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The President and Nuclear Weapons: Authorities, Limits, and Process

SUMMARY

There is no more consequential decision for a president than ordering a nuclear strike. In the Cold War, the threat of sudden nuclear annihilation necessitated procedures emphasizing speed and efficiency and placing sole decision-making authority in the president's hands. In today's changed threat environment, the legal authorities and process a U.S. president would confront when making this grave decision merit reexamination. This paper serves as a resource in the national discussion about a president's legal authority and the procedures for ordering a nuclear strike, and whether to update them.

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Executive Summary

There is no more consequential decision for a president than ordering a nuclear strike. The U.S. government grappled with the process for making that decision during the decades of the Cold War. The threat of sudden nuclear annihilation by the Soviet Union shaped the resulting procedures, which emphasize speed and efficiency and which place sole decision-making authority in the president's hands. Today we face a different threat environment, but tensions remain between states with nuclear weapons. As a result, public and congressional attention has focused on the legal authorities and limitations, as well as the process, that a U.S. president would confront when making the grave decision of whether to use a nuclear weapon. It is a complex subject, and few sources address it clearly and simply. This paper seeks to fill that gap by identifying the key legal questions relevant to a president's decision and by summarizing the state of the law and the relevant process.

Currently, neither domestic nor international law specifically addresses the authority to use nuclear weapons. Nonetheless, because of the devastating potential of those weapons, existing authorities relating to use of force generally may apply differently to nuclear weapons than to other weapons. The paper looks first at U.S. domestic law, including the Constitution and statutes, and examines the respective powers of the president and Congress in decisions about the use of nuclear weapons. The Constitution's division of war powers between the executive and legislative branches is notoriously murky. Congressional authority might act in two ways to restrict a president's decision to use nuclear weapons: (1) if the president is required to seek congressional authorization before use, and (2) if a statute prohibits or limits certain uses of those weapons. Regarding the first, there is little question that a president has the authority to respond in self-defense against a nuclear attack without seeking prior authorization. The more difficult question arises when a president plans a first use of nuclear weapons. There is a strong argument that if a president contemplates a first use of nuclear weapons to preempt a perceived nuclear threat before the threat has developed to the point at which an attack has begun or is imminent, he must first seek authorization from Congress. The legal conclusion might be different, however, if the first use is in response to a conventional attack on the United States or in the course of a conventional armed conflict.

Like questions about authorization, the extent of Congress's power to limit by statute a president's authority to use nuclear weapons is controversial. Congress clearly has some power to affect a president's decision-making in this area, if it chooses to act. Most experts agree that Congress's various war powers would allow it to prevent entirely the inclusion of nuclear weapons in the arsenal. Congress could also deny funding for weapons through its appropriations power. Congress's broad authorities to establish and regulate armies and a navy also include some power to restrict presidential decision-making about when and how to use nuclear weapons, but how much is not clear. The closer congressional action comes to micromanaging tactical "battlefield" decisions, the more likely it is to run afoul of the president's authority as commander in chief.

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The paper next examines international law and how it may act to limit a president's options in using nuclear force. The United Nations (UN) Charter would prohibit any use of force, including nuclear force, in the territory of another state unless the state consents, the UN Security Council authorizes the force, or the force is in self-defense against an actual or imminent armed attack. In addition, for a use of nuclear force to be legal, it must satisfy customary *ad bellum* international law requirements of necessity and proportionality. The proportionality principle is likely to be a challenge for any first use of nuclear weapons in self-defense because of the enormous destructive power of those weapons. International humanitarian law (IHL) regulates the means and methods used in conflict and balances the two fundamental principles

of humanity and military necessity. The principle of humanity includes three key requirements: distinction, proportionality, and avoidance of unnecessary suffering. Each of these requirements presents a very significant legal hurdle for the use of nuclear weapons.

Before any actual decision to launch, the president has an opportunity to consult with advisers, including his lawyers, although there is no requirement that he do so. The final decision to launch is the president's alone.

Last, the paper examines—to the extent possible in an unclassified source—the current executive branch process for decisions about nuclear launch, the opportunities those procedures afford for a president to receive legal advice, and possible protections against an illegal nuclear strike order. The policies and procedures by which the United States may employ nuclear weapons are designed to ensure that, if deterrence fails, the United States has the capability to respond effectively with nuclear weapons. The process for nuclear launch decisions includes extensive contingency planning in peacetime that provides a president with a range of options that have been debated and reviewed in advance, including by lawyers. Before any actual decision to launch, the president has an opportunity to consult with advisers, including his lawyers, although there is no requirement that he do so. The final decision to launch is the president's alone. Once a president makes this decision, the order goes to an Emergency Action Team at the Pentagon and a structured and automatic process begins, with limited flexibility for the actors in that process to raise legal concerns.

Because a president's order to launch nuclear weapons could violate U.S. or international law, an important question is whether there are sufficient opportunities to guard against an illegal order. The process provides some opportunities, but there are no guarantees. As noted, there is legal review of the predeveloped or preplanned options presented to the president for decision. This review focuses on IHL issues and can eliminate options that are illegal under any circumstance, but it does not address fully the constitutional, *ad bellum*, or other legal issues that rely on an understanding of the specific context and circumstances of a potential strike. A president may seek additional legal advice before a decision to launch; this would often happen as part of the traditional National Security Council process. A president may choose to truncate that process, however, or even dispense with it altogether.

With respect to the question of whether and how an illegal order to launch nuclear weapons could be impeded, there are two possible mechanisms. One is the obligation for members of the armed forces to refuse unlawful orders, and the other is the process set out in the Twenty-Fifth Amendment to the U.S. Constitution for transfer of power in the event of a president's disability. Both are difficult and of limited use in this context. After the president makes a launch decision, a member of the Emergency Action Team

responsible for implementation may raise concerns that the order is unlawful. Members of the armed forces are obligated to refuse orders that are “manifestly” or “patently” illegal. This is a strict standard, however, and the legal issues involved are complex and fact dependent. The automatic nature of the post-decision process for implementing a launch order could make it difficult for military personnel to seek and receive adequate advice in the time available.

The second mechanism—the Twenty-Fifth Amendment procedures—involves several steps, including the vice president seeking a vote of principal Cabinet members, notification to Congress, an opportunity for the president to reverse the transfer, a second cabinet vote and congressional notification, and a vote of both houses of Congress. The process is time consuming, but it does, in principle, provide a possible route to transfer of power in the extreme case in which an infirm president is determined to move forward with what the president’s cabinet judges to be a reckless or illegal nuclear strike.

This paper illuminates but does not attempt to provide authoritative answers to the many complex and contested legal issues that accompany decisions about the use of nuclear force. It identifies some limitations on a president’s actions and potential shortcomings in the existing process. Its primary purpose, however, is to highlight key issues, summarize the various viewpoints, and provide some practical insight into how legal questions may arise and whether and how they can affect decisions regarding the use of nuclear weapons. This paper is intended to serve as a resource in the national discussion pertaining to the authority and procedures of a president to order a nuclear launch, and potential options for updating that authority and those procedures.

Introduction

There is no more consequential decision for a president than ordering a nuclear strike. The U.S. government grappled with the process for making that decision during the decades of the Cold War. The threat of sudden nuclear annihilation by the Soviet Union shaped the resulting procedures, which emphasize speed and efficiency and which place sole decision-making authority in the president's hands. Today we face a different threat environment, but tensions remain between states with nuclear weapons. As a result, public and congressional attention has focused on the legal authorities and limitations, as well as the process, that a U.S. president would confront when making the grave decision of whether to use a nuclear weapon. It is a complex subject, and few sources address it clearly and simply.

The U.S. Constitution's division of war powers between the executive and legislative branches is notoriously murky. Few areas of law are more debated and less settled.

This paper seeks to fill that gap by identifying the key legal questions and summarizing the state of the law. It first discusses U.S. law—the Constitution and statutes—and examines the respective powers of the president and Congress in decisions about the use of nuclear weapons. The paper next looks at international law and how it may act to limit a president's options for using nuclear force. Finally, it examines the current executive branch process for decisions about nuclear launch, the opportunities those procedures afford for providing legal advice, and possible protections against an illegal nuclear strike order.

The paper does not attempt to provide authoritative answers to the many complex and contested legal issues that accompany decisions about nuclear force. It does identify some limitations on a president's actions and potential shortcomings in the existing process. Its primary purpose, however, is to highlight key issues, to summarize the various viewpoints, and to provide some practical insight into how legal questions may arise and whether and how they can affect decisions.

Does U.S. Law Limit the President's Decision to Use Nuclear Weapons?

The U.S. Constitution's division of war powers between the executive and legislative branches is notoriously murky. Few areas of law are more debated and less settled. The Constitution confers significant authority on each branch, but the exact scope of those authorities and the ways in which they interact remain controversial. Congressional authority might act in two principal ways to restrict a president's decision to use nuclear weapons: (1) if the president is required to seek congressional authorization before use, and (2) if a statute prohibits or limits certain uses of those weapons.

Constitutional War Powers: Background

As part of an attempt to create structural checks on the power of each coequal branch of government, the Founders granted war power authority to both the executive and legislative branches. The Constitution's grants of authority to Congress to "declare War,"¹ to "raise and support Armies,"² to "provide and maintain a Navy,"³ and to "make Rules for the Government and Regulation of the land and naval Forces,"⁴ among others—as well as Congress's power over appropriations,⁵ including for the national defense and foreign affairs—collectively provide significant power over the military and foreign affairs.⁶

There is wide—although not universal—agreement among constitutional scholars and practitioners that the power to "declare War" was intended to (and still does) require congressional authorization for *some conflicts*.⁷ Those experts just disagree about the kinds of conflicts⁸ and the degree of control this authority gives Congress over the conduct of those conflicts.⁹ Contemporary understandings of the "declare War" clause generally deem an authorization for the use of military force or other statutory authorization to be an acceptable mechanism for Congress to exercise its authority and do not require a formal declaration of war.¹⁰ The powers to "raise and support Armies," "make Rules for the Government and Regulation of the land and naval Forces," and "provide and maintain a Navy," some scholars argue, necessarily include the lesser authority to regulate or restrict the weapons those military services may use.¹¹ Finally, the appropriations power can be used to impose meaningful limitations on the conduct of military action. The most significant use of the "power of the purse" to limit the military was the 1973 prohibition of use of appropriations to support combat activities in Vietnam, Cambodia, and Laos.¹² Congress could also use its appropriations power to slow or halt the development of new nuclear capabilities, to limit nuclear explosive testing, to limit the number of nuclear weapons in the arsenal, or to reduce the size of the nuclear force.¹³

The president's principal war power derives from Article II's instruction that the "President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States."¹⁴ As commander in chief, the president has "command of the forces and the conduct of military campaigns."¹⁵ This is widely understood to confer on the president alone the authority to command forces and direct the conduct of military campaigns through "battlefield decisions."¹⁶

Scholars—and, to a lesser degree, courts—have grappled throughout U.S. history with how these grants of authority interact. There is general agreement that the president's war powers have expanded, in practice, since World War II.¹⁷ There are many explanations for this expansion.¹⁸ Even so, the degree of this shift is not clear, and most would agree that Congress maintains significant authority.

