President of the United States, Destroyer of Worlds: Considering Congress's Authority to Enact a Nuclear No-First-Use Law

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President of the United States, Destroyer of Worlds:¹ Considering Congress’s Authority to Enact a Nuclear No-First-Use Law

John Ramming Chappell*

This article argues that Congress can exercise its constitutional war powers to enact a law restricting the President from using nuclear weapons first. The article contends that using a nuclear weapon is qualitatively different from conventional warfare and that the first use of nuclear weapons marks a decision to enter into war. Therefore, nuclear first use is not a battlefield decision within the President’s commander in chief power but rather a choice to enter the United States into a new type of conflict that could pose a direct, immediate, and existential threat to the U.S. homeland. Regulating that decision falls under Congress’s exclusive war powers. Congress can limit its authorizations of war and prohibit military actions beyond its authorization. Therefore, Congress could stipulate that its war authorizations extend only to conventional hostilities unless Congress expressly authorizes the first use of nuclear weapons. Using its authority to limit authorizations of for the use of military force, Congress can enact a no-first-use law.

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I. Still Living Under a Nuclear Sword of Damocles²

After decades of Taiwanese self-governance, suppose the People’s Republic of China mounts an invasion across the Taiwan Strait to “unify” the mainland with its “rebel province.”³ The United States has long professed a “strategic ambiguity” approach to Taiwan,⁴ meaning that successive U.S. administrations have declined to definitively state under which conditions the United States would come to Taiwan’s defense in such a contingency.⁵ Now, with tensions between China and the United States at an all-time high, the President decides to take military action against China to repel the attack.⁶ The President’s advisors warn him that the United States does not have sufficient conventional forces mobilized nearby to halt the offensive before the Chinese military reaches Taiwan’s shore.⁷ Without consulting Congress,⁸ the President orders a nuclear strike targeting Chinese forces, a first use of nuclear weapons that prompts a Chinese nuclear response.⁹

² John F. Kennedy, President of the United States, Address Before The General Assembly Of The United Nations (Sep. 25, 1961) (“Today, every inhabitant of this planet must contemplate the day when this planet may no longer be habitable. Every man, woman and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness.”)
³ See Lindsay Maizland, Why China-Taiwan Relations Are So Tense, COUNCIL ON FOREIGN RELS. (May 10, 2021), https://www.cfr.org/backgrounder/china-taiwan-relations-tension-us-policy.
⁴ See Taiwan Relations Act, 22 U.S.C. § 3301 (“. . . to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan”).
⁶ For an argument in favor of the United States defending Taiwan from a former Trump administration State Department official, see Elbridge Colby, The United States Should Defend Taiwan, NAT’L REV. (Dec. 20, 2021), https://www.nationalreview.com/magazine/2021/12/20/the-united-states-should-defend-taiwan/.
⁸ This scenario would require the President to have a preemptive authorization to enter into hostilities with China in defense of Taiwan. Members of Congress have advocated such an authorization. See S.Amdt.4285 to S.Amdt.3867 to H.R. 4350, 117th Cong. (2021). See also Rep. Elaine Luria, Congress must unie Biden’s hands on Taiwan, WASH. POST (Oct. 11, 2021), https://www.washingtonpost.com/opinions/2021/10/11/elaine-luria-congress-biden- taiwan/ (“It is time to untie the hands of our president so that he can, in fact, carry through with the ‘rock solid’ commitment to Taiwan if actions by China require it.”)
⁹ During Chinese attacks on Taiwan in 1958, the United States reportedly considered using nuclear weapons in defense of Taiwan. See Charlie Savage, Risk of Nuclear War Over Taiwan in 1958 Said to Be Greater Than Publicly Known, N.Y. TIMES (May 22, 2021), https://www.nytimes.com/2021/05/22/us/politics/nuclear-war-risk-1958-us-china.html. While much has changed since then, the events of 1958 show that nuclear first use in a Taiwan contingency may be within the realm of possibility.
The ensuing nuclear exchange ends millions of civilian lives in the United States and China within days.\textsuperscript{10}

\textbf{A. The Persistent Threat of Nuclear Weapons}

Seventy-six years after the United States used the first nuclear weapons in war to bomb Nagasaki and Hiroshima, no other country has launched nuclear weapons in warfare. However, the risk of a nuclear exchange remains. Although the recurring nuclear crises of the Cold War have subsided,\textsuperscript{11} nuclear weapons remain at the forefront of national security conversations in disparate regions,\textsuperscript{12} and an exchange of nuclear strikes remains possible.\textsuperscript{13} While the decision to use nuclear weapons is a matter of life or death for many people, in the U.S. it lies with one person: the


President. Despite the persisting danger of a nuclear exchange, Congress currently has no say in the President’s decision to use nuclear weapons, including a decision to use nuclear weapons first.\textsuperscript{14}

In the United States, the Trump presidency renewed concerns about the use of U.S. nuclear weapons and opened a dialogue about the President’s sole authority to make such a potentially devastating decision.\textsuperscript{15} President Trump reportedly suggested launching nuclear weapons into hurricanes on multiple occasions.\textsuperscript{16} His exchanges with Kim Jong Un included a declaration that “I too have a Nuclear Button, but it is a much bigger & more powerful one than his, and my Button works!”\textsuperscript{17} and a threat of “fire and fury” against North Korea.\textsuperscript{18} President Trump’s temperament drew attention to the President’s nuclear authorities, resulting in a flurry of books, essays, and editorials expressing concern about his responsible use of the nuclear arsenal.\textsuperscript{19} Authors called attention to the President’s sole authority to order a nuclear launch and the U.S. policy that allows

\textsuperscript{14}WILLIAM J. PERRY & TOM Z. COLLINA, THE BUTTON: THE NEW NUCLEAR ARMS RACE AND PRESIDENTIAL POWER FROM TRUMAN TO TRUMP 3 (2020). In a 2017 NPR/Ipsos poll, 44% of respondents thought that the President needed congressional approval for a nuclear strike, and just 24% correctly responded that the President can order a nuclear strike without consulting anyone else. Scott Horsley, NPR/Ipsos Poll: Half Of Americans Don’t Trust Trump On North Korea, NPR (Sep. 18, 2017), https://www.npr.org/2017/09/18/551095795/npr-ipsos-poll-most-americans-dont-trust-trump-on-north-korea.


\textsuperscript{17}Trump to Kim: My nuclear button is 'bigger and more powerful', BBC (Jan. 3 2018), https://www.bbc.com/news/world-asia-42549687.


the United States to use nuclear weapons first.\textsuperscript{20} Amid concerns about President Trump launching an unprovoked nuclear attack in 2017,\textsuperscript{21} the Senate held its first hearing on nuclear launch authority since 1976.\textsuperscript{22}

In early 2022, concerns about a possible nuclear exchange mounted during Russia’s invasion of Ukraine, especially after President Vladimir Putin put Russia’s nuclear deterrent on high alert in late February.\textsuperscript{23} As the Russian military met significant resistance and struggled to gain ground in much of the country, some analysts expressed that President Putin might opt to use low-yield nuclear weapons against Ukrainian forces.\textsuperscript{24} As Ukrainian President Volodymyr Zelensky called for the United States to impose a no-fly zone in Ukraine, American analysts warned that such a measure could risk a nuclear war.\textsuperscript{25}

\textsuperscript{23} Yuras Karmanau et al., \textit{Putin puts nuclear forces on high alert, escalating tensions}, \textit{Associated Press} (Feb. 27, 2022), https://apnews.com/article/russia-ukraine-kyiv-business-europe-moscow-2e4e1c7f84f22b6afbe5a2f936725550.
B. No First Use

Recognizing the devastation that a nuclear exchange could wreak, nuclear policymakers in the White House and on Capitol Hill have long considered, but never adopted, a promise to never use nuclear weapons first – what is known as a “no-first-use policy.”26 Such a promise would be tantamount to acknowledging that the sole purpose of U.S. nuclear weapons is to deter other states’ use of nuclear weapons. Deterrence requires an adversary to perceive that, if an adversary strikes the U.S. with nuclear weapons, the United States could launch a retaliatory second strike with surviving nuclear forces that would result in unacceptable losses for the aggressor state.27 Under a deterrence framework in which the sole purpose of nuclear weapons is deterring a nuclear attack by another state, a state does not need to use nuclear weapons first.

