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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.

* John Ramming Chappell is a joint J.D. and M.S. in Foreign Service candidate, 2023, at Georgetown University. He would like to thank Professors Don Wallace and David Stewart for their insight and guidance, as well as Professor Robert Gallucci. Katie Dames and Professor Jane Stromseth also significantly influenced his thinking on this topic, as did his peers who took the time to read and comment on drafts.

¹ Upon witnessing the first detonation of a nuclear bomb at New Mexico's Trinity Site in 1945, Manhattan Project scientist J. Robert Oppenheimer reportedly quote the Bhagavad Gita, saying "Now I am become Death, the destroyer of worlds." See Maria Cramer, *Now I Am Become Death: The Legacy of the First Nuclear Bomb Test*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/15/us/trinity-test-anniversary.html>.

TABLE OF CONTENTS

I.	STILL LIVING UNDER A NUCLEAR SWORD OF DAMOCLES	47
A.	The Persistent Threat of Nuclear Weapons	48
B.	No First Use.....	51
II.	BACKGROUND AND HISTORY OF NO-FIRST-USE POLICY DEBATES.....	52
A.	The Policy Debate Around No First Use	52
B.	Presidential Considerations	54
C.	Congressional Proposals	57
III.	NUCLEAR WEAPONS AND THE WAR POWERS OF CONGRESS AND THE PRESIDENT	60
A.	Congressional War Powers	61
B.	Presidential War Powers	63
C.	Concurrent War Powers	65
IV.	NO FIRST USE AND CONGRESS'S NUCLEAR WAR POWER	68
A.	Use of Nuclear Weapons: Battlefield Tactics or a Declaration of War?	69
B.	First Use of Nuclear Weapons Enters the United States into Nuclear War	72
C.	Congressional Limitations on First Use of Nuclear Weapons	73
V.	A NO-FIRST-USE LAW IN DIFFICULT CASES.....	76
A.	First Use In Response to a Non-Nuclear Attack Against the United States	76
B.	Anticipatory First Use	79
VI.	CONCLUSION	81

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/background/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").

⁵ See Steven M. Goldstein, *In Defense of Strategic Ambiguity in the Taiwan Strait*, NAT'L BUREAU OF ASIAN RSCH. (Oct. 15, 2021), <https://www.nbr.org/publication/in-defense-of-strategic-ambiguity-in-the-taiwan-strait/>.

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/>.

⁷ See Dan Lamothe, *In Taiwan war game, few good options for U.S. to deter China*, WASH. POST (Oct. 26, 2021), <https://www.washingtonpost.com/national-security/2021/10/26/us-taiwan-china/>.

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 untie 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.¹⁰

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,¹¹ nuclear weapons remain at the forefront of national security conversations in disparate regions,¹² and an exchange of nuclear strikes remains possible.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

¹⁰ Kyle Mizokami, *A Nuclear War with China and Russia? 335,000,000 Dead, For Starters*, NAT'L INT. (Aug. 22, 2021), <https://nationalinterest.org/blog/reboot/nuclear-war-china-and-russia-335000000-dead-starters-192271>.

¹¹ See, e.g., Michael Peck, *Yes, the 1956 Suez Crisis Almost Caused Nuclear War*, NAT'L INTEREST (Aug. 7, 2020), <https://nationalinterest.org/blog/reboot/yes-1956-suez-crisis-almost-caused-nuclear-war-166532> (arguing that the Suez Crisis risked nuclear war); Martin J. Sherwin, *One Step from Nuclear War*, NAT'L ARCHIVES (2012), <https://www.archives.gov/publications/prologue/2012/fall/cuban-missiles.html> (recounting how the United States and Soviet Union came to the brink of nuclear war during the Cuban Missile Crisis); Fred Kaplan, *Apocalypse Averted*, SLATE (Feb. 18, 2021), <https://slate.com/news-and-politics/2021/02/able-archer-nuclear-war-reagan.html> (arguing that the United States and Soviet Union came close to nuclear war during the 1983 Able Archer training exercise).

