Countermeasures in Response to Russia’s Violations of the New START Treaty*, U.S. DEP’T OF STATE (June 1, 2023), <https://www.state.gov/u-s-countermeasures-in-response-to-russias-violations-of-the-new-start-treaty/>.

61. *Id.* The United States’ countermeasures are arguably legal. Pursuant to Article 49 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the codification of customary law on state responsibility, countermeasures may be taken by an injured state to induce the injuring state to comply with its obligations, and are limited to non-performance of international obligations. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, art. 49; *Customary Law on State Responsibility*, GEORGETOWN LAW LIBRARY, <https://guides.ll.georgetown.edu/c.php?g=371540&p=2511830> (last visited May 10, 2024).

62. Bureau of Arms Control, Deterrence, and Stability, *supra* note 60.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

stability and the promotion of transparency,” publicly released a portion of the data that Russia would have received if not for its noncompliance.⁶⁷ The data includes the United States’ aggregate numbers of its nuclear forces subject to New START.⁶⁸ The released data confirms to Russia and its nuclear peers the U.S. commitment to observing the numerical limits of the Treaty.

The beginning of President Donald Trump’s second term, however, has frustrated many of the actions the Biden administration took to support Ukraine and rebuke Russia, leaving the fate of Ukraine uncertain. Not only has the Trump administration engaged in talks with Russia on ending the conflict without the presence of Ukrainian officials,⁶⁹ but the administration suspended delivery of all U.S. military aid to Ukraine following the cancellation of a planned U.S.-Ukraine bilateral minerals deal signing ceremony in early March of 2025.⁷⁰ Yet, even if tensions between Washington and Moscow cool pursuant to a continued cessation of U.S. aid to Ukraine, it remains improbable that the Trump administration will succeed in negotiating a successor treaty to New START, at least in the short term.

Although President Trump has publicly made comments seeking nuclear arms control talks with Russia and China since reassuming the presidency, he failed in his first term to launch multilateral arms control talks between the United States, Russia, and China, and left the single opportunity at extending New START to 2026 to President Biden.⁷¹ He was further unable during his first term to secure bilateral nuclear deals with North Korea and Iran.⁷² This track record does not bode well

67. *Id.*

68. Bureau of Arms Control, Deterrence, and Stability, *New START Treaty Aggregate Numbers of Strategic Offensive Arms*, U.S. DEP’T OF STATE (May 12, 2023), <https://www.state.gov/new-start-treaty-aggregate-numbers-of-strategic-offensive-arms-5/>.

69. Humeyra Pamuk & Peshia Magid, *US and Russia Forge Ahead on Peace Talks, Without Ukraine*, REUTERS (Feb. 19, 2025, 4:03 AM), <https://www.reuters.com/world/europe/europe-says-it-is-committed-ukraine-ahead-russia-us-talks-2025-02-18/>.

70. Andrew Roth & Oliver Holmes, *US Suspends All Military Aid to Ukraine in Wake of Trump-Zelenskyy Row*, THE GUARDIAN (Mar. 4, 2025, 6:04 AM), <https://www.theguardian.com/world/2025/mar/04/us-military-aid-ukraine-pause-trump-zelenskyy-updates>.

71. *ACA Welcomes Trump’s Acknowledgement of the “Tremendous” Cost and Dangers of Nuclear Weapons and Interest in “Denuclearization” with Russia and China*, ARMS CONTROL ASS’N (Jan. 24, 2025), <https://www.armscontrol.org/pressroom/2025-01/aca-welcomes-trumps-acknowledgement-tremendous-cost-and-dangers-nuclear-weapons>.

72. Jon B. Wolfsthal, *Trump Wants a Nuclear Deal. Can He be the Ultimate Negotiator?*, BULL. OF THE ATOMIC SCIENTISTS (Jan. 31, 2025), <https://thebulletin.org/2025/01/trump-wants-a-nuclear-deal-can-he-be-the-ultimate-negotiator/>.

for the current administration's ability to strike a successor treaty to New START.

If the Trump administration is indeed sincere about negotiating a successor treaty to New START, negotiations with Russia would prove difficult and contentious given the verification and compliance issues that previously arose under the New START regime. Addressing and overcoming these complexities while negotiating a new framework could take several months, if not years, to achieve,⁷³ well beyond New START's February 5, 2026 expiration. The length of negotiations will likely increase drastically if the nations continue to insist on a multilateral successor treaty instead of a bilateral one. While the United States has insisted on including China in negotiations, Moscow has insisted on including France and the United Kingdom in nuclear talks.⁷⁴ Thus, the United States' unilateral observance of New START's limitations on strategic nuclear arms and certain verification measures, the approach advocated in this Note, is critical given the unlikely negotiation of a successor treaty, at least prior to February 5, 2026.

IV. THE NEGOTIATING TABLE BACK HOME

Even if the United States and Russia navigate geopolitical tensions and negotiate a successor treaty to New START, both nations will encounter a new foe: the negotiating tables of their respective domestic legislatures. Any negotiated successor treaty will likely be thwarted by internal politics within the U.S. Senate. The Russian Federal Assembly, on the other hand, is unlikely to oppose legislation that is desired by President Putin.

In the United States, the president's treaty-making power is enumerated in Article II, Section 2 of the United States Constitution.⁷⁵ Treaty ratification requires the "advice and consent of the Senate"; in other words, the treaty must receive approval from a supermajority of the Senate.⁷⁶ Separate from this treaty-making process are executive agreements, which may also be promulgated pursuant to the Article II, Section 2 authority of the President.⁷⁷ Nevertheless, an Article II treaty is arguably the proper vehicle for a successor treaty given its nuclear arms control subject matter and other factors as outlined by the U.S.

73. ARMS CONTROL ASS'N, *supra* note 71.

74. Xiaodon Liang, *Trump Says U.S. Is Open to Nuclear Talks*, ARMS CONTROL ASS'N (Mar. 2025), <https://www.armscontrol.org/act/2025-03/news/trump-says-us-open-nuclear-talks>.