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Is Congressional Authorization Required for Use of Nuclear Weapons?

All but those with the most executive-favoring view of war powers¹⁹ would agree that *some* circumstances exist under which Congress's war powers require the president to obtain congressional authorization before taking military action. The question, then, is: when does a president's plan to use a nuclear weapon trigger this requirement?

A nuclear attack on the United States represents one of the gravest threats imaginable. The president would need to act quickly and decisively. There is little doubt of his authority under those circumstances to respond with nuclear force without seeking prior authorization from Congress.

There are two relevant scenarios to consider: (1) a scenario in which a president plans to use a nuclear weapon in self-defense against a nuclear attack, and (2) a U.S. "first use" of nuclear weapons.²⁰ The latter scenario is the more complicated, and there is a strong argument that the president would be required to seek congressional authorization in some first-use scenarios.

Self-Defense against Nuclear Attack

The president has the authority, on his own initiative, to use force in self-defense to repel an attack on the United States. This was the Supreme Court's holding in the *Prize Cases*.²¹ In that Civil War-era opinion, the court held that no prior declaration of war was required before President Lincoln blockaded Southern ports in response to a Confederate use of force. The court concluded that "the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."²² This presidential authority to act unilaterally in the face of an attack is widely accepted.²³ A nuclear attack on the United States represents one of the gravest threats imaginable. The president would need to act quickly and decisively. There is little doubt of his authority under those circumstances to respond with nuclear force without seeking prior authorization from Congress.

First Use of Nuclear Weapons

A more difficult question arises when a president plans a first use of nuclear weapons.²⁴ First-use scenarios fall into two broad categories, although there are variations within each category: (1) a first use of nuclear weapons intended, perhaps, to address a perceived nuclear threat but launched before that threat has developed to the point at which a nuclear attack has begun or is imminent, and (2) a first use in response to a conventional attack or during a conventional armed conflict. In the first scenario, the argument that prior congressional authorization would be required is stronger.

First Use in the Absence of Conflict or Attack. There is a long history of presidents using conventional force without congressional authorization and not in response to an attack on the United States. Most notably, President Harry S. Truman never sought or received authorization for U.S. involvement in the Korean War, a conflict that lasted longer than three years.²⁵ Executive branch precedent since that time, however, generally supports the view that Truman's actions were not constitutional and that congressional approval was required.²⁶

More common have been presidential commitments of troops or uses of force in more limited circumstances without congressional sanction.²⁷ Two recent examples of this type of deployment are (1) the Obama administration's participation in a 2011 allied military air operation in Libya in reaction to fears of an impending massacre by the al-Gaddafi regime²⁸ and (2) the Trump administration's strikes in Syria in response to the Assad government's use of chemical weapons on its own citizens.²⁹ In both circumstances, the Office of Legal Counsel (OLC) at the Department of Justice—the office that provides definitive legal advice for the executive branch—advised the president that congressional authorization was not required before using force.³⁰

OLC engages in two inquiries in determining whether using force without congressional authorization, and in the absence of an attack, is appropriate: (1) whether the president can find that the proposed operations further “important national interests,” and (2) whether the “anticipated nature, scope, and duration” of the anticipated conflict “constitutes a ‘war’ within the meaning of the Declaration of War clause.”³¹ Presumably, any president contemplating the use of a nuclear weapon will be able to articulate a satisfactory national interest in doing so. It will be a greater hurdle, however, to demonstrate that the planned engagement does not constitute a “war” in the constitutional sense.

In its Libya and Syria opinions, OLC emphasizes the “limited means, objectives, and intended duration”³² of the planned operations and the “efforts to avoid escalation”³³ to illustrate that the conflict falls short of “war.” OLC identifies the type of engagement that would trigger a requirement for congressional authorization as one involving “prolonged and substantial” military actions that typically would involve “exposure of U.S. military personnel to significant risk over a substantial period.”³⁴ Among the considerations deemed relevant is whether U.S. forces are “likely to ‘suffer or inflict substantial casualties as a result of the deployment.’”³⁵

Any analysis of these issues is highly fact dependent, but it is unlikely that a proposed first-use nuclear strike would be “limited” in “means, objectives, and intended duration.” Casualties would likely be massive and the risk of escalation great.³⁶ In applying the executive branch's own legal analysis, then, a proposed first use of nuclear weapons when the United States has neither been attacked nor is engaged in an authorized conflict would likely be considered a “war” for purposes of the “declare War” clause and would require prior authorization.

First Use Following a Conventional Strike or During Conventional Armed Conflict. The legal question could change if a first use of nuclear weapons is in response to a conventional attack on the United States or during an ongoing conventional armed conflict. As previously discussed, the Supreme Court has held that the president is not required to seek authorization when responding in self-defense.³⁷ The president's powers may also be greater when the country is engaged in armed conflict, particularly if it is an authorized conflict. Some have suggested that a nuclear response to a conventional provocation or conflict is so sharply escalatory that it “arguably initiates a new and dangerously more threatening war” and therefore requires congressional approval even if the president is acting in self-defense or the country is engaged in an authorized armed conflict, which the president seeks to escalate.³⁸ Throughout much of the Cold War, U.S. policy held that the response to a large-scale Soviet conventional attack would be nuclear use.³⁹ Although the policy was silent on whether Congress would authorize that response, this does suggest that the U.S. Government at that time did not share the view that a nuclear response would initiate a new conflict. Given

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that precedent, the president's lawyers would probably conclude that he has the authority to respond with nuclear force on his own initiative, particularly if a rapid response is needed.

Practical Challenges: Enforcement and Accountability

As discussed, there are at least some scenarios in which a president should obtain congressional approval before engaging in a first use of nuclear weapons. It is not clear, however, how much this legal requirement would, as a practical matter, limit presidential action because there is no mechanism to enforce it. There is little chance that the courts would act on the issue, because they are notoriously reluctant to involve themselves in war powers disputes.⁴⁰ Increasingly, Congress is also reluctant to assert itself on matters of war and peace.⁴¹

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There are many strong legal, political, and governance arguments for obtaining congressional authorization before using a nuclear weapon. But for a president unmoved by those arguments, the improbability of court or congressional intervention removes a powerful motivation to obtain authorization. Unless public pressure provides a different incentive, the Constitution's requirement of prior authorization may have little practical effect.

May Congress Limit or Prohibit Use of Nuclear Weapons?

Currently, no statute limits or regulates the president's authority to use nuclear weapons. Bills on the subject have been introduced and debated over the decades, however,⁴² and congressional interest has increased recently.⁴³ Like questions about authorization, the extent of Congress's authority to pass such a statute is controversial, although Congress certainly has some power to affect the president's decision-making in this area if it chooses to act.

Since the mid-twentieth century, the Supreme Court and lower courts, when considering the interplay of executive and legislative powers, have looked to Justice Robert H. Jackson's analysis in the 1952 case *Youngstown Sheet & Tube Co. v. Sawyer*.⁴⁴ In that case, which considered President Truman's seizure of steel production facilities during the Korean War, Justice Jackson explained that the president's powers generally "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."⁴⁵ Thus, the president's flexibility to act in areas such as this one, in which both branches possess authority, depends in part on whether Congress has spoken on the issue. When the president

acts in a way that is consistent with an express or implied authorization by Congress, "his authority is at its maximum."⁴⁶ When Congress has been silent on an issue, the president may rely only on his own powers, but there is a "zone of twilight"⁴⁷ in which the distribution of powers is uncertain and congressional inertia can enable presidential action. When the president acts in a way that is incompatible with the express or implied will of Congress, "his power is at its lowest ebb" and he can act only when his power is "exclusive" and "so conclusive and preclusive" that it is "beyond control by Congress."⁴⁸

As discussed, the precise limits of congressional and executive war powers authority are a source of continual debate.⁴⁹ Some things are fairly clear. Congress’s power to “raise and support Armies,” “provide and maintain a Navy,” and “make Rules for the Government and Regulation of the land and naval Forces” would allow Congress to remove nuclear weapons from the U.S. arsenal. Congress could also deny funding for the weapons.⁵⁰ The Supreme Court has long recognized that Congress has some authority to constrain the president’s activities during wartime,⁵¹ although the degree of that authority remains unclear. Most experts would agree that if Congress attempted to legislate specific tactical moves in battle or to issue orders directly to the president’s subordinates, that would intrude impermissibly on “exclusive” presidential authority.⁵² How far this goes is less clear. Some argue that a choice of which weapon to employ—once that weapon is in the arsenal—is, similarly, an exclusive presidential authority on which Congress cannot intrude.⁵³ Others say that Congress’s powers to establish and regulate armies and a navy, as well as to cut off funds for nuclear weapons entirely, necessarily include the authority to place restrictions on the president’s decision-making with respect to the use of those weapons.⁵⁴

Assuming that Congress possesses some authority to limit the president’s ability to use nuclear weapons, the next question is what types of restrictions are most likely to survive scrutiny—either by the courts (although court review is quite unlikely),⁵⁵ or by the executive branch.⁵⁶ The closer a statute comes to micromanaging tactical “battlefield” decisions, the more problematic it becomes. Some possible actions include the following.

Limitation by Statute of First Use of Nuclear Weapons. Legislation proposed in the 115th Congress would restrict the president’s ability, on his own, to order a “first-use nuclear strike,” defined as an “attack using nuclear weapons against an enemy that is conducted without the president determining that the enemy has first launched a nuclear strike against” the United States or its allies.⁵⁷ The proposal does not prohibit first use or declare a policy against it, but it asserts Congress’s role in the decision-making process by stating that such a strike would violate the Constitution unless Congress had first passed a declaration of war that “expressly authorizes” a nuclear strike.⁵⁸ Congress has considered similar legislation in the past.⁵⁹

There is a strong argument, articulated in the previous section, that such a proposal is within Congress’s power. Unlike a prohibition, it would not take a military option off the table. Instead, it asserts a congressional role in this highly consequential national security decision. Nonetheless, this claim of congressional authority could be controversial within the executive branch, making it likely that the legislation would prompt a veto.

Limitations as Part of a Force Authorization. A similar but more targeted option would be for Congress—in the process of authorizing a conventional conflict—to limit the use of nuclear weapons in that conflict. For example, Congress might clarify that first use of nuclear weapons would require separate authorization. The Supreme Court has held that Congress may limit the scope and targets of a conflict it has authorized.⁶⁰ On many occasions throughout U.S. history, Congress has authorized the use of force but placed limitations on how that force may be employed,⁶¹ including by identifying permissible targets,⁶² by specifying which military service could be used,⁶³ and by limiting the geographic or temporal scope of the conflict.⁶⁴ There

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does not appear to be an example of Congress restricting the type of weapon that the president may use, but an argument can be made that such a restriction does not differ in relevant ways from those precedents. Such an approach might be less likely to invite a veto than a statute limiting the first use of nuclear weapons because the president would presumably want the underlying authorization. The approach would not be without its detractors, however. Some would argue, for example, that it undermines deterrence to take nuclear weapons off the table. In addition, limitations on authorization in the context of an ongoing conflict could prove politically difficult for members of Congress.