¹² As China emerges as a world power, strategic competition between the United States and China has sparked concern about China's growing nuclear arsenal. See, e.g., Caitlin Talmadge, *The US-China nuclear relationship: Why competition is likely to intensify*, BROOKINGS INST. (Sep. 2019), <https://www.brookings.edu/research/china-and-nuclear-weapons/>. The bilateral arms control process between the United States and Russia has all but collapsed, with New START the last remaining U.S.-Russia nuclear agreement. See *U.S.-Russian Nuclear Arms Control Agreements at a Glance*, ARMS CONTROL ASSOC. (Apr. 2020), <https://www.armscontrol.org/factsheets/USRussiaNuclearAgreements>. India and Pakistan, both nuclear weapons states, have been at loggerheads and dispute control of Kashmir. See *Fact Sheet: Escalating Tensions Over Kashmir*, CENTER FOR ARMS CONTROL & NON-PROLIFERATION (Mar. 2021), <https://armscontrolcenter.org/escalating-tensions-over-kashmir/>. Iran's nuclear program, subject of the defunct Joint Comprehensive Plan of Action with the United States, has drawn concern from regional adversaries, including its chief rival Saudi Arabia and nuclear-armed Israel. See Kali Robinson, *What Is the Iran Nuclear Deal?*, COUNCIL ON FOREIGN RELS. (Apr. 28, 2022), <https://www.cfr.org/background/what-iran-nuclear-deal>. In Northeast Asia, North Korea's nuclear weapons raise the stakes of any conflict with South Korea and elicit concern from constitutionally pacifist Japan. See *North Korea's Military Capabilities*, COUNCIL ON FOREIGN RELS. (Dec. 22, 2021), <https://www.cfr.org/background/north-korea-nuclear-weapons-missile-tests-military-capabilities>.

¹³ See Max Fisher, *As Russia Digs In, What's the Risk of Nuclear War? It's Not Zero*, N.Y. TIMES (Mar. 22, 2022). See generally BRAD ROBERTS, *THE CASE FOR U.S. NUCLEAR WEAPONS IN THE 21ST CENTURY* (2016).

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.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.¹⁵ President Trump reportedly suggested launching nuclear weapons into hurricanes on multiple occasions.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!"¹⁷ and a threat of "fire and fury" against North Korea.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.¹⁹ Authors called attention to the President's sole authority to order a nuclear launch and the U.S. policy that allows

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>.

¹⁵ See Emily Guskin, *Most Americans don't trust President Trump with the 'nuclear button'*, WASH. POST (Jan. 23, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/01/23/most-americans-dont-trust-president-trump-with-the-nuclear-button/>.

¹⁶ Jonathan Swan & Margaret Talev, *Scoop: Trump suggested nuking hurricanes to stop them from hitting U.S.*, AXIOS (Aug. 25, 2019), <https://www.axios.com/trump-nuclear-bombs-hurricanes-97231f38-2394-4120-a3fa-8c9cf0e3f51c.html>.

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

¹⁸ Peter Baker & Choe Sang-hun, *Trump threatens 'fire and Fury' against North Korea if it endangers U.S.*, N.Y. TIMES (Aug. 8 2017), <https://www.nytimes.com/2017/08/08/world/asia/north-korea-un-sanctions-nuclear-missile-united-nations.html>.

¹⁹ E.g., PERRY & COLLINA, *supra* note 14, at 7–10; JEFFREY LEWIS, *THE 2020 COMMISSION REPORT ON THE NORTH KOREAN NUCLEAR ATTACKS AGAINST THE U.S.: A SPECULATIVE NOVEL* (2018); BOB WOODWARD & ROBERT COSTA, *PERIL* (2021); Editorial Board, *Trump and the nuclear button*, WASH. POST (Nov. 25, 2017), https://www.washingtonpost.com/opinions/trump-and-the-nuclear-button/2017/11/25/85bb50b2-cafd-11e7-8321-481fd63f174d_story.html; Alana Abramson, *Here's Exactly What Donald Trump Would Have to Do to Launch Nuclear Weapons*, TIME (Jan. 3, 2018), <https://time.com/5085723/nuke-button-donald-trump-nuclear-weapons-north-korea/>; Bruce Blair & Jon Wolfsthal, *Trump can launch nuclear weapons whenever he wants, with or without Mattis*, WASH. POST (Dec. 23, 2018), <https://www.washingtonpost.com/outlook/2018/12/23/trump-can-launch-nuclear-weapons-when-ever-he-wants-with-or-without-mattis/>; Garrett M. Graff, *By the Way, Donald Trump Could Still Launch Nuclear Weapons at Any Time*, WIRED (Nov. 17, 2020), <https://www.wired.com/story/donald-trump-nuclear-weapons-system-reform/>; Jack Detsch, *What Could Stop an 'Unbinged' U.S. President From Ordering a Nuclear Strike?*, FOREIGN POL'Y (Jan. 8, 2021), <https://foreignpolicy.com/2021/01/08/trump-nuclear-strike-pelosi-white-house-pentagon-congress/>.