Past no-first-use debates have included questions about whether passing a no-first-use law would exceed Congress’s authority. As the Biden administration reviews the U.S. nuclear posture and considers adopting a no-first-use policy, evaluating the constitutionality of Congress enacting a no-first-use law helps determine whether Congress could enshrine a no-first-use policy in law, regardless of President Biden’s decision.

Using the proposed Restricting First Use of Nuclear Weapons Act as a model,28 this article argues that Congress can constitutionally enact a law restricting the President’s use of nuclear weapons. Section II outlines the history of no-first-use policy debates. Section III discusses how the Constitution allocates war powers between Congress and the President in general. Section IV then considers how war powers apply to the first use of nuclear weapons and how Congress could

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26 This paper discusses executive and legislative no-first-use proposals in Section IA and IB.
28 See H.R. 669, 117th Cong. (2021). This paper discusses the bill further in Section IC.
constrain first use. Section V analyzes two situations that raise constitutional and practical issues for a no-first-use law. Finally, Section VI discusses the article’s findings and their implications for U.S. nuclear policy.

II. BACKGROUND AND HISTORY OF NO-FIRST-USE POLICY DEBATES

Policymakers have debated whether to declare a no-first-use policy for at least seventy years, beginning soon after the dawn of the nuclear age.29 Both Congress and presidential administrations have considered implementing a no-first-use policy.30 However, the United States has elected to keep first use on the table time and again. This Section outlines past no-first-use debates.

A. The Policy Debate Around No First Use

The 2018 Nuclear Posture Review describes the current U.S. declaratory policy,31 ruling out a no-first-use pledge in order to maintain deterrence against non-nuclear attacks.32 U.S. declaratory policy precludes using nuclear weapons against “states that are party to the [Non-Proliferation Treaty] and in compliance with their nuclear non-proliferation obligations.”33 The Nuclear Posture Review states that the United States would consider using nuclear weapons in response to “attacks on the U.S., allied, or partner civilian population or infrastructure, and attacks on U.S. or allied nuclear forces, their command and control, or warning and attack assessment capabilities.”34

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30 For further discussion of past consideration of no-first-use policies, see subsections B and C of this Section.
31 The Nuclear Posture Review is the chief expression of U.S. nuclear policy. Declaratory policy is a set of public statements regarding the circumstances under which a state would consider using nuclear weapons. See generally, GEORGE PERKOVICH & PRANAY VADDI, PROPORTIONATE DETERRENCE: A MODEL NUCLEAR POSTURE REVIEW 1, 31-32 (2021).
33 Id. at 21.
34 Id.
Proponents of a no-first-use policy argue that the United States should never need to use nuclear weapons first because the United States can accomplish any necessary objective that the first use of nuclear weapons could advance with conventional force instead. No-first-use supporters also claim that prohibiting the first use of nuclear weapons would decrease the likelihood of a mistaken nuclear launch by ensuring that the United States would not respond to a false alarm with a nuclear strike. No-first-use supporters further argue that the current policy of leaving first use on the table undermines stability in a crisis by incentivizing other states to launch a preemptive strike, increasing the risk of miscommunication and brinkmanship, and prompting opponents to take measures to increase the survivability of their forces that would increase the risk of unauthorized use.

Opponents of a no-first-use policy, on the other hand, argue that the policy would undermine deterrence. They claim the United States needs a nuclear deterrent against both nuclear attacks and significant conventional, chemical, biological, or cyber threats. Conventional threats were especially salient during the Cold War when policymakers feared the Warsaw Pact may invade NATO and that the Pact’s conventional superiority required a nuclear deterrent. Furthermore, they

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35 See PERRY & COLLINA, supra note 14, at 210. Generally speaking, the use of conventional force refers to the use of military force by means that do not involve nuclear, chemical, or biological weapons.
38 See, e.g., John R. Harvey, Assessing the Risks of a Nuclear ‘No First Use’ Policy, WAR ON THE ROCKS (July 5, 2019), https://warontherocks.com/2019/07/assessing-the-risks-of-a-nuclear-no-first-use-policy/ (“The first risk is to deterrence: Adversaries, absent a fear of reprisal, could be emboldened to act against U.S. interests.”)
39 See id.
posit that a no-first-use policy would undermine extended deterrence over U.S. allies, incentivizing them to develop their own nuclear arms amid eroding U.S. assurances.

B. Presidential Considerations

Several administrations have weighed the possibility of a no-first-use policy. George Kennan, the diplomat and strategist who first crafted the Cold War’s containment policy, recommended a no-first-use policy to the Truman administration in 1950, but President Truman declined to implement the proposal and kept the first use of nuclear weapons under “active consideration.”

During the Clinton administration, Defense Secretary Les Aspin considered a no-first-use policy as part of a post-Cold War nuclear posture. However, Aspin elected not to incorporate no first use into the Nuclear Posture Review after allies expressed concern that the policy would undermine their security. Although the details of those concerns are not publicly available, allies tend to approach the prospect of a no-first-use policy with caution if they depend on U.S. security assurances to deter conventional attacks. A no-first-use policy would retain the option of retaliating with nuclear weapons against a nuclear attack on an ally, but it would rule out the use of nuclear weapons in retaliation against a non-nuclear attack, whether on an ally or the United States. Therefore, allies and partners that depend on the United States for extended deterrence against non-

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41 As British Defense Minister Denis Healey argued in the 1960s, “it only takes five percent credibility to deter the Russians, but ninety-five percent credibility to reassure the Europeans.” ROBERTS, supra note 13, at 179.
43 See PERRY & COLLINA, supra note 14 at 88.
44 See Perry & Collina, supra note 14 at 95.
nuclear attacks tend to oppose a no-first-use policy because it would make a conventional attack against them appear less risky.

The election of President Barack Obama elicited hopes for policies to reduce the role of nuclear weapons in U.S. security, including a no-first-use policy.\(^{46}\) In a 2009 speech in Prague, President Barack Obama affirmed “America’s commitment to seek the peace and security of a world without nuclear weapons.”\(^ {47}\) That vision contributed to President Obama’s selection for the Nobel Peace Prize that year.\(^ {48}\) However, after consultations with allies, the Obama administration chose not to include no first use in the 2010 Nuclear Policy Review.\(^ {49}\) President Obama revisited no first use at the end of his second term but again encountered resistance from advisors and allies, including Japan, South Korea, France, and the United Kingdom.\(^ {50}\)

The Trump administration resurfaced concerns about U.S. nuclear policy, making no first use an important policy issue in the 2020 presidential election.\(^ {51}\) No-first-use policy even appeared in a Democratic presidential debate in 2019 when Senator Elizabeth Warren supported the idea because “[i]t reduces the likelihood that someone miscalculates, [or] someone misunderstands.”\(^ {52}\)

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\(^{46}\) See id at 96.


\(^{49}\) See PERRY & COLLINA, supra note 14, at 96; ROBERTS supra note 13, at 201. Allies in Northeast Asia particularly opposed the change. Neither Japan nor South Korea has nuclear weapons despite their proximity to North Korea and China. U.S. allies in Northeast Asia instead rely on U.S. extended deterrence to guard against existential security threats, making them especially sensitive to changes in the U.S. nuclear posture.


