

# The President and Nuclear Weapons: Implications of Sole Authority in Today's World

By Ernest J. Moniz and Sam Nunn

***The indefinite combination of human fallibility and nuclear weapons will destroy nations. Is it right and proper that today there are 7,500 strategic offensive nuclear warheads, of which 2,500 are at 15 minute alert to be launched by the decision of one human being?***<sup>1</sup>

~ Robert McNamara, former U.S. secretary of defense, December 2003, *The Fog of War* ~

## Introduction

There is no more consequential decision for a president than ordering a nuclear strike. Once launched, a nuclear-armed missile cannot be recalled or aborted. Today, the strategic environment and threats that could lead to the use of a nuclear weapon have changed from the Cold War, yet much of U.S. policy with respect to nuclear use authority remains grounded in that past era, increasing the risk of an accident or a mistake. As a result, there is renewed attention by Congress, former officials, experts, and publics on the legal authorities and limitations involved—as well as the process a U.S. president would confront—in making such a grave decision, and whether that structure can be altered to reduce the risk of a mistaken launch, while preserving the security benefits of nuclear deterrence as long as nuclear weapons exist.

To illuminate and inform a discussion of nuclear use authority, the Nuclear Threat Initiative (NTI) commissioned a paper by Mary DeRosa and Ashley

Nicolas to identify the key legal questions relevant to a president's decision.<sup>2</sup> The paper includes a summary of the state of domestic and international law and the relevant process relating to the potential exercise of nuclear use authority. Informed by that analysis, this paper seeks to identify legally available steps to improve and strengthen the decision-making process for nuclear use and consultations with Congress.

## The Need for Speed—and Sole Authority: Procedures Designed for a Different Era

Throughout the Cold War period of confrontations and crises, the threat of sudden nuclear annihilation by the Soviet Union shaped the decision-making process and the procedures for using nuclear weapons. Under the perceived threat of a “bolt-from-the-blue” nuclear attack and the need to guard against a “nuclear Pearl Harbor,” the procedures developed from 1945-to-1991 increasingly emphasized speed and efficiency—and

<sup>1</sup> *The Fog of War: Eleven Lessons from the Life of Robert S. McNamara*, directed by Errol Morris (2003; New York: Sony Pictures Classics); “Despite progress in reducing Cold War nuclear arsenals, the world’s combined inventory of nuclear warheads remains at a very high level: roughly 13,890 warheads as of early-2019. Of these, approximately 9,330 are in the military stockpiles (the rest are awaiting dismantlement), of which some 3,600 warheads are deployed with operational forces, of which about 1,800 US, Russian, British, and French warheads are on high alert, ready for use on short notice.” Hans M. Kristensen and Matt Korda, “Status of World Nuclear Forces,” Federation of American Scientists, Washington, DC, May 2019, available at [fas.org/issues/nuclear-weapons/status-world-nuclear-forces/](http://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/).

<sup>2</sup> Mary B. DeRosa and Ashley Nicolas, “The President and Nuclear Weapons: Authorities, Limits, and Process,” Nuclear Threat Initiative, Washington, DC, December 2019. [www.NTI.org/The-President-and-Nuclear-Weapons](http://www.NTI.org/The-President-and-Nuclear-Weapons).

provided one reason for maintaining the option for nuclear first use—and placed sole decision-making authority in the hands of the president. Thirteen presidents have shouldered this responsibility under various geopolitical conditions and threats, ranging from major wars in Korea and Vietnam to regional crises spanning Europe and the Caribbean, most notably the 1962 Cuban Missile Crisis.

Despite enormous changes in the strategic and threat landscape over the past 30 years, nuclear force postures in the United States and Russia retain extensive capabilities for prompt-launch—and the associated requirement for a decision on nuclear use within minutes of warning of a possible attack. There is currently insufficient leadership focus in Washington and Moscow on the need to manage and reduce nuclear risks—an alarmingly dangerous situation considering the deterioration in relations between the United States and Russia since the 2014 Ukraine crisis, the resulting curtailment of political and military dialogue, the erosion of arms control structures, the advances in military technologies, and the cyber risks to early warning and command and control systems. Russian election meddling exacerbated the deterioration of the relationship considerably.

The procedures still in use today were designed for a different era. By favoring speed over consultation and deliberation, and by relying on the president as sole authority, the decision to launch a U.S. nuclear weapon is exclusively in the president's hands; currently, no statute limits the president's authority to employ nuclear weapons.