the United States to use nuclear weapons first.²⁰ Amid concerns about President Trump launching an unprovoked nuclear attack in 2017,²¹ the Senate held its first hearing on nuclear launch authority since 1976.²²

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.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.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.²⁵

²⁰ John Mecklin, *Commentary: Can Congress stop a president waging nuclear war?*, REUTERS (Nov. 30, 2017, 1:29 PM) <https://www.reuters.com/article/us-mecklin-nuclear-commentary/commentary-can-congress-stop-a-president-waging-nuclear-war-idUSKBN1DU2HW>.

²¹ Karoun Demirjian, *Trump's nuclear authority divides senators alarmed by his 'volatile' behavior*, WASH. POST (Nov. 14, 2017), https://www.washingtonpost.com/powerpost/senators-deadlock-in-debate-over-whether-to-restrain-trumps-nuclear-launch-authority/2017/11/14/491a994a-c95b-11e7-8321-481fd63f174d_story.html.

²² Kingston Reif, *Senate Examines Launch Authority*, ARMS CONTROL TODAY, (Dec. 2017), <https://www.armscontrol.org/act/2017-12/news/senate-examines-launch-authority>. See also *Authority to Order the Use of Nuclear Weapons: Hearing Before the Comm. on Foreign Rels. U.S. Senate*, 115th Cong. (2017) [hereinafter *Authority to Order the Use of Nuclear Weapons*], <https://www.foreign.senate.gov/imo/media/doc/11%2014%2017%20Authority%20to%20Order%20the%20Use%20of%20Nuclear%20Weapons1.pdf>.

²³ Yuras Karmanau et al., *Putin puts nuclear forces on high alert, escalating tensions*, ASSOCIATED PRESS (Feb. 27, 2022), <https://apnews.com/article/russia-ukraine-kyiv-business-europe-moscow-2e4e1cf784f22b6afbe5a2f936725550>.

²⁴ See William J. Broad, *The Smaller Bombs That Could Turn Ukraine Into a Nuclear War Zone*, N.Y. TIMES (Mar. 21, 2022), <https://www.nytimes.com/2022/03/21/science/russia-nuclear-ukraine.html>; David French, *This Is a Uniquely Perilous Moment*, ATLANTIC (Mar. 12, 2022), <https://www.theatlantic.com/ideas/archive/2022/03/a-uniquely-perilous-moment/627040/>.

²⁵ See, e.g., Brian Finucane & Olga Oliker, *Zelensky Wants a No-Fly Zone. NATO Is Right to Say No*, N.Y. TIMES (MAR. 25, 2022), <https://www.nytimes.com/2022/03/25/opinion/no-fly-zone-ukraine-nati-russia.html>; Joshua Pollack, *A no-fly zone might help Ukraine. Or it might lead to nuclear war*, WASH. POST (Mar. 4, 2022), <https://www.washingtonpost.com/outlook/2022/03/04/ukraine-nuclear-war-proxy/>.

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

²⁶ This paper discusses executive and legislative no-first-use proposals in Section IA and IB.

²⁷ The Department of Defense defines deterrence as “the prevention of action by the existence of a credible threat of unacceptable counteraction and/or belief that the cost of action outweighs the perceived benefits.” DEP’T OF DEF., DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 63 (2021), <https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf>.

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

²⁹ See P.M. Kamath, *The First And No First Use Options Of Nuclear Weapons*, 17 WORLD AFF'S 26, 27–28 (2013).

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).

³² DEP'T OF DEF., NUCLEAR POSTURE REVIEW 22 (2018), <https://uploads.fas.org/media/2018-Nuclear-Posture-Review-Version-2.pdf>.

