Nuclear Command and Statutory Control

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INTRODUCTION

Acquiescence to a claim of expansive executive authority, U.S. Supreme Court Justice Robert Jackson famously warned, allows that power to become "a loaded weapon" available for use or abuse.[1] The nuclear weapons over which the President has all but complete power are, however, not metaphorical. More than 500 global-range U.S. ballistic missiles are continually in alert postures, cocked and loaded with over 1,000 thermonuclear warheads.[2] Hundreds more warheads can be loaded onto aircraft and other missiles.[3] As all three branches of government and the public have allowed for nearly 75 years, the President need only reach for the phone or the nuclear "football" to order a nuclear attack at any time, without anyone's authorization or second vote.[4]

After decades of inertia, the nation has resumed a conversation about nuclear command and control that has been dormant since the Cold War's end 30 years ago.[5] The Defense Department,

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[1] *See* Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). All three branches of government have repudiated the race-based deprivation of liberty at issue in *Korematsu* and ratified at that time by the Court majority. *See* Trump v. Hawaii, 138 S.Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided…").

[2] The "cocked and loaded" terminology is that of President Trump regarding U.S. conventional capabilities for a potential strike on Iran. *See* Donald J. Trump (@realDonaldTrump), TWITTER (June 21, 2019, 9:03 AM), https://perma.cc/H7QP-T9XB. It applies equally well to the U.S. nuclear posture: nuclear-armed global range ballistic missiles on land and at sea in alert postures. The numbers above are based on Kristensen & Korda, adjusted downward due to a portion of the sea-based ballistic missile force being on submarines in port or otherwise not in firing position. *See* Hans M. Kristensen & Matt Korda, *United States Nuclear Forces 2019,* 75 BULL. ATOMIC SCIENTISTS 122 (2019). U.S. submarine-launched ballistic missiles carry many warheads – multiple independently targeted re-entry vehicles (MIRVs) – and U.S. land-based missiles could re-upload them. For discussion, see Dakota S. Rudesill, *MIRVs Matter: Banning Hydra-Headed Missiles in a New START II Treaty*, 54 STAN. J. INT'L L. 83 (2018) (arguing for treaty limiting MIRVs).

[3] *See* U.S. DEP'T OF DEF., NUCLEAR POSTURE REVIEW 41–48 (2018) [hereinafter 2018 NPR].

[4] The nuclear "football," containing nuclear weapons information and secure communications equipment, has been at the President's side in one form or another since the 1960s.

[5] At the end of the Cold War scholarly, practitioner, and public attention to nuclear command and control sharply declined. For engagement near the end of the Cold War, *see*, *e.g.*, MANAGING NUCLEAR OPERATIONS (Ashton B. Carter, John D. Steinbruner & Charles A. Zraket, eds., 1987) (non-legal scholars, policy experts, and civilian and military practitioners analyze policy, military, technology, arms control, and psychological issues); FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES? (Peter Raven-Hansen, ed. 1987) (legal scholarship on law and nuclear weapons). After the Soviet Union's demise, law professors stopped writing on the subject. *Cf.,* ELAINE SCARRY, THERMONUCLEAR MONARCHY: CHOOSING BETWEEN DEMOCRACY AND DOOM (2014) (professor of English argues that nuclear command and control system is unconstitutional). Several law students wrote related Notes.

Congress, the nuclear policy community, legal scholars, and the public are engaged.[6] Presidential candidates have debated a U.S. "no first use" policy.[7] Frequently, the nuclear command and control debate returns to a dilemma. A primary virtue of the system's legal, decision process, and technology architecture is also a potential liability: concentration of discretion to use the world's most destructive weapons in one person. What could enable timely presidential decision in the classic nuclear nightmare of an adversary nuclear attack may permit other nightmares: an unwarranted launch order, or a precipitous order where the necessity and legality of the strike are questionable and the President has bypassed advisors and ignored pertinent fact and law.

Nuclear command and control is getting renewed attention because the possibility of U.S. use of nuclear weapons may be rising.[8] Russia has revived as a geopolitical adversary of the United States, which withdrew from a landmark nuclear arms treaty in August 2019 after Russian violations.[9] China and North Korea have enhanced their nuclear capabilities, and tensions with Iran are spiking.[10] The risk of trans-national terrorist networks acquiring weapons of mass

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6 *See* Sandra Erwin, *U.S. STRATCOM to Take Over Responsibility for Nuclear Command, Control and Communications*, SPACENEWS (July 23, 2018), https://perma.cc/ZPZ9-DWLD (describing changes in system's organization regarding communications); Jon. B. Wolfstahl (@JBWolfstahl), TWITTER (Dec. 10, 2018, 5:49 PM), https://perma.cc/K6ZH-N45T (Secretary of Defense James Mattis reportedly "inserted himself into the nuclear weapons chain of command"); Bruce G. Blair, *Strengthening Checks on Presidential Nuclear Launch Authority*, ARMS CONTROL TODAY (Jan. / Feb. 2018), https://perma.cc/9FGF-W4KD (calling for checks on presidential launch authority); S. 272, 116th Cong. (2019) (legislation introduced by Sen. Elizabeth Warren (D-MA) stating "It is the policy of the United States to not use nuclear weapons first"); Restricting First Use of Nuclear Weapons Act of 2017, H.R. 669, 115th Cong. (2017) (legislation introduced by Rep. Ted Lieu (D-CA)); Restricting First Use of Nuclear Weapons Act of 2017, S. 200, 115th Cong. (2017) (legislation introduced by Sen. Ted Markey (D-MA)); *Authority to Order the Use of Nuclear Weapons: Hearing Before the S. Comm. on Foreign Relations*, 115th Cong. 22 (2017) [hereinafter *SFRC 2017 Hearing*] (first congressional hearing on nuclear command and control since 1976); Anthony J. Colangelo & Peter Hayes, *An International Tribunal for the Use of Nuclear Weapons*, 2 J. PEACE & NUCLEAR DISARMAMENT 219 (2019) (arguing for international tribunal to hold military officers accountable for illegal nuclear launch orders); Richard K. Betts & Matthew C. Waxman, *The President and the Bomb: Reforming the Nuclear Launch Process*, 97 FOR. AFF. 119 (2018) (recommending the Secretary of Defense and Attorney General must confirm a nuclear launch order and its legality). See also the interdisciplinary conferences mentioned *supra* note *, which have included legal scholars.

7 *See* S. 272, *supra* note 6 (Sen. Warren legislation); Bruce Blair & Jon Wolfsthal, *We Still Can't 'Win' a Nuclear War. Pretending We Could Is a Dangerous Fantasy*, WASH. POST (Aug. 1, 2019, 1:55 PM), https://perma.cc/N7TX-FACE (Sen. Warren argues for "no first use"; former Vice President, then-presidential candidate, and newly elected President Joe Biden proposed that nuclear deterrence be the sole purpose of U.S. nuclear arms).

8 *See* Ernest Moniz & Sam Nunn, *The Return of Doomsday: The New Nuclear Arms Race – and How Washington and Moscow Can Stop It*, 98 FOR. AFF. 150 (2019) (risk of nuclear employment highest since Cuban Missile Crisis in 1962).

9 *See* Hans M. Kristensen & Matt Korda, *Russian Nuclear Forces 2019,* 75 BULL. ATOMIC SCIENTISTS 73, 82 (2019) (Russia modernizing nuclear forces); Ilya Arkhipov, *Putin Warns U.S. of New Arms Race After Nuclear Deal's Collapse*, BLOOMBERG (Aug. 5, 2019, 9:23 AM), https://perma.cc/MT9D-H5WE (United States withdrawal from 1987 Intermediate-range Nuclear Forces (INF) Treaty with Russia effective August 2019 in response to alleged Russian violation spurs warnings and concerns of new nuclear arms race).

10 *See* Hans M. Kristensen & Matt Korda, *Chinese Nuclear Forces 2019,* 75 BULL. ATOMIC SCIENTISTS 171, 171 (2019); Hans M. Kristensen & Robert S. Norris, *North Korean Nuclear Capabilities 2018,* 74 BULL. ATOMIC SCIENTISTS 41, 41 (2018); Babak Dehghanpisheh & Tuqa Khalid, *Iran Makes New Nuclear Threats that Would*

destruction endures. The United States has also elected an unconventional personality to the presidency, one who has more explicitly threatened the "fire and fury" of nuclear war than any predecessor.[11]

The design of the nuclear command and control system is, however, an urgent question that transcends the moment's geopolitics or leadership. It demands great care. Because nuclear deterrence directly depends on the responsiveness of the system, any changes must be well justified.[12] Any changes must facilitate good decision-making in the most perilous circumstances by both the most and least prudent presidential personalities.

This is not an easy conversation. The matter is bedeviled by its importance and complexity. A cloak of classification shrouds many of the system's most important details. The status quo reflects decades of inertia behind the notion that, for reasons of national security necessity, nuclear weapons are the President's weapons. The fact that the current system has never been used operationally is both cause for celebration and a challenge to analysis and reform.[13] On the public record, we simply do not know precisely how the decision process would unfold. We do, however, have the opportunity and responsibility to think about how it should.

This article speaks to an interdisciplinary audience. For the legal community, this article explains how policy, military, technology, and other factual aspects of nuclear operations powerfully shape how the law operates – currently and potentially – regarding "the bomb." Meanwhile, this article's message to the policy, military, and legal communities is that new approaches are possible. Nuclear weapons need not be assumed to be constitutionally special: left entirely to one branch of government.

Instead, nuclear weapons should join a short list of critical national security capabilities that are *statutorily special*: governed by congressionally-written tailored decision process rules. Nuclear weapons should join covert action and foreign intelligence surveillance on this list.[14] Like nuclear weapons, these matters were left too long to near-total executive discretion. As process statutes, the covert action statute and Foreign Intelligence Surveillance Act (FISA) run over the top of any underlying legal authority for use of force. They allow effective and urgent defense of the country, while promoting deliberation and discouraging abuse of authority.

Reverse Steps in Pact, REUTERS (July 8, 2019, 7:01 AM), https://perma.cc/GN64-KXGK (Iran has enriched uranium in violation of 2015 agreement, and threatened to restart deactivated centrifuges and further enrich).

11 *See* Peter Baker & Chloe Sang-Hun, *Trump Threatens 'Fire and Fury' Against North Korea if It Endangers U.S.*, N.Y. TIMES (Aug. 8, 2017), https://perma.cc/B8HK-JTFV. *See also* Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 2, 2018, 7:49 PM), https://perma.cc/EU9T-ACEH (President says he has "a Nuclear Button, but it is a much bigger & more powerful one than [North Korea's], and my Button works!").

12 *See* Charlie Dunlap, *The Danger of Tampering with America's Nuclear Command and Control System*, LAWFIRE (Nov. 22, 2017), https://perma.cc/VK6Z-SRAC [hereinafter Dunlap, *The Danger of Tampering*].

13 President Truman's 1945 decision to employ the atomic bomb against Japan and the 1962 Cuban Missile Crisis both predated the advent of the nuclear command and control system we have inherited.

14 *See* 50 U.S.C. § 3093 (2019) (covert action); Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801 *et seq* (1978).

In terms of organization, this article begins by analyzing important developments in the nearly 50 years since Congress voted on nuclear command and control, in the 45 years since a drunken President reportedly called for nuclear use, and in the 30 years since the Cold War ended and the conversation among legal scholars about nuclear launch authority went on hiatus.[15] Part I explains that nightmarish risks remain unaddressed in the nuclear command and control system at the national leadership level. Part II explores convergence – how the nuclear and conventional worlds have become more similar, in ways that augur toward creation of decision process rules for nuclear use. Today, a nuclear use scenario is likely to have more in common with the 2011 raid that killed Usama bin Laden than with the Cold War worst-case scenario for which the nuclear command and control system is optimized. In Part III, this article sets out the value of robust decision process at the inter-agency National Security Council (NSC) level of the Executive Branch, a forum used effectively to make decisions about bin Laden and other complex, highly classified national security matters. Because the President can waive self-imposed rules, they should be provided by statute.

Part IV explains that the constitutional case for congressional authority to legislate regarding nuclear use has grown stronger since the nuclear constitutional conversation halted at the Cold War's end. Thirty years later, the renewed nuclear command and control conversation is often distracted by problematic claims and assumptions. Changes in the international security environment, developments in constitutional doctrine, and entrenchment of process statutes regarding covert action and surveillance all run against viewing nuclear weapons as constitutionally special and left entirely to the President. These developments would provide more authority for current legislation mandating "no first use." That, however, is a separate question from what this article recommends in Part V: a decision process statute. Such a law would make decisions about nuclear use, like covert action and surveillance, statutorily special. Part V also addresses potential objections and outlines possible alternatives. Finally, this article's appendix includes a draft statute – a prompt for the renewed dialogue to continue, for new thinking, and for Congress to end its acquiescence.

Ultimately, this proposal seeks to provide rules and build norms that would help ensure that nuclear weapons could only be employed in two situations, both in which law other than the proposed statute provides authority for the use of force. One use situation is imminent or initiated adversary nuclear attack. The second is where adversary nuclear attack is not imminent, the available time is used by the relevant national security stakeholders to evaluate a range of nuclear and non-nuclear options, preferably using the NSC process, and non-nuclear weapons would not be sufficient. The statute this article recommends would be informed by the covert action statute and other frameworks.

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[15] Before a 2018 piece on illegal nuclear orders, almost exactly three decades passed since publication of the last law review article by a law professor on nuclear launch authority. *See* Anthony J. Colangelo, *The Duty to Disobey Illegal Nuclear Strike Orders*, 9 HARV. NAT'L SEC. J. 84 (2018); Peter Raven-Hansen, *Nuclear War Powers*, 83 AM. J. INT'L L. 786 (1989).

This proposal challenges longstanding habit and received wisdom. It will face resistance – both reflexive and thoughtful – from individuals and institutions invested in our risk-riven nuclear command and control system. This new approach may also be criticized by those who accept minority legal views of nearly unlimited presidential power generally, or apply that view specifically to nuclear weapons. But making certain critical national security capabilities statutorily special is now longstanding elsewhere in the core of the national security legal regime. And it is amply warranted here. Importantly, the statute this article recommends would do nothing to undermine nuclear deterrence. It would do nothing to impede proper use of the Commander in Chief power. It would do nothing to frustrate necessary and legal use of nuclear weapons. This proposal would, in contrast, help ensure that the government operates as it should at the national leadership level regarding nuclear arms.

There is no guarantee that in our constitutional system a committed rogue president could be stopped. But in minimally invasive fashion, this proposal would provide the keepers of our nation's loaded nuclear weapons new grounds to resist impulsive or illegal orders.[16]

I. THREE ENDURING NUCLEAR NIGHTMARES

In November 2017, the Senate Foreign Relations Committee held the first congressional hearing on nuclear command and control in 41 years.[17] General Robert Kehler, the former chief of the nation's nuclear command, the U.S. Strategic Command, testified about three potential nuclear use scenarios: an imminent or ongoing attack against the United States or its allies, presidential consideration of a nuclear strike absent an apparent threat, and strategic warning that nuclear attack against the United States may be actively contemplated by an adversary.[18] All three are nuclear nightmares.[19] All three were discussed at the last hearings in 1976.[20] Yet four decades later the nuclear command and control system – in its legal, process, and technology aspects – remains optimized only for the first nuclear nightmare. Of course, the law prohibits unnecessary, disproportionate, or otherwise illegal use of force of any kind.[21] But on the public record the precise

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16 For a thoughtful treatment of the larger phenomenon of resistance, *see* Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139 (2018) (critiquing both antipathy for and too much faith in bureaucratic resistance to check a misguided President).

17 *See* SFRC 2017 hearing, *supra* note 6.

18 *See* SFRC 2017 hearing, *supra* note 6.

19 Nuclear weapons are deeply terrifying, and the "nuclear nightmare" meme has been around for some time. *See, e.g.*, JOSEPH CIRINCIONE, NUCLEAR NIGHTMARES (2015) (policy-focused book about current nuclear threats and arms control); NUCLEAR NIGHTMARES: THE WARS THAT MUST NEVER HAPPEN (British Broad. Corp. Television 1979) (documentary film on nuclear weaponry and deterrence).

20 *See First Use of Nuclear Weapons: Preserving Responsible Control: Hearings before the Subcomm. on Int'l Sec. & Scientific Affairs of the Comm. on Int'l Relations of the House of Rep.*, 94th Cong. (1976) [*hereinafter* HIRC 1976 hearings].

21 *See* U.N. Charter art. 51 (inherent right of self-defense); U.S. DEP'T OF DEF., OFFICE OF GEN. COUNSEL, LAW OF WAR MANUAL (2016) [*hereinafter* U.S. LAW OF WAR MANUAL], specifically §§ 1.11.5 (under *jus ad bellum* "To constitute legitimate self-defense under customary international law, it is generally understood that the defending State's actions must be necessary" and "[P]roportionate to the nature of the threat being addressed"); *Id*. §§ 2.2, 2.4

contours of the nuclear command and control system's process norms are unclear, and are untested since a disturbed President's reported drunken nuclear instructions 45 years ago. One simply cannot be confident that the law of armed conflict or these uncertain norms could restrain a President who is committed to ordering a nuclear attack either without justification (what this article conceives as a Rogue President) or before its legality, implications, and alternatives are fully evaluated (a Precipitous President).

A. Nuclear Nightmare Number One: Initiated or Temporally Imminent Attack

The Nuclear Command and Control System (NCCS) is, in the words of the Defense Department, "a legacy of the Cold War."[22] It was designed with the unforgiving realities of missile flight times in mind. If the Soviet Union or China were to be deterred from shooting first in a crisis – launching a first strike that would decapitate the U.S. government or destroy U.S. forces on the ground – a complex array of machines, organizations, and people distributed across thousands of miles would have to do a series of complicated things in a matter of minutes while under nuclear attack.[23] The system would have to detect and analyze the threat, transmit that information to national leadership, evaluate the threat and potential responses, make a decision, and communicate that decision promptly, securely, and reliably to personnel in the field operating missiles, submarines, and bombers in time for them to launch and inflict unacceptable damage on the adversary before U.S. forces were destroyed or otherwise rendered inoperative.[24] The timelines are almost impossibly compressed. By some public estimates, U.S. national leadership would have perhaps 10 minutes to evaluate an incoming ballistic missile attack from the Eurasian landmass, make a decision about launch, and transmit orders to the field. If an adversary launched ballistic or cruise missiles at Washington, D.C., from a submarine close to the U.S. coastline in depressed flight trajectories, according to some public estimates it could be challenging for the national leadership to have even 200 seconds before the first adversary warheads detonated.[25] Were an

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(necessity and proportionality principles of the *jus in bello* international law of armed conflict (LOAC), also referenced as International Humanitarian Law).

22 2018 NPR, *supra* note 3, at 56.

23 The Defense Department recently defined deterrence as ensuring that an adversary understands that attack "will fail and result in intolerable costs for them." *See* 2018 NPR, *supra* note 3, at 20.

24 *See* OFFICE OF THE ASSISTANT SEC'Y OF DEF. FOR NUCLEAR, CHEM., AND BIOLOGICAL DEF. PROGRAMS, NUCLEAR MATTERS HANDBOOK, 85-105 (2016), https://perma.cc/CL5E-PMPC (describing system). Nuclear planners have been long concerned about the system's ability to operate under attack despite nuclear weapon effects that include computer-destroying electromagnetic pulse (EMP). *See* Ashton P. Carter, *Communications Technologies and Vulnerabilities*, *in* MANAGING NUCLEAR OPERATIONS, *supra* note 5, at 273, 273-78 (EMP effects); Walter Slocombe, *Preplanned Operations*, *in* MANAGING NUCLEAR OPERATIONS, *supra* note 5, at 121, 137 (even if "dire predictions of near total C^3 collapse prove too pessimistic, something . . . will go wrong"). Concern about cyber threats is growing and one driver of a multi-billion dollar modernization. *See* 2018 NPR, *supra* note 3, at viii.

25 *See* MARC AMBINDER, THE BRINK: PRESIDENT REAGAN AND THE NUCLEAR WAR SCARE OF 1983 at 25-26 (2018) (less than three minutes if Soviets used submarine-launched ballistic missiles); Slocombe, *supra* note 24, at 132-37 (other decision timelines).

adversary nuclear device clandestinely transported to within range of the national leadership on the ground, warning time could also be zero.[26]

The inherited system, designed during the Cold War, focuses on the President. It does this for the constitutional reason of the President's position as Commander in Chief, and to reflect civilian control of the armed forces. Presidential focus and the unity of command – rather than, for example, vesting launch authority with a committee or involving Congress – in theory also provides the U.S. government its most credible possibilities of having meaningful decision time before nuclear war begins, of shooting first in a pre-emptive strike if it looks like an adversary is readying attack, of "launch under attack" with adversary missiles in the air, or of surviving an adversary first strike and still being able to command the U.S. arsenal.[27] The credibility of the system working under sudden, massive, catastrophic nuclear attack, or during a limited or even protracted nuclear war, is integral to nuclear deterrence as a theory and as practiced for over half a century.[28]

Current procedures provide for a "threat conference" at which the President would confer, to the extent they or their deputies are available, with the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Commanders of the U.S. Strategic Command and the North American Aerospace Defense Command (NORAD).[29] Other military commanders (for example, the NATO

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[26] One commonly discussed decapitation scenario involves an adversary nuclear weapon secreted into the nation's capital and detonated blocks from the White House. At that point, the system's decision focus would shift from the President to the next-in-line surviving presidential successor, as provided by the Constitution and statute and organized by the federal government's Continuity of Operations (COOP), Continuity of Government (COG), and Enduring Constitutional Government (ECG) plans. *See* U.S. CONST. art. II, § 1, cl. 6; U.S. CONST. amend. XXV; 3 U.S.C. § 19 (2006); Presidential Policy Directive 40 (PPD-40), National Continuity Policy, July 15, 2016 (unpublished document); Dep't Homeland Security, Federal Continuity Directive 1: Federal Executive Branch National Continuity Program and Requirements, Jan. 17, 2017, https://perma.cc/Z4CW-N4JS (continuity plan issued pursuant to and referencing PPD-40).

[27] *See* U.S. CONST., art. II, § 2, cl. 1. The President can, and at least during the Cold War did delegate authority to lower level officials. *See, e.g.,* Slocombe, *supra* note 24, at 133-34; Paul Bracken, *Delegation of Nuclear Command Authority*, *in* MANAGING NUCLEAR OPERATIONS, *supra* note 5, at 352, 352-72. The defense doctrine of the North Atlantic Treaty Organization (NATO) has long involved processes for delegating authority for use of U.S. nuclear weapons. *See, e.g.,* Catherine McArdle Kellher, *NATO Nuclear Operations*, *in* MANAGING NUCLEAR OPERATIONS, *supra* note 5, at 445, 445-69.

[28] The NCCS also provides the President information about damage inflicted by adversary weapons, the status of U.S. forces under attack, and the damage inflicted by U.S. weapons, to inform as best as is possible ongoing presidential decision-making and communications with the adversary about war termination. These additional tasks would be especially important if nuclear use was not in the context of a full superpower exchange. Limited and even "protracted" nuclear war options were theorized and prepared from the onset of the nuclear age and became important parts of the NCCS and U.S. nuclear war planning during the Cold War, thanks to concerns about the unwinnable nature of a full superpower nuclear exchange and the ascendance of game theory in U.S. nuclear theology. *See, e.g.*, HENRY A. KISSINGER, NUCLEAR WEAPONS AND FOREIGN POLICY 132-202 (1957) (theorizing limited nuclear war). The practical plausibility of these ideas, and their implications, were criticized. Limited nuclear war options continue to be theorized. *See, e.g.*, ON LIMITED NUCLEAR WAR IN THE 21ST CENTURY (Jeffrey A. Larsen & Kerry M. Kartchner, eds., 2014) (edited volume by scholars and practitioners on history and on current challenges).