75. U.S. CONST. art. II, § 2, cl. 2.

76. *Id.*

77. *See, e.g.*, U.S. Dep't of State, Foreign Aff. Manual 11 FAM 720 (2010).

Department of State.⁷⁸ New START's predecessors, START I and the Moscow Treaty, were also ratified via the Article II constitutional process.⁷⁹

Mustering sixty-seven of 100 senators, however, is a daunting task. While the Moscow Treaty and START I met little resistance in the Senate, garnering yea-nay tallies of ninety-five to zero and ninety-three to six,⁸⁰ respectively, the Senate gave its advice and consent to New START by a vote of seventy-one to twenty-six,⁸¹ a margin of five. This shift reflects the Article II treaty becoming a dying vehicle to pursue an international agreement by recent presidential administrations, explainable in part by partisan politics.⁸² Indeed, the Senate "has been a barrier to all but the most uncontroversial Article II treaties."⁸³ Since the prospect of obtaining the advice and consent of the Senate would depend on how controversial the treaty's contents are, the partisan composition of the Senate, and the President's own priorities, partisan politics will likely thwart the ratification of a successor treaty.⁸⁴

78. The State Department's Foreign Affairs Manual provides eight factors to navigate whether an international agreement should take the form of an Article II treaty or otherwise. The majority of these factors, including (1) the extent to which the agreement involves commitments or risks affecting the nation as a whole; (3) whether the agreement can be given effect without the enactment of subsequent legislation by the congress; (4) past U.S. practice as to similar agreements; (5) the preference of the Congress as to a particular type of agreement; (6) the degree of formality desired for an agreement; and (8) the general international practice as to similar agreements, militate strongly in favor of an Article II treaty being the proper vehicle for a successor treaty. *Id.* at 11 FAM 723.3.

79. See, e.g., The Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, RF-U.S., May 24, 2002, S. TREATY DOC. No. 107-8 [hereinafter The Moscow Treaty]; Treaty with the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms (The START Treaty), U.S.S.R.-U.S., July 31, 1991, S. TREATY DOC. No. 102-20 [hereinafter The START Treaty]. However, not all nuclear agreements were enacted via the Article II process. The Interim Agreement on the Limitation of Strategic Offensive Arms in May 1972 entered legal force via an executive agreement between President Nixon and General Secretary Leonid Brezhnev. See *9.30.1972 - S.A.L.T. I Takes Effect*, RICHARD NIXON FOUNDATION (Sep. 30, 2010), <https://www.nixonfoundation.org/2010/09/9-30-1972-s-a-l-t-i-takes-effect/>.

80. See The Moscow Treaty, *supra* note 79; The START Treaty, *supra* note 79.

81. Woolf, *supra* note 33, at 23.

82. See generally Curtis Bradley, Oona Hathaway & Jack Goldsmith, *The Death of Article II Treaties?*, LAWFARE (Dec. 13, 2018, 10:00 AM), <https://www.lawfaremedia.org/article/death-article-ii-treaties>.

83. *Id.*

84. It should not necessarily be assumed that all fifty-three Republican senators of the One Hundred Nineteenth U.S. Congress will vote in line with a Republican president. Following Russian suspension of New START, Republican senators introduced the "No START Treaty Act," legislation that formally accuses Russia of breaching New START, declares that the United States

In contrast, the Constitution of the Russian Federation and the Federal Law on International Treaties of the Russian Federation regulate Russia's treaty-making process.⁸⁵ A majority vote by both Houses of the Russian Parliament, the State Duma and the Federation Council, is required prior to treaty ratification.⁸⁶ While both Houses voted unanimously to extend New START for five years,⁸⁷ one year later both chambers voted unanimously in favor of suspending New START.⁸⁸ Given that all 628 deputies and senators voted unanimously to extend New START and then to suspend the Treaty, both at the suggestion of President Putin, it appears that the Federal Assembly will vote in line with the desires of President Putin.

Ultimately, the domestic politics of the U.S. Senate are likely to frustrate ratification of a successor treaty, while the Federal Assembly will enact the desires of President Putin. Thus, with all indicators pointing towards Russia's unwillingness to negotiate a successor treaty given ongoing geopolitical hostilities and the barrier that the U.S. Senate presents to the treaty-making process, the United States must adopt an approach to respond to the improbability of a successor treaty to take the place of New START upon the Treaty's expiration.

should withdraw from the Treaty, and places limits on future arms control negotiations, including that any limitations on the size of the U.S. and Russian arsenals must also be placed on the arsenal of China. While some of these senators have stood against nuclear arms control treaties historically, this proposed legislation is indicative of partisan difficulties in the Senate. *See generally* Press Release, Sen. Tom Cotton, Cotton, Colleagues: U.S. Should Withdraw from New Start Treaty (May 18, 2023), <https://www.cotton.senate.gov/news/press-releases/cotton-colleagues-us-should-withdraw-from-new-start-treaty>.

85. KONSTITUTSIYA ROSSIĬSKOĬ FEDERATSII [KONST. RF] [CONSTITUTION] art. 86 (Russ.); *see generally* Federal'nyĭ Zakon RF o Mezhdunarodnykh Dogovorakh Rossiĭskoi Federatsii [Federal Law on the International Treaties of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1995, No. 101-FZ; *see* W.E. Butler, *National Treaty Law and Practice: Russia*, in NATIONAL TREATY LAW AND PRACTICE 537, 538 (Hollis, Blakeslee & Ederington eds., 2005).

86. *See* KONSTITUTSIYA ROSSIĬSKOĬ FEDERATSII [KONST. RF] [CONSTITUTION] art. 95 (Russ.); *National Labour Law Profile: Russian Federation*, INT'L LABOUR ORG. (Jan. 2022), https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158917/lang-en/index.htm; *see also* Woolf, *supra* note 33, at 23.

87. Vladimir Isachenkov, *Russian Lawmakers Approve New START Nuclear Treaty Extension*, PBS (Jan. 27, 2021), <https://www.pbs.org/newshour/world/russian-lawmakers-approve-new-start-nuclear-treaty-extension>.