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.³⁵ 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.³⁶ 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.³⁷

Opponents of a no-first-use policy, on the other hand, argue that the policy would undermine deterrence.³⁸ They claim the United States needs a nuclear deterrent against both nuclear attacks and significant conventional, chemical, biological, or cyber threats.³⁹ 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.⁴⁰ Furthermore, they

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.

³⁶ Nina Tannenwald, *It's Time for a U.S. No-First-Use Nuclear Policy*, TEX. NAT'L SEC. REV. (July 2, 2019), <https://tnsr.org/roundtable/policy-roundtable-nuclear-first-use-and-presidential-authority/#essay2>.

³⁷ Michael S. Gerson, *The Future of U.S. Nuclear Policy: The Case for No First Use*, BELFER CTR. (Feb. 2011), <https://www.belfercenter.org/publication/future-us-nuclear-policy-case-no-first-use>.

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.*

⁴⁰ Stephen L. Carter, *The Constitution and Prevention of Nuclear Holocaust: A Reaction to Professor Banks*, 13 J. LEGIS., 206, 206 (1986).

posit that a no-first-use policy would undermine extended deterrence over U.S. allies,⁴¹ incentivizing them to develop their own nuclear arms amid eroding U.S. assurances.⁴²

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."⁴³

During the Clinton administration, Defense Secretary Les Aspin considered a no-first-use policy as part of a post-Cold War nuclear posture.⁴⁴ 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.⁴⁵ 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-

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.

⁴² Franklin C. Miller & Keith B. Payne, *The dangers of no-first-use*, BULL. ATOM. SCI. (Aug. 22, 2016), <https://thebulletin.org/2016/08/the-dangers-of-no-first-use/>. *But see* Jon Wolfsthal, *Nuclear First-Use Is Dangerous and Unnecessary*, TEX. NAT'L SEC. REV. (July 2, 2019), <https://tnsr.org/roundtable/policy-roundtable-nuclear-first-use-and-presidential-authority/#essay3>. Extended deterrence is a U.S. commitment to retaliate against attacks on another state, thereby preventing attacks on the state because prospective attackers expect to incur unacceptable losses in a U.S. retaliatory strike. Allies and partners that rely on the United States for extended deterrence are sometimes described as being under the U.S. "nuclear umbrella."

⁴³ *See* PERRY & COLLINA, *supra* note 14 at 88.

⁴⁴ *See* Steve Fetter & Jon Wolfsthal, *No First Use and Credible Deterrence*, 1 J. PEACE & NUCLEAR DISARMAMENT 102, 106.

⁴⁵ *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

⁴⁶ See *id* at 96.

⁴⁷ Barack Obama, President of the United States, Remarks By President Barack Obama in Prague As Delivered (April 5, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-prague-delivered>.

⁴⁸ Press Release, The Norwegian Nobel Committee, The Nobel Peace Prize for 2009 (Oct. 9, 2009), <https://www.nobelprize.org/prizes/peace/2009/press-release/>.

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.

⁵⁰ See Josh Rogin, *U.S. allies unite to block Obama's nuclear 'legacy'*, WASH. POST (Aug. 14, 2016), https://www.washingtonpost.com/opinions/global-opinions/allies-unite-to-block-an-obama-legacy/2016/08/14/cdb8d8e4-60b9-11e6-8e45-477372e89d78_story.html.

⁵¹ See Robert Burns, *Biden would push for less US reliance on nukes for defense*, ASSOCIATED PRESS (Sep. 21, 2020) <https://apnews.com/article/election-2020-nuclear-weapons-elections-joe-biden-russia-1299ae16f3f21db12e4a41ce2392a0f7>.

⁵² *Transcript of July Democratic Debate 2nd Round Night 1: Full Transcript July 30, 2019*, REV (July 30, 2019), <https://www.rev.com/blog/transcripts/transcript-of-july-democratic-debate-night-1-full-transcript-july-30-2019>. Senator Warren’s statement followed a question from the moderator regarding her no-first-use bill, discussed further in Section IC of this paper. See S. 272, 116th Cong. (2019); see also Tannenwald, *supra* note 36 (supporting Sen. Warren’s argument).