Montana governor Steve Bullock countered that he “wouldn’t want to take [first use] off the table.”

The Biden administration has begun its Nuclear Posture Review, which was expected for release in early 2022. The process has already sparked controversy within the Department of Defense, where senior officials requested the resignation of a political appointee overseeing the review. The ouster drew concern from Senator Ed Markey, who worried the appointee’s reassignment may have been motivated by a desire to disadvantage no first use in the review process. In late 2021, hundreds of top scientists urged President Biden to adopt a no-first-use policy in a letter. Dozens of members of Congress followed suit in early 2022, urging the President to “declare that the sole purpose of nuclear weapons is to deter a nuclear attack on the United States and its allies, and that the United States will never use nuclear weapons first.” President Biden’s past support for a no-first-use policy has also elicited concern from allies. As Vice President in January 2017, Joe Biden said, “Given our non-nuclear capabilities, and today’s threats—it’s hard to envision a plausible scenario in which the first use of nuclear weapons would be

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53 Transcript of July Democratic Debate, supra note 52.
54 See Steven Pifer, The Biden Nuclear Posture Review: Defense, Offense, and Avoiding Arms Races, ARMS CONTROL TODAY (2022), https://www.armscontrol.org/act/2022-01/features/biden-nuclear-posture-review-defense-offense-avoiding-arms-races (“In June, the administration launched a missile defense review, which should be completed early in 2022, about the same time as the NPR.”).
58 Letter from 55 Members of Senate and House of Representatives to Joseph R. Biden, President of the United States (Jan. 22, 2022), https://www.markey.senate.gov/imo/media/doc/nuclear_posture_review1.pdf. The letter’s signatories included Senator Markey and Representative Lieu, the sponsors of the legislation upon which this article focuses.
necessary. Or make sense.” Biden reaffirmed his position as a presidential candidate. However, in March 2022, administration officials reportedly indicated that President Biden’s Nuclear Posture Review will not adopt a no-first-use policy.

In sum, presidential administrations have considered a no-first-use policy and elected to keep their options open while assuring the public that they would only use nuclear weapons in extreme circumstances.

C. Congressional Proposals

Congress, in turn, has explored passing a no-first-use law. Unlike presidential policy considerations, a no-first-use law would bind the Executive Branch across administrations. However, efforts to pass a no-first-use law have thus far fallen flat partially due to constitutional concerns.

During the Vietnam War, legislators considered how to best reclaim congressional authority over war powers and foreign policy. The 1970s saw framework legislation like the War Powers Resolution, National Emergencies Act, and the Arms Export Control Act. As Congress considered how to reassert control over foreign policy and national security issues, two no-first-use proposals emerged.

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64 See id.
In 1971, the Federation of American Scientists (FAS) drafted a bill requiring the assent of a committee of congressional leaders before a President could use nuclear weapons first without a declaration of war. FAS renewed its call for a no-first-use law in 1984 with an essay in *Foreign Policy*. The essay sparked debate among constitutional scholars and elicited criticism from those who questioned the constitutionality of a leadership committee authorizing nuclear first use. In particular, some concluded the mechanism amounted to an unconstitutional legislative veto and Congress could not delegate its war powers to a leadership committee.

In 1972, Senator William Fulbright (D-Ark.) proposed an amendment to a draft of the War Powers Resolution that would prohibit the President from using “nuclear weapons without the prior, explicit authorization of Congress” except “in response to a nuclear attack or to an irrevocable launch of nuclear weapons.” Senator Jacob Javits (D-N.Y.) opposed the amendment on constitutional grounds, stating that, after Congress places a nuclear weapon in the U.S. arsenal, the President has the prerogative as commander in chief to decide “whether, when, or how to use it or not to use it.” The Senate overwhelmingly voted down the Fulbright Amendment with a vote of 68-10. As of 2021, that instance remains Congress’s only vote on a no-first-use law.

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70 See generally Banks, *supra* note 67 (discussing delegation issues in the FAS proposal, an important issue outside of the scope of this paper).
72 118 Cong. Rec. 12451 (1972) (statement of Senator Javits).
73 See MULLIGAN, *supra* note 71 at 12.
With renewed concerns about the first use of nuclear weapons during the Trump administration, Congress has again considered a no-first-use law. Senator Elizabeth Warren (D-Mass.) and Congressman Adam Smith (D-Cal.) introduced a 2019 bill that simply read, “It is the policy of the United States to not use nuclear weapons first.”\(^{74}\) They reintroduced the bill in 2021.\(^{75}\) Both Warren-Smith bills attracted cosponsors but neither has come to a vote.\(^{76}\)

Senator Ed Markey and Congressman Ted Lieu have introduced the Restricting First Use of Nuclear Weapons Act in every Congress since 2017,\(^{77}\) aiming to provide checks and balances on presidential sole authority to use nuclear weapons.\(^{78}\) The Markey-Lieu proposal is the leading no-first-use bill since the Fulbright Amendment.

The Markey-Lieu bill argues nuclear weapons are distinct from conventional weapons as a constitutional matter.\(^{79}\) The proposal’s findings include recognition that “nuclear weapons are uniquely powerful” and “a first-use nuclear strike carried out by the United States would constitute a major act of war.”\(^{80}\) Therefore, the bill stipulates “[n]o Federal funds may be obligated or expended to conduct a first-use nuclear strike unless such strike is conducted pursuant to a war declared by Congress that expressly authorizes such strike.”\(^{81}\) The Restricting First Use of Nuclear Weapons Act defines a first use of nuclear weapons as an “attack using nuclear weapons against an enemy that is conducted without the Secretary of Defense and the Chairman of the Joint Chiefs of Staff first

\(^{74}\) S. 272, 116th Cong. (2019).

\(^{75}\) S. 1219, 117th Cong (2021).

\(^{76}\) S. 272, 116th Cong. (2019).


\(^{78}\) S. 1148, 117th Cong. § 2(8) (2021).

\(^{79}\) Id. §§ 2(4–8) (2021).

\(^{80}\) Id. §§ 2(4–5) (2021).

\(^{81}\) Id. § 3(a).
confirming to the President that there has been a nuclear strike against the United States, its territories, or its allies.”

By finding the first use of nuclear weapons a major act of war\textsuperscript{83} and establishing “[a] first-use nuclear strike conducted absent a declaration of war by Congress would violate the Constitution,”\textsuperscript{84} the bill interprets Congress’s war power as inclusive of regulating nuclear first use. The bill also recognizes the President’s role as commander in chief, noting the President currently has sole operational authority to authorize the use of nuclear weapons and U.S. military officers must comply with the President’s order in accordance with their obligations under the Uniform Code of Military Justice.\textsuperscript{85}

Although the Markey-Lieu bill has garnered dozens of cosponsors in each of the three Congresses in which it has been introduced, it has never left the originating committee for a floor vote in either chamber of Congress.\textsuperscript{86} However, previous no-first-use proposals have sparked considerable constitutional debates, inviting the question of whether constitutional concerns may hinder the passage of the Restricting No First Use Act of 2021.

\section*{III. Nuclear Weapons and the War Powers of Congress and the President}

As previous no-first-use proposals demonstrate, the first use of nuclear weapons raises questions about the respective roles of Congress and the President in waging war. This Section

\begin{footnotesize}
\textsuperscript{82} Id. § 3(b). Some may argue this clause vests de facto first-use authority in the Secretary of Defense and Chairman of the Joint Chiefs of Staff, but its inclusion in a definition rather than an operative clause of the bill reduces this concern. The clause gives no additional authority to the Secretary or Chairman; it only defines first use based on their factual findings.

