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Nuclear Weapons, the War Powers, and the Constitution: Mutually Assured Destruction?

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**NUCLEAR WEAPONS, THE WAR POWERS, AND THE CONSTITUTION:
MUTUALLY ASSURED DESTRUCTION?**

John M.A. DiPippa*

*A screaming comes across the sky.
It has happened before but there is nothing to compare it to now.***

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** Thomas Pynchon, GRAVITY’S RAINBOW (1973).

I. INTRODUCTION

In November 2017, a committee of Congress did something it had not done in over forty years: considered whether to limit the President's power to unilaterally use nuclear weapons.¹ The committee hearing occurred amidst increasingly bellicose rhetoric between the United States and North Korea.² It followed the introduction earlier that year of bills to require a congressional declaration of war before the President authorized the first use of nuclear weapons.³ In spite of this renewed interest in the grave dangers of nuclear Armageddon, the committee failed to reach an agreement on what, if anything, should be done.⁴ Thus, the nuclear status quo remains unchanged: the President has unilateral authority to order the use of nuclear weapons.

The conventional wisdom about presidential power to make war *vis-a-vis* Congress posits that while the President may use military force to defend the nation, any offensive use of force requires congressional authorization.⁵ Of course, the reality was never as simple as the conventional wisdom held. Presidents in the nineteenth century sometimes deployed the military prior to congressional action.⁶ The notion of "defensive war" allowed presidents to

1. *First Use of Nuclear Weapons: Preserving Responsible Control: Hearings Before the Subcomm. on Int'l Sec. and Sci. Affairs of the H. Comm. on Int'l Relations*, 94th Cong. 3–4 (1976); see Patricia Zengerle, *Senate Committee Questions Trump's Nuclear Authority*, REUTERS (Nov. 14, 2017), <https://www.reuters.com/article/us-northkorea-missiles-usa-senate/senate-committee-questions-trumps-nuclear-authority-idUSKBN1DE2ON> [<https://perma.cc/BU5S-P456>]; see also Editorial, *Rethinking the President's Nuclear Trigger*, N.Y. TIMES, Nov. 16, 2017, at A22.

2. See *Rethinking the President's Nuclear Trigger*, *supra* note 1.

3. Press Release, Ted Lieu, Congressman for Cal.'s 33rd Dist., Congressman Lieu, Senator Markey Introduce the Restricting First Use of Nuclear Weapons Act of 2017 (Jan. 24, 2017), <https://lieu.house.gov/media-center/press-releases/congressman-lieu-senator-markey-introduce-restricting-first-use-0> [<https://perma.cc/DM2S-W5N4>] (Representative Ted Lieu and Senator Edward Markey introduced bills entitled the "Restricting First Use of Nuclear Weapons Act of 2017"); see also Ankit Panda, "No First Use" and Nuclear Weapons, COUNCIL ON FOREIGN REL. (Jul. 17, 2018), <https://www.cfr.org/backgroundunder/no-first-use-and-nuclear-weapons> [<https://perma.cc/HQ9B-Z7ZH>].

4. See Zengerle, *supra* note 1 ("I do not see a legislative solution today, but that doesn't mean that over the course of the next several months one might develop," [Senator Corker] told reporters after the hearing.").

5. See, e.g., LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 284 (Princeton Univ. Press rev. ed. 1985) ("For constitutional as well as practical reasons, the two activities are supposed to work in concert. The President commands the troops but only Congress can provide them. Congress declares war but depends on the President to wage it.").

6. *Id.* at 287–89 (recounting actions by Jefferson and, most famously, Lincoln, to use force first and seek authorization or ratification second); *id.* at 288 ("The executive may act outside the law when necessity demands it, explain his actions, and ask the legislature for acquittance.").

take actions to defend the United States, its people, and its possessions outside of the country.⁷ After World War II, however, defensive war took “a quantum jump, both conceptually and in practice.”⁸ Post-World War II theory and practice drifted toward allowing the President more and more authority to “make war before Congress has had a chance to act.”⁹ Our strategic commitments, our mutual defense obligations, and our far-flung military bases expanded the range of our nation’s protective cover.¹⁰

Nuclear weapons challenge this conventional thinking. The perfect storm of our changing understanding of the constitutional rules for making war and the imperatives of the nuclear age has conspired to blind us to constructive examination of the issue.¹¹ If the nation’s defense strategy policy contemplates a nuclear first strike capability or includes a nuclear first use option, then the conventional constitutional wisdom appears to have little meaning.¹² Because of this, presidential power to unilaterally employ nuclear weapons in an offensive context outside of retaliation for a sudden nuclear attack raises serious constitutional questions about the proper distribution of the power to make war.¹³

Building on this insight, this Article discusses the implications the original meaning of the proper constitutional distribution of the war power as it relates to the use of nuclear weapons. This Article aims to provide a framework to answer the question of the constitutionality of the use of nuclear weapons as the Framers might answer.

Part II discusses the relatively few legal scholars who address the constitutional issues relating to the use of nuclear weapons. In Part III, I will outline the development of the U.S. policies on using nuclear weapons. Part IV discusses the need for congressional involvement in nuclear decision making. Part V discusses what the historical sources tell us the Constitution’s Framers may have meant when they set out the Constitution’s war powers. In

7. *Id.* at 284, 292–93 (recounting actions by John Adams, James Polk, and William McKinley that justified as defensive warfare).

8. *Id.* at 292–93.

9. *Id.* at 284.

10. *Id.* at 292–93 (“No longer did the administration confine the notion of ‘repelling sudden attacks’ to military actions on our continental boundaries.”).

11. See Paul A. Hemesath, *Who’s Got the Button? Nuclear War Powers Uncertainty in the Post-Cold War Era*, 88 GEO. L.J. 2473, 2474 (2000) (arguing that the post-Cold War era demands a fresh look at the constitutional rules for using nuclear weapons).

12. See Yonkel Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 STAN. L. REV. 1543 (1988) (“As the dangers of war have increased exponentially since the time when the Constitution was ratified, the efficacy of the constitutional safeguards which were intended to limit the likelihood of war has dwindled dramatically.”).

13. *Id.*

Part VI, I will use a contextual analysis borrowed from international law to develop the constitutional principles that should guide our consideration of these questions. Part VII discusses some proposals to limit or regulate unilateral presidential power. Finally, Part VIII concludes this Article.

II. LEGAL SCHOLARSHIP ON THE BOMB

Before the first atomic bomb exploded at the Trinity test site, Enrico Fermi took bets with some of his Manhattan Project colleagues on whether or not the explosion would ignite the atmosphere.¹⁴ Fermi's bet annoyed some of the men engaged in the bomb's development.¹⁵ Months earlier, the scientists had worked out the calculations and showed that an atmospheric conflagration would not occur.¹⁶ Nevertheless, taking Fermi's money was not a sure thing.¹⁷ After all, the United States created the bomb in haste and under the pressure of war. Fears of a possible German development of an atomic weapon prompted the Manhattan Project.¹⁸ Scientists developed the first atomic bombs in an extraordinarily short amount of time: the Manhattan Project received the go-ahead in 1942 and tested its creation on July 16, 1945.¹⁹ One scientist apologized for a program that had "too frequently

14. ALLAN M. WINKLER, *LIFE UNDER A CLOUD: AMERICAN ANXIETY ABOUT THE ATOM* 30 (Oxford Univ. Press 1993); RICHARD RHODES, *MAKING OF THE ATOMIC BOMB* 664 (Simon & Schuster 1986) [hereinafter RHODES, *MAKING THE BOMB*].

15. RHODES, *MAKING THE BOMB*, *supra* note 14, at 664 (noting the statement made by General Leslie Groves, military head of the project: "I had become a bit annoyed with Fermi . . . when he suddenly offered to take wagers from his fellow scientists on whether or not the bomb would ignite the atmosphere and, if so, whether it would merely destroy New Mexico or destroy the world"). Kenneth Bainbridge, a fellow scientist, "was furious because Fermi's 'thoughtless bravado' might scare the soldiers" who did not have Fermi's knowledge of nuclear fission. *Id.*

16. John Horgan, *Bethe, Teller, Trinity and the End of Earth*, *SCI. AM.: CROSS-CHECK* (Aug. 4, 2015), <https://blogs.scientificamerican.com/cross-check/bethe-teller-trinity-and-the-end-of-earth/> [<https://perma.cc/3DJJ-3YSZ>].

17. RHODES, *MAKING THE BOMB*, *supra* note 14, at 664–65 ("[A] new force was about to be loosed on the world; no one could be absolutely certain—Fermi's point—of the outcome of its debut.").

18. R.G. GRANT, *WHY DID HIROSHIMA HAPPEN?* 17 (2011); RHODES, *MAKING THE BOMB*, *supra* note 14, at 403–07; *see id.* at 457 (explaining that Japan was also working on an Atomic Bomb); ROBERT S. NORRIS, *RACING FOR THE BOMB: GENERAL LESLIE GROVES, THE MANHATTAN PROJECT'S INDISPENSABLE MAN* 450 (2002) (concluding that only a few Japanese scientists had been working on atomic research with very little to show for it); *see also* THOMAS POWERS, *HEISENBERG'S WAR: THE SECRET HISTORY OF THE GERMAN BOMB*, at vii (1993).

19. F.G. GOSLING, *THE MANHATTAN PROJECT: MAKING THE ATOMIC BOMB* 63, 65 (1999).

reduced to guesswork and empirical shortcuts.”²⁰ Moreover, the scientists working on the project constantly went beyond the limits of both practical and theoretical knowledge as each corresponding step toward completion of the weapon brought new and unexpected problems.²¹ Finally, nothing like the new weapon had ever been tried before.²² No government had ever lavished the amount of money on the development of a weapon like the United States did on the Manhattan Project.²³ Neither had any government ever tested such a device before. The actual, as opposed to the theoretical result, was unknown.²⁴

Fermi’s macabre bet, and the uncertainty which generated it, illustrated the difficulty of thinking about nuclear weapons.²⁵ In 1945, no one really knew the precise effects of an atomic explosion. For example, the first atomic scientists greatly underestimated the amount of radiation released by nuclear fission (and later fusion).²⁶ Later, scientists also became aware of the electromagnetic pulse, a pulse of electricity that can disrupt and destroy the electrical systems of an entire continent.²⁷ Today scientists agree that large scale nuclear war would have a dramatic effect on the world’s climate.²⁸ They only disagree on how much of an effect it would have.²⁹

Seen through this haze of uncertainty, Einstein’s purported dictum—to change our way of thinking³⁰—becomes doubly difficult if we are not even

20. RHODES, MAKING THE BOMB, *supra* note 14, at 576 (quoting George B. Kistiakowsky).

21. *Id.* at 305. In 1939, Albert Einstein wrote a letter to a Belgian ambassador warning that the Nazis may be developing an atomic weapon. RICHARD RHODES, DARK SUN: THE MAKING OF THE HYDROGEN BOMB 433 (1995) [hereinafter RHODES, DARK SUN].

22. See RHODES, MAKING THE BOMB, *supra* note 14, at 576.

23. See JOEL LEVITT, MANAGING MAINTENANCE SHUTDOWNS AND OUTAGES 101 (1st ed. 2004).

24. See RHODES, MAKING THE BOMB, *supra* note 14, at 315.

25. MICHAEL QUINLAN, THINKING ABOUT NUCLEAR WEAPONS 13 (2009).

26. See Len Ackland, *U.S. Warhead Production*, BULL. OF THE ATOMIC SCIENTISTS, Jan./Feb. 1988, at 2; see also GERARD DEGROOT, THE BOMB: A LIFE 275–76 (2005) (describing the “shocking ignorance” of scientists who allowed soldiers to inspect the Japanese bombsites a few weeks after the attacks, even telling them to drink water from the local sources).

27. *Electromagnetic Pulse*, ACADEMIC AMERICAN ENCYCLOPEDIA (1989).

28. MALCOM CHALMERS, LESS IS BETTER: NUCLEAR RESTRAINT AT LOW NUMBERS 28 (Adrian Johnson & Ashlee Godwin eds., 2012).

29. RAYMOND L. MURRAY & KEITH E. HOLBERT, NUCLEAR ENERGY: AN INTRODUCTION TO THE CONCEPTS, SYSTEMS, AND APPLICATIONS (7th ed. 2015).

30. Einstein said, “The unleashed power of the atom has changed everything except our modes of thinking and we thus drift toward unparalleled catastrophe.” *Atomic Education Urged by Einstein*, N.Y. TIMES, May 25, 1946, at 13. He is also reported to have said, “The world as we have created it is a process of our thinking. It cannot be changed without changing our thinking.” However, little authority exists to definitively link him with this quote, and it may be

sure what we are supposed to be thinking about. For most people, the weight of technical difficulty, the staggering proportions, and the inevitable uncertainty leads to simplistic conclusions. Either they conclude that if nuclear weapons are ever used again it will mean an immediate end of the world or they conclude that the effects of nuclear war won't be as bad as predicted. As Leon Wieseltier has said, "If there is anything as foolish as not thinking about nuclear weapons, it is not thinking about them enough."³¹

By and large, legal scholarship has not given nuclear weapons enough thought.³² Shortly after World War II, William Borden, a lawyer, wrote one of the first strategic analyses of nuclear warfare.³³ Borden attacked the notion of mutual strategic deterrence.³⁴ He argued that war between world powers

a conflation of other similar statements. See *Albert Einstein*, WIKIQUOTE, https://en.wikiquote.org/wiki/Albert_Einstein [<https://perma.cc/529G-26TJ>].

31. LEON WIESELTIER, *NUCLEAR WAR, NUCLEAR PEACE 2* (1983).

32. Although not a legal scholar, Herman Kahn thought a lot about nuclear weapons at the beginning of the nuclear era. See generally HERMAN KAHN, *ON THERMONUCLEAR WAR* (1960) (arguing that mutually assured destruction was a flawed strategy and that the United States should plan to fight and win a nuclear war, and noting that Kahn's ideas greatly influenced the nation's nuclear policies and continue to do so to the present); HERMAN KAHN, *ON ESCALATION: METAPHORS AND SCENARIOS*, at x (Frederick A. Praeger 1965) [hereinafter KAHN, *METAPHORS AND SCENARIOS*]; SHARON GHAMARI-TABRIZI, *THE WORLDS OF HERMAN KAHN* 41 (2005) (discussing how Kahn's willingness to passionately discuss the consequences of nuclear war contributed to the creation of Dr. Strangelove in the satirical film of the same name).

33. See generally WILLIAM LISCUM BORDEN, *THERE WILL BE NO TIME: THE REVOLUTION IN STRATEGY* (1946). Borden would later write a letter to the FBI Director, J. Edgar Hoover, accusing the nuclear scientist, J. Robert Oppenheimer, of being a communist agent. See XV U.S. ATOMIC ENERGY COMM'N, *IN THE MATTER OF J. ROBERT OPPENHEIMER: TRANSCRIPT OF HEARING BEFORE PERSONNEL SECURITY BOARD* 2837, 2857 (1954), <https://www.osti.gov/includes/opennet/includes/Oppenheimer%20hearings/Vol%20XV%20Oppenheimer.pdf> [<https://perma.cc/2EJV-K4T3>] (documenting William Borden's reading of his letter, in full, before the Board). This letter led to an investigation of Oppenheimer and, ultimately, the revocation of Oppenheimer's security clearance and the end of his government career. See Barton J. Bernstein, *The Oppenheimer Loyalty-Security Case Reconsidered*, 42 STAN. L. REV. 1383, 1383–84 (1990). See generally KAI BIRD & MARTIN J. SHERWIN, *AMERICAN PROMETHEUS: THE TRIUMPH AND TRAGEDY OF J. ROBERT OPPENHEIMER* 478 (2005); GREGG HERKEN, *BROTHERHOOD OF THE BOMB: THE TANGLED LIVES AND LOYALTIES OF ROBERT OPPENHEIMER, ERNEST LAWRENCE, AND EDWARD TELLER* 267 (2002); PHILIP M. STERN, *THE OPPENHEIMER CASE: SECURITY ON TRIAL I* (1969).

34. BORDEN, *supra* note 33, at 87 ("A full scale atomic war will not be won by pulverizing cities and industry, though this may be done as an incidental measure, but by destroying the enemy's military power of retaliation."); see also *id.* at 225 ("Unless a world government intercedes in time, an attack on the United States will surely come.").

was inevitable³⁵ and that nuclear weapons would be used.³⁶ Because of this, the United States should prepare to fight and win a nuclear conflict.³⁷ He asserted that nuclear war could happen upon literally a moment's notice and its outcome decided over the course of a few hours.³⁸ Therefore, the President should at all times have the great powers that are typically only reserved for during a declared war.³⁹ Borden believed the President must have the power to "order any war prosecuted to a successful conclusion, regardless of the cost."⁴⁰ Indeed, as long as a vital minority of civilian defense workers remained loyal to the government, a nuclear war would not even need the support of the American people.⁴¹

Borden's premises—that nuclear war will come in an instant and therefore the President must have the power to respond immediately—have structured what little debate there has been about the constitutional aspects of nuclear war. The presidential scholar, Edward Corwin, included discussion about nuclear weapons in his critique of the post-war Constitution.⁴² In *Total War and the Constitution*, Corwin remarked that "if we take [the atomic bomb's] menace with proper seriousness," it will likely have "a considerable effect on both our industrial and our constitutional structure."⁴³ He added:

[T]he effect will not be confined to wartime (wars waged with atomic bombs are likely to be over in a few hours) but will spread through

35. *Id.* at 41 ("An armed peace cannot persist indefinitely, that either war or voluntary federation must resolve the truce."). Interestingly, Borden posited the inevitability of war only in the absence of powerful and effective international control over nuclear weapons. *See also id.* (Unless the Soviet Union and the United States "can unite in a single sovereignty . . . war between them is as inescapable as the physical law that oil and water do not mix.").

36. *See id.* at 28–29.

37. *See id.* at 225.

38. *Id.* at 84 ("In all human probability such a conflict would be brief and one-sided (perhaps lasting only a few hours . . .)").

39. *See id.* at 84–87 (explaining how quickly nuclear war could devastate the country when the approval of many is needed to retaliate).

40. *Id.* at 84.

41. *Id.*

42. Corwin published an essay in 1951 on the subject. *See* EDWARD S. CORWIN, *The Atom Bomb and the Constitution*, in CORWIN'S CONSTITUTION 167 (Kenneth D. Crews ed., 1986) [hereinafter CORWIN, *The Atom Bomb*]. The essay only briefly discussed presidential power. *See id.* at 188 (explaining that failure to seek declaration from Congress if defensive force leads to "real war" would be "one more step toward Presidential autocracy"). Rather, the essay focused on the need for international agreements and cooperation to defend against the use of nuclear weapons. *Id.* at 173.

43. EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 8 (1947) [hereinafter CORWIN, *TOTAL WAR*].

peacetime. The effect of the impact of total war on the Constitution will thus become embedded in our peacetime Constitution.⁴⁴

Although Corwin acknowledged the effect nuclear weapons might have on the structure of the government, his concern (at least initially) was the effect of this peacetime mobilization on individual rights.⁴⁵ In the end, he rejected the notion that atomic weapons made war “impossible.”⁴⁶ The atomic bomb, he noted wryly, “may have effectively prevented all future wars except the next one, but that is just the war that today has mankind so deeply, so justifiably troubled.”⁴⁷

Corwin was not specific, however, about how to reconcile the nuclear age with constitutional structure. In other contexts, he voiced his fear of “presidential autocracy.”⁴⁸ He saw Congress, not the courts, as the remedy to this problem: [E]scape must be sought from ‘presidential autocracy’ by resort not to the judicial power, but to the legislative power—in other words, by resort to timely action by Congress and to procedures for the meeting of emergency situations so far as these can be intelligently anticipated.⁴⁹

He argued for the creation of a joint congressional committee to supplant any individual committees and to receive all communications on nuclear policy.⁵⁰ In some unspecified way, this new committee would consult with the President and direct Congress take appropriate action. Presumably, these devices also applied to questions of nuclear strategy.

After Corwin, Raoul Berger was one of the first constitutional scholars to address the question of the application of constitutional norms to modern warfare.⁵¹ Berger did not address nuclear war directly in his scholarship, however. Rather, he publicly endorsed the Federation of American Scientists’ (FAS) proposal to rein in the President’s power through the creation of a

44. *Id.*

45. *Id.* at 181; see also EDWARD S. CORWIN, *Our Constitutional Revolution and How to Round It Out*, in *PRESIDENTIAL POWER AND THE CONSTITUTION* 157, 160–61 (Richard Loss ed., 1976) (noting that war watered down the notion of enumerated powers).

46. See CORWIN, *TOTAL WAR*, *supra* note 43, at 9.

47. *Id.* at 9–10.

48. See CORWIN, *The Atom Bomb*, *supra* note 42, at 188.

49. Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 66 (1953).

50. EDWIN S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 298 (4th rev ed. 1957) [hereinafter CORWIN, *OFFICE AND POWERS*].

51. Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 80–82 (1972).

consultation committee.⁵² Berger supported the FAS proposal saying that “the authority ‘to repel attacks’ does not give the president any blanket authority to conduct war.”⁵³ It was “an extraordinary interpretation,” to say “that once we have been fired upon, Congress just becomes a wooden Indian” with “no further participation” in a war.⁵⁴

Berger’s discussion is short like Corwin’s but for a different reason. Corwin was constrained by the lack of development. He acknowledged that his remarks on the subject were premature because “the strategy from the horrendous discovery has still to be elaborated.”⁵⁵ His remarks at that time were tentative and introductory because the technology was new. Berger, on the other hand, was constrained by more remote events. To him, the intent of the Framers as evidenced by the historical record guided all questions of constitutional interpretation.⁵⁶

Berger advocated a return to the original constitutional distribution of powers.⁵⁷ Berger believed that “Congress, not the President, was given virtually plenary power to deal with all facets of war-making,” leaving the President only the power to repel sudden attacks on the U.S.⁵⁸

Corwin disagreed with the notion that the Constitution “contained in embryo from the outset the entirety of constitutional law.”⁵⁹ Although this overstates Berger’s position, his fidelity to the Framers is the hallmark of his

52. Charles Mohr, *Nuclear First Use is Revived as an Issue*, N.Y. TIMES, Sept. 9, 1984, § 1, at 19.

53. Murrey Marder, *Scientists Call for an ‘Additional Lock’ on The Nuclear Trigger*, WASH. POST, Sept. 9, 1984, at A14.

54. *Id.*

55. CORWIN, *The Atom Bomb*, *supra* note 42.

56. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 3 (1977) [hereinafter BERGER, *GOVERNMENT BY JUDICIARY*]; Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 353–54 (1988) [hereinafter Berger, *Originalist Theories*].

The cardinal index of constitutionality is the Constitution itself, not what others have said about it . . . we must look at the Constitution with eyes unclouded by the opinions of others. On so great a constitutional issue, nothing less suffices than the most searching analysis of the immediately relevant text and what the Framers *stated* they meant to accomplish by it.

Berger, *supra* note 51, at 31–32.

57. Berger, *supra* note 51, at 29.

58. *Id.* at 45.

59. EDWARD S. CORWIN, *The Dissolving Structure of Our Constitutional Law*, in *PRESIDENTIAL POWER AND THE CONSTITUTION*, *supra* note 45, at 141, 142. Corwin maintained this view in his later works. See EDWIN S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 7–9, 12–13 (1955); EDWIN S. CORWIN, *The President’s Power*, in *THE PRESIDENT: ROLE AND POWERS* 361 (1965); CORWIN, *OFFICE AND POWERS*, *supra* note 50.

constitutional scholarship.⁶⁰ Nevertheless, they both agree that the President has the power to defend the country by retaliating against a sneak nuclear attack.

Neither Corwin nor Berger say very much about the relationship of constitutional war powers and nuclear warfare because their statements were part of larger works written against the background of more immediate and practical events.⁶¹ Therefore, nuclear weapons were not the specific focus of their work. For Corwin, Franklin Delano Roosevelt's "aggrandizement" of power during World War II and its perpetuation thereafter obliterated what Corwin called the "constitutional law of peace."⁶² Berger wrote during the late Vietnam War era when Congress was either debating or had just enacted the War Powers Act.⁶³

In contrast, Arthur S. Miller's concern was nuclear war.⁶⁴ In 1982, Miller wrote that "[t]he time has come for lawyers to confront the question of whether nuclear weapons—their manufacture, deployment, and use—can be justified under constitutional or international law."⁶⁵ Miller, quoting Einstein, declared that the time had come to "change our modes" of thinking about the constitutionality of nuclear weapons and sought in his work to do that.⁶⁶ Miller outlined five possible constitutional sources for his claim that nuclear weapons were unconstitutional: the Preamble,⁶⁷ the congressional war power,⁶⁸ the constitutional power to punish offenses,⁶⁹ and the integration of international law norms into the Constitution.⁷⁰ A fifth argument—that government has an affirmative duty to protect the citizens—springs from several sources, most importantly the Due Process Clause.⁷¹

60. See Berger, *Originalist Theories*, *supra* note 56; Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 U. IND. L.J. 619, 619 (1997).

61. See Berger, *supra* note 51, at 47.

62. CORWIN, *TOTAL WAR*, *supra* note 43, at 149–50, 184.

63. War Powers Resolution, 50 U.S.C. § 1543 (2012). See generally BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 56 (writing on how interpretations of the Fourteenth Amendment were counter to the Framers' underlying intent).

64. Arthur S. Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA L. REV. 21, 21–23 (1982).

65. *Id.* at 21.

66. *Id.* at 23.

67. *Id.* at 27.

68. *Id.* at 29.

69. *Id.* at 32.

70. *Id.* at 33.

71. *Id.* at 35.

Miller's work is significant. It is the first piece of constitutional scholarship addressed to the problem of nuclear war. Its creativity stimulated thought on the problem. It is flawed, however. His argument concerning the Preamble illustrates the flaws found throughout his work.

Miller cannot settle on a position to take in regard to the Preamble. At first, he wants to give it substantive content.⁷² Miller argued that the goals of the Preamble provided a starting point for more detailed analysis.⁷³ Nuclear weapons threaten these goals: to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessing of liberty on ourselves and on our posterity.⁷⁴ He concluded that "no one can argue that threatening the very existence of 'posterity' can be constitutional."⁷⁵

This seems to imply that once the substance was ascertained it could be enforced, but he is quick to qualify this statement: "The [P]reamble is not part of the Constitution," he says "[i]t precedes it."⁷⁶ It "sets the tone for the meaning to be given to the specific provisions" of the Constitution.⁷⁷ Yet this cannot be his argument, however. Many people can argue nuclear weapons

72. *Id.* at 27.

73. *See id.* at 28.

74. *Id.*; *see* U.S. CONST. pmbl.

75. Miller, *supra* note 64, at 28. For an invocation of posterity to argue against the holding in *Roe v. Wade*, see Raymond Marcin, "Posterity" in the Preamble and a Positivist Pro-Life Position, 38 AM. J. JURIS. 273, 283 (1993) ("In light of the case law on [p]reambles in general and on the Preamble to the Constitution of the United States in particular, it would seem that some limited use may be made of the 'Blessings of Liberty to . . . our Posterity' clause in shedding light on the spirit behind the [F]ifth and [F]ourteenth [A]mendments' rights to life and liberty.").

76. Miller, *supra* note 64, at 27. This is the conventional position. *See* Jacobson v. Massachusetts, 197 U.S. 11, 13 (1905) ("Although [the United States' Constitution's] Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the Preamble, it be found in some express delegation of power or in some power to be properly implied therefrom."). *But see* John W. Welch & James A. Heilpern, Recovering Our Forgotten Preamble, 91 S. CAL. L. REV. 1021, 1022 (2018) (arguing that the Preamble "deserves a primary place in constitutional law, in federal judicial decision-making, and in the nation's civic discourse").

77. *See* Miller, *supra* note 64, at 27; *see also* Kenneth Shuster, *Because of History, Philosophy, the Constitution, Fairness & Need: Why Americans Have a Right to National Health Care*, 10 IND. HEALTH L. REV. 75, 89–91 (2013) (arguing that the Preamble supports a constitutional right to health care).

very effectively advance the goals of the Preamble.⁷⁸ Indeed, the notion of mutual deterrence quite clearly provides for the common defense and protects posterity in a way that other conventional means cannot; it makes total war absolute and therefore unthinkable.⁷⁹ Miller's argument from the Preamble does not advance his ultimate thesis unless the Preamble is given substantive content. Thus, we see Miller arguing essentially this syllogism: The Preamble requires the protection of posterity, and nuclear weapons will wipe out posterity, thereby rendering nuclear weapons as unconstitutional.⁸⁰

Miller also feints in the direction of natural law. After again disclaiming that the Preamble has any enforceable content, he goes on to say that its goals implicate "a higher law than the Constitution."⁸¹ He asks somewhat rhetorically, "[C]an a principle of natural justice . . . be employed to determine the validity of nuclear weapons?"⁸² He gives an unqualified affirmative answer.⁸³ His position is ripe with possibility. One wants to know the source of these great principles, their content, and their discernment. The structural implication of this natural law thesis raises many questions. Yet Miller leapfrogs the specifics of the argument: "Without going further into the complex question of natural justice, what particular provisions . . . are conceivably relevant to the nuclear weapons situation?"⁸⁴ Miller raises the issue of natural law, then abandons it. If the Preamble implicates natural law, then these implications need to be explored. If the Preamble does not implicate natural law, then raising it in connection with Miller's argument concerning the Constitution makes little sense.

78. See cf. C. Dean McGrath Jr., *The Genius of the Constitution: The Preamble and the War on Terror*, 3 GEO. J.L. & PUB. POL'Y 13, 18 (2005) (arguing that the Preamble provided support for the Bush Administration's war on terror policies).

79. See Lori Fisler Damrosch, *Banning the Bomb: Law and Its Limits*, 86 COLUM. L. REV. 653, 660 (1986) (reviewing *NUCLEAR WEAPONS AND LAW* (Arthur S. Miller & Martin Feinrider eds., 1984)) ("The problem with basing a constitutional argument against nuclear weapons on the desire for self-preservation is that no one has yet devised a better way to defend the United States against nuclear destruction than through the maintenance of a credible nuclear force to deter the execution of external threats.").

80. See Miller, *supra* note 64, at 28 ("Since nuclear weapons threaten the goals of the [P]reamble, the meaning is that there will be no posterity left to pick up the pieces after the bombs have exploded. Not only will the constitutional order have vanished, but quite possibly civilization itself. No one can validly argue that threatening the very existence of 'posterity' can be constitutional.").

81. *Id.* at 28 (quoting Governor William Seward, Speech to the United States Senate (Mar. 11, 1850)).

82. *Id.* at 29.

83. *Id.*

84. *Id.*

Finally, without natural law, one is left with the contradiction between Miller's assertions of a contentless Preamble and a Preamble that affirmatively requires the protection of posterity. One searches in vain in the rest of the article for the resolution of this conflict.

Only when Miller reaches his fifth point—that the government has an affirmative duty to protect the people—does he return briefly to the Preamble.⁸⁵ Indeed, it's not even clear that Miller keeps faith with his initial proposition that the Preamble sets the tone for the interpretation of the rest of the Constitution.⁸⁶ In short, Miller's arguments turn constitutional law on its head. He seems to say that nuclear weapons are terrible; therefore, they must be unconstitutional.⁸⁷ If there is to be a legal condemnation of nuclear weapons, the Constitution, with its accumulated baggage of history, custom, and precedent must do so. It does not serve the cause of constitutional government to allow our fear of nuclear war to swallow the document. If we worry about the death of law through nuclear holocaust, we must not engage in a kind of symbolic nuclear destruction of the Constitution.⁸⁸

Miller seems to recognize this.⁸⁹ The strongest (and longest) part of his article is a more or less conventional analysis of the war powers of Congress where he argues that Congress, not the President, has the exclusive power to make war.⁹⁰

In their 1986 book, *To Chain the Dog of War*,⁹¹ Francis Wormuth and Edwin Firmage devote a chapter to the question of the constitutional war power and nuclear weapons.⁹² They argue that the Constitution gives Congress the war power “leaving the President only limited authority to act unilaterally in extraordinary situations.”⁹³ This division of power “reflects the

85. Miller, *supra* note 64, at 36.

86. *Id.* at 31–32 (“Circumstances have changed so radically since 1787, and even since the first primitive atom bombs were exploded in 1945, that old practices and old modes of thinking about constitutional propriety must be re-examined. New doctrine must be discovered: The government must be obliged, as Madison said, to control itself.”).

87. *See id.* at 28; *see also id.* at 36 (“Nuclear weapons so endanger the lives, liberties, and property of all Americans that they should be considered to be a deprivation contrary to due process.”).

88. *See* Stephen Carter, *War Making Under the Constitution*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?* 109 (Peter Raven-Hansen ed., 1987).

89. *See* Miller, *supra* note 64, at 32.

90. *Id.* (“To permit the President alone to have the power to trigger thermonuclear war is contrary both to the letter and the spirit of the Constitution. The failure of Congress to retrieve its war-making authority can no longer be tolerated.”).

91. FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* (Univ. of Ill. Press, 2d ed. 1989).

92. *Id.* at 271–82.

93. *Id.* at 271.

[F]ramers' desire that deliberation and debate be brought to bear on any decision so momentous as to commit the nation to war."⁹⁴ Unfortunately, nuclear war "seems to preclude the luxury of deliberation and debate, requiring instead secrecy and dispatch."⁹⁵

Although some conclude that nuclear war renders the Constitution's division of power obsolete,⁹⁶ Wormuth and Firmage resist this temptation. Instead, they argue that the unique nature of nuclear war requires particular attention to the Constitution's allocation of war making authority more than ever:

The [F]ramers' judgment, inescapably value-laden was that, matters of war and peace—now writ large, in matters of extinction and survival—collective conscience, rather than individual whim, must prevail. If the [F]ramers were chary of permitting the President to wield muskets and sail ships surely we must pause to consider the wisdom of allowing our presidents to unilaterally control the vast nuclear arsenal.⁹⁷

Nuclear weapons change the nature of warfare in several ways. First, they are qualitatively different from other weapons in their sheer destructive power.⁹⁸ Second, modern delivery systems are quick, accurate, and widely dispersed.⁹⁹ Third, there are tens of thousands of nuclear weapons dispersed among the (growing) handful of countries in the nuclear club.¹⁰⁰ Fourth, the devastation wrought by all out nuclear war is almost unimaginable.¹⁰¹

94. *Id.*

95. *Id.*

96. *See, e.g.,* Carter, *supra* note 88, at 123.

97. WORMUTH & FIRMAGE, *supra* note 91, at 272.

98. *Id.* When *To Chain the Dog of War* was published in 1989, the world's nuclear arsenals possessed more than 6,000 times the destructive potential of all the shells fired and bombs dropped in World War II—including the Hiroshima and Nagasaki bombs. *Id.* For a description of the development of the incomparably more powerful Hydrogen Bomb, see generally RHODES, *DARK SUN*, *supra* note 21.

99. WORMUTH & FIRMAGE, *supra* note 91, at 272–73. It took the plane carrying the Hiroshima bomb six and a half hours to travel 1,700 miles, but intercontinental ballistic missiles travel thousands of miles in minutes and nuclear submarines patrolling the oceans place weapons even closer to their intended targets. *Id.* at 273.

100. *Id.* This number of weapons and their dispersal raises the possibility of accidental nuclear war. *Id.* at 273–74.

101. *Id.* at 274–77. Over 1 billion people could be killed immediately in an all-out nuclear exchange while another billion people would die within six months from radiation sickness. *Id.* at 274–75. In addition, millions more would perish from the environmental and social effects of a nuclear exchange: nuclear winter and a breakdown of social order. *Id.* at 275–76. Wormuth

These changes to warfare dictate a return to the Framers' approach to war making:

Surely the wisdom of the [F]ramers is unassailable: deliberation and debate are essential before this nation commits itself to those initial steps toward nuclear war that, once taken, may not be retraceable. Congressional powers over the conduct of foreign relations and, ultimately, the war power, must be invoked before the state becomes committed to a course of conduct that is deterministic and irreversible, a course that allows not alternative to nuclear war.¹⁰²

Legal scholarship on the constitutional dimensions of nuclear war reached its zenith with the publication of *First Use of Nuclear Weapons: Under the Constitution, Who Decides?*¹⁰³ This collection of essays grew out of a symposium hosted by the Federation of American Scientists and the Lawyers Alliance for Nuclear Arms Control.¹⁰⁴ The topics ranged from presidential first use¹⁰⁵ to the allocation of constitutional power¹⁰⁶ to specific suggestions for implementing controls on the use of nuclear weapons.¹⁰⁷

Jeremy Stone, whose essay was published in that collection, argued that the first use of nuclear weapons was unconstitutional.¹⁰⁸ Stone conceded that “few would question the right of a President to respond with nuclear weapons” to a nuclear attack but the first use of nuclear weapons “raises quite different questions.”¹⁰⁹ Unlike a sudden surprise nuclear attack, conventional wars are not won or lost in minutes.¹¹⁰ Indeed, it would take several hours to release the tactical nuclear weapons to be used in the most likely scenario: an attack

and Firmage noted that experts “grimly concluded, extinction of the human species itself cannot be excluded.” *Id.* at 276.

102. WORMUTH & FIRMAGE, *supra* note 91, at 277.

103. FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 88. For an earlier compendium, see NUCLEAR WEAPONS AND THE LAW (Arthur Selwyn Miller & Martin Feinrider eds., 1984).

104. FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 88, at vii.

105. See Jeremy J. Stone, *Presidential First Use Is Unlawful*, in FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 88, at 3.

106. See *Debate: Allocating War Powers Under the Constitution*, in FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 88, at 93.

107. See Carter, *supra* note 88, at 109.

108. Stone, *supra* note 105, at 4.

109. *Id.* at 5.