[29] *See* Amy F. Woolf, CONG. RES. SERV., IF10521, DEFENSE PRIMER: COMMAND AND CONTROL OF NUCLEAR FORCES 1 (2018), https://perma.cc/9MLN-XAMT. The NATO Commander's title, referencing the Supreme Allied

Commander or regional combatant commanders) or civilian officials, such as the Director of National Intelligence or Secretary of State, may be added depending on the threat and time available. These advisors would inform and advise. Selecting among options and ordering use of nuclear weapons are decisions that are exclusively the President's. It is also up to the President about whether to participate in a threat conference – or whether to talk with advisors at all before giving an order. Because having two officials who have to agree doubles the chances of a successful decapitation strike, the theory goes, there is no second vote.[30]

The system's technology supports presidential decision where speed, unity of decision, verification of the President's identity, authentication of orders, and communications security are imperative. It enables the most current intelligence to be transmitted to the President rapidly. Open sources indicate that the nuclear "football" carried by a military aide assigned to the President contains the highly classified Nuclear Decision Handbook – the "black book" – with a summary of standing strike options. The football contains communications equipment to verify the President's identity, and to encode and promptly transmit the President's order to the Pentagon and U.S. Strategic Command.[31] The public record is ambiguous as to whether current procedures provide for the Secretary of Defense to confirm that the order came from the President.[32] Open sources include references to the President's potential ability to bypass top advisors and issue orders directly to lower level officers staffing the Pentagon's National Military Command Center.[33] The public record indicates that after the President's orders are transmitted to bombers, missile officers, or submarines, the factual and legal basis for the President's orders are not reviewed by forces in the field before weapons are released (and once fired, nuclear-armed missiles cannot be recalled).[34] From the top down, the inherited system implicitly assumes that the

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Commander title of the Western allies' top military commander in Europe in World War II, is the Supreme Allied Commander – Europe (SACEUR).

30 *See* Woolf, *supra* note 29, at 1 (discussing sole decision power of President). Bomber, land-based ICBM, and submarine crews, even after receiving an authenticated launch order, follow a "two person rule" – they cannot fire without two officers acting. *See* Blair, *supra* note 6, at n.1. Such a rule for the national leadership level has been periodically discussed but never adopted. *See, e.g.,* Herb Lin*, A Two-Person Rule for Ordering the Use of Nuclear Weapons, Even for POTUS?*, LAWFARE (Nov. 9, 2016, 2:54 PM), https://perma.cc/BT2S-VYBJ.

31 *See* Woolf, *supra* note 29, at 1.

32 For such a reference, *see id*. There is nothing on the public record to suggest that the Secretary's involvement is legally required.

33 President Kennedy raised exactly this possibility in a now-declassified January 1962 memorandum, "ALERT PROCEDURES and JCS EMERGENCY ACTIONS FILE." Kennedy asked whether the system at that time would allow him to order nuclear use "without first consulting with the Secretary of Defense and/or the Joint Chiefs of Staff" by calling the Pentagon's Joint War Room, evidently a predecessor to the National Military Command Center. President Kennedy asked "What would I need to say" to order "an immediate nuclear strike?" Memorandum from President John F. Kennedy (Jan. 16, 1962), reprinted in SCARRY, *supra* note 5, at 409 n.17.

34 *See* Woolf, *supra* note 29, at 1. According to open sources, U.S. Minuteman missiles fire within two minutes, and submarine-based ballistic missiles fire within 15 minutes. *See* Id. Depending on the location of the missiles and their targets, flight times would range from several minutes to several dozen. Bomber aircraft would presumably release their weapons at a release point once within range of their target. Depending on the location and readiness of a bomber at the time it receives a launch order, whether and how long it takes to equip ("generate") and prepare the bomber for its mission, flight time to the release point (potentially from bases in the continental United States to the

President's orders are legal. Thanks to the system's security and authentication capabilities, orders are understood to be issued by a President or Acting President successor invested with authority by the people and the Constitution, and in our republic uniquely accountable to all of them.[35]

As inherited from the Cold War, the theory and practice of nuclear deterrence rest on legal theories of practical necessity and self-defense, focused on the President. Neither Congress nor any international body have provided specific standing legal authority to use nuclear weapons.[36] In the archetypical, worst nuclear nightmare of initiated adversary nuclear attack, there would not be time for Congress or the United Nations to convene and act. As a question of U.S. law, the credibility of a timely U.S. nuclear launch decision therefore came to rest on the President's authority as Commander in Chief under Article II of the Constitution.[37] Indeed, the importance to nuclear deterrence of the President's authority to order nuclear use both benefitted from and helped drive growth in theories of executive power during the Cold War. Of course, the notion that the President acting without Congress could initiate use of force unilaterally has its critics generally, and in the nuclear context, as well. But it is well grounded in constitutional law doctrine.[38] Under international law, a nuclear response or preemptive nuclear launch in the face of attack would rest on *jus ad bellum* theories of the inherent right of self-defense, and the right to act in self-defense before an imminent attack (sometimes called preemptive or anticipatory self-defense).[39]

The President has become so empowered legally regarding nuclear weapons, and the potential decision timeline is so unforgivably constrained in the classic nuclear nightmare, that at the national leadership level there are no clear indications that the system anticipates involvement of

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other side of the planet), and potential flight time of a cruise missile-carried warhead, a launch order could take minutes to dozens of hours to be executed using bomber aircraft. Unlike the land-based and sea-based legs of the U.S. nuclear triad, U.S. bomber aircraft were taken off alert by President George H.W. Bush in 1991.

35 As Akhil Amar notes, all other senior officials in the U.S. government are chosen or confirmed by officials who are selected by a subset of the people. *See* AKIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005).

36 Enacted at the dawn of the atomic age, the Atomic Energy Act of 1946, 42 U.S.C. § 2121(b)(1), provides the President authority to "direct the [Atomic Energy] Commission to deliver such quantities of special nuclear material or atomic weapons to the Department of Defense for such use as he deems necessary in the interest of national defense." An expansive interpretation is implicit authorization for launch. Professor Peter Raven-Hansen emphasizes that the legislative history disputes that reading. *See* Raven-Hansen, *supra* note 15, at 790-91. Congress has never explicitly authorized or prohibited combat use of nuclear weapons. Under international law, threat or use of force is presumed to be illegal unless self-defense or other exceptions are operative. *See* U.N. Charter art. 2(4).

37 U.S. CONST. art. II, § 2.

38 *See, e.g.*, The Prize Cases, 67 U.S. 635, 665 (1862) (authority to repel attacks).

39 *See* U.N. Charter art. 51 (right of self-defense). The International Court of Justice wrestled with nuclear deterrence in a landmark 1996 decision. The Court found the catastrophic and hard-to-contain effects of nuclear weapons difficult to reconcile with international law. But the Court could not rule use or threat of use per se illegal because of "the fundamental right of every State to survival" and self-defense, the successful practice precedent of nuclear deterrence, and the reservations many states have attached to multilateral nuclear treaties. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶¶ 95-97, 102 (July 8). For analysis of pre-attack self-defense, see Ashley Deeks, *Taming the Doctrine of Preemption*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller, ed., 2015) (analyzing anticipatory, preemptive, and preventive theories of self-defense); U.S. LAW OF WAR MANUAL, *supra* note 21, § 1.11.5.1 (right of self-defense against imminent attack).

the Attorney General or any other legal advisor. Unless the President or a subordinate acts affirmatively to include a lawyer,[40] any legal advice during a nuclear threat conference would therefore be operative by virtue of having been provided earlier to the participants, provided in the moment by lawyers fortunate enough to be at the elbow of their principal,[41] or else having been "baked in" – that is, reflected in nuclear operational plans thanks to legal review of strike options during the earlier standard war plan-writing process. This planning-stage legal review includes *jus ad bellum* international law regarding resort to use of force, certainly involves *jus in bello* principles of the international law of armed conflict (LOAC), and should also include other relevant U.S. law.[42] Legal review during preparation of standing nuclear war plans includes assumptions about the presence of non-combatant persons and property, the configuration of adversary forces and assets, and potentially too some consideration of weather conditions that can influence radioactive fallout patterns. Intelligence about these "facts on the ground" can change rapidly and dictate reassessment. Such legal reassessment ought to include legal advisors. Based on the public record, however, today we cannot be confident that legal advisors actually would be available to the President at the moment of nuclear decision.

B. Nuclear Nightmares Two and Three: Rogue President, and Precipitous President

The current nuclear command and control system may be the best that can be crafted to deal with the classic nuclear nightmare of launch in the face of imminent or initiated adversary attack. That risk is resurgent thanks to the advancing nuclear capabilities of Russia, China, and North Korea, and their long-term trajectories of increasingly confrontational relations with the United States.[43] The inherited system, however, creates serious hazards in the hands of a President intent on first use of nuclear weapons where adversary attack is not temporally imminent, and the necessity and otherwise legality of nuclear use have not been established. One variant of this nightmare is a Rogue President who orders nuclear use without evident factual predicate or legal

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[40] *See* JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 226 (2007) ("the civilian lawyers that will engage on operational questions involving the means and methods of conflict (as opposed to the development of doctrine) are the lawyers the president, the secretary of defense, and their immediate advisors designate" at their discretion).

[41] For example, the Staff Judge Advocate – the senior military lawyer – at the U.S. Strategic Command. General Kehler, the former head of the U.S. Strategic Command, has written that he would want a military lawyer on hand at any point employment of nuclear weapons would be contemplated. *See* C. Robert Kehler, *Nuclear Weapons & Nuclear Use*, 145 DAEDALUS 50 (2016)*; see also* Lt. Col. Theodore T. Richard, U.S. Air Force, *Nuclear Weapons Targeting: The Evolution of Law and U.S. Policy*, 224 MIL. L. REV. 862 (2016) (recent Strategic Command Staff Judge Advocate's analysis of U.S. nuclear targeting and the law). Of course, the operational commander would stand between the military lawyer and the President.

[42] For discussion, see U.S. LAW OF WAR MANUAL, *supra* note 21, §§ 1.11, 2.2 – 2.6 (discussing *jus ad bellum*, and *jus in bello* LOAC principles of necessity, distinction, proportionality, humanity, and honor, the last of which is an addition).

[43] Five other states are understood to possess nuclear weapons (the United Kingdom, France, India, Pakistan, and Israel). Iran is not believed to be a nuclear weapons state but as a 2015 international agreement limiting Iran's nuclear program collapses there are indications Iran may be renewing its drive for a nuclear weapon. *See* Dehghanpisheh & Khalid, *supra* note 10.

basis. A second related but distinct risk – one where there is no imminent threat of adversary nuclear attack – is that of a Precipitous President. That is, a Commander in Chief who resorts to nuclear weapons where a crisis or conventional conflict is underway and U.S. nuclear use at some point might be necessary and legal, but nuclear use's implications, legality, or alternatives have not yet been carefully evaluated. A Precipitous President is an impulsive leader who reaches for "the button" too quickly.

The President would be able to rely neither on international law nor on Article II constitutional authority for a non-necessary use of force. Use of force is illegal if it is unnecessary, and under U.S. law any use of force rising to the level of "war" (which any nuclear strike certainly would due to its effects or escalation risk) that is not a response to an armed attack would require congressional authorization.[44] Even where the United States is involved in an armed conflict that is authorized under international and U.S. law, particular uses of force are still illegal if they do not comply with the international law of armed conflict (LOAC) and its *jus in bello* principles of necessity, distinction, proportionality, and humanity. Compliance with LOAC requires careful analysis of intelligence and tailoring of the use of force in terms of target selection, choice of weapon, angle of attack, and other respects, a process that involves military personnel, lawyers, and sometimes national leadership.[45] Ensuring the lawfulness of nuclear operations is especially challenging because the effects of nuclear weapons are so powerful (including heat, blast, and prompt radiation) and hard to contain (especially radioactive fallout and computer-destroying electromagnetic pulse (EMP)).[46] The inherited nuclear command and control system structurally anticipates that presidential nuclear orders *will* be legal, however, and the President will never misuse the nation's nuclear loaded weapons.

As Professor and former NSC legal advisor James E. Baker observes, presidents get the process they choose "within the constitutional and statutory framework of decision-making."[47] The Constitution and statute provide a general chain of command.[48] However, there is no statute or publicly known executive order governing nuclear launch specifically.[49] In a legitimate crisis the President may be content to consult the anticipated line-up of threat conference civilian and

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44 *See* U.N. Charter arts. 2(4) (general prohibition on threat or use of force) and 51 (necessity exception for self-defense); Mary B. DeRosa & Ashley Nicolas, *The President and Nuclear Weapons: Authorities, Limits, and Process* 6-7, Dec. 2019, https://media.nti.org/documents/The_President_and_Nuclear_Weapons_Authorities_Limits_and_Process.pdf (discussing Executive Branch precedents regarding use of force).

45 For discussion, *see* James E. Baker, *LBJ's Ghost: A Contextual Approach to Targeting Decisions and the Commander in Chief*, 4 CHI. J. INT'L L. 407 (2003).

46 *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 92 (July 8) (describing view that nuclear weapon effects are too difficult to contain to meet distinction and humanity requirements of the law of armed conflict).

47 *See* BAKER, *supra* note 40, at 99-100, 106.

48 *See* U.S. CONST. art. II, § 2 (Commander in Chief Clause); 10 U.S.C. § 162(b) (military chain of command).

49 The universe of classified or otherwise unreleased presidential and agency-level directives with legal force is of unknown size but is certainly vast. *See* Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L, SEC. J. 241, 283-99 (2015).

military leaders. The President could additionally involve other civilian officials, the Attorney General, or other lawyers. Or, an impulsive President could open the nuclear football and give an order without consulting anyone.[50] As senators worried at the recent congressional hearing, the President could awaken senior civilian and military officials with a strike order, rather than their waking the President with a threat warning.[51]

Senior officials have only bad options in the face of a Rogue President or Precipitous President. There is no legal rule or known framework of norms to apply short of asking whether a strike order is illegal under LOAC, and how that body of law is interpreted and applied by the United States. General Kehler testified that "the military does not blindly follow orders" and executes only legal orders.[52] Here, an impulsive presidential launch order might fall into a worrisome grey zone: ambiguously legal, potentially illegal if carefully analyzed, but in the moment perhaps not "clearly illegal" or "manifestly unlawful."[53] Yet whether the President's order is legally ambiguous or clearly illegal, the complete list of recourses for the Secretary of Defense, the Commander of the U.S. Strategic Command, or subordinates in the chain of command is short. Their only options at that point would be verbal dissuasion of the President, refusal, or resignation. If the President persisted, General Kehler testified that "I do not know exactly" what happens.[54]

While those in the chain of command would benefit from time to consult lawyers and analyze the legal issues and intelligence, the President in contrast could relieve an objecting official immediately. If an official tried to continue in office despite dismissal, the official could rely only on their knowledge of the nuclear command and control system and on their own power of persuasion with other personnel in a desperate, insubordinate attempt to thwart transmission of the President's order to the field. With nuclear war and countless lives in the balance, a rogue secretary or relieved general or admiral would bureaucratically battle a Rogue President or Precipitous President. The nation and world could get to this nightmarish point stunningly fast.[55]

The only options remaining would be complicated, fraught processes provided by the Constitution: removal of the President by the Cabinet under the Constitution's 25th Amendment,

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50 "There is no capability to directly launch nuclear weapons from the 'football.' Upon presidential direction, military command center personnel would transmit an order that would be issued over multiple systems to the fielded forces." *See* E-mail from Karen Singer, U.S. Strategic Command Pub. Aff. Off. (March 11, 2019, 2:59 PM) (on file with author).

51 *See* SFRC 2017 hearing, *supra* note 6. (testimony of Peter D. Feaver).

52 *See SFRC 2017 Hearing*, *supra* note 6, at 40 (testimony of Gen. C. Robert Kehler (USAF, Ret.)); *see also* Michael Collins, *Retired General, Others Urge Caution in Limiting President's Power to Order Nuclear Strike*, USA TODAY (Nov. 14, 2017, 6:00AM), https://perma.cc/X7J3-GAH6.

53 *See* U.S. LAW OF WAR MANUAL, *supra* note 21, §18.3; Rome Statute of the International Criminal Court, art. 33(1)(c), *entered into force*, July 1, 2002, 2187 U.N.T.S. 90. For discussion, see Colangelo, *supra* note 15, at 91.

54 *See SFRC 2017 Hearing*, *supra* note 6, at 20 (testimony of Gen. C. Robert Kehler).

55 A similar point could be reached if there were a temporally imminent threat justifying the use of nuclear weapons but the President seemed intent on choosing a nuclear *option* that was not necessary or legal under the circumstances. For a fictionalized depiction of such a situation, *see* JEFFREY LEWIS: THE 2020 COMMISSION REPORT ON THE NORTH KOREAN NUCLEAR ATTACKS AGAINST THE UNITED STATES (2018) (President seeks nuclear strike on North Korea and China in response to North Korean attack).

or by Congress via impeachment by the House and trial and then conviction by the Senate.[56] These processes involve a large number of officials who are typically scattered across the capital or country (or world) at any given moment, surely a considerable amount of informal process and politicking behind the scenes, and multiple formal process steps. Both removal efforts could be contested by the President and their most loyal aides and partisans.[57] Accordingly, these removal processes could be expected to take at the very least many hours. Removal could also take days, weeks, or months. In contrast, a nuclear launch order can be executed in minutes. The Constitution's solutions for removing a Rogue or Precipitous President are, for this reason, probably best thought of in the nuclear context as ex post processes – as first steps along a long road of correction and national reflection on an atomic atrocity. The President can push "the button" faster than Executive or Legislative Branch officials can constitutionally oust the Commander in Chief.

For over half a century the nation and the world have been fortunate not to have a U.S. President who successfully reaches for the nuclear "loaded weapon" and orders plainly or ambiguously illegal use of the bomb. But the historical record suggests we came close. President Richard Nixon reportedly called for nuclear use while drunk and while battling depression during the Watergate scandal. A President who boasted that "I can go into my office and pick up the telephone and in 25 minutes 70 million people will be dead" dangerously combined alcohol and psychoactive drugs.[58] It was simple historical good luck that President Nixon's impairment was obvious to his aides. It was good luck that they – lacking evident norms and violating the chain of command – prevailed upon the alerted Joint Chiefs of Staff to sit on, and ultimately ignore, the

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[56] U.S. CONST. amend. XXV; U.S. CONST. art. II, § 4.

[57] Even with ample time the process did not result in removal of the two Presidents impeached and tried in the Senate to date, Andrew Johnson and Bill Clinton.

[58] For Nixon's statement, reportedly made to legislators during Watergate, see HIRC 1976 hearings, *supra* note 20. Accounts of Nixon's nuclear instructions may be apocryphal. There are, however, multiple accounts, and they have some consistency:

> The CIA's top Vietnam specialist, George Carver, reportedly said that in 1969, when the North Koreans shot down a US spy plane, "Nixon became incensed and ordered a tactical nuclear strike . . . . The Joint Chiefs were alerted and asked to recommend targets, but [national security advisor] Kissinger got on the phone to them. They agreed not to do anything until Nixon sobered up in the morning."
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> [On another occasion, a White House aide] told a colleague "of the time he was on the phone [listening] when Nixon and Kissinger were talking. Nixon was drunk, and he said, 'Henry, we've got to nuke [Vietnam].'"

Anthony Summers & Robbyn Swan, *Drunk in Charge (part two)*, GUARDIAN (Sept. 2, 2000), https://perma.cc/LT3X-LG89, *excerpt from* ANTHONY SUMMERS, THE ARROGANCE OF POWER: THE SECRET WORLD OF RICHARD NIXON (2000); TIM WEINER, ONE MAN AGAINST THE WORLD 89–91 (2015); ELIZABETH DREW, RICHARD M. NIXON 55–57 (2007). For anxiety, Nixon took medication that caused "slurred speech, mental confusion, and irritability. Mixed with alcohol, it enhances alcohol's effects." DREW, *supra*, at 27. Whether or not reports of a drunk President dialing up a nuclear strike are true, they are plausible – based on Nixon's known condition, his bragging about his ability to kill with nuclear weapons, and in view of what we know about human nature.

instructions.[59] Nixon's Saturday Night Massacre of Justice Department officials was a terrible day for our nation, but it was still good luck that when President Nixon fired Executive Branch officials seriatim it was to frustrate the Watergate investigation rather than to find a subordinate who would transmit an unjustified nuclear launch order.[60]

It may be emotionally reassuring simply to decide to believe – as we implicitly do now – that there will never be a nuclear Saturday Night Massacre. It is comforting to postulate that no President will ever again impulsively order a nuclear strike – and next time press those orders to execution. But loading so many innocent lives on wishful thinking is not rational. A sizable portion of humanity regularly becomes mentally compromised due to illness, alcohol, or drugs. Normal-appearing people regularly commit horrifying crimes, awful errors in judgment, and other anti-social acts. Nixon's well documented abuses of power demonstrate that high performing leaders are not immune. On the contrary, research suggests that psychopathic personality traits could be four or more times as common in top corporate positions compared to the population generally.[61] A reasonable inference is that psychopathy's incidence is at least as high among politicians. Additionally, we now know that Nixon was not alone in being high or otherwise mentally compromised in high office. Kennedy reportedly took a number of drugs that had psychoactive effects, and several other presidents had physical and mental afflictions that reasonably could impact their judgment.[62] Heavy drinker and future President Andrew Johnson was reportedly so ill and belligerently intoxicated in the U.S. Senate Chamber at his swearing-in as Vice President that he barely succeeded in executing the oath of office.[63] Accounts have Johnson impaired when

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59 *See supra* note. The President is the only White House official in the military chain of command. *See* 10 U.S.C. § 162(b).

60 The historical record shows concern about President Nixon's mental state reportedly resulting in multiple deviations from the chain of command regarding nuclear weapons. Secretary of Defense James R. Schlesinger reportedly told the military that any nuclear launch orders had to be cleared with him. *See* Garrett M. Graff, *The Madman and the Bomb*, POLITICO (Aug. 11, 2017), https://perma.cc/ZK5N-7TWU. With the President apparently distraught and intoxicated, the Secretary of State and other senior officials put U.S. nuclear forces on higher alert to deter Soviet intervention in the 1973 Yom Kippur War. *See* WALTER ISAACSON, KISSINGER: A BIOGRAPHY 530–33 (1992). Whether or not these second-hand accounts are accurate, their plausibility indicts the nuclear command and control system. Change the President's personality, the Soviet response, or the conduct of the President's advisors, and the consequences could have been catastrophic.

61 *See* Paul Babiak, Craig S. Neumann & Robert D. Hare, *Corporate Psychopathy: Talking the Walk*, 28 BEHAV. SCI. & L. 174, 184 (2010).

62 *See* Rose McDermott, *The Politics of Presidential Medical Care: The Case of John F. Kennedy*, 33 POLITICS & LIFE SCI. 77, 84-85 (2014); Visar Berisha, Shuai Wang, Amy Lacross & Julie M. Liss, *Tracking Discourse Complexity Preceding Alzheimer's Disease Diagnosis: A Case Study Comparing the Press Conferences of Presidents Ronald Reagan and George Herbert Walker Bush*, 45 J. ALZHEIMER'S DISEASE 959, 961-63 (2015), https://perma.cc/M8H8-95KV (questions about Reagan's mental functioning); Joshua Wolf Shenk, *Lincoln's Great Depression*, ATLANTIC (Oct. 2005), https://perma.cc/9P83-36SW (Lincoln suffered depression and suicidal thoughts as President); Edwin A. Weinstein, *Woodrow Wilson's Neurological Illness*, 57 J. AM. HIST. 324, 336–46 (1970) (President Wilson suffered a stroke and other illnesses that caused delusions and incapacity). Two Presidents became ill and died while in office, two others were shot but recovered, and two lingered after assassination attempts before dying in office.

63 *See* Jonathan R. Allen, *Andrew Johnson Drunk at Lincoln's Second Inaugural*, CIVIL WAR HIST. & STORIES, https://perma.cc/M6UP-DGMR (Johnson was ill with typhoid and "too drunk to perform his duties & disgraced

Lincoln was assassinated and he had to assume the presidency. Looking beyond American history, one does not need to include mad monarchs, bad emperors, or 20th century totalitarians to compile a long list of leaders who have suffered serious physical and mental illnesses, substance abuse problems, and clinical defects of character that compromised their judgment.[64] One especially horrifying example is the South American chief of state who in the 1800s prolonged a hopeless war that killed much of his nation's population, driven in part by delusions of glory.[65]

In the 1800s it took months or years to kill on the scale a Rogue or Precipitous President could murder in minutes. An unnecessary or otherwise illegal nuclear strike could also cause genetic defects and suffering for generations, do extensive harm to civilian property and the global economy, and damage the environment. If it precipitated a general nuclear exchange the strike could end civilization. At the least, an unwarranted U.S. nuclear attack would do catastrophic and irreparable damage to the moral authority of the United States. For our failure to design a nuclear command and control system reasonably able to impede its entirely plausible misuse, the country would bear heavy moral responsibility. With the great power represented by nuclear weapons comes the overdue responsibility of crafting a decision process reliably able to frustrate a leader whose mental faculties fail in the ways that those of humans regularly do.