88. Elena Teslova, *Russian Parliament Approves Suspension of New START Treaty*, ANADOLU AGENCY (Feb. 23, 2023), <https://www.aa.com.tr/en/europe/russian-parliament-approves-suspension-of-new-start-treaty/2828069>.

V. WHY THE UNITED STATES SHOULD OBSERVE NEW START'S
STRATEGIC OFFENSIVE LIMITS AND CERTAIN VERIFICATION MEASURES

Absent a successor treaty to New START, the United States must adopt a strategic approach to protect its own national security interests that does not incentivize the stockpiling of nuclear arms. While this approach would ideally shape into a non-binding bilateral agreement with Russia, the United States should unilaterally follow this approach if a bilateral agreement cannot be met. To accomplish this, it is vital that the United States observes: (1) New START's aggregate limits on strategic offensive arms;⁸⁹ and (2) New START's prohibition on interfering with Russia's NTM and utilizing concealment measures that impede verification via NTM.⁹⁰ Additionally, the United States must observe two New START auxiliary actions post-expiration, including: (1) publicly releasing the aggregate numbers of its strategic offensive arms;⁹¹ and (2) providing Russia with notifications of ICBM and SLBM launches,⁹² as well as on major strategic exercises.⁹³

As discussed in Section II.A, Article II of New START stipulates that both parties may not exceed 700 deployed ICBMs, deployed SLBMs, and deployed heavy bombers; 1550 warheads on deployed ICBMs, warheads on deployed SLBMs, and nuclear warheads counted for deployed heavy bombers; and 800 deployed and non-deployed ICBM launchers, deployed and non-deployed SLBM launchers, and deployed and non-deployed heavy bombers.⁹⁴ These numbers are more than sufficient to deter Russia, as well as China.

Given the loss of New START's verification regime to assess Russian observation of these limits, the United States' best recourse is to rely on NTM to monitor Russia's strategic nuclear arms via a combination of satellites, ground-based radars, and aircraft.⁹⁵ The United States' prior discovery via NTM that the Russian 9M729 missile violated the INF Treaty suggests that NTM will continue to be a critical element of U.S. monitoring efforts following New START's expiration.⁹⁶ There is an

89. New START Treaty, *supra* note 15, art. II(1)(a)–(c).

90. *Id.* art. X(1)(b)–(c).

91. See Bureau of Arms Control, Deterrence, and Stability, *supra* note 68.

92. New START Treaty, *supra* note 15, Protocol, Part IV, § IV(1).

93. *Id.* Protocol, Part IV, § III(5).

94. *Id.* art. II(1)(a)–(c).

95. See Rose Gottemoeller, *The New START Verification Regime: How Good Is It?*, BULL. OF THE ATOMIC SCIENTISTS (May 21, 2020), <https://thebulletin.org/2020/05/the-new-start-verification-regime-how-good-is-it/>.

96. See *id.*

opportunity cost to this approach, as it diverts NTM from other missions.⁹⁷ Nevertheless, because Russia will probably not observe a verification regime absent a binding treaty, the opportunity cost is a necessary casualty.

Russia, too, will likely rely on its NTM capabilities to monitor U.S. nuclear facilities absent the verification measures of the New START regime. Thus, the United States should show restraint in interfering with Russia's NTM and should not utilize concealment measures that impede verification. Given the necessity of NTM for both sides following New START's expiration, as neither party may resort to the Treaty's verification measures, a conscious restraint on interfering with Russia's NTM would likely cause reciprocal restraint by Russia. After all, from the earliest days of U.S.-Russia nuclear arms control, noninterference with NTM has been a basic principle that both sides have agreed on.⁹⁸ Restraint in this context is not naivety; rather, it permits a means of verification that does not completely erode confidence in assessing the other nation's arsenal.

The two auxiliary measures, unilateral publication of the aggregate numbers of the United States' strategic offensive arms and the provision of certain notifications, prevent complete opacity between the United States and Russia. Regarding the former measure, this data should be released to signal to Russia that the United States is observing New START's limitations on strategic offensive arms. The data corroborates information that Russia collects via NTM, and it should be released yearly, as to routinely—but not too often as to naively reward Russia for its suspension of New START—eliminate Russian suspicion that the United States is exceeding the limits. Although this data is a portion of the data Russia would receive under New START's bilateral exchange, only this data should be transmitted in order to avoid marginal information advantages. The latter measure avoids Russia mistaking a test or training exercise for an attack, especially while the bilateral relationship remains negative. Moreover, such notifications are still legally required under separate agreements.⁹⁹ These auxiliary measures constitute common-sense avoidance of suspicion and escalation, without giving a significant informational or military advantage to Russia or

97. See VINCE MANZO, CNA, NUCLEAR ARMS CONTROL WITHOUT A TREATY? 1 (2019), <https://www.cna.org/reports/2019/04/IRM-2019-U-019494.pdf>.

98. Gottemoeller, *supra* note 95.

99. The 1988 Ballistic Missile Launch Notifications Agreement provides for notifications of ICBM and SLBM launches. The 1989 Agreement on Reciprocal Notifications of Major Strategic Exercises provides for notifications of major strategic exercises. See Bureau of Arms Control, Deterrence, and Stability, *supra* note 60.

other nuclear peers. Because other New START verification provisions, like conducting on-site inspection activities and operating the BCC, would present a significant information advantage to Russia if observed unilaterally, such provisions should be tabled, at least until Russia is ready to bilaterally cooperate.

A. Precedent Exists for Observing Strategic Offensive Limitations and Verification Provisions Absent a Binding Treaty

The United States has previously observed U.S.-Russia bilateral nuclear arms control treaty provisions absent a binding obligation to do so—both unilaterally and bilaterally—for over eight years in the U.S.-Russia nuclear relationship, effectuating stability in the sphere of nuclear arms control when U.S.-Russia relations deteriorated and a treaty was not feasible, or during gaps between treaties. Examples of precedent include the bilateral observation of the SALT I Interim Agreement,¹⁰⁰ SALT II,¹⁰¹ and START I,¹⁰² as well as the unilateral U.S. observation of START I's verification regime during its “bridge period.”¹⁰³ Given this precedent, the United States should resort to a similar posture upon the expiration of New START.