\textsuperscript{83} Id. § 2(5).

\textsuperscript{84} Id.

\textsuperscript{85} Id. § 2(7).

\end{footnotesize}
discusses the war powers of Congress and the President and analyzes the interaction between their respective authorities.

A. Congressional War Powers

The Framers of the Constitution recognized the gravity of decisions to enter into war and allocated certain war powers to Congress. Writing as Publius in Federalist 69, Alexander Hamilton stated that “the declaring of war… [and] the raising and regulating of fleets and armies… would appertain to the legislature.” In a 1793 essay, James Madison wrote, “In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department.”

Congress’s power to declare war includes authority over those decisions to enter into war. The Constitution expressly vests in Congress the exclusive power to declare war. The declare war authority is more than a formalistic authority to issue a declaration. In *Talbot v. Seeman*, Chief Justice John Marshall observed that “The whole powers of war...by the constitution of the United States [are] vested in Congress.” A formal declaration is not required to conduct a war. Rather, Congress may decide to enter into war in a variety of ways, including with authorizations for the use of military force or appropriations.

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87 THE FEDERALIST NO. 69 (Alexander Hamilton).
88 JAMES MADISON, LETTERS OF HELVIDIUS: WRITTEN IN REPLY TO PACIFICUS, ON THE PRESIDENT’S PROCLAMATION OF NEUTRALITY. PUBLISHED ORIGINALLY IN THE YEAR 1793 3–13 (Samuel Harrison Smith ed., 1796).
91 See Prakash, supra note 89, at 48.
92 Talbot v. Seeman, 5 U.S. 1, 28 (1801).
93 HENKIN, supra note 91, at 76. See also SPENCER P. BOYER ET AL., DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES 25–29 (2005).
As mentioned, the Markey-Lieu no-first-use bill observes that “[t]he Constitution gives Congress the sole power to declare war” and asserts that nuclear first use “would constitute a major act of war.” Senator Markey emphasized Congress’s war powers, saying, “Our Constitution affords Congress, not the President, the exclusive power to declare war and that extends, clearly, to the most catastrophic type of war, nuclear war. No Commander-in-Chief [sic] should be able to act alone to start a nuclear war.”

Under the Constitution, Congress is authorized to “make Rules for the Government and Regulation of the land and naval Forces.” The Land and Naval Forces Clause establishes Congress’s authority over internal regulation of the armed forces. Under that authority, Congress established the Uniform Code of Military Justice and enacts defense authorization acts that shape the military’s internal bureaucracy. Senator Fulbright asserted that his no-first-use amendment to the War Powers Resolution was authorized under the Land and Naval Forces Clause, but he mostly appealed to the declare war power during debate.

The Constitution also states that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,” granting Congress the authority to make appropriations. The Constitution further authorizes Congress to “lay and collect Taxes...to...provide for the common Defense… of the United States.” The Constitution prohibits

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94 S. 1148, 117th Cong. § 2(a) (2021).
97 Rudesill argues that the Land and Naval Forces Clause also encompasses Congress’s power over external regulation of the armed forces, including the use of military force, surveillance, and interrogation. See Dakota S. Rudesill, The Land and Naval Forces Clause, 86 U. CIN. L. REV. 391, 296 (2018). He further posits that Congress could regulate the use of nuclear weapons pursuant to its external regulation authority. See Dakota S. Rudesill, Nuclear Command and Statutory Control, 11 J. NAT’L SEC. L. & POL’Y 365, 408 (2021).
98 See MULLIGAN, supra note 71, at 12.
100 Id. § 8, cl. 1.
an appropriation for the army extending beyond two years,\(^{101}\) providing Congress with periodic opportunities to control the conduct of war by reducing or eliminating funding to the military.\(^{102}\) Congress can use its power of the purse to limit military action.\(^{103}\) As the U.S. Court of Claims observed in *Swaim v. United States*, “Congress may increase the Army, or reduce the Army, or abolish it altogether.”\(^{104}\) Similarly, Congress could remove nuclear weapons from the U.S. arsenal, choose to modernize existing nuclear forces, or halt the development of particular delivery systems.\(^{105}\)

Senator Markey and Congressman Lieu appeal to Congress’s appropriations power in their no first use proposal. As mentioned, their bill stipulates, “No Federal funds may be obligated or expended to conduct a first-use nuclear strike unless such strike is conducted pursuant to a war declared by Congress that expressly authorizes such strike.”\(^{106}\)

**B. Presidential War Powers**

On the other hand, the President serves as commander in chief under the Constitution.\(^{107}\) The Commander in Chief Clause has “given rise to some of the most persistent controversies in our constitutional history,” fueling assertions that it “vests power to do anything, anywhere, that can be done with an army or navy.”\(^{108}\) However, Alexander Hamilton described the commander in chief authority as “much inferior” to the authority of the British king, amounting to “nothing more than the supreme command and direction of the military and naval forces.”\(^{109}\)

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\(^{101}\) *Id.* § 8, cl. 12.

\(^{102}\) See Prakash, *supra* note 89, at 56.


\(^{104}\) *Swaim v. United States*, 28 Ct. Cl. 173, 221 (1893), aff’d, 165 U.S. 553, (1897).

\(^{105}\) See Raven-Hansen, *supra* note 69, at 217.

\(^{106}\) S. 1148, 117th Cong. § 3(a) (2021).

\(^{107}\) U.S. CONST. art. I, § 2, cl. 1.

\(^{108}\) Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

\(^{109}\) THE FEDERALIST NO. 69 (Alexander Hamilton).
Under the commander in chief authority, the President has exclusive authority to conduct military campaigns through battlefield decisions. Writing for the majority in Fleming v. Page, Chief Justice Taney asserted, “As commander-in-chief [sic], [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.” The Swaim court wrote, “so long as we have a military force[,] Congress can not take away from the President the supreme command.” In the context of nuclear weapons, some argue that this exclusive authority includes the choice “to use or not to use a particular weapon in the existing arsenal against an armed enemy.”

As commander in chief, the President can use military force in response to an armed attack without congressional authorization. At the Constitutional Convention, James Madison and Elbridge Gerry amended the draft Constitution to give Congress the power to “declare war” instead of “make war,” enabling the President to “repel sudden attacks.” In The Prize Cases, Justice Grier wrote that, in the case of an invasion by a foreign state, “the President is not only authorized but bound to resist by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.” The War Powers Resolution similarly recognizes “a

110 See HENKIN supra note 90, at 48.
112 Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), aff’d, 165 U.S. 553 (1897).
113 Robert F. Turner, Congressional Limits on the Commander in Chief: The FAS Proposal, in FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES? 46 (Peter Raven-Hansen ed., 1987). See also 118 Cong. Rec. 12451 (1972) (statement of Senator Javits) (“I have deep concern… as to whether the President of the United States with his constitutional authority as Commander in Chief can be prevented from using a weapon in our arsenal in defense of the United States or in defense of the Armed Forces of the United States.”)
114 See HENKIN, supra note 90, at 47. See also H.R.J. Res. 542, 93rd Cong. (1973) (“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”
116 The Amy Warwick, 67 U.S. 635, 668 (1862).
national emergency created by attack upon the United States, its territories or possessions, or its armed forces” as a legitimate constitutional basis for introducing U.S. armed forces into hostilities.117 In the context of nuclear weapons, the President’s duty to respond to an armed attack extends to nuclear second strikes in retaliation for a nuclear attack on the United States.118

C. Concurrent War Powers

Despite the immense gravity of decisions to enter into war, the Constitution offers relatively little guidance about the relationship between presidential and congressional war powers. The constitutionality of a no-first-use law turns on the boundary between the war powers of Congress and those of the President.