Montana governor Steve Bullock countered that he “wouldn’t want to take [first use] off the table.”⁵³

The Biden administration has begun its Nuclear Posture Review, which was expected for release in early 2022.⁵⁴ The process has already sparked controversy within the Department of Defense, where senior officials requested the resignation of a political appointee overseeing the review.⁵⁵ 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.⁵⁶ In late 2021, hundreds of top scientists urged President Biden to adopt a no-first-use policy in a letter.⁵⁷ Dozens of members of Congress followed suit in early 2022, urging the President to “[d]eclare 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.”⁵⁸ President Biden’s past support for a no-first-use policy has also elicited concern from allies.⁵⁹ 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

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.”).

⁵⁵ Lara Seligman et al., *Pentagon’s top nuclear policy official ousted in reorganization*, POLITICO (Sept. 21, 2021, 06:08 PM), <https://www.politico.com/news/2021/09/21/pentagon-top-nuclear-official-ousted-reorganization-513502>.

⁵⁶ Letter from Edward J. Markey, United States Senator, to Joseph R. Biden, President of the United States (Sep. 24, 2021), https://www.markey.senate.gov/imo/media/doc/letter_to_president_biden_nuclear_policy.pdf.

⁵⁷ David E. Sanger, *Hundreds of Scientists Ask Biden to Cut the U.S. Nuclear Arsenal*, N.Y. TIMES (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/us/politics/scientists-letter-nuclear-arsenal.html>.

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.

⁵⁹ Julian Borger, *Nuclear arms hawks give bureaucratic mauling to Biden vow to curb arsenal*, GUARDIAN (Nov. 3, 2021), <https://www.theguardian.com/world/2021/nov/03/nuclear-arms-joe-biden-pentagon-hawks>.

necessary. Or make sense.”⁶⁰ Biden reaffirmed his position as a presidential candidate.⁶¹ However, in March 2022, administration officials reportedly indicated that President Biden’s Nuclear Posture Review will not adopt a no-first-use policy.⁶²

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.⁶³ The 1970s saw framework legislation like the War Powers Resolution, National Emergencies Act, and the Arms Export Control Act.⁶⁴ As Congress considered how to reassert control over foreign policy and national security issues, two no-first-use proposals emerged.

⁶⁰ William J. Perry & Tom Z. Collina, *To Prevent Nuclear War, President Biden Should Listen to Vice President Biden*, DEF. NEWS (Nov. 17, 2021), <https://www.defensenews.com/opinion/commentary/2021/11/17/to-prevent-nuclear-war-president-biden-should-listen-to-vice-president-biden/>.

⁶¹ See Kingston Reif, *Biden Administration Begins Nuclear Posture Review*, ARMS CONTROL ASSOC. (Sep. 2021), <https://www.armscontrol.org/act/2021-09/news/biden-administration-begins-nuclear-posture-review>.

⁶² Michael R. Gordon, *Biden Sticks With Longstanding U.S. Policy on Use of Nuclear Weapons Amid Pressure From Allies*, WALL STREET J. (Mar. 25, 2022), <https://www.wsj.com/articles/biden-sticks-with-longstanding-u-s-policy-on-use-of-nuclear-weapons-amid-pressure-from-allies-11648176849>.

⁶³ See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR*, 45–46 (1990).

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.⁶⁵ FAS renewed its call for a no-first-use law in 1984 with an essay in *Foreign Policy*.⁶⁶ The essay sparked debate among constitutional scholars⁶⁷ and elicited criticism from those who questioned the constitutionality of a leadership committee authorizing nuclear first use.⁶⁸ In particular, some concluded the mechanism amounted to an unconstitutional legislative veto⁶⁹ and Congress could not delegate its war powers to a leadership committee.⁷⁰

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.”⁷¹ 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.”⁷² The Senate overwhelmingly voted down the Fulbright Amendment with a vote of 68-10.⁷³ As of 2021, that instance remains Congress’s only vote on a no-first-use law.

⁶⁵ See Peter Raven-Hansen, *Introduction*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?* ix (1987).

⁶⁶ Jeremy Stone, *Presidential First Use Is Unlawful*, 56 *FOREIGN POL’Y* 94 (1984).

⁶⁷ E.g., William C. Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, 13 *J. LEGIS.* 1 (1986); Stephen Carter, *The Constitution and the Prevention of Nuclear Holocaust: A Reaction to Professor Banks*, 13 *J. LEGIS.* 1206 (1986).

