



PRESIDENTIAL NUCLEAR LAUNCH AUTHORITY: MORE COOKS IN THE KITCHEN

David S. Jonas and Bryn McWhorter*****

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** Partner, FH+H Law Firm; Former General Counsel, National Nuclear Security Administration; Former General Counsel, Defense Nuclear Facilities Safety Board; Adjunct Professor, Georgetown University Law Center, George Washington University Law School, and former Adjunct Professor at the U.S. Naval War College. B.A., Denison University; J.D., Wake Forest University School of Law; LL.M., The Judge Advocate General's School, U.S. Army; LL.M., Georgetown University Law Center; M.A., U.S. Naval War College. Mr. Jonas previously served in the U.S. Marine Corps, concluding his service with the Joint Chiefs of Staff as the nuclear nonproliferation planner. The views expressed herein are the author's own and do not necessarily reflect the official policy or position of FH+H or any agency of the U.S. Government.

*** Associate, Squire Patton Boggs; J.D., The George Washington University Law School; H.B.A., University of Utah. The views expressed herein are the author's own and do not necessarily reflect the official policy or position of Squire Patton Boggs.

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I. INTRODUCTION

Despite the potentially apocalyptic consequences of their use, in the United States, the power to authorize the launch of nuclear weapons lies in the hands of a single individual, the President.¹ Although no President has authorized a nuclear attack since the World War II bombings of Hiroshima and Nagasaki, in recent years there has been growing interest in tightening control over this authority.² Calls for reform particularly flared during the last administration as President Trump regularly sidestepped traditional processes for changing national security and foreign policy in favor of doing so

¹ See AMY F. WOOLF, CONG. RSCH. SERV., IF10521, DEFENSE PRIMER: COMMAND AND CONTROL OF NUCLEAR FORCES 1 (2020).

² See John Mecklin, *Commentary: Can Congress Stop a President Waging Nuclear War?*, REUTERS (Nov. 30, 2017, 11:29 AM), <https://www.reuters.com/article/us-mecklin-nuclear-commentary/commentary-can-congress-stop-a-president-waging-nuclear-war-idUSKBN1DU2HW>.

informally through social media.³ Yet calls for reform have persisted beyond the Trump administration into President Biden's first term.⁴

Politicians,⁵ along with legal and national security experts,⁶ have set forth proposals advocating for adopting a process that requires the participation of multiple individuals before the U.S. may launch a nuclear attack. In general, the proposals differentiate between the first use and second use of nuclear weapons.⁷ Second use instances are situations in which the United States is already under nuclear attack (or attack by chemical/biological weapons or a conventional attack so massive that the existence of the state is threatened) and must respond rapidly in self-defense.⁸ Second use

³ See Richard K. Betts & Matthew C. Waxman, *The President and the Bomb*, FOREIGN AFFAIRS (Feb. 13, 2018), https://www.foreignaffairs.com/articles/ united-states/2018-02-13/president-and-bomb?utm_medium=promo_email&utm_source=lo_flows&utm_campaign=register_user_welcome&utm_term=email_1&utm_content=20210527. See also Chelsey Cox, *Gen. Milley Feared Trump Might Launch Nuclear Attack, Made Secret Calls to China, New Book Says*, USA TODAY (Sept. 14, 2021, 2:33 PM), <https://www.usatoday.com/story/news/politics/2021/09/14/gen-mark-milley-worried-trump-could-launch-nuclear-attack/8334915002/>.

⁴ See Steve Herman, *Democrats Want Biden to Relinquish Sole Authority for Nuclear Launches*, VOA (Feb. 26, 2021, 1:34 PM), <https://www.voanews.com/usa/us-politics/democrats-want-biden-relinquish-sole-authority-nuclear-launches>. See also Jon B. Wolfsthal, *Nuclear War Shouldn't Be Up to Any One Person*, THE ATLANTIC (March 28, 2022), <https://www.theatlantic.com/ideas/archive/2022/03/trump-biden-nuclear-weapon-russia-presidential-authority/627610/>.

⁵ See Restricting First Use of Nuclear Weapons Act of 2021, H.R. 669, 117th Cong. (2021). See also Elizabeth Warren & William J. Perry, Opinion, *No President Should Have Unilateral Power to Use Nuclear Weapons: Sen. Warren and Sec. Perry*, USA TODAY (Jan. 25, 2021), <https://www.usatoday.com/story/opinion/2021/01/25/after-trump-end-nuclear-launch-authority-for-presidents-column/4235023001/>.

⁶ See Richard K. Betts & Matthew Waxman, *Safeguarding Nuclear Launch Procedures: A Proposal*, LAWFARE (Nov. 19, 2017, 11:37 AM), <https://www.lawfareblog.com/safeguarding-nuclear-launch-procedures-proposal>.

⁷ See Bruce Blair, *Strengthening Checks on Presidential Nuclear Launch Authority*, ARMS CONTROL TODAY (Jan./Feb. 2018), <https://www.armscontrol.org/act/2018-01/features/strengthening-checks-presidential-nuclear-launch-authority>.

⁸ See Blair, *supra* note 7; Lisbeth Gronlund et al., *An Expert Proposal: How to Limit Presidential Authority to Order the Use of Nuclear Weapons*, BULL. OF THE ATOMIC SCIENTISTS (Jan. 8, 2021), https://thebulletin.org/2021/01/an-expert-proposal-how-to-limit-presidential-authority-to-order-the-use-of-nuclear-weapons/?utm_source=Newsletter&utm_medium=Email&utm_campaign=Monday

instances are largely left out of reform proposals, allowing the President to retain sole power to authorize the launch.⁹ This is fully appropriate given the very short time for decision-making once an attack commences. The first use of nuclear weapons is the subject of most reform proposals,¹⁰ including the one contained in this Article.¹¹ To ensure that the power to authorize the first use of nuclear weapons is appropriately curtailed, the authorization process should require the President, Vice President, and Secretary of Defense to all affirmatively approve the strike.¹²

Section II of this Article provides background information on the current authorization process and its underlying legal authorities, exploring extant tensions between the legislative and executive branches' assertions of their respective war powers. It then surveys the array of reforms proposed by political leaders and national security experts. Section III first identifies the criteria for evaluating the various reform proposals. Next, it explores the problems posed by the current decision-making process and analyzes the potential advantages and shortcomings of the proposals in circulation. Then it sets forth the authors' recommendations for reform, including language that could be inserted into the next National Defense

Newsletter01112021&utm_content=NuclearRisk_ExpertProposal_01082021; Scott D. Sagan, *The Commitment Trap: Why the United States Should Not Use Nuclear Threats to Deter Biological and Chemical Weapons Attacks*, 24 INT'L SECURITY 85, 85 (2000) (discussing U.S. policy on nuclear response to a chemical or biological attack).