110. *Id.*

on a NATO ally.¹¹¹ This would give the President ample time to consult on the decision. He noted:

[S]etbacks in a conventional war overseas would not cost the United States its existence, its freedom, or its ability to pursue the conflict over time and in other ways, as America did in two world wars.¹¹²

Stone argued that the Constitution requires Congress to authorize offensive use of the military.¹¹³ Using nuclear weapons to respond to a non-nuclear attack is so disproportionate that it constitutes “an entirely new war in common-sense terms.”¹¹⁴ In legal terms, the first use of nuclear weapons without a declaration of war “would have gone from trying to ‘repel’ an attack on our forces and allies abroad to initiating just that kind of much wider commitment that the Founding Fathers wanted to be made by Congress.”¹¹⁵

Professor John Norton Moore disagreed with Stone. To Moore, it is:

[A] paradigm principle of American constitutional law that the President may conduct hostilities against an attacking nation, including *in extremis* making decisions to employ nuclear weapons in settings where, as here, Congress has not enacted any prohibition on such use.¹¹⁶

The more interesting (and real) constitutional question, according to Moore, was “the power of Congress to place policy limits on the exercise by the President of his power as Commander in Chief to conduct hostilities.”¹¹⁷ Moore notes that the issue is unsettled and the sources ambiguous.¹¹⁸ Indeed, the sources are circular.¹¹⁹ Ultimately, Moore doubts that Congress can put

111. *Id.* at 5, 8.

112. *Id.* at 5.

113. *See id.*

114. *Id.* at 8.

115. *Id.*

116. John Norton Moore, *The Constitution, Nuclear Weapons, and Deterrence: An Analysis of the FAS Proposal*, in *FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?*, *supra* note 88, at 23, 29.

117. *Id.*

118. *Id.*

119. *Id.* (first citing *Swaim v. United States*, 128 Ct. Cl. 173, 221 (1893), *aff'd*, 165 U.S. 553 (1897) (“The President cannot, under the disguise of military orders, evade the legislative regulations by which he in common with the Army must be governed; and Congress cannot in the disguise of ‘rules of government’ of the Army impair the authority of the President as commander in chief.”); and then citing *United States v. Myers* 272 U.S. 52 (1926) (holding that

any limits on the Commander in Chief power.¹²⁰ Even if the legal issue were resolved in favor of Congress, “its real world effect would be to reduce deterrence and crisis stability.”¹²¹

Robert Turner took a less measured approach in his essay. Turner argued that any limits on the President’s Commander in Chief power would be “flagrantly unconstitutional . . . and rather than promote peace, [it] would weaken our deterrent and make both conventional and nuclear war more likely.”¹²² Turner asserted that the Framers vested the “supreme command” of the military in the President.¹²³ Congress could do nothing to limit or direct this command.¹²⁴ Impeachment was the only constitutional remedy for a President who wrongly started a war.¹²⁵

Professor Stephen Carter adopted a position based both on the system of checks and balances, and the separation of powers. He argued that the President may use nuclear weapons to defend the country or its interests even in response to a conventional attack but that Congress may restrict the President’s ability to do so.¹²⁶ Carter said, “We cannot wish nuclear weapons

Congress cannot invade powers held exclusively by the President)). The real question is whether the power to engage in offensive action is one of the President’s exclusive powers.

120. Moore, *supra* note 116, at 33–34.

121. *Id.* at 34 (“[T]he no first use proposals, in both their substantive and procedural variants, seem largely cosmetic.”).

122. Robert Turner, *Congressional Limits on the Commander in Chief: The FAS Proposal*, in *FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?*, *supra* note 88, at 36, 36. Turner responded to Stone’s proposal to create a consultation committee that could veto Presidential action. This specific proposal would be unconstitutional. Turner’s objection would extend to any limitation on the President’s commander in chief power. See *INS v. Chadha*, 462 U.S. 919, 959 (1983).

123. Turner, *supra* note 122, at 39 (“[T]he supreme command—and all decisions which accompany it, such as where to deploy forces in peacetime to deter war, and what forces and weapons to employ, and in what manner in order to defeat an enemy in the event hostilities break out—are confided exclusively by the Constitution in the President.”). Curiously, Turner did not cite Federalist 69 where Hamilton used the “supreme command” phrase seemingly to downplay the President’s commander in chief power. See, e.g., LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 246 (Univ. Press of Kan., 3d ed. rev. 1991) (observing that *Federalist* 69 offered a “modest definition” of President’s power).

124. Turner, *supra* note 122, at 39.

125. *Id.* Moore accuses Stone of being unrealistic, but one wonders whether impeachment is a realistic expectation in the era of Mutually Assured Destruction. The danger no first use proposals address is the possible escalation of a conventional conflict to a thermonuclear exchange of strategic missiles. Edwin E. Smith, *Congressional Authorization of Nuclear First Use: Problems of Implementation*, in *FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?*, *supra* note 88, at 169, 174 (arguing impeachment is no remedy if there is no functioning country left).

126. Carter, *supra* note 88, at 110. Carter approves this power so long as Congress properly uses one of its delegated powers and does not exceed any limits on those powers. *Id.*

away, and we cannot excise them through judicial fiat either.”¹²⁷ Even though a nuclear bomb “is a weapon of almost unimaginable destructive power,” that fact is “devoid of constitutional significance.”¹²⁸ This new crisis demands a wise political solution but Carter believed that:

[T]he urgent necessity for political solutions to the nuclear conundrum does not alter the meaning of the structural provisions establishing the system of balanced and separated powers. And under those provisions, unless Congress acts, the discretion to use or abuse all American armed forces rests with the President of the United States.¹²⁹

According to Carter, we may not have much of country left standing after a full nuclear exchange, but we should not ignore the Constitution in pursuit of our security.¹³⁰

III. THE DEVELOPMENT OF NUCLEAR POLICY

By the late 1960s, the structure of United States nuclear policy had taken shape: the United States would launch a devastating nuclear attack on the Soviet Union if attacked with nuclear weapons and reserved the right to launch a nuclear attack if the Soviet Union attacked U.S. NATO allies.¹³¹ This policy formed in the Cold War era when the Soviet Union, and its nuclear-armed ally China, were the primary adversaries to the United States and its nuclear-armed allies.¹³²

Much prior scholarship proceeds from the assumption that nuclear war will occur quickly and end quickly, and that total destruction of at least the United States, if not the world, will result.¹³³ This perception arises from the doctrine of mutual assured destruction.¹³⁴

127. *Id.* at 119.

128. *Id.*

129. *Id.*

130. *Id.* at 122.

131. See generally RICHARD RHODES, ARSENALS OF FOLLY: THE MAKING OF THE NUCLEAR ARMS RACE (2007) [hereinafter RHODES, ARSENALS OF FOLLY]; DONALD M. SNOW, NUCLEAR STRATEGY IN A DYNAMIC WORLD: AMERICAN POLICY IN THE 1980S (1981).

132. SNOW, *supra* note 131, at 51; RHODES, ARSENALS OF FOLLY, *supra* note 131, at 74. See generally FRED KAPLAN, THE WIZARDS OF ARMAGEDDON 148–54 (1991).

133. See Col. Alan J. Parrington, USAF, *Mutually Assured Destruction Revisited: Strategic Doctrine in Question*, AIRPOWER J., Winter 1997, at 5, 6.

134. *Id.*

This doctrine started quite early in the Post-Hiroshima era¹³⁵ and took shape in the Eisenhower Administration as a “massive retaliatory power,”¹³⁶ positing that if nuclear weapons are used against the United States, the country will reply with such force as to assure the total destruction of the adversary.¹³⁶ Even then, however, the purely deterrent function of nuclear weapons became mixed with other, more aggressive uses. For example, in 1947 the Joint Chiefs of Staff argued for the necessity of the “Super Bomb” (the Hydrogen Bomb) because they concluded:

[It was] necessary to have within the arsenal of the United States a weapon of the greatest capability, in this case the super bomb. Such a weapon would improve our defense in its broadest sense, as a potential offensive weapon, a possible deterrent to war, a potential retaliatory weapon, as well as a defensive weapon against enemy forces.¹³⁷

A silent premise of this doctrine is that the United States will not be the first country to use its nuclear weapons.¹³⁸ The popular perception then was that a massive Soviet attack on U.S. cities and military installations would justify a similarly massive attack on the Soviet Union.¹³⁹

The leading proponent of massive retaliation in the Eisenhower years, General Curtis LeMay, remarked that such an attack would leave the Soviet Union, a “burning, irradiating rubble.”¹⁴⁰ LeMay argued for targeting large military or industrial complexes within urban areas because even if the bombs missed their precise targets, they would inflict what he called “bonus damage.”¹⁴¹

135. See SNOW, *supra* note 131, at 50 (discussing how the Russian explosion of an atomic bomb caught the United States off guard and led to the first statement on nuclear policy, NSC-68, a hastily drafted document that simply asserted United States nuclear superiority).

136. See Parrington, *supra* note 133; see also SHELDON M. COHEN, *ARMS AND JUDGMENT: LAW, MORALITY, AND THE CONDUCT OF WAR IN THE TWENTIETH CENTURY* 166–72 (1989).

137. RHODES, *ARSENALS OF FOLLY*, *supra* note 131, at 76 (quoting Memorandum by the Joint Chiefs of Staff to the Secretary of Defense (Johnson) (1950), reprinted in 1 *FOREIGN RELATIONS OF THE UNITED STATES 1950: NATIONAL SECURITY AFFAIRS; FOREIGN ECONOMIC POLICY* 503, 505 (Neal H. Petersen et al. eds., 1977)).

138. RHODES, *ARSENALS OF FOLLY*, *supra* note 131, at 81 (“McGeorge Bundy, the national security advis[o]r to Presidents John F. Kennedy and Lyndon Johnson stated . . . ‘[T]here has been literally no chance at all that any sane political authority . . . would consciously choose to start a nuclear war.’”); see BORDEN, *supra* note 33, at 19–21.

139. John Foster Dulles, *The Evolution of Foreign Policy*, *AIR FORCE MAGAZINE*, Jan. 12, 1954, at 1.

140. RHODES, *ARSENALS OF FOLLY*, *supra* note 131, at 84.

141. *Id.* at 80.

LeMay and others urged the United States to prepare for and wage “total war from the first hour of a conflict than allow it to drag on and consume more lives.”¹⁴² Because they believed that it was impossible to defend the country from nuclear attack, they argued for the development of an arsenal of overwhelming strength and power designed to “kill more women and children more quickly than the enemy.”¹⁴³ Thus, LeMay established what he called his “Sunday Punch”: an assault strategy where the United States would develop overwhelming and redundant nuclear weaponry and launch most of its stockpile in its first attack.¹⁴⁴ This would leave the Soviet Union “a smoking, radiating ruin.”¹⁴⁵ LeMay could have said the same about the United States.

A significant number of nuclear strategists never accepted this notion, however.¹⁴⁶ They always maintained that nuclear strategy should not be geared to the all-out attack and response, the “wargasm” Herman Kahn called it.¹⁴⁷ Rather, United States nuclear policy must be geared to fight and to win a nuclear war.¹⁴⁸ Much of American nuclear production and deployment through 1974 was a response to the arguments for a war fighting capacity.¹⁴⁹

This policy began to evolve as the Cold War thawed and the security environment changed.¹⁵⁰ The Soviet Union collapsed, China became more powerful and independent, more countries acquired nuclear weapons, and the threat of non-state terrorism loomed.¹⁵¹ Even before then, however, nuclear strategists developed a war fighting alternative to mutually assured destruction. Paul Nitze, an influential strategic thinker, urged the adoption of a nuclear war posture that replicated the success of World War II’s air campaign in Europe.¹⁵² Treating nuclear weapons as simply larger, more

142. *Id.*

143. *Id.* at 80–81. Stanley Baldwin, the British Prime Minister after World War I, was referring to the development of air power as a crucial element of defense strategy. *Id.* LeMay paraphrased Baldwin when he remarked that stopping an air attack once launched would be impossible and, therefore, the United States had to be prepared to retaliate in kind against any such attack. *Id.*

144. *Id.* at 84.

145. *Id.*

146. 1956: EUROPEAN AND GLOBAL PERSPECTIVES 97–98 (Carole Fink et al. eds., 2006).

147. KAHN, METAPHORS AND SCENARIOS, *supra* note 32, at 194.

148. TOM SAUER, NUCLEAR INERTIA: US NUCLEAR WEAPONS POLICY AFTER THE COLD WAR 40 (2005).

149. INTELLIGENCE POLICY AND NATIONAL SECURITY 127 (Robert L. Pfaltzgraff, Jr. et al. eds., 1981).

150. SAUER, *supra* note 148, at 40. *See generally* RHODES, ARSENALS OF FOLLY, *supra* note 131; SNOW, *supra* note 131.

151. *See* COHEN, *supra* note 136, at 172 (implying that the Soviet Union became less of a threat after the Cold War).

152. *See* RHODES, ARSENALS OF FOLLY, *supra* note 131, at 103. Nitze went on to participate in defense planning for the Truman Administration. *Id.* at 103–04.

powerful conventional armaments, Nitze urged an initial focus on military targets to clear the way for the bombing of the enemy's cities.¹⁵³ He dubbed this a "counterforce" strategy in opposition to LeMay's "countervalue" strategy.¹⁵⁴

It was not until 1974, however, that war fighting became the official policy of this country when the Secretary of Defense James Schlesinger announced the doctrine bearing his name.¹⁵⁵ The Schlesinger doctrine purported to give the President more nuclear options than simply destroying enemy cities.¹⁵⁶ Rather, Schlesinger claimed that the new plan consisted of a series of limited nuclear options which ranged from the destruction of a few missile sites, cities, or industries to counterforce warfare—full-scale strikes at Soviet military installations and the industries which support it.¹⁵⁷ Schlesinger also noted the ability to "implement response options that cause far less civilian damage".¹⁵⁸ The Carter Administration perfected the Schlesinger doctrine in Presidential Directives NSC 50-59.¹⁵⁹ These documents went beyond both the notion of selectivity to victory and the plan for management of a protracted nuclear conflict.¹⁶⁰ They provided justifications for counterforce weapons as well as other measures designed to ensure that the United States would prevail in a nuclear war. Indeed, the old term counterforce was replaced by the word "countervailing" to signify the new approach.¹⁶¹ Moreover, the directives provided for the use of nuclear weapons in support of ground troops who survive an earlier nuclear exchange.¹⁶²

American nuclear policy since the announcement of the Schlesinger doctrine has followed its direction. Counterforce weapons system like the MX missile and the B-1 bomber; technical improvements like multiple independently targetable reentry vehicles and increased accuracy; and defensive measures like the Strategic Defense Initiative and civil defense plans were all part of the re-tooling of American nuclear doctrine from

153. *Id.* at 103.

154. *Id.*

155. JAMES SCHLESINGER, ANNUAL DEFENSE DEPARTMENT REPORT 1, 3 (1974); *see* COHEN, *supra* note 136, at 172.

156. SCHLESINGER, *supra* note 155, at 4.

157. *See id.* at 35–41.

158. *Id.* at 41.

159. *See* Carter Administration, *Presidential Directives*, FED'N OF AM. SCIENTISTS, <https://fas.org/irp/offdocs/pd/index.html> [<https://perma.cc/GVL5-6M8A>] (citing Presidential Directives NSC-56 to NSC-59); *see also* RHODES, ARSENALS OF FOLLY, *supra* note 139, at 146.

160. *See id.* (citing Presidential Directives NSC-50 to NSC-59).

161. *Id.*

162. *Id.*

deterrence to war fighting.¹⁶³ The Reagan Administration never developed a new strategic doctrine. Rather, its policies suggested an endorsement of the war fighting notions enshrined in National Security Decision Memorandum 26.¹⁶⁴

Beginning with the Clinton Administration,¹⁶⁵ presidents began to issue periodic Nuclear Posture Reviews.¹⁶⁶ The 1994 review kept deterrence as the centerpiece of nuclear strategy but suggested that nuclear forces be reduced to the minimum needed to maintain deterrence.¹⁶⁷ In 1996, however, the Clinton Administration suggested that the United States might use nuclear weapons in response to a chemical attack.¹⁶⁸ By 2002, the United States expressly added the deterrence of the use of weapons of mass destruction by nation states and terrorist organizations to its nuclear weapons policy.¹⁶⁹

163. RHODES, ARSENALS OF FOLLY, *supra* note 131, at 136–37, 157–58.

164. *Id.* at 168. For example, the Reagan Administration pursued the Strategic Defense Initiative (SDI), a proposed defense against nuclear attack that included, among other things, space-based weapons. *Id.* at 243. Sadly, President Reagan's attachment to the SDI led to the collapse of the Iceland talks with then Soviet Premier Gorbachev when the two leaders were on the verge of agreeing to the total elimination of two countries' nuclear weapons. *Id.* at 236–70; see also RICHARD RHODES, TWILIGHT OF THE BOMBS: RECENT CHALLENGES, NEW DANGERS, AND THE PROSPECT FOR A WORLD WITHOUT NUCLEAR WEAPONS 4–5 (2010) (stating that parties came close to agreement ridding the world of nuclear weapons but faltered over the question of the SDI).

165. DEP'T OF DEF., NUCLEAR POSTURE REVIEW (1994); Michael Rubner, *U.S. Nuclear Weapons Policy in the Post Cold War Era*, 9 MICH. ST. U.-DCL J. INT'L L. 271, 274 (2000) (reviewing nuclear policy from the Clinton and the first Bush presidencies).

166. See Anna Péczeli, *The Next Nuclear Posture Review: Bring in State, Energy and Allies*, BULLETIN.ORG (Apr. 25, 2017), <https://thebulletin.org/2017/04/the-next-nuclear-posture-review-bring-in-state-energy-and-allies/> [<https://perma.cc/8TZY-7X24>]. Congress mandated the reviews during the Bush and Obama Administrations. *Id.* Thus, they differ in process, content, and scope from the Clinton and Trump reviews. In any event, these reviews are designed to set out the country's nuclear policy and strategy for the next 5–10 years. *Id.* President Trump ordered the Nuclear Posture Review as part of his Administration's effort to “rebuild” the nation's armed forces. Presidential Memorandum on Rebuilding the U.S. Armed Forces, 2017 DAILY COMP. PRES. DOC. 77 (Jan. 27, 2017).

167. Nuclear forces will be “smaller, safer, more secure, and maintained at lower alert rates.” DEP'T OF DEF., *supra* note 165, at 35.

168. Harold A. Feiveson & Ernst Jan Hogendoorn, *No First Use of Nuclear Weapons*, NONPROLIFERATION REV., Summer 2003, at 1, 1 (“Secretary of Defense William Perry said that if the United States was attacked by chemical weapons, ‘We could have a devastating response without the use of nuclear weapons, but we would not forswear that possibility.’”).