Non-binding agreements to observe limitations on strategic offensive arms can be traced back to the SALT I Interim Agreement, the first agreement between the United States and the Soviet Union, in conjunction with the ABM Treaty, which placed limits and restraints on the parties' nuclear weapons systems.¹⁰⁴ While the Interim Agreement did not address warhead numbers or strategic bombers, it froze the number of launchers the United States and Soviet Union could maintain

100. Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect To The Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., May 26, 1972, T.I.A.S. No. 13445.

101. *See Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (SALT II)*, U.S. DEP'T OF STATE, <https://2009-2017.state.gov/t/isn/5195.htm> (last visited May 10, 2024) [hereinafter SALT II].

102. The START Treaty, *supra* note 79.

103. While this Article analyzes bilateral nuclear arms control treaties between the United States and Russia, there are other examples. The Biden administration announced in June 2022 that the United States would align its usage of anti-personnel landmines with the key provisions of the Ottawa Convention, despite not being a party to the multilateral treaty. *See* Daryl Kimball & Magritte Gordaneer, *Biden Reverts to Obama-Era Landmines Policy*, ARMS CONTROL ASS'N (July 2022), <https://www.armscontrol.org/act/2022-07/news/biden-reverts-obama-era-landmines-policy>.

104. *Strategic Arms Limitation Talks Treaty (SALT I)*, NUCLEAR THREAT INITIATIVE, <https://www.nti.org/education-center/treaties-and-regimes/strategic-arms-limitation-talks-salt-i-salt-ii/> (last visited May 10, 2024).

for five years.¹⁰⁵ The Interim Agreement was signed by President Nixon and General Secretary Brezhnev on May 26, 1972, and entered into force as an executive agreement.¹⁰⁶

The Interim Agreement was dubbed “interim” because the parties intended to continue negotiations;¹⁰⁷ however, the subsequent treaty, SALT II, was not signed until 1979. Thus, because the Interim Agreement was set to expire on October 3, 1977, the United States, presented with the opportunity to reclaim its autonomy in the area of strategic offensive arms,¹⁰⁸ unilaterally announced in September of 1977 that the country would continue to honor the Interim Agreement while SALT II was still being negotiated, provided the Soviet Union would do the same.¹⁰⁹ The Soviet Union responded that it would honor the Interim Agreement, as well.¹¹⁰ The Carter administration expressed that this was a political commitment, creating no legal obligations.¹¹¹ Thus, this non-binding commitment to honor a limitation of U.S. and Russian strategic offensive arms lasted for roughly one year and nine months until SALT II.

SALT II, signed by President Carter and General Secretary Brezhnev on June 18, 1979, continued SALT I's limitation on strategic offensive arms. The Treaty provided for an aggregate limit of 1,320 total number of launchers of MIRVed ballistic missiles and heavy bombers with long-range cruise missiles, 1,200 total launchers of MIRVed ballistic missiles, and 820 launchers of MIRVed ICBMs.¹¹² Moreover, the Treaty added transparency and verification measures such as advance notification of certain ICBM test launches, the creation of a Standing Consultative Commission, and an agreed database for systems included in various SALT-limited categories.¹¹³ Like New START, SALT II permitted national technical means of verification.¹¹⁴

105. *Strategic Arms Limitation Talks (SALT I)*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/treaties/strategic-arms-limitation-talks> (last visited May 10, 2024).

106. NUCLEAR THREAT INITIATIVE, *supra* note 104.

107. *Id.*

108. NOTBURGA K. CALVO-GOLLER & MICHEL A. CALVO, *THE SALT AGREEMENTS: CONTENT, APPLICATION, VERIFICATION* 183 (1987).

109. NUCLEAR THREAT INITIATIVE, *supra* note 104.

110. *Id.*

111. CALVO-GOLLER & CALVO, *supra* note 108, at 184.

112. SALT II, *supra* note 101. MIRV stands for Multiple Independently-targetable Reentry Vehicle. For background on MIRVs, see *Multiple Independently-targetable Reentry Vehicle (MIRV)*, CTR. FOR ARMS CONTROL AND NON-PROLIFERATION, <https://armscontrolcenter.org/wp-content/uploads/2017/08/MIRV-Factsheet.pdf>.

113. SALT II, *supra* note 101.

114. *Id.*

Ultimately, SALT II never received the advice and consent of the Senate, as consideration was delayed given the breakdown of U.S.-Soviet relations following the Soviet Union's invasion of Afghanistan.¹¹⁵ Instead, President Carter announced in 1980 that the United States would observe the numerical limits of SALT II as long as the Soviet Union reciprocated, to which General Secretary Brezhnev made similar statements regarding Soviet observation of the Treaty.¹¹⁶ Even Carter's successor, President Reagan, who referred to SALT II as "fatally flawed," saw the importance of the non-binding agreement between the nations.¹¹⁷ In 1982, while in office, he stated he would do nothing to undercut the SALT agreements as long as the Soviet Union showed equal restraint.¹¹⁸ Thus, between 1980 and 1986, both the United States and Soviet Union observed the numerical limitations of SALT II, irrespective of the lack of a legally binding treaty.¹¹⁹ It was not until President Regan identified Soviet noncompliance that the United States ceased honoring the obligations of SALT II.¹²⁰

The four-month "bridge period" between the expiration of START I and the signing of New START saw the United States' unilateral commitment to part of START I's verification regime. According to Rose Gottemoeller, New START's chief U.S. negotiator, the parties signed a political statement immediately before the expiration of START I conveying that "the United States and Russia would continue to abide by the spirit of the START Treaty while the negotiations for a follow-on treaty were continuing."¹²¹ During this period, the United States continued notifications as a goodwill gesture and was willing to continue data exchanges.¹²² The United States continued notifications despite Russia failing to do so, as Russia remained staunch in "insisting that verification

115. *Id.*

116. *Id.*

117. Daryl Kimball, *LOOKING BACK: The Nuclear Arms Control Legacy of Ronald Reagan*, ARMS CONTROL ASS'N, https://www.armscontrol.org/act/2004_07-08/Reagan (last visited May 10, 2024).