⁹ See Blair, *supra* note 7; Lisbeth Gronlund et al., *supra* note 8.

¹⁰ See Blair, *supra* note 7.

¹¹ Admittedly, much of the underlying rationale for restricting the President's power applies to both first and second uses. For instance, the need for both speed and secrecy in the decision-making process applies in both situations; however, given the catastrophic nature of nuclear weapons, the authors find it imprudent to constrain the President's nuclear authorization powers when the nation is already or imminently will be under nuclear attack in the same manner as when the United States is not facing nuclear attack.

¹² To denote the affirmative approval of all three actors in their own proposal, the authors use the term "concurrence," defined by the Merriam Webster Dictionary as "agreement or union in action." *Concurrence*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/concurrence> (last accessed Sept. 26, 2021). When discussing other reform proposals, the authors use the term selected by the proposals' authors.

Authorization Act. Section IV concludes by emphasizing the magnitude of the decision at issue and reiterating the importance of making reform a top priority. It suggests that constitutional amendment should be the ultimate goal in effectuating these changes but recognizes that bipartisan legislation would be the most effective stopgap until a constitutional amendment could take place.

II. BACKGROUND

A. The Current Authorization Process

The current mechanism to authorize the launch of nuclear weapons involves a robust set of processes and procedures that span situation monitoring and target development, force planning, decision conferencing, and force execution.¹³ A rigorous system consisting of cryptological devices and sensors monitors and provides timely information on impending attacks on North America.¹⁴ The importance of timeliness cannot be understated. In the case of an incoming intercontinental ballistic missile, the time available to act may be very short; the President may be notified a mere 10 minutes, or even less, before the weapons detonate.¹⁵ The recent development and deployment of hypersonic nuclear weapons that can allow weapons to proceed from launch to target in minutes make this clear. Information concerning a subject event is gathered from multiple independent sources, and operators then filter out ambiguous signals to best protect against false alarms.¹⁶ Generally, this information is reliable, accurate, and unambiguous.¹⁷ However, the potential for

¹³ See OFF. OF THE DEPUTY ASSISTANT SEC'Y OF DEF. FOR NUCLEAR MATTERS, NUCLEAR MATTERS HANDBOOK 16-19 (2020) [hereinafter "NUCLEAR MATTERS HANDBOOK"].

¹⁴ See *id.* at 16–17.

¹⁵ See Frank N. von Hippel, *Biden Should End the Launch-on-Warning Option*, BULL. ATOMIC SCIENTISTS (June 22, 2021), <https://thebulletin.org/2021/06/biden-should-end-the-launch-on-warning-option/>.

¹⁶ See NUCLEAR MATTERS HANDBOOK, *supra* note 13, at 17.

¹⁷ See *id.*

false alarms still exists¹⁸ and is an important reason for inserting an additional buffer against impetuous action.

Events of concern are relayed across emergency communication systems to the President, Secretary of Defense, and the Chairman of the Joint Chiefs of Staff.¹⁹ Then the military advisors provide the details of the situation and options for response to the President.²⁰ Following this consultation, the President determines whether to order the launch of nuclear weapons and the size and type of nuclear response.²¹

A communications device known as the nuclear “football” conveys the order, which is contained in a suitcase carried by a military aide always in close physical proximity to the President.²² The President is required to identify himself to Pentagon officials through the unique alphanumeric code contained in the “biscuit,” an identification card always carried by the President.²³ The order is then transmitted to the Pentagon and U.S. Strategic Command.²⁴ Once the order is confirmed as having come from the President, Strategic Command issues directions to prepare for the launch of the nuclear

¹⁸ See Daryl G. Kimball, *Nuclear False Warnings and the Risk of Catastrophe*, ARMS CONTROL TODAY (Dec. 2019), <https://www.armscontrol.org/act/2019-12/focus/nuclear-false-warnings-risk-catastrophe>.

¹⁹ See NUCLEAR MATTERS HANDBOOK, *supra* note 13, at 17.

²⁰ See *id.* at 18.

²¹ See *id.*

²² See AMY F. WOOLF, CONG. RSCH. SERV., IF10521, DEFENSE PRIMER: COMMAND AND CONTROL OF NUCLEAR FORCES I (2020).

²³ See Bruce G. Blair, et al., *Right of Launch: Command and Control Vulnerabilities After a Limited Nuclear Strike*, WAR ON THE ROCKS (Nov. 20, 2020), <https://warontherocks.com/2020/11/right-of-launch-command-and-control-vulnerabilities-after-a-limited-nuclear-strike/>.

²⁴ See Eryn MacDonald, *Whose Finger Is on the Button?*, UNION OF CONCERNED SCIENTISTS (Dec. 2017),

<https://www.ucsusa.org/sites/default/files/attach/2017/11/Launch-Authority.pdf>.

weapons.²⁵ Once the weapons are launched, the order cannot be reversed and the launched nuclear weapons cannot be recalled.²⁶

B. Underlying Tensions in Legal Authority

The U.S. Constitution grants war powers to the legislative and executive (political) branches of government;²⁷ however, the content of these powers has long been a source of governmental and academic debate.²⁸ Indeed, “the legal aspect of the nuclear command and control conversation has grappled with how the Founders’ constitutional vision is to be made meaningful”²⁹ Over the years, the legislative and executive branches of government have periodically attempted to expand the scope of their war-making authority, often resulting in pushback from the other.³⁰ Because the Constitution is obviously silent on the issue of nuclear weapons, the discord permeating matters of authority as it relates to armed conflict has extended to the issue of control over nuclear weapons.³¹

Article II of the U.S. Constitution vests the President with several powers related to the waging of war.³² In large part, the President’s war powers derive from his role as Commander-in-Chief

²⁵ See AMY F. WOOLF, CONG. RSCH. SERV., IF10521, DEFENSE PRIMER: COMMAND AND CONTROL OF NUCLEAR FORCES 1 (2020).