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himself & the Senate by making a drunken foolish speech," observed one Senator); *see also* Vice President Andrew Johnson, Inaugural Address (Mar. 4, 1865), https://perma.cc/4NVB-HQBA (rambling, angry remarks). Many other senior officials have had serious drinking problems and impairment, including: House Speaker Carl Albert (*see* GARRETT M. GRAFF, RAVEN ROCK 220–21 (2017) (in-patient treatment for alcoholism while first in line for the presidency after Vice President's resignation)); Senator and Defense Secretary nominee John Tower, *see* Andrew Rosenthal, *F.B.I. Document on Tower Cited 'Pattern of Alcohol Abuse'*, N.Y. TIMES (Mar. 17, 1989), https://perma.cc/4T7N-UV5W; Supreme Court Justice William O. Douglas, *see* Robert W. Mull, *Yakima and Justice Douglas: The Curious Story of a Famous but not a Favorite Son*, 1 COLUMBIA MAG. 2 (1987), https://perma.cc/9LG2-ZGPG; Vice President Daniel Tompkins, *see* RAY W. IRWIN, DANIEL D. TOMPKINS: GOVERNOR OF NEW YORK AND VICE PRESIDENT OF THE UNITED STATES 309 n. 55 (1968). Speaker Albert, Senator Tower, and Vice President Tompkins were blocked from ascending further. President Nixon, President Andrew Johnson, and Justice Douglas were not.

64 *See, e.g.,* Marvin Rintala, *Family Portrait: Churchills at Drink*, 21 BIOGRAPHY 1, 2–3 (1998) (British Prime Minister Winston Churchill suffered depression and drank heavily, which in the assessment of British naval officers at times impacted his decision-making); Michael White, *So Tony Blair Turned to Alcohol – It's a Rare PM that Doesn't*, GUARDIAN, (Sept. 2, 2010), https://perma.cc/R7GU-C8NL (H.H. Asquith, the Prime Minister who took Britain into World War I, known as "Squiffy" for drunkenness at Parliament); Craig Wallace, *Only Human – Disability in Australian Politics (Part 1: Human Leaders)*, MUSEUM OF AUSTRALIAN DEMOCRACY (Dec. 2, 2016), https://perma.cc/9XUK-USRJ (Australian Prime Ministers suffered heart attacks and other ailments that impacted their work).

65 Estimates of Paraguay's total population losses during its war with the triple alliance of Argentina, Brazil, and Uruguay have varied widely but probably total five to 18 percent. *See* Vera Blinn Reber, *The Demographics of Paraguay: A Reinterpretation of the Great War, 1864-70*, 68 HISP. AM. HIST. REV. 289, 310 (1988). For comparison, the Soviet Union's population declined by four percent during a Second World War rightly regarded as cataclysmic for that state. *See id*. at 308. Scholars disagree about the causes of the war but based on the historical record one may reasonably lay a significant share of the blame for continuing the war – against powers with 38 times Paraguay's population and larger militaries – with Paraguayan leader Francisco Solano Lopez. *See id*. at 289 n.1, 319.

II. NUCLEAR-CONVENTIONAL CONVERGENCE & THE NATIONAL LEADERSHIP-LEVEL REVIEW GAP

After the Cold War, the United State dramatically reduced nuclear weapons but did nothing known to counter the command and control system's perilous over-reliance on the President's mental state. The United States has left nuclear weapons constitutionally special – reserved for one person in one branch. But legal, policy, and technological inertia has not stopped a slate of contextual tectonic shifts that suggest that it is time for reform. We can group these under the heading of *convergence* between nuclear and conventional operations.

The Department of Defense has grappled with several aspects of convergence. The U.S. military has in conventional conflicts relied heavily on sensors, communications systems, and forces (bombers, cruise missiles, and submarines) built for the nuclear mission. The Pentagon has also explored the use of high-precision conventional weapons to destroy adversary nuclear forces.[66] The Defense Department has in response made a number of adjustments to policy, doctrine, and its organization, and broadened the range of strike options available to the President.[67] Recently, the Pentagon's 2018 Nuclear Posture Review warned of convergence abroad: advancing nuclear capabilities of Russia, China, and North Korea, together with their development of "hybrid war" doctrines that integrate nuclear and conventional weapons.[68]

Above the departmental level, however, the U.S. government has not come to terms with convergence. This Part will analyze important aspects of this sea change that augur toward revision of the nuclear command and control system at the national leadership level. One powerful convergence driver is a change in threat and mission: the most likely nuclear employment scenario

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66 Convergence is an outgrowth in part of the high-tech Revolution in Military Affairs (RMA), the synergistic use of advanced military systems for seeing, talking, and striking. *See* WILLIAM A. OWENS, LIFTING THE FOG OF WAR (2000) (former Vice Chairman of the Joint Chiefs of Staff analyzes RMA). Meanwhile, the United States, Russia, and China use components of their nuclear command and control systems to support both conventional and nuclear operations. These developments raise escalation concerns: that a non-nuclear conflict that included attacks on entangled systems could incentivize a nuclear response before the capability is lost. *See* James M. Acton, *Escalation Through Entanglement: How the Vulnerability of Command-and-Control Systems Raises the Risks of an Inadvertent Nuclear War*, 43 INT'L SEC. 56 (2018); *see also* 2018 NPR, *supra* note 3, at 21 (Pentagon warning that United States would consider using nuclear weapons if faced with "significant nonnuclear attacks" on "U.S. or allied nuclear forces, their command and control, or warning and attack assessment capabilities").

67 Nuclear Posture Reviews (NPRs) by the Department of Defense often emphasize conventional options alongside nuclear options. *See* KURT GUTHE, THE NUCLEAR POSTURE REVIEW: HOW IS THE "NEW TRIAD" NEW?, CTR. FOR STRATEGIC AND BUDGETARY ASSESSMENTS (2002) 1-2, https://perma.cc/BXR7-4JRW (George W. Bush Administration in classified 2001 NPR envisioned conventional global strike capabilities together with nuclear weapons as one third of a "new triad"); U.S. DEP'T OF DEF., NUCLEAR POSTURE REVIEW vii–viii (2010) [hereinafter 2010 NPR] (Obama Administration emphasizes greater role for conventional weapons in deterring conventional threats deterred during Cold War by nuclear weapons). Additionally, the Defense Department created Global Strike Command in the late 2000s to provide a single command for the service focused on worldwide employment of long-range conventional and nuclear force. *See* AIR FORCE GLOBAL STRIKE COMMAND, https://perma.cc/SS3Y-MG3K.

68 *See* 2018 NPR, *supra* note 3, at v; *see also* Robert Peters, Justin Anderson & Harrison Menke, *Deterrence in the 21st Century: Integrating Nuclear and Conventional Force*, 12 STRATEGIC STUD. Q. 15, 16, 18–25 (2018) (evidence and implications of hybrid strategies); BRAD ROBERTS, THE CASE FOR U.S. NUCLEAR WEAPONS IN THE 21ST CENTURY 245 (2016) ("theory of victory" involving nuclear use to damage the U.S. will to fight).

now has more in common with a sensitive counter-terror raid than a global thermonuclear war.[69] Other key elements of convergence are changes in how the military plans, and the expanding operational role of law and lawyers. Convergence undermines old assumptions about the special nature of nuclear weapons. It suggests reform of the nuclear command and control system to mandate an appropriately robust decision process at the national leadership level, in situations in which adversary nuclear attack is not imminent, with particular emphasis on lawyer-provided legal review at the presidential moment of decision.

A. The Most Likely Nuclear Employment Scenario

During the Cold War, the primary design loadstars for U.S. nuclear forces and the command and control system were deterrence of a general strategic nuclear exchange and deterrence of an overwhelming Warsaw Pact conventional attack in Europe. The United States also developed a series of lower intensity, flexible response options to deal with a slate of contingencies. In part because a primary rationale for U.S. nuclear weapons during the Cold War was deterring attack on Western Europe by larger Warsaw Pact conventional forces, nuclear and conventional war planning were in some ways linked. Shorter range tactical (non-strategic) nuclear weapons had especially important roles in NATO war plans.[70] Even so, there has long been a general conceptual distinction between the nuclear and non-nuclear realms. The norms that developed and the nuclear command and control system made nuclear weapons special. War plans regarding the intercontinental-range and more powerful strategic nuclear forces based in the United States were for the most part separately prepared. The conceptual, operational, and bureaucratic "firebreak" at the conventional/nuclear "threshold" has resonated with an international norm against use of nuclear weapons since 1945, and has endured.[71]

Although deterrence of resurgent Russia and China remains the highest priority of U.S. nuclear forces, an important change has occurred. Today, the most likely nuclear employment scenario is no longer a nuclear exchange with a major nuclear power.[72] Nor is it a Rogue President ordering a strike out of the blue. Rather, the most probable use of nuclear weapons today by the United States would be use of one or a handful of weapons, in combination with non-nuclear forces,

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69 The term was made famous by the Cold War movie WAR GAMES (1982).

70 *See* Dakota S. Rudesill, *Regulating Tactical Nuclear Weapons*, 102 GEO. L.J. 99, 114–15 (2013) (discussing tactical nuclear weapons in U.S. and NATO doctrine); HANS M. KRISTENSEN, U.S. NUCLEAR WEAPONS IN EUROPE: A REVIEW OF POST-COLD WAR POLICY, FORCE LEVELS, AND WAR PLANNING (2005), https://perma.cc/WVF9-GVW5.

71 *See* Peters, Anderson & Menke, *supra* note 68, at 27–32 (analyzing six enduring challenges to integration of U.S. convention and nuclear plans).

72 The most recent Nuclear Posture Review (NPR) identifies deterrence of nuclear attack as the primary mission of nuclear forces. *See* 2018 NPR, *supra* note 3, at vii. Among nuclear powers, Russia and China pose the greatest potential nuclear threat to the United States and its allies. Deterrence of non-nuclear attack is another mission of U.S. nuclear forces. *See* 2018 NPR, *supra* note 3, at vii.

against a limited target set in service of limited objectives, potentially where adversary nuclear attack is not underway or temporally imminent.[73]

With alternatives on the table, and with lack of a "no first use" policy, senior officials could consider use of a nuclear weapon because of its unique destructive and signaling capabilities. One commonly mentioned mission, for example, is use of one or more lower yield warheads to reach a hardened or deeply buried target, such as a bunker used by terrorists or a rogue state that intelligence suggests is contemplating a catastrophic attack. This scenario was central to the 2000s debate about building a Robust Nuclear Earth Penetrator (RNEP) version of the Air Force's B61 air-delivered nuclear bomb.[74] Even though RNEP went nowhere, the scenario returns with some frequency in connection with ongoing modernization of the B61 bomb and the Trump Administration's drive for a low-yield warhead for the Trident II submarine-launched ballistic missile.[75] Other hypothetical limited nuclear use scenarios involve striking a rogue state's weapons of mass destruction, or ensuring destruction of North Korean nuclear-armed mobile missiles before they can deploy from their bases.[76]

These most likely uses of nuclear weapons in important respects resemble conventional operations against counter-terrorism (CT) high value targets (HVTs). There may be strategic warning of days to weeks. A variety of nuclear and non-nuclear force employment options would be available. Evaluating and tailoring the options, and preparing for a range of potential outcomes (including success, failure, and other consequences), would require analysis in advance of a complex mix of intelligence, diplomatic, policy, military, and legal questions. The stakeholders represented in the National Security Council (NSC) process bring a range of information, advice, and capabilities.

The 2011 strike against Al Qaeda leader Usama bin Laden is an instructive case study.[77] Quality but questionable intelligence collected by the CIA suggested that bin Laden had been found. The issue was elevated to the NSC, leading to extensive review of the intelligence by a select group of cabinet-level members of the NSC and staff from multiple agencies. The NSC staff coordinated weeks of work by the White House, military, intelligence agencies, and multiple cabinet departments as the Council developed, evaluated, and prepared a range of options for presidential decision. These included waiting and collecting more intelligence, a massive

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73 *See* Woolf, *supra* note 29, at 2 (mentioning scenario).

74 *See* JONATHAN MEDALIA, CONG. RES. SERV., RS21762, ROBUST NUCLEAR EARTH PENETRATOR BUDGET REQUEST AND PLAN, FY2005-FY2009 (2004), https://perma.cc/RA3P-TRFL.

75 *See* 2018 NPR, *supra* note 3, at xii, 33, 44 (modernization informed by North Korean reliance on "hardened and deeply buried facilities;" ability to strike them is key U.S. nuclear force attribute).

76 This article mentions the kind of hypothetical scenarios that often get discussed in nuclear and policy conversations, without endorsement. Another limited nuclear use scenario of rising concern is use in the context of a conventional conflict with Russia or China. The risks of escalation there are significant, however, and for that reason such a possibility is both important and still probably less likely than the scenarios mentioned in the main text above.

77 For accounts of the decision process, see LEON PANETTA, WORTHY FIGHTS: A MEMOIR OF LEADERSHIP IN WAR AND PEACE 306–21 (2016) (then-CIA Director); CHARLIE SAVAGE, POWER WARS 257–71 (2015) (investigative journalist).

conventional strike by Air Force bombers, a drone-delivered conventional strike, and a complex air/ground assault involving special operations forces from multiple military services under CIA authority. The inter-agency process was also used to evaluate a slate of important, complex, and in some respects novel questions under international and U.S. law.[78] These questions reportedly included the strike's legality in view of Pakistan's sovereignty and the international law of armed conflict, whether to kill or capture bin Laden, as a question of U.S. law whether the strike would be conducted under statutory or Article II presidential authority, and whether the strike would be conducted under the covert action statute or regarded as a traditional military activity in the armed conflict with Al Qaeda.[79] The work of the inter-agency team was urgent, and concerned matters of life and death. It involved the most sensitive intelligence sources and highly classified military capabilities.[80] The process succeeded in involving multiple government stakeholders in careful deliberation regarding a multitude of issues, presented well-crafted and distinct options to the President, got a clear and timely presidential decision, securely transmitted that order to the field, and facilitated a successful operation. There were no leaks before the operation (including to Pakistan, where the operation was conducted) that could have compromised intelligence sources and methods, endangered U.S. personnel, or tipped off the target. Operation Neptune's Spear achieved complete tactical surprise, without U.S. loss of life.[81]

Ultimately, the mastermind of the 9/11 terrorist attacks was found at an above-ground compound and incapacitated at President Obama's orders by a special operations team. But one could imagine nuclear weapons as a suggested option had bin Laden been reported instead to be hiding in a heavily defended cave deep beneath a mountain's rocky slopes and preparing another 9/11-scale attack, or if the United States had good intelligence that a rogue state such as North Korea were moving to provide nuclear arms to terrorists.[82] There is no obvious reason why the same tailored inter-agency process could not have accommodated review of one or more nuclear options.

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78 Scholars who served in government have since provided cogent insights into the complexity of several issues with which the NSC grappled. *See* Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. 1165 (2013) (challenges of defining the battlefield); Ashley Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT'L L. 483 (2012) (use of force against non-state actor on another state's territory).

79 Traditional military activity falls outside the statutory definition of covert action. *See* 50 U.S.C. § 3093(e)(2). *See also* Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (post-9/11 force authorization).

80 The latter included a stealth helicopter previously unknown to the public. *See* Tom Geoghegan & Sarah Shenker, *Stealth Helicopters Used in Bin Laden Raid*, BBC (May 6, 2011), https://perma.cc/PLU4-SME7.

81 Although operationally effective and generally reflecting good process, the tailored NSC process used for the bin Laden decision has been faulted for relying too heavily on White House lawyers to the exclusion of the Attorney General, State Department Legal Advisor, and other Senate-confirmed senior lawyers. *See* SAVAGE, *supra* note 77, at 258–60.

82 *See* Andrew J. Coe, *North Korea's New Cash Crop*, 28 WASH. Q. 73 (2005) (nuclear weapon transfer concern).

B. Operational Planning and Lawyering Up

The plans used in sensitive counter-terrorism operations in recent years were developed with the benefit of an operational planning process conducted and refined by the U.S. military's geographic combatant commands and the Joint Staff over the past several decades. Among other things, modern military planning involves objective-based planning, driven by the idea of targeting for effect rather than destruction. These ideas were fairly novel in military doctrine when the nuclear command and control conversation began its long hiatus 30 years ago. Today, the nuclear operational planning process has been informed by a conventional operational planning process that fully embraced these doctrinal innovations in the 1980s and 1990s and employed and refined them in the long years of war since the 9/11 attacks.[83] This revised nuclear planning process has facilitated a reduction in the number of U.S. nuclear targets and weapons.

This greater planning similarity is a second decades-long convergence driver. The revised process now provides more nuclear and non-nuclear options, more closely tailored to specific objectives, with higher fidelity to the law of armed conflict. The trend will only continue: President Trump's Defense Department announced that "the United States will sustain and replace its nuclear capabilities, modernize [command, control, and communications technology], and strengthen the integration of nuclear and non-nuclear military planning."[84]

A related contributor to convergence has been a general "lawyering up" throughout the national security enterprise.[85] More lawyers are more involved in more issues than ever, including the most highly classified operations. Operational law ("op-law") – application of the principles of the LOAC – has greatly expanded as a practice field, the most extensive version of the Pentagon's *Law of War Manual* was released in recent years, and there has been explosive growth in commentary on op-law issues from non-government experts.[86] Within the military, the regional combatant commands facilitated the process via increasing incorporation of op-law in their near-continual combat operations since the Cold War's end.[87] The U.S. Strategic Command followed

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83 *See* Kehler, *supra* note 41, at 57-58.

84 *See* 2018 NPR, *supra* note 3, at viii.

85 For discussion of the general phenomenon, see JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE Presidency After 9/11 xi-xiii, 122-201 (2012); Margo Schlanger, *Intelligence Legalism and the National Security Agency's Civil Liberties Gap*, 6 HARV. NAT'L SEC. J. 112 (2015); Laura K. Donohue, *National Security Pedagogy and the Role of Simulations*, 6 J. NAT'L SEC. L. & POL'Y 489, 492-94 (2013).

86 *See* U.S. LAW OF WAR MANUAL, *supra* note 21. Examples of engagement by non-government commenters regarding operational law include the *Lawfare* and *Just Security* law blogs and the University of Nebraska School of Law's annual advanced operational law conference.

87 The regional combatant commands have used lethal force in Panama (Operation Just Cause, 1989), Iraq (Operation Desert Storm, 1991; Operation Southern Watch, 1992-2003; Operation Desert Strike, 1996; Operation Northern Watch, 1997-2003; Operation Desert Fox, 1998; Operation Iraqi Freedom, 2003-onward), Serbia (Operation Allied Force, 1999); Afghanistan (Operation Enduring Freedom, 2001-onward); Libya (Operation Odyssey Dawn, 2011); and Iraq and Syria (Operation Inherent Resolve, 2014-onward).

suit, expanding the roles of op-law and lawyers in planning and exercises.[88] This was important: the first joint nuclear command, founded at the Cold War's end, turned away from decades of deficient adherence to the law.[89] The government nuclear community also took a turn away from a Cold War-era culture of soft disdain for lawyers and law. This culture owed much to the apocalyptic overkill of Cold War nuclear plans, expectation that little to no time would be available for legal advice at the moment of a "launch under attack" decision, and the centrality of the President in the nuclear command and control system.[90]

Reflection on the three decades since the Cold War's end illuminates the interwoven nature of the military planning and lawyering threads of convergence. Conventional and nuclear operations are now more alike than ever. Options are more easily considered alongside one another and integrated into common plans that reflect an unprecedented and still-growing role for lawyers and law.

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At least this is the new state of affairs in the Defense Department. Because the current nuclear command and control system has never been used operationally, there is a gap in our understanding of what *national leadership level* nuclear decision-making would involve.[91]

The best the public can do today is hope: hope that any President would order the kind of careful analysis of a full slate of options through the NSC process that preceded the bin Laden raid, to include legal review by lawyers.[92] The public can only hope, too, that the right lawyers will be

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88 *See* Col. Charles J. Dunlap, Jr., U.S. Air Force, *Taming Shiva: Applying International Law to Nuclear Operations*, AIR FORCE L. REV. 157, 167–69 (1997) (then senior lawyer at U.S. Strategic Command describes post-Cold War evolution); Kehler, *supra* note 41, 54-60 (recent Commander emphasizes importance of law and lawyers); *see also* Richard, *supra* note 41.

89 The U.S. Strategic Command was created in 1992 as a joint combatant command, assuming operational responsibility from Strategic Air Command (SAC) and its naval counterpart.

90 *See* Richard, *supra* note 41, at 930 (with massive target sets including economic targets, Cold War nuclear war plans called into serious question theoretical legal protection for civilian populations); Slocombe, *supra* note 24, at 135-36 (Cold War-era analysis notes that missile flight time from the Soviet Union plus timelines for attack detection, threat communication, and transmission of a presidential launch order "leaves almost no reserve time for actual decisionmaking;" if Soviet missiles were instead launched from submarines off the U.S. east coast there could be no warning or decision time at all for the President in Washington, D.C., before the Soviet warheads detonated). Reflecting different threat circumstances and changed attitudes about law and lawyers, the Obama Administration's 2013 nuclear employment strategy stated that all plans must "be consistent with the fundamental principles" of the Law of Armed Conflict (LOAC). *See* U.S. DEP'T OF DEF., REPORT ON NUCLEAR EMPLOYMENT STRATEGY OF THE UNITED STATES SPECIFIED IN SECTION 491 of 10 U.S.C. 4–5 (2013); *see also* 2018 NPR, *supra* note 3, at 23 (Trump Administration states "nuclear operations would adhere" to LOAC). *But see* Jeffrey G. Lewis & Scott D. Sagan, *The Nuclear Necessity Principle: Making U.S. Targeting Policy Conform with Ethics & the Laws of War*, 145 DAEDALUS 62 (2016) (criticizing the adherence of nuclear plans to LOAC).

91 During the Cuban Missile Crisis the nuclear command and control system was comparatively primitive in its communications capabilities and in the forces it commanded. The fastest-launching U.S. forces, land-based Minuteman missiles, were just being fielded. MICHAEL DOBBS, ONE MINUTE TO MIDNIGHT: KENNEDY, KHRUSHCHEV, AND CASTRO ON BRINK OF NUCLEAR WAR 276–79 (2008).

92 There have been hints in policy documents in recent years, for example regarding an intention to retain the ability to launch under attack but also plan for more likely 21st century scenarios, use of "adaptive planning," and a

included. Military lawyers certainly ought to be involved, but the legal questions at the national leadership level will extend beyond op-law. Contested questions of constitutional separation of powers, statutory interpretation, and international law may well present. Civilian lawyers at NSC and at the State, Defense, and Justice Departments will have particular competence in sorting a potentially dense mixture of law, legal policy, and constitutional norms.[93]

The inherited nuclear command and control system remains a special process built around the President and Defense Department actors, for nuclear operations that the convergence phenomenon has in important ways made more like the conventional operations that have received robust review at the NSC level, be they the bin Laden raid or other war plans developed via modern, lawyered-up combatant command planning methods. Nuclear-conventional convergence is, in short, a major contextual development that begs focused thought about the benefits, means, and contours of NSC-level inter-agency review of nuclear strike decisions.

III. THE CASE FOR PROCESS – AND A PROCESS STATUTE

General Michael Hayden, formerly the second-ranking U.S. intelligence official, observes that the inherited nuclear command and control system "is designed for speed and decisiveness. It's not designed to debate the decision"[94] – even where there is time for deliberation that would improve the decision. To mitigate the Rogue and Precipitous President risks described in Part I, and update the nuclear command and control system at the national leadership level for the nuclear-conventional convergence described in Part II, this Part argues for process rules. Here, this article sets out the benefits of good process in decision-making, and particularly the value of inter-agency review through the NSC. This Part then disputes the suggestion that the problems now inherent in the system can be effectively mitigated without legislation. A statute is the best way to ensure that a President committed to impulsive nuclear button-pushing will hit legal rules and process norms designed to help ensure that any nuclear use is necessary and legal and the President's authorities are not abused.

A. The Value of Deliberation and Inter-Agency Process

Ideally, the President would have the time, inclination, and logistical ability to confer with senior officials from multiple agencies (and Congress) even in a situation in which an adversary

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commitment not to allow adversaries to escalate successfully beyond U.S. conventional capabilities. *See* U.S. DEP'T OF DEF., *supra* note 90; U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW: REPORT TO CONGRESS 13 (2014). But these bread crumbs fall short of providing public confidence that the Executive Branch would employ an inter-agency process as robust as was used in the bin Laden raid, an decision potentially as complex and ramified as nuclear use.

93 The questions presented by a potential strike on North Korea are a good example. *See, e.g., Tensions Rise Between the United States and North Korea*, 112 AM. J. INT'L L. 95 (2018) (presenting conflicting views on whether the President could authorize a first strike); Marty Lederman, *No, the President Cannot Strike North Korea Without Congressional Approval*, JUST SEC. (Aug. 10, 2017), https://perma.cc/9BZ7-2FUW (preemptive strike would violate international and U.S. law).

94 *See* Woolf, *supra* note 29, at 1(quoting Hayden, who served as Principal Deputy Director of National Intelligence, CIA Director, and NSA Director).

nuclear attack were temporally imminent or underway.[95] Where an adversary attack is not imminent but nuclear use is contemplated, there is no compelling reason to avoid review through the inter-agency NSC process. There is good reason it ought to be obligatory.