118. SALT II, *supra* note 101.

119. *Id.*

120. George C. Wilson & R. Jefferey Smith, *U.S. to Break SALT II Limits Friday*, WASH. POST (Nov. 26, 1986, 7:00 PM), <https://www.washingtonpost.com/archive/politics/1986/11/27/us-to-break-salt-ii-limits-friday/796f8715-e76e-41be-822c-dd33109813a9/>.

121. GOTTEMOELLER, *supra* note 15, at 86.

122. Jessica Rogers et al., *The Long View: Strategic Arms Control After the New Start Treaty*, 78 BULL. OF THE ATOMIC SCIENTISTS 347, 352 (2022).

measures could only be conducted pursuant to a legally binding treaty.”¹²³ Russia did, however, bilaterally observe the numerical limits of START I.¹²⁴

In sum, non-binding numerical limitations on the strategic nuclear arsenals of the United States and Russia, whether placed on warheads, delivery vehicles, or both, were observed for a total of over eight years when taking into account U.S. and Russian observance of the SALT I Interim Agreement, SALT II, and the “bridge period” between START I and New START. Moreover, the United States unilaterally observed a portion of START I’s verification regime despite Russia’s failure to honor its commitment.

The success of this precedent, which managed to endure even at negative points of the parties’ relationship (e.g., the Soviet invasion of Afghanistan), indicates that the United States can—and should—observe New START’s limits on strategic offensive arms and certain verification measures absent a binding obligation to do so. While a bilateral non-binding agreement is ideal,¹²⁵ this precedent supports a unilateral approach, especially regarding verification measures. Moreover, even if Russia agrees to a non-binding agreement observing New START’s numerical limits, the United States might have to unilaterally observe the additional verification measures this thesis advocates, an approach supported by U.S. actions during the bridge period between START I and New START.

B. *Observing New START’s Strategic Offensive Limitations and Certain Verification Provisions Provides National Security Benefits*

In addition to preventing complete opacity between the United States and Russia, there are numerous national security benefits the United States would reap if it unilaterally observed the strategic offensive limitations of New START, as well as certain verification measures. Two of these benefits will be explored in this section: (1) circumventing the astronomical costs of an arms race; and (2) developing goodwill to keep the door open for future piecemeal non-binding bilateral agreements, or even a comprehensive treaty.

123. GOTTEMOELLER, *supra* note 15, at 86.

124. Rogers et al., *supra* note 122, at 352.

125. Literature often refers to this type of agreement as a “Gentlemen’s Agreement.” The author has chosen to refrain from its use in this Article given its sexist connotations. For an example of “Gentlemen’s Agreement” being referred to, see Abigail Williams, ‘*Gentlemen’s Agreement*’ on U.S.-Russia Nuclear Treaty Extension? U.S. Says Yes, Russia Says No, NBC (Oct. 14, 2020), <https://www.nbcnews.com/news/world/gentlemen-s-agreement-u-s-russia-nuclear-treaty-extension-u-n1243299>; Rogers et al., *supra* note 122, at 352.

Stockpiling nuclear arms entails significant monetary costs, which the United States can avoid by observing the strategic offensive limitations of New START. The United States spends a considerable portion of its budget on nuclear operations: the Biden administration's recent budget request for fiscal year 2025 earmarks USD 69 billion for nuclear weapons operations, sustainment, and modernization.¹²⁶ A nuclear arms race between the United States and Russia would exacerbate this already hefty cost. The Congressional Budget Office (CBO) analyzed several scenarios in which it extrapolated the cost of increasing deployed U.S. strategic nuclear forces to the levels specified in the Moscow Treaty (1,700 to 2,200 warheads), the START II Treaty (3,000 to 3,500 warheads), and the START I Treaty (6,000 warheads).¹²⁷ Pursuant to a flexible approach that expands forces to Start I limits, in which the Department of Defense (DOD) would purchase enough delivery vehicles to reach the desired total number of warheads while maintaining the current number of warheads allocated to each missile and bomber, the DOD would incur costs totaling USD 410 billion to USD 439 billion, as well as additional annual operation and sustainment costs of USD 24 billion to USD 28 billion.¹²⁸

Given that the United States arsenal can already deter two nuclear competitors, as explained in Section V.C, these prohibitive costs should be diverted to other strategic considerations. For example, the United States could take a fraction of these costs and enhance its intelligence systems by replacing and augmenting the fifth and sixth geostationary satellites in the Space-Based Infrared Satellite-High System, which would cost an average of USD 1.1 billion each.¹²⁹ The United States could also divert such costs into expanding its missile defenses. The CBO states that building forty new silos at the Alaska Ground-Based Midcourse Defense base and purchasing interceptors to bolster missile defense against a theoretical Russian attack would cost roughly USD 5 billion.¹³⁰ The CBO also discusses additional alternatives to nuclear stockpiling.¹³¹

126. See Xiaodon Liang, *U.S. Nuclear Costs, Projections Continue to Rise*, ARMS CONTROL ASS'N (Apr. 2024), <https://www.armscontrol.org/act/2024-04/news/us-nuclear-costs-projections-continue-rise>.

127. See CONG. BUDGET OFF., *THE POTENTIAL COSTS OF EXPANDING U.S. STRATEGIC NUCLEAR FORCES IF THE NEW START TREATY EXPIRES* (2020), <https://www.cbo.gov/system/files/2020-08/56475-START.pdf>.

128. *Id.*

129. *Id.* at 8.