²⁶ See Rob Ludacer, *Here’s How Easy It Is for the US President to Launch a Nuclear Weapon*, BUS. INSIDER (Nov. 14, 2018), <https://www.businessinsider.com/nuclear-bomb-launch-procedure-us-government-president-2017-11>.

²⁷ See U.S. CONST. art. 1, § 8; U.S. CONST. art. 2, § 2.

²⁸ See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., IF10521, LEGISLATION LIMITING THE PRESIDENT’S POWER TO USE NUCLEAR WEAPONS: SEPARATION OF POWERS IMPLICATIONS 4-6 (2017).

²⁹ Dakota Rudesill, *Nuclear Command and Statutory Control*, 11 J. NAT’L SEC. L. & POL’Y 365, 403 (2021).

³⁰ See Dave Roos, *US Presidents and Congress Have Long Clashed Over War Powers*, HISTORY (Jan. 16, 2020), <https://www.history.com/news/us-presidents-war-powers-congress>.

³¹ See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., IF10521, LEGISLATION LIMITING THE PRESIDENT’S POWER TO USE NUCLEAR WEAPONS: SEPARATION OF POWERS IMPLICATIONS 12 (2017).

³² See U.S. CONST. art. 2, § 2, cl. 1.

of the armed forces, but also from the Chief Executive role.³³ Although the Constitution does not provide greater detail insofar as the specific functions subsumed by these roles and the Supreme Court has never addressed the nuclear issue directly, the Court's jurisprudence on war powers helps elucidate the matter.

In an early interpretation of Executive war powers, Chief Justice Chase explained that as Commander-in-Chief, the President holds the power to conduct campaigns, a power with which Congress cannot interfere.³⁴ Furthermore, the President is vested with not just the power, but the constitutional duty, to repel attacks.³⁵ In the *Prize Cases*, the Court upheld President Lincoln's southern port blockade, finding that the President not only has the authority to counter force with force, but "is bound to accept the challenge without waiting for any special legislative authority."³⁶ The Court has also accorded deference to the Executive concerning "core strategic matters of warmaking."³⁷ Broadly speaking, foreign relations "questions uniquely demand single-voiced statement of the Government's views"³⁸ which expands the President's authority in matters of foreign affairs.³⁹

This is not to say that Congress has no role to play in war. Informed by their experience under King George III, the Framers specifically sought to protect the nascent republic from the tyrannical overtures of military dictatorship by allocating war powers in the nation's founding document to both the legislative and executive branches.⁴⁰ The Constitution confers upon Congress, *inter alia*, the power to declare war, establish rules for the administration of military

³³ See Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 83-84 (1984).

³⁴ See *Ex parte Milligan*, 71 U.S. 2, 139 (1866) (Chase, C.J., concurring).

³⁵ See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863).

³⁶ *Id.* at 668-69.

³⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004).

³⁸ *Baker v. Carr*, 369 U.S. 186, 211 (1962).

³⁹ The authors recognize that "speaking" with one voice is not necessarily the same as "acting" with one actor; however, it does help underscore the President's heightened authority when it comes to foreign policy.

⁴⁰ See THE FEDERALIST NO. 69 (Alexander Hamilton).

justice, and raise and support armies.⁴¹ Through the power to spend “for the common Defence,” Congress also authorizes and appropriates funds for the military.⁴² These powers are augmented by Congress’s power to enact legislation deemed “necessary and proper” for their execution, as well as the execution of all powers enumerated in the Constitution.⁴³

Despite the Constitution’s allocation of war powers amongst the political bodies—those being the executive and legislative branches—of the federal government, persistent lacunae in the content thereof led to the development of a tripartite framework for analyzing the constitutionality of Executive action.⁴⁴ In his *Steel Seizure* case concurrence, Justice Robert Jackson formulated three categories into which Executive action may fall.⁴⁵ The first category accounts for Executive measures taken pursuant to express or implied congressional authorization.⁴⁶ When the President operates in conjunction with Congress’s approval, his power is at its zenith.⁴⁷ He wields both the power of his office and all that which Congress may delegate.⁴⁸ When the President acts with neither the approval nor disapproval of Congress, he occupies a “zone of twilight” in which the allocation of power between Congress and the President is uncertain.⁴⁹ The third category pertains to presidential action incompatible with Congress’s will, either express or implied.⁵⁰ In such case, the President relies solely upon his own constitutional authority

⁴¹ See U.S. CONST. art. 1, § 8.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635-38 (1952).

⁴⁵ See *id.*

⁴⁶ See *id.* at 635-36.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *Steel Seizure*, 343 U.S. at 637.

⁵⁰ See *id.*

and his actions are most closely scrutinized.⁵¹ His powers are at their lowest.⁵²

The *Youngstown* framework, together with the Constitution's express grants of war powers, provide the backdrop against which presidential action in the area may be analyzed. Yet even within these parameters, the legislative and executive branches continue to clash over the allocation of power when it comes to armed conflict.⁵³ These disputes have not always produced a definitive legal resolution on the merits as courts at times have invoked justiciability issues such as the political question doctrine to dispose of the cases.⁵⁴ As a result, many issues in the field of national security reside in a legal limbo.⁵⁵

C. Reform Proposals in Circulation

One proposal relating to nuclear weapon authorization focuses on the presidential chain of succession, requiring consensus between the President, Vice President, and Speaker of the House of Representatives.⁵⁶ Under this scheme, the President still issues the order to launch nuclear weapons, but the National Military Command Center's subsequent execution of this order is contingent on the agreement of the Vice President and Speaker.⁵⁷ These two officials assess the order's validity and explicitly determine the legality of the potential attack.⁵⁸ Together, these requirements protect against a decline in the President's mental soundness and fitness and also ensure compliance with the law of armed conflict.⁵⁹

⁵¹ See *id.*

⁵² See *id.*

⁵³ See Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63, 77-78 (2002).