International laws related to conflict—including the UN Charter, the Geneva Conventions, and other treaty and customary international laws—operate differently from domestic law found in the U.S. Constitution and statutes. They can nonetheless act to constrain a president’s decision-making related to the use of nuclear weapons.

Imposing Procedural Requirements for a First-Use Decision. A more limited but perhaps more realistic recent proposal would not seek to insert Congress into the president’s decision-making process for the first use of nuclear weapons but would strengthen that process within the executive branch.⁶⁵ Such a proposal reflects the concern, discussed in Section III, that there are inadequate mechanisms to ensure that the president receives responsible advice and considers all relevant factors in a decision about first use of nuclear weapons.⁶⁶ Possible procedural protections could include a requirement that the secretary of defense certify that the launch order is valid—that is, that it comes from the commander in chief—and that the attorney general (or designee) be included in the decision process and confirm that the order is legal.⁶⁷

Although those requirements, if imposed by Congress,⁶⁸ would no doubt generate some constitutional concerns, they are far less intrusive on presidential authorities than the other alternatives discussed. Those who seek congressional input on these decisions will not find this approach as satisfying as the options previously discussed, but it is less likely to prompt a veto or other negative executive branch action and thus stands a better chance of becoming law.⁶⁹

Does International Law Limit the President’s Authority to Use Nuclear Weapons?

International laws related to conflict—including the UN Charter, the Geneva Conventions, and other treaty and customary international laws—operate differently from domestic law found in the U.S. Constitution and statutes. They can nonetheless act to constrain a president’s decision-making related to the use of nuclear weapons.⁷⁰

The International Court of Justice (ICJ), in a 1996 advisory opinion on the legality of nuclear weapons, concluded that “[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.”⁷¹ The court emphasized, however, that any use of force by means of nuclear weapons must comply with the UN Charter and its provisions related to the use of force as well as with the principles of international humanitarian law and other international laws related to conflict.⁷² As discussed in more detail in Section II.b, the court concluded that “the threat or use of nuclear weapons would generally be contrary” to international law related to conflict, particularly

IHL, but it could not “conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”⁷³

Some Uses of Nuclear Weapons Could Violate the UN Charter and *Jus Ad Bellum* Principles of International Law

Although the use of nuclear weapons is not per se prohibited under international law, there are a variety of ways in which a nuclear strike—particularly a first use of nuclear weapons—could violate specific international law requirements. For example, using force with a nuclear weapon—or any other weapon—could violate the UN Charter’s prohibition on the use of force in the territory of another state unless it met the requirements for one of the exceptions to that prohibition.⁷⁴ One exception, found in Article 51 of the charter, permits a use of force in self-defense against an armed attack.⁷⁵ Thus, a military strike, using a nuclear weapon or any other weapon, would be illegal if the United States had not suffered an armed attack.⁷⁶ A state need not wait until an armed attack has occurred to respond in self-defense, but can act in anticipatory self-defense if an armed attack is “imminent.”⁷⁷ What qualifies as an imminent attack is the subject of some disagreement among nations and legal experts. A preventive strike—that is, one against a prospective attacker that has the capability to strike but is neither planning nor preparing to do so—would not be a lawful exercise of anticipatory self-defense.⁷⁸ It is the position of the U.S. government that the imminence standard is not solely a question of temporal proximity, but can be based on other circumstances. For example, the United States might consider an armed attack to be imminent, even if it is not expected immediately, when the attacker is clearly committed to the attack and failing to act promptly would result in the loss of the opportunity to take effective action in self-defense.⁷⁹

For a use of force in self-defense to be legal, it also must satisfy customary international law requirements of necessity and proportionality.⁸⁰ The necessity requirement in this context requires an assessment of whether force in a non-consenting state is necessary to address the threat or whether other measures short of force—law enforcement or diplomacy, for example—would suffice.⁸¹ The proportionality principle examines the type of force employed to determine whether the damage it will cause—including to innocent civilians—is more than what is needed to prevent or repel an armed attack. Although these assessments are highly fact dependent, the proportionality principle is likely to be a challenge for any use of a nuclear weapon in self-defense because of the massive human and environmental destruction that those weapons cause and the inevitable impact on civilians.

Many Uses of Nuclear Weapons Would Violate International Humanitarian Law

IHL, also known as the law of armed conflict and the *jus in bello*, does not focus on the justness of a conflict or on how the parties came to be fighting. IHL is about the means and methods used in conflict and how

Although the use of nuclear weapons is not per se prohibited under international law, there are a variety of ways in which a nuclear strike—particularly a first use of nuclear weapons—could violate specific international law requirements.

the law applies to control their use. IHL balances the two fundamental principles of humanity and military necessity. The International Committee of the Red Cross describes the balance this way:

IHL is a compromise between two underlying principles, of humanity and of military necessity. . . . The principle of military necessity permits only that degree and kind of force required to achieve the legitimate purpose of a conflict, i.e. the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources. It does not, however, permit the taking of measures that would otherwise be prohibited under IHL. The principle of humanity forbids the infliction of all suffering, injury or destruction not necessary for achieving the legitimate purpose of a conflict.⁸²

The principle of humanity includes three key requirements: distinction, proportionality, and avoidance of unnecessary suffering. Use of a nuclear weapon, assuming it can satisfy the requirements of the military necessity principle, would not be permitted if it otherwise violates IHL.

The principle of humanity includes three key requirements: distinction, proportionality, and avoidance of unnecessary suffering. Use of a nuclear weapon, assuming it can satisfy the requirements of the military necessity principle, would not be permitted if it otherwise violates IHL. As the ICJ Advisory Opinion points out, use of nuclear weapons runs a very high risk of violating IHL because each of the key requirements of the humanity principle raises high, perhaps insurmountable, legal hurdles.⁸³

Distinction Requirement. The principle of distinction protects civilians not taking part in hostilities by requiring parties to the conflict to “distinguish between civilian objects and military objectives and . . . direct their operations only against military objectives.”⁸⁴ Parties are not permitted to target civilian populations.⁸⁵ A related principle prohibits the use of weapons that are, by their nature, indiscriminate—that is, those “of a nature to strike military objectives and civilians or civilian objects without distinction.”⁸⁶

Some argue that nuclear weapons, with their massive blasts and the even larger radius in which radiation would be released, are by their nature indiscriminate because it is impossible to distinguish between military objectives and civilians in their use. According to this argument, a nuclear strike would always violate the distinction requirement.⁸⁷ The ICJ was not willing to make this broad determination because it lacked sufficient facts, including about the possible use of low-yield tactical nuclear weapons.⁸⁸ The U.S. Department of Defense has taken the position that nuclear weapons are not inherently indiscriminate.⁸⁹ A distinction analysis would consider the weapon’s strength, the manner in which it distributes its yield, and the potential radius of radiation. Any nuclear strike would create a high risk of a distinction violation.

Proportionality Requirement. This IHL principle prohibits launching an attack—even against a legitimate military objective—in which incidental harm to civilians would be excessive in relation to the anticipated military advantage.⁹⁰

The proportionality principle obligates parties to refrain from such attacks and “take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.”⁹¹ An attack is illegal if it would kill or injure civilians to a degree that is disproportionate to its advantage.

The challenges that the proportionality principle present for a contemplated nuclear strike are obvious if the attack is planned anywhere near a civilian population. The initial blast that accompanies a nuclear attack would kill large numbers of civilians in the area. The radiation would cause death and disease for years to come. Thus, it is difficult to imagine a nuclear attack near civilians that would not violate the proportionality principle, particularly if conventional weapons are available that would achieve a similar military objective. The proportionality analysis might shift, however, if the nuclear weapon in question had a sufficiently low yield that its overall impact would cause less harm to civilians than available conventional weapons that were suited to the task.

Avoidance of Unnecessary Suffering. “The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited.”⁹² IHL recognizes that injury and suffering will occur, but it prohibits causing unnecessary suffering. Again, the characteristics of a nuclear strike and the potential for long-term illness and death caused by cancer and other radiation-related diseases make this prohibition difficult to address. This is particularly true if conventional weapons are available that could accomplish similar objectives.⁹³

The final decision to launch is in the president’s hands alone and cannot be overruled.

Process and Decision-Making

The internal executive branch authorities and procedures by which the United States may use nuclear weapons have developed over decades, primarily during the Cold War. Designed to respond to a nuclear attack in progress, the procedures have emphasized speed and decisiveness.⁹⁴ This focus on rapid decision-making is critical when minutes count but not as important when more time is available. In that circumstance, a process that provides the president ample opportunity for input—including legal advice—and deliberation is preferable.

Although the precise details of the nuclear launch system—known as the Nuclear Command Control System (NCCS)⁹⁵—remain highly classified,⁹⁶ the general contours can be understood from the work of scholars and accounts of those familiar with the process, including former Minuteman crew members. The NCCS process has two phases: (1) preplanning and advice, and (2) decision and execution. The first phase involves a continuous process of developing and reviewing options, including conducting legal review. Before any decision to launch, the president has an opportunity to consult advisers, if he chooses to do so, although there is no requirement or formal structure for that consultation.

The final decision to launch is in the president’s hands alone and cannot be overruled.⁹⁷ Once the president decides to launch, a more structured and automatic process begins. An Emergency Action Team, which includes at least one senior military official, will receive the president’s decision and translate it into an order to be communicated to combat crews. This is the final step before a launch.

Preplanning Nuclear Launch Options

The policies and procedures for a nuclear launch are designed to ensure that, if deterrence fails, the United States “has both the capability . . . and national resolve . . . to respond effectively to any contingency.”⁹⁸ Since the Truman administration, presidents have issued guidance related to the use of nuclear weapons.⁹⁹

Each administration also reviews nuclear readiness and policy objectives through a Nuclear Posture Review (NPR).¹⁰⁰ Within each administration, the secretary of defense, along with the Joint Chiefs of Staff and the combatant commanders, works to clarify contingency plans for potential employment of nuclear weapons. Contingency planning gives the president a range of numbered-plan options spanning a diverse set of potential attack scenarios, allowing him to choose between attacks of different scales.¹⁰¹ This preplanning

process is a critical opportunity to subject plans to rigorous review and debate without the pressure of a developing crisis. Essential to the preplanning process is a legal review. The legal review seeks to ensure that all options ultimately presented to the president offer conventional alternatives and otherwise seeks to ensure—to the extent possible without knowing the exact context of a proposed strike—the options’ compliance with international humanitarian law.¹⁰²

During a launch under attack, however, the time available to confer would be limited because speed is a top priority. Experts estimate that the president would have less than ten minutes to deliberate in launch-under-attack conditions.