169. *Id.* (citing National Strategy to Combat the Proliferation of Weapons of Mass Destruction, 38 WEEKLY COMP. PRES. DOC. 2150 (Dec. 11, 2002)). This had become clear as early as February 2002. See John Simpson, *The Role of Security Assurances in the Nuclear Nonproliferation Regime*, in SECURITY ASSURANCES AND NUCLEAR NONPROLIFERATION 71 (Jeffrey W. Knopf ed., 2012) (quoting Secretary of State Rick Boucher, “[i]f a weapon of mass destruction is used against the United States or its allies, we will not rule out any specific type of military response”); see also *The National Security Strategy of the United States of America*,

These policies were “diplomatically disavowing the use of nuclear weapons except in extreme circumstances and yet, at the same time, hedging the disavowal to allow the greatest possible latitude for the use of nuclear weapons.”¹⁷⁰ In addition, the 2002 review articulated nuclear war fighting as a key component of the U.S. defense strategy.¹⁷¹ As Joseph Gerson noted:

The Bush [A]dministration has again put nuclear weapons—and their various uses—at the center of U.S. military and foreign policy. The message of the administration’s Nuclear Posture Review (NPR) in December 2001 was unmistakable. As *The Bulletin of the Atomic Scientists* editorialized, “Not since the resurgence of the Cold War in Ronald Reagan’s first term has U.S. defense strategy placed such an emphasis on nuclear weapons.” The NPR reiterated the U.S. commitment to first-strike nuclear war fighting. For the first time, seven nations were specifically named as primary nuclear targets: Russia, China, Iraq, Iran, Syria, Libya, and North Korea. Consistent with calls by senior administration figures who spoke of their “bias in favor of things that might be usable,” the NPR urged funding for development of new and more usable nuclear weapons. This included a new “bunker buster.” Seventy times more powerful than the Hiroshima A-bomb, the bunker buster was designed to destroy enemy command bunkers and WMD (weapons of mass destruction) installations buried hundreds of feet beneath the surface.¹⁷²

WHITE HOUSE (2002), <https://georgewbush-whitehouse.archives.gov/nsc/nssall.html> [<https://perma.cc/S6L6-YUYE>] (“Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores for less than it costs to purchase a single tank. Terrorists are organized to penetrate open societies and to turn the power of modern technologies against us. To defeat this threat we must make use of every tool in our arsenal—military power, better homeland defenses, law enforcement, intelligence, and vigorous efforts to cut off terrorist financing.”).

170. Feiveson & Hogendoorn, *supra* note 168; see also Michael Intriligator, *US Nuclear Weapons Policy Under the Bush Administration*, WAGINGPEACE.ORG (July 25, 2004), <https://www.wagingpeace.org/us-nuclear-weapons-policy-under-the-bush-administration/> [<https://perma.cc/5HHM-MWWC>] (discussing the changes in nuclear strategy made by the George H. W. Bush Administration).

171. Stephen Young & Lisbeth Gronlund, *A Review of the 2002 US Nuclear Posture Review* 1 (Union of Concerned Scientists, Working Paper, May 14, 2002), [http://web.sungshin.ac.kr/~youngho/data/security/NPR-1\(8Jan02\).pdf](http://web.sungshin.ac.kr/~youngho/data/security/NPR-1(8Jan02).pdf) [<https://perma.cc/22N9-U9EF>].

172. Joseph Gerson, *Empire and Nuclear Weapons*, WAGINGPEACE.ORG (Dec. 5, 2007), <https://www.wagingpeace.org/empire-and-nuclear-weapons/> [<https://perma.cc/BZ9G-5GLB>].

The Obama Administration's nuclear strategy largely followed that of its predecessors even though it also pledged to abolish nuclear weapons.¹⁷³

President Trump ordered a new Nuclear Posture Review as part of his Administration's effort to "rebuild" the nation's armed forces.¹⁷⁴ The Trump Administration's goal was to "ensure that the United States nuclear deterrent is modern, robust, flexible, resilient, ready, and appropriately tailored to deter 21st-century threats and reassure our allies."¹⁷⁵

The 2018 Nuclear Posture Review pushes the country in a different direction from previous reviews.¹⁷⁶ Gone is the Obama Administration call for the abolition of nuclear weapons.¹⁷⁷ Instead, the Trump Administration argues that "it is not possible to delay modernization of our nuclear forces if we are to preserve a credible nuclear deterrent."¹⁷⁸

Flexibility is the cornerstone of the Trump Administration's policy on the use of nuclear weapons.¹⁷⁹ The review notes that this flexibility will allow the President "to tailor the approach to deterring one or more potential adversaries in different circumstances."¹⁸⁰ The Administration cites the increasing threat from a newly empowered Russia, the changing security landscape, and the latent threats from potential nuclear adversaries like Iran and North Korea.¹⁸¹ This changing environment demands that United States policy be tailored to meet the known current threats and any unknown future threats.¹⁸²

The review reaffirms traditional goals while at the same time expanding the possible circumstances in which nuclear weapons may be used. It reiterates traditional policies: to deter potential nuclear and non-nuclear attacks, provide security assurance to our allies and partners, to achieve us

173. See *National Security Strategy*, WHITE HOUSE (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf [<https://perma.cc/5RBG-CXTY>]. But see Charles J. Moxley Jr., *Obama's Nuclear Posture Review: An Ambitious Program for Nuclear Arms Control but a Retreat from the Objective of Nuclear Disarmament*, 34 FORDHAM INT'L L.J. 734, 737 (2011) ("The nuclear policy announced by the Obama NPR is thus inconsistent with the United States' obligation under [the non-proliferation treaty] to negotiate nuclear disarmament in good faith."). See generally Winston P. Nagen & Erin K. Slemmens, *Developing U.S. Nuclear Weapons Policy and International Law: The Approach of the Obama Administration*, 19 TUL. J. INTL. & COMP. L. 41 (2010).

174. See Presidential Memorandum on Rebuilding the U.S. Armed Forces, *supra* note 166, at 1.

175. *Id.* at 2.

176. See OFFICE OF THE SEC'Y OF DEF., NUCLEAR POSTURE REVIEW, at VI (2018).

177. See Moxley, *supra* note 173, at 765.

178. OFFICE OF THE SEC'Y OF DEF., *supra* note 176, at I.

179. *Id.* at II.

180. *Id.*

181. *Id.* at I.

182. See *id.* at II.

goals if deterrence fails, and provide a hedge against an uncertain future.¹⁸³ The primary goal of U.S. nuclear forces is to ensure that “potential adversaries do not miscalculate regarding the consequences of nuclear first use, either regionally or against the United States itself.”¹⁸⁴

While the primary goal still is to deter potential nuclear adversaries from using nuclear weapons, the complex security environment demands that nuclear weapons play a role in other, complementary purposes.¹⁸⁵ The review notes that effective nuclear deterrence requires “nuclear-armed adversaries must recognize that their threats of nuclear escalation do not give them freedom to pursue non-nuclear aggression.”¹⁸⁶ A full range of nuclear capabilities is needed to create “the credible risk of intolerable consequences for the adversary.”¹⁸⁷

The new posture moves well beyond the confines of mutually assured destruction in the event of a strategic nuclear attack.¹⁸⁸ Specifically, the review rejects a no first use pledge: To help preserve deterrence and the assurance of allies and partners, the United States has never adopted a “no first use” policy and, given the contemporary threat environment, such a policy is not justified today. It remains the policy of the United States to retain some ambiguity regarding the precise circumstances that might lead to a U.S. nuclear response.¹⁸⁹

In addition, the posture makes clear that the actions of non-state actors and non-nuclear aggression might lead to the first use of nuclear weapons. The Administration promised not to use nuclear weapons except in “extreme circumstances to defend the vital interests of the United States, its allies, and

183. *Id.* at VII.

184. *Id.*

185. *Id.* (“These roles are complementary and interrelated.”).

186. *Id.* at 21.

187. *Id.*

188. *2018 Nuclear Posture Review*, FED’N OF AM. SCIENTISTS (Feb. 6, 2018), <https://fas.org/issues/nuclear-weapons/nuclear-posture-review/> [https://perma.cc/4PSS-HG57] (“The Trump NPR perceives a rapidly deteriorating threat environment in which potential nuclear-armed adversaries are increasing their reliance on nuclear weapons and follows suit. The review reverses decades of bipartisan policy and orders what would be the first new nuclear weapons since the end of the Cold War. Furthermore, the document expands the use of circumstances in which the United States would consider employing nuclear weapons to include ‘non-nuclear strategic attacks.’”). *But see* Frank A. Rose, *Is the 2018 Nuclear Posture as Bad as Its Critics Claim It Is?*, BROOKINGS (Apr. 2018), <https://www.brookings.edu/research/is-the-2018-nuclear-posture-review-as-bad-as-the-critics-claim-it-is/> [https://perma.cc/3R3D-VKG4] (arguing that the review does not break with previous United States policy but faces public relations issues with its message).

189. OFFICE OF THE SEC’Y OF DEF., *supra* note 176, at 22.

partners.”¹⁹⁰ Extreme circumstance could include “significant non-nuclear strategic attacks,” including “attacks on the U.S., allied or partner civilization population or infrastructure, and attacks on U.S. or allied nuclear forces, their command and control, or warning and attack assessment capabilities.”¹⁹¹ The review expressly includes a terrorist nuclear attack on the United States or its allies as an extreme circumstance justifying the use of nuclear weapons.¹⁹²

In addition, the review discusses the need to build up the U.S. strategic and tactical nuclear arsenal to deter current and future aggression.¹⁹³ In particular, the review notes that Russia’s capacity to and policy of threatening the first use of nuclear weapons to gain an advantage in regional conflicts seems premised on the calculation that the United States has neither the capacity nor the will to respond with nuclear weapons.¹⁹⁴ The review posits that, without a flexible and tailored nuclear policy, a nuclear state like Russia might gamble that the United States would not unleash a strategic response to their use of a tactical weapon.¹⁹⁵ This could lead to settlement of these conflicts on terms favorable to our adversaries.¹⁹⁶ Thus, the posture notes that the United States must ensure that Russia “does not miscalculate regarding the consequences of limited nuclear first use, either regionally or against the United States.”¹⁹⁷ Russian first use, regardless of scale, will “fundamentally alter the conflict, and trigger incalculable and intolerable costs for Moscow.”¹⁹⁸

Any use of nuclear weapons would follow an unspecified “deliberative process.”¹⁹⁹ Still, the United States will keep “a portion of its nuclear forces on alert day-to-day, and retain the option of launching them promptly.”²⁰⁰ According to the review, the missiles are not on “hair-trigger alert.”²⁰¹ Rather,

190. *Id.* at 21.

191. *Id.*

192. *Id.* at 67–68 (“The United States will hold fully accountable any state, terrorist group, or other non-state actor that supports or enables terrorist efforts to obtain or employ nuclear devices . . . a terrorist nuclear attack against the United States or its allies or partners would qualify as an ‘extreme circumstance’ under which the United States could consider the ultimate form of retaliation.”).

193. *Id.* at 27 (“This need for flexibility to tailor U.S. capabilities and strategies to meet future and unanticipated developments runs contrary to a rigid, continuing policy of ‘no new nuclear capabilities.’”).

194. *See id.* at 30.

195. *Id.* at 30–31.

196. This is the “escalate to de-escalate” doctrine. *Id.* at 30.

197. *Id.*

198. *Id.*

199. *Id.* at 22. However, that process seemingly does not include Congress as is shown by the alert system being subject to military and civilian control.

200. *Id.*

201. *Id.* at 22.

the alert system is “highly stable” and “subject to multiple layers” of civilian and Presidential control.²⁰² Finally, the review notes:

All U.S. presidents since 1945 have considered U.S. employment of nuclear weapons only in extreme circumstances and for defensive purposes . . . [The use of nuclear weapons] would adhere to the law of armed conflict and the Uniform Code of Military Justice. The United States will strive to end any conflict and restore deterrence at the lowest level of damage possible for the United States, allies, and partners, and minimize civilian damage to the extent possible consistent with achieving objectives.²⁰³

IV. NEED FOR CONGRESSIONAL INVOLVEMENT

The changing security landscape and the consequent change in our nuclear strategy makes congressional involvement more necessary than ever. The most recent Nuclear Posture Review makes clear that the President can use nuclear weapons under an increasing number of circumstances.²⁰⁴ Unlike the popular conception the United States will wait until the bombs are falling to deploy nuclear weapons, the posture makes clear that the President can use weapons even when the United States has not been attacked and even when those attacks are not nuclear.²⁰⁵

Congress delegated the authority to use nuclear weapons to the President in the Atomic Energy Act of 1946.²⁰⁶ In the process of setting up the Atomic Energy Commission, Congress said:

202. *Id.* But see ERIC SCHLOSSER, COMMAND AND CONTROL: NUCLEAR WEAPONS, THE DAMASCUS INCIDENT, AND THE ILLUSION OF SAFETY (2013) (detailing incidents where control system failed, almost resulting in a nuclear attack, focusing on an accident in Arkansas); see also RHODES, ARSENALS OF FOLLY, *supra* note 131, at 165–66 (describing a NATO military exercise in 1983 that caused the Soviet Union to come within minutes of ordering nuclear attack: “[T]he United States and the Soviet Union, apes on a treadmill, inadvertently blundered close to nuclear war in November 1983.”).

203. OFFICE OF THE SEC’Y OF DEF., *supra* note 176, at 23.

204. See OFFICE OF THE SEC’Y OF DEF., *supra* note 176, at 21. But see Michaela Dodge & Denitsa Nikolova, 5 *Myths About the Nuclear Posture Review*, HERITAGE FOUND. (Feb. 2, 2018), <https://www.heritage.org/missile-defense/commentary/5-myths-about-the-nuclear-posture-review> [https://perma.cc/5KRA-MJJE].

205. See OFFICE OF THE SEC’Y OF DEF., *supra* note 176, at 21 (describing non-nuclear attacks that could constitute “extreme circumstances,” thus warranting a nuclear response).

206. 42 U.S.C. § 2121(b) (2012); see RHODES, ARSENALS OF FOLLY, *supra* note 131, at 78 (noting that the act was designed to take control of the weapons from the military and lodge control of them with the civilian President and quoting President Truman saying that he didn’t want a “dashing lieutenant colonel decid[ing] when would be the proper time to drop one”).

The President from time to time may direct the Commission (1) to deliver such quantities of . . . atomic weapons to the Department of Defense for such use as he deems necessary in the interests of national defense or (2) to authorize any atomic weapons . . . for military purposes.²⁰⁷

Mutually assured destruction may have held the few nuclear states at bay.²⁰⁸ Neither side (and there were only two sides during the Cold War) would be willing to risk total destruction from strategic nuclear weapons.²⁰⁹ As the members of the nuclear club grew, shifting alliances and national jealousies took the advantage from the United States.²¹⁰

The security environment has become even more complex. The advent of tactical warheads, dirty bombs, and global terrorism, nuclear weapons greatly complicate the nuclear calculus.²¹¹ The threat of nuclear terrorism made mutually assured destructions look even more anachronistic.²¹² Nuclear weapons can now more easily be seen as “like other munitions.”²¹³ Nuclear war, at least of a limited nature, is now possible²¹⁴ and, indeed, contemplated by the U.S. national security policy.²¹⁵

207. 42 U.S.C. § 2121(b). Arguably, this only delegates to the President the power to control the production of nuclear weapons or their designation as weapons. Under this reading, the statute did not disturb the constitutional process for getting the nation into war. *See, e.g.,* Peter Raven-Hansen, *Nuclear War Powers*, 83 AM. J. INT’L L. 786, 792–93 (1989) (arguing the War Powers Resolution may require additional specific delegation to use nuclear weapons to the President beyond the broad wording of the resolution). *But see* H. Bartholomew Cox, *Raison d’etat and World Survival: Who Constitutionally Makes Nuclear War?*, 57 GEO. WASH. L. REV. 1614, 1621–28 (1989) (arguing that the statute gives unfettered discretion over the use of nuclear weapons to the president and, therefore, is an unconstitutional delegation of power).

208. *See* SNOW, *supra* note 131, at 204–42.

209. *Id.*

210. *Id.*

211. *See* OFFICE OF THE SEC’Y OF DEF., *supra* note 176, at V.

212. The existence of weapons of mass destruction and their proliferation raise serious doubts about preventive and preemptive measures. *See generally* EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 166–67 (1982).

213. *See generally* NINA TANNENWALD, THE NUCLEAR TABOO: THE UNITED STATES AND THE NON-USE OF NUCLEAR WEAPONS SINCE 1945, at 252 (2007) (referencing the policy under the Eisenhower administration that nuclear weapons were “like other munitions,” a term used in William Burr’s essay *US Nuclear History: Nuclear Arms and Politics in the Missile Age 1955–1968*); RHODES, ARSENALS OF FOLLY, *supra* note 131, at 103 (nuclear strategist Paul Nitze concluded that nuclear weapons “compressed the explosive power of many conventional weapons into one”).

214. Raven-Hansen, *supra* note 207, at 788 (observing the most likely use of nuclear weapons is in the escalation of a conventional war in Europe).

215. *See, e.g.,* OFFICE OF THE SEC’Y OF DEF., *supra* note 176, at 66 (observing that nuclear terrorism would be met with a nuclear response).

This vastly more complicated scenario requires that the status quo in regard to the use of nuclear weapons, especially their first use, be examined. The Framers' vision of congressional primacy in war making is now so obscured as to be unrecognizable.²¹⁶ The current policy of the United States eliminates the Legislative branch from any role in deciding if and when the country goes to nuclear war.²¹⁷ At a minimum, we must restore some of the original constitutional balance between the Executive and Congress.²¹⁸ To explore this question, the following Sections will begin with the Framers' understanding of the war making process and then apply those ideas in the context of nuclear strategy.²¹⁹

V. HISTORY OF THE WAR POWER

To say that the Framers did not foresee nuclear weapons is to say very little.²²⁰ The Framers did not anticipate television either, but courts have not hesitated to extend the First Amendment to the electronic media.²²¹ The critical issue is whether the principles the Framers placed in the Constitution

216. See Michael J. Garcia, *A Necessary Response: The Lack of Domestic and International Constraints upon a U.S. Nuclear Response to a Terrorist Attack*, 1 GEO. J.L. & PUB. POL'Y 515, 523 (2003) ("[T]he President would likely face few domestic legal restraints by Congress or the courts if he decided to use nuclear weapons in the face of a substantial terrorist attack. If the United States were attacked and the President wished to use nuclear force, Congress would have few means by which to pose an effective challenge to the President's decision and might be unlikely to do so for political reasons as well.").

217. Raven-Hansen, *supra* note 207, at 786–87. Professor Raven-Hansen argued that "[t]he development of nuclear weapons has turned [the original constitutional] framework on its head." The battle plan will take place almost by itself due to the overlapping systems of pre-positioning, executive delegation and the weapons "vast destructive potential and speed of delivery . . . Congress is thus unlikely to have any control 'the day after.'" *Id.*

218. *Id.* at 795 ("Congress has surely been in equal measure uninterested, uninformed and unduly dependent on the Executive in the control and planning of nuclear war. Perhaps questions about the existence of the presidential war power will help recall the first branch to the more critical question of its wise use.").