⁵⁴ See *id.* at 79-80.

⁵⁵ See *id.* at 75.

⁵⁶ See Gronlund et al., *supra* note 9.

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.*

A similar proposal incorporates additional individuals for concurrence.⁶⁰ Again, the President orders the launch of nuclear weapons with execution dependent upon determining its validity and lawfulness.⁶¹ The difference here is that the Secretary of Defense must assess the validity, meaning the order has come from the President, while the Attorney General determines lawfulness.⁶²

Another proposed solution requires the majority approval of the Speaker of the House, the President Pro Tempore of the Senate, and the majority and minority leaders of both the House and the Senate.⁶³ Allowing for a simple majority rather than consensus is a practical consideration.⁶⁴ If one or more individuals are unavailable, the decision-making process could still be carried out.⁶⁵ Some approaches also suggest Congressional participation in the form of the adoption of legislation prohibiting the President from ordering the launch of nuclear weapons absent a congressional declaration of war.⁶⁶

In a stark departure from the rest of these proposals, one option involves members of the Supreme Court.⁶⁷ This option suggests the adoption of a new Nuclear War Powers Act, which brings at least two Supreme Court Justices into the fold and requires their approval.⁶⁸

Lastly, some suggest foregoing the consensus requirement and, instead, mandating consultation with various individuals, such as

⁶⁰ See Betts & Waxman, *Safeguarding Nuclear Launch Procedures: A Proposal*, *supra* note 6.

⁶¹ *See id.*

⁶² *See id.*

⁶³ See Michael E. O'Hanlon, *Going It Alone? The President and the Risks of a Hair-Trigger Nuclear Button*, BROOKINGS (Mar. 1, 2016), <https://www.brookings.edu/blog/order-from-chaos/2016/03/01/going-it-alone-the-president-and-the-risks-of-a-hair-trigger-nuclear-button/>.

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See* Restricting First Use of Nuclear Weapons Act of 2019, H.R. 669, 116th Cong. (2019).

⁶⁷ *See* O'Hanlon, *supra* note 63.

⁶⁸ *See id.*

members of Congress and defense and legal experts, early in the process.⁶⁹ Together, these individuals explore use-of-force scenarios during peacetime.⁷⁰ Although this requires the President to confer with these persons, the President is not bound by their advice and remains free to unilaterally authorize the use of nuclear weapons.⁷¹

III. ANALYSIS

A. *Establishing the Criteria and Identifying the National Values Against Which to Evaluate Reform Proposals*

Attempts to reform the nuclear launch authorization process aim to serve many national values. At their core, the proposals are meant to protect against the arbitrary or unwarranted use of nuclear weapons. The current authorization process, wherein the authority lies in one person, fails to adequately safeguard against the unique risks posed by nuclear weapons. In fact, the process “implicitly assumes that the President’s orders are legal.”⁷² The cataclysmic effects generated by employing a nuclear weapon necessitates remedying the risks inherent in vesting the power in a single individual.

In analyzing the more specific goals and values that should underlie reform, several appear particularly salient. First, any reform implemented should guard against a rash or impaired president. Both historically and recently, questions over presidential impairment of various sorts highlight the need to allocate the responsibility for the nuclear codes amongst multiple people. For example, at times President Kennedy was under the influence of painkillers and stimulants.⁷³ President Nixon was sometimes intoxicated from

⁶⁹ See Rachel Elizabeth Whitlark, *Should Presidential Command Over Nuclear Launch Have Limitations? In a Word, No.*, 2 TEX. NAT’L SEC. REV. 138, 143 (2019).

⁷⁰ See *id.*

⁷¹ See *id.* at 143.

⁷² Rudesill, *supra* note 29, at 374.

⁷³ See Robert Dallek, *The Medical Ordeals of JFK*, THE ATLANTIC (Dec. 2002), <https://www.theatlantic.com/magazine/archive/2002/12/the-medical-ordeals-of-jfk/305572/>.

alcohol.⁷⁴ Impairment can also come from sources other than substance use. Many viewed President Trump as emotional, often ignoring the wise advice of his advisors⁷⁵ or failing to exercise impulse control.⁷⁶ With President Biden, many have questioned whether his advanced age is a source of impairment.⁷⁷

Most reform proposals, including the one put forth in this article, view the addition of more participants as a safeguard against the risks associated with a decline in a President's mental soundness or fitness.⁷⁸ None of the individuals who are suggested as additions to the process are mental health experts, but even so, they can still assess to a certain degree if the President is acting in a way that is potentially indicative of mental illness or decline. Yet, even if every President acted rationally and exercised wise and temperate judgment, a single individual should not be vested with the power to first use nuclear weapons—a power that could potentially result in the destruction of the world.

Second, the authorization process must ensure sufficient speed and secrecy in decision-making. Even when the United States is not facing adversarial nuclear attack, the situation may still require fast decision-making. The process must reflect that reality and not be so cumbersome as to hinder the United States's ability to take necessary action. Additionally, the process must not expand to encompass too wide a circle of people such that secrecy is compromised. Third, reform should promote democratic accountability. The consequences of using nuclear weapons are so

⁷⁴ See John A. Farrell, *The Year Nixon Fell Apart*, POLITICO (Mar. 26, 2017), <https://www.politico.com/magazine/story/2017/03/john-farrell-nixon-book-excerpt-214954/>.

⁷⁵ See Ryan Pickrell, *Trump Ignored Top Advisers*, BUS. INSIDER (Sept. 9, 2019), <https://www.businessinsider.com/trump-ignored-warnings-of-top-advisers-on-meeting-with-taliban-2019-9>.