Congress created the NSC in the National Security Act of 1947 to advise the President regarding the integrated use of the classic instruments of national power – military, diplomatic, intelligence, and economic.[96] Congress has frequently amended the statute to perfect the NSC's structure.[97] The NSC's members under the statute as amended are the President, Vice President, and the Secretaries of State, Defense, Energy, and Treasury, plus "other officers of the United States Government as the President may designate."[98] Presidents by executive order typically include other members (such as the White House Chief of Staff, Assistant to the President for National Security Affairs (APNSA, often called the national security advisor), and Attorney General), and other advisors (particularly the Chairman of the Joint Chiefs of Staff and the Director of National Intelligence, the Executive Branch's senior military and intelligence advisors, respectively).[99] Every President has used the NSC process and its White House staff to develop and appraise options in view of the threat, frame issues for presidential decision, and coordinate implementation across the many agencies of the U.S. national security apparatus.[100] The statute and executive orders together provide the President and NSC staff ample latitude to tailor the NSC process.

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95 NATO's decision-making process would require consultation with many stakeholders even where a threat is imminent. During the Cold War it was also common to hear the claim that Congress could be consulted and even take legislative action even if there were just days before a conventional war in Europe went nuclear. *See, e.g.,* Raven-Hansen, *supra* note 15.

96 *See* National Security Act of 1947, § 101, 61 Stat. 496 (1947), *amended by* 50 U.S.C. § 3021 (2014). *See generally* IVO H. DAALDER & I.M. DESTLER, IN THE SHADOW OF THE OVAL OFFICE (2009) (analysis of NSC functioning). Law enforcement and the rule of law together are an additional instrument of national power. *See* BAKER, *supra* note 40, at 20-31.

97 Congress has amended the statute more than a dozen times. In recent decades Congress has re-enacted the statute and re-organized the NSC, directed the Defense Department to explain how it will be a better participant, and replaced the head of the CIA with the Director of National Intelligence as senior intelligence advisor to the President and the Council. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, 130 Stat. 2422-23, § 1085 (2016) (re-enactment and streamlining); National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 291, § 952 (2008) (Pentagon participation); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3689, §§ 1071-72 (2004) (senior intelligence advisor).

98 *See* 50 U.S.C. § 3021(c)(1).

99 *See, e.g.,* President Donald J. Trump, National Security Presidential Memorandum (NSPM) 4: Organization of the National Security Council, the Homeland Security Council, and Supporting Staff (April 4, 2017) (current administration's directive on NSC organization generally). Although styled an "NSPM" the order has the same effect as an executive order.

100 *See* Jon J. Rosenwasser & Michael Warner, *History of the Interagency Process for Foreign Relations in the United States: Murphy's Law?*, in THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABYRINTH 11 (Roger Z. George & Harvey Rishikof, eds., 2010) (history and role of staff).

Use of a nuclear weapon plainly meets the essential criteria for consideration by the NSC.[101] First, nuclear use would implicate multiple instruments of national power (in fact all of them), and therefore benefit from the coordinated input of the agencies represented on the NSC. Second, any nuclear use would be a matter of great importance to the nation and world. It would violate the nearly 75 year-old norm against nuclear use, detonate a weapon with effects that are difficult to contain and predict, and inflict harm that would be brought to every corner of the world through the internet and television. Even a low-yield tactical nuclear bomb would have strategic – that is, major – implications in military, diplomatic, intelligence, economic, and legal respects.[102] Using "the bomb" is inevitably a big deal. And third, use of a nuclear weapon would require the knowledge and decision of the President. As Commander in Chief and under the design of the nuclear command and control system, only the President can direct employment of nuclear weapons.[103] Because nuclear use so plainly qualifies for NSC review it is problematic that no publicly known law, directive, or aspect of the nuclear command and control system provides for it.

NSC review offers the attributes of "good process."[104] Better decisions tend to come from including the right people at the right time, evaluating the best information and advice, allowing a variety of experts and institutional perspectives to be heard, identifying and testing assumptions, evaluating and refining alternatives, presenting several high-quality options for decision, and implementing a clear decision. Process can be tailored for the particular timelines, operational details, information sensitivities, and personalities involved.[105] These attributes of good process were for the most part reflected in NSC-level consideration of the 2011 bin Laden raid (discussed in Part II above), the 1990-91 Gulf War (robust NSC review analyzed a range of options), and the 1962 Cuban Missile Crisis (a tailored "Ex Com" NSC process with a large role for the Attorney General reviewed a full slate of options including nuclear war).[106] The NSC is a proven process for considering all aspects of decisions as consequential as nuclear use.

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101 These principles can be discerned from scholarly and practitioner analyses of the NSC. *See, e.g.*, BAKER, *supra* note 40, at 105-19, 122-23; DAALDER & DESTLER, *supra* note 96.

102 *See* Rudesill, *supra* note 70, at 157–59 (discussing strategic effects of all nuclear weapons and arguing for the end of the strategic/tactical distinction).

103 Pre-delegation and automation of the launch process creates dilemmas, especially in the context of a crisis with a peer adversary such as the Soviet Union or Russia. Former national security advisor Brent Scowcroft during the Cold War called this "the automatic phase of war" as "the battle plan unfolds more of less automatically." By one Cold War-era estimate, due to pre-delegation and automation nearly half of U.S. strategic weapons could be fired without presidential decision. *See* Raven-Hansen, *supra* note 15, at 786-87. During the Cuban Missile Crisis, President John F. Kennedy was reportedly so concerned that U.S. nuclear-armed missiles in Turkey would be fired without his authorization in the event of Soviet conventional attack that he ordered their fuses removed and his personal authorization required for their launch. *See* ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 98 (1969).

104 For discussion of good process, particularly through the NSC, see BAKER, *supra* note 40, at 22-31, 99-125.

105 Process can "find the right balance between speed and strength, secrecy and input [and] always meet deadlines." *See* BAKER, *supra* note 40, at 124.

106 *See* ROBERT M. GATES, DUTY: MEMOIRS OF A SECRETARY AT WAR 538-43 (2014) (bin Laden decision process described by Secretary of Defense); RICHARD N. HAASS, WAR OF NECESSITY, WAR OF CHOICE (2010)

The inherited nuclear command and control system, however, is focused on the President plus officials from only one NSC player, the Defense Department. That structure carries with it an implicit suggestion that the options for the United States are the *military* options in the "black book" prepared by the Defense Department inside the nuclear "football."

The current nuclear command and control system has no publicly known process rules that would prevent available time for deliberation to be squandered by classic national security process maladies. These include secrecy, speed, exclusion of key actors and information, and personalization and ego.[107] Consequentialist fears of "blood on your hands" from failure to act also often interfere with good process, and tend to favor acquiescence to executive action. The 2003 invasion of Iraq is instructive on every point. By multiple accounts, President George W. Bush made a "lonely decision" in secret for war.[108] He did so in the context of great anxiety about additional 9/11-scale attacks and before many agencies represented on the NSC understood that a decision had been made.[109] The President decided on war without focused NSC deliberation on the question of going to war, and without skeptical analysis of simplistic, assumption-laden Defense Department plans for Iraq after regime change.[110] The President's precipitous decision left the U.S. government unprepared when no meaningful stocks of weapons of mass destruction (the primary stated rationale for war) were found in Iraq and the country devolved into long years of chaos, insurgency, and civil war. The region, the reputation of the United States government abroad and at home, and thousands of American families who lost loved ones in the war have not fully recovered. A poorly-made decision for war in Iraq in turn facilitated the rise of the so-called Islamic State, years of civil war in Syria, and a massive refugee flow that has destabilized U.S.-allied Europe.[111]

Of course, additional process is not a panacea. Even the best process cannot cure a no-win situation, or always guarantee that the objectively best option will be selected. Process itself also has potential drawbacks.[112] These include delay, micromanagement, bureaucratic parochialism,

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(firsthand account and analysis of NSC process in advance of 1991 and 2003 wars with Iraq); *see* DOBBS, *supra* note 91, at 38 (Ex Com met in complete secrecy for nearly a week); GRAHAM T. ALLISON & PHILIP ZELIKOW, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (1999) (analysis); KENNEDY, *supra* note 103, at 48, 52, 98 (consideration of use of nuclear weapons during Cuba crisis).

107 *See, e.g.,* BAKER, *supra* note 40, at 124.

108 *See* HAASS, *supra* note 106 (book contrasts poor process regarding Iraq in 2002–3 with good process in 1990–91); DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMOIR 456-57 (2012) (many NSC discussions about Iraq generally and war preparations but President made a "lonely decision" for war).

109 The former State Department Policy Planning Staff director recalls that Secretary of State Colin Powell had to go around the NSC process and air his concerns with the President at a private dinner. The President had already decided. *See* HAASS, *supra* note 106, at 233–37.

110 *See* PETER R. MANSOOR, SURGE 6-7 (2014) (historian and former Army officer analyzes planning errors).

111 Congress did ratify the President's decision and authorize force, investing a second branch in the decision. Congress's deliberations were shaped by arguments that Congress had to back their Commander in Chief in a time of war with terrorists that the Bush Administration claimed were linked with Iraq's Saddam Hussein regime. *See* Authorization for the Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

112 *See* BAKER, *supra* note 40, at 124.

groupthink, and risk of leaks. Despite their success in running the bin Laden decision, for example, the Obama NSC staff were at times criticized for too much process – taking too long to decide and intruding into agency-level details and authorities.[113]

Managing the NSC process is a task of the President and senior advisors, not a reason not to use it. The bin Laden raid case study and other successful examples of inter-agency process demonstrate that NSC review can enhance decision-making about the most highly sensitive matters. Secrets can be kept, operational surprise maintained, timely legal advice can be provided, and thoughtful decisions made.

For a matter as complex and ramified as use of nuclear weapons, a process that includes an array of actors responsible for different aspects of the decision, carefully evaluates the intelligence, and which examines a full range of options and their implications, increases the chances that an ill-considered nuclear strike will not happen. In the event that nuclear use is necessary and legal, more robust review would help identify the best nuclear option. That is, one that is tailored in terms of weapon, yield, target, and means of delivery, and thereby better able to serve its objectives and minimize unnecessary harm – as is prudent from military and diplomatic standpoints and is required by the law of armed conflict.

The high-value target (HVT) counter-terrorism "playbook" and its companion for cyber operations, reflected in a series of NSC directives during the Obama Administration, provide a modern NSC-level process precedent.[114] They need a companion that provides NSC process for consideration of use of nuclear weapons, operative where decision time is available and tailored for nuclear matters.

B. Implementation: The Need for a Statute

As in the case of inter-agency review of counter-terrorism and cyber operations, NSC review could be implemented by executive order. But an administrative-only solution, like other proposals offered during the Cold War and during the revived conversation about nuclear command and control, have shortcomings. This section evaluates several non-legislative proposals, and explains why they are more problematic than a statute.

Changes to the nuclear command and control process could be promulgated most quickly (and potentially in the greatest detail) administratively. Ambassador Richard Betts and Professor Matthew Waxman recommend that the President by executive order mandate that any launch order be accompanied by Secretary of Defense attestation that the order is valid and Attorney General

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113 *See, e.g.*, GATES, *supra* note 106, at 587 (Obama Administration Defense Secretary complains of micromanagement).

114 *See* EXEC. OFF. OF THE PRESIDENT, PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013) https://perma.cc/D9FY-DWPA (declassified playbook guidelines); Dakota S. Rudesill, *Trump's Secret Order on Pulling the Cyber Trigger*, LAWFARE (Aug. 29, 2018), https://perma.cc/NFV7-EL6F (discussing Obama-era NSC-level decision processes for counter-terrorism and cyber operations).

agreement that it is legal.[115] The President should issue an executive order that goes at least as far as Betts and Waxman urge. However, as proposed it is limited to two cabinet actors. The Betts-Waxman process order would not necessarily capture the benefits of more fulsome NSC review, to include the State Department (diplomatic equities) and U.S. Intelligence Community (intelligence considerations). It also leaves constraints on the President to the discretion of the President. A chief executive can cancel an executive order as easily as promulgate one – including orally, and in secret.[116] This is not a hypothetical. Via classified directives, President Trump reportedly vitiated much of the NSC decision process he inherited regarding counter-terror raids and cyber operations.[117] The valuable expectation-setting and norm-building a nuclear decision process executive order might do could be largely canceled on day one of the term of a new president who prefers maximum flexibility – or at any point thereafter.

If an executive order is the quickest but least resilient route to reform, the procedurally most difficult but legally sturdiest is a constitutional amendment.[118] An amendment could govern nuclear weapons specifically and enduringly restructure the Executive Branch.[119] But the amendment process has fallen into disuse. It is probably not a possibility in this hyper-divided age.[120]

Some participants in the nuclear dialogue have suggested using judicial process, but it could be equally unavailing.[121] As discussed in Part IV below, the courts sometimes do speak and speak powerfully regarding national security and separation of powers.[122] Federal courts, however, prefer

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115 *See* Betts & Waxman, *supra* note 6. *See also* James M. Acton, Keynote Remarks at the 2019 Project on Nuclear Issues Capstone Conference (Apr. 30, 2019) (physicist and policy expert urges executive order to add other cabinet officials to nuclear launch decisions).

116 It is the Justice Department's position that the President may revise or withdraw an executive order at any time, in writing or orally, without public notice. *See* Rudesill, *supra* note 49, at 291.

117 *See* Dustin Volz, *Trump, Seeking to Relax Rules on U.S. Cyberattacks, Reverses Obama's Directive*, WALL ST. J. (Aug. 15, 2018, 11:36 PM), https://perma.cc/BJ2P-ATEE; Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES (Sept. 21, 2017), https://perma.cc/N73N-A8DY; Rudesill, *Cyber Trigger*, *supra* note 114.

118 *See* U.S. CONST. art. V.

119 *See* Yonkel Goldstein, Note, *The Failure of Constitutional Controls over War Powers in the Nuclear Age: The Argument for A Constitutional Amendment*, 40 STAN. L. REV. 1543 (1988) (calling for amendment to define the roles of Congress and the President regarding nuclear war).

120 The Constitution's other path to amendment is through a constitutional convention called by two-thirds of the states. *See* U.S. CONST. art. V. Balanced budget advocates are getting closer to having enough states call for a constitutional convention. *See* Michael Wines, *Inside the Conservative Push for States to Amend the Constitution*, N.Y. TIMES (Aug. 22, 2016), https://perma.cc/3R5N-7VY5. The convention to perfect the Articles of Confederation teaches that such a process could spiral, pulling in many other issues or even again lead to an effort to write a new Constitution. *See id*. Meeting the three-fourths-of-states ratification threshold would be hard.

121 *See, e.g.,* Paul A. Hemesath, Note, *Who's Got the Button - Nuclear War Powers Uncertainty in the Post-Cold War Era*, 88 GEO. L.J. 2473, 2502-03 (2000) (arguing for amendment of the War Powers Resolution to allow court challenge and ruling on nuclear weapons under the Constitution).

122 *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 561 (2006) (presidential order regarding suspected enemy fighters in post-9/11 armed conflict with Al Qaeda is contrary to statute and invalid); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-89 (1952) (presidential order to seize steel mills during Korean War is contrary to will

to avoid national security matters, often deploying avoidance and justiciability doctrines – such as deference canons, the political question doctrine, and standing, ripeness, and state secrets theories – to sidestep the merits or toss suits entirely.[123] Because abuse of the nuclear command and control system could precipitate a cataclysmic nuclear war, the system does implicate life, liberty, and indeed everything else protected by the Constitution.[124] Courts, however, do not open themselves to adjudicating claims of catastrophically poor judgment in use of force or maintaining civilization-ending weapons.[125] Even if nuclear command and control were to get before the judiciary, courts generally refuse to impose process or otherwise insist on limits on executive national security decision-making unless individual rights or exercise of Congress's powers are implicated.[126]

For that reason, because other lawmaking routes are so problematic, and because of the risks inherent in the status quo, it is to statutory solutions that we now turn.

IV. THE STRENGTHENED CASE FOR THE CONSTITUTIONALITY OF STATUTORY RULES FOR NUCLEAR WEAPONS

Since the dawn of the nuclear age, Congress has regularly legislated regarding nuclear hardware. The nation's legislature has authorized, funded, structured, modernized, and overseen a truly massive array of nuclear assets: a stockpile that at its height included some 30,000 warheads; the thousands of aircraft, missiles, and submarines that have carried them; the dozens of military installations that have hosted them; the nuclear laboratories and industrial enterprise that have designed and created nuclear hardware, at an historical cost approaching a trillion dollars; the

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of Congress and invalid); The Prize Cases, 67 U.S. 635, 665 (1862) (presidential order to blockade the South during Civil War leading to seizure of ships is valid in absence of legislative authorization or restriction); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804) (presidential order regarding seizure of ships during naval war with France is contrary to statute and invalid).

123 *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 400, 420-23 (2013) (petitioners lack standing to challenge FISA Amendments Act because they cannot show they were secretly surveilled); United States v. Richardson, 418 U.S. 166, 174-76 (1974) (taxpayer lacks standing to challenge intelligence statute); Campbell v. Clinton, 203 F.3d 19, 19 (D.C. Cir. 2000) (suit by Members of Congress alleging War Powers Resolution violation dismissed for lack standing and political question reasons); Dellums v. Bush, 752 F. Supp. 1141, 1149-52 (D.D.C. 1990) (suit during run-up to war with Iraq by Member of Congress dismissed on ripeness). *Cf.*, John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1407-17 (1988) (criticizing justiciability doctrines).

124 *Cf.,* Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1296-1301 (1991) (arguing that nuclear weapons are unconstitutional and damage the social contract); Arthur S. Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA L. REV. 21, 36 (1982) (arguing that nuclear weapons are unconstitutional set against constitutional ethos and "so endanger the lives, liberties, and property of all Americans that they should be considered to be a deprivation contrary to due process").

125 Courts "are not the only guardians of the Constitution. Their reluctance [to adjudicate nuclear command] should not foreclose a growing dialogue." Miller, *supra* note 124, at 36-37.

126 *See Hamdan*, 548 U.S. 557, 624 (President's Commission Order No. 1 regarding enemy combatants invalid as violation of Uniform Code of Military Justice statute); Hamdi v. Rumsfeld, 542 U.S. 507, 508 (2004) (adjudication must include constitutional due process protections for U.S. citizen detained as enemy combatant); *Youngstown*, 343 U.S. at 587-89 (presidentially ordered seizure of steel mills for national defense purposes invalid because not authorized by statute or Constitution). *See also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320-22 (1936) (upholding statutory delegation of decision authority to President regarding arms trade).

world's most advanced intelligence, surveillance, and reconnaissance (ISR) and early warning (EW) capabilities, designed to detect and monitor nuclear threats worldwide; and a multi-layered globally operational nuclear command, control, and communications system crafted to enable timely and informed presidential decision even in the throes of nuclear Armageddon.[127] Additionally, Congress has a long record of involvement in nuclear arms control. The Senate has offered its advice and consent to a series of Washington-Moscow nuclear arms control treaties that have capped and then reduced nuclear forces, and then legislatively implemented them, starting in 1972.[128] That was the year the Congress also held its single vote on legislation governing operational employment of nuclear weapons, the Fulbright Amendment. Although that measure did not pass, other statutory proposals were frequently discussed until the Cold War's end.

A key question then as now is whether legislation governing nuclear command and control would be constitutional. That debate needs to be understood before considering new proposed legislation. Importantly, the constitutional conversation also needs to be updated to account for important developments since the nuclear command and control conversation (at least outside the Defense Department) went on hiatus when the Berlin Wall came down 30 year ago.

This article maintains here in Part IV.A that reformers should not be dissuaded from statutory solutions by the nature of the constitutional conversation to date. The fate of the Fulbright Amendment, like implicit assertions that nuclear weapons are constitutionally special, are more red herrings than they are instructive. Next, Part IV.B analyzes separation of powers doctrine in relevant part. Congress has unused authority to govern nuclear weapons legislatively in the face of expansive assertions of presidential power. Ultimately, nuclear weapons need not be constitutionally special – for either branch. Third, Part IV.C argues that nuclear weapons can instead be made statutorily special. Thanks to a series of international security, doctrinal, and legislative developments subsequent to the Fulbright Amendment, the nuclear command and control conversation is resuming with firmer footing for Congress to write statutory rules. Especially salient is that the past half century has seen enactment and entrenchment of tailored process statutes for covert action and national security surveillance. Unlike the effective permission the War Powers Resolution (WPR) provides for the President to initiate hostilities for 60 to 90 days without congressional authorization,[129] the covert action and surveillance regimes constrain the President's ex ante access to national security loaded weapons. They will be used as legislative precedents in the next main section (Part V) for making nuclear weapons statutorily special.

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127 Former Secretary of Defense Mark Esper wrote his dissertation on Congress and strategic forces. *See* Mark T. Esper, The Role of Congress in the Development of the United States' Strategic Nuclear Forces, 1947-68, 405-08 (Aug. 31, 2008) (Ph.D. dissertation, George Washington University) (Proquest) (arguing that Congress was extensively involved in crafting of long-range nuclear forces).

128 For discussion, see Rudesill, 102 GEO. L.J., *supra* note 70, at 128–38 (analysis of history of bilateral nuclear arms control agreements approved by Senate); David A. Koplow, *Eve of Destruction: Implementing Arms Control Treaty Obligations to Dismantle Weaponry*, 8 HARV. NAT. SEC. J. 158 (2017) (Congress involved in implementation).

129 *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, § 5(b) (1973) (60 to 90 day clock).

A. Reform Should Not be Dissuaded by the Constitutional Conversation to Date

The new conversation about nuclear command and control sometimes proceeds as if the Cold War-era debate resolved the constitutional questions. Some, especially in the policy and military nuclear communities that usually drive nuclear conversations, essentially believe that Congress lost and whatever powers it could have asserted are permanently dormant. Others with legal and non-legal backgrounds believe that nuclear weapons are inevitably constitutionally special in one sense or another: uniquely and per se unconstitutional, reserved exclusively to the President, or available to the President for first use only if Congress formally declares war. None of these claims are persuasive. They distract from Congress's opportunity to assert its under-utilized but still extant powers to govern the nation's nuclear loaded weapons.

1. Cold War-era Statutory Proposals

As discussed in Part III.B above, participants in the new nuclear command and control conversation should not be dissuaded from exploring reform due to the problems with executive order, constitutional amendment, or litigation solutions. Similarly, reformers should not be dissuaded by the failure of Congress to enact any one of several prominent Cold War-era statutory proposals and the ensuing decades of acquiescence to near-total Executive power.

Nearly a half century ago the Senate held Congress's single vote to date about whether to apply legislative rules to use of nuclear weapons. An amendment to the WPR authored by Senator J. William Fulbright (D-AR) would have barred nuclear use "without the prior explicit authorization of the Congress" except in the most imminent threat situation imaginable: where adversary nuclear weapons were in the air or had already detonated. Arguments that the amendment would infringe on the President's authority as Commander in Chief played a role in the measure's 68-10 defeat in April 1972.[130]

It would be wrong, however, to interpret such overwhelming rejection of the amendment as a compelling legislative precedent about the constitutionality of writing rules for nuclear use. Of course, Congress is not bound by its past rejection of a proposed law. And as is common in legislative bodies, there was a lot else going on.