219. See *infra* notes 418–66. Here, I will borrow the contextual analysis from Professor Burns Weston. Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 542 (1983); see also BURNS H. WESTON, *HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION* (1989).

220. See Cox, *supra* note 207, at 1621 ("To search for the intentions of the founding fathers in such a case is speculative, if not mischievous, because they obviously did not think of nuclear weapons.").

221. See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); *Burstyn v. Wilson*, 343 U.S. 495, 506 (1952).

have any application to the specific problems presented by nuclear weapons.²²²

Revolutionary era Americans feared executive power.²²³ Edward Corwin, the noted presidential scholar, remarked “that ‘the executive magistracy’ was the natural enemy, the legislative assembly the natural friend of Liberty.”²²⁴ Thus, the Articles of Confederation²²⁵ did not provide for an Executive.²²⁶ Congress retained both legislative and executive powers.²²⁷ The first Executive officers were congressional creations.²²⁸

The arrangement did not work well. State legislatures did not prove to be “guardians of Liberty.”²²⁹ Regional jealousies, state adventures in foreign affairs, and the general inefficiencies of the Articles led to “growing apprehension as the Congress found itself incapable of discharging its duties and responsibilities. Support began to grow for an independent executive.”²³⁰

Informed by these concerns, the delegates who gathered in Philadelphia in 1787 agreed on the need to create an executive department but little else about it.²³¹ This divergence of opinion meant that the Convention had to devote its attention to basic questions about the Executive: “[W]ould it be single or plural, act with or without a council, have veto power, how would it be chosen, for what term and with what possibility of re-election.”²³² Article

222. See, e.g., KEYNES, *supra* note 212, at 33 (reasoning that the Framers’ deliberate ambiguity requires a generous interpretation of their words).

223. See KEYNES, *supra* note 212, at 17 (discussing early ideas about separation of powers providing “defenses against tyranny”). For a discussion of the royal prerogatives that influenced the Framers, see Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 271–83 (2009).

224. CORWIN, OFFICE AND POWERS, *supra* note 50, at 4.

225. See generally Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397 (2017) (showing strengths and weakness of claims through Supreme Court decisions relating to the original meaning of the Constitution, which rely, at least in part, on the Articles of Confederation).

226. KEYNES, *supra* note 212, at 28 (observing the failure to provide an executive was not viewed as a fatal flaw in the Articles of Confederation).

227. See *id.* at 25–26.

228. *Id.* at 25.

229. See RAOUL BERGER, CONGRESS V. SUPREME COURT 10–11 (1969); see also KEYNES, *supra* note 212, at 18 (describing Jefferson’s reference to “legislative despotism” in the state legislatures).

230. FISHER, *supra* note 5, at 12; see also KEYNES, *supra* note 212, at 29.

231. See KEYNES, *supra* note 212, at 29 (“[C]reation of a unitary executive with independent tenure who shared limited power over war and foreign affairs with Congress reflected the Framers’ general fear of governmental power and their particular fear of prerogative.”).

232. W. TAYLOR REVELEY, III, WAR POWERS OF THE PRESIDENT AND CONGRESS 59, 72 (1981).

It reflects this structural focus. The Convention rarely addressed issues of presidential power, either as to source or as to scope.

Several concerns motivated the Framers in their approach to the war powers of the proposed new government.²³³ Under the Articles of Confederation, Congress had the “sole and exclusive right and power of determining on peace and war” as well as the power of “making rules for the government and regulation of the . . . land and naval forces, and for directing their operations.”²³⁴ At the same time, the Articles gave Congress extensive control over the issuance of letters of marque and reprisal but reserved some authority for states to issue such after a congressional “declaration of war.”²³⁵ The drafters of the Articles did not need to be precise with their terminology because in any event the only institution of government given any power under the Articles was the Congress.²³⁶ More important was the power of Congress to direct the armed forces. Unlike the Constitution that splits the war declaring function from the war making function, the Articles joined these powers in one Congress.²³⁷

To a large extent, the creation of a powerful legislature reflected the colonists’ fear of executive control. As Edward Corwin put it, America was no longer a colony when it saw “the ‘executive magistracy’ as the natural enemy, the legislative assembly the natural friend of liberty.”²³⁸ Post-revolution state constitutions reflected this fear which created legislatures with great powers and executives with narrow, tightly defined powers.²³⁹ The state experience with powerful legislatures was not entirely satisfactory.²⁴⁰ By 1787, the tyrannical excesses of the state assemblies had sobered the Framers on the wisdom of a single dominant branch of government.²⁴¹ In spite of the lingering suspicion of executive power and a lingering faith in elected

233. See generally KEYNES, *supra* note 212.

234. *Id.* at 25.

235. See *id.* at 25–26.

236. *Id.* at 17 (“The Articles of Confederation . . . completely ignored both the separation of powers and checks and balances.”).

237. *Id.* at 34. Of course, the Confederation Congress was limited by the constraints placed on its power to impose taxes, spend money, authorize military action, and raise armies. *Id.* at 25–26; see FISHER, *supra* note 5, at 12–13.

238. CORWIN, OFFICE AND POWERS, *supra* note 50, at 5–6.

239. KEYNES, *supra* note 212, at 17–18.

240. See KEYNES, *supra* note 212, at 18; Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 647–53 (1996).

241. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1975).

assemblies, the Framers approached the Constitutional Convention more disposed toward executive power than before.²⁴²

Inefficiencies under the Articles bolstered this disposition further.²⁴³ Even though Article 9 gave Congress “the sole and exclusive right and power of determining on peace and war . . . entering into treaties and alliances . . . of granting letters of marque and reprisal in times of peace,”²⁴⁴ each of these grants of power were limited by accompanying conditions on their exercise or their scope.²⁴⁵

Accordingly, under the Articles of Confederation, Congress found it increasingly difficult to conduct foreign affairs.²⁴⁶ Article IX stated that:

The United States in Congress assembled shall never engage in a war, nor grant letters of marque or reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of the majority of the United States in Congress assembled.²⁴⁷

Requiring a supermajority allowed small states blocked action.²⁴⁸ Ad hoc committees designed to conduct aspects of foreign affairs degenerated into regional bickering.²⁴⁹ Individual states conducted their own foreign ventures.²⁵⁰ Alexander Hamilton called it “a system so radically vicious and

242. CHRISTOPHER COLLIER & JAMES L. COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787, at 218 (1986).

243. *See id.* at 228–33.

244. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1.

245. Article VI reserved the right of state self-defense until Congress could assemble, prohibited any treaties that restricted the States’ ability to impose import or export tariffs on any commodity, and limited letters of marque and reprisal to times of war. *Id.* art. VI, paras. 1, 3, 5.

246. *Id.*

247. *Id.* art. IX, para. 6.

248. *See* KEYNES, *supra* note 212, at 26.

249. *Id.*

250. *See* COLLIER & COLLIER, *supra* note 242, at 6; KEYNES, *supra* note 212, at 27.

unsound, as to admit not of amendment but by an entire change in its leading features and characters.”²⁵¹

From today’s perspective, we view the question of the war making power as an inter-branch matter.²⁵² We seek the answer in the entrails of the proper distribution of power between the President and Congress.²⁵³ The Framers, however, saw the problem in Federalism terms: how to structure the federal government so it can effectively carry out the Union’s war and peace functions without entirely crushing state authority.²⁵⁴ Thus, the little debate on the war powers of the federal government at the convention, thereafter, centered primarily on the power of the federal government versus the states, as opposed to the distribution of the war and peace powers among the several branches of the federal government.²⁵⁵

This concern was two-sided.²⁵⁶ During the Confederation, the diplomatic activity of some individual states was a cause for concern.²⁵⁷ As Edward Keynes put it, “the Articles of Confederation established an organization of thirteen states, but a fourteenth state, the United States, did not exist because the states retained their sovereignty.”²⁵⁸ This led James Madison and Alexander Hamilton to raise the specter of disunity inviting foreign aggression.²⁵⁹ George Washington noted:

I do not conceive we can exist long as a nation, without having lodged somewhere a power which will pervade the whole Union in as energetic a manner, as the authority of the different state governments

251. THE FEDERALIST NO. 22, at 144–45 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

252. See HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 205–06 (1990).

253. See REVELEY, *supra* note 232, at 71–72; see also FISHER, *supra* note 5, at 10–11, 25–26; 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, 786 (2008) (“[W]hen it came to questions of the military and foreign relations, the delegates were far more consumed by discussions of the relative powers of the federal and state governments than by the allocation of such powers within the federal system.”).

254. KEYNES, *supra* note 212, at 18–19. See generally COLLIER & COLLIER, *supra* note 242, at 241–58 (describing the events and discussions leading up to how the Framers established the balance of powers underlying the principles of federalism).

255. William P. Rogers, *Congress, the President, and the War Powers*, 59 CALIF. L. REV. 1194, 1197–98 (1971).

256. See *id.*

257. See COLLIER & COLLIER, *supra* note 242, at 9; see also KEYNES, *supra* note 212, at 27 (outlining Virginia’s treaty with France, its loan from Spain, and its use of armaments as collateral; also mentioning other states that “laid embargoes, fitted out navies, authorized privateers, drafted armies, and negotiated with the Indian tribes”).

258. KEYNES, *supra* note 212, at 27.

259. W. Taylor Reveley, III, *Constitutional Allocation of the War Powers Between the President and Congress: 1787–1788*, 15 VA. J. INT’L L. 73, 76–77 (1974).

extends over the several States. To be fearful of vesting Congress, constituted as that body is, with ample authorities for national purposes, appears to me the very climax of popular absurdity and madness. . . . Many are of opinion that Congress have too frequently made use of the suppliant humble tone of requisition, in applications to the States, when they had a right to assume their imperial dignity and command obedience. Be that as it may, requisitions are a perfect nihility, where thirteen sovereign, independent disunited States are in the habit of discussing [and] refusing compliance with them at their option. Requisitions are actually little better than a jest and a bye word through out the Land. If you tell the Legislatures they have violated the treaty of peace and invaded the prerogatives of the confederacy they will laugh in your face. . . . Things cannot go on in the same train forever.

It is much to be feared, as you observe, that the better kind of people being disgusted with the circumstances will have their minds prepared for any revolution whatever. We are apt to run from one extreme into another. To anticipate [and] prevent disastrous contingencies would be the part of wisdom [and] patriotism.²⁶⁰

At the same time, the Framers and their contemporaries generally feared a centralized government in possession of a standing army.²⁶¹ This concern for Federalism has largely vanished from modern consideration of the war and peace powers.²⁶² These concerns prompted the Framers assembled in Philadelphia in May 1787 to amend the Articles of Confederation.²⁶³ Quickly, however, they re-defined their task from amendment to restructuring.²⁶⁴

They said little on war and peace issues until later in the summer.²⁶⁵ The early comments show a fear of lodging unlimited war powers, peace powers, or both in the President.²⁶⁶ During a debate about whether the executive should be one or several persons, Charles Pinckney, John Rutledge, and James Wilson expressed similar sentiments against giving the executive war and

260. Letter from George Washington to John Jay (Aug. 15, 1786), in *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 207, 208–09 (Henry P. Johnston ed., Da Capo Press 1971) (1891).

261. Reveley, *supra* note 259, at 92–93.

262. CORWIN, *TOTAL WAR*, *supra* note 43, at 70.

263. Reveley, *supra* note 259, at 94–95.

264. *See id.* at 95.

265. *Id.* at 95, 103.

266. *See* Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 3 *THE FOUNDER'S CONSTITUTION* 96 (Philip B. Kurland & Ralph Lerner eds., 1987).

peace powers.²⁶⁷ Pinckney feared that these powers would make the presidency “a monarchy, of the worst kind, to wit an elective one,”²⁶⁸ while Rutledge and Wilson expressed the less sanguine notion that the power of war and peace were “of a Legislative nature.”²⁶⁹ Madison agreed with both Wilson’s delineation of executive and legislative powers and Pinckney’s characterization of an elected monarch, added that any powers given to the executive should be “confined and defined.”²⁷⁰

The Convention made little progress on the war, peace question until August.²⁷¹ At that time, the Convention dispatched the Committee of Detail to put the finishing touches on a draft constitution.²⁷² On August 6th, the Committee, through John Rutledge, reported to the Convention.²⁷³ The Committee gave the Legislature the power “to make war.”²⁷⁴ In addition, it gave the Legislature the powers:

To make rules concerning captures on land and water; [t]o declare the law and punishment of piracies and felonies committed on the high seas . . . and of offenses against the law of nations; [t]o subdue a rebellion in any State, on the application in any state, on the application of its legislature; . . . [t]o raise armies; [t]o build and equip fleets; [t]o call forth the aid of the militia, in order to execute the laws

267. James Madison, Notes on the Constitutional Convention (June 1, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64, 65 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS]; *Madison Debates June 1*, AVALON PROJECT: DOCUMENTS L., HIST. & DIPL., https://avalon.law.yale.edu/_18th_century/debates_601.asp; see John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 258 (1996).

268. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 45 (Adrienne Koch ed., 1966) [hereinafter MADISON’S NOTES]; *Madison Debates June 1*, *supra* note 267.

269. Madison, *supra* note 267; *Madison Debates June 1*, *supra* note 267; see also Yoo, *supra* note 267, at 258 (describing the concerns of James Wilson and Charles Pinckney of adopting the English division of powers).

270. Rufus King, Notes on the Constitutional Convention (June 1, 1787), in 1 FARRAND’S RECORDS, *supra* note 267, at 70, 70 (James Madison); *Powers of the Executive*, [1 June] 1787, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-10-02-0011> [<https://perma.cc/N7S7-ZWHT>].

271. See MADISON’S NOTES, *supra* note 268, at 389.

272. See Yoo, *supra* note 267, at 258–59.

273. James Madison, Journal (Aug. 6, 1987), in 2 FARRAND’S RECORDS, *supra* note 267, at 176; *Madison Debates August 6*, AVALON PROJECT: DOCUMENTS L., HIST. & DIPL., https://avalon.law.yale.edu/18th_century/debates_806.asp [<https://perma.cc/9TGW-KXW3>].

274. James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), in 2 FARRAND’S RECORDS, *supra* note 267, at 177, 182.

of the Union, enforce treaties, suppress insurrections, and repel invasions”²⁷⁵

The Committee also proposed creating an executive who “shall be [C]ommander in [C]hief of the Army and Navy of the United States, and of the Militia of the several States.”²⁷⁶

The Convention considered each clause of the Constitution in turn.²⁷⁷ On August 17, they reached the “make war” clause.²⁷⁸ The question before the Convention was whether to substitute “declare” for “make.”²⁷⁹ The debate was remarkably short; Madison’s notes on it take up barely more than a page and a half.²⁸⁰

Pinckney opposed giving the power to the whole Legislature.²⁸¹ Rather, he favored giving it to the Senate, “being more acquainted with foreign affairs, and most capable of proper resolutions.”²⁸² Pierce Butler responded that the Senate had the same infirmities as the whole Legislature.²⁸³ “He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the nation will support it.”²⁸⁴

None of the other delegates showed Butler’s faith in executive restraint.²⁸⁵ Eldridge Gerry remarked that he never expected to hear in a republic “a motion to empower the Executive alone to make war.”²⁸⁶ George Mason was “[against] giving the power of war to the Executive, because not (safely) to be trusted with it.”²⁸⁷ Madison and Gerry moved to substitute “declare” for “make,” which left the Executive with the power to “repel sudden attacks.”²⁸⁸

275. Madison, *supra* note 274.

276. Madison, *supra* note 274.

277. Clara S. Foltz, *Constitution-Maker*, 66 IND. L.J. 849, 895 (1991).

278. MADISON’S NOTES, *supra* note 268, at 472–76.

279. Reveley, *supra* note 259, at 103–04.

280. James Madison, Notes on the Constitutional Convention (Aug. 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 267, at 314, 318–19; *Madison Debates August 17*, AVALON PROJECT: DOCUMENTS L., HIST. & DIPL., https://avalon.law.yale.edu/18th_century/debates_8_17.asp [<https://perma.cc/W649-XH8A>].

281. Madison, *supra* note 280.

282. *Id.* at 318 (Charles Pinckney).

283. *Id.*; see also Reveley, *supra* note 259, at 104 (describing how Pierce Butler’s statements advanced the arguments of Charles Pinckney one step further).

284. Madison, *supra* note 280, at 318 (Pierce Butler).

285. *Id.* at 319.

286. *Id.*

287. *Id.*; see also WORMUTH & FIRMAGE, *supra* note 91, at 18 (noting that George Mason spoke in favor of facilitating peace, not war).

288. Madison, *supra* note 280, at 318.

Roger Sherman seemed to speak against the motion.²⁸⁹ He favored leaving the language as it was because the proposed substitution narrowed what he saw as the already existing power of the President to “repel and not to commence war.”²⁹⁰

Oliver Ellsworth spoke of the difference between war and peace.²⁹¹ He wanted to make it easier to get into war than out of it because “[w]ar . . . is a simple and overt declaration [while] peace [is] attended with intricate & secret [negotiations].”²⁹² Mason spoke against the Ellsworth notion.²⁹³ Mason was in favor of “clogging rather than facilitating war; but for facilitating peace.”²⁹⁴ He favored the substitution of “declare.”²⁹⁵

At this point, the Convention voted on the motion. Madison’s records diverge from the official journal.²⁹⁶ Madison records one vote, initially seven for, two against, and one absent.²⁹⁷ The journal, however, shows a vote four in favor and five against.²⁹⁸ Madison noted that after his sole recorded vote, Rufus King remarked “that ‘make war’ might be understood to ‘conduct’ it which was an Executive function.”²⁹⁹ King’s remark apparently satisfied any concerns Ellsworth had to the motion, as Madison says, “Mr. Ellsworth gave up his objection (and the vote of [Connecticut] was changed to—ay.)”³⁰⁰

The journal shows that a second vote on the motion was taken.³⁰¹ This time the vote was eight to one—the same tally as Madison’s second vote.³⁰²

289. *Id.*

290. *Id.* at 318 (Roger Sherman); see also SIDNEY M. MILKIS & MICHAEL C. NELSON, *THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT*, 1776–2011, at 45 (6th ed. 2011).

291. Madison, *supra* note 280, at 319.

292. *Id.* at 319 (Oliver Ellsworth).

293. *Id.*; see also Alexander M. Bickel, *Congress, the President, and the Power to Wage War*, 48 CHI.-KENT L. REV. 131 (1971) (citing NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 475–76 (Ohio Univ. Press ed. 1966)).

294. Madison, *supra* note 280, at 319.

295. *Id.*

296. Letter from James Madison to Thomas Jefferson, *supra* note 266; see also LOUIS FISHER, *PRESIDENTIAL WAR POWERS* 6 (3rd ed. rev. 2013).

297. Madison, *supra* note 280, at 319.

298. 1 THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 246 (Jonathan Elliot ed., Washington, D.C., 1836) [hereinafter ELLIOT’S DEBATES].