⁷⁶ See Josh Delk, *GOP Lawmaker: Trump's 'Lack of Impulse Control' Concerning*, THE HILL (Mar. 24, 2018), <https://thehill.com/blogs/ballot-box/380069-gop-lawmaker-trumps-lack-of-impulse-control-concerning>.

⁷⁷ See Jacob Jarvis, *Joe Biden's Age is a Concern to Voters*, NEWSWEEK (Oct. 14, 2020, 6:52 AM), <https://www.newsweek.com/joe-biden-age-77-concern-voters-trump-74-attacks-1538978>.

⁷⁸ See *infra* Section II.3.

great that the decision to authorize such use should reflect this value. Lastly, another criterion or value that should guide reform is leveraging relevant legal, military, and political expertise. The use of nuclear weapons implicates all three realms, legal, military, and political, to the highest degree and the authorization process should include individuals who can provide the best guidance in these areas. This holistic approach will better ensure that the potential use of nuclear weapons is neither illegal nor ill-advised. There are undoubtedly additional values or criteria upon which to base reform, and the authors do not wish to discount them; however, the points above provide a strong foundation for reform and should be utilized in assessing the various proposals.

B. Existing Reform Proposals Fall Short in Resolving the Process's Current Problems

1. Involving Congress in the Decision-Making Process is Both Impractical and a Violation of the Principle of Separation of Powers

The few proposals requiring Congressional approval of the use of nuclear weapons should fail for both practical and constitutional reasons. Insofar as practicality is concerned, requiring the approval of either the Speaker of the House of Representatives or other specified members of Congress, could too easily jeopardize national security.⁷⁹ This is less an inherent problem and reflects mostly as an artifact of the current political climate, but even so it cannot be discounted. Acrimonious partisanship has often led to gridlock on many important issues.⁸⁰ Should the use of nuclear weapons come under consideration, tensions and differences may

⁷⁹ The author identifies as one factor among several contributing to the persistent demand for information leaks, enduring political partisanship, and the desires of the parties to gain political advantage. See GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS 10 (2011).

⁸⁰ See Molly E. Reynolds, *Improving Congressional Capacity to Address Problems and Oversee the Executive Branch*, BROOKINGS (Dec. 4, 2019), <https://www.brookings.edu/policy2020/bigideas/improving-congressional-capacity-to-address-problems-and-oversee-the-executive-branch/>.

flare even more drastically.⁸¹ A smooth authorization process is vital, and there must be no possibility of gridlock.

Yet, in looking at the United States's political climate, scholars and government actors should exercise caution in determining which actors are brought into the fold. Resorting to Congress is not the only method for ensuring meaningful discourse in the authorization process. Engaging other high-ranking officials, like senior Cabinet members, can accomplish the same goal. This type of seniority and the unique devastation that nuclear weapons can wreak decreases the likelihood that they function as mere "yes-men." Given the grave consequences implicated by the nuclear option, and the highly toxic political atmosphere of recent years, the decision to use nuclear weapons must be as insulated as possible from political gamesmanship.

Again, gaining concurrence between individuals on opposing sides of the political aisle has utility because it provides a safeguard against a potentially ill-advised launch of nuclear weapons. Moreover, the profound consequences that result from the use of nuclear weapons underscore the importance of operating from a basis of national unity. These points are salient, but not so compelling as to necessitate the Speaker's involvement in the decision-making process. The added protection Congress may provide as a political counterweight to the President is outweighed by the potential for inappropriate political leveraging and information leaks. The

⁸¹ When Senator J. William Fulbright introduced an amendment in 1972 to the War Powers Resolution that would require the President to obtain explicit authorization from Congress before using nuclear weapons, Congress itself could not even agree that such restriction was constitutionally permissible. Compare STEPHEN P. MULLIGAN, CONG. RSCH. SERV., IF10521, LEGISLATION LIMITING THE PRESIDENT'S POWER TO USE NUCLEAR WEAPONS: SEPARATION OF POWERS IMPLICATIONS 12 n. 97 (2017) (statement of Sen. Javits) ("I have deep concern, and I am not trying to conclude the question, as to whether the President of the United States with his constitutional authority as Commander in Chief can be prevented from using a nuclear weapon in our arsenal as defense of the United States or in defense of the Armed Forces of the United States."), with *id.* at 12 (statement of Sen. Cooper) ("I do not think that writing this language into a statute can in any way limit the constitutional authority of the President to use nuclear weapons if he thought it necessary to protect the existence of our country. We cannot by statute deny the constitutional power of the President.").

existential nature of using nuclear weapons must reflect the primacy of national security over politics.

Constitutionally, owing largely to the President's role as Commander-in-Chief, the addition of Congressional participation in this manner violates the principle of separation of powers.⁸² As Commander-in-Chief, the President controls the means and methods of waging war.⁸³ This should include the decision to use nuclear weapons. Congress certainly serves critical functions in matters of military engagement. It may declare war and appropriate funds for the military, but it does not control the methods of warfare.⁸⁴

Some might argue that a new infringement on presidential authority in this area constitutes another unjustified inroad on the Executive similar to the War Powers Resolution of 1973.⁸⁵ One of the authors of this Article has previously argued that the War Powers Resolution should be repealed.⁸⁶ However, the War Powers Resolution merely requires the President to notify Congress within 48 hours of introducing American troops into new hostilities or substantially enlarging existing force levels and to terminate the engagement within 60 days unless Congress declares war or otherwise authorizes the engagement.⁸⁷

Still, issues such as those considered under the War Powers Resolution move at a glacial pace compared to the first use of nuclear weapons, which may now be authorized to be used instantly. Yet, even if the situation evolves more slowly, with the President contemplating such action over a period of days or weeks, the analysis does not change. Concurrence should still be required. Therefore, while there

⁸² See *Hamdi*, 542 U.S. at 531.

⁸³ See *id.*

⁸⁴ See U.S. CONST. art. 1, § 8.

⁸⁵ See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., IF10521, LEGISLATION LIMITING THE PRESIDENT'S POWER TO USE NUCLEAR WEAPONS: SEPARATION OF POWERS IMPLICATIONS 12 (2017).