⁶⁸ See generally *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?* (Peter Raven-Hansen ed., 1987).

⁶⁹ See Peter Raven-Hansen, *The Constitutionality of the FAS Proposal: A Critical Summary*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?* 211 (Peter Raven-Hansen ed., 1987). See *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983) (holding legislative vetoes unconstitutional); *Bowsher v. Synar*, 478 U.S. 714, 757–58 (1986) (holding that Congress may not authorize a lesser representative of the Legislative Branch to act on its behalf).

⁷⁰ See generally Banks, *supra* note 67 (discussing delegation issues in the FAS proposal, an important issue outside of the scope of this paper).

⁷¹ STEPHEN P. MULLIGAN, *LEGISLATION LIMITING THE PRESIDENT’S POWER TO USE NUCLEAR WEAPONS: SEPARATION OF POWERS IMPLICATIONS* 11–12 (Nov. 3, 2017).

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).

⁷⁷ H.R. 669, 115th Cong. (2017); H.R. 669, 116th Cong. (2019); H.R. 669, 117th Cong. (2021). Senator Markey also introduced the bill as an amendment to the National Defense Authorization Act for Fiscal Year 2022. Press Release, Senator Ed Markey, Senator Markey Introduces NDAA Amendments to Reduce Role of Nuclear Weapons, Threat of Nuclear War (Nov. 19, 2021), <https://www.markey.senate.gov/news/press-releases/senator-markey-introduces-ndaa-amendments-to-reduce-role-of-us-nuclear-weapons-threat-of-nuclear-war>.

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.”⁸²

By finding the first use of nuclear weapons a major act of war⁸³ and establishing “[a] first-use nuclear strike conducted absent a declaration of war by Congress would violate the Constitution,”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.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.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.

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

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.

⁸³ *Id.* § 2(5).

⁸⁴ *Id.*

⁸⁵ *Id.* § 2(7).

⁸⁶ H.R. 669, 115th Cong. (2017); H.R. 669, 116th Cong. (2019); H.R. 669, 117th Cong. (2021).

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.”⁸⁷ 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.”⁸⁸

Congress’s power to declare war includes authority over those decisions to enter into war.⁸⁹ The Constitution expressly vests in Congress the exclusive power to declare war.⁹⁰ The declare war authority is more than a formalistic authority to issue a declaration.⁹¹ 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.”⁹² 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.⁹³

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).

⁸⁹ See Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, 50 (2007). See also William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 700 (1997) (“The Founders intended that the [Declare War] Clause would vest in Congress principal responsibility for initiating conflict.”).

⁹⁰ U.S. CONST. art. I, § 8, cl. 11; see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 97 (2d ed. 1996).

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.”⁹⁴ 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.”⁹⁵

Under the Constitution, Congress is authorized to “make Rules for the Government and Regulation of the land and naval Forces.”⁹⁶ 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.⁹⁷ 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.⁹⁸

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.⁹⁹ The Constitution further authorizes Congress to “lay and collect Taxes...to...provide for the common Defense... of the United States.”¹⁰⁰ The Constitution prohibits

⁹⁴ S. 1148, 117th Cong. § 2(a) (2021).

⁹⁵ Press Release, Senator Ed Markey, Senator Markey and Rep. Lieu Announce Reintroduction of Bill to Limit U.S. President’s Ability to Start a Nuclear War (Jan. 19, 2021), <https://www.markey.senate.gov/news/press-releases/01/19/2021/senator-markey-and-rep-lieu-announce-reintroduction-of-bill-to-limit-us-presidents-ability-to-start-a-nuclear-war>.

⁹⁶ U.S. CONST. art. I, § 8, cl. 14.

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.

⁹⁹ U.S. CONST. art. I, § 7, cl. 1.

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

¹⁰¹ *Id.* § 8, cl. 12.

¹⁰² See Prakash, *supra* note 89, at 56.

¹⁰³ MARY B. DEROSA & ASHLEY NICOLAS, NUCLEAR THREAT INITIATIVE, THE PRESIDENT AND NUCLEAR WEAPONS: AUTHORITIES, LIMITS, AND PROCESS 5 (Dec. 2019), https://media.nti.org/documents/The_President_and_Nuclear_Weapons_Authorities_Limits_and_Process.pdf.