299. Madison, *supra* note 280, at 319; see also Reveley, *supra* note 259, at 106 (detailing the dropped objection by Oliver Ellsworth following Rufus King’s comment of to “make” war being understood as to “conduct” war).

300. Madison, *supra* note 280, at 319; see also Reveley, *supra* note 259, at 106 n.103 (providing James Madison’s textual note, which stated Rufus King’s comment and Oliver Ellsworth’s dropped objection).

301. See 1 ELLIOT’S DEBATES, *supra* note 298, at 246.

302. *Id.*

Some other maneuvering occurred.³⁰³ Pinckney unsuccessfully tried to strike the entirety of the declare war clause.³⁰⁴ Butler moved to give “the Legislature the power of peace, as they were to have that of war.”³⁰⁵ Seconding the motion, Gerry noted that as few as eight senators could “exercise the power if vested in that body, and . . . may consequently give up part of the [United] States.”³⁰⁶ In spite of these arguments, the motion failed to gain even one affirmative vote.³⁰⁷ The Convention then adjourned for the day.³⁰⁸ It did not return to the declaration clause.³⁰⁹

The literature on this debate is extensive but a fair consensus on several points has emerged among the commentators. The majority of scholars concede that the Framers intended to give Congress, and not the President, the power to initiate the use of the armed forces.³¹⁰ Indeed, this principle seemed self-evident among the Framers.³¹¹ Charles Lofgren notes that the Committee

303. *Id.* at 246–47.

304. Madison, *supra* note 280, at 319; *see also* Reveley, *supra* note 259, at 108 (noting that Charles Pinckney’s effort to strike the declare war clause failed without any recorded argument).

305. Madison, *supra* note 280, at 319.

306. *Id.*

307. Madison, *supra* note 280, at 319; *see also* KEYNES, *supra* note 212, at 36–37 (detailing the events and discussions that led to the unanimous vote).

308. Letter from James Madison to Thomas Jefferson, *supra* note 266.

309. *See id.*

310. *See, e.g.*, LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 75–76 (2d ed. 1996); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 75 (1990) [hereinafter KOH, *NATIONAL SECURITY CONSTITUTION*]; Leonard G. Ratner, *The Coordinated Warmaking Power: Legislative, Executive and Judicial Roles*, 44 S. CAL. L. REV. 461, 465 (1970); William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 18–19 (1972); *see also* JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3 (1993); FISHER, *supra* note 5, at 293; FISHER, *supra* note 296, at 4 (“On numerous occasions the delegates to the constitutional convention emphasized that the power of peace and war associated with monarchy would not be given to the President.”); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 72–73 (1990); WORMUTH & FIRMAGE, *supra* note 91, at 52; David Gray Adler, *The President’s War-Making Power*, in *INVENTING THE AMERICAN PRESIDENCY* 119, 140–41 (Thomas E. Cronin ed., 1989); Peter Raven-Hansen, *Constitutional Constraints: The War Clause*, in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR* 28, 30 (Gary M. Stern & Morton H. Halperin eds., 1994); John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1386 (1988); Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1637 (2000); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1297 (1988); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 597 (1993).

311. *See* CATO INST., *CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 108TH CONGRESS* 110 (2003); KOH, *supra* note 310, at 75–76; Reveley, *supra* note 259, at 96–97.

on Detail “had little trouble in allocating the war-making power.”³¹² “Clearly, as the committee sensed the will of the Convention on these points—points which, it must be remembered, had scarcely been debated—war making fell almost automatically to Congress.”³¹³

The ratifying conventions also interpreted the war powers of Congress broadly.³¹⁴ Reveley concluded that “the Ratifiers generally equated Congress’ power to declare war under the Constitution with its power to determine on war under the Articles of Confederation.”³¹⁵ Robert Livingston stated that the powers of the Confederation Congress and the new Congress were “the very same . . . [including] the power of making war.”³¹⁶

James Wilson argued that the new Constitution would not “hurry us into war . . . [because] the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representative.”³¹⁷ Like the Philadelphia convention, the ratifying conventions engaged in little debate over the declaration of war clause.³¹⁸ This “modest inattention . . . appears to have stemmed from the unanimous expectation that it left the President no independent war-making authority.”³¹⁹ Only Pierce Butler, at the South Carolina Convention, spoke on the declaration clause issue.³²⁰ Butler recounted for the delegates his recollections of the debate surrounding the substitution of “declare” for “make.”³²¹ He said the Convention at first proposed:

[T]o vest the sole power of making peace or war in the Senate; but this was objected to as inimical to the genius of a republic, by destroying the necessary balance they were anxious to preserve. Some gentlemen were inclined to give this power to the President; but it was objected to as throwing into his hands the influence of a

312. Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 679 (1972).

313. *Id.*

314. Reveley, *supra* note 259, at 123–28; see also Cameron O. Kisler, *The Anti-Federalists and Presidential War Powers*, 121 YALE L.J. 459, 467 (2011) (concluding that the anti-federalist position provides support for congressional primacy).

315. Reveley, *supra* note 259, at 126.

316. Lofgren, *supra* note 312, at 685.

317. The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution (Nov. 26, 1787), in 2 ELLIOT’S DEBATES, *supra* note 298, at 528.

318. *Id.*

319. Reveley, *supra* note 259, at 127.

320. CATO INST., *supra* note 311, at 512.

321. Debates in the Legislature and in Convention of the State of South Carolina, on the Adoption of the Federal Constitution (Jan. 16, 1788), in 4 ELLIOT’S DEBATES, *supra* note 298, at 263.

monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction. The House of Representatives was then named; but an insurmountable objection was made to this proposition—which was, that negotiations always required the greatest secrecy, which could not be expected in a large body.³²²

In the Federalist No. 41, Madison seems to argue that the power to declare war is inherent.³²³ He listed the declaration clause as a power to provide “[s]ecurity against foreign danger,”³²⁴ and then added: “Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative. The existing Confederation establishes this power in the most ample form.”³²⁵

Madison was most concerned about quelling state fears of a centralized war power.³²⁶ He saw the necessity of placing the power with the federal government: “Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils.”³²⁷

Thus the power to declare war, to raise armies, to grant letters of marque and reprisal, to regulate and call out the militia, and to tax are necessary concomitants of the Union’s “impulse of self-preservation.”³²⁸ The Constitution attempted to limit military establishments without impairing their effectiveness.³²⁹ With these safeguards, Madison argued for the absolute necessity of broad war powers.³³⁰

Madison’s comments ignored the distribution of power between the Congress and the Executive.³³¹ Like others, he seemed to think that the Constitution left the Congress with the power to make war.³³²

322. *Id.*

323. THE FEDERALIST NO. 41 (James Madison).

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *See id.*

332. *Id.*

The breadth of congressional war making powers was also suggested by the power to grant letters of marque and reprisal.³³³ These were species of private warfare in which governments would grant authority to private individuals to carry out hostilities.³³⁴ Although the Confederation Congress possessed the power to issue letters of marque and reprisal, their use for the peacetime satisfaction of the private claims had fallen into disuse.³³⁵ It could be argued that the inclusion of this power was careless oversight in that the practice was obsolete by the time of the Convention.³³⁶

Professor Lofgren, however, rejects that interpretation.³³⁷ He believed that the clause “could easily have been interpreted [by its authors and their contemporaries] . . . as a kind of shorthand for vesting in Congress the power of general reprisal outside the context of declared war.”³³⁸ Although this interpretation is not without doubt, it comports with the late eighteenth century understanding of perfect and imperfect wars.³³⁹ Declared wars were “perfect” while undeclared wars were “imperfect.”³⁴⁰ Imperfect wars occurred “where a certain violent protection of our rights is necessary,” with the violence consisting of state-authorized private reprisals directed at property held by the subjects of another nation.³⁴¹ Imperfect wars could lead to perfect wars.³⁴²

333. See Abraham D. Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS. 12, 27 (1976); see also C. Kevin Marshall, *Putting Privateers in Their Place: The Applicability of Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 953 (1997).

334. See Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1035 (1986).

335. *Id.*

336. See William Young, *A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal*, 66 WASH. & LEE L. REV. 895, 905 (2009).

337. Lofgren, *supra* note 312, at 693–97.

338. *Id.* at 696.

339. See, e.g., GLENNON, *supra* note 310, at 77–78; ARTHUR M. SCHLESINGER, Jr., *THE IMPERIAL PRESIDENCY* 21 (2004). But see Gregory Sidak, *The Quasi War Cases—and Their Relevance to Whether “Letters of Marque and Reprisal” Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL’Y 465, 467 (2005) (“As used by legal scholars when the Constitution was drafted, these words had meanings that were both well understood and not dependent upon the allocation of war-making power between the legislative and executive branches.”).

340. *War power*, BALLENTINE’S LAW DICTIONARY (Legal Assistant ed. 1994). See generally KEYNES, *supra* note 212, at 20–23 (arguing the Executive must follow congressional consent within the context of an ambiguous division between Congress’s and the Executive’s powers).

341. Lofgren, *supra* note 312, at 692.

342. Daniel J. Hessel, *Founding-Era Jus Ad Bellum and the Domestic Law of Treaty Withdrawal*, 125 YALE L.J. 2394, 2426 (2016).

Lofgren concluded that the power over *marque* and reprisals would have given increased plausibility to the view that Congress possessed whatever war-commencing power was not covered by the phrase “to declare war.”³⁴³ Thus, a late eighteenth century American could reasonably believe “that the Constitution vested Congress with control over the commencement of war, whether declared or undeclared.”³⁴⁴

While granting Congress broad powers, the Framers made a sharp distinction between the power to commence war and the power to conduct it once begun.³⁴⁵ Whereas Congress was given the power to put the country into a state of war, once it did so, the responsibility of conducting the war fell to the President.³⁴⁶ Thus, from the beginning, the Convention agreed that the President would be the Commander in Chief.³⁴⁷ Like the declaration clause, the Commander in Chief Clause received little attention.³⁴⁸ Most of the state constitutions in effect at that time created a similar power in the state governor.³⁴⁹ There was distrust for unchecked executive authority. As Professors Barron and Lederman noted:

[N]ot a single one of the new state constitutions expressly conferred such preclusive authority, nor did any of them suggest that the legislative branch would be prevented from interfering with the Commander in Chief’s conduct of military operations. Moreover, five of them—including the Massachusetts Constitution, which likely was the primary model for the federal Commander in Chief Clause in 1787—stated expressly that the governor would have to exercise his military powers in conformity with state law.³⁵⁰

343. Lofgren, *supra* note 312, at 697; *see also* KOH, NATIONAL SECURITY CONSTITUTION, *supra* note 310, at 76–77; Hessel, *supra* note 342, at 2420; Ratner, *supra* note 310, at 465; Van Alstyne, *supra* note 310, at 18–19 (arguing Congress alone has the power to engage in war).

344. Lofgren, *supra* note 312, at 697. *But see* Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 850–51 (1972).

345. Reveley, *supra* note 259, at 93.

346. *See also* Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685, 1703–04 (2002) (arguing that the Articles of Confederation understood the commander in chief power relating to the chain of command and not to using military to start war).

347. *See* REVELEY, *supra* note 232, at 58.

348. *See* Barron & Lederman, *supra* note 253, at 780.

349. *Id.* at 781 (“Ten of the new state constitutions designated the state’s highest executive officer—usually but not always denominated the Governor—as the Commander in Chief of the state militia.”).

350. *Id.* at 782.

The Convention's first proposal on this subject, the New Jersey Plan, specifically prohibited the Executive to "take command of any troops, so as personally to conduct any enterprise as General" ³⁵¹ Hamilton's plan authorized the executive to "have the direction of the war when authorized or begun." ³⁵² Earlier, Pierce Butler and Eldridge Gerry supported a single executive because of the efficiency he would have in directing combat. ³⁵³ Butler said that his support for a single executive was forged by "seeing the manner in which a plurality of military heads distracted Holland when threatened with invasion"; while Gerry thought it would be "extremely inconvenient" to have multiple executives, "particularly in military matters . . . It would be a general with three heads." ³⁵⁴

From these few references, the Convention adopted the brief Commander in Chief power without discussion. ³⁵⁵ The phrase first appeared on May 25. ³⁵⁶ The notion that the President would have the power to conduct a war was not unimportant to some. For example, Rufus King's explanation that the insertion of "declare" for "make" did not take away the Executive function to conduct a war prompted at least one state to change its vote, and if Jackson's journal is correct, may have reversed a vote against the change. ³⁵⁷

Once the concerns about the Executive on horseback and the ubiquitous fears of central government were satisfied, the Commander in Chief Clause was not controversial. ³⁵⁸ Perhaps, "the [C]ommander in [C]hief [C]lause was noncontroversial because the Framers intended it to convey tightly

351. James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 FARRAND'S RECORDS, *supra* note 267, at 242, 244; *see also* Berger, *supra* note 51, at 37.

352. James Madison, Notes on the Constitutional Convention (June 18, 1787), in 1 FARRAND'S RECORDS, *supra* note 267, at 282, 292.

353. *See* Madison, *supra* note 267, at 39–40.

354. James Madison, Notes on the Constitutional Convention (June 2, 1787), in 1 FARRAND'S RECORDS, *supra* note 267, at 79, 89; James Madison, Notes on the Constitutional Convention (June 4, 1787), in 1 FARRAND'S RECORDS, *supra* note 267, at 96, 97.

355. *See* Madison, Notes on the Constitutional Convention (June 4, 1787), *supra* note 354, at 103–05. For the most extensive discussion of the commander in chief power, *see* Barron & Ledderman, *supra* note 253.

356. James Madison, Notes on the Constitutional Convention (May 25, 1787), in 1 FARRAND'S RECORDS, *supra* note 267, at 3, 3; Barron & Lederman, *supra* note 253, at 786–87 (stating that the Commander in Chief power was first proposed by Charles Pinckney on May 29, 1787).

357. Barron & Lederman, *supra* note 253, at 790.

358. *Id.* at 786.

circumscribed authority.”³⁵⁹ The Ratifiers viewed the Commander in Chief power as the narrow power to conduct the nation’s military operations.³⁶⁰

Nevertheless, this carried a great power and potential for abuse. This made the Commander in Chief a matter in some ratifying conventions.³⁶¹ Some Ratifiers expressed the fear that an unscrupulous president may become like a king in that he would use the army to ensure punishment.³⁶² Nevertheless, the Conventions were persuaded that the Commander in Chief power would be a limited one.³⁶³

The best description of this power came from Hamilton in the *Federalist*.³⁶⁴ Hamilton’s argument was practical—a single voice was needed to carry out a war: “[T]he direction of a war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”³⁶⁵

Hamilton’s more general comments on the advantage of a single Executive reveal the practical nature of his argument.³⁶⁶ For example, in the *Federalist*, No. 70, Hamilton extolled the energy of a single Executive saying: “That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and [dispatch] will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”³⁶⁷ Moreover, multiple executives increase the possibility of disagreement among themselves and the people, and “tend[] to conceal faults and destroy responsibility.”³⁶⁸

359. Reveley, *supra* note 259, at 113; *see also* Barron & Lederman, *supra* note 253, at 786 (arguing that the Framers’ lack of debate regarding the commander in chief power demonstrated the Framers’ understanding of that clause, an understanding which was reflected in the pre-convention limitation imposed on state executives); David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 484 (2008) (arguing the Framers understood the power to confer “limited authority” and later history does not broaden such authority).

360. Luban, *supra* note 359, at 567 (“If a power is not that of military command, the presumption should be that the Commander in Chief Clause does not entail it.”); Reveley, *supra* note 259, at 128.

361. *See* Barron & Lederman, *supra* note 253, at 794 (“There were occasional statements addressing the issue, including some that reflected a concern about the President having an uncontrollable command power. But such statements were not left unchallenged by those who defended the document.”).

362. *Id.* at 794–95.

363. *See id.* (arguing that the Executive’s powers were perceived to be limited by the drafters of the Constitution).

364. *See* THE FEDERALIST NO. 74 (Alexander Hamilton).

365. *Id.*; *see also* Barron & Lederman, *supra* note 253, at 798–99.

366. *See* THE FEDERALIST NO. 70 (Alexander Hamilton).

367. *Id.*

368. *Id.*

Hamilton described the substantial power of the Commander in Chief Clause in comparison to the English Crown.³⁶⁹ Where the King of Great Britain had command of his armies “at all times,” the President could have only “occasional command” of the armed forces as were called into actual service of the Union.³⁷⁰ He described the Commander in Chief power as much inferior to the King’s:

[N]othing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British King extends to the [declaring] of war and to the [raising] and [regulating] of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.³⁷¹

Hamilton thought that the President’s power was not even as great as that of some state governors.³⁷² Edward Corwin interpreted Hamilton to mean that, in war, the President would be:

[T]op general and top admiral of the forces provided by Congress, so that no one can be put over him or be authorized to give him orders in the direction of the said forces; but otherwise he will have no powers that any high military or naval commander not also President might not have.³⁷³

The result was a Constitution that split the war commencing and war conducting powers.³⁷⁴ Professor Van Alstyne summarized the result of vesting the war commencing power in Congress and the war-conducting power in the President.³⁷⁵

If it is the case that the Congress has made a suitable determination to authorize the use of armed force to effectuate national policy in any given instance, then discretion concerning affiliated logistical,

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

370. *Id.*

371. *Id.*

372. *Id.*; see also Barron & Lederman, *supra* note 253, at 797.

373. CORWIN, OFFICE AND POWERS, *supra* note 50, at 228.

374. Barron & Lederman, *supra* note 253, at 802 (“[T]he system of war powers the Framers appear to have favored comports quite well with their well-established embrace of checks and balances, a belief that was itself rooted in their practical experience with the dangers of unconstrained executive authority, particularly in war.”).

375. Van Alstyne, *supra* note 310, at 9.

tactical, and strategic decisions properly reposes with the presidency, consistent always, however, with the scope of the antecedent congressional declaration.³⁷⁶

To paraphrase Van Alstyne, the Constitution allows the Congress to authorize the President to conduct a war. In turn, the Constitution restricts the President to the war authorized by Congress.³⁷⁷

The question remains about the scope of any emergency presidential power prior to any congressional declaration of war.³⁷⁸ Madison and Gerry's motion to substitute "declare" for "make" carried with it the coda "leaving to the Executive the power to repel sudden attacks."³⁷⁹ The delegates apparently accepted this notion as self-evident. No debate was recorded on this issue. The absence of debate does not help to delimit the power. Although mentioned by Madison in his motion and not debated, the Framers did not include language to that effect in the text of the Constitution.³⁸⁰ The Framers constitutionalized some aspects of emergency powers. In Article I, Section 8, Clause 15, Congress is given the power to call out "the Militia . . . to suppress Insurrections and repel Invasions."³⁸¹ Once "called into the actual [s]ervice of the United States," the President is the "Commander in Chief of the Army and Navy."³⁸² Finally, the Constitution forbid states to "engage in [w]ar, unless actually invaded, or in such prominent [d]anger as will not admit of delay."³⁸³

These references suggest several principles. Congress and the States were expected to respond to sudden emergency: Congress by calling out the militia, and the States when faced with a threat that required immediate action.³⁸⁴ Although the President is not mentioned, the thrust of debate on August 16, 1787, showed that the Framers intended to lodge some emergency power in the President.³⁸⁵ The extent of this power is not clear, however.