⁸⁶ See David S. Jonas & Erielle Davidson, *War Powers Resolution Should Be Repealed*, WASH. TIMES (Apr. 6, 2021), <https://www.washingtontimes.com/news/2021/apr/6/david-s-jonas-and-erielledavidson-war-powers-reso/>.

⁸⁷ See War Powers Resolution, 50 U.S.C. §§ 1541-1548.

are many arguments against the War Powers Resolution, covered in the cited article,⁸⁸ there are an equal number of compelling arguments to limit the ability of one person to potentially initiate the destruction of the world simply because it may have been a bad day.⁸⁹

2. Excluding the Vice President, and Including the Attorney General, in the Authorization Process Deviates Too Far from the Presidential Line of Succession

The second proposal's exclusion of the Vice President and incorporation of the Attorney General fails to adequately account for the presidential chain of succession. Should the Vice President assume the presidency, responsibility for the nuclear launch codes will fall to that person.⁹⁰ Excluding the first person in line to gain that control is unwise.

Although the Attorney General is within the Executive branch and heads a department which advises on national security matters,⁹¹ this individual is not sufficiently involved in day-to-day military matters to warrant his or her concurrence in the nuclear authorization process. Using nuclear weapons is one of the most consequential military decisions ever made for both the country and the world. The Attorney General's expertise does not adequately lend itself to requiring his or her approval of such a decision. Under the current interagency process, the Department of Justice's Office of Legal Counsel advises on the legality of the uses of force.⁹² Moreover, consultation with legal counsel is certainly critical. The United States has an obligation to comply with all applicable laws.⁹³ Department of Defense lawyers throughout the strategic, operational, and tactical levels of warfare⁹⁴ are trained in analyzing the legality of uses of

⁸⁸ See generally Jonas & Davidson, *supra* note 86.

⁸⁹ See *id.*

⁹⁰ See U.S. CONST. amend. XXV, § 4.

⁹¹ See 28 C.F.R. § 0.72 (2016).

⁹² See 28 C.F.R. § 0.25(a) (2016).

⁹³ See GENERAL COUNSEL OF THE DEP'T. OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, §§ 1.10.1.4, 1.10.2 (2016).

⁹⁴ See U.S. JOINT FORCE DEVELOPMENT, LEGAL SUPPORT TO MILITARY OPERATIONS 1 (2016).

force,⁹⁵ making them a more prudent option for optional consultation rather than concurrence.

3. The Supreme Court Should Not Be Involved Due to Separation of Powers Concerns and Expertise Deficiencies

Involvement of the Supreme Court raises similar separation of powers concerns as congressional participation but to an even greater degree. Whereas Congress is at least delegated some explicit war powers, the Constitution does not grant the judiciary any such power, save for its duty to consider cases and controversies.⁹⁶

Moreover, the Supreme Court may dispose of a lawsuit arising from the decision to launch nuclear weapons under the political question doctrine or by simply refusing to consider it.⁹⁷ Under the political question doctrine, matters of foreign policy and national security are textually committed to the political branches of government and, because of that, may be deemed a nonjusticiable political question.⁹⁸ The Constitution “recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.”⁹⁹ Thus, the Court has traditionally hesitated to interfere with the

⁹⁵ See Michael F. Lohr, *Legal Support in War: The Role of Military Lawyers*, 4 CHI. J. INT'L L. 465, 471 (2003).

⁹⁶ See U.S. CONST. art. 3, § 2.

⁹⁷ See CONSTITUTION ANNOTATED: OVERVIEW OF THE POLITICAL QUESTION DOCTRINE, https://constitution.congress.gov/browse/essay/artIII-S2-C1-9-1/ALDE_00001283/ (last visited Mar. 3, 2023) (defining the contours of the Political Question Doctrine). Indeed, the Supreme Court has historically been very hesitant to consider any military cases, having heard only a handful over the years. And one of those few did not even involve a solely military question, but rather an issue of criminal law relevant to the entire nation. One of the authors was privileged to argue that case. See *Davis v. United States*, 512 U.S. 450, 452 (1994) (David S. Jonas argued the case for the petitioner).

⁹⁸ See CONSTITUTION ANNOTATED: OVERVIEW OF THE POLITICAL QUESTION DOCTRINE, https://constitution.congress.gov/browse/essay/artIII-S2-C1-9-1/ALDE_00001283/ (last visited Mar. 3, 2023) (defining the contours of the Political Question Doctrine); U.S. CONST. art. 2, § 2; U.S. CONST. art. 1, § 8, cl. 11-13.

⁹⁹ *Hamdi*, 542 U.S. at 531.

Executive's authority in national security and military affairs.¹⁰⁰ Although not all controversies involving foreign policy lie beyond judicial review,¹⁰¹ the decision to use nuclear weapons can hardly be anything other than such a "core strategic matter," making that decision one upon which the Court would also be reluctant to intrude.¹⁰²

Even if the Constitution was amended to give the Supreme Court this sort of role, the Court's expertise deficiencies make judicial involvement inappropriate. In *Smith v. Obama*, the U.S. Court of Appeals for the District of Columbia invoked the political question doctrine when it declined to decide on the merits of whether Congress's enactment of the 2001 and 2002 Authorization[s] for Use of Military Force authorized the use of force against the Islamic State.¹⁰³ Given the Constitution's textual commitment of foreign policy and national security to the political branches, the court recognized that it was ill-equipped to second-guess the Executive's application of the statutory authorizations in ongoing combat operations.¹⁰⁴ These same expertise deficiencies logically extend to participating in the decision to use nuclear weapons.¹⁰⁵ Indeed, the Court and the Justices are configured to render decisions in months, not minutes.¹⁰⁶ The entire concept is simply unworkable.

¹⁰⁰ *See id.*

¹⁰¹ *See Baker*, 369 U.S. at 211.

¹⁰² *Id.*

¹⁰³ *See Smith v. Obama*, 217 F.Supp. 3d. 283, 303-04 (D.D.C.), *order vacated, appeal dismissed as moot sub nom*; *Smith v. Trump*, 731 F. App'x 8 (D.C. Cir. 2018).