## Strengthening the Nuclear Use Authority Process

The following steps to improve and strengthen the decision-making process for nuclear use and for consultations with Congress could be adopted now by the executive branch. As appropriate, they could be encouraged or mandated in legislation to help ensure that a decision relating to the potential use of nuclear weapons is deliberative with appropriate consultations within the executive branch and Congress and undertaken consistent with the U.S. Constitution and national and international law. These actions can be complementary and pursued in tandem and could include the following:

## Strengthening executive branch procedures and planning regarding the potential use of a nuclear weapon

- Building on the existing pre-planning process within the Department of Defense, any pre-planned policy option involving the potential use of a U.S. nuclear weapon should receive a full policy and interagency legal review, and be approved by the secretary of defense, in consultation with the secretary of state, the attorney general, and the director of national intelligence. The review should also take into account hypothetical “red team” plans based on the latest intelligence regarding the doctrine, strategy, and weapons capabilities of potential adversaries.
- Any consideration by the president of the potential use of a U.S. nuclear weapon—including both first use and response in self-defense when the decision-making time allows a window for consultations—should involve such consultation with relevant officials in the Executive Branch of Government including the secretary of defense, the secretary of state, the chairman of the Joint Chiefs of Staff, the commander of the U.S. Strategic Command, and the attorney general (including interagency legal review). The available time for consultations should be significantly influenced by the magnitude of the reported attack in self-defense scenarios.

## Strengthening procedures for consulting and briefing Congress

- The Speaker of the House and the House minority leader, majority and minority leaders of the Senate, along with the chair and ranking members of the Committees on Armed Services, Foreign Relations, and Intelligence, should be briefed at least annually on the nuclear weapons employment policy guidance issued by the president. They also should be briefed generally on the executive branch procedures for ordering and implementing a nuclear strike.
- Any consideration by the president of the potential use of a U.S. nuclear weapon—including first use and response in self-defense (as discussed above)—should involve, when possible, consultation with relevant officials in the Congress. At a minimum, the Speaker of the House and House minority leader and the majority and minority leaders of the Senate should be consulted as part of any such consideration.

Together, these steps would encourage appropriate focus before or during a crisis, inform a deliberative process, and enhance the legitimacy of—and trust in—any decision about potential use of a nuclear weapon by the president.

## Strengthening the role of Congress

In parallel, Congress should move quickly to encourage through oversight and legislation a comprehensive approach to reducing the risk of nuclear use—whether through a deliberate act of aggression, an accident, or a miscalculation—particularly in light of the fragile relationship between Washington and Moscow where the means of managing nuclear risks developed during the Cold War have withered.

**First**, Congress should mandate reports to appropriate committees—with clear reporting requirements by the executive branch—to assist in providing close and sustained oversight of executive branch efforts to reduce nuclear risks. Those reports should address matters including the following:

- Cyber threats to nuclear weapons or related systems—including nuclear planning systems, early warning systems, communication systems, and delivery systems, in addition to the nuclear weapons themselves—and steps that can be taken to reduce those risks.
- Adequacy of safeguards to prevent unauthorized nuclear use by any element of the chain of command or other actors.
- Capability and feasibility of fail-safe procedures and mechanisms on all nuclear weapon systems, including consideration of developing and employing capabilities to abort an accidental missile launch and encouraging all nuclear weapon states to do likewise.
- Intelligence capabilities to give accurate assessments in real time of the national origin of a nuclear attack on America or our allies from whatever means, including submarines or aircraft, or a nuclear attack by nonstate actors or terrorists.
- Assessment of other nuclear weapon states' capacities and procedures to avoid catastrophic accidents or unauthorized use.

The executive branch should welcome such oversight as an opportunity to work with Congress to reduce nuclear

risks, improve nuclear security, and provide reassurance to the American people. In addition, the United States should call for other nuclear weapon states to undertake similar reviews in their own interests and the interests of global security.

**Second**, although mandating congressional authorization of all uses of nuclear weapons in all circumstances could weaken deterrence, Congress can and should hold hearings and develop a legislative proposal clarifying its role in the authorization of the use of nuclear weapons in certain circumstances. Specifically, particularly in the absence of a “No First Use” policy and relying on its constitutional war powers, Congress could require congressional authorization for the first use of a nuclear weapon (e.g., via statute or as part of a force authorization), where the legal argument for a congressional role is strongest. This provision would except use in self-defense against an attack on the United States or its allies that has begun or is imminent.