376. *Id.*

377. *Id.*

378. See FISHER, *supra* note 5, at 312–14.

379. MADISON'S NOTES, *supra* note 268, at 476.

380. See *id.*

381. U.S. CONST. art. I, § 8, cl. 15.

382. *Id.* art. II, § 2.

383. *Id.* art. I, § 10, cl. 3; see also Heather Dwyer, *The State War Power: A Forgotten Constitutional Clause*, 33 U. LA VERNE L. REV. 319, 320 (2012) (arguing that a state may engage in defensive war in some circumstances).

384. For an argument that the states also possess war powers, see Dwyer, *supra* note 383, at 322.

385. MADISON'S NOTES, *supra* note 268, at 468–69.

Raoul Berger interprets Madison's motion literally.³⁸⁶ The President has emergency power only to respond to an actual invasion.³⁸⁷ "Viewed against repudiation of royal prerogative, no more can be distilled from the Madison–Gerry remark than a limited grant to the President of power to repel attack when, as the very terms 'sudden attack' imply, there could be no time to consult with Congress."³⁸⁸

Berger sees a connection between the Framers' limitation of the presidential power and nuclear warfare.³⁸⁹

We are apt to think that devastating surprise is peculiar to our times, forgetting that the Founders had lived through surprise massacres in frontier forts and settlements and well knew such havoc. It was that experience which led them to leave imminent danger of Indian attacks to the individual threatened state.³⁹⁰

Professor Ratner, although ultimately reaching a different conclusion, agrees with Berger that "[i]n 1787, 'repel sudden attack' probably meant 'resist invasion or rebellion.'"³⁹¹

Even the means by which a President may resist sudden attack may be limited.³⁹² Professor Lofgren noted the Framers' apparent familiarity with the nineteenth century concept of perfect and imperfect warfare.³⁹³ Perfect war was formally declared and engaged in by nation states while imperfect war was not declared but "where a certain violent protection of . . . rights is necessary."³⁹⁴ This violence would be carried out by state authorized reprisals against the property of another nation.³⁹⁵ Contemporary writers noted the link between reprisals and imperfect war.³⁹⁶ Lofgren concludes that the inclusion of the power to grant letters of marque and reprisal was not superfluous but

386. See Berger, *supra* note 51, at 34.

387. *Id.* at 41.

388. *Id.*

389. See *id.* at 43 (comparing threat of attack to threats such as the Cuban missile crisis).

390. *Id.*

391. Ratner, *supra* note 310, at 467.

392. See, e.g., Press Release, Restricting First Use Act, *supra* note 3.

393. Lofgren, *supra* note 312, at 689–93.

394. *Id.* at 692.

395. *Id.*

396. *Id.*

rather was intended to give Congress the power over the commencement of war either declared or undeclared.³⁹⁷

If so, then the President's constitutional emergency powers in time of sudden attack would be limited to defensive measures. That is, he or she could defend against the attack but could not go further and perform reprisals, i.e., acts of war. In other words, any defensive response must be proportionate to the threat. Any decision to commence war, either declared or undeclared, must be taken by Congress. Once taken, the President, as Commander in Chief, must carry out the war as declared by Congress.³⁹⁸

This study of the historical record suggests several principles that apply to the contemporary use of nuclear weapons: First, the President has no authority to initiate or prosecute aggressive war.³⁹⁹ Second, the President has authority to use force to defend the country against attack.⁴⁰⁰ Third, the President may not expand the action beyond its defensive nature.⁴⁰¹ Fourth, Congress may authorize the President to fight aggressive war and to use any weapons at his disposal.⁴⁰² Fifth, Congress may restrict the President's conduct of the war.⁴⁰³

Little in the historical record suggests that the President has any power, inherent, textual, or otherwise, to initiate war.⁴⁰⁴ The Framers' fear of

397. *Id.* at 700. *But see* Sidak, *supra* note 339, at 499 ("The Quasi War cases [interpreting the letters of marque and reprisal] concern national sovereignty and supremacy, not the separation of powers.").

398. *See, e.g.,* Reinstein, *supra* note 223, at 263 (suggesting three limitations on implied presidential powers where Congress prevails when conflict occurs).

399. Zheyao Li, Note, *War Powers for the Fourth Generation: Constitutional Interpretation in the Age of Asymmetric Warfare*, 7 GEO. J.L. & PUB. POL'Y 373, 402 (2009) ("[A]ny Presidential claim of a preclusive war power with respect to other nation-states would be inconsistent with the Constitution.").

400. *Id.* (distinguishing non-state actors as requiring bold Presidential defensive action); *see also* Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551, 1626 (2011) ("A president has great responsibility, but part of that responsibility is not only to execute the laws with care and fidelity, but also to play a role in constituting the community through constitutional practices and commitments.").

401. *See* Reinstein, *supra* note 223, at 263.

402. *See* Lofgren, *supra* note 312, at 680 (explaining the President could direct the war after congressional authorization).

403. Barron & Lederman, *supra* note 253, at 800.

404. *See, e.g.,* FISHER, *supra* note 296, at 4 ("The power to go to war was not left to solitary action by a single executive, but to collective decision making through parliamentary deliberations."); Barron & Lederman, *supra* note 253, at 800 ("There is simply too much evidence suggesting a Founding-era understanding under which the legislature possessed the power to subject the Executive to control over all matters pertaining to warmaking, save those that would deprive him of superintendence."). *But see* JOHN YOO, *THE POWERS OF WAR AND PEACE* 141–42 (2005) (describing the original understanding of war powers as giving the President significant unilateral authority over deployment of military while congressional

centralized power, their recent colonial experience, and the distribution of power among the three branches all point to congressional control over the decision to go to war.⁴⁰⁵ Louis Fisher concludes that there was little doubt about the limited scope of the President's war power. The duty to repel sudden attacks represents an emergency measure that permits the president to take actions necessary to resist sudden attacks either against the mainland of the United States or against American troops abroad. The President never received a general power to deploy troops "whenever and wherever he thought best, and the Framers did not authorize him to take the country into full-scale war or to mount an offensive attack against another nation."⁴⁰⁶

On the other hand, the record is clear that the Framers intended the President to perform the practical function of guarding the nation against attack.⁴⁰⁷ A multiple member Congress should be entrusted with the decision to go to war,⁴⁰⁸ but it would be impossible for that same Congress to convene in time to authorize a defense against a sudden attack.⁴⁰⁹ Nevertheless, the declaration of war is exclusive to Congress, while the war fighting responsibility is shared by the President and Congress.⁴¹⁰ Therefore, although

control only came through its power of the purse); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006) (reemphasizing the President's authority over wartime decisions within the context of the war on terror).

405. KEYNES, *supra* note 212, at 29–30; MADISON'S NOTES, *supra* note 268, at 476.

406. FISHER, *supra* note 296, at 8–9; *see also* Louis Fisher, *Historical Survey of the War Power and the Use of Force*, in *THE U.S. CONSTITUTION AND POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES* 13 (Gary M. Stern & Morton H. Halperin eds., 1994) [hereinafter Fisher, *Historical Survey*] (noting the careful limitations on the power of the President to repel sudden attacks).

407. *See* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002) (explaining nineteenth century nations understood many actions tantamount to a declaration of war, and this understanding captures the conventional wisdom that only Congress can initiate hostile, offensive action, but the President can use force defensively); *see also* Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by Declare War*, 93 CORNELL L. REV. 45, 120–21 (2007) (discussing the eighteenth century view that hostile signals were regarded as declarations of war because they "evinced a resort to warfare to settle differences").

408. *See* Alfred W. Blumrosen & Steven M. Blumrosen, *Restoring the Congressional Duty to Declare War*, 63 RUTGERS U. L. REV. 407, 413 (2011) (noting that the Constitution prevents a single person from committing the nation to war); *see also* Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War*, 69 OHIO ST. L.J. 391, 398 (2008) ("The President has the power of initiative, the ability and authority to act quickly in the face of rapidly changing wartime realities in the theater of action. Congress, on the other hand, has a more deliberative, reflective power, allowing it to check and limit presidential initiative both *before* and *after* the Executive acts.").

409. *See* Ramsey, *supra* note 407, at 1550 (noting Madison's argument for the President's power to repel sudden attacks "without the delay of consulting Congress").

410. Rogers, *supra* note 255, at 1196, 1212; *see also* Prakash, *supra* note 407, at 45 ("The Constitution grants the 'declare war' power to Congress only, and hence only Congress can

the President may meet a sudden attack, the President must seek congressional approval to go beyond defense.⁴¹¹

There is no constitutional limitation on the prosecution of an aggressive war, however. The Constitution sets out a procedure to follow in order to commit the nation to war.⁴¹² It does not set any limitations on what kind of war Congress may authorize.⁴¹³

Congressional supremacy also extends to the conduct of the war.⁴¹⁴ A declared war is a perfect war but the implicit recognition of an imperfect war in the Constitution suggests the Framers wanted Congress to have the first, ultimate, and on-going say on the question of war.⁴¹⁵ The Commander in Chief Clause is given consent by congressional authorization to make war.⁴¹⁶ It was not meant to be the President's separate reservoir of war powers.⁴¹⁷

decide whether the United States will start a war or wage war against a nation that already has declared war against the United States. Under the original Constitution, the President cannot make these fateful choices.”).

411. See Ramsey, *supra* note 407, at 1626–31.

412. U.S. CONST. art. I, § 7, cl. 3. See generally 3 PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES ch. 13, § 5 (Lewis Deschler ed., 1994) (detailing the procedures followed for declarations of war since 1936).

413. Indeed, Congress may have the power to require the President to escalate the level of conflict. See Russell A. Spivak, *Co-Parenting War Powers: Congress's Authority to Escalate Conflicts*, 121 W. VA. L. REV. 135, 136 (2018); see also Charles Tiefer, *Can Congress Make a President Step up a War?*, 71 LA. L. REV. 391 (2011) (setting out an analytical template for analyzing situations involving a “hawkish” Congress).

414. “The war power of the national government is ‘the power to wage war successfully.’ It extends to every matter and activity so related to war as substantially to affect its conduct and progress.” *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (quoting Charles Evans Hughes, *War Powers Under the Constitution*, 2 MARQ. L. REV. 3, 9 (1917)); see also Barron & Lederman, *supra* note 253, at 691–92 (indicating a lack of historical evidence that Congress could not control the conduct of a war).

415. THE FEDERALIST NO. 69 (Alexander Hamilton); Lobel, *supra* note 408, at 466 (“The Framers of the Constitution intended that Congress have substantial power to control the conduct of warfare it has authorized. The consistent history of congressional restrictions confirms that the Constitution grants Congress concurrent power to decide not only whether to initiate warfare, but how and in what manner those authorized wars should be fought.”).

416. Barron & Lederman, *supra* note 253, at 802 (“The title ‘commander in chief’ did not necessarily imply that its holder possessed any power to operate free from statutory control; to the contrary, there are important indications that the Framers assumed—up to and including the moment of ratification—that a person so named would be subject to such control.”); John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 664 (2011) (“Our government can only prevent executive usurpation of our national war powers by observing and enforcing the implied and subordinate nature of the Commander-in-Chief power.”).

417. See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 700 (1997) (examining evidence that supports congressional primacy

VI. A CONTEXTUAL ANALYSIS

Professor Burns Weston has proposed a contextual analysis of the legality of nuclear weapons under international law.⁴¹⁸ The problems faced in that forum are similar to those faced when discussing nuclear weapons legality under the Constitution. Weston responds to the contention that the continued existence of the weapons themselves is an argument for their legality.⁴¹⁹ In addition, no international treaty clearly outlaws nuclear weapons and further there is confusion over the source of any implied authority to promulgate a general prohibition.⁴²⁰

Weston shows that such thinking is influenced by the assumptions it makes about the world and the international legal system.⁴²¹ Such assumptions, based on a statist and centrist notion of world affairs, are out of place in a world threatened by Nuclear Armageddon.⁴²²

Because the absence of any treaty, prohibition makes it impossible to assess the legality *vel non* of nuclear weapons, Weston analyzes the legality of these weapons in the contexts in which they are likely to be used.⁴²³ He applies the rules he derives to each context.⁴²⁴

This approach and Weston's justification of it have clear analogues in constitutional law. The lack of any explicit constitutional condemnation of weapons of mass destruction and the continued acceptance of our nuclear arsenal by Congress serve only to establish the proposition that nuclear weapons are not per se unconstitutional. Instead, the Constitution's structural and procedural provisions appear to require that a pragmatic judgment be made on these weapons in the contexts in which they will actually be used.⁴²⁵

Weston posits only defensive scenarios.⁴²⁶ He concludes that any number of international treaties and practices outlaw the offensive use of nuclear weapons.⁴²⁷ Moreover, all the nations which possess these weapons admit to

in declaring war by, among other things, showing that the Constitution does not allow the President to veto a declaration of war).

418. See generally Weston, *supra* note 219.

419. *Id.* at 548.

420. *Id.* at 548.

421. *Id.* at 545.

422. *Id.*

423. *Id.* at 553.

424. *Id.* at 554–60.

425. Carter, *supra* note 88, at 199.

426. See Weston, *supra* note 219, at 568.

427. See *id.* at 590.

intending only defensive use.⁴²⁸ This cannot apply to a constitutional analysis, however. As we have seen above, Congress can authorize an aggressive war.⁴²⁹ Such authorization would supersede any treaties to the contrary for constitutional purposes.⁴³⁰

Nevertheless, the answer is straightforward: Any offensive action, conventional or nuclear, must have prior congressional approval. Congress may choose to authorize perfect war, through a declaration, or imperfect war, through congressional resolution.⁴³¹ The Constitution would not stand in the way of aggressive war. Any obstacles to aggressive war would be political and not legal.⁴³²

Weston posits two general contexts with specific sub-contexts within each. The general categories are: First-strike (initiating or preemptive) defensive uses; and Second Strike (retaliatory) defensive uses. Nuclear weapons can be used in each context in the following ways: (1) Strategic nuclear warfare, which includes counter-value (societal) targeting and counterforce (military) targeting; and (2) Tactical nuclear warfare, which comprises theater (intermediate) targeting and battlefield (limited) targeting.⁴³³

A. First Strike, Counter-Value Targeting

In this scenario, the President would order a nuclear strike on the opponent's cities with strategic weapons in response to a perceived threat of attack on the United States. In theory, a preemptive, counter-value strike is designed to deter the opponent from attacking by inflicting enormous damage on its society. It is likely, however, to invite the opponent to respond in kind. A nuclear opponent whose cities have been decimated by large-scale nuclear

428. See, e.g., BEATRICE HEUSER, NATO, BRITAIN, FRANCE, AND THE FRG: NUCLEAR STRATEGIES AND FORCES FOR EUROPE, 1949–2000 (1997); Military Doctrine of the Russian Federation of 2014, para. 27 (Russ.); Julian Coman, *Pentagon Wants 'Mini-Nukes' to Fight Terrorists*, TELEGRAPH (Oct. 26, 2003), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/1445165/Pentagon-wants-mini-nukes-to-fight-terrorists.html> [<https://perma.cc/66LT-Y6S4>]; see also RHODES, ARSENALS OF FOLLY, *supra* note 132, at 76.

429. See Lofgren, *supra* note 312, at 680.

430. Weston, *supra* note 219, at 566 (noting that states are not obliged to comply with treaties if they are not party to or failed to object to the agreement); see Fisher, *Historical Survey*, *supra* note 406, at 11.

431. See Lobel, *supra* note 408, at 466–67 (“Accordingly, the Constitution sensibly accords the President considerable flexibility and discretion to prosecute a war, but permits Congress to maintain the ultimate authority to decide whether the President’s policies and strategies are those the nation should follow.”).

432. Garcia, *supra* note 216, at 523.

433. Weston, *supra* note 219, at 575.

weapons has little to lose by launching a retaliatory attack on the United States.⁴³⁴ It seems disingenuous to describe first strike, counter-value targeting as defensive. Nevertheless, the constitutional question concerns the President's ability to respond to a threat of attack.

It is undisputed that the President can respond defensively to an attack.⁴³⁵ The issue here, however, is the nature of the response and the imminence of the attack. As our historical study points out, the Framers were familiar with surprise attacks.⁴³⁶ The notion, self-evident to them, that the President could respond seems limited to "imminent" attacks, however.⁴³⁷ These would be attacks where there would be no opportunity to convene Congress for consultation or to ask for a declaration. It is for this reason that Raoul Berger confines imminent to the case of missiles actually falling on the United States.⁴³⁸ As a first principle, then, counter-value targeting must wait until the nuclear attack is imminent; that is, at least until the opponent's missiles are in the air.⁴³⁹

A second principle, however, further supports the conclusion against a first strike against counter-value targets. Our historical study shows that the President may not expand the military action beyond its defensive scope.⁴⁴⁰ This implies a proportionality principle.⁴⁴¹ That is, the President's defensive response must be in proportion to the attack. A first strike, however, is based on the speculation that the opponent will attack.⁴⁴² There is no way to judge proportionality in this case. Thus, to be faithful to the values enshrined in the Constitution, one must conclude that first strike, counter-value targeting must await congressional approval.⁴⁴³

434. See, e.g., BORDEN, *supra* note 33.

435. See Berger, *supra* note 51, at 49.

436. See *supra* notes 204–417 and accompanying text.

437. Berger, *supra* note 51, at 44.

438. *Id.* at 45.

439. See Weston, *supra* note 219, at 577–79; see also MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 244 (2007) (arguing that a threat short of an act of war does not justify a preemptive strike against enemy which would be an intrusion on Congress' exclusive power to declare war).

440. See *supra* Part V.

441. Cf. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3098 (2015) (embodying the notion that the larger the harm imposed should be justified by more weighty reasons).

442. See Weston, *supra* note 219, at 579.

443. See Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1818 (2010) (stating that unilateral presidential power to order a nuclear attack "is as close to unconstrained power as one can imagine").

The idea behind the proportionality principle is to allow Congress to convene to decide the country's proper response.⁴⁴⁴ A preemptive, counter-value strike virtually assures the beginning of a retaliatory spiral, where first the opponent and then the United States respond to one another's barrages with an attack of their own. In this situation, a first strike is just that: the initiation of warfare. The Constitution requires congressional approval.

The second scenario to consider is a preemptive strike against so-called counterforce targets, that is, military targets. In theory, such a first strike is limited to the military installations which are capable of carrying out a nuclear attack on the United States.⁴⁴⁵ In practice, however, such targeting would cause enormous collateral damage.⁴⁴⁶ Such damage would assure a retaliatory strike.⁴⁴⁷ Thus, the proportionality principle would rule out any such preemptive attack.