¹⁰⁴ *See id.* at 299.

¹⁰⁵ David S. Jonas & Bryn McWhorter, *Nuclear Launch Authority: Too Big a Decision for Just the President*, ARMS CONTROL ASS'N (June 2021), <https://www.armscontrol.org/act/2021-06/features/nuclear-launch-authority-too-big-decision-just-president>. The authors find a key distinction in the expertise necessary to review a decision taken by the legislative and executive branches, and the expertise that would be required if the Supreme Court participated in the decision to use nuclear weapons. Although the Court may find it has the expertise to review the use of nuclear weapons after the fact, the Justices are not trained military advisers. Justices reviewing the correct use of nuclear weaponry is a far stretch from their traditional functions.

¹⁰⁶ *Davis*, 512 U.S. 452.

Even if incorporated more in a personal capacity as lawyers and scholars, the impact the participation would have on the Justices's roles on the Court weighs against judicial consideration of nuclear weapons use. If lawsuits arising from the use of nuclear weapons are filed, the Justices who participated in the authorization process should recuse themselves based on conflict of interest.¹⁰⁷ This is not necessarily a negative outcome. Indeed, the recusal is important to ensure a bias-free decision. Still, considering the gravity of the underlying subject matter, it would be ill-advised to establish a process that precluded the Court from ever sitting in full when deciding those cases.

C. Reform Proposals Requiring Mere Consultation Instead of Concurrence Do Not Sufficiently Constrain the President's Power

Proposals advocating for consultation with national security advisers do not adequately check the President's power to authorize the use of nuclear weapons. Calls for reform stem from the risk inherent in allowing a single individual to control the nuclear codes,¹⁰⁸ particularly the risk of arbitrary, unlawful, or unwarranted authorization.¹⁰⁹ Consultation cannot act as a true backstop when the President is not obligated to follow his advisors' guidance. Indeed, this proposal is more reflective of the current reality than requiring real change. Moreover, there are many kinds of relationships included in the concept of consulting or conferring such¹¹⁰ that any proposal which relies on a consultation requirement requires specificity as to what each proposal entails.

¹⁰⁷ 28 U.S.C. § 455(a) (2016) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

¹⁰⁸ Jonas & McWhorter, *supra* note 105.

¹⁰⁹ *Id.*

¹¹⁰ See Blair, *supra* note 7.

1. Requiring Concurrence Among the President, Vice President, and Secretary of Defense is the Most Prudent Option for Reform

Given the potentially catastrophic consequences that could arise from the use of nuclear weapons, appropriate constraints must be implemented to mitigate the risks inherent in the current launch authorization process. Authorization reform need not extend to situations where the United States is responding to a nuclear attack. This requires careful drafting and consideration since, although highly unlikely, the first use by an enemy state could potentially be against a formal treaty ally or friendly state. But the response to a nuclear attack against an ally should also not be considered first use because the very survival of the United States or an ally is at stake, and the President is merely responding. Being forced to respond to an adversary's nuclear attack is a strikingly different scenario than one in which the President is responding to conventional warfare because of the necessity of ensuring survival— unless the conventional attack is so overwhelming that it threatens the very survival of the United States or an ally. Because of the grave threat of a nuclear attack, the President should retain the sole power to authorize the second use of nuclear weapons. The President's contemplation of the first use of nuclear weapons necessitates the implementation of safeguards. The most sensible means of doing so would require the concurrence of the Vice President and Secretary of Defense. Their concurrence should only apply to whether to use nuclear weapons; once all three concur on first use, the President retains the final word on the size and type of nuclear response.

Incorporating the Vice President in the approval process is prudent for several reasons. First, incorporating the Vice President reasonably accounts for the presidential chain of succession.¹¹¹ In the event that the President dies, resigns, becomes incapacitated, or is removed from office, the Vice President steps into that role.¹¹² This role includes assuming responsibility over the nuclear launch codes. Second, being first in the line of succession, the Vice President is

¹¹¹ See U.S. CONST. amend. XXV, § 1.

¹¹² See *id.*

presumably already familiar with the nuclear command process. The Vice President is also likely aware of the nuclear package options, making him or her better equipped to make a decision. It makes sense to include the Vice President in the process from the outset because of his or her unique position and work with the President. This proposal creates an additional incentive to ensure that the Vice President is actually kept in the loop on all nuclear activities so the Vice President can readily step into this consultation process if necessary. Third, given the magnitude of this decision, it is important to ensure political accountability. Apart from the President, the Vice President is the only other public official elected by the entire nation, which lends an added degree of public accountability.¹¹³

Multiple rationales support involving the Secretary of Defense in the decision-making process. First, this individual presumably has the military knowledge to comprehend the utility and challenges of using nuclear weapons. Legally, the Secretary is obligated to seek the military advice of the Chairman of the Joint Chiefs of Staff in creating national defense strategy.¹¹⁴ This enables the Secretary to comprehensively understand the practicalities and operations of armed conflict, leaving him best situated to assess the United States's options.¹¹⁵ Additionally, where a nuclear option is being considered, the Secretary would likely (and could easily) confer with the Chairman,¹¹⁶ thereby heightening the military expertise being utilized. Such conferral should not be required because of the potential time considerations at play.¹¹⁷ Even so, the Secretary's involvement with the Chairman in formulating national defense strategy is a tremendous benefit when keeping an eye towards the importance of leveraging military knowledge.¹¹⁸

Second, the Secretary is also well-positioned to tap into the knowledge of legal experts who are experienced in ensuring the United

¹¹³ See U.S. CONST. art. 2, § 1.

¹¹⁴ See 10 U.S.C. § 113(g)(1)(C) (2016).

¹¹⁵ See § 113(g)(1).

¹¹⁶ See § 113(g)(3)(C)(v).

¹¹⁷ See generally § 113(g)(1)-(3).

¹¹⁸ See § 113(g)(2)(A).