In *Swaim v. United States*, the Court of Claims clarified that “Congress cannot in the disguise of ‘Rules for Government’ of the Army impair the authority of the President as Commander in Chief.”119 Nor could Congress infringe on his authority as commander in chief through the power of the purse or the necessary and proper powers.120

Therefore, the constitutionality of a no-first-use law rests on identifying where Congress’s exclusive declare war authority ends and the President’s exclusive commander in chief authority begins. Constitutional scholars generally agree that Congress could not micromanage battlefield tactics.121 For example, Congress could not order a retreat of a particular battalion during a war. During the 1972 debate of the Fulbright Amendment, Senator Jacob Javits expressed doubt about

117 *War Powers Resolution*, 50 USC §1541(c).
118 This paper further discusses the issue of nuclear first use in response to a non-nuclear attack on the United States in Section IVB.
120 *See Raven-Hansen, supra* note 69, at 217.
121 *See DeRosa & Nicolas, supra* note 103, at 9.
whether “[Congress] can instruct the President as to whether, when, or how to use a [nuclear weapon].”  

However, Congress does have some authority to restrict presidential action in the conduct of war and it has repeatedly done so throughout U.S. history. In *Ex parte Milligan*, Chief Justice Chase wrote that Congress has

> the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war… except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander in Chief.

Professor Louis Henkin, an expert in constitutional aspects of foreign affairs, similarly asserted that, while it would be “unthinkable for Congress to attempt detailed, tactical decision, or supervision,”

> “the President’s powers as Commander in Chief are subject to ultimate Congressional authority to ‘make’ the war, and that Congress can control the conduct of the war it has authorized.”

Professor Saikrishna Prakash, an expert in presidential authority in foreign relations, wrote “while the President may use military force, the President may not order those uses of force that amount to informal declarations of war.”

Congressional action modulates the President’s power over foreign affairs, a principle expressed in *Youngstown Sheet & Tube v. Sawyer*. In his *Youngstown* concurrence, Justice Jackson

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122 See MULLIGAN, supra note 71, at 12.  
123 See DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS 1776 TO ISIS xii (2016) (“Even when Congress has chosen to stay silent at the outset of an armed conflict, presidents have, time and again, met legislative resistance as the fighting has dragged on. And, sometimes, Congress has challenged the president’s powers of command even in advance of the use of force, placing obstacles in his way in the event that he should choose a course of action certain to lead to war.”).  
124 Ex parte Milligan, 71 U.S. 2, 139 (1866).  
125 HENKIN, supra note 90, at 104.  
126 Id. at 103.  
127 Prakash, supra note 90, at 57.  
128 Proponents of an expansive presidential foreign affairs power often cite *United States v. Curtiss-Wright*, in which Justice Sutherland called the President the “sole organ of the federal government in international relations.” United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (quoting John Marshall, who was a member of the House of Representatives at the time of the statement, regarding President’s authority to order an extradition). But see Henkin,
formulated a tripartite framework for presidential power, acknowledging, “Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.”129 If the President takes measures incompatible with the express or implied will of Congress, the President’s power is “at its lowest ebb” and the President must rely only on their constitutional powers without reliance on Congress’s constitutional powers.130 When the President acts without “a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”131 On the other hand, when “the President acts pursuant to an express or implied authorization of Congress” the President’s authority “is at its maximum.”132 In such cases, the President may exercise their constitutional authorities and Congress’s.

There is currently no congressional grant or restriction on the President’s use of nuclear weapons.133 Under the tripartite framework of Youngstown, the first use of nuclear weapons falls into the “zone of twilight.”134 By expressly prohibiting the first use of nuclear weapons without congressional authorization, a no-first-use law would move a President’s first use of nuclear weapons from the zone of twilight into Justice Jackson’s third category, where a President’s action defies Congress’s will and “his power is at its lowest ebb, for then he can rely only upon his own

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129 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
130 Id. at 637.
131 Id.
132 Id. at 635.
133 See DEROSA & NICOLAS, supra note 103, at 8.
134 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
constitutional powers minus any constitutional powers of Congress over the matter.” A no-first-use law would be unconstitutional, therefore, if the President, using only his own constitutional powers as commander in chief, could use nuclear weapons first. If the commander in chief authority extends to nuclear first use, then a no-first-use law would exceed Congress’s authority and thus be unable to successfully invade an exclusive presidential power.

Determining whether a no-first-use law complies with the Constitution hence requires ascertaining whether the first use of nuclear weapons falls under the President’s plenary authority as commander in chief or Congress’s exclusive authority to declare war.

IV. NO FIRST USE AND CONGRESS’S NUCLEAR WAR POWER

Congress could probably not enact legislation prohibiting the President from firing a surface-to-air missile, for example, in the arsenal for which it has already allocated funds. Such a regulation would encroach on the President’s commander in chief power. Are nuclear weapons like any other weapon, or are they distinct enough to warrant congressional restrictions over their use that would not be permitted for other weapons? This Section analyzes whether the regulation of nuclear weapons usage, in general, and the first use of nuclear weapons, in particular, encroaches on the President’s commander in chief authority, and assesses a mechanism for congressional regulation of first use.

135 Id.
136 See Raven-Hansen, supra note 69, at 216.
137 See Turner, supra note 113 at 46 “[Congress] would also exceed its proper authority by seeking to direct the President . . . to use or not to use a particular weapon in the existing arsenal . . . .”
A. Use of Nuclear Weapons: Battlefield Tactics or a Declaration of War?

During debate regarding the Fulbright Amendment, Senator Javits argued that, once a nuclear weapon is in the arsenal of the United States, Congress likely could not restrict the President’s use of that weapon. However, Senator Fulbright recognized the importance of legally distinguishing between conventional and nuclear weapons, pointing to existing statutes that “treat nuclear weapons and nuclear affairs differently from the way we treat conventional situations.” Their debate contested the boundary between the President’s commander in chief authorities and Congress’s declare war power with respect to nuclear first use. Who was right?

There is no bright line indicating where the President’s authority to use military force short of war ends. However, in considering authority to use military force short of war, the executive branch and legal scholars have considered factors including: the nature, scope, and duration of hostilities; the risk of violent response; the likely international consequences of the operation; the risk of U.S. and foreign casualties; and the nature of a target and capacity of the targeted entity to retaliate, among other factors.

The characteristics of nuclear weapons indicate that the use of nuclear weapons is not a use of force short of war. At least two criteria can guide a comparison between nuclear and conventional armaments: destructive power and strategic consequences. While destructive power speaks to the nature, scope and duration of hostilities, strategic consequences are relevant to the risk of a violent response, likely international consequences, risk of U.S. casualties, and likelihood of retaliation. Each criterion demonstrates that the conventional-nuclear firebreak remains robust and that nuclear and conventional hostilities are markedly different. However, this article focuses on the second criterion.

139 Id. at 12450 (statement of Senator Fulbright).
because it holds regardless of the yield of a particular warhead. The strategic consequences of the use of a nuclear weapon indicate that nuclear weapons are constitutionally distinct from conventional arms because their use amounts to a declaration of war, and their use as part of an ongoing conventional conflict marks the beginning of a new nuclear war.

When it comes to destructive power, some argue that the development and deployment of low-yield nuclear weapons have eroded the conventional-nuclear firebreak or lowered the nuclear threshold. From the perspective of constitutional war powers, such erosion could support a finding that nuclear weapons are no different from conventional weapons and therefore that Congress cannot prevent first use pursuant to the commander in chief authority.

While the nuclear-conventional firebreak has eroded, it remains robust enough such that the destructive effects of nuclear weapons are still far greater than those of conventional arms. In terms of yield alone, there has been some convergence between nuclear and conventional armaments. Since the Manhattan Project created the first nuclear weapons, scientists have developed conventional explosives with increased yields and nuclear explosives with yields both higher and lower than early atomic bombs.