During a recent congressional hearing, experts distinguished a scenario in which “the military wakes up the president” from one in which the “president wakes the military up.”¹⁰³ The first scenario (called the *launch-under-attack* scenario), in which the military wakes the president, is the one for which the current procedures were primarily designed. In this scenario, the United States is under nuclear attack. The second scenario, as discussed in previous sections, involves a first use of nuclear weapons, in which the United States engages in a nuclear strike without first being the subject of a nuclear attack. The president “wakes the military up” because there is no immediate nuclear threat. In this situation, there is presumably more time for deliberation. Nuclear first use has generally been considered unlikely in the years since the Cold War,¹⁰⁴ but no law or executive branch policy prohibits it.¹⁰⁵

Launch Under Attack

A launch-under-attack scenario would begin with the detection of inbound missiles or bombers. The early warning detection system is designed to “provide ‘unambiguous, reliable, accurate, timely, survivable and enduring’ warning about attacks on the United States.”¹⁰⁶ An alert would likely originate with North

American Aerospace Defense Command.¹⁰⁷ The early warning staff is required to conduct a preliminary assessment to evaluate the validity of the threat. If the threat is evaluated at “medium or high confidence,”¹⁰⁸ the president is notified. The president then receives information on the pending attack from his top military advisers and is presented with options for a response and an opportunity to receive advice from civilian and military personnel.¹⁰⁹ During a launch under attack, however, the time available to confer would be limited because speed is a top priority.¹¹⁰ Experts estimate that the president would have less than ten minutes to deliberate in launch-under-attack conditions.¹¹¹

If a decision is made to launch, the president (or the person acting with his authority)¹¹² issues a launch order to the Pentagon and to United States Strategic Command.¹¹³ To issue the order, the president accesses information contained in the “nuclear football,” a briefcase that always travels with the president, carried by an active duty military officer.¹¹⁴ The briefcase contains an array of plans developed in advance, from which the president selects the most appropriate option. Once the president has chosen a launch option, the order is transmitted to the nuclear forces via an Emergency Action Team, most likely stationed at the Pentagon.¹¹⁵

To be transmitted successfully, the order must survive two-person verification. It is a common misconception that two-person verification is required to approve a launch order. The verification process is not a substantive review of the order; it is simply a process, using prearranged codes, to ensure that the order originated with the president himself.¹¹⁶ Once the president communicates the launch order and the Pentagon verifies his identity, the Pentagon transmits the order to the components of the nuclear triad—land-based, submarine, and bomber platforms—through a message that is approximately “the length of a tweet.”¹¹⁷

During execution of the launch, United States Strategic Command is responsible for the “implementation of the nuclear launch order.”¹¹⁸ The verified order goes to five land-based crews and at least one submarine crew, who then begin their own verification process. During this time, bombers also prepare to launch with a nuclear payload. The land-based Minuteman crews, once they have received a launch order, use the “sealed-authentication system” (SAS) codes (prepared by the National Security Agency) and compare the SAS codes with the order to authenticate.¹¹⁹ Crews then enter the launch plan into the weapons system, retrieve the launch keys, and enter additional codes to unlock the missiles. At the time dictated by the original launch plan, the crews turn the keys to transmit the plan to the missiles.¹²⁰ At the turn of the key, crews transmit a “vote.” When the missile system receives two “votes,” the launch initiates.¹²¹ This means that, even if three crews were unwilling or unable to vote, the launch order would still be executed upon the action of the two remaining crews. This redundancy ensures that, even if three launch crews were destroyed in an initial attack, the United States would maintain its ability to respond. Aboard a submarine, the missile will launch when the captain, executive officer, and two crew members authenticate the message. Land-based missiles launch within two minutes from the time the initial order is issued.¹²² Submarine-based missiles take about fifteen minutes.¹²³ Once missiles have launched, there is no way to recall the weapons or disarm them in flight.¹²⁴

If a president is considering a first use of nuclear weapons, the initial process for decision-making could provide more opportunity for deliberation and consultation than when the nation is under nuclear attack.

First-Use Launch

If a president is considering a first use of nuclear weapons, the initial process for decision-making could provide more opportunity for deliberation and consultation than when the nation is under nuclear attack. Not all first-use launch scenarios are the same. The term *first use* is typically associated with a “sunny day” scenario involving a decision by the United States to initiate a conflict, perhaps to preempt a nuclear threat, but first use could also occur in response to a conventional attack or as an escalation of ongoing non-nuclear hostilities. The typical process for deliberation on national security decisions is through the National Security Council. The president convenes his key national security advisers, including at least the secretary of defense, the secretary of state, the chairman of the Joint Chiefs of Staff, the director of national intelligence, and the national security adviser.¹²⁵ Typically, this process provides an opportunity for legal advice through what is known as the Lawyers Group,¹²⁶ which includes the senior lawyers from the key national security departments and agencies. There is no guarantee, however, that a president will use this process when deciding about the use of a nuclear weapon. The president alone decides how he receives advice. The president might choose a different process with more limited participants—perhaps

including lawyers, perhaps not—for discussion of a matter this sensitive. Thus, although the opportunity for deliberation and legal advice exists at this stage, it depends on the president’s commitment to such a process. If the president decides to launch a nuclear strike, with or without consultation and advice, the process would carry on in the manner described for a launch under attack, but without the time pressures associated with that scenario.

In a launch under attack—or a first use in which a president opts for a truncated decision-making process—the opportunity for predecisional legal advice would be minimal. After a president decides, the process of executing his order is largely automatic.

The United States has never adopted a “no first use” policy—in large part because of the deterrent effect created by the availability of a first-use option. The United States has been circumspect, however, in the way it describes the circumstances in which nuclear force would be appropriate. Specifically, the United States has stated that it will employ nuclear weapons only under “extreme circumstances to defend the vital interests of the United State, its allies, and partners.”¹²⁷ This was the policy of the Obama administration and was adopted by the Trump administration in its first NPR.¹²⁸ However, there are some significant, if subtle, differences in how the NPRs of these two administrations defined “extreme circumstances.”

Protections against Illegal Strike Orders

As discussed in the previous sections, there are some circumstances under which a president’s order to launch a nuclear weapon would violate U.S. or international law. An important question about the process for making such a momentous decision is whether there are sufficient checks to allow a president or his advisers to identify and prevent an illegal nuclear strike.

Opportunity for Legal Advice

To protect against illegal orders, there must be a realistic opportunity for lawyers to review a strike and determine its legality. In the processes previously described, military and civilian lawyers from the Department of Defense provide legal advice during the preplanning of nuclear launch options. At that stage, lawyers presumably can eliminate certain options that would be illegal under any circumstance. They

might determine, for example, that a certain weapon is inherently indiscriminate or that a proposed target has no military objective, thus eliminating the weapon or target from consideration. Some legal analysis, however, requires an understanding of the circumstances of a proposed strike. Determinations of military necessity, proportionality, and unnecessary human suffering all involve a balancing that requires knowledge of the threat and circumstances on the ground at the time of the launch decision. Constitutional questions about the need for authorization and questions of *ad bellum* legality under international law are also dependent on the facts at the time of decision and would require the involvement of lawyers outside the Department of Defense.

As noted, it is possible—although not necessary—that a decision about a first use of nuclear weapons would run through the traditional National Security Council process and could, therefore, receive a thorough legal review by the Lawyers Group. In a launch under attack—or a first use in which a president opts for a truncated decision-making process—the opportunity for predecisional legal advice would be minimal. After a president decides, the process of executing his order is largely automatic. In the case of a first use,

however, when there may be less time pressure, an officer on an Emergency Action Team could have an opportunity to engage more senior officers and lawyers if there is reason for concern.

The Duty to Disobey Unlawful Orders

Members of the armed forces are bound to follow orders of their superior officers.¹²⁹ This duty of obedience, however, applies only to “lawful orders.”¹³⁰ Thus, service members are obligated to refuse orders that are “manifestly” or “patently” illegal.¹³¹ The genesis of this obligation is international law’s rejection of the defense of “following superior orders.”¹³² The Charter of the Nuremberg Tribunal, for example, explicitly precluded a superior-orders defense in its proceedings,¹³³ and subsequent international criminal tribunals, including the International Criminal Court, have done the same.¹³⁴ U.S. case law has also adopted the principle,¹³⁵ and it is clear that U.S. service members can be criminally prosecuted or held civilly liable if their compliance with an order violates the law.¹³⁶

Although the requirement to disobey unlawful orders is clear, how to identify such an order is less so. It is not enough that an order be legally debatable or questionable. The requirement of obedience to superior orders is critical to the proper functioning of military command.¹³⁷ To allow—even require—legal debate about a broad range of orders would be destructive of good order and discipline. That is why the duty to disobey applies only to “manifestly” or “patently” illegal orders. The obligation extends only to orders that are illegal on their face; there should be no ability to debate the legal question.¹³⁸

Legal issues on matters of force are often complex and difficult. Members of an Emergency Action Team receiving a presidential order most likely will lack sufficient information to assess the legality of an attack. It is unlikely, for example, that the failure to obtain congressional authorization for a use of force involving a nuclear weapon would be considered “manifestly” or “patently” illegal. Military officers, or even their lawyers, would have little background on those issues, and even experts hold conflicting views on the subject. Similarly, whether a use of force can be considered a response to an imminent armed attack for purposes of satisfying the UN Charter’s *jus ad bellum* requirements for resort to force is a subject that is often contested among countries and within the U.S. legal community. The answer would be no more clear to a service member reacting to a launch order.

There are circumstances, however, in which an order to use a nuclear weapon—particularly if the order involves a first use of such a weapon—would be “manifestly” or “patently” illegal. Context is important, but, for example, an order for a nuclear strike targeting a civilian population center that would not provide a direct military advantage would be “manifestly” or “patently” illegal. Similarly, an order to strike a military target in an urban or other densely populated setting—particularly when a conventional weapon that is less devastating to civilians would suffice—would be “manifestly” disproportionate and would satisfy even the rigorous standard for the duty to disobey.

The launch process could make it difficult for anyone in the operational chain to reach a determination about manifest illegality because it is designed to move quickly and relatively automatically after a presidential decision.

Nonetheless, as previously discussed, the launch process could make it difficult for anyone in the operational chain to reach a determination about manifest illegality because it is designed to move quickly and relatively automatically after a presidential decision. Furthermore, those in the process might assume that legal concerns had been resolved in advance of a launch, during the development of numbered plans. Even if a military officer is convinced of a launch's illegality and decides to disobey the president, it is not clear whether or how that would halt a launch. Recently, current and former commanders of United States Strategic Command have stated that they would oppose an illegal nuclear strike order and notify the president of their concerns.¹³⁹ Neither commander suggested that his decision would necessarily stop the launch.¹⁴⁰ Some experts argue that there would be inadequate time to halt an illegal order.¹⁴¹

The Twenty-Fifth Amendment

The constant “nuclear anxiety”¹⁴² of the Cold War, coupled with the sudden assassination of President John F. Kennedy, prompted the 89th Congress to address gaps left by the Presidential Succession Act of 1947.¹⁴³ As then former vice president Richard Nixon explained, “[w]ith the advent of the terrible and instant destructive power of atomic weapons, the nation cannot afford to have any period of time when there is doubt or legal quibbling as to where the ultimate power to use those weapons resides.”¹⁴⁴ The result of congressional action, the Twenty-Fifth Amendment, ratified in 1967,¹⁴⁵ provides procedures for vice presidential succession and for scenarios in which the president is disabled,¹⁴⁶ thereby ensuring “continuity of executive authority.”¹⁴⁷

Section 4¹⁴⁸ of the Twenty-Fifth Amendment is the provision most often raised during discussions about nuclear launch authority as it relates to presidential disability.¹⁴⁹ Section 4¹⁵⁰ provides that, if the president is no longer able to perform the duties of the office,¹⁵¹ the vice president, the cabinet, and Congress have the ability to transfer power from the president to the vice president.¹⁵² There is no clear standard for defining “unable to discharge the powers and duties of his office.”¹⁵³ Such a determination would be left to the vice president and members of the cabinet.¹⁵⁴ Proceedings under the Twenty-Fifth Amendment would begin when the vice president and a majority of the principal cabinet members¹⁵⁵ notify Congress of the president's inability to perform his duties.¹⁵⁶ Upon notification of Congress, executive authority is transferred immediately to the vice president.¹⁵⁷ In response, the president may convey to Congress that “no inability exists,” at which time he “resumes the powers and duties of his office.”¹⁵⁸ The vice president, again with a majority of the cabinet, may then notify Congress that the incapacity remains, in which case the vice president would retain the powers of the presidency until a vote by both houses. A decision to transfer power to the vice president requires a two-thirds vote of both the House and the Senate.¹⁵⁹

As previously discussed, particularly in a launch-under-attack scenario, the nuclear launch decision process can move extremely quickly. The Twenty-Fifth Amendment's removal procedures are cumbersome and would not provide an expedient solution to presidential disability in a launch-under-attack scenario. However, if an infirm president were considering a preemptive nuclear strike that his advisers considered reckless, or worse, the Twenty-Fifth Amendment could provide a route to a transfer of power.