Such a provision would not impinge on the president's current authority to use a nuclear weapon in response to an imminent or ongoing attack against the United States or its allies. Rather, the effect would be to impede a U.S. president from ordering a preventive nuclear strike or “bolt-from-the-blue” without prior congressional authorization. It would constitute a legal constraint that must be recognized in developing and considering military and policy options for the president, and in implementing the orders of the president.

Legislating a congressional role in the authorization of the use of nuclear weapons as described above would immediately bump into the U.S. Constitution's division of war powers between the executive and legislative branches—an area of law that, as the DeRosa and Nicolas paper points out, is notoriously murky and unsettled. Moreover, there almost certainly would be a number of gray areas deriving from even the most carefully crafted legislation requiring a congressional role for the first use of a nuclear weapon.

For this reason, Congress should embed such a provision in the formation of a permanent active council of congressional leadership that would, as an entity, be available for the consultations with the president envisioned in the original War Powers Resolution of 1973. Such a group would consult regularly with the executive on vital national security issues. It would provide a forum through which executive-legislative

consultation can be facilitated on issues relating to war and peace, including the potential first use of a nuclear weapon. The creation of this active council of congressional leadership should enhance overall congressional-executive coordination and enable Congress and the executive branch to respond more effectively to the types of situations that could lead to the most consequential decision imaginable—the consideration of nuclear use. Establishing executive-legislative relationships through such a council is critical for effective rapid consultation in a crisis. Trust of this sort cannot be forged in the heat of a crisis and its requirement for timely and wise decision-making.

## Changes to Nuclear Force Structure, Force Posture, and Policy to Increase Decision Time

Today, the rationale for speed and sole authority in the United States is premised primarily on the perception of risk emanating from the other major nuclear power—Russia—due to the size and posture of its nuclear forces: strategic long-range nuclear-armed ballistic missiles on high alert and capable of prompt-strike; and in the future the potential deployment of novel means of delivering a nuclear weapon, including hyper-sonic boost glide vehicles or cruise missiles that can travel at very high speeds, fly at low-altitudes, and maneuver to elude defenses.

By means of comparison, the risk of nuclear use with respect to China does not include this toxic combination of a large number of strategic long-range nuclear forces deployed on prompt-launch that would necessitate a U.S. nuclear force posture that prioritizes speed and sole authority. Rather, a scenario involving conflict between China and the United States would most likely begin as a conventional conflict in the Asia-Pacific region that would evolve over many days or even months. Other threats that are occasionally cited as having the potential to justify the possible employment of U.S. nuclear weapons—e.g., North Korea’s nuclear forces and program, a possible Iranian nuclear weapons program in the future, or an attack from any country involving

biological weapons or non-nuclear strategic attacks—are of a scale, and involve a timeline or both that are separable and distinct from the dynamic of U.S.-Russian nuclear forces and therefore do not result in the same pressure for speed of decision and action when it comes to any consideration of nuclear use.

Hence, steps—including changes in nuclear force structure, posture, and policy—that would reduce vulnerability to short-warning nuclear attacks and would increase warning and decision time between the United States and Russia to give decision-makers more than just minutes to decide whether to use nuclear weapons would complement and reinforce other policy and procedural changes. Such steps would provide greater confidence in the process by which a president might consider the use of nuclear weapons. Engaging with China to avoid replicating U.S.-Soviet Cold War-era nuclear force structures, prompt-launch postures, and policies—and the mutual nuclear risks driven by speed and sole authority—should also be a priority. The bottom line is that the U.S. and Russian nuclear weapons stockpile size, delivery systems, and force postures are the overwhelming drivers of possible strategic instability and use authority challenges.

## Conclusion

Almost 75 years after President Harry S. Truman’s decision to use nuclear weapons to end World War II, the final decision to use a U.S. nuclear weapon remains in the president’s hands alone. Throughout the nuclear era, nuclear capabilities have evolved in ways that increase the speed and certainty of delivering a nuclear strike—and increase the now unimaginable pressure a president would be under to make a momentous and potentially catastrophic decision. In the absence of initiative, the inherent risks associated with compressed nuclear decision-making time by a sole authority will only increase. Taking steps now to increase confidence in the process for considering the use of nuclear weapons—and creating the conditions for future improvements in that process—can substantially reduce nuclear risks while maintaining the security benefits of nuclear deterrence as long as nuclear weapons exist.

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