Tactical preemptive strikes against military targets might be different, however. In theory, these strikes would be against military targets using low-yield weapons.⁴⁴⁸ The problem comes in applying the proportionality principle in light of the enormous power of even low yield weapons.⁴⁴⁹ So called tactical weapons can range from small battlefield weapons only a fraction of the size of the Hiroshima weapon to bombs which rival the power of strategic weapons delivered by inter-ballistic missiles.⁴⁵⁰ The use of one of these latter weapons against a military target could potentially cause the same kind of disproportionate collateral damage that counterforce strategic weapons cause. In either case, the first use of such weapons virtually assures an enlargement of the conflict beyond its defensive scope.⁴⁵¹

The constitutionality of preemptive tactical strikes depends on the size of the weapon used. A truly low-yield weapon, the use of which does not invite strategic response, might satisfy the defensive and proportionality

444. See Li, *supra* note 399, at 402 ("The Framers intended the slow, deliberative process by which Congress makes its decisions to be a check against executive aggression and aggrandizement.").

445. See Stone, *supra* note 105, at 17 (describing this as a "pre-emptive 'forestalling' attack").

446. See *id.* at 17–18.

447. *Id.*

448. *Id.* at 18.

449. See RHODES, *ARSENALS OF FOLLY*, *supra* note 132, at 102–03.

450. See generally *Tactical Weapons Systems*, *ENCYCLOPEDIA BRITANNICA* (July 20, 1998), <https://www.britannica.com/technology/tactical-weapons-system> [<https://perma.cc/CH56-B5J2>].

451. See Raven-Hansen, *supra* note 207, at 789 ("A broad range of informed opinion, running across the political spectrum, agrees that nuclear escalation of a conventional European war would probably be uncontrollable, that 'limited' nuclear war is a contradiction in terms.").

principles.⁴⁵² Professor Weston employs the same distinction in his analysis of the international law rules governing nuclear war.⁴⁵³ He defines a tactical weapon as one below the 13 to 22 kiloton level of the Hiroshima and Nagasaki weapons.⁴⁵⁴

Using this as our baseline, the question then becomes can the first use of nuclear weapons ever be both defensive and proportionate.⁴⁵⁵ First, the use of tactical weapons absent congressional approval to preempt a conventional attack would not be proportionate to the threat posed by the adversary.⁴⁵⁶ Indeed, the President has the responsibility to defend the United States. In the likely situation, however, a conventional force would be arrayed against United States forces deployed in a foreign country.⁴⁵⁷ This is a qualitatively different case from missiles falling on the United States. The President would not be defending the United States against sudden attack.⁴⁵⁸ Rather, the situation would undoubtedly have developed over a period of time.⁴⁵⁹ During this interim, Congress could convene to consider the extent of presidential authority.⁴⁶⁰ Without such authority, the President must meet conventional force with conventional force.

The use of tactical weapons to preempt a tactical nuclear attack would follow the same analysis. The likely development of such a crisis over a relatively long period of time would allow Congress to debate the question.⁴⁶¹

The principle of proportionate response would limit presidential authority on the second use of nuclear weapons to a tactical nuclear attack. Absent

452. *But see* Louis René Beres, *In a Dark Time: The Expected Consequences of an India-Pakistan Nuclear Exchange*, 14 AM. U. INT'L L. REV. 497, 513 (1998) (reasoning that even a limited nuclear conflict could cause devastating human, biological, and environmental effects beyond the region where attack occurred).

453. Weston, *supra* note 219, at 579.

454. *Id.* at 582.

455. *See* REVELEY, *supra* note 232, at 356 n.22 (suggesting that using nuclear weapons initiates new conflict).

456. *See* Stone, *supra* note 105, at 8.

457. *See* Raven-Hansen, *supra* note 207, at 787, 790; *see also* William C. Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, 13 J. LEGIS. 1, 1–2 (1986) (stating that War Powers Act grants the President discretion to commit forces to “national emergency created by attack upon the United States, its territories or possessions, or its armed forces”).

458. Stone, *supra* note 105, at 8.

459. Raven-Hansen, *supra* note 207, at 790 (“But today the probable scenario of nuclear escalation of a conventional war in Europe presents a very different time frame. NATO commanders and defense experts have estimated that such an attack will yield at least 2 to 3 days in which to make a first-use decision, and probably more to the extent that Warsaw Pact mobilization efforts provide advance warning.”).

460. *Id.*

461. *See* Stone, *supra* note 105, at 5.

congressional approval, the President could not respond to a tactical strike with a strategic strike. Assuming a proportionate response, however, the second use of nuclear weapons would not violate the constitutional norms that animated the Framers.

The Constitution might not preclude the use of a tactical response to a conventional attack. Nothing in the historical study would prevent the President from using the weapons at his disposal to defend American troops.⁴⁶² Nevertheless, the risk that using nuclear weapons to defend against a conventional attack would expand the conflict beyond its defensive context and would outweigh the necessity for their use.⁴⁶³ The guiding principle should be that in all but the most extreme circumstances Congress must authorize the initiation of conflict and its conduct.⁴⁶⁴ There would be ample time for Congress to debate the nature and extent of presidential authority.⁴⁶⁵

In summary, the principles the Framers embedded in the Constitution require prior congressional authorization before the President launches a strategic preemptive strike.⁴⁶⁶ By the same token, the same principles require congressional authorization prior to any preemptive tactical strike. On the other hand, a defensive retaliation in kind would not require constitutional approval. A retaliation out of proportion to the attack would require prior congressional authorization.

VII. RESTORING THE BALANCE

This Article focuses on the norm of prior congressional authorization.⁴⁶⁷ A thorough analysis on how to implement that norm is beyond the scope of

462. *See id.* at 19.

463. *See id.* at 8.

464. *See Charles Tiefer, The FAS Proposal: Valid Check or Unconstitutional Veto?, in FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?, supra* note 88, at 143, 156–59 (demonstrating strong historical role of Congress).

465. *See Reid Skibell, Separation-of-Powers and the Commander in Chief: Congress's Authority to Override Presidential Decisions in Crisis Situations*, 13 *GEO. MASON L. REV.* 183, 185 (2004) (“Congress’s war powers are sufficiently robust that it can countermand presidential decisions justified under a broad interpretation of the commander-in-chief power.”).

466. *See Jonathan G. D’Errico, The Specter of a Generalissimo: The Original Understanding of the President’s Defensive War Powers*, 42 *FORDHAM INT’L L.J.* 153, 156 (2018) (“The Constitution was designed to encourage presidential initiative in the immediate defense of national borders while necessitating congressional approval to sustain longer conflicts.”).

467. Other limitations on the President, such as cutting congressional funding or initiating impeachment would be spectacularly ineffective after the President launched a nuclear attack. *See Tung Yin, Structural Objections to the Inherent Commander-in-Chief Power Thesis*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 965, 978–79 (2007) (“Given the anticipated nature of nuclear war as involving no more than one or two waves of nuclear strikes by each side,

this Article but it will be helpful to discuss a few of the possibilities.⁴⁶⁸ The question is “[w]hat war powers system would enhance the effectiveness of the United States in making decisions about war and peace.”⁴⁶⁹

Professor Raven-Hansen laid out the range of possibilities:

Nothing in the present distribution [of the war powers] would bar Congress from prohibiting first use or early first use. If time permits—as well it may today or in the near future in the European first-use scenario—the full Congress could also remove the prohibition during a conventional war. Congress cannot invade the [C]ommander in [C]hief’s prerogatives by microcommanding the armed forces, but its power to authorize limited or partial war—limited in this case to conventional war—has been judicially recognized since 1800.⁴⁷⁰

Working within the current constitutional structure, Congress could pass legislation involving itself in making nuclear policy.⁴⁷¹ It could require the

defunding would not allow Congress to terminate the nuclear war initiated by the President. Similarly, the failure of Congress to declare “total” war between the United States and its nuclear adversary would be of little comfort to either nation with nuclear warheads already on their annihilating trajectories.”).

468. See Ganesh Sitaraman & David Zions, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516, 574–88 (2015), for an interesting approach to designing an improved institutional war powers decision making process by using the insights of behavioral psychology to create five institutional designs to regulate the war powers of Congress and the President.

469. Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2515 (2006).

470. Raven-Hansen, *supra* note 207, at 793–94; see also Antonio F. Perez, *A Whole Text Reading of the War Powers Clauses: Why the Constitution’s Text Obviates Esoteric War Powers Debates and Encourages Policy Flexibility and Democratic Accountability*, 12 GEO. J.L. & PUB. POL’Y 861, 863 (2014) (“[B]y enabling the President to act and burdening Congress with responsibility for enacting constraining legislation, debate will shift . . . towards the prudence and morality of specific decisions, as judged by the People’s elected representatives and ultimately, therefore, the People themselves.”).

471. See Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1687–88 (2014) (“Rather than devoting its institutional energy to reasserting its control over decisions to engage the enemy with military force in particular circumstances, Congress would work to engage the executive branch more seriously and continually with regard to the general policy circumstances under which force might be contemplated.”). See generally Eric Talbot Jensen, *Future War and the War Powers Resolution*, 29 EMORY INT’L L. REV. 499 (2015) (arguing for an expansion of the War Powers Resolution to include actions by personnel, supplies, or capabilities, and covering hostilities against and violations of other nation’s sovereignty.) Of course, different constitutional and political questions arise if the President refuses to comply. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (reasoning that Presidential action rises and falls in conjunction with congressional approval and disapproval). See Peter Raven-Hansen, *The Constitutionality of the*

President to prepare a quadrennial Nuclear Posture Review and submit it to Congress for approval.⁴⁷² The process could be modeled on the National Emergencies Act.⁴⁷³ Congress would treat the review as a special bill and be required to vote on it and submit the results to the President for signature or approval. If the President vetoed the bill, Congress could override the veto.⁴⁷⁴ Unlike the National Emergency Act, which imposes strict and fairly short time frames for congressional action, Congress would be allowed to spend more time considering the review.⁴⁷⁵ This approval could be joined with an on-going requirement that the President inform Congress and consult with congressional committees on possible changes to the Nuclear Posture Review.⁴⁷⁶

Congress could pass legislation in advance to deal with the use of nuclear weapons⁴⁷⁷ or otherwise limit the President's discretion to use nuclear

FAS Proposal: A Critical Summary, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?*, *supra* note 88, at 211, 211–20, for a list of the different legal contexts in which presidential first-use might present itself.

472. *See, e.g.*, Nuclear Cruise Missile Reconsideration Act of 2017, H.R. 2667, 115th Cong. (1st Sess. 2017) (restricting defense funds until the Secretary of Defense complete a Nuclear Posture Review that “includes an assessment of the capabilities and effects of the use of the long-range standoff weapon, and for other purposes”).

473. National Emergencies Act, 50 U.S.C. §§ 1601–51 (2012); *see also* Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1245–46 (2018) (proposing a sliding scale of procedural restraints on the President's foreign affairs powers with Congress potentially borrowing from the Administrative Procedures Act, the National Environmental Policy Act of 1969, and other similar statutory procedural schemes).

474. *See, e.g.*, National Emergencies Act § 1631 (requiring the President to submit an emergency declaration to Congress for approval, which must vote on it within a brief period).

475. The National Emergencies Act requires action within several weeks. *See id.* § 1622(b). Voting so quickly on the nuclear posture review would not be necessary, although Congress would still be required to vote.

476. *See, e.g.*, JAMES A. BAKER, III ET AL., NATIONAL WAR POWERS COMMISSION REPORT 10 (2008) (aiming to improve the largely ineffective War Powers Resolution of 1973); *see also* Julia L. Chen, *Restoring Constitutional Balance: Accommodating the Evolution of War*, 53 B.C. L. REV. 1767, 1770 (2012) (arguing for a broader and more flexible approach that would require meaningful consultation between the President and the Congress); Brenda Flynn, *The War Powers Consultation Act: Keeping War out of the Zone of Twilight*, 64 CATH. U. L. REV. 1007, 1009 (2015) (discussing the proposed War Powers Consultation Act). *But see* Matthew Fleischman, *A Functional Distribution of War Powers*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 137, 145 (2010) (arguing for a significantly different War Powers Act that greatly reduces the time for congressional notice and consideration).

477. For a general discussion on how Congress might use its “power of the purse” to control the President's use of nuclear weapons, *see* Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 942–43 (1994) (reasoning that power is broad but not unlimited and may infringe on presidential power).

weapons.⁴⁷⁸ As opposed to the broad delegation of control to the President in the Atomic Energy Act,⁴⁷⁹ Congress could pre-authorize specific uses under specific circumstances.⁴⁸⁰ Congress also could approach the matter as the Markey-Lieu legislation does and declare that “[i]t shall be the policy of the United States that no first-use nuclear strike should be conducted absent a declaration of war by Congress.”⁴⁸¹

Finally, we could amend the Constitution.⁴⁸² Perhaps nuclear weapons have rendered the Constitution’s imprecise processes obsolete and the consequences of nuclear war so severe that we have to rethink the balance of war powers.⁴⁸³ Any structural changes to the war powers would require a constitutional amendment.⁴⁸⁴ For example, Edward Corwin and the Federation of American Scientists suggested special committee approval or

478. See also Waxman, *supra* note 471, at 1687–88 (“Rather than devoting its institutional energy to reasserting its control over decisions to engage the enemy with military force in particular circumstances, Congress would work to engage the executive branch more seriously and continually with regard to the general policy circumstances under which force might be contemplated.”). See generally BAKER, *supra* note 476, at 12.

479. See 42 U.S.C. § 2121 (2012); see also Flynn, *supra* note 476, at 1009 (discussing the proposed War Powers Consultation Act).

480. Alberto R. Gonzales, *Advising the President: The Growing Scope of Executive Power to Protect America*, 38 HARV. J.L. & PUB. POL’Y 451, 507 (2015) (“Under the appropriate circumstances, and when time permits, Congress should insist on prior consultation. Congress must engage in vigorous oversight and be unafraid to question executive action and to test the assumptions that drive executive decisions.”); see also Jonathan T. Menitove, *Once More Unto the Breach: American War Power and a Second Legislative Attempt to Ensure Congressional Input*, 43 U. MICH. J.L. REFORM 773, 798 (2010) (arguing for a revision of the defense appropriation process to allow Congress to reassert its authority over decisions to go to war).

481. Restricting First Use of Nuclear Weapons Act, H.R. 669, 116th Cong. (2019) (defining first use as an attack using nuclear weapons against an enemy without President determining whether enemy first launched a nuclear strike against U.S. or an ally).

482. See Goldstein, *supra* note 12, at 1592; see also Ray Forrester, *Presidential Wars in the Nuclear Age: An Unresolved Problem*, 57 GEO. WASH. L. REV. 1636, 1641 (1989) (suggesting three “nuclear footballs” in the hands of President, Speaker of the House, and President *pro tem*, all of whom would have to agree to launch nuclear weapons). See generally Donald A. Dechert, III, Note, *Perpetual Warfare: Proposing a New American Constitutional Amendment for the War Powers*, 52 VAL. U. L. REV. 457, 459 (2018) (arguing that constitutional amendment is the solution to the problematic state of using military force).

483. Goldstein, *supra* note 12, at 1543 (“As the dangers of war have increased exponentially since the time when the Constitution was ratified, the efficacy of the constitutional safeguards which were intended to limit the likelihood of war has dwindled dramatically.”).

484. *Id.* But see Banks, *supra* note 457, at 2 (“Still acting under the War Powers Act, the President chooses not to consult Congress before firing the nuclear weapons.”).

legislative vetoes.⁴⁸⁵ These methods would contravene the constitutional process for making law and, thus, require a constitutional amendment.⁴⁸⁶

VIII. CONCLUSION

This discussion takes on an otherworldly tone after a while.⁴⁸⁷ Some good can come about if, as Herman Kahn said, this discussion “takes the edge off the bizarreness, i.e., if it makes it easier to discuss the problem and to weigh various policies on their merits, rather than on relatively thoughtless (though often deeply held) emotional reactions.”⁴⁸⁸ The Framers could never have anticipated mass destruction weapons like nuclear bombs.⁴⁸⁹ We can articulate the general but indeterminate principles very well, but we have no way of knowing if the Framers would have modified these principles if they lived in the nuclear age.⁴⁹⁰ In the end, the nuclear age may require new

485. See Banks, *supra* note 457, at 2–3. Compare EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY, 83–84, 155 (13th ed. 1973), with Stone, *supra* note 105, at 11 (requiring the President to get approval of a “planning committee” consisting of high-ranking legislative officials and committee chairs).

486. See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (finding legislative veto inconsistent with the “finely wrought” constitutional procedure to make law). But see Tiefer, *supra* note 464, at 143–44 (arguing that *Chadha* does not apply to war powers); Banks, *supra* note 457, at 4 (suggesting committee violates neither *Chadha* nor the separation of powers); Hemesath, *supra* note 11, at 2502 (urging passage of new War Powers Resolution to remove “ambiguities”). See generally Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A “Joint Decision” Solution*, 77 GEO. L.J. 367 (1988) (proposing a “joint decision” framework modeled on but going beyond the War Powers Resolution).

487. See, e.g., Carter, *supra* note 88, at 109 (discussing nuclear war in legalistic terms “eerie and disquieting”); Herman Kahn, *Nuclear Proliferation and Rules of Retaliation*, 76 YALE L.J. 77, 89 (1966) (discussing retaliation scenarios had “many bizarre aspects”).

488. HERMAN KAHN, IN DEFENSE OF THINKING (Herman Kahn ed., Hudson Inst. 1962). In an essay adapted from his book *Thinking About the Unthinkable*, Kahn stated that he was tempted to reply to critics who accused him of icy rationality by asking: “Would you prefer a warm, human error? Do you feel better with a nice emotional mistake?” *Id.* GHAMORI-TABRIZI, *supra* note 32, at 42.

489. But see Note, *Recapturing the War Power*, 119 HARV. L. REV. 1815, 1836 (2006) (“Although the United States’ geopolitical position has changed dramatically since the Founding, many of the concerns underlying our separated and sequenced war powers—the fear of executive overreach and provocation of conflict, as well as the need for unitary and swift decision making in the areas of foreign affairs, national defense, and protection of commerce abroad—continue to be relevant today.”).

490. See Fleischman, *supra* note 476, at 146.

constitutional rules and not recourse to the old principles.⁴⁹¹ The only way to know, however, is to apply the old principles to the new age.⁴⁹²

The point of this Article was to explore the truth of Jefferson's claim that the Constitution has chained "the dog of war."⁴⁹³ In an age of clipper ships and slow-moving armies without means of immediate communication, Jefferson may have been correct. One hopes the constitutional structures that could constrain eighteenth century armies will have an effect on the use of nuclear weapons.

491. *Id.* ("[O]riginalism has taken the war powers debate as far as it can go, and it is time to answer this question by an alternative means.").

492. Levinson & Balkin, *supra* note 443, at 1866 ("We cannot leave the growth of republics to chance and circumstance; one must design systems for emergencies in advance to head off problems before they occur. That is why all students of constitutionalism, including those who study the presidency, must also be students of constitutional design.").

493. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 392–98 (Julian P. Boyd ed., 1958).

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