The Trump administration deployed W-76 nuclear warheads, which may have yields under ten kilotons, on submarines for Trident II missiles. The atomic bombs dropped on Hiroshima and Nagasaki had yields of sixteen and twenty-one kilotons. By comparison, the most powerful

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142 Yield is a measurement of explosive power, typically denoted in tons or kilotons of TNT. However, nuclear arms have other forms of destructive power absent from conventional arms, namely radioactive and electromagnetic effects.


conventional explosive in the U.S. arsenal has a yield of about ten tons, or one-tenth of one percent of the W-76’s yield. The United States began developing its lowest yield nuclear weapon, a ten-ton tactical warhead, in the late 1950s, but the weapon is not currently in use.

Even if conventional and nuclear weapons had equal yields, the strategic consequences of using even a low-yield nuclear weapon are momentous. The strategic consequences are also more constitutionally relevant than destructive power alone because the likelihood of escalation and retaliation speaks to how using of nuclear weapons enters the United States into a war. The use of low-yield nuclear weapons in war would prompt the use of strategic nuclear weapons in retaliation. A limited nuclear war is implausible. Senior policymakers have long recognized that the use against a nuclear-weapons state of any nuclear weapon, regardless of yield, could precipitate a full-scale nuclear exchange.

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149 By contrast, using destructive power as a criterion for constitutional relevance may yield unworkable results because the nearly all weapons in the U.S. arsenal today are more advanced than those available to the founding generation.
150 Vipin Narang, The Discrimination Problem: Why Putting Low-Yield Nuclear Weapons on Submarines Is So Dangerous, WAR ON THE ROCKS (Feb. 8, 2018), https://warontherocks.com/2018/02/discrimination-problem-putting-low-yield-nuclear-weapons-submarines-dangerous/. Although there is not consensus around a precise definition of “strategic nuclear weapons,” they are typically referenced in contrast to “nonstrategic,” “tactical,” or “low-yield” nuclear weapons. Strategic weapons, including the three legs of the U.S. nuclear triad, have high yields and long ranges. While strategic nuclear weapons’ primary function is to maintain deterrence against a nuclear attack, “low-yield” nuclear weapons have shorter ranges and lower yields and thus could be used in a battlefield, tactical context. See Amy F. Woolf, CONG. RSCH. SERV., RL32572, NONSTRATEGIC NUCLEAR WEAPONS 4-5 (Mar. 7, 2022), https://sgp.fas.org/crs/nuke/RL32572.pdf.
151 See Perry & Collina, supra note 14, at 100 (“Expecting a limited response [to a limited nuclear attack] is wishful thinking in the extreme”); see also McGeorge Bundy et al., Nuclear Weapons and the Atlantic Alliance, 60 FOREIGN AFF. 753, 757 (1982) (“It is time to recognize that no one has ever succeeded in advancing any persuasive reason to believe that any use of nuclear weapons, even on the smallest scale, could reliably be expected to remain limited.”).
The first use of nuclear weapons transforms conventional wars into a qualitatively different type of conflict.\textsuperscript{152} As Senator Fulbright observed, “the conversion of any conventional conflict into a nuclear conflict cannot be considered a mere change of tactics in a continuing conflict.”\textsuperscript{153} While a conventional war abroad may cost lives and resources, a nuclear war poses an immediate and existential threat to millions of civilians in the United States.\textsuperscript{154}

Therefore, with regards to the commander in chief power, the use of nuclear weapons should be treated differently from conventional hostilities. While Congress could not dictate conventional tactics from Capitol Hill, it can regulate the use of nuclear weapons in war because the immense strategic consequences of their use place regulating nuclear weapons into the realm of Congress’s authority to declare war.

\textbf{B. First Use of Nuclear Weapons Enters the United States into Nuclear War

The decision to use nuclear weapons first enters the United States into a nuclear war. In the case of a retaliatory strike, nuclear war has been forced on the United States. The President is not


\textsuperscript{153} 118 Cong. Rec. 12451 (1972).

\textsuperscript{154} See Peter Raven-Hansen, \textit{Nuclear War Powers}, 83 Am. J. Int’l L. 786, 789 (1989) (“A conventional war in Europe is a serious threat to our national security and would certainly cost thousands of American lives. But would it be the same war after the first use of nuclear weapons? 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…As grave as it is, the threat posed to U.S. national security by a conventional attack on NATO pales in significance beside the threat of general nuclear war.”) Estimates of the death toll from a nuclear exchange vary. A 2019 simulation from Princeton University’s Science and Global Security program estimated that “34.1 million people could die, and another 57.4 million could be injured, within the first few hours of the start of a nuclear war between Russia and the United States triggered by one low-yield nuclear weapon.” \textit{New Study on US-Russia nuclear war: 91.5 million casualties in first few hours, INT’L CAMPAIGN TO ABOLISH NUCLEAR WEAPONS} (2019), https://www.icanw.org/new_study_on_us_russia_nuclear_war#:~:text=34.1\%20million\%20people\%20could\%20die,Science%20and%20Global%20Security%20programme. Estimates were much higher during the cold war; a 1979 U.S. government study assessed several scenarios with immediate death counts between 200,000 and 160,000,000. See LIONEL S. JOHNS \textit{et al.}, \textit{THE EFFECTS OF NUCLEAR WAR} 10 (1979). A 2013 report from Physicians for Social Responsibility also estimated, “the number of people threatened by nuclear-war induced famine would be well over two billion.” Ira Helfand, \textit{Nuclear Famine: Two Billion People at Risk?}, \textit{PHYSICIANS FOR SOCIAL RESPONSIBILITY} 2 (2013), https://www.ippnw.org/wp-content/uploads/2020/07/2013-Nuclear-Famine.pdf.
only authorized but bound to respond to a nuclear attack, potentially with a nuclear second strike.\footnote{See The Amy Warwick, 67 U.S. at 635.} However, by definition, first use marks a decision to enter into a nuclear war that falls within Congress’s declare war authority.

After a U.S. first use, a retaliatory strike by an adversary becomes probable. U.S. missile defense systems would be unlikely to prevent nuclear weapons from landing in the United States.\footnote{See PERRY & COLLINA, supra note 14, at 162-64.} Nuclear first use, therefore, marks the first action in a new nuclear war that puts millions of civilians in the United States under imminent threat.\footnote{See id. at 100 (“There is every reason to believe that, once attacked with atomic weapons, a nation would be so outraged and/or assume a full attack was on the way that it would respond with everything they’ve got.”) \textit{E.g.}, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) Pub. L. No. 107-40, 115 Stat. 224 (2001) (“the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.“).} Thus far, only the first use of nuclear weapons would likely invite such a direct, immediate, and existential threat to the United States.

Therefore, Congress may regulate the first use of nuclear weapons without infringing on the President’s commander in chief authority. Past authorizations for the use of military force have not distinguished between conventional and nuclear hostilities,\footnote{See BILL FRENCH, ENDING THE ENDLESS WAR 4 (2014), https://www.justsecurity.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESS-WAR_FINAL.pdf (“Of the 35 instances that Congress has authorized the use of military force, 60 percent contained geographic limitations, 43 percent named the enemy, 37 percent limited the kinds of military operations or forces authorized to be employed, and 23 percent contained an expiration date.”).} but an authorization limited to measures short of nuclear first use would be within Congress’s constitutional powers.