130. *Id.*

131. *Id.*

As to the second benefit, observing New START's strategic offensive limitations and certain verification measures unilaterally would instill goodwill, thus keeping open the door for future piecemeal agreements or even a binding treaty. Scholars argued during the Cold War that "in order to reverse the nuclear arms race, nuclear powers should unilaterally seek to reduce tensions."¹³² Indeed, unilateral actions during the Cold War resulted in reciprocity. For example, President Kennedy's 1963 speech stating that the United States would no longer conduct atmospheric nuclear tests paved the way for the Limited Test Ban Treaty.¹³³ President George H.W. Bush's unilateral pledges to reduce the number and deployment of tactical nuclear weapons resulted in General Secretary Gorbachev reciprocating.¹³⁴ Unilateral observation of New START's limitations on strategic offensive arms and certain verification measures could thus result in Russia responding in a reciprocal piecemeal fashion. Even if Russia forms a non-binding agreement with the United States as to New START's numerical limits, there is a national security interest in unilaterally performing certain verification measures, as Russia could see the importance of a verification scheme and begin reciprocating in a piecemeal fashion, possibly leading to the ratification of a treaty.

C. The United States Can Deter Two Peer Nuclear Competitors While Observing New START's Limitations on Strategic Offensive Arms

The most salient counterargument to this Article's thesis is that assuming the United States *unilaterally* observes New START's limitations on strategic offensive arms, the United States would no longer be able to deter both Russia and China because projections show that China will possess 1,000 operational nuclear warheads by 2030.¹³⁵ Consequently, United States national security would be at risk. Although conversations over the respective nuclear arsenals of the United States and Russia took center stage during the Cold War, the growth of China's nuclear armaments and ambition has provoked questions on how the United States can deter two peer nuclear competitors,¹³⁶ especially as both a multilateral treaty between the three nations and a U.S.-China bilateral treaty are

132. Névine Schepers & Oliver Thränert, *Arms Control Without Treaties*, 9/3 CSS POL'Y PERSP. 1, 3 (2021).

133. *Id.*

134. *Id.*

135. U.S. DEP'T OF DEF., *supra* note 13.

136. See, e.g., Heather Williams & Nicholas Adamopoulos, *Arms Control After Ukraine: Integrated Arms Control and Deterring Two Peer Competitors*, CSIS (Dec. 16, 2022), <https://www.csis.org/analysis/arms-control-after-ukraine-integrated-arms-control-and-deterring-two-peer-competitors>.

improbable.¹³⁷ While some commentators have argued that the United States should expand its strategic arsenal in response,¹³⁸ the United States is still able to deter Russia and China while observing New START's numerical limitations and should continue to unilaterally observe them even if Russia has exceeded New START's numerical limitations and China continues to ramp up their arsenal.

Although the United States must now grapple with two peer nuclear competitors, "deterrence is based on the credible threat of retaliation in response to an attack."¹³⁹ Thus, given the United States' current arsenal, "it is implausible that Russia or China will conclude that they could sufficiently degrade U.S. nuclear capabilities with a first strike, even in a worst-case scenario of a joint Chinese-Russian first strike, to avoid massive retaliation."¹⁴⁰ Moreover, literature exists that argues the United States currently has a number of nuclear weapons beyond what is required for deterrence.¹⁴¹ As Charles Moxley notes, there is "a body of literature that says that we can go much lower [than New Start's limits] . . . there has been literature certainly for many years on 1000."¹⁴² He elaborates, "and indeed literature to the effect that 500 nuclear weapons or less would be sufficient for deterrence."¹⁴³ Such literature looks to the concept of minimum deterrence, which calls for "nuclear arsenals smaller than the two major nuclear superpowers currently possess, but large enough to allow

137. While the United States has decades of experience negotiating treaties with Russia, "China has never engaged in nuclear arms control talks with the United States." See Rogers et al., *supra* note 122. This is beginning to change, however. See Shizuka Kuramitsu, *China, U.S. Hold Rare Arms Control Talks*, ARMS CONTROL ASS'N (Dec. 2023), <https://www.armscontrol.org/act/2023-12/news/china-us-hold-rare-arms-control-talks>.

138. See, e.g., Robert Peters, *Russia and China Are Running in a Nuclear Arms Race While the United States is Jogging in Place*, THE HERITAGE FOUND. (Sept. 13, 2023), <https://www.heritage.org/defense/report/russia-and-china-are-running-nuclear-arms-race-while-the-united-states-jogging-place>; Lauren Sukin, *When Nuclear Superiority Isn't Superior: Revisiting the Nuclear Balance of Power*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 17, 2023), <https://carnegieendowment.org/research/2023/10/when-nuclear-superiority-isnt-superior-revisiting-the-nuclear-balance-of-power?lang=en>.

139. Lynn Rusten & Mark Melamed, *The Three-Competitor Future: U.S. Arms Control with Russia and China*, ARMS CONTROL ASS'N (Mar. 2023), <https://www.armscontrol.org/act/2023-03/features/three-competitor-future-us-arms-control-russia-and-china>.

140. *Id.*

141. Zoom interview with Charles Moxley, Adjunct Professor of Law, Fordham School of Law (Apr. 10, 2024) (on file with author). Professor Moxley is the author of *NUCLEAR WEAPONS AND INTERNATIONAL LAW: EXISTENTIAL RISKS OF NUCLEAR WEAPONS AND DETERRENCE THROUGH A LEGAL LENS* (Rowman & Littlefield 2024).