Conclusion

As the foregoing discussion demonstrates, the president has significant authority and flexibility on decisions about use of nuclear weapons. There are some legal limits to his authority, however. If the president were to consider a first use of nuclear weapons, precedent within the executive branch would require in some cases that he first seek congressional authorization. In addition, requirements of international humanitarian law raise significant—in some cases insurmountable—legal hurdles for many potential uses of nuclear weapons. What is not clear is whether the current procedures for reaching decisions on a nuclear launch are adequate to ensure that these legal requirements will be considered or that the president's advisers will have the opportunity to protect against an illegal strike order.

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Endnotes

- ¹ U.S. Const. art. I, § 8, cl. 11.
- ² *Id.* cl. 12.
- ³ *Id.* cl. 13.
- ⁴ *Id.* cl. 14.
- ⁵ *Id.* § 9, cl. 7. Among other powers, the Constitution also grants Congress the authority to provide for the organizing, arming, and disciplining of the militia and to make all laws necessary and proper for carrying into execution the powers vested in the government of the United States. *Id.* § 8, cl. 16, 18.
- ⁶ *Id.* § 8, cl. 1, 12–14. See Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 U. Cin. L. Rev. 391 (2018) (suggesting that much of the congressional authority to constrain presidential national security decision-making flows from U.S. CONST. art. I, § 8, cl. 14).
- ⁷ See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002) (suggesting that an understanding of the term “declare War” consistent with seventeenth- and eighteenth-century practice supports the widely accepted theory that Congress has the power to initiate war); Charles A. Lofgren, *War-Making under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 701 (1972) (“Americans originally understood Congress to have at least a coordinate, and probably the dominant, role in initiating all but the most obviously defensive wars, whether declared or not.”); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND THE OLIVE BRANCH?* 29 (1981) (describing the war powers of the Constitution as facially “tilt[ed] decisively toward Congress”); Matthew Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1636 (2014). Historically, a formal declaration of war served to put an enemy on notice and declare to the world that “one nation had decided to wage war on another.” Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, 53 (2007). Although the U.S. Congress has not issued a formal declaration of war since 1942, congressional authorization for the use of military force has been used to permit the president to use “all necessary and appropriate force” in a range of conflicts. Compare Joint Resolution Declaring that a State of War Exists between the Government of Rumania and the Government and the People of the United States, H.J. Res., 2d Cong. § 321 (1942), with Authorization for the Use of Force against Terrorists, Pub. L. 107-40, 115 Stat. 224 (2001). See generally JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL31133, *DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS* (2014). Cf. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).
- ⁸ See, e.g., discussion of Justice Department’s Office of Legal Counsel Analysis, *infra*, notes 27–33 and accompanying text.
- ⁹ See *infra*, Section I.c. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2062 (2005).
- ¹⁰ *Id.* See also *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971) (finding that military appropriations and selective service statutes were sufficient to show congressional authorization for the Vietnam War).
- ¹¹ See Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 Tex. L. Rev. 299, 331–50 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689, 734 (2008) (“To like effect, Congress’s power to ‘declare War’ has been interpreted to encompass the lesser included power to limit the scope and nature of hostilities in which U.S. armed forces may engage.”) [hereinafter *Framing the Problem*]; see also *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (suggesting that the president’s war powers are defined by statute and that the executive cannot act outside the authority authorized by Congress); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).
- ¹² Department of Defense Appropriations Act, 1970, Pub. L. No. 91-171, § 643, 83 Stat. 469, 487 (1969) (forbidding the use of funds “to finance the introduction of American ground combat troops into Laos or Thailand.”). See also National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, tit. XII, §1203, 111 Stat. 1629, 1929 (1997) (prohibiting the use of funds to support deployment of U.S. forces to the Republic of Bosnia and Herzegovina absent a certification from the president stating that any such deployment was “required in order to meet the national security interests of the United States.”); National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, §1232(a), 113 Stat. 512, 788 (1999) (prohibiting the use of funds to support deployment of U.S. troops to Haiti).
- ¹³ See, e.g., Energy and Water Development Appropriations Act of 1993, Pub. L. No. 102-377, §507, 106 Stat. 1315, 1343–44 (1992) (imposing a nine-month moratorium on nuclear testing and a framework for any future testing over the subsequent three years, and mandating a multilateral Comprehensive Test Ban Treaty negotiation through the Hatfield-Exon-Mitchell amendment).
- ¹⁴ U.S. CONST. art II, § 2, cl. 1. See also *id.* § 1, cl. 1, setting forth the president’s authority as chief executive. The president’s Article II authorities also give the president broad powers in the field of foreign affairs. These foreign affairs powers include authority to negotiate treaties, to enter into treaties (with the advice and consent of the Senate), to nominate and appoint ambassadors, and to receive ambassadors and public ministers. *Id.* § 2, 3; see *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (Court held that the power to recognize foreign states resides in the president alone); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (explaining that the “President alone has the power to speak or listen as a representative of the nation . . .,” as the “sole organ of the nation in its external relations, and [as] its sole representative with foreign nations”).

- ¹⁵ Ex parte Milligan, 71 U.S. (4 Wall.) 2 at 139 (1866) (Chase, C.J., concurring in judgment).
- ¹⁶ MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 84 (1990) (“[The President’s] sole powers do extend to operational battlefield decisions concerning the means to be employed to achieve ends chosen by Congress.”); Ex parte Milligan, 71 U.S. (4 Wall.) 2 at 88 (Chase, C.J., concurring in judgment) (“Congress has the power not only to raise and support and govern armies but to declare war . . . This power necessarily extends . . . except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.”); Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006) (“Congress cannot direct the conduct of campaigns . . .”) (quoting Ex parte Milligan, 71 U.S. (4 Wall.) 2 at 139); Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) (explaining that the president, as commander in chief, may “direct movements” and employ forces “in the manner he may deem most effectual”); see also Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319, 1321 (2005) (“Many scholars . . . admit that Congress cannot regulate tactical decisions involving the retreat and advance of soldiers.”). But see Barron & Lederman, *Framing the Problem*, supra note 11, at 696 (“there is surprisingly little Founding-era evidence supporting the notion that the conduct of military campaigns is beyond legislative control and a fair amount of evidence that affirmatively undermines it.”).
- ¹⁷ See ANN VAN WYNEN THOMAS & A.J. THOMAS JR., THE WAR-MAKING POWERS OF THE PRESIDENT: CONSTITUTIONAL AND INTERNATIONAL LAW ASPECTS 19 (1982); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2114 (2006) (discussing the executive’s expanding authority).
- ¹⁸ ELSEA & WEED, supra note 7, at 5. One reason this phenomenon has increased in recent years has been reluctance by Congress to assert its own authorities on matters of war and peace. See Keith E. Whittington, *R.I.P. Congressional War Power*, LAWFARE BLOG (Apr. 20, 2018, 7:00 AM), www.lawfareblog.com/rip-congressional-war-power.
- ¹⁹ See, e.g., Memorandum from John C. Yoo, Deputy Asst. Attorney Gen., U.S. Dep’t of Justice to the Deputy Counsel to the President, “The President’s Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them,” Sept. 25, 2001, lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2013/10/Memorandum-from-John-C-Yoo-Sept-25-2001.pdf (“the President has broad authority to use military force abroad, including the ability to deter future attacks.”).
- ²⁰ *Full Committee Hearing on Authority to Order the Use of Nuclear Weapons Before the S. Comm. on Foreign Affairs*, 115th Cong. (2017), www.foreign.senate.gov/hearings/authority-to-order-the-use-of-nuclear-weapons-111417 (distinguishing between scenarios in which the military wakes up the president and scenarios in which the president wakes up the military).
- ²¹ The Prize Cases, 67 U.S. (2 Black) 635 (1863). The Supreme Court considered President Abraham Lincoln’s decision, after the Confederate States’ firing on Fort Sumter and other belligerent acts, to declare a blockade of southern ports and seize as “prizes” vessels attempting to violate the blockade. Vessel owners sued, arguing that the blockade was illegal because Congress had not declared war. *Id.* at 649.
- ²² *Id.* at 668. It is a separate question whether the president must subsequently seek authorization to pursue an extended conflict. A few months after President Lincoln instituted his blockade, Congress acted to ratify and approve the president’s actions. The *Prize Cases* court acknowledged this but did not hold that it was required. Nonetheless, Congress has authorized virtually all extended conflicts in U.S. history—with the notable exception of the Korean War—and many scholars would argue that the president is bound to seek such authorization for an extended conflict, even if it was not required initially. See *infra* notes 23, 27 and accompanying text.
- ²³ See, e.g., LOUIS FISHER, PRESIDENTIAL WAR POWER 8–10 (3d ed. 2013); Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1 (1998); MATTHEW C. WEED, CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 1 (2017). Such authority would likely include authority to act against an imminent nuclear attack as well, although there is little discussion of the applicability of the *Prize Cases* authority to anticipatory self-defense in constitutional scholarship or executive branch precedent. But cf. William C. Bradford “*The Duty to Defend Them*”: A Natural Law Justification for the Bush Doctrine of Preventive War, 79 NOTRE DAME L. REV. 1365, 1446–1449 (2004).
- ²⁴ This paper does not address accidental use of nuclear weapons.
- ²⁵ See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 1060 (discussing Truman’s unilateral decision to deploy troops to Korea) [hereinafter *A Constitutional History*].
- ²⁶ See *id.* at 1056 and accompanying text.
- ²⁷ The President and the War Power: South Vietnam and the Cambodian Sanctuaries, 1 Op. O.L.C. Supp. 321, 326 (1970) [hereinafter *Cambodian Sanctuaries*]; Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 331 (1995) (“In at least 125 instances, the President acted without express authorization from Congress.”); Deployment of United States Armed Forces to Haiti, 28 Op. O.L.C. 30, 31 (2004) [hereinafter *Haiti Deployment II*] (“the President may take military action abroad, even, as here, in the absence of specific prior congressional authorization”); Authority to Use Military Force in Libya, 2011 WL 1459998, at *6 (Apr. 1, 2011) [hereinafter *Libya Deployment*] (“we believe that, under these circumstances, the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad, even without prior specific congressional approval.”); April 2018 Airstrikes against Syrian Chemical-Weapons Facilities, 2018 WL 2760027 (O.L.C. May 31, 2018) [hereinafter *Syrian Strikes*] (arguing that the president’s decision to launch attacks against Syria was permissible where “the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense”).
- ²⁸ David Kirkpatrick, Steven Erlanger & Elisabeth Bumiller, *Allies Open Air Assault on Qaddafi’s Forces in Libya*, N.Y. TIMES (Mar. 19, 2011), www.nytimes.com/2011/03/20/world/africa/20libya.html.