In the teeth of the Cold War, the Fulbright Amendment would have challenged U.S. deterrence policy in two respects. First, absent "explicit authorization of the Congress" – which could take hours to months – the United States would have lost the deterrent power of the threat to shoot first in anticipatory self-defense if it looked like the Soviet Union or China were preparing a nuclear attack. Second, the Fulbright Amendment was vulnerable to the charge that if enacted it could raise questions about the credibility of NATO's policy of relying on the threat of U.S. first use of tactical nuclear weapons in Europe to deter attack by the Warsaw Pact's numerically superior conventional

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130 *See* 118 CONG. REC. S12451 (1972) (statement of Sen. Javits); 118 CONG. REC. S12452 (statement of Sen. Eagleton). For discussion, *see* Stephen P. Mulligan, CONG. RES. SERV., LEGISLATION LIMITING THE PRESIDENT'S POWER TO USE NUCLEAR WEAPONS: SEPARATION OF POWERS IMPLICATIONS 12 (Nov. 3, 2017). The vote on the Fulbright Amendment had an unusually high number of non-voting Senators (22).

forces.[131] Absent separate congressional action, the Fulbright Amendment would have instituted a "no first use" policy.[132]

Several Senators urged colleagues to reserve the nuclear and "no first use" basket of questions to a separate bill in the future.[133] Senators also argued that if the Fulbright Amendment passed it would open a Pandora's box of amendments.[134] Additionally, critics assailed the amendment's scope. Fulbright's proposal went beyond nuclear arms.[135] Some Senators worried that it gave the President more authority to use *conventional* force than Congress intended.[136]

The Fulbright Amendment's fate was tied tightly to its Cold War context, legislative strategy considerations, its reach into conventional force questions, and concerns about drafting.[137] Senator William B. Spong (D-VA) was correct that a vote for or against the Fulbright Amendment could create "misinterpretation" of Congress's intent and confusion about its legislative effort to interpret the Constitution.[138]

Similarly, one should not read a general rejection of congressional authority to govern nuclear command and control into concerns with another prominent Cold War-era legislative proposal. The Fulbright Amendment was inspired by a bill drafted by the Federation of American Scientists that would, absent a declaration of war, require the President to get the concurrence of a committee of congressional leaders before ordering nuclear launch.[139] To critics, the Federation was

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131 *See* McGeorge Bundy, George F. Kennan, Robert S. McNamara & Gerard Smith, *Nuclear Weapons and the Atlantic Alliance*, 60 FOR. AFF. 753, 754 (1982) (willingness to use nuclear weapons first was "major element in every doctrine" of NATO). As mentioned in *supra* note 95, some experts and scholars believed during the Cold War that even in the event of a Warsaw Pact conventional invasion of Western Europe there would probably have been sufficient time for Congress to act before the United States used nuclear weapons.

132 That was Fulbright's stated intent, but not U.S. policy. *See* 118 CONG. REC. S12450 (statement of Sen. Fulbright); 118 CONG. REC. S12451 (statement of Sen. Javits) (amendment raised questions "fundamental to the whole strategic posture of the United States").

133 *See* 118 CONG. REC. S12450 (statement of Sen. Spong), 118 CONG. REC. S12452 (statement of Sen. Eagleton), 118 CONG. REC. S12454 (statement of Sen. Cooper).

134 *See* 118 CONG. REC. S12450 (statement of Sen. Spong) (amendment would "open the door for many other amendments").

135 *See Senate Passes Bill Defining Constitutional War Powers*, *in* CQ ALMANAC 1972, at 05-842-05-851 (28th ed., 1972, 1973).

136 *See* 118 CONG. REC. S12450 (statement of Sen. Spong).

137 The Markey-Lieu bill of recent congresses is similar to the Fulbright Amendment but simpler. Markey-Lieu requires a war declaration for first use of nuclear weapons unless the President determines "that the enemy has first launched a nuclear strike against the United States or an ally of the United States." The bill does not concern conventional forces. *See* Restricting First Use of Nuclear Weapons Act of 2017, H.R. 669, 115th Cong. (2017); Restricting First Use of Nuclear Weapons Act of 2017, S. 200, 115th Cong. § 3 (2017).

138 *See* 118 CONG. REC. S12450 (statement of Sen. Spong).

139 *See* Peter Raven-Hansen, *Introduction*, *in* FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 5, at ix (Fulbright Amendment grew out of Federation of American Scientists proposal); Jeremy J. Stone, *Presidential First Use is Unlawful*, *in* FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 5, at 3, 11-12 (describing and arguing for Federation bill).

proposing an impermissible legislative veto.[140] Others disagreed and defended a de minimis and warranted deviation from rigid formalism in separation of powers.[141]

Non-lawyer participants in the new nuclear command and control conversation in particular need to understand that the fate of these proposals, or any other introduced but unenacted to date, reflect at most congressional acquiescence. As Justice Jackson observed, Congress can make its powers meaningful through their use.[142]

2. Claims that Nuclear Weapons are Constitutionally Special

Just as controversies about past prominent legislative proposals should not dissuade statutory reform, so ought not assertions – express or implied – that nuclear weapons are constitutionally special.[143]

Some thinkers have argued that nuclear weapons are inherently unconstitutional because they are so catastrophically destructive, carry such unique escalation risk, and have concentrated so much authority in one person. Their "unnatural monstrocity" means that they cannot be reconciled with the Constitution's ethos, popular rights including life and liberty, and Congress's role under the Constitution.[144] However, the Constitution's text – beyond categorical distinctions among federal armies and a navy, state troops and ships of war, the militia, and privateers (Marque and Reprisal) – draws no distinctions among forces.[145] Today, this constitutional speciality claim flies in the face of nearly 75 unbroken years of two-branch investment in, and public acceptance of, nuclear deterrence. Finally, recall that the worst-case nuclear nightmare of imminent or initiated adversary nuclear attack and the expansive presidential power that comes with it persists as a remote possibility but is not the most likely nuclear employment scenario.

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140 The Supreme Court later held the legislative veto unconstitutional. *See* I.N.S. v. Chadha, 462 U.S. 919, 921 (1983) (invalidating legislative veto). *See also* Stephen L. Carter, *War Making Under the Constitution and the First Use of Nuclear Weapons*, *in* FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 5, at 109, 109-28.

141 *See* William C. Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, *in* FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 5, at 129, 129-42 (arguing that committee not a *Chadha* violation); Charles Tiefer, *The FAS Proposal: Valid Check or Unconstitutional Veto?*, *in* FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 5, at 143, 143-65 (distinguishing *Chadha* as domestic case); Raven-Hansen, *supra* note 15, at 794 (deviations from formalist constitutional vision allowed by Supreme Court to promote key congressional objectives and warranted here).

142 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (discussing congressional acquiescence).

143 I thank a conversation with Professor Matthew Waxman at Stanford's February 2019 conference on nuclear launch authority for the concept of nuclear weapons being constitutionally special.

144 *See* Milner S. Ball, *Nuclear War: The End of Law*, 7 NOVA L. REV. 53, 57 (1982) (nuclear weapons are "deconstitutionalizing or anti-constitutionalizing" because of their "blasphemy" and "unnatural monstrocity" [sic]). For arguments against constitutionality, *see* Miller, *supra* note 124, at 36-37; Scarry, *supra* note 124.

145 *See* U.S. CONST. art. I, § 8, cl. 10, 12, 13, 15, 16; U.S. CONST. art. I, § 10, cl. 3.

A more common line of constitutional speciality thinking includes the notion that "the bomb" must always be left entirely to the President. Sometimes, a presidentialist view of separation of powers (see discussion below) that embraces all modalities of force is invoked to put employment of nuclear weapons beyond legislative control.[146] This does not reflect constitutional speciality of nuclear weapons. Where a presidentialist vision is not deployed, however, discussions of nuclear force frequently will nevertheless not admit room for legislative governance. This *does* reflect constitutional speciality thinking (although commonly of a variety that is more strong normative implication than explicit argument). Typically, omissions of any potential legislative power over nuclear employment are paired with reference to the time horizons and existential stakes of the worst-case nuclear nightmare.[147] But again: the scenario that has driven design of the command and control system and most powerfully shaped constitutional thinking about it is *not* the most likely scenario. In short, when referencing the constitution, the nuclear use conversation – in print and especially in the informal conversations in which constitutional law is often most meaningful[148] – goes too quickly to the most extreme case to the detriment of a full discussion of the legislative regulatory possibilities.

A third variant of the speciality claim is that nuclear weapons are constitutionally special for Congress. The current Markey-Lieu bill, which builds on ideas in the Fulbright and Federation legislative proposals, crisply articulates this reasoning:

> Sec. 2(a). FINDINGS. . . . (4) Nuclear weapons are uniquely powerful weapons that have the capability to instantly kill millions of people, create long-term health and environmental consequences throughout the world, directly undermine global peace, and put the United States at existential risk from retaliatory nuclear strikes.
>
> (5) By any definition of war, a first-use nuclear strike from the United States would constitute a major act of war.
>
> (6) A first-use nuclear strike conducted absent a declaration of war by Congress would violate the Constitution.
>
> Sec. 2(b). DECLARATION OF POLICY. – It is the policy of the United States that no first-use nuclear strike should be conducted absent a declaration of war by Congress.[149]

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146 *See, e.g.*, Robert F. Turner, *Congressional Limits on the Commander in Chief: The FAS Proposal*, in FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 5, at 37, 37-46.

147 *See, e.g.*, Dunlap, *The Danger of Tampering*, *supra* note 12 (legal scholar rejects legislative variation of Betts-Waxman proposal, without mention of room for other legislative approaches, emphasizing adversary rapid attack risk that "leaves little time for the President to exercise his Constitutional responsibility to provide for the common defense"); Woolf, *supra* note 29, at 1 (policy expert rejects possibility of legislative action).

148 For the importance of the constitutional conversation in informal process and practice settings, *see* BAKER, *supra* note 40.

149 *See* Restricting First Use of Nuclear Weapons Act of 2017, H.R. 669, 115th Cong. (2017); Restricting First Use of Nuclear Weapons Act of 2017, S. 200, 115th Cong. (2017).

The Markey-Lieu bill has an exception for an initiated nuclear attack against the United States or its allies.[150] The essential idea is, as Senator Fulbright argued, that when nuclear weapons are used it is the "beginning of a whole new war."[151] This claim of specialness and consequence has some merit. Certainly, employment of a nuclear weapon against the forces or territory of an adversary would be a major use of force and an act of war. One would certainly hope the nation's legislature would act before nuclear weapons are used. A declaration of war would send powerful messages of resolve and acceptance of responsibility by the elected representatives of the people. But why must presidentialist claims of constitutional specialness should be matched by equally rigid congressionalist claims? Regular statutes have been used throughout U.S. history to authorize wars that have often caused destruction on a scale one or more nuclear weapons could inflict. Statutory force authorizations are the only form of legislative war authorization used after World War II.[152] Statutes enacted in advance can also provide rules where Congress does not or cannot act in a crisis.

B. Separated and Shared Powers Over Nuclear Weapons

The constitutional conversation about nuclear weapons has unfolded in the context of separate, contested, and ultimately concurrent and shared war powers of the Legislative and Executive Branches.

In their 1789 replacement for the Articles of Confederation, the Framers' project was one that we would recognize as balancing security and liberty: to craft a federal central government strong enough to protect a large country, but with powers sufficiently separated and checked that its internal institutional and personal rivalries would prevent it from repeating the predations against liberty that drove the American revolt against British rule.[153] Their project was equally defense-enabling and counter-authoritarian.[154] The Constitution created a President with responsibilities as Chief Executive and Commander in Chief,[155] but as a check on military dictatorship and to ensure accountability gave a refashioned bicameral Congress an extensive slate of powers over the national security apparatus. Via its powers to Raise and Support Armies and Provide and Maintain a Navy, only the Congress could create a federal military.[156] Via its organizational, calling-forth,

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150 *See* Restricting First Use of Nuclear Weapons Act of 2017, H.R. 669, 115th Cong. (2017); Restricting First Use of Nuclear Weapons Act of 2017, S. 200, 115th Cong. (2017).

151 *See* 118 CONG. REC. S12450 (statement of Sen. Fulbright). *See also* SCARRY, *supra* note 5, at 37-84 ("the Constitution requires a congressional declaration of war").

152 *See, e.g.,* Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing force against 9/11 attackers and supporters) (authorizing force against 9/11 attackers and supporters); Act of June 5, 1942, ch. 325, 56 Stat. 307 (last U.S. war declaration, against Nazi-controlled Romania).

153 *See* THE FEDERALIST NO. 51 (1788) (James Madison) ("Ambition must be made to counteract ambition" and government must be structured "to control itself.").

154 *See* Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 U. CIN. L. REV. 391, 394, 399, 416 (2018) (counter-authoritarian purposes); AMAR, *supra* note 35, at 114-21 (national defense-enabling powers and limitations).

155 *See* U.S. CONST. art. II, § 1-2.

156 *See* U.S. CONST. art. I, § 8, cl. 12-13.

and governing powers over the state militias, only the Congress could hand the new republic's only extant military forces of any consequence to the federal Commander in Chief.[157] No funds for these forces would be available without an act of Congress, and the army's funding expired after two years – a default fail-safe against an oppressive military.[158] Congress could statutorily "make Rules for the Government and Regulation of the land and naval Forces," controlling the military establishment's organization and justice system, and operations.[159] The nation's legislature could authorize and control privateers (Marque and Reprisal), make rules for captures on land and sea, and define and punish infractions against international law.[160] Congress was given power to Declare War, and tax and spend to "provide for the common Defense."[161]

The Constitution envisioned that the new federal government would be better able to defend the country than the Articles' confederal structure. However, the Constitution did not give the power to "make war" to the President nor to Congress.[162] Similarly, the Constitution did not give either branch Congress's power under the Articles of "directing" the "land and naval Forces."[163] Giving command to the President and military-raising, force-governing, funding-providing, and war-declaring to Congress was a verdict for a capable federal government but one also set up for liberty-protecting inter-branch tension.

The Constitution's text, origins, and history of active interpretation by the three branches put several aspects of the constitutional balance of power largely beyond dispute. Only the Congress can create federal forces. It can generally appropriate, terminate, or condition funding as it desires. The President has what Professors Barron and Lederman term "superintendence" – the Commander in Chief cannot be replaced at the head of the military chain of command.[164] Using

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157 *See* U.S. CONST. art. I, § 8, cl. 15-16.

158 *See* U.S. CONST. art. I, § 9, cl. 7; § 8, cl. 12.

159 *See* U.S. CONST. art. I, § 8, cl. 14. *See* Rudesill, *The Land and Naval Forces Clause*, *supra* note 154, at 442, 480-81 (dual power theory of the Clause); AMAR, *supra* note 35, at 188 (Clause provides power over military justice and to proscribe President's use of force, but not direct it).

160 *See* U.S. CONST. art. I, § 8, cl. 11, 10.

161 *See* U.S. CONST. art. I, § 8, cl. 11, 1.

162 At the Constitutional Convention, the Committee of Detail's draft accorded Congress the power to "make war." Its change by the delegates to "declare war" came in the context of creation of the President as Commander in Chief but with frustratingly little explanatory drafting history. *See* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 182 (1911).

163 *See* ARTICLES OF CONFEDERATION OF 1781, art. IX.

164 *See* 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, 767-70 (2008) [hereinafter *Lowest Ebb Part I*]; David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter *Lowest Ebb Part II*]. *See also* DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS 1776 TO ISIS (2016). Subsequent to authoring the Harvard articles with Lederman, Barron was appointed to the U.S. Court of Appeals for the First Circuit. *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (Constitution "undoubtedly puts the Nation's armed forces under presidential command" but its boundaries are uncertain). In contrast, the British could appoint multiple Commanders in Chief, and the Congress under the Articles of Confederation could do so as well.

the forces Congress has provided, the President can order them to repel sudden attacks, and has some additional authority to use force absent congressional authorization or restriction.[165]

If these constitutional four corners are clear, so too is that the circumstances of the founding era were turned on their heads by the nuclear age. The threat and its timelines, U.S. capabilities, and which organs of government could be expected to take the greatest responsibility for national defense could not have been more transformed.[166] The Framers wrote the Constitution understanding that the President may need to act – with what militia could be federalized or regulars were on hand – before Congress could assemble. Similarly, the Framers gave the state militias a primary role in national defense, and in the Constitution explicitly gave states authority to "engage in War" if "actually invaded, or in such imminent Danger as will not admit of delay."[167] The Framers also knew that the continent and Atlantic Ocean were vast and that sail ships, horses, and human feet were slow. Communications with foreign powers, intelligence collection about them, and the advance of adversary military forces would all take time. Congress could convene and take a central role. The Legislative Branch had temporal space to inquire, to deliberate in consultation with the executive, and to decide about what kind of force to employ (privateers, state forces, federalized militia, or federal regulars?), whether and what kind of war to have, and what rules to write. "No standing armies" was not just principle but reality: federal forces at the Constitution's ratification totaled a few hundred troops and no navy.[168] James Wilson observed during the ratification debates that the Constitution's "system will not hurry us into war; it is calculated against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress."[169] The nuclear age, in contrast, has been characterized by standing U.S. nuclear forces of global reach and immediate availability, armed with more thermonuclear bombs than President Washington had federal soldiers, arrayed against nuclear arsenals in Eurasia and under

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165 *See* The Prize Cases, 67 U.S. 635, 665 (1863) (authority to repel attacks, in case where Congress had not acted); Carter, *supra* note 140, at 118 & n. 58, 124 n. 20 (noting presidential power to order use of force absent congressional authorization or restriction goes beyond "repel attacks" power).

166 *See* Raven-Hansen, *supra* note 15, at 786 (making this observation).

167 *See* U.S. CONST. art. I, § 10, cl. 3 (conditional permission for states to wage war); *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring) ("the militia rather than a standing army was contemplated as the military weapon of the Republic"); THE FEDERALIST NO. 29 (Alexander Hamilton) (national army "dangerous to liberty" is unnecessary if the federal government could employ the state militias to defend the country). *But see* RICHARD H. KOHN, EAGLE AND SWORD: THE BEGINNINGS OF THE MILITARY ESTABLISHMENT IN AMERICA 277-303 (1975) (efforts by some Framers to neuter militias, and controversy over Hamilton's drive in 1790s for federal army).

168 Years before, the Continental Army had been demobilized and the Continental Navy disbanded and its last ship sold. *See* 1 WILLIS J. ABBOT, I NAVAL HISTORY OF THE UNITED STATES, ch. XV (1896). Alexander Hamilton successfully pushed for a few Treasury Department revenue cutters in 1790, the predecessors to the U.S. Coast Guard. A small U.S. Navy was established by the Naval Act of 1794. *See* 1 Stat. 350, ch. 12 (1794). During the Washington and Adams Administrations, Congress blunted Executive drives for sizable federal armies to deal with frontier and French threats. Congress did create a frontier force of several thousand but to the frustration of Hamilton – then the second-highest ranking general – abandoned work on a new army when the French threat fizzled. *See* BARRON, *supra* note 164, at 43-49; KOHN, *supra* note 167, at 277-88. The War Department in the mid-1790s had a headquarters staff of seven, including the Secretary and doorkeeper. Working personnel at times totaled two. *See* KOHN, *supra* note 167, at 290-92.

169 *See* 2 ELLIOT'S DEBATES 528 (J. Elliot, ed., 1832) (statement of Wilson).

the seas that can devastate the country in minutes. Reliance on the President's urgent defense authority became unavoidable.

The legal aspect of the nuclear command and control conversation has grappled with how the Founders' constitutional vision is to be made meaningful, and how the Congress can remain relevant, in such radically changed and existentially perilous times. Debate often focused during the Cold War, as it has again now that the conversation has resumed, on the question of if and when the President may use nuclear weapons absent congressional authorization, and on what ex ante controls Congress can or should impose.

In the context of Justice Jackson's canonical tripartite framework in *Youngstown Sheet & Tube v. Sawyer* (the Steel Seizure Case) for evaluating the intersection of congressional and presidential powers in national security, these questions are ones of Categories Two and Three.[170] There is no question of the President's authority under U.S. law to employ nuclear force in Category One: where the President is acting pursuant to congressional authority. The Cold War-era and Markey-Lieu statutory proposals discussed in Part IV.A aspire to put any nuclear use in this category. Category Two is "a zone of twilight" of "uncertain" power, where the President is acting absent congressional authorization.[171] A presidential launch order in response to a sudden nuclear threat that does not admit time for legislative action would be on firm ground in Category Two, as acknowledged by virtually all participants in the nuclear command and control debate, and the Fulbright and Markey-Lieu proposals. In contrast, a Rogue President presents a terrible dilemma: practical control of the nuclear trigger but highly-questionable-to-zero true constitutional authority, because the threat that the Commander in Chief may repel without congressional action is highly-questionable-to-zero. Like the Rogue President, the Precipitous President who reaches for the nuclear football in a developing crisis or ongoing conflict where adversary nuclear attack is not imminent, and does so without evaluation of implications and alternatives, could either be a Category Two or Three actor. If Congress has not expressed its will, the President's constitutional authority would depend on the extent to which the threat is real, and if so whether nuclear use is necessary and otherwise legal. It would also depend on whether one agrees with the generally accepted but still contested proposition that the President may employ force below the level of full war without congressional authorization, beyond situations in which attacks are imminent or underway – assuming nuclear use could ever fall below the level of full war. Rounding out the *Youngstown* framework, a Rogue, Precipitous, or even thoughtful President might instead order nuclear use contrary to the express or implied will of Congress, for example in violation of an enacted Markey-Lieu bill. Here, the Commander in Chief would find their power at its "lowest ebb," able to rely only on whatever power Congress could not extinguish.[172]

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[170] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636-41 (1952) (Jackson, J., concurring) (framework for analyzing collisions of the President and Congress regarding national security). For discussion of the framework, see Heidi Kitrosser, *It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401 (2010); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 112, 134-36 (1990).

[171] *See Youngstown*, 343 U.S. at 636-37 (Jackson, J., concurring).

[172] *See id*. at 636-37 (Jackson, J., concurring).

The nuclear conversation about which branch wins in *Youngstown*'s Category Three has fallen along the familiar lines of three general bodies of theory.[173] Rarely articulated in the nuclear context is the congressionalist school of thought. It would allow Congress to legislate virtually any rules for nuclear forces or any other, to include detailed tactical direction of nuclear war.[174] A second school of thought, what can be termed the presidentialist view, reflects expansive claims of executive power. Generally, in its most rigid and formalist incarnation, this vision exalts the President's supreme powers to act in defense of the country, checked only via appropriations termination or impeachment and removal.[175] Otherwise, inter-branch clashes are left to elections and politics.[176] Presidentialism is unusually common inside the government's nuclear community, implicitly reflecting the view that nuclear weapons are constitutionally special presidential weapons. Despite its adherents in several presidential administrations, presidentialism like congressionalism is a minority viewpoint among jurists and scholars. The majority school of thought generally, with adherents among scholars in the nuclear command and control conversation, is that of shared, concurrent power.[177] In *Youngstown* Category Three the Commander in Chief remains what Hamilton described as "the first general and admiral" of the nation, but like the military commanders of Founding-era states and Great Britain is bound by statute.[178] This theory generally was reflected in Justice Jackson's analysis and the Supreme Court's invalidation in *Youngstown* of President Truman's defiance of congressional will to seize steel mills for national defense purposes in the teeth of the Korean War – a war some feared would go nuclear. The majority, concurrent power view would dictate a strong presumption that a Rogue or Precipitous President who ordered a nuclear launch in defiance of statute would be acting illegally under the Constitution.

Such a statute would not be congressional direction of tactical maneuvers, analogous to the instructions on the movement of forces and timing of attack typical of Congress's micromanagement of the War for Independence's Commander in Chief, General George Washington. Rather, a nuclear use statute would reflect Congress attaching conditions to its

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173 For discussion of these schools of thought, see Rudesill, *The Land and Naval Forces Clause*, *supra* note 154, at 426-31. These categories are by nature generalizations.

174 For a congressionalist view, *see, e.g.*, Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 332 (2008).

175 *See, e.g.,* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, 155, 159-60 (2005) (non-appropriations statute cannot limit presidential use of the military). A still smaller minority of thinkers go further and argue that even the power of the purse cannot limit what the President can order the military to do, once Congress raises forces. *See, e.g.,* J. Terry Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME L. REV. 187, 210, 213 (1975) (argument). The scholarly consensus is different. *See* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 7, 181 (1994) (Congress generally prevails regarding appropriations).

176 *See, e.g.,* Turner, *supra* note 146, at 37-48.

177 *See* Banks, *supra* note 141 (assumption of executive-congressional shared war powers underlying article's argument); Carter, *supra* note 140, at 111-16; Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO STATE L.J. 391 (2008); Raven-Hansen, *supra* note 15.

178 *See* THE FEDERALIST NO. 69 (Alexander Hamilton).

raising-and-providing particular nuclear (air) armies and naval forces; writing "Rules for the Government and Regulation of the land and naval Forces;" deciding generally on the scope and intensity of war the President would then command; and providing appropriations.[179] Congress would reasonably be exercising its checking legislative powers to ensure that spending only "provide[s] for the common Defence and general Welfare" and guards against potentially cataclysmic abuse of the repel-attacks and superintendence presidential authorities.

The renewed nuclear command and control conversation should take note of a significant body of new research since the Cold War that has added to the balance of the Founding Era evidence and constitutional history that lies against the presidentialist claim that in national security Congress cannot bind the President via statute. Especially compelling is the magisterial work of Professors Barron and Lederman, analyzing the evidence regarding *Youngstown* Category Three clashes from the Founding to George W. Bush Administration.[180] Presidentialist claims were relatively rare from Washington's Administration into the Twentieth Century. Those assertions, and a more limited body of newer scholarship by presidentialists, have stumbled against an extensive multi-century record of Congress often governing the armed forces and presidential employment of them in detail.[181] Barron and Lederman, like a number of other constitutional scholars writing after the Berlin Wall's demise, fortify a "well-developed understanding" from the Founding onward that the Commander in Chief "could be subject to legislative control even as to tactical matters of war."[182]

This new scholarship has thrown instructive light on a series of statutes, dating from the Founding Era to the present, that have conditioned and restricted what the President can do with the armed forces. For example, the Insurrection Act and Posse Comitatus Act have circumscribed domestic use of force, and a series of statutes have regulated detention and interrogation of the enemy (including barring torture).[183] As discussed in more depth below, the covert action statute and Foreign Intelligence Surveillance Act (FISA) bar direct (often lethal) action and espionage by the military and intelligence agencies, respectively, subject to legislated definitions and decision process stipulations.[184] Like the Washington Administration-era Calling Forth Act that would form

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179 *See* Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 361-62, 426-37 (2018) ("near-complete" congressional power to withhold forces and funding and attach conditions binding on the Commander in Chief).