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.¹¹⁰ 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.”¹¹¹ The *Swaim* court wrote, “so long as we have a military force[,] Congress can not take away from the President the supreme command.”¹¹² 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.”¹¹³

As commander in chief, the President can use military force in response to an armed attack without congressional authorization.¹¹⁴ 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.”¹¹⁵ 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.”¹¹⁶ The War Powers Resolution similarly recognizes “a

¹¹⁰ See HENKIN *supra* note 90, at 48.

¹¹¹ *Fleming v. Page*, 50 U.S. 603, 615 (1850).

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.”)

¹¹⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318 (Max Farrand ed., rev. ed. 1966).

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.

¹¹⁹ *Swaim v. United States*, 28 Ct. Cl. 173, 221 (1893), *aff’d*, 165 U.S. 553 (1897).

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].”¹²²

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.¹²³ 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.¹²⁴

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,”¹²⁵ “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.”¹²⁶ 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.”¹²⁷

Congressional action modulates the President’s power over foreign affairs, a principle expressed in *Youngstown Sheet & Tube v. Sawyer*.¹²⁸ In his *Youngstown* concurrence, Justice Jackson

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

supra note 90, at 41 n.19 (“both Marshall and Jefferson spoke of the President only as the sole organ of communication and did not imply any power to make foreign policy. Substantive power was later read into the phrase”). *Accord* Koh, *supra* note 63, at 61 (“[Marshall’s] remarks were controversial, not because Congress had accepted a broad presidential monopoly over all foreign relations, but because it had largely acquiesced in the President’s narrower dominance over diplomatic communications”). Justice Sutherland’s statement was in dicta as *Curtiss-Wright* turned on the constitutionality of a congressional delegation to the President of its authority under the foreign commerce power to impose an arms embargo. Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 5 (1973) (“Those portions of Sutherland’s opinion which go beyond the issue of delegation in foreign affairs are dicta”).

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.”¹³⁵ 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.¹³⁶

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.¹³⁷ 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.¹³⁸ 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."¹³⁹ 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.¹⁴⁰

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

¹³⁸ 118 Cong. Rec. 12451 (1972) (statement of Senator Javits).

¹³⁹ *Id.* at 12450 (statement of Senator Fulbright).

¹⁴⁰ See SPENCER P. BOYER ET AL., DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES 17–18 (2005).

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.¹⁴¹ 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.¹⁴² 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.¹⁴³ The atomic bombs dropped on Hiroshima and Nagasaki had yields of sixteen and twenty-one kilotons.¹⁴⁴ By comparison, the most powerful

¹⁴¹ Nina Tannenwald, *The Great Unraveling: The Future of the Nuclear Normative Order*, AM. ACADEMY OF ARTS & SCIENCES (Apr. 2018), <https://watson.brown.edu/files/watson/imce/research/Tannenwald%20-%20The%20Great%20Unraveling%202018%20PDF.pdf>.

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.

¹⁴³ See AMY F. WOOLF, A LOW-YIELD, SUBMARINE-LAUNCHED NUCLEAR WARHEAD: OVERVIEW OF THE EXPERT DEBATE 1 (Jan. 5 2021), <https://sgp.fas.org/crs/nuke/IF11143.pdf>.

¹⁴⁴ See *Hiroshima, Nagasaki, and Subsequent Weapons Testing*, WORLD NUCLEAR ASSOC. (Mar. 2016), <https://www.world-nuclear.org/information-library/safety-and-security/non-proliferation/hiroshima,-nagasaki,-and-subsequent-weapons-testin.aspx>.

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.¹⁴⁵ The United States began developing its lowest yield nuclear weapon, a ten-ton tactical warhead,¹⁴⁶ in the late 1950s,¹⁴⁷ but the weapon is not currently in use.¹⁴⁸

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.¹⁴⁹ The use of low-yield nuclear weapons in war would prompt the use of strategic nuclear weapons in retaliation.¹⁵⁰ 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.¹⁵¹

¹⁴⁵ See *Mother of all bombs: How powerful is US mega-weapon?*, BBC NEWS (Apr. 13, 2017), <https://www.bbc.com/news/world-asia-39596333>.