- ²⁹ Eline Gordts & Willa Frej, *Trump Orders Strikes on Syria in Retaliation for Chemical Attack*, HUFFINGTON POST (Apr. 13, 2018), www.huffingtonpost.com/entry/trump-strikes-syria-retaliation-chemical-attack_us_5acc7508e4b07a3485e7e642.
- ³⁰ Office of Legal Counsel opinions tend to take a strong view of executive war powers authority. A significant contingent of constitutional scholars take issue with the OLC analysis in the Libya and Syria cases and argue that presidents Obama and Trump were required to obtain congressional authorization before proceeding. *See, e.g.*, Curtis Bradley & Jack Goldsmith, *OLC's Meaningless "National Interests" Test for the Legality of Presidential Uses of Force*, LAWFARE BLOG (June 5, 2018, 3:13 PM), www.lawfareblog.com/olcs-meaningless-national-interests-test-legality-presidential-uses-force; Jack Goldsmith, *The Constitutionality of the Syria Strike through the Eyes of OLC (and the Obama Administration)*, LAWFARE BLOG (Apr. 7, 2017, 7:31 AM), www.lawfareblog.com/constitutionality-syria-strike-through-eyes-olc-and-obama-administration; Steve Vladeck, *OLC's Formal (and Remarkably Broad) Defense of the April Syria Strikes*, JUST SECURITY (June 1, 2018), www.justsecurity.org/57300/olcs-formal-and-remarkably-broad-defense-april-syria-strikes; Ashley Deeks & Marty Lederman, *Would Airstrikes against Assad Be Lawful and Effective? Reactions to the State Dissent Cable*, LAWFARE BLOG (June 20, 2016, 9:08 AM), www.lawfareblog.com/would-airstrikes-against-assad-be-lawful-and-effective-reactions-state-dissent-cable.
- ³¹ Libya Deployment, *supra* note 27, at *8. *See also* Syrian Strikes, *supra* note 27, *7.
- ³² Libya Deployment, *supra* note 27, at *13.
- ³³ Syrian Strikes, *supra* note 27, at *16.
- ³⁴ Libya Deployment, *supra* note 27, at *8; Syrian Strikes, *supra* note 27, at *6.
- ³⁵ Syrian Strikes, *supra* note 27, at *14 (quoting Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 179 (1994)).
- ³⁶ *See* Dakota S. Rudesill, *Regulating Tactical Nuclear Weapons*, 102 GEO. L.J. 99, 157–59 (2013) (suggesting that any nuclear use is inherently strategic in its geopolitical effects).
- ³⁷ *See supra* Section I.b.i., notes 21–23 and accompanying text.
- ³⁸ Peter Raven-Hansen, *Introduction*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?* ix at x (Peter Raven-Hansen ed., 1987) [hereinafter *WHO DECIDES?*].
- ³⁹ Jeremy J. Stone, *Presidential First Use Is Unlawful*, in *WHO DECIDES?*, *supra* note 38, at 3–4.
- ⁴⁰ Typically, when faced with cases challenging a president's military action, the court will dismiss on one of two grounds, as follows: (1) It will find that the person or entity complaining has no "standing" to challenge the president's decision because the decision caused the person or entity no "concrete, particularized" injury that is "actual or imminent," traceable to the president's action, and capable of redress by the court. *See, e.g.*, *Smith v. Trump*, No. 16-5377, 2018 WL 3528292 (D.D.C. July 10, 2018) (challenging the legality of Operation Inherent Resolve; dismissed on standing grounds); *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011) (challenging the legality of military actions taken in Libya; dismissed on standing grounds); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (challenging the legality of air strikes against the Federal Republic of Yugoslavia; dismissed on standing grounds); *Mottola v. Nixon*, 464 F.2d 178 (9th Cir. 1972) (challenging the legality of operations in Cambodia; dismissed on standing grounds). Or, (2) It will conclude that the issue represents a "political question" that is not appropriate for judicial review. *See, e.g.*, *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (challenging the legality of military assistance to El Salvador; dismissed as a non-justiciable political question).
- ⁴¹ *See, e.g.*, John Hart Ely, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 47–49 (1993); Whittington, *supra* note 18.
- ⁴² *See, e.g.*, Restricting First Use of Nuclear Weapons Act, H.R. 669, 115th Cong. (2017) (prohibiting the president from using the armed forces to conduct a first-use nuclear strike absent to a congressional declaration of war authorizing such strike); To Establish the Policy of the United States Regarding the No-First-Use of Nuclear Weapons, H.R. 4415, 115th Cong. (2017); *see generally* William G. Miller, *A Congressional Committee on National Security: The Perspective From the Hill*, in *WHO DECIDES?*, *supra* note 38, at 181.
- ⁴³ *See On the Authority to Order the Use of Nuclear Weapons Before the S. Comm. on Foreign Relations*, 115th Cong. (2017) (first hearing related to president's authority to use nuclear weapons in more than 40 years); Jeremy Herb, *Could Congress Stop Trump from Bombing North Korea?*, CNN (Aug. 10, 2017), www.cnn.com/2017/08/09/politics/trump-bomb-north-korea-congress/.
- ⁴⁴ Justice Jackson's analysis in *Youngstown* appeared in a concurring opinion. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634 (1952). President Truman seized the steel production facilities to avoid a strike that would have stalled steel production, with potential negative implications for the economy and defense production. Justice Jackson concurred with the majority of justices that the seizure exceeded the president's authority. Congress had neither authorized the seizure nor been silent on the matter. Congress, in the Taft-Hartley Act, had given the president authority to prohibit a strike in the event of a national emergency. Truman did not want to take that step and opted instead to seize the facilities. *Id.* at 582–84.
- ⁴⁵ *Id.* at 635.
- ⁴⁶ *Id.*
- ⁴⁷ *Id.* at 637.
- ⁴⁸ *Id.* at 637–38.
- ⁴⁹ *See supra* Section I.

- ⁵⁰ Stephen L. Carter, *The Constitution and Prevention of Nuclear Holocaust: A Reaction to Professor Banks*, 13 J. LEGISL. 206, 214 (1986) (“The Congress might prohibit any use of nuclear weapons (except to respond to nuclear attack) without congressional provisions. . . . Or the Congress might impose rules governing the particular set of circumstances in which nuclear weapons should be used.”).
- ⁵¹ *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).
- ⁵² See Barron & Lederman, *A Constitutional History*, *supra* note 25, at 945–46 (explaining that, although there is “little Founding era support” for the notion that Congress cannot impose statutory limits on wartime executive action, it is clear that Congress may not interfere with the military chain of command itself by assigning “ultimate decision-making authority” to anyone other than the president, including senior military officers); Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto Gonzales, Counsel to the President, 39 (Aug. 1, 2002), available at www.justice.gov/olc/file/886061/download (“Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.”). See generally JENNIFER K. ELSEA, MICHAEL JOHN GARCIA, & THOMAS J. NICOLA, CONG. RESEARCH SERV., R41989, CONGRESSIONAL AUTHORITY TO LIMIT MILITARY OPERATIONS (2013).
- ⁵³ Robert F. Turner, *Congressional Limits on the Commander in Chief: The FAS Proposal*, in WHO DECIDES?, *supra* note 38, at 46 (“[Congress] would also exceed its proper authority by seeking to direct the President . . . to use or not to use a particular weapon in the existing arsenal. . .”).
- ⁵⁴ See Allen Ides, *Congressional Authority to Regulate the Use of Nuclear Weapons*, in WHO DECIDES?, *supra* note 38, at 80–83; Carter, *supra* note 50; cf. Barron & Lederman, *A Constitutional History*, *supra* note 25, at 946–50 and throughout (president does not possess absolute exclusive authority in this area); see generally ELSEA, GARCIA, & NICOLA, *supra* note 52, at 20–22.
- ⁵⁵ As discussed *supra* note 40 and accompanying text, the judiciary is extremely unlikely to review the substance of statutory restrictions in this area. Thus, the chances of judicial guidance or determinations, particularly in advance, are very low.
- ⁵⁶ Lawyers in the executive branch would determine whether, in their judgment, the statute in question would intrude impermissibly on the president’s authority. The president could then decide to accept the legislative restrictions, could veto a bill, or could issue a signing statement declaring that the restrictions are unconstitutional and will not be enforced or will be enforced only to the extent that they are consistent with his constitutional authorities.
- ⁵⁷ Restricting First Use of Nuclear Weapons Act, H.R. 669, 115th Cong. (2017) (prohibiting the president from using the armed forces to conduct a first-use nuclear strike absent to a congressional declaration of war authorizing such strike).
- ⁵⁸ *Id.*
- ⁵⁹ In 1972, Senator William Fulbright (D-AR) proposed such a limitation as an amendment to the proposed War Powers Resolution. Fulbright’s proposal was debated at length on the Senate floor, but it ultimately failed and was not included in the legislation. See 118 CONG. REC. 12,448 (Apr. 12, 1972).
- ⁶⁰ *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).
- ⁶¹ Bradley & Goldsmith, *supra* note 9, at 2017.
- ⁶² *Id.* at 2073, 2077–78.
- ⁶³ *Id.* at 2073.
- ⁶⁴ *Id.* at 2073–74.
- ⁶⁵ Richard K. Betts and Matthew C. Waxman, *The President and the Bomb: Reforming the Nuclear Launch Process*, FOREIGN AFFAIRS (Mar./Apr. 2018), www.foreignaffairs.com/articles/united-states/2018-02-13/president-and-bomb.
- ⁶⁶ *Id.*
- ⁶⁷ Richard K. Betts and Matthew Waxman, *Safeguarding Nuclear Launch Procedures: A Proposal*, LAWFARE BLOG (Nov. 19, 2017, 11:37 AM), www.lawfareblog.com/safeguarding-nuclear-launch-procedures-proposal.
- ⁶⁸ The architects of this proposal would prefer to see the executive branch adopt the procedures on its own, thus avoiding any separation-of-powers controversy. *Id.*
- ⁶⁹ The authors of this proposal also argue that the executive branch could adopt these process fixes on its own. Such action obviously would eliminate any constitutional concerns. *Id.*
- ⁷⁰ The U.S. Constitution states that treaties are part of the “supreme law of the land” and therefore generally binding on the president. U.S. CONST. art. IV; Barron & Lederman, *A Constitutional History*, *supra* note 25, at 1112 n.347. Although international law operates differently within the U.S. system than obligations and constraints found in the U.S. Constitution or statutes, the United States generally considers itself to be bound by customary international law and by the domestic legislation enacting international agreements. See generally CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 31–74, 138–67 (2013) [hereinafter INTERNATIONAL LAW]. The Supreme Court has relied on the laws of war to inform its interpretation of congressional authorizations of force and has concluded that those laws “can inform the boundaries” of the powers that Congress has granted the president in an authorization. Bradley & Goldsmith, *supra* note 9, at 2095–97. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–22 (2004).