142. *Id.*

143. E-mail from Charles J. Moxley, Adjunct Professor of L., Fordham School of Law, to Matthew Johnson (Aug. 21, 2024, 12:00 EST) (on file with author).

sufficient retaliatory strike capability as to retain strategic stability.”¹⁴⁴ Scholars have noted that,

[T]he number needed to fulfill basic nuclear deterrence is not large and excess weapons increase the nuclear danger without contributing to national or the world's security. Even absent a detailed accounting of nuclear requirements indicating whether the United States needs tens or hundreds of nuclear weapons for deterrence, quick assessment can provide confidence that the number will not exceed one thousand. Therefore, immediate calls to reduce to a thousand weapons, pending further analysis of when and how to go below a thousand, are valid.¹⁴⁵

Thus, given that the United States currently deploys 1,419 strategic nuclear warheads,¹⁴⁶ it can continue to deter two nuclear peers while observing the numerical limitations of New START. Indeed, according to Jake Sullivan, “the United States does not need to increase our nuclear forces to outnumber the combined total of our competitors in order to successfully deter them.”¹⁴⁷ President Trump also iterated in the first month of his second term that “[t]here’s no reason for us to be building brand-new nuclear weapons; we already have so many.”¹⁴⁸

A counterargument to this contention is that the United States would not be able to deter a military alliance between Russia and China. This argument warrants attention but is ultimately a non-starter. Although both states have increased the number of joint security exercises, the Russian and Chinese militaries do not exhibit interoperability.¹⁴⁹ Indeed, a veneer of mistrust also permeates the relationship between many Chinese and Russian officials, business leaders, and citizens,¹⁵⁰

144. Stephen J. Cimbala & Lawrence J. Korb, *Can Minimum Deterrence Save Nuclear Arms Control*, BULL. OF THE ATOMIC SCIENTISTS (June 10, 2024), <https://thebulletin.org/2024/06/can-minimum-deterrence-save-nuclear-arms-control/>.

145. HANS M. KRISTENSEN ET AL., FED’N OF AM. SCIENTISTS & THE NAT. RES. DEF. COUNCIL, FROM COUNTERFORCE TO MINIMAL DETERRENCE: A NEW NUCLEAR POLICY ON THE PATH TOWARD ELIMINATING NUCLEAR WEAPONS 3 (2009), https://nuke.fas.org/norris/nuc_10042901a.pdf.

146. See Bureau of Arms Control, Deterrence, and Stability, *supra* note 68.

147. Sullivan, *supra* note 54.

148. Liang, *supra* note 74.

149. Clara Fong & Lindsay Maizland, *China and Russia: Exploring Ties Between Two Authoritarian Powers*, COUNCIL ON FOREIGN RELATIONS (Mar. 20, 2024), <https://www.cfr.org/backgroundunder/china-russia-relationship-xi-putin-taiwan-ukraine>.

150. See *id.*

frustrating a formal military alliance. Even if such an alliance was formed, it is important to note that a combined Russia-China arsenal would only be just above 1.2 times larger than the U.S. nuclear arsenal.¹⁵¹ And if that number grew as China continued to stockpile nuclear armaments, the United States could meet a numerical gap via other means, including continuing its nuclear modernization program, which it should continue to do while observing the numerical limitations of New START.

As discussed in Section II.A, Article V(1) of New START permits “modernization and replacement of strategic offensive arms.”¹⁵² President Obama set forth a massive rebuild of the U.S. nuclear arsenal,¹⁵³ an effort that the 2022 Nuclear Posture Review identified as a top priority to maintain a strong nuclear deterrence.¹⁵⁴ This modernization recapitalizes all three legs of the existing nuclear “triad” of submarines, missiles, and bombers and their associated warheads and supporting infrastructure, among other initiatives.¹⁵⁵ While there may be concerns that Russia will stockpile arms absent the limitations of New START, especially more advanced arms such as Russia’s “Avangard” hypersonic missile system,¹⁵⁶ U.S. modernization efforts will field advanced arms such as the Sentinel intercontinental ballistic missile system, the Columbia class ballistic missile submarine, and the B-21 Raider, among other initiatives.¹⁵⁷ Therefore, by continuing to modernize its nuclear capabilities across all parts of the nuclear triad, as well as investing in cutting-edge, non-nuclear capabilities to sustain U.S. military advantage,¹⁵⁸ the United States can plug potential national security gaps that exist between itself and its nuclear peers while maintaining the numerical limits of New START.

151. Sukin, *supra* note 138.

152. New START Treaty, *supra* note 15, art. V(1).

153. *The Trillion (and a Half) Dollar Triad?*, ARMS CONTROL ASS’N (Aug. 18, 2017), <https://www.armscontrol.org/issue-briefs/2017-08/trillion-half-dollar-triad>.

154. Joseph Clark, *Pentagon Tackling Nuclear Modernization with Proactive, Integrated Approach*, U.S. DEP’T OF DEF. (Aug. 25, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3505989/pentagon-tackling-nuclear-modernization-with-proactive-integrated-approach/>.

155. For a detailed discussion of current U.S. nuclear modernization initiatives, see U.S. DEP’T OF DEF., 2022 NUCLEAR POSTURE REVIEW (2022).

156. *Russia Deploys Avangard Hypersonic Missile System*, BBC (Dec. 27, 2019), <https://www.bbc.com/news/world-europe-50927648>.

157. Clark, *supra* note 154.

158. Sullivan, *supra* note 54.

D. *The United States Should Observe New START's Numerical Limitations and Prohibition Against NTM Interference, even if Russia Exceeds the Numerical Limits or Interferes with U.S. NTM*

If Russia exceeds the numerical limitations of New START or inhibits U.S. NTM via interference or concealment following its expiration, the United States should continue to observe these limitations unless Russia performs an action that is “militarily significant.” On the other hand, the auxiliary actions that this thesis also advocates for—publicly releasing the numbers of U.S. strategic offensive arms and providing Russia with notifications of certain launches and military exercises—should be observed without exception. Failure to observe the auxiliary actions, despite Russia failing to mirror them, would only deepen opacity without providing substantial national security benefits.