180 *See* BARRON, *supra* note 164; Barron & Lederman, *Lowest Ebb Part I*, *supra* note 164; Barron & Lederman, *Lowest Ebb Part II*, *supra* note 164.

181 *Compare* YOO, *supra* note 174 (presidentialist claims), *with* Barron & Lederman, *Lowest Ebb Part I*, *supra* note 164, & Barron & Lederman, *Lowest Ebb Part II*, *supra* note 164 (shared power and expansive congressional powers evident in constitutional record).

182 *See* Barron & Lederman, *Lowest Ebb Part I, supra* note 164, at 785-86. For other scholarly studies that contest the presidentialist theory and have been published since the end of the Cold War, *see* Barron & Lederman, *Lowest Ebb Part II, supra* note 164; Lobel, *supra* note 177; Prakash, *supra* note 174; Rudesill, *The Land and Naval Forces Clause, supra* note 154.

183 For discussion, see Rudesill, *The Land and Naval Forces Clause, supra* note 154, at 450-67.

184 *See* Covert Action Statute, 50 U.S.C. § 3093; Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801 *et seq.*

the basis of the Insurrection Act, FISA requires permission from a federal judge.[185] Inevitably, the precise contours of the indefeasible presidential power in *Youngstown*'s Category Three that Congress cannot condition are somewhat blurry. But the weight of the constitutional record shows that the President's "lowest ebb" is "lower and the blur is smaller than claimed by presidentialists."[186]

C. Firmer Footing for Nuclear Rule Writing

A deeper scholarly understanding of the full sweep of the originalist evidence and constitutional history supporting congressional power to legislate limits on use of the military instrument is only one development since Congress last voted on nuclear command and control that provides firmer footing now for Congress to act. The case for congressional rule writing regarding nuclear weapons is also stronger because of change in the international security environment, post-9/11 wartime Supreme Court decisions on separation of powers, and entrenchment of framework process statutes that provide useful legislative precedents for making nuclear weapons statutorily special.

1. Change in the International Security Environment

As emphasized above and by Professor Peter Raven-Hanson at the Cold War's end, the factual realities of transportation methods, communications infrastructure, and military forces informed the work of the Framers.[187] Tens of thousands of U.S. and Soviet nuclear warheads on thousands of supersonic missiles pointed at each other, and growing fear by the 1970s and 1980s that the Soviets might attempt a first strike, constitutionally changed matters.[188] Further factual change now allows for readjustment regarding nuclear weapons of what Justice Jackson termed the constitutional equilibrium.[189] As described in Part II.A, the most likely U.S. nuclear use scenario now probably looks in terms of strategic warning and complexity like a sensitive counter-terrorism operation. There is therefore more temporal room that amounts to more constitutional room for Congress to assert its Article I powers and responsibility to manage the military instrument of power. Congress can write rules to mitigate the Rogue and Precipitous President risks without as much worry that legitimate exercise of the repel-attacks Commander in Chief power will be meaningfully compromised. North Korea's acquisition of the bomb and global-range missiles and

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185 *See* Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1802-04 (1978); Calling Forth Act, 1 Stat. 271 (1792). Statutorily-mandated judicial review of this use of force was not controversial in Congress. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801 253-56 (1997). The judicial role was dropped when the 1792 statute was amended. *See* 1 Stat. 424 (1795); The Insurrection Act, 2 Stat. 443 (1807). For discussion, see WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT 43-45 (2016) (detailing early congressional action surrounding the Calling Forth Act).

186 *See* Rudesill, *The Land and Naval Forces Clause, supra* note 154, at 431.

187 *See* Raven-Hansen, *supra* note 15.

188 *See* AMBINDER, *supra* note 25, at 24 (concern Soviet Union would attempt a first strike).

189 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

growing concern about conventional conflict with Russia or China that could go nuclear further underscore the importance of careful decision-making and guardrails against impulsive nuclear trigger-pulling.

2. Post-9/11 Wartime Supreme Court Precedents

The George W. Bush Administration sought to expand the role of nuclear weapons in U.S. strategy and repeatedly made some of the most expansive assertions to date of executive power.[190] In landmark wartime cases, the Supreme Court pushed the constitutional equilibrium back toward the *Youngstown* vision of shared power, with implications for any use of force.

In *Hamdi v. Rumsfeld*, the Court held in 2004 that a U.S. citizen captured on a foreign battlefield and designated an enemy combatant by the Commander in Chief could be detained and was entitled to due process protections.[191] The Court's plurality construed the 1972 Non-Detention Act's bar on detention of a U.S. citizen absent an act of Congress to have been satisfied implicitly by another statute, the post-9/11 Authorization for the Use of Military Force (AUMF).[192] A presidentialist view was articulated by Justice Thomas in dissent, equating detention with other "central functions of warmaking."[193] *Hamdi* stands for rejection of such claims in wartime: the plurality emphasized the *Youngstown* vision of shared power and the centrality of statutes, while a dissent by Justices Scalia and Stevens maintained that the Treason Clause and its prescriptions controlled instead.[194] Note as well that the plurality was only able to argue the Non-Detention Act's satisfaction by implication because that statute did not include a requirement for explicit reference in later congressional enactment or some other clear statement rule.

Hamdi informed the Court's *Hamdan* decision two years later.[195] In this decision about a foreign national captured on the battlefield, the Court upheld the Uniform Code of Military Justice statute over the President's order regarding detention of the enemy.[196] The majority in *Hamdan* grappled with the Executive Branch's statutory argument for authority in the 2001 AUMF, and recited the familiar constitutional principles that the Commander in Chief has authority to repel attacks and has command the armed forces without legislative direction. In ruling against the Commander in Chief, the Court not merely distinguished the 2001 AUMF statute but also cited by

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190 *See* GUTHE, *supra* note 67, at 1-2 (nuclear weapons); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009) (analyzing Bush Administration executive power claims).

191 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).

192 *See* Non-Detention Act, 18 U.S.C. § 4001(a) (1948); Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

193 *See* Hamdi, 542 U.S. at 579, 596 (Thomas, J. dissenting). Thomas also agreed with the plurality on detention authority on statutory grounds.

194 *See Hamdi*, 542 U.S. at 508 (O'Connor, J., plurality op.); *Hamdi*, 542 U.S. at 554 (Scalia & Stevens, JJ., dissenting).

195 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 591-93 & n.23 (2006).

196 *See* Uniform Code of Military Justice, ch. 169, 64 Stat. 109 (1950), codified as amended at 10 U.S.C. §§ 801- 946 (2016).

clause Congress's legislative authorities over the military. The majority again emphasized *Youngstown*, and wrote that the President may not disregard congressional enactments.[197]

Any suggestion that *Hamdi* and *Hamdan* were merely about detainees founders against the plain doctrinal power of these cases in legal and historical context. They continue a line of landmark decisions dating to the Founding Era in which the Supreme Court has used cases about seizures during war – of ships, people, and industry – to define separation of powers doctrine.[198] In these cases the Court has never sided with the President over Congress, instead making clear that the Commander in Chief is subject to statute even in times of war.[199]

The doctrinal reverberations of the post-9/11 cases were felt at the Justice Department's Office of Legal Counsel (OLC), the opinions of which are precedent for the Executive Branch and tend to be friendly to the President. In sweeping early 2000s presidentialist opinions, OLC had gone as far as to assert that "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."[200] Post-*Hamdi* in 2004, and then post-*Hamdan* and before expiry of the George W. Bush administration, in extraordinary moves OLC withdrew, modified, or replaced a series of post-9/11 opinions on matters including interrogation, detainees, surveillance, and use of force, and acknowledged congressional authorities. OLC acknowledged that the President was not just subject to statute regarding detention but interrogation as well.[201] Having essentially argued that

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197 *See Hamdan*, 548 U.S. at 591-93 & n.23. *See also* Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers after* Hamdan, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 960-61 (2007) (after *Hamdan* greater attention must be paid to congressional powers).

198 *See supra* note 122 (*Little*, Prize Cases, *Youngstown*, Civil War, and Korean War); *Ex parte* Milligan, 71 U.S. 2, 4 (1866) (captured alleged Confederate agent cannot be tried by military commission if civil courts are open and operating). For an influential discussion of *Little*, see Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright?, 13 YALE J. INT'L L. 4 (1988).

199 *See supra* note 122. *Little* and *Youngstown*, like *Hamdan*, held presidential orders invalid in face of statute. *The Prize Cases* upheld presidential action where Congress had not acted (under *Youngstown* doctrine, Category Two).

200 *See* Memorandum from Jay S. Bybee, Assistant Att'y General, Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A 39 (Aug. 1, 2002), https://perma.cc/KL35-M9U5, *superseded by*, Definition of Torture Under 18 U.S.C. §§ 2340–2340A, 28 Op. O.L.C. 297 (Dec. 30, 2004) [hereinafter Levin Memorandum].

201 *See, e.g.,* Levin Memorandum, *supra* note 200 (withdrawing and replacing 2002 interrogation memorandum, one of several withdrawn or replaced); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, Re: Memorandum for the Files, Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 5 (Jan. 15, 2009), https://perma.cc/447Q-NKFF (withdrawing or modifying prior memoranda, and admitting congressional authority in several Article I clauses – the Land and Naval Forces Clause, Captures Clause, and Define and Punish Clause – to write statutes binding on the President regarding detainees). In addition to Supreme Court decisions, other factors were operative in OLC's remarkable doctrinal course corrections. One was new leadership at OLC that recognized the overbroad and otherwise "deeply flawed" claims in post-9/11 OLC opinions. *See* JACK GOLDSMITH, THE TERROR PRESIDENCY 152–60, 181 (2007) (account of lawyer who took over OLC and administratively drove the first round of revisions). Another was President Bush's signature on legislation on detention of enemy combatants, interrogation (particularly barring torture), and surveillance that restricted Executive power. *See* Detainee Treatment Act, Pub. L. No. 109–148, 119 Stat. 2680 (2005) (after *Hamdi* governing detention of enemy combatants); *Id.*, §§ 1002, 1003, 119 Stat. 2680, 2739-44 (in the wake of revelations of abusive interrogations, prohibiting "cruel, inhuman, and degrading

presidential orders about detainees (and other matters) and battlefield maneuvers were constitutionally equivalent, OLC's course correction inevitably signaled that claims about the Commander in Chief being beyond congressional regulation were suspect more generally.

To be sure, ambiguity remained about the precise contours of congressional and presidential powers in *Youngstown*'s Category Three. Clearly, however, *Hamdi* and *Hamdan* buttressed Congress's constitutional standing regarding war powers. It left the inter-branch equilibrium in a sensible place: despite an attack on the homeland, an atmosphere of fear (including of nuclear terrorism), and two ongoing wars, the Commander in Chief generally may not defy enactments of the elected representatives of the people.[202]

3. Special Statutes: Covert Action and FISA

Hamdan upheld a framework national security statute over presidential order. This section explores two other major frameworks – for covert action and national security surveillance – enacted after Congress last voted on nuclear command and control nearly 50 years ago and further entrenched after the Cold War's end 30 years ago. These statutes regulate highly sensitive activities that the executive claims are vital to national security and implicate the Commander in Chief power.[203] The statutes provide guardrails to prevent abuse of executive power, ensure accountability, and facilitate good process by proscriptively defining activities and providing decision process steps. They make "secret wars" and monitoring of foreign agents inside the United States statutory special. In so doing, by analogy and thick practice precedent, the covert action statute and FISA have strengthened the ground for Congress to make nuclear use statutorily special, as well.

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treatment or punishment" of any "individual in the custody or under the physical control" of the U.S. government and limiting Department of Defense interrogation techniques to those in the Army Field Manual); FISA Amendments Act, Pub. L. No. 110-261, 122 Stat. 2436 (2008) (bringing surveillance activities initiated after 9/11 based on Article II authority under statutory regulation).

202 For example of public concerns during litigation of *Hamdan* that terrorists may obtain and use a nuclear weapon, *see* GRAHAM T. ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE (2004).

In another post-Cold War case, the Supreme Court in *Zivitofsky* ruled for the President over Congress regarding recognition of a foreign state. This foreign relations case was not about the military or force. The majority emphasized the Ambassadors Clause of Article II. *See* Zivitofsky *ex rel*. Zivitofsky v. Kerry, 576 U.S. 1, 2 (2015). The Court also dealt a devastating blow to the gloss on presidential power generally provided by *United States v. Curtiss-Wright Exp. Corp*. 299 U.S. 304 (1936). For nearly eight decades this simple legislative delegation case's unnecessary and over-read dicta provided Executive lawyers with a talismanic citation in support of expansive presidentialist claims in any foreign or national security context. *See* KOH, supra note 170, at 94 (terming phenomenon the "*Curtiss-Wright*, so I'm right" cite); s*ee also* Marty Lederman, *Thoughts on* Zivitofksy*, Part Seven: "*Curtiss-Wright-*Out of Sight," and the Fate of the Argument for an Exclusive Executive Diplomatic Authority,"* JUST SEC. (Jun. 14, 2015), https://perma.cc/N48H-3Z8R (Court undermined *Curtiss-Wright*'s doctrinal power).

203 *See, e.g.,* ALBERTO GONZALES, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 2 (Jan. 19, 2006) (Justice Department white paper on warrantless surveillance in defiance of FISA); Intelligence Authorization Act, Fiscal Year 1991, H.R. REP. NO. 102-166, at 27-28 (1991) (Conf. Rep.) (discussion of Executive claims about constitutionality of covert action reporting provisions).

These statutory frameworks are familiar to national security lawyers. They are novel, however, to what can be an insular nuclear command and control conversation.

The covert action statute has been assembled through a series of enactments, most notably the 1974 Hughes-Ryan amendment and the 1991 Intelligence Authorization Act.[204] Absent the President's personal authorization and reporting of a "finding" to Congress certifying that criteria have been met, the statute as amended bans clandestine operations to influence conditions abroad where the role of the United States will not be acknowledged.[205] The statute flatly bars covert actions targeting Americans. The statutory definition extends beyond lethal operations, but covert action has correctly been described as involving "secret wars" – or at least quasi-deniable clandestine aspects of overt wars and foreign policies. Open sources indicate that the bin Laden raid, CIA drone strikes, CIA paramilitary operations, cyber attack on Iran's nuclear program, and assistance to the 1980s Afghan Mujaheddin fighters and other foreign fighters have been conducted pursuant to the covert action statute.[206] The modern statute requires the Executive Branch to explain any operation's legality.[207]

FISA bars another critical national security activity – surveillance of the enemy and other foreign agents inside the country – subject to its definitional restrictions and process stipulations.[208] "Classic FISA," the original 1978 statute as amended, requires that before the Executive Branch can surveil for foreign intelligence purposes U.S. persons suspected of being agents of foreign powers, the Attorney General (or lower level officials) must make a series of showings and convince a federal judge to authorize electronic intelligence collection.[209] Section 702 of the modernized FISA, the FISA Amendments Act of 2008 as amended, requires that the Attorney General and Director of National Intelligence (DNI) make annual certifications to the FISA court before the U.S. government can collect inside the United States data that is associated with non-U.S. persons located abroad.[210] The statute includes many other reporting requirements, as well.[211]

These statutes have a number of important things in common.

First, both statutes limit what the Commander in Chief can order the armed forces and civilian intelligence officers to do. Both military and civilian personnel have acted subject to the covert

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204 *See* 50 U.S.C. § 3093; Pub. L. 93-558, 88 Stat. 1795 (1974); Pub. L. No. 102-88, 105 Stat. 429 (1991). For discussion generally, *see* BAKER, *supra* note 40, at 148-58.

205 These criteria include negative definitions: exclusion of traditional diplomatic, military, and law enforcement activities, mere collection of intelligence, and related support activities. *See* 50 U.S.C. § 3093.

206 For discussion of the bin Laden raid as a covert action, for example, see SAVAGE, *supra* note 77, at 257–71.

207 *See* 50 U.S.C. § 3093(b)(2).

208 *See* 50 U.S.C. § 1801 *et seq.* FISA is an example of a super-statute: an enactment that powerfully shapes normative expectations in the public mind, beyond the black and white of the U.S. Code. *See* William N. Eskridge, Jr., & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

209 *See* 50 U.S.C. § 1801, 1804.

210 *See* 50 U.S.C. § 1881(a).

211 *See, e.g.,* 50 U.S.C. § 1802(a)(1)(C)-(2) (reporting to Congress regarding surveillance of communications between or among foreign powers).

action statute. Surveillance governed by FISA is carried out by both military and civilian personnel as well, and most notably by the National Security Agency (NSA) – a component of the Defense Department headed by a four-star military officer. Both statutes bind the national security apparatus, and the Commander in Chief. As I have argued, these statutes rest on several constitutional authorities, including Congress's power to enact "Rules for the Government and Regulation of the land and naval Forces."[212]

Second, Congress enacted the covert action and surveillance frameworks after revelations that unfettered Executive discretion had been abused. The long decades when covert action had been left to executive discretion were characterized by secret assassination attempts against leaders of governments with which the United States was at peace, clandestine efforts to influence U.S. politics and other conditions inside the country, and other abuse of authority.[213] Passage of FISA was prompted in part by use of "national security" as a rationale for wiretapping of civil rights leaders, dissidents, feminists, and students by executive fiat, and suspicionless bulk collection of the Fourth Amendment-protected communications of millions of Americans.[214]

Third, both statutes were enacted over claims that Congress lacked the authority to control the Commander in Chief, that Congress through acquiescence had agreed, and that Congress could not after so long now intrude on the Commander in Chief power and change the constitutional equilibrium. Decades of thick practice have since transformed unprecedented intrusions on Executive authority into centerpieces of the national security legal regime.

Fourth, while these statutory frameworks are distinct in their details, they both define terms in ways that limit presidential latitude, identify responsible Executive Branch actors, and structure the decision process.[215] Through reporting requirements the statutes set expectations and foster "good process" norms. They gather information for Congress, facilitating oversight and policy formation by the Legislative Branch. The statutes also manage secrecy – including legal secrecy – through reporting and transparency provisions.

Fifth, both process statutes run over the top of underlying legal authority to use force. This is reflected in the covert action statute's requirement for information on the legal basis for covert operations, in the operation of both statutes during times of war or peace, and in specific statutory language making FISA the exclusive authority for national security surveillance.[216]

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212 *See* Rudesill, *The Land and Naval Forces Clause*, *supra* note 154, at 465-73.

213 *See* S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, S. REP. NO. 94-755 (1976) (Church Committee Report).

214 *See id.*

215 The covert action statute and FISA are analogous in some respects to decision process statutes in the domestic realm. One example is the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*. NEPA governs the decision process used by federal agencies when the government is contemplating action with potential environmental impact.

216 *See* 50 U.S.C. § 3093(b)(2) (2019) (requirement of statement of legal basis for covert action); 50 U.S.C. §§ 1811-1812 (1811: FISA operation during war, 1812: FISA exclusive authority). In contrast to FISA's explicit language, the covert action statute by lacking any mention of war applies at all times.

A few qualifications to this section's analysis are in order. First, the possibility of use of just one or a handful of nuclear weapons, for example against a bin Laden-like target in a bunker or in a conventional conflict with a nuclear state that escalates, has long existed. The need to deter large nuclear attack by Russia and China also endures. Second, directing lethal force is perhaps closer to the core of the Commander in Chief power than capturing the enemy, authorizing "black ops," or collecting intelligence. Note too that the Supreme Court has not made clear the extent of presidential authority regarding covert action and national security surveillance that has survived enactment of the special statutes governing those activities.[217] Furthermore, deference to the President in national security remains formidable, and successive administrations have used force and made claims that arguably have reduced the salience of the framework statute that governs force generally, the WPR.[218] Congress has largely acquiesced.[219]

These are legitimate caveats, but important considerations lie against the extent to which they argue against this article's contention that the constitutional footing has grown stronger for Congress to write statutory rules for nuclear use. First, the range of nuclear employment scenarios has not changed but what has is that the most likely scenario now involves more deliberation time and less catastrophic stakes than the Cold War nightmare upon which relegation of nuclear launch authority to the President is predicated. Second, decades of statutory regulation of covert action and surveillance activities once entirely left to the Executive – plus extensive practice "gloss" – have like *Hamdi* and *Hamdan* inevitably weakened presidentialist claims since the Cold War's end. And arguments based in congressional acquiescence to Executive claims regarding the WPR or other matters only go so far. As Professor Baker has written, "that Congress had not previously chosen to exercise [its] authorities did not mean it did not possess the authority to do so, only that it had not found it necessary and proper to do so…."[220]

Congress retains powerful authorities to control use of force. International security, doctrinal, and statutory developments since the Cold War's end are reasonably and best read to provide firmer footing for Congress to exercise those powers. Congress can reasonably write rules for the most likely and most worrisome nuclear use scenarios, where profound concern about impulsive presidential action endures and where there is time for and much to be gained from Executive

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217 Critics of FISA's constitutionality often cite a decision of FISA's appellate court, the Foreign Intelligence Surveillance Court of Review, which wrote in one of its only published opinions that "We take for granted that the President does have [authority to conduct warrantless searches for foreign intelligence] and, assuming that is so, FISA could not encroach on the President's constitutional power." *See* In re Sealed Case, 310 F.3d 717, 742 (FISA Ct. Rev. 2002). The secretive court's assumption remains untested at the Supreme Court nearly two full decades later, as robust three-branch FISA practice continues into its fifth decade. *See also* United States v. U.S. District Court (*Keith*), 407 U.S. 297, 298 (1972) (warrant requirement for domestic security surveillance).

218 For discussion, *see* Rudesill, *The Land and Naval Forces Clause*, *supra* note 154, at 465-66 nn. 318-19.

219 One partial exception was Congress's legislation pursuant to the War Power Resolution to withdraw U.S. military support to the Saudi air war in Yemen. President Trump vetoed it and Congress did not over-ride. *See* Allie Malloy, *Trump Vetoes Yemen War Powers Resolution, His 2nd Veto Since Taking Office*, CNN (April 17, 2019, 2:44 PM), https://perma.cc/X8HT-SS42.

220 *See* BAKER, *supra* note 40, at 79; *accord* Carter, *supra* note 140, at 118-19 (conventional and nuclear weapons similar under Constitution, and Congress can act).

Branch "good process." The authorities Congress *has* exercised to write the covert action law and other special statutes have generated now-longstanding frameworks that, while not off-the-shelf perfect models for nuclear use, provide tools that ought to be reconfigured for governing nuclear weapons.

V. MAKING NUCLEAR WEAPONS STATUTORILY SPECIAL

In a new essay, Professor Waxman suggests borrowing elements from the covert action regime to govern overt uses of force generally.[221] That is the work of this Part, focused on nuclear weapons. This Part looks to other statutory frameworks, as well: FISA, the Goldwater-Nichols Defense Reform Act, and the WPR.[222]

To address the Rogue and Precipitous President risks, to manage nuclear-conventional convergence, to ensure that the benefits of Executive Branch inter-agency process and appraisal of options are captured where time permits, and to build on international security, doctrinal, and statutory developments that have strengthened Congress's constitutional footing to govern use of nuclear force, this Part proposes a process statute (see the Appendix for a full draft), entitled the Nuclear Forces Control Act (NFCA). Here, this article describes and analyzes the model statute and addresses potential objections. This proposal's objective is to prompt fresh thinking about how Congress might end its three-quarter-century acquiescence to all but complete presidential control over the nation's nuclear loaded weapons.

A. The Nuclear Forces Control Act (NFCA)

The NFCA balances constitutional equities and sets a new – or at least somewhat clearer – equilibrium regarding nuclear command and control. This proposal utilizes well-accepted congressional powers of restriction of use of force and funds, definition of terms, structuring the national security apparatus, creating criminal penalties for violation of the law, and requiring reporting to Congress.

1. Purposes and Projects

Like the WPR, the statute begins with the statute's purposes.[223] Section (a)(1) states that these are:

> to exercise Congress's constitutional authority to control use of the forces it creates;
> to inform congressional oversight of the international security environment and of

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221 *See* Matthew Waxman, Waging Covert War, Discussion Paper for Duke-Virginia Foreign Relations Roundtable 2, 7 (Sept. 28, 2019) (unpublished manuscript on file with author). Waxman observes that Congress is unlikely to enact a "blanket statutory framework for overt warfare" akin to 50 U.S.C. § 3093, but suggests consideration of drawing "elements" from the covert action regime to regulate overt warfare.