\section*{C. Congressional Limitations on First Use of Nuclear Weapons}

Congress may limit the nature and extent of a war in its authorizations.\footnote{See id. at 100 (“There is every reason to believe that, once attacked with atomic weapons, a nation would be so outraged and/or assume a full attack was on the way that it would respond with everything they’ve got.”) \textit{E.g.}, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) Pub. L. No. 107-40, 115 Stat. 224 (2001) (“the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.“).} Based on the distinction between nuclear and conventional weapons and the effect of nuclear first use as starting a nuclear war, this sub-section argues Congress can both constitutionally and reasonably limit a declaration of war to measures short of nuclear first use.
The legal precedents regarding limited war date to the late eighteenth century. During the presidency of John Adams (1797–1801), the United States fought an undeclared war with France.\(^{160}\) The conflict stemmed from the United States’ refusal to support France in its war with Great Britain and normalization of relations with Great Britain, which induced France to harass American vessels.\(^{161}\) Therefore, Congress authorized a war against France limited to naval hostilities.\(^{162}\)

In *Bas v. Tingy,* the Supreme Court found that Congress had authorized the Quasi War with France. Justice Bushrod Washington described the Quasi War as a public war because it was an “external contention by force, between some of the members of the two nations, authorised by the legitimate powers.”\(^{163}\) Public wars, Justice Washington found, may be “confined in [their] nature and extent.”\(^{164}\) Justice Salmon Chase agreed, writing, “Congress is empowered to declare a general war, or congress may wage a limited war.”\(^{165}\) Distinguishing between types of war, Justice Chase expressed, “If a general war is declared, its extent and operations are only restricted and regulated by the jus belli, forming a part of the law of nations, but if a partial war is waged, its extent and operation depend on our municipal laws.”\(^{166}\)

Congress can choose to limit war to means short of the first use of nuclear weapons. As argued above, the authorization of measures short of first use is reasonable because nuclear hostilities are qualitatively different from conventional hostilities and the first use of nuclear weapons enters the United States into a nuclear war. While the founding generation could not have


\(^{161}\) See *id.*


\(^{163}\) *Bas v. Tingy,* 4 U.S. (4 Dall.) 37, 40 (1800).

\(^{164}\) *Id.*

\(^{165}\) *Id.* at 43.

\(^{166}\) *Id.*
contemplated the extent of devastation that a nuclear war would cause, they recognized that war exists in degrees. Congress, therefore, can limit the scope of authorized uses of military force. Past authorizations of wars during the nuclear age have not precluded the use of nuclear weapons. The two instances of nuclear first use in warfare, when the Truman administration dropped nuclear bombs on Hiroshima and Nagasaki, occurred pursuant to an authorization that neither expressly authorized nor prohibited the use of nuclear weapons. However, if Congress chose, it could limit war authorizations to measures short of nuclear first use. In his book on U.S. foreign relations and the Constitution, Professor Louis Henkin suggests that Congress may bind the President with directives as to “whether to fight a ‘conventional’ or a nuclear war.”

In authorizing a limited war, Congress may restrict the President from acting outside of the bounds of a limited congressional authorization. In *Little v. Barreme*, the Supreme Court held the President could not conduct captures beyond Congress’s Quasi War authorization.

Therefore, Congress can enact a law, like the Markey-Lieu bill, prohibiting the first use of nuclear weapons unless expressly authorized by Congress. Such legislation is based on the recognition of the distinction between nuclear and conventional war as forms of total and limited war. A no-first-use law would require a more explicit authorization of nuclear first use based on

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167 *See* Brown v. United States, 12 U.S. 110, 153–54 (1814) (Story, J., dissenting) (“The sovereignty, as to declaring war and limiting its effects, rests with the legislature. The sovereignty, as to its execution, rests with the president. If the legislature do not limit the nature of the war, all the regulations and rights of general war attach upon it.”).

168 S.J. Res. 116 (1941) (“[T]he President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government”).

169 *H*ENKIN, *supra* note 90, at 104.


171 *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (“But when it is observed that the general clause of the first section of the ‘act, which declares that such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made,’ obviously contemplates a seizure within the United States; and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port”).

172 As Justice Salmon Chase wrote in *Bas v. Tingy*, “If a general war is declared, its extent and operations are only restricted and regulated by the jus belli, forming a part of the law of nations, but if a partial war is waged, its extent and operation depend on our municipal laws.” *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800). Based on Justice Chase’s
Congress’s declare war authority and the recognition that the first use of nuclear weapons amounts to a choice to enter into a nuclear war.

V. A No-First-Use Law in Difficult Cases

This Section assesses two cases that present practical and constitutional challenges for a no-first-use law. First, a no-first-use law would prevent the President from responding to a conventional attack by escalating to a nuclear response. Second, a no-first-use law would potentially restrict the President from launching a nuclear strike in anticipation of a nuclear strike on the United States. Each case calls for consideration of whether a no-first-use law would infringe on the President’s exclusive commander in chief authority in these instances.

A. First Use In Response to a Non-Nuclear Attack Against the United States

Suppose the President orders a nuclear strike against another state in response to a non-nuclear armed attack on the United States or its armed forces. This situation encompasses two scenarios. In the first scenario, a foreign adversary attacks the United States, its armed forces, or one of its allies with conventional, biological, or chemical weapons. In the second scenario, the U.S. and a foreign adversary are engaged in a conventional conflict and U.S. military involvement is authorized by Congress. The two scenarios are constitutionally similar. Each invites the question of whether the President, when unambiguously authorized to use force in some way, may escalate from conventional warfare to the use of nuclear weapons.

Under current U.S. law, Congress has not expressly restricted how the President may respond to an attack on the United States, but the law of armed conflict requires that self-defense be
limited to the minimum force necessary to repel the attack and proportional to the threat the attack poses.173

However, the President’s responsibility to repel an attack in defense of the United States does not amount to the open-ended constitutional authority to mount offensive operations against the adversary’s cities.174 As commander in chief, the President’s can repel sudden attacks but cannot “take the fight to the enemy and indiscriminately attack that nation’s ports, [or] territory” without congressional authorization.175 As Prakash writes, “in response to hostilities initiated by another nation, the President is limited to a lethal but calibrated defensive response, reserving to Congress the decision to wage an offensive war.”176 For example, President Thomas Jefferson launched a limited attack against the Barbary pirates attacking U.S. vessels in the Mediterranean before requesting authorization from Congress for more decisive action.177 Therefore, in response to a limited attack on U.S. troops overseas, for example, the President would not have the constitutional authority to launch a nuclear strike against a foreign capital without congressional authorization.178

These observations temper the President’s authority to mount a nuclear strike in response to a conventional attack. Under current domestic law, the President could use nuclear weapons to respond to a non-nuclear attack on the U.S. or its armed forces, a possibility left open in the Trump

173 See DE ROSA & NICOLAS, supra note 103, at 11.
174 Whether such an action would be permissible under international law lies outside of the scope of this article and is not directly relevant to constitutional war powers issues as a matter of U.S. law. For more information on limitations on self-defense in the jus ad bellum context, see generally David Kretzmer, The Inherent Right to Self-Defense and Proportionality in Jus Ad Bellum, 24 Eur. J. of Int’l L. 235 (2013).
175 Prakash, supra note 89, at 118.
176 Id.
178 In recent years, the executive branch has not focused extensively on constitutional limitations on the President’s use of force in self-defense without preexisting congressional authorization. For example, discussion of limitations on the President’s use of force in self-defense does not appear in the Department of Defense’s Law War Manual, which instead focuses on the right of states to use force in self-defense as a matter of international law regarding jus ad bellum. See DEPT OF DEF., LAW OF WAR MANUAL 46–47 (Dec. 2016).
administration’s Nuclear Posture Review. However, while the President can use necessary military force to repel a non-nuclear attack against the United States, Congress can limit how the President responds to an armed attack if that response amounts to a declaration of unauthorized war, which would be the case if the Markey-Lieu bill was enacted.