- ⁷¹ A new treaty would outlaw nuclear weapons under international law. U.N. Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards Their Total Elimination, *Treaty on the Prohibition of Nuclear Weapons*, U.N. Doc. A/CONF/229/2017/8 (July 7, 2017), at undocs.org/A/CONF.229/2017/8. The treaty passed in the United Nations General Assembly in July 2017. A number of nations have already signed the treaty, and several have ratified it. *Status of the Treaty*, Treaty on the Prohibition of Nuclear Weapons, disarmament.un.org/treaties/t/tpnw. But the United States and several other nuclear-armed countries have publicly opposed the treaty. Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom and France Following the Adoption of a Treaty Banning Nuclear Weapons (July 7, 2017), at www.scribd.com/document/353174842/Joint-Press-Statement-by-UK-France-US-on-nuclear-ban-treaty. The treaty would not impose obligations on non-signatory countries. In addition, the clear public statements by these objecting countries would impede development of any customary international norm based on the treaty's provisions and, if it developed, would assure that the norm would not apply to those countries. See Anthony J. Colangelo, *The Duty to Disobey Illegal Nuclear Strike Orders*, 9 HARV. NAT. SEC. J. 84, 87 n.122 (2018). See also BRADLEY, INTERNATIONAL LAW, *supra* note 70, at 138 (citing the importance of persistent objection during the formation of customary international law).
- ⁷² Legality of the Threat or Use of Nuclear Weapons, Advisory Op., 1996 I.C.J. 226, 266 (July 8) [hereinafter Legality Advisory Op.].
- ⁷³ *Id.*
- ⁷⁴ U.N. Charter art. 2, ¶ 4.
- ⁷⁵ U.N. Charter art. 51. Other exceptions are if the UN Security Council has authorized force or if the state in which the force occurs has consented.
- ⁷⁶ It is the longstanding U.S. legal position that any use of force against the United States would meet the standard for an armed attack. The United States is alone in this view among the international community.
- ⁷⁷ For a discussion on the scope of anticipatory attacks, see Ashley S. Deeks, *Taming the Doctrine of Pre-emption*, in THE OXFORD HANDBOOK ON THE USE OF FORCE IN INTERNATIONAL LAW 661 (Marc Weller ed., 2015).
- ⁷⁸ See Ashley Deeks, “Imminence” in the Legal Adviser’s Speech, LAWFARE BLOG (Apr. 6, 2016, 7:00 AM), www.lawfareblog.com/imminence-legal-advisers-speech (noting a “heated debate” that arose when the George W. Bush administration articulated a principle of “pre-emption” that was understood by many to “effectively de-couple[] the right of self-defense from the need to show some type of imminent threat”).
- ⁷⁹ See *id.*
- ⁸⁰ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 176 (June 27). UN Charter Article 51 is understood to incorporate these customary international law requirements. Customary international law emerges from the practice of states. Therefore, there is no written or agreed form of these concepts, which leads to a lack of clarity in their application.
- ⁸¹ See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 726 (2008).
- ⁸² International Committee of the Red Cross, *What Is IHL?*, September 18, 2015 at www.icrc.org/en/document/what-ihl. See also DEPT OF DEF., LAW OF WAR MANUAL, 50–52 (June 2015) (identifying the three “interdependent principles” as military necessity, humanity, and honor) [hereinafter LAW OF WAR MANUAL].
- ⁸³ Legality Advisory Op., 1996 I.C.J. at 831.
- ⁸⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].
- ⁸⁵ Colangelo, *supra*, note 71, at 103.
- ⁸⁶ Additional Protocol I, art. 51, ¶ 4.
- ⁸⁷ Colangelo, *supra* note 71, at 104; Legality Advisory Op., 1996 I.C.J. at 829.
- ⁸⁸ Legality Advisory Op., 1996 I.C.J. at 829.
- ⁸⁹ LAW OF WAR MANUAL, *supra* note 82, at 367.
- ⁹⁰ International Committee of the Red Cross, IHL Database, Rule 14, available at ihl-databases.icrc.org/customary-ihl/eng/docs/v1_chapter4_rule14; LAW OF WAR MANUAL, *supra* note 82, at 60–61.
- ⁹¹ LAW OF WAR MANUAL, *supra* note 82, at 61.
- ⁹² International Committee of the Red Cross, IHL Database, Rule 70, available at ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70; see also LAW OF WAR MANUAL, *supra* note 82, at 358–59; Additional Protocol I, art. 35, ¶ 2.
- ⁹³ One possible international law justification for the use of nuclear weapons could be the controversial doctrine of belligerent reprisals. A *belligerent reprisal* is “an action that would otherwise be unlawful but that in exceptional cases is considered lawful under international law when used as an enforcement measure in reaction to unlawful acts of an adversary.” International Committee of the Red Cross, IHL Database, Rule 145, available at ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule145. According to the International Committee of the Red Cross, the trend in international humanitarian law is to outlaw belligerent reprisals. The Department of Defense, in the *Law of War Manual*, identifies reprisals as “extreme measures of coercion” that are available to states to persuade an adversary to cease violations of law under certain conditions. LAW OF WAR MANUAL, *supra* note 82, at 1093. In response to a serious violation of international law by an

adversary, a reprisal can include an act that would otherwise be unlawful. Reprisals must be used only to induce compliance with the law, not for revenge or punishment. Before engaging in a reprisal, a state must conduct a careful inquiry to ensure that the reprisal is justified, and it must exhaust all other means of securing the adversary's compliance with law. Any reprisal must be proportional to the illegal act to which the state is responding. *Id.* at 1094–95; International Committee of the Red Cross, IHL Database, Rule 145. Although the proportionality requirement does not mean the response must be identical, it is unlikely that the use of a nuclear weapon as a reprisal would be considered proportional to anything other than a nuclear attack. The Department of Defense's *Law of War Manual* discusses several practical reasons why reprisals may be ill advised. For example, they can be counterproductive and frequently can lead to unwanted escalation of a conflict. LAW OF WAR MANUAL, *supra* note 82, at 1099.

Some uses of nuclear weapons are likely to violate other international law principles, including some found in human rights law, such as the human rights law right against the arbitrary deprivation of life. The International Court of Justice has held that during a conflict, the more conflict-specific framework—international humanitarian law—will govern over human rights law and that the application of human rights law principles to those situations will be informed by the applicable IHL rules. *See* Colangelo, *supra* note 71, at 11. Some countries have also argued that nuclear strikes could violate various treaties, instruments, and norms related to protection of the environment. *See* Legality Advisory Op., 1996 I.C.J. at 820.

⁹⁴ AMY WOOLF, CONG. RESEARCH SERV., 7-5700, DEFENSE PRIMER: COMMAND CONTROL OF NUCLEAR FORCES, at *1 (2016) [hereinafter COMMAND AND CONTROL].

⁹⁵ “The NCCS is an interagency system including stakeholders from the White House, DoD, Department of State (DOS), Department of Homeland Security (DHS), Department of Justice (DOJ), Federal Bureau of Investigation (FBI), DOE, and Office of the Director of National Intelligence (ODNI).” OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR NUCLEAR MATTERS, NUCLEAR MATTERS HANDBOOK (2016), www.acq.osd.mil/ncbdp/nm/NMHB/chapters/chapter_6.htm.

⁹⁶ *See* *Hearing on Authority to Order the Use of Nuclear Weapons Before the S. Comm. on Foreign Relations*, 115th Cong. (2017) (statement of Brian P. McKeon).

⁹⁷ Terrance Roehrig, *The U.S. Nuclear Umbrella: Planning, Capabilities, and Credibility*, in JAPAN, SOUTH KOREA, AND THE UNITED STATES NUCLEAR UMBRELLA 162 (2017) (citing the Goldwater-Nichols Act of 1986); *see also* WOOLF, COMMAND AND CONTROL, *supra* note 94, at *1.

⁹⁸ C. Robert Kehler, *Nuclear Weapons and Nuclear Use*, J. AM. ACAD. ARTS & SCI., 51 Q. 4 (2016).

⁹⁹ *Id.* (President Obama published guidance in 2013).

¹⁰⁰ *See, e.g.*, U.S. DEP'T OF DEFENSE, NUCLEAR POSTURE REVIEW, Feb. 2018, *available at* media.defense.gov/2018/Feb/02/2001872886/-1/-1/1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.PDF.

¹⁰¹ *See* WOOLF, COMMAND AND CONTROL, *supra* note 94, at *1.

¹⁰² Kehler, *supra* note 98, at 59.

¹⁰³ *Full Committee Hearing on Authority to Order the Use of Nuclear Weapons Before the S. Comm. on Foreign Affairs*, 115th Cong. (2017), *available at* www.foreign.senate.gov/hearings/authority-to-order-the-use-of-nuclear-weapons-111417.

¹⁰⁴ Former vice president Joe Biden has said, “it’s hard to envision a plausible scenario in which the first use of nuclear weapons would be necessary.” Joe Biden, Remarks by the Vice President on Nuclear Security (Jan. 11, 2017), *transcript available at* <https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/remarks-vice-president-nuclear-security>.

¹⁰⁵ WOOLF, COMMAND AND CONTROL, *supra* note 94, at *2.

¹⁰⁶ *Id.*

¹⁰⁷ North American Aerospace Defense Command, *About NORAD*, www.norad.mil/About-NORAD (“NORAD uses a network of satellites, ground-based radar, airborne radar and fighters to detect, intercept and, if necessary, engage any air-breathing threat to Canada and the United States.”).

¹⁰⁸ Bruce Blair, *Protocol for a U.S. Nuclear Strike*, NUCLEAR AGE PEACE FOUNDATION (Feb. 28, 2018) www.wagingpeace.org/protocol-u-s-nuclear-strike/.

¹⁰⁹ Top advisers would likely include the statutory members of the National Security Council, the secretary of defense, the secretary of state, the national security adviser, the chairman of the Joint Chiefs of Staff, and the commander of U.S. Strategic Command.

¹¹⁰ Blair, *supra* note 108 (During the Cold War, experts believed that a Soviet warhead would reach the United States within fifteen minutes if launched by submarine or thirty minutes if launched by plane).

¹¹¹ WOOLF, COMMAND AND CONTROL, *supra* note 94, at *2; Blair, *supra* note 108.

¹¹² In the event that the president is incapacitated, authority for the launch of nuclear weapons would follow the order of presidential succession. *See* Paul Bracken, *Delegation of Nuclear Command Authority*, in MANAGING NUCLEAR OPERATIONS 361–63 (Ashton B. Carter, John D. Steinbruner & Charles A. Zraket, eds., 1987).

¹¹³ WOOLF, COMMAND AND CONTROL, *supra* note 94, at *1.