222 The idea of expanding the War Powers Resolution to include nuclear weapons is not new; see, for example the congressional debate on the Fulbright Amendment, analyzed above. Discussion of drawing elements from the covert action regime to govern overt use of force has been less frequent. *See id.*

223 *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, § 2(a).

> the Executive Branch; to prevent unnecessary or otherwise illegal use of nuclear forces in any case and particularly where the United States, its forces, or allies do not face temporally imminent nuclear attack; to facilitate the most careful and thorough decision-making process within the Executive Branch that is practicable; and, to provide definitions and interpretive guidance to facilitate compliance.

Unlike the WPR, the statute then in Section (a)(2) cites the full relevant list of Congress's authorities.[224]

The NFCA's design reflects several meta-projects. First, through its force limitations, decision-prompting reports, and other provisions, the statute endeavors to clarify when nuclear weapons may be used and when inter-agency process is in order. These rules, in turn, augur toward norms and expectations that would help steel the resolve of presidential subordinates to start pushing back on an impulsive President, ideally at an earlier point than waiting for an order that is patently illegal. Second, the draft statute makes no formal intrusion on the Commander in Chief power beyond the NFCA's well-grounded force limitations and suggestions for use of NSC process. The statute does not direct forces, give Congress a "second vote," displace the President at the top of the chain of command, require the President to get the assent of any subordinate for anything the President can legally order, or give any other Executive Branch official authority to order use nuclear weapons. Third, the NFCA leaves undisturbed the nuclear command and control system's flexibility and responsiveness. Echoing emergency exceptions to reporting requirements in the covert action statute and other laws, in a situation of extremis (here, in the face of imminent or initiated adversary nuclear attack) the statute's reporting requirements could be met after executive action when time permits.[225]

2. Restrictions on Force and Funding

Section (b) provides "Rules for Nuclear Forces," absent compliance with which forces "are not provided for operational employment." This language textually references Congress's powers to "make Rules for the Government and Regulation of the land and naval Forces" and to provide such forces.[226]

The first rule is that legal authority to use force comes from some other expression of Article I or II power. This is meant to frustrate argument that this statute provides a standing authorization for use of nuclear weapons. It also prompts analysis of whether a congressional enactment or President's Article II repel-attacks authority are operative in a particular situation. Where time is

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224 *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, § 2(b) (citing Necessary and Proper Clause with unenumerated reference to Congress's other powers).

225 *See* 50 U.S.C. § 3093 (2019) (exception of written finding and reporting requirements allows the President to order covert action and later prepare written finding and report to Congress); 50 U.S.C. § 1805 (2018) (Attorney General may authorize surveillance without court order generally required by FISA in case of emergency); War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, § 4(a)(3) (President must report to Congress within 48 hours of introduction of forces into hostilities).

226 *See* U.S. CONST. art. I, § 8, cl. 12-14.

available for Congress to deliberate, the rule implicitly reserves the larger policy question of whether Congress should authorize force – especially nuclear force – regarding a particular adversary, one that is enormously consequential and ought to get deep case-specific engagement. In short, this provision has the NFCA process statute running over the top of some other authority for use of force, in the same way that the covert action statute, FISA, and WPR operate and prompt deliberation and reporting separate from legal authority for use of force flowing from Article I or II of the Constitution.

Next, the statute in Section (b)(1)(B) codifies the nuclear declaratory doctrine (policy) baseline of both the Obama and Trump Administrations: nuclear weapons will only be employed in "extreme circumstances" to defend the "vital interests" of the United States and its allies.[227] At present, a Rogue or Precipitous President could waive this policy floor at will. The statute also here stipulates that any use must be militarily necessary and otherwise legal. This provision of the NFCA in these ways cements a policy baseline absent congressional repeal, and underscores applicability of a legal regime that includes the law of armed conflict.[228]

The NFCA's next criterion, Section (b)(1)(C), provides another part of the statute's proscriptive core. Subject to availability of some other authority for use of force and to the declaratory doctrine just discussed, Section (b)(1)(C) allows nuclear use in two circumstances only.

One is where an adversary nuclear attack is imminent or initiated. Here, the President's repel-attacks Article II authority plainly would be operative and "extreme circumstances" present. In order to tie the Article II repel-attacks authority to its temporal rationale (action must be taken before Congress can gather and deliberate), to foster careful inter-agency review where there is time for it, and to make it harder for a Rogue or Precipitous President to argue that mere possession of nuclear arms by a potential adversary creates an imminent threat justifying a U.S. nuclear attack, imminence is defined in the NFCA in specific terms.[229] Section (d)(3) stipulates that imminence

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227 *See* 2010 NPR, *supra* note 67, at ix; 2018 NPR, *supra* note 3, at ii.

228 *See* Part I *supra* regarding the law of armed conflict. It already applies to any nuclear use, but underscoring its applicability has normative force.

229 This provision is meant to complicate for purposes of the NFCA the sweeping understandings of imminence deployed by recent administrations. The George W. Bush Administration argued that, after 9/11, the mere presence of some unknown number of Al Qaeda members in Iraq, plus alleged Iraqi possession of weapons of mass destruction, created an "urgent duty" for preventive war. *See* President George W. Bush, Remarks by the President on Iraq (Oct. 7, 2002, 8:02 PM), https://perma.cc/FRS7-EBF4 ("urgent duty" because "Iraq could decide on any given day to provide a biological or chemical weapon" to terrorists). The Obama Administration argued that U.S. citizens alleged to be terrorist leaders pose a "continued and imminent threat" to the extent they are "engaged in continual planning and direction of attacks upon U.S. persons," not because of their participation in any particular plot nearing fruition, and therefore lethal force may be used against them. *See* Memorandum from David J. Barron, Acting Assistant Att'y General, Office of Legal Counsel, U.S. Dep't of Justice, Memorandum for the Attorney General, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi 40-41 (July 16, 2010), https://perma.cc/2XZG-VCAW (redacted targeted killing memorandum). The President might assert that her or his judgment about imminence and its meaning ought to prevail. The NFCA thereby sets up a *Youngstown* Category Three confrontation rather than one in more President-friendly Category Two. It is not clear which branch would win, but there would be a strong argument for the nation's legislature. Congress generally prevails

means that adversary nuclear attack is "reasonably possible within the next 72 hours, based on assessment of adversary capabilities and intentions. Adversary possession of the technological capability of launching a nuclear attack, without other significant indications of adversary intent, does not create imminence under this Section." If advisors and the President were discussing reasonable questions as to the temporal and adversary capabilities and intentions prongs, the President's judgment would prevail. If subordinates saw little to no factual predicate, on the other hand, then the NFCA statutory provision would provide them new legal and normative grounds for pushing back and ultimately refusing to comply – potentially starting a series of firings and resignations that would slow an impulsive President and signal to other legislative and Executive Branch actors (and hopefully to the President, too) that something is horribly amiss.

The second circumstance in which the NFCA would not bar nuclear use, found in Section (b)(1)(C)(ii), is where adversary attack is not imminent and "the military, diplomatic, legal, intelligence, environmental, and other implications of both nuclear and non-nuclear options have been carefully evaluated, and non-nuclear weapons will not succeed in defending the vital interests of the United States and its allies." The next provision, Section (b)(2), provides:

> **National Security Council and the Nuclear Command, Control, and Communications System at the National Leadership Level.**
> (A) National Security Council. Consistent with the direction of the President, the National Security Council established by 50 U.S.C. 3021 shall advise the President in the evaluation of nuclear and non-nuclear options, particularly as provided in paragraph (b)(1)(C)(ii).
> (B) The Vice President. The Vice President shall be responsible for the coordination of National Security Council interagency review of nuclear threats, capabilities, and decisions.[230]
> (C) Legal Advice. The nuclear command, control, and communications system shall be configured to facilitate the involvement of the Attorney General, and other legal advisors as appropriate, to the extent practicable.

These (b)(1)(C)(ii) and (b)(2) provisions, taken together, provide additional criteria for executive decision where adversary nuclear attack is not imminent. They avoid disruption of the chain of command. They send clear signals from Congress that every effort ought to be made to evaluate nuclear use decisions through the NSC process and integrate the Attorney General or other legal advisors into threat conferences, NSC deliberations, and other national leadership-level nuclear deliberations. While still allowing the President flexibility to design his or her decision process

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in Category Three (see Part IV.B) so long as it does not displace the Commander in Chief at the head of the chain of command, which this draft provision does not. Judgment about national security threats is not only a presidential responsibility, and on the contrary is inherently reflected in Congress's enactments. Congress can also define terms via statute, and thereby limit government authorities. *See* 1 U.S.C. (first chapter of U.S. Code, providing definitions). That is what the NFCA does here, in the course of writing rules for the forces Congress provides.

230 The most recent statutory designations of coordinators and other officials for the NSC are the special advisor on international religious freedom and the coordinator for combating foreign influence operations and campaigns. *See* 50 U.S.C. § 3021(g).

("Consistent with the direction of the President," "to the extent practicable"),[231] the expectations generated by these provisions would likely buttress the willingness of officials to question rogue or precipitous presidential behavior and press for careful review via the NSC where time plainly permits.

The last parts of the NFCA's proscriptive core are provisions that wrap the statute in a funding limitation (Section (b)(6)) and – borrowing FISA's criminal penalty – create criminal liability for its violation (Section (c)).[232] Congress's powers of the purse and criminalization (particularly regarding the armed forces) are among Congress's strongest and well understood within the national security apparatus. These provisions therefore could have resolve-strengthening normative effects regarding the NFCA, over and above the baseline responsibility of all personnel to refuse orders that violate the law of armed conflict. This part of the NFCA may help presidential subordinates conclude that the better part of honor is to resist and if necessary resign or be relieved, in the process sending a message to their colleagues, replacements, and others in positions of power – and perhaps to a mentally clouded President too – that things are not right with the President and "the bomb."

3. Reporting Requirements and Norm Building

Congress could reasonably stop at this point. Or, Congress might contemplate stronger provisions (such as outlined in Part V.B below) that could present stronger impediments to a Rogue or Precipitous President but simultaneously be more vulnerable on constitutional grounds. Another path, reflected in the NFCA, would be additional expectation-creation and norm-building, using Congress's power to require Executive Branch officials to report to the Legislative Branch that structures, authorizes, limits, funds, and oversees its activities.

The set of reporting requirements in the NFCA is crafted to do several things: help subordinates recognize when the President is in violation of the NFCA's (b)(1) imminent threat and careful evaluation requirements for use of nuclear weapons; underscore that the President's access to "the button" is subject the NFCA's statutory framework; and further build expectations around careful evaluation and NSC inter-agency good process where adversary nuclear attack is not imminent.[233] Simultaneously, reporting requirements would facilitate congressional oversight of threats to the nation and of Executive Branch activities, including potential presidential incapacity.[234]

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231 This provision's references to presidential discretion echo the existing NSC statute. *See* 50 U.S.C. § 3021(b).

232 *See* 50 U.S.C. § 1809 (FISA criminal penalty). *See also* 18 U.S.C. § 1385 (posse comitatus criminal penalty). To underscore that a presidential pardon would not fully relieve subordinates of liability for disregarding the statute, Congress could rework FISA's civil liability provision for the nuclear context. *See* 50 U.S.C. § 1810 (FISA civil penalty).

233 Executive Branch officials commonly complain there are too many reporting requirements. Despite their numerousness, they are under-studied by scholars.

234 Statutorily-imposed reporting requirements gather information for Congress and therefore reflect and enable Congress's oversight powers. They also assign decisions to particular actors, facilitating Congress's management of the administrative apparatus. They are abundant, including in annual legislation and standing national security

Section (b)(3) of the NFCA suggests four main provisions that serve these objectives. These reporting provisions are tailored to the nuclear context and well precedented in the national security legal regime. They would not slow the nuclear command and control system in a crisis. Nor would they intrude on the Commander in Chief's position at the head of the chain of command, or ability to act lawfully without the permission of subordinates.

First, Section (b)(3)(A) of the NFCA requires specific senior officials at the apex of the military and intelligence apparatus – the Secretary of Defense, Director of National Intelligence, Chairman of the Joint Chiefs of Staff, and Commander of the U.S. Strategic Command – to notify Congress "as soon as possible" when in their judgment the nation, its forces, or allies face temporally imminent nuclear attack. Such notice would have obvious value to Congress, which conducts ongoing oversight regarding threats.[235] This NFCA provision is a tailored version of standing provisions, enacted as part of framework statutes, that call for Executive officials to provide risk assessments to Congress and exercise independent judgment.[236] The provision does not create a "second key" at the national leadership level, of the kind present in missile launch control centers.[237] It is not an ex ante or otherwise formal requirement for a subordinate to assent to a president's nuclear launch order. Instead, the threat notification obligation engages the "human factor:" the integrity and conscience of senior officials likely to be part of a nuclear threat conference (three of whom who could transmit a nuclear launch order).[238] Knowing that they have obligations both to follow the law and to respect the Commander in Chief's judgments, if they

framework statutes. For discussion of work done by one of the annual national security acts, *see e.g.*, Rudesill, *The Land and Naval Forces Clause*, *supra* note 154, at 452-53 (annual National Defense Authorization Act finds constitutional footing inter alia in the Land and Naval Forces Clause and structures the military portion of the national security apparatus).

235 Threats drive legislative changes to the organization, funding, and legal authorities of the national security apparatus. Congress holds a slate of "worldwide threat assessment" hearings. *See, e.g., Cyber Threats are Biggest Concern for ODNI in Worldwide Threat Assessment Report*, HOMELAND SEC. TODAY (Mar. 12, 2018), https://perma.cc/C3PM-VF8B (testimony to Senate Armed Services Committee).

236 *See* Goldwater-Nichols Defense Reform Act, Pub. L. 99-433, § 201, 100 Stat. 1005 (1986), codified as amended at 10 U.S.C. § 151(f) (with notice to Secretary of Defense, Joint Chiefs of Staff may provide their own views to the President and Congress on any matter concerning the Department of Defense), 153(b)(2) (Chairman of the Joint Chiefs of Staff shall provide risk assessment to Congress regarding national military strategy, transmitted through the Secretary of Defense, who may add comments), 153(c) (Chairman shall submit directly to Congress a report on the needs of the combatant commands, including the Chairman's views on whether the President's budget request is deficient); DANIEL MAURER, CRISIS, AGENCY, AND LAW IN U.S. CIVIL-MILITARY RELATIONS 43-45 (2017) (independence of the Chairman under Goldwater-Nichols). *See also* Intelligence Reform and Terrorism Prevention Act (IRTPA), Pub. L. 108-458, § 102A, 118 Stat. 3644 (2004), (codified as amended at 50 U.S.C. § 3024(a)(2) (2020)) (Director of National Intelligence as head of the intelligence community shall ensure that intelligence provided to Executive and Legislative Branches is "objective [and] independent of political considerations").

237 See Woolf, *supra* note 29; Blair, *Strengthening Checks on Presidential Nuclear Launch Authority*, *supra* note 6; Lin, *A Two-Person Rule for Ordering the Use of Nuclear Weapons, Even for POTUS?*, *supra* note 30.

238 *See* 10 U.S.C. § 162(b) (military chain of command runs from President to Secretary of Defense to commanders of joint combatant commands); *id.* § 163(a) (orders may be passed through the Chairman of the Joint Chiefs of Staff). The Director of National Intelligence is not in the military chain of command but is a logical reporter to Congress on threats as head of the intelligence community and director of the National Intelligence Program. *See* 50 U.S.C. § 3023(b).

were not in good conscience prepared to report to Congress that attack is imminent, and saw no reasonable basis on which to defer to the President's claims of an imminent threat, an official of integrity would infer that the President was on an ill-considered and very well illegal path. The requirement to inform Congress of a nuclear threat would in this way serve as a prompt for individual reflection, rather than a formal process step added to the nuclear command and control system. In anticipation of a Rogue or Precipitous President who relieves or evades the usual threat conference participants, the draft statute could also impose the imminent threat-reporting requirement on anyone in the chain of command contacted directly by the President with a launch order.[239]

Next, with modifications the NFCA extends the covert action statute's reporting provisions to the nuclear context. As discussed above, Title 50 of the U.S. Code bars covert action to influence conditions in the United States, and bars them abroad (including use of force) absent a presidential written finding and report to Congress – ideally in advance, and in extremis as soon as possible thereafter.[240] The work being done here is normative (underscoring that the President exercises Article II authority within a statutory framework and is accountable) and informative (notifying Congress that the Executive Branch is up to extremely sensitive things).

In the draft NFCA, the covert action mechanism is reworked and extended to multiple actors, for several purposes.

Section (b)(3)(B) calls for a special role for the Vice President, a standing NSC member made coordinator for nuclear matters by paragraph (b)(2)(B) of the NFCA: to inform the congressional leadership when the NSC has begun to deliberate about nuclear use.[241] Congress has a strong interest in knowing of such deliberations, especially where there is no imminent threat already driving reports under (b)(3)(A) or public concern. Communication through a single person would facilitate protection of sensitive information (subject to declassification procedures addressed later in the NFCA). Importantly, the special nuclear responsibilities of the Vice President where there

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239 There is no claim in the public record that the President has the ability to contact military subordinates so low on the chain of command (such as a submarine crew) that they could not be expected to have access to information about an adversary nuclear threat. Instead, the kind of lower level officers the President inferentially is most likely to be able to contact include the acting deputy to an unavailable – or the successor to a relieved – Secretary of Defense, Chairman of the Joint Chiefs of Staff, or Commander of the U.S. Strategic Command, or else officers (perhaps junior generals or admirals, or field-grade officers) at the Pentagon's National Military Command Center (NMCC). If the usual threat conference officials where incapacitated or out of communication due to adversary nuclear attack, the all but certainly obvious fact of an attack to anyone in the nuclear chain of command would be enough for the officer to be confident that the legal authority (plainly the President's repel-attacks authority would be operative), "extreme circumstances," and imminent threat prongs of the NFCA had been satisfied. The official could then report the threat to Congress "as soon as possible," assuming the official and the Congress survived.

240 *See* 50 U.S.C. § 3093. The statute includes a series of options for the form of the report and how widely it is shared within Congress, in view of the sensitivity of covert operations. Regarding the legislative framework, see BAKER, *supra* note 40, at 148-58; W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 116-22 (1992); *See also* Robert S. Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539 (2012) (convergence between operations and authorities for military and intelligence activities, with particular reference to modern covert action statute).

241 I thank Ned Foley for the suggestion to think about a special role for the Vice President.

is time to deliberate would foster an expectation of involvement in an historic decision – investing the Vice President in the NFCA's process norm-building.[242] Additionally, the President would have to know that if the Vice President's role under the NFCA were bypassed when time was available for NSC deliberation that the President in the process would be giving the Vice President information the latter (depending on the circumstances) might use to argue for the President's removal – and the Vice President's succession to the presidency. As Madison advised, ambition can be made to counter ambition.[243]

The NFCA's next provision, in paragraph (b)(3)(C) is the most similar to the covert action statute. This provision requires a presidential finding that the NFCA's stipulations have been observed, and reporting of that finding to Congress. Briefing on this part of the NFCA during every usual nuclear command and control orientation would serve to remind the Commander in Chief that Congress has regulated use of "the bomb."

The three layers of reporting just outlined may well be enough to serve the NFCA's expectation creation aims. Also, as the number of people communicating classified information goes up so too does the risk of a leak. If Congress still wanted more expectation-building around NSC "good process" where adversary attack is not imminent, however, Congress could enact additional reporting requirements for cabinet officers.[244] Section (b)(3)(D) of the NFCA calls for the Secretaries of State and Defense and the Attorney General to report to Congress contemporaneously with the President's report – meaning, separately and roughly the same time. These cabinet officers would be on the hook to explain how the nuclear strike makes sense in view of their equities (foreign policy interests, military necessity, the rule of law) and complies with the NFCA. As with the other notifications and finding, this reporting obligation would not formally impede presidential action. But it would provide an additional reminder that nuclear use is regulated by statute and another process prompt for presidential subordinates to reflect on the President's compliance with the law.[245]

4. Protecting the Statute

Finally, Section (e) of the NFCA is written to complicate interpretive tactics sometimes used by the Executive to avoid statutory limitations.[246] The NFCA in Section (e) borrows FISA's

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[242] The Vice President is a two branch actor, serving also as President of the Senate. *See* U.S. CONST., art. I, § 3, cl. 4.

[243] *See* THE FEDERALIST NO. 51 (1788) (James Madison) ("Ambition must be made to counteract ambition" and government must be structured "to control itself."). Of course, the Vice President may be a pliant personality who always defers to the President. Process rules, expectations, and norms can only do so much.

[244] These cabinet members in a multitude of contexts are already subject to an array of reporting requirements.

[245] The NFCA in Section (b)(4) additionally calls for ongoing consultation with and reporting to Congress, in language informed by § 3 of the War Powers Resolution. *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555.

[246] Such provisions do not always generate compliance. But the statute is stronger with them. *See* Jonathan F. Mitchell, *Legislating Clear Statement Regimes in National Security*, 43 GA. L. REV. 1059, 1098–1100 (2009)

exclusivity provision to make clear that it controls regarding the nuclear decision process.[247] It requires that the statute can only be amended or repealed by explicit reference.[248] It includes a severability provision.[249] The draft NFCA also provides interpretive guidance meant to frustrate creative reconstruction of the statute in secret or via use of minority legal interpretive theories.[250]

B. Potential Objections and Alternatives

The draft NFCA is one approach to a process-generating statute. With the intent of stimulating further discussion and research, this section addresses several potential objections and sketches alternatives.

1. Potential Objections

(national security statutes requiring a clear statement do not always receive Executive compliance, and must be buttressed by procedural checks); Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1213-14 (2006) (courts will apply clear statement rules to protect under-enforced constitutional values).

The NFCA § (b)(7) also prevents the President from appointing whomever she chooses (for example, a pliant, unqualified, or corrupted person) to perform functions under this statute or in the nuclear chain of command, in the event that the specified official is unavailable, has resigned, or been relieved. Under the NFCA, their role would be assumed by their organization's next-in-command.

247 *See* 50 U.S.C. § 1812(a). (Precedence is perhaps a better term than exclusivity because statutes operate in the context of the Constitution and administrative directives, but for legal consistency the NFCA uses FISA's term of art). President George W. Bush ordered surveillance outside of FISA after 9/11 in violation of a provision in Title 18 of the U.S. Code that made FISA the exclusive authority for foreign intelligence surveillance. *See* 18 U.S.C. § 2511(2)(f); SAVAGE, *supra* note 77, at 183–85. The move was heavily criticized. *See, e.g.,* Letter from Constitutional Law Scholars and Former Government Officials 2 (Jan. 9, 2006), https://perma.cc/LL5A-HW9R. The Executive and Legislative Branches then agreed to bring the extra-FISA surveillance activities under statute. *See* Protect America Act of 2007, Pub. L. No. 110-55, 151 Stat. 552 (2007); FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008). In the process, Congress re-enacted the exclusivity provision within FISA at 50 U.S.C. § 1812(a), reinforcing its legal and normative pull. *See id.* at § 102(a), Pub. L. No. 110-261, 122 Stat. 2459.

248 Lack of an explicit reference or other clear statement provision in the Non-Detention Act, 18 U.S.C. § 4001a, made it easier for the Supreme Court in *Hamdi* to agree with Executive Branch arguments that the post-9/11 AUMF satisfied the statute or was a constructive amendment. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 508 (2004) (O'Connor, J., plurality op.). The Executive similarly argued that the AUMF implicitly authorized surveillance outside FISA. *See* GONZALES, *supra* note 203. When Congress brought the extra-FISA surveillance activities under statute, *see* Protect America Act of 2007, Pub. L. No. 110-55, 151 Stat. 552 (2007); FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008), it also enacted a clear statement rule. *See* 50 U.S.C. § 1812(b).

249 This provision is modeled on the War Powers Resolution provision. *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, § 9. *See also* I.N.S. v. Chadha, 462 U.S. 919, 932 (1983) (such "unambiguous language" creates presumption of severability).

250 This "secret law"-combating provision is informed by Executive Branch and FISA court interpretation of Sec. 215 of the USA PATRTIOT Act in secret regarding telephony metadata in a way that, when leaked, appeared nothing like the statute on its face. *See* Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513, 1525 (2014) (critiquing secret legal interpretation). The NFCA provision enacts a Public Law Supremacy Rule. *See* Rudesill, *Coming to Terms with Secret Law*, *supra* note 49, at 301-05, 338-42 (describing rule). *See also* Appendix, NFCA § (b)(5) (other transparency measures).