Because nuclear conflicts are qualitatively different from non-nuclear conflicts, Congress’s declare war authority extends to limitations on the President’s choice to transform a non-nuclear war into a nuclear one. Congress maintains the authority to choose not only whether the United States shall enter a war, but what form of war it shall wage. The United States military has conventional superiority over any potential adversary. Whether a conventional strike occurred in the United States or against U.S. forces in another location, a successful conventional attack on the United States would be unlikely to pose an existential threat to the country. A nuclear attack, however, could put millions of American lives at risk.

Congress could constrain the President’s response to an attack on the United States with no-first-use legislation. The Markey-Lieu proposal would prevent the President from using nuclear weapons in response to a non-nuclear attack on the United States or its armed forces.

\footnotesize{\textsuperscript{179} DEPT OF DEF., supra note 32, at 21 (“The United States would only consider the employment of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners. Extreme circumstances could include significant non-nuclear strategic attacks. Significant non-nuclear strategic attacks include . . . attacks on the U.S., allied, or partner civilian population or infrastructure, and attacks on U.S. or allied nuclear forces, their command and control, or warning and attack assessment capabilities.”).}
\footnotesize{\textsuperscript{180} See HENKIN, supra note 90, at 104 n.49.}
\footnotesize{\textsuperscript{181} See PERRY & COLLINA, supra note 14, at 210.}
\footnotesize{\textsuperscript{182} See note 49 for a discussion of casualty estimates from nuclear warfare.}
B. Anticipatory First Use

The Restricting No First Use of Nuclear Weapons Act of 2021 raises the constitutional and practical concern of whether the President would be able to launch an anticipatory nuclear strike preempting an expected nuclear strike on the United States.

As a constitutional matter, the President’s duty to repel attacks on the United States under the commander in chief power includes an authority to use military force in anticipation of an imminent attack. Under current law, the President could probably use nuclear weapons first in anticipation of an imminent nuclear attack on the United States. The President’s authorization to launch an anticipatory strike in response to a less-than-imminent threat against the United States is not permitted under Article II, although a President could blur the imminence requirement as the Trump administration did in its legal justification for the targeted killing of Iranian general Qassem Soleimani.

The Markey-Lieu proposal defines a first use of nuclear weapons as any case where the Secretary of Defense and the Chairman of the Joint Chiefs of Staff have not confirmed to the President that there has been a nuclear strike against the United States, its territories, or its allies. In this definition, the proposal implicitly allows the President to mount a second strike after the United States has been attacked with a nuclear weapon. However, the Markey-Lieu bill, if passed into law, would prevent the President from using nuclear weapons to preempt a nuclear attack on the United States unless expressly authorized by Congress.

185 See H.R. 669, 117th Cong., § 3(b) (2021).
The Markey-Lieu proposal would not infringe on the President’s exclusive authority to mount a preemptive use of military force in response to an expected nuclear attack on the United States. In launching an anticipatory nuclear strike, the President makes the decision to enter the United States into nuclear war before a foreign adversary has started hostilities and triggered the President’s duty to respond. Under the Constitution, however, the choice to enter the United States into a war belongs to Congress.186 A war has not necessarily begun before the President orders an anticipatory nuclear first strike. A President could misapprehend the foreign adversary’s intentions, mistakenly assuming that a nuclear strike is imminent. A President could also rely on a false alarm, launching a nuclear strike first and igniting a nuclear war. In either case, an adversary has not unilaterally forced war upon the United States and the President’s decision to mount an anticipatory strike would amount to a choice to enter the United States into war. Because the choice to enter into a nuclear war lies exclusively with Congress under the declare war power, the restriction proposed in the Markey-Lieu bill does not exceed Congress’s constitutional authority.

Restricting the anticipatory use of nuclear weapons would reduce the likelihood of a nuclear exchange due to a misperception or mistake.187 A no-first-use law would require more certainty that nuclear war has begun than is required in the status quo before ordering a nuclear attack, thereby giving the President more time to assess the circumstances and available intelligence before making a decision to retaliate.

As a practical matter, the U.S. can maintain deterrence without the possibility of an anticipatory strike. The enactment of a no-first-use law would amount to recognizing that the sole purpose of nuclear weapons is deterring nuclear attacks by other states, and U.S. nuclear weapons could still fulfill that purpose under the Markey-Lieu proposal. The United States can wait for

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186 See HENKIN, supra note 90, at 68 (“The power of Congress over war and peace is ‘plenary’”).
187 See Tannenwald, supra note 36.
confirmation of a nuclear strike before launching a retaliatory strike because the air-based and sea-based legs of the American nuclear triad would still have second-strike capability after a nuclear strike against land-based ICBMs. If nuclear weapons only serve to deter nuclear attacks on the United States, there is no significant strategic advantage from striking first and risking using nuclear weapons due to a false alarm or mistake.

VI. CONCLUSION

This paper opened with a scenario of nuclear war beginning with a conventional Chinese invasion of Taiwan. Currently, the President can unilaterally order such a nuclear strike anywhere in the world without consulting Congress. However, a no-first-use law such as the Restricting First Use of Nuclear Weapons Act would prohibit the President from using nuclear weapons first unless expressly authorized to do so by Congress. Such a law would prevent the sort of escalation to nuclear war described in the introductory hypothetical.

President Joe Biden, a long-time proponent of a no-first-use policy, will reportedly soon announce whether his administration will adopt the policy in the upcoming Nuclear Posture Review. Whether or not President Biden chooses to shift U.S. declaratory policy to no first use for the first time, Congress would not exceed its authority if it either overrode his decision to leave first use on the table or enshrined his no-first-use decision in law.

Congress’s declare war authority extends beyond a formalistic power to issue an official declaration. Instead, the declare war authority vests in Congress the power to make decisions that

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188 See PERRY & COLLINA, supra note 14, at 117-121. This is a hotly debated issue among nuclear policy experts. See also Tannenwald, supra note 36 (addressing the costs and benefits of a no-first-use policy, including discussion of preemption).


190 See Pifer, supra note 54.
enter the United States into war.\textsuperscript{191} Any first use of nuclear weapons against a nuclear armed state,\textsuperscript{192} whether with tactical or strategic warheads, would invite retaliation in kind and engender significant strategic consequences.\textsuperscript{193} The choice to use nuclear weapons first as an escalation to a non-nuclear conflict transforms the conflict into a qualitatively different war. The choice to use nuclear weapons, therefore, is not a battlefield decision contained within the President’s commander in chief power but rather a choice to enter the United States into a new type of conflict that could pose a direct, immediate, and existential threat to the U.S. homeland.

Congress can limit its authorizations of war.\textsuperscript{194} During the Quasi War with France, Congress authorized only a limited war and prohibited military actions beyond its authorization.\textsuperscript{195} Similarly, Congress could stipulate that its authorizations for the use of military force extend only to conventional hostilities unless Congress expressly authorizes the first use of nuclear weapons. Pursuant to its declare war authority, Congress can enact a no-first-use law.

However, whether Congress can muster the political will to enter the no first use fray is another matter altogether. No first use remains a topic of serious debate among policymakers. Congress could probably not rally a supermajority to overcome a presidential veto if President Biden chooses to maintain the status quo. However, Congress may be able to reinforce President Biden’s no-first-use policy if he commits to one, thereby enshrining the pledge in law and binding future presidents. As Congress considers its role in debates about U.S. nuclear posture, it should proceed with confidence that it could constitutionally enact a no-first-use law if it chose to do so.

\textsuperscript{191} See Prakash, supra note 89, at 48.
\textsuperscript{193} See Section IVB of this article for further discussion of the strategic consequences of nuclear first use.
\textsuperscript{194} See Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800).
\textsuperscript{195} See CONG. RSCH. SERV., supra note 162, at 5.