This approach finds support in the Nitze-Baker test, a litmus test for effective verification which stems from U.S. arms negotiator Paul Nitze and was expanded upon by former U.S. Secretary of State James Baker.¹⁵⁹ During the U.S.-Soviet negotiations over the INF Treaty, Paul Nitze stated, “[i]f the other side moves beyond the limits of the treaty in any militarily significant way, we would be able to detect such violation in time to respond effectively, and thereby deny the other side the benefit of the violation.”¹⁶⁰ James Baker, during the START I negotiations, added the qualification that effective verification includes the ability to detect “patterns of marginal violations that do not present immediate risk to U.S. security.”¹⁶¹ As Christopher Ford, former Assistant Secretary of State for International Security and Non-Proliferation, argued, the militarily significant aspect of the Nitze-Baker test “allows for the possibility that if one’s verification margin of error is sufficiently small, outcome divergences within that margin may be acceptable because they would not overturn the military balance that it is the fundamental ambition of the agreement to regulate.”¹⁶² Thus, “effective verification does not require 100 percent certainty, and one of the reasons why it is possible to have arms control agreements between geopolitical rivals and ideological adversaries at all.”¹⁶³

As discussed in Section V.C, the United States can deter Russia and China despite New START’s numerical limitations because the U.S. arsenal exceeds minimum deterrence capabilities and the United States

159. Christopher A. Ford, *Why Not Nuclear Disarmament?* 27 THE NEW ATLANTIS 3, 4 (2010).

160. *Id.*

161. *Id.*

162. *Id.* at 5.

163. *Id.*

is continuing to modernize its nuclear arsenal; thus, a militarily significant action that gives Russia the upper hand is a high standard. Given these factors, the United States has considerable wiggle room on how to reproach Russia and can take advantage of its modernization efforts and strategic relationships with allies to address Russia's actions. The United States could also rely on other strategic capabilities enhanced via funds diverted from not participating in a nuclear arms race, as discussed in Section V.B. This approach echoes a 2012 Pentagon report that followed the signing of New START, in which the Pentagon stated,

Russian deployment of additional strategic warheads, which, even if significantly above the New START Treaty limits, would have little to no effect on the U.S. assured second-strike capabilities The Russian Federation, therefore, would not be able to achieve a military significant advantage by any plausible expansion of its strategic nuclear forces, even in a cheating or breakout scenario under the New START Treaty.¹⁶⁴

Moreover, in the event that the United States assesses that it must respond to a Russian military advantage by decisively exceeding New START's numerical limitations, the United States could resort to its reserve of additional warheads—the stockpile consists of 3,750 active and inactive nuclear warheads¹⁶⁵—which could be uploaded onto ballistic missiles and bombers, providing a hedge against such unexpected security challenges.¹⁶⁶ They could also be uploaded relatively quickly.¹⁶⁷ It would take Russia achieving an astoundingly significant military advantage that could not be met by other means before the United States should revoke unilateral observation of the numerical limitations of New START.

Similarly, the United States should not interfere with Russian NTM or utilize concealment measures to impede Russian NTM, unless Russian interference with U.S. NTM results in a military advantage. For example, one method of concealment is to place nets over mobile

164. Pifer, *supra* note 56.

165. This number does not include retired warheads awaiting dismantlement. See Shannon Bugos, *U.S. Discloses Nuclear Stockpile Numbers*, ARMS CONTROL ASS'N (Nov. 2021), <https://www.armscontrol.org/act/2021-11/news/us-discloses-nuclear-stockpile-numbers>.

166. EDWARD GEIST, RAND CORP., *QUALITIES PRECEDE QUANTITIES: DECIDING HOW MUCH IS ENOUGH FOR U.S. NUCLEAR FORCES 4* (2023), https://www.rand.org/content/dam/rand/pubs/perspectives/PEA2500/PEA2555-2/RAND_PEA2555-2.pdf.

167. CONG. BUDGET OFF, *supra* note 127.

missiles to prevent clear satellite pictures.¹⁶⁸ If the United States can detect minor concealment of Russia's arsenal, which could tentatively be overcome by investment in U.S. intelligence capabilities (see Section V.B), reciprocal action is not warranted. If, however, Russia utilizes comprehensive and long-lasting electromagnetic interference against U.S. satellites or launches a kinetic attack against U.S. satellites, resulting in a distinct Russian military advantage regarding NTM capabilities, the United States should then, and only then, respond in kind and interfere with Russia's NTM and use concealment measures.

VI. CONCLUSION

Although "the whole arms control architecture has been dismantled" due to President Vladimir Putin's suspension of New START,¹⁶⁹ the foundation on which the U.S.-Russian bilateral nuclear arms control architecture once stood for half a century still endures, despite a handful of cracks. Because the United States and Russia are unlikely to ratify a successor treaty to New START due to Russia's war in Ukraine and partisan politics in the U.S. Senate, the United States should unilaterally adopt a policy that observes key provisions of New START upon its expiration, thereby taking the first step in attempting to repair the foundation of the U.S.-Russia arms control architecture. Unilateral observation of the specific New START provisions advocated for in this thesis, observing New START's limitations on strategic offensive arms and prohibition against interfering with NTM or using concealment measures to impede NTM, as well as the auxiliary actions of publishing the aggregate numbers of U.S. strategic offensive arms and providing Russia with notifications of ICBM and SLBM launches and significant military exercises, all constitute the first common-sense and logical bricks to be laid upon this foundation.

Precedent exists for a unilateral observation of New START's limitation on strategic offensive arms and verification measures absent a binding obligation to do so. Such a unilateral approach would confer critical national security benefits, namely, the avoidance of the prohibitive costs associated with a nuclear arms race and instilling goodwill for future piecemeal agreements, without sacrificing the United States' ability to deter Russia and China. Given the advantages of this unilateral approach, the United States should continue to observe New START's limits on strategic offensive arms and prohibition against interfering with NTM or using concealment measures, unless Russia gains a

168. Gottemoeller, *supra* note 95.

169. See NATO, *supra* note 5.

significant military advantage by exceeding the numerical limits or critically interfering with U.S. NTM.

A decision to instead regain full control and autonomy over the numbers of its nuclear arsenal and stockpile nuclear arms—a choice the United States rejected in the scope of the SALT I Interim Agreement, SALT II, and the bridge period prior to New START—not only further assists President Putin in dismantling what is left of the arms control architecture between the nations, but would spark (or exacerbate) a nuclear arms race between the United States, Russia, China, and other nuclear countries, threatening the opening of Pandora's Box, or, in other words, nuclear Armageddon. At this critical moment that will shape the future of U.S.-Russia nuclear arms control, the United States should adopt a unilateral policy observing key provisions of New START to work towards sealing Pandora's Box, once and for all.