¹¹⁴ Stuart Jeffries, *The “Nuclear Football”: The Deadly Briefcase That Never Leaves the President’s Side*, GUARDIAN (Aug. 22, 2016, 7:49 AM), www.theguardian.com/world/2016/aug/22/nuclear-football-donald-trump; Mark Hertling, *Nuclear Codes: A President’s Awesome Power*, CNN (June 10, 2016 12:44 AM), www.cnn.com/2016/06/09/opinions/nuclear-codes-hertling/index.html.

¹¹⁵ WOOLF, COMMAND AND CONTROL, *supra* note 94.

¹¹⁶ See Kehler, *supra* note 98, at 55.

¹¹⁷ Dave Merrill, Nafeesa Syeed & Brittany Harris, *To Launch a Nuclear Strike, President Trump Would Take These Steps*, BLOOMBERG NEWS (Jan. 20, 2017) (explaining that the message includes the war plan, time to launch, authentication codes, and codes to unlock the missiles).

¹¹⁸ WOOLF, COMMAND AND CONTROL, *supra* note 94, at *1.

¹¹⁹ Merrill, Syeed & Harris, *supra* note 117.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² WOOLF, COMMAND AND CONTROL, *supra* note 94, at *1.

¹²³ *Id.*

¹²⁴ For a comprehensive discussion of launch procedures and the personnel responsible for missile launches, see Lesley Stahl, *Who’s Minding the Nukes?*, CBS NEWS (Apr. 27, 2014), www.cbsnews.com/news/whos-minding-the-nuclear-weapons/.

¹²⁵ The group would likely include others, including additional relevant military personnel, the director of the Central Intelligence Agency, additional White House national security officials, and perhaps the attorney general.

¹²⁶ See CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY 64–65 (2015).

¹²⁷ U.S. DEP’T OF DEFENSE, NUCLEAR POSTURE REVIEW, Feb. 2018, available at media.defense.gov/2018/Feb/02/2001872886/-1/-1/1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.PDF.

¹²⁸ *Id.*

¹²⁹ Christopher Fonzone, *What the Military Law of Obedience Does (and Doesn’t) Do*, AMERICAN CONSTITUTION SOCIETY ISSUE BRIEF, at 4–6 (March 2018). The Uniform Code of Military Justice Article 90 states that anyone who “willfully disobeys a lawful command of his superior commissioned officer” will be subject to criminal penalties. 10 U.S.C. § 890 (2016).

¹³⁰ Fonzone, *supra* note 129, at 6 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14(c)(2) (2016)).

¹³¹ *Id.* (citing GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 359 (2010), noting that while the terms “manifestly” and “patently” illegal are used most commonly as the standards for this obligation, other “identical or virtually identical” terms have been used to describe the type of illegality that triggers the duty, including “obvious,” “outrageous,” and “clear and unequivocal.”) *Id.* at note 32.

¹³² See Colangelo, *supra* note 71, at 89–90 (citing Charles Garraway, *Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied*, 81 INT’L REV. RED CROSS 785, 785–94 (1999)).

¹³³ *Id.* at 90.

¹³⁴ *Id.*

¹³⁵ Fonzone, *supra* note 129, at 7 n. 36.

¹³⁶ *Id.*

¹³⁷ The requirement of obedience to superior orders is not limited to those orders originating with uniformed officers. Civilian control of the armed forces is a critical check on military authority, and military officers are subordinate to the orders of civilians in the chain of command. See Austin Ramzy, *What if Trump Ordered a Nuclear Strike on China? It’d Comply, Says Admiral*, N.Y. TIMES (July 27, 2017), www.nytimes.com/2017/07/27/world/asia/us-admiral-nuclear-strike-china-trump-order.html?_r=0.

¹³⁸ The Department of Defense’s *Law of War Manual* uses as examples orders to “fire upon the shipwrecked” or “kill defenseless persons” who are under the physical control of U.S. forces. LAW OF WAR MANUAL *supra* note 82, at 1075, § 18.3.2.1 (rev. vol. 2016). See Colangelo, *supra* note 71, at 92.

¹³⁹ The U.S. Strategic Command commander would be in the best position to disobey a direct order to launch. See Daniella Diaz, *Top General Says He’d Push Back on “Illegal” Nuclear Strike Order*, CNN (Nov. 20, 2017), www.cnn.com/2017/11/18/politics/air-force-general-john-hyten-nuclear-strike-donald-trump/index.html (quoting Strategic Command Commander General John Hyten, “I provide advice to the President,” Hyten said. “He’ll tell me what to do, and if it’s illegal, guess what’s going to happen? I’m gonna say, ‘Mr. President, that’s illegal.’ Guess what he’s going to do? He’s going to say, ‘What would be legal?’ And we’ll come up with options of a mix of capabilities to respond to whatever the situation is, and that’s the way it works. It’s not that complicated.”); Rebecca Kheel, *Retired General Says Officers Can Refuse Nuclear Strike Order, but Process Is Murky*, THE HILL (Nov. 14, 2017), thehill.com/policy/defense/360297-retired-general-says-officers-can-refuse-nuclear-strike-order-but-process (discussing retired general C. Robert Kehler’s Senate testimony that, if faced with a nuclear strike order he considered illegal, “I would have said, ‘I have a question about this’ and I would have said ‘I’m not ready to proceed.’” When asked what would happen next, Kehler responded, “I don’t know exactly.”).

¹⁴⁰ Diaz, *supra* note 139; Kheel, *supra* note 139.

¹⁴¹ See Bruce Blair, *Strengthening Checks on Presidential Nuclear Launch Authority*, ARMS CONTROL TODAY (Jan./Feb. 2018) at 11, available at www.armscontrol.org/sites/default/files/files/ACT/ACT_JanFeb18_Blair_Prepublication.pdf. (In discussing what he calls “The Nuremberg solution,” Blair argues that it would not be possible for Strategic Command commanders to halt a launch by disobeying an illegal order in part because “a launch order normally would be transmitted by the Pentagon directly to the firing crews at the bottom of the chain, and StratCom and other senior military commanders receiving it at the same time could not interfere at this late stage. StratCom could scramble to issue a termination order but it would almost certainly arrive too late to stop the launch.”)

¹⁴² Rebecca C. Lubot, “A Dr. Strangelove Situation”: *Nuclear Anxiety, Presidential Fallibility, and the Twenty-Fifth Amendment*, 86 FORDHAM L. REV. 1175, 1175 (2017).

¹⁴³ See THOMAS H. NEALE, CONG. RESEARCH SERV., RL 31761, PRESIDENTIAL AND VICE PRESIDENTIAL SUCCESSION: OVERVIEW AND CURRENT LEGISLATION 4 (2004); see generally Lubot, *supra* note 142.

¹⁴⁴ Letter from Richard Nixon, former vice president, to Estes Kefauver, U.S. senator from Tenn. (June 10, 1963).

¹⁴⁵ See John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 908, 924 (2011).

¹⁴⁶ After the assassination of President Kennedy, the vice president’s office remained vacant for fourteen months until the appointment of Vice President Hubert H. Humphrey. See NEALE, *supra* note 143, at 4 n.12.

¹⁴⁷ 111 CONG. REC. 7942 (1965) (statement of Representative William M. McCulloch) (discussing the importance of executive continuity).

¹⁴⁸ The Twenty-Fifth Amendment is made up of four provisions that supersede the original Article II, section 1, clause 6 of the Constitution. See John Hudak, *The 25th Amendment*, BROOKINGS (June 9, 2017), www.brookings.edu/blog/unpacked/2017/06/09/the-25th-amendment/. Although the Twenty-Fifth Amendment provides a framework for continuity, it does not provide for “every conceivable succession contingency.” During ratification debates, some commentators raised concerns that the Twenty-Fifth Amendment was too narrow, specifically citing the possibility that both the president and the vice president could simultaneously be infirmed. See Lubot, *supra* note 142, at 1194–95. Section 1 provides that the vice president “shall become President” if the President is removed by death or resignation. U.S. CONST. amend. XXV, § 1. Section 2 addresses vacancies in the office of the vice president, instructing the president to nominate a vice president to be confirmed by the majority of both Houses of Congress. U.S. CONST. amend. XXV, § 2. Section 3 allows the president to temporarily transfer power to the vice president by written declaration to Congress and is appropriate in cases of a temporary and predictable disability. This transfer is critical in ensuring that control over the nuclear arsenal and the national command authority is maintained at all times. Section 3 has been invoked by presidents Ronald Reagan and George W. Bush to provide for temporary transfers of power during medical procedures. In 1985, while President Reagan was under anesthesia for a medical procedure, George H. W. Bush was acting president. Twice during the George W. Bush presidency, Vice President Dick Cheney served as acting president. See Feerick, *supra* note 145, at 929, 931.

¹⁴⁹ See, e.g., Andrew Prokop, *The 25th Amendment, Explained: How a President Can Be Declared Unfit to Serve*, Vox (Jan. 12, 2018, 10:32 AM) www.vox.com/policy-and-politics/2017/2/9/14488980/25th-amendment-trump-pence (discussing the Twenty-Fifth Amendment as a check on executive authority); David Welna, *Why President Trump Has Exclusive Authority to Order a Nuclear Strike*, NPR (Oct. 3, 2017, 5:00 AM), www.npr.org/2017/10/03/555266383/why-president-trump-has-exclusive-authority-to-order-a-nuclear-strike (discussing the Twenty-Fifth Amendment as a remedy to an illegal nuclear launch order); Allan Smith, *Global Security Expert: Yes, Trump Could Unilaterally Decide to Launch a Nuclear Weapon*, BUSINESS INSIDER (Aug. 9, 2017, 6:11 PM), www.businessinsider.com/nuclear-weapons-trump-how-are-launched-2017-8 (referring to the Twenty-Fifth Amendment as the “only thing” that could be used to stop a presidential launch order).

¹⁵⁰ Section 4 of the Twenty-Fifth Amendment has never been invoked.

¹⁵¹ Congress always retains the authority to impeach the president for high crimes and misdemeanors. U.S. CONST. art. II, § 4. The Twenty-Fifth Amendment was intended to be used in “especially dire” situations in which the president was unable to perform the duties of his office because of illness, not wrongdoing. See Hudak, *supra* note 148.

¹⁵² U.S. CONST. amend. XXV, § 4.

¹⁵³ *Id.*

¹⁵⁴ Jeffrey Rosen, *The 25th Amendment Makes Presidential Disability a Political Question*, ATLANTIC (May 23, 2017), www.theatlantic.com/politics/archive/2017/05/Presidential-disability-is-a-political-question/527703/.

¹⁵⁵ The Constitution also provides for a decision to be made by the vice president and “other such body as Congress may by law provide.” U.S. CONST. amend. XXV, § 4.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*, cl. 1.

¹⁵⁸ U.S. CONST. amend. XXV, § 4.

¹⁵⁹ *Id.*

About the Nuclear Threat Initiative

The Nuclear Threat Initiative works to protect our lives, environment, and quality of life now and for future generations. We work to prevent catastrophic attacks with weapons of mass destruction and disruption (WMDD)—nuclear, biological, radiological, chemical, and cyber.



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