States's compliance with applicable law.¹¹⁹ Uses of force require compliance with the law of armed conflict.¹²⁰ The analysis involved in ensuring compliance is especially challenging if the United States is contemplating the first use of nuclear weapons. It is only logical to utilize lawyers who are adept at making use of force assessments. Although lawyers in other departments and agencies at times conduct these assessments, Department of Defense lawyers regularly do so for uses of force involving conventional weapons;¹²¹ conducting the requisite analysis for the use of nuclear weapons is a natural extension of the assessments they currently perform. Any reform process should leverage Department of Defense expertise and stipulate that, time permitting, the Secretary of Defense solicit their counsel and share their assessments with the President and Vice President.

To the degree possible, discussions regarding the use of nuclear weapons should include the Secretary of State. Apart from being the most senior cabinet member, the Secretary of State is responsible, *inter alia*, for negotiating international agreements, conducting diplomatic outreach with foreign representatives, and serving as principal adviser to the President on foreign policy.¹²² This individual undoubtedly provides significant value, and the other relevant officials should certainly confer with the Secretary of State, especially considering that the decision involves relations with allies and co-belligerents). However, the decision of whether to use nuclear weapons pertains to the waging of war, not its prevention. Where time

¹¹⁹ See Lohr, *supra* note 95, at 473.

¹²⁰ The law of armed conflict ("LOAC") is composed of both conventional and customary international law, both of which bind the United States. The United States signed and ratified the Geneva Conventions, which comprise a significant portion of LOAC, on February 8, 1955. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, p.36-37; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, at 64-65; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1948, 6 U.S.T. 3316, at 91-92; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, at Art. III.

¹²¹ See Lohr, *supra* note 95, at 474.

¹²² See *Duties of the Secretary of State*, DEP'T OF STATE, <https://www.state.gov/duties-of-the-secretary-of-state/> (last visited July 6, 2021).

and circumstances permit, consultation with the Secretary of State should be required, but given that this position is not one of war-making, the Secretary of State's approval should not be required. Requiring the approval of the Secretary of Defense better reflects the nuances of waging war.

If the United States faces an urgent situation and the individuals whose approvals are required are unavailable and cannot participate, whether due to death, injury, or an inability to be contacted, the deputy Secretary of Defense and the Secretary of State should jointly make the decision. This assumes that the official has been confirmed by the Senate to their post and is not merely Acting. Their involvement reflects the goal of prioritizing the officials with the most direct knowledge of nuclear weapons employment.¹²³ Acting officials should be prohibited from performing these functions. Apart from that scenario, the most prudent requirement is mandating concurrence of the President, Vice President, and Secretary of Defense. Although the President already cannot fire the Vice President, this Article's proposal prohibits the President from firing any official whose approval is required because of their decision to decline to give their consent. These additional individuals, with the added protection from such a prohibition, provide the best protection against the current risks stemming from the President's singlehanded control over the launch of nuclear weapons.

IV. CONCLUSION

The best method for implementing this reform is through Constitutional amendment. This avenue helps resolve separation of power concerns and concretizes the reformed process in a way that legislation or executive order cannot. Achieving a Constitutional amendment is a tremendously arduous task, but it should remain the ultimate goal with regard to the reformation of the nuclear authorization process. Until that can be achieved, the enactment of bipartisan legislation providing for the same changes should be a governmental priority. New legislation is not only more appropriate than proclamations or executive orders, which the President may

¹²³ See *id.*; 10 U.S.C. § 113(g)(2)(A).

revoke at will, but also new legislation is much easier than a constitutional amendment for Congress to achieve.¹²⁴ Implementing these changes through legislation imposes a legal obligation to comply that requires Congressional action to repeal, which is stronger than any proclamation or executive order.

The decision to use nuclear weapons yields truly profound and enduring consequences for both the nation and the world. Allowing a single individual to wield power so immense is ill-advised and carries great risk. Reforming the decision-making process to include the Vice President and Secretary of Defense is the best remedy to the current risks inherent in the existing process. To help advance the reform process, the authors of this Article suggest the following language, as either a standalone bill or as part of the National Defense Authorization Act for the next fiscal year. In drafting this statutory language, the authors of this Article believed that the appearance of hypersonic nuclear weapons demanded the inclusion of a paragraph involving anticipatory first strike:

SECTION 1. SHORT TITLE.

This act may be cited as the “Nuclear Command Authorization Act.”

SECTION 2. REFORM OF THE NUCLEAR LAUNCH AUTHORIZATION PROCESS.

Title 50 U.S. Code, Chapter [X], is amended by adding Sec. [X]:

(a) **Nuclear Launch Authorization Concurrence Requirement.**

(1) **Instances of First-Use.**

(A) Where the United States, its territory or that of its allies, or armed forces have not been subject to nuclear attack or overwhelming conventional attack threatening the very existence and viability of the state, or attack involving

¹²⁴ See VIVIAN S. CHU & TODD GARVEY, CONG. RSCH. SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 7 (2014).

chemical or biological weapons and where the United States contemplates the use of nuclear weapons, any use thereof will be deemed a “first-use” of nuclear weapons.

- (B) Any first use of nuclear weapons requires the President to obtain the concurrence of the Vice President and Secretary of Defense prior to ordering the launch. If the Secretary of Defense is not immediately available, the Deputy Secretary of Defense shall be contacted for concurrence. In no instance may an official in an Acting capacity take these actions. In the absence of a Senate confirmed Secretary of Defense or Deputy Secretary of Defense, the Secretary of State shall be contacted for concurrence.
 - (C) Should circumstances and intelligence provide convincing evidence that an enemy state plans to immediately commence an attack on the United States involving the use of nuclear weapons, the President may act under this legislation as if he were responding to a first strike.
- (2) **Instances of Second-Use.**
- (A) Where the United States contemplates the use of nuclear weapons in response to a nuclear attack launched against United States territory, its forces, or its allies, or an imminent threat of such attack, any use will be deemed “second-use.”
 - (B) In instances of second-use, the President as Commander-in-Chief of U.S. Armed Forces holds the sole power to authorize the use of nuclear weapons.