Is the NFCA too strong? There are certain to be claims that statute would undermine nuclear deterrence by limiting launch authority, statutorily giving roles to other Executive Branch officials, or expanding Congress's involvement. But the NFCA legally proscribes and normatively seeks to frustrate launch where there is no imminent threat, in a context in which national security officials are certain to be deferential to a sober president's judgments and eager to protect the country. Its provisions mainly provide new bases for subordinates to report to Congress and – as a matter of conscience rather than formal process – decide that the President is dangerously impulsive. The NFCA would do nothing to change the nuclear command and control system's ability to generate decision where adversary missiles are in the air. It would have no impact where a senior official could reasonably defer to the President's judgment that adversary nuclear attack is imminent in the next three days, or where presidential subordinates believed that the President had in good faith carefully evaluated alternatives. Those are low bars that operate only regarding the conscience of senior subordinates, and only against a Rogue or Precipitous President. Recalcitrant subordinates (reasonable or unreasonable) can still be relieved. Congress's role is one of receiving reports, and potentially passing legislation (probably requiring a super-majority for veto-override). None of these are bases on which a remotely rational adversary might *start a nuclear war* that would trigger the President's repel-attacks authority and result in their destruction.

Critics might claim that Congress has never denied the Commander in Chief the use of existing forces, or that once raised Congress cannot restrict the President's use of a particular weapon.[251] Neither is true. Congress has since the Founding variously conditioned or banned uses of extant military forces, and often legislated with great specificity. Under statute, U.S. forces could seize only ships sailing to (and therefore not from) French ports during the Founding Era naval war with France, generally may not be used for domestic law enforcement, may not be used to suppress insurrections or other domestic disorder absent statutory requirements, may not operate at polls or interfere in U.S. elections, may not interrogate in a manner at odds with the Army Field Manual or torture, may not detain or punish the enemy contrary to legislated rules and procedures, and may not be used to conduct covert action or national security surveillance absent certain certifications and showings.[252] It makes no obvious sense, and does not accord with the constitutional history, to think that statutory limits of this kind are valid if applied to all weapons and forces but invalid if applied only to one type of weapon (especially a uniquely powerful one). Military forces may not be ordered to violate properly enacted statute whether general or specific,

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[251] *See* Emerson, *supra* note 175, at 210 (similar argument); The Prize Cases, 67 U.S. 635, 670 (1863) (in case lacking conflicting statute, dicta stating that the President is able to "determine what degree of force the crisis demands").

[252] *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804) (President's order to seize U.S. ships going to *and from* French ports illegal under statute); Posse Comitatus Act, ch. 263, § 15, 20 Stat. 145, 152 (1878) (repealed, re-enacted, and codified as amended at 18 U.S.C. § 1385) (generally prohibiting federal forces from engaging in law enforcement); 10 U.S.C. §§ 251-55 (2016) (Insurrection Act); 18 U.S.C. §§ 592-93 (troops generally may not be deployed at polls, or interfere in elections); 18 U.S.C. §§ 2340, 2340A & 42 U.S.C. § 2000dd (interrogation restrictions); Hamdan v. Rumsfeld, 548 U.S. 557, 624 (2006) (President's order regarding detainees invalid under UCMJ statute); 50 U.S.C. § 3093 (covert action); 50 U.S.C. § 1801 *et seq.* (FISA).

violate the law of armed conflict or otherwise commit war crimes, or violate treaties ratified by the Senate that prohibit a variety of military activities (including targeting wounded or shipwrecked enemy troops, and testing nuclear weapons anywhere except underground)[253] and specific weapons (including chemical weapons, a particular weapon of mass destruction that like nuclear weapons was created by Congress in abundance).[254]

In view of Congress's powers and the nuclear stakes, another objection might be that the draft NFCA is too modest. For example, the President might try to wiggle around the NFCA through arguments about its particular definitions and other terminology, together with demands for deference to the President and Executive Branch in national security. The statute would also not stop the President from attempting a nuclear Saturday Night (firing) Massacre to find subordinates willing to execute problematic orders. In the end, doing more than this statute provides via legislated proscriptions, funding limits, and reporting requirements would require Congress (or the Congress, states, or people through a constitutional amendment) to attempt a larger adjustment to the constitutional equilibrium.

2. Potential Alternatives

This article endeavors to catalyze further discussion by scholars and practitioners and encourage new thinking about nuclear launch authority. Following are several alternative statutory directions.

A more permissive NFCA could allow nuclear use in the face of attack by non-nuclear weapons. The United States deployed nuclear forces to Europe to deter Warsaw Pact conventional attack, and U.S. nuclear doctrine has long reserved the possibility of nuclear use in response to threats from chemical, biological, and other weapons of mass destruction.[255] This article and its draft statute have reserved without judgment this controversial basket of issues, which would need to be addressed.

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253 *See Little,* 6 U.S. (2 Cranch) at 170 (seizing Danish ship contrary to statute); War Crimes Act, 18 U.S.C. § 2441 (2006) (criminal penalty); Uniform Code of Military Justice arts. 2, 18, 21, (*codified at* 10 U.S.C. §§ 802, 818, 821 (2019)) (jurisdiction to try violations of law of war); Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31 (wounded and sick soldiers out of the fight may not be attacked and must be provided food, medicine, freedom from abuse, and other basic protections); Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85 (applying similar standards of protection for sailors); Convention (III) Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 135 (protecting prisoners of war); Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, (protecting non-combatants); Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water, *opened for signature* Aug. 5, 1963, 480 U.N.T.S. 43.

254 *See* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45.

255 The Trump Administration controversially has suggested that the United States might use nuclear weapons in response to catastrophic cyber threats. *See* 2018 NPR, *supra* note 3, at 38 (U.S. nuclear capabilities hedge against nuclear and non-nuclear threats including cyber); David E. Sanger & William J. Broad, *Pentagon Suggests Countering Devastating Cyberattacks with Nuclear Arms*, N.Y. TIMES (Jan. 16, 2018), https://perma.cc/BVT6-5HFY.

Alternatively, a more expansive statute would embrace use of force generally. That would amount to a rewrite of the WPR. Or, a less intrusive statute – one regarding force generally or limited to nuclear weapons – could be enacted as legislative advice. Of course, because Presidents have in recent decades pushed against the strictures of the WPR and other hard-law statutes, their regard for a "Sense of the Congress" statute would likely be lower still.[256]

If Congress instead sought to write a stronger statute than outlined here, one can postulate several options.

For example, Congress could integrate into the NFCA a "no first use" provision, or subsequently pass the Markey-Lieu or even Fulbright proposals that would require ex ante congressional legislation absent an initiated adversary attack. Alternatively, Congress could require that the reports in Section (b)(3) of the NFCA be ex ante – delivered to Congress before the President could act. Any President is sure to object, as would separation of powers formalists and presidentialists.[257] Even so, the question warrants new analysis. While it is considering deviations from formalist separation of powers, the renewed conversation might revisit and perhaps update Cold War-era proposals for permission from a congressional leadership committee for first use of nuclear weapons.[258]

Another limited but potentially justified departure from formal separation of powers doctrine – one that could see Congress asserting its authorities against those of a defiant President in *Youngstown* Category Three – is borrowing a limited Executive Branch process step from FISA's Sec. 702. As discussed in Part IV.C, Sec. 702 requires the Attorney General and Director of National Intelligence (DNI) to make certifications (and the FISA court to approve them) before the government may conduct certain intelligence collection inside the United States.[259] A revised NFCA might require certification that there is an imminent threat in the judgment of either of the top two civilian intelligence officials, the Secretary of Defense and DNI. The Secretary is probably the official most likely to inform the President of an imminent threat of adversary nuclear attack. The DNI is the senior U.S. intelligence officer.[260] The Secretary and the DNI would have the benefit of information flows from the North American Aerospace Defense Command (NORAD),

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256 The salience of such hortatory provisions and reporting requirements are under-studied parts of the administrative state and in the national security context in particular.

257 For discussion of inter-branch controversy over ex ante reporting in the covert action context, see REISMAN & BAKER, *supra* note 240, at 121. In the face of a veto Congress there permitted the President temporal latitude.

258 A variation of the Federation of American Scientists proposal discussed in Part IV.A is providing a role for the Vice President as President of the Senate (a two-branch officer), and the Speaker of the House.

259 *See* 50 U.S.C. § 1881a (2018). The legislative and statutory history is worth note. Sec. 702 was written and amended in the wake of the George W. Bush Administration's violation of FISA with warrantless wiretapping after 9/11, and with congressional knowledge of an infamous hospital room confrontation in which the Bush White House sought to pressure the Justice Department's leadership to reauthorize part of the warrantless collection program under internal Executive Branch rules and oversight. *See* SAVAGE, *supra* note 77, at 190–94. Congress in Sec. 702 decided against reliance on such Executive self-regulation and gave the Attorney General and DNI statutory certification responsibilities. Regarding FISA's constitutionality, *see supra* note 217; Rudesill, *The Land and Naval Forces Clause*, *supra* note 154, at 457-61.

260 *See* 50 U.S.C. § 3023(b) (2020).

the U.S. Strategic Command and other combatant commands, and the 17-agency U.S. Intelligence Community. Requiring one of these top officials to certify in their independent judgment that there is a temporally imminent threat guards against a President who concocts or wildly exaggerates a threat. Allowing *either* official to certify (in contrast Sec. 702 requires two certifications) reduces the extent of the intrusion on the Commander in Chief and provides operational flexibility in the event of a fast-moving threat. If there truly is good reason to think there is an imminent threat of adversary nuclear attack, their recognition of the threat would happen in the course of doing their jobs. If the Secretary or DNI were eliminated or otherwise could not be contacted due to an attack that is already underway, the statute could waive the requirement.[261]

Plausible argument could be offered that the departure from formalism would be minimal and appropriate in view of the Rogue President risk.[262] Our constitutional system has permitted other deviations from formalism to serve important congressional and national equities.[263] But this section 702-inspired certification would certainly be contested by presidentialists and also by thinkers who share the concurrent powers (majority) view of separation of powers, because the certification would – however minimally and valuably – give a presidential subordinate a potential veto on use of force, disrupting the chain of command.[264] Alternatively, critics may point out that FISA draws authority in part from the Fourth Amendment (whereas the NFCA would not), or they may question Congress's intent in Sec. 702, or they could distinguish use of force and intelligence collection. One can imagine thoughtful responses to these points, auguring toward an expanded conversation in this direction.[265]

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261 If instead neither of these officials and none of their successors are available to make the certification because the President is intent on a nuclear strike and has relieved the entire civilian leadership of the Defense Department *and* Office of the Director of National Intelligence, a good assumption is that the President is mentally unfit. The NFCA at that point could have the nuclear command and control system fail-safe (fail into safe mode) until the President is removed, resigns, transfers power to an Acting President, or comes to their senses.

262 Scholars have in recent years presented compelling evidence that undermines the originalist case for the Unitary Executive Theory – the idea that the President possesses all, and indivisible, executive authority available to the federal government, including a raft of national security powers that inhere to the state. Professors Peter Shane and Julian Davis Mortensen have, respectively, presented powerful originalist evidence that the Founders were comfortable with division of executive power and that its original meaning was simply the power to implement (execute) law created by some other authority. *See* Peter Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016); Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020). *Cf.,* Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. __ (2020) (statute restricting President's removal authority of an Executive Branch official unconstitutional).

263 *See* Raven-Hansen, *supra* note 15, at 794 (deviations from formalist separation of powers justified to advance goals within Congress's authority).

264 *See* Barron & Lederman, *Lowest Ebb, Part II*, *supra* note 164, at 945-46 (statute may not assign ultimate decision authority to subordinate instead of Commander in Chief).

265 For example, along with other constitutional provisions supporting both Sec. 702 and a 702-like NFCA provision, the Declare War Clause would provide authority for the latter where it does not for the former.

CONCLUSION

Whatever statute or executive order requires, a committed Rogue or Precipitous President may still succeed in pushing to execution a nuclear strike order the nation comes to regret deeply. There is too much uncertainty, and perhaps too much presidential power.[266] But a constitutional equilibrium that includes some sensible efforts at statutory regulation of the President's access to "the bomb" is preferable to the status quo. Accordingly, this article recommends a statute that proscribes use where "extreme circumstances" do not pertain, and where adversary nuclear attack is not imminent and the executive has not reviewed a full slate of options. This article looks to Title 50 U.S. Code for long-used reporting requirements, reworking them for nuclear decisions in ways that would help build expectations and norms of careful appraisal and good process as time permits. A committed Commander in Chief would be able to relieve a lot of subordinates before being relieved in turn (via the Twenty-Fifth Amendment or impeachment), but a nuclear Saturday Night Massacre would be the more difficult the firmer and broader the ground on the basis of which subordinates could resist. The suggested Nuclear Forces Control Act provides such new ground, and a reporting-driven prompt for the statute's invocation potentially before the question of legality under the law of armed conflict is reached. More bases on which to push back inferentially buys more time for resistance to spread and grow, and more possibility that a Rogue or Precipitous President will be stopped or come to their senses. In turn, greater clarity about the rules of nuclear use and greater confidence that any nuclear use would be necessary and legal would buttress public confidence in government and the nation's nuclear forces.

This article has argued that it is time to replace inherited notions that nuclear weapons are constitutionally special with the understanding that they ought to be made statutorily special. Because of enduring nuclear nightmares, nuclear-conventional convergence, the value of "good process" and statutes that facilitate it, change in military technology and the international security environment, doctrinal developments, and entrenchment of the covert action and FISA statutory frameworks – thanks to all these post-Cold War developments, Congress can and should act.

Executive abuse of authority prompted Congress to legislate limits and process rules for some of the nation's most sensitive national security activities, including covert action and national security surveillance. Tragically, impulsive employment – or attempted illegal employment – of the nation's nuclear loaded weapons may be necessary to prompt Congress to craft a new regime balancing presidential nuclear command and statutory control. But the nation need not wait for another moment of presidential impairment, nor for an atomic atrocity. Participants in the revived national conversation about nuclear command and control should think anew about legislative solutions using Congress's under-utilized Article I powers. The constitutional history of congressional acquiescence regarding nuclear weapons need not be our constitutional fate.[267]

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266 "Perhaps the strictures of the Constitution are such that the Congress cannot select a constitutionally valid scheme . . . But if our options are so limited, then we are already far too late." Carter, *supra* note 140, at 123.

267 For the concept, *see* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

APPENDIX: DRAFT STATUTE

SECTION 1. SHORT TITLE.

This Act may be cited as the "Nuclear Forces Control Act."

SECTION 2. CONTROLS ON USE OF NUCLEAR WEAPONS.

Title 50 U.S. Code, Chapter __, is amended by adding Sec. ___:

(a). Purposes and Congressional Authority.

(1) **Purposes.** The purposes of this Section are to exercise Congress's constitutional authority to control use of the forces it creates; to inform congressional oversight of the international security environment and of the Executive Branch; to prevent unnecessary or otherwise illegal use of nuclear forces in any case and particularly where the United States, its forces, or allies do not face temporally imminent nuclear attack; to facilitate the most careful and thorough decision-making process within the Executive Branch that is practicable; and, to provide definitions and interpretive guidance to facilitate compliance.

(2) **Constitutional Authority.** This Section reflects exercise of the powers of Congress pursuant to Article, I, sec. 8, cl. 1, 11, 12, 13, 14, 18, and Article I, sec. 9, cl. 7 of the Constitution to "provide for the common Defence and general Welfare," "declare War," "raise and support Armies," "provide and maintain a Navy," "make Rules for the Government and Regulation of the land and naval Forces," "provide for calling forth the Militia" to "repel Invasions," discipline and govern the militia,[268] "make all Laws which shall be necessary and proper for carrying into Execution" these powers, control appropriations, and conduct oversight.

(b). Rules for Nuclear Forces, Funding Limitation, etc.

The following rules and conditions shall govern operational employment of nuclear forces.

(1) **Rules for Nuclear Forces.** Nuclear weapons are not provided for operational employment, and shall not be operationally employed, unless:[269]

(A) law other than this Section provides legal authority for use of force, including nuclear weapons;

(B) use of nuclear weapons is militarily necessary in extreme circumstances to defend the vital interests of the United States and its allies, and is otherwise legal; and,

(C) one of two circumstances pertain:

(i) the United States, its forces, or allies face imminent nuclear attack; or,

(ii) nuclear attack on the United States, its forces, or allies is not imminent, and the military, diplomatic, legal, intelligence, environmental, and other implications of both nuclear and non-

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[268] Although nuclear-capable aircraft, missiles, and submarines are operated by federal regular military forces, the broader military establishment that supports their operations and the command and control system includes extensive participation by the National Guard. The Guard is the "organized militia" under statute. *See* 10 U.S.C. § 311(b)(1) (2016).

[269] This statute, like the covert action law and FISA, is centered around a bar on activity contrary to its definitions and processes.

nuclear options have been carefully evaluated, and non-nuclear weapons will not succeed in defending the vital interests of the United States and its allies.

(2) National Security Council and the Nuclear Command, Control, and Communications System at the National Leadership Level.

(A) National Security Council. Consistent with the direction of the President, the National Security Council established by 50 U.S.C. 3021 shall advise the President in the evaluation of nuclear and non-nuclear options, particularly as provided in paragraph (b)(1)(C)(ii).

(B) The Vice President. The Vice President shall be responsible for the coordination of National Security Council interagency review of nuclear threats, capabilities, and decisions.

(C) Legal Advice. The nuclear command, control, and communications system shall be configured to facilitate the involvement of the Attorney General, and other legal advisors as appropriate, to the extent practicable.

(3) **Notifications, Finding and Reporting Requirements.**

(A) Threat Notification to Congress.[270] Whenever in their independent judgment nuclear attack on the United States, its forces, or allies is imminent, the following officials shall notify the congressional leadership as soon as possible, and thereafter keep the congressional leadership fully and currently informed until the threat is no longer imminent: the Secretary of Defense, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Strategic Command, and any other person in the military chain of command contacted by the President with an order for operational employment of nuclear weapons.[271] Notifications and updates may be provided in oral or written form, as extensive as circumstances warrant, transmitted separately, or transmitted together if in agreement about the imminence of the threat.

(B) National Security Council Deliberation Notification to Congress. The Vice President shall notify the congressional leadership within 48 hours of initiation of National Security Council review of potential operational employment of nuclear weapons. The notification shall be provided in written form but may initially be provided in oral form.

(C) Presidential Finding and Report. Nuclear weapons are not provided for operational employment, and shall not be operationally employed, unless the President determines and explains in a written finding that the criteria in paragraph (b)(1-2) are met, and reports that finding to the congressional leadership.

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[270] The covert action statute requires that the DNI and other presidential subordinates keep Congress "fully and currently informed" regarding covert actions. The implication is that these are already-authorized covert actions. In view of the much higher potential stakes associated with nuclear threats and use, this model statute temporally moves up the reporting requirement to track the emergence of the threat.

[271] Effective implementation of the statute would be facilitated by training for the nuclear chain of command in the statute and on how to report to Congress.

(i) Timing. The finding shall be reported as soon as possible after decision and before operational employment of nuclear weapons.

(ii) Exception. Where time does not permit the preparation and transmission of a written finding before operational employment of nuclear weapons, as soon as possible the President shall make an oral report to the congressional leadership, and thereafter a written finding shall be prepared and transmitted to the congressional leadership.

(D) Reports Contemporaneous to Presidential Finding. Where nuclear attack on the United States, its forces, or allies is not temporally imminent, contemporaneous with the presidential finding in (b)(3)(C) and with a similar timing requirement and exception, the following officials shall report to the congressional leadership as follows:

(i) The Secretary of State shall report regarding how employment of nuclear weapons serves the vital interests of the United States and otherwise complies with this Section;

(ii) The Secretary of Defense shall report regarding how the employment of nuclear weapons is militarily necessary and otherwise complies with this Section;

(iii) The Attorney General shall report regarding how the employment of nuclear weapons is legal and otherwise complies with this Section; and,

(iv) Any other person in the military chain of command contacted by the President with an order for the operational employment of nuclear weapons shall report regarding how such employment complies with this Section.

(4) **Congress.**

(A) Consultation. The President in every possible instance shall consult with Congress before and after employment of nuclear weapons.

(B) Reporting and Ongoing Oversight. With due regard for the protection from unauthorized disclosure of classified information related to intelligence and nuclear weapons, the President, the Vice President, and the heads of all departments, agencies, and military commands involved in the contemplated or executed operational employment of nuclear weapons:

(i) shall cooperate with the Congress in the creation and maintenance of secure methods for transmission of notifications, findings, and reports under this Section;

(ii) shall keep the congressional leadership and relevant committees fully and currently informed of (a) contemplated, planned, and executed operational employment of nuclear weapons, (b) relevant threat and weapon effects assessments, and (c) the functioning of the nuclear command, control, and communications system; and,

(iiI) shall furnish to the relevant committees any information or material related to operational employment of nuclear weapons which is in the possession, custody, or control of any department,

agency, or entity of the United States Government and which is requested by a relevant committee.[272]

(5) **Public Transparency.** If classified the written notifications, finding, and reports stipulated in (b)(3) shall be declassified not later than one year after transmission to Congress, an unclassified summary shall be published, or an unclassified statement shall be published indicating that one or more communications were transmitted to Congress and stating when more information will be published.[273]

(6) **Funding Limitation.** No appropriations shall be available for activities not in compliance with this Section.

(7) **Vacancies.** Should a Senate-confirmed officer identified in this Section be unavailable, the responsibilities identified in this Section and their role in the nuclear chain of command shall be vested in the person duly acting in their role, provided that such official shall be the Senate-confirmed officer of the unavailable official's department, who has duly ascended to the acting position by virtue of their department's specific order of succession. In any such case and without regard to the Federal Vacancy Reform Act, no person other than the official exercising an acting role by virtue of their department's specific order of succession may perform their functions under this Section or in the nuclear chain of command.

(c). Criminal Sanctions. Any order to employ nuclear weapons where the conditions in paragraph (b)(1) have not been met is an illegal order. Any person participating in the execution of the order who knows that the conditions in paragraph (b)(1) have not been met, or who could reasonably ascertain whether the conditions in paragraph (b)(1) have been met, shall be punishable by a fine of not more than $10,000 or imprisonment for not more than five years. This Section does not apply to persons who transmit, execute, or otherwise act on an authenticated order to employ nuclear weapons, who have no knowledge or reasonable ability to know whether the conditions in paragraph (b)(1) have been met.

(d). Definitions.

(1) "Operational employment" means intentional launch against an adversary and detonation of one or more nuclear warheads.

(2) "Independent judgment" means an assessment not directed by any other person or entity.

(3) "Imminent" means reasonably possible within the next 72 hours, based on assessment of adversary capabilities and intentions. Adversary possession of the technological capability of launching a nuclear attack, without other

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[272] This provision is borrowed in modified form from the covert action statute, 50 U.S.C. § 3093(b) (2019), with addition of the President and Vice President and removal of explicit mention of the DNI. *See also* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, § 4(b) (1973) (presidential reporting).

[273] This transparency provision is modeled on secret law-combating stipulations of the USA FREEDOM Act, Pub. L. No. 114-23, § 402, 129 Stat. 268, 279–82 (codified as amended at 50 U.S.C. 1872) (2015) (declassification of Foreign Intelligence Surveillance Court decisions with significant legal interpretations, or publication of a redacted version or a summary).

significant indications of adversary intent, does not create imminence under this Section.

(4) "Contemporaneously" means at approximately the same time as the President's finding is reported, and at the least as soon as possible thereafter.

(5) "Unpublished" means not available to the public.

(6) "Congressional leadership" means the Speaker of the House, the Majority Leader of the Senate, and the Minority Leaders of the House and Senate. These officials shall share notifications, findings, and reports received pursuant to this Section, written or oral, in full, with the chair and ranking members of the Armed Services Committees of the House and Senate, the House Foreign Affairs Committee and the Senate Foreign Relations Committee, and the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence.

(e). Rules of Construction.

(1) Exlusivity. This Section shall be the exclusive means under which decisions about operational employment of nuclear weapons may be conducted.

(2) No Implied Amendment or Repeal. This Section shall not be interpreted to be amended, qualified, superseded, or repealed except by explicit reference to this Section in subsequent Public Law.

(3) Severability. If any provision or part of any provision in this Section or application thereof is held invalid, the remainder of the Section shall not be regarded as invalid.

(4) Supremacy of Public Law. This Section, and any classified or otherwise unpublished legal authority, order, directive, rule, memorandum, or other guidance or interpretation construed to relate to this Section, shall be interpreted in a manner deferential to the public meaning of this Section: the understanding a knowledgeable and reasonable person would have of this Section, employing majority approaches to interpreting law, and considering only information actually available to the public.