¹⁴⁶ *Complete List of All U.S. Nuclear Weapons*, NUCLEAR WEAPON ARCHIVE (June 12, 2020), <https://nuclearweaponarchive.org/Usa/Weapons/Allbombs.html>.

¹⁴⁷ SANDIA NAT'L LABORATORIES, HISTORY OF THE MK-54 WEAPON (1968), <https://osf.io/n6yrb/>.

¹⁴⁸ See David E. Hoffman, *The Little Nukes That Got Away*, FOREIGN POLY (Apr. 1, 2010), <https://foreignpolicy.com/2010/04/01/the-little-nukes-that-got-away-2/> ("Today, the Davy Crockett system has long been retired").

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.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.”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.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.

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

¹⁵² See Jeremy Stone, *Presidential First Use is Unlawful*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?* 4 (Raven-Hansen ed., 1987); Stephen L. Carter, *War Making Under the Constitution and the First Use of Nuclear Weapons*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?* 109 (Raven-Hansen ed., 1987).

¹⁵³ 118 Cong. Rec. 12451 (1972).

¹⁵⁴ See Peter Raven-Hansen, *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.” *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 ET AL., *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, *Nuclear Famine: Two Billion People at Risk?*, PHYSICIANS FOR SOCIAL RESPONSIBILITY 2 (2013), <https://www.ipnw.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.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ 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,¹⁵⁸ but an authorization limited to measures short of nuclear first use would be within Congress's constitutional powers.

C. Congressional Limitations on First Use of Nuclear Weapons

Congress may limit the nature and extent of a war in its authorizations.¹⁵⁹ 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.

¹⁵⁵ See *The Amy Warwick*, 67 U.S. at 635.

¹⁵⁶ See PERRY & COLLINA, *supra* note 14, at 162-64.

¹⁵⁷ 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.”)

¹⁵⁸ 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”).

¹⁵⁹ 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.”).

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

¹⁶⁰ See *The XYZ Affair and the Quasi-War with France, 1798–1800*, DEP’T OF STATE, <https://history.state.gov/milestones/1784-1800/xyz>. See also BARRON, *supra* note 123, at 36-55 (discussing constitutional war powers issues during the Quasi War).

¹⁶¹ See *id.*

¹⁶² CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 5 (Apr. 18, 2014), https://www.everycrsreport.com/files/20140418_RL31133_7afb274ca9969db8d8b95898a2e3a23f2549da51.pdf.

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.¹⁶⁷ 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.¹⁶⁸ 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.”¹⁶⁹

In authorizing a limited war, Congress may restrict the President from acting outside of the bounds of a limited congressional authorization.¹⁷⁰ In *Little v. Barreme*, the Supreme Court held the President could not conduct captures beyond Congress’s Quasi War authorization.¹⁷¹

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.¹⁷² A no-first-use law would require a more explicit authorization of nuclear first use based on

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 HENKIN, *supra* note 90, at 104.

¹⁷⁰ See BARRON, *supra* note 123, at 66–67.

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

distinction, a war in which the use of nuclear weapons is not permitted as a matter of U.S. law would be a limited war because the President would conduct the war under legal restrictions other than those established in international law.

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 DEROSA & 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-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. OF INT'L L. 235 (2013).

¹⁷⁵ Prakash, *supra* note 89, at 118.

¹⁷⁶ *Id.*

¹⁷⁷ Samuel T. Lair, *Assessing the Jefferson Administration's Actions During the First Barbary Wars and their Impact on U.S. Small War Policy*, SMALL WARS J. (July 29, 2019), <https://smallwarsjournal.com/jrnl/art/assessing-jefferson-administrations-actions-during-first-barbary-wars-and-their-impact-us>.

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 DEP'T OF DEF., LAW OF WAR MANUAL 46–47 (Dec. 2016).

administration's Nuclear Posture Review.¹⁷⁹ 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.¹⁸⁰ The United States military has conventional superiority over any potential adversary.¹⁸¹ 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.¹⁸²

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.

¹⁷⁹ DEP'T 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.").

¹⁸⁰ See HENKIN, *supra* note 90, at 104 n.49.

¹⁸¹ See PERRY & COLLINA, *supra* note 14, at 210.

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.¹⁸³ 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.¹⁸⁴

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.¹⁸⁵ 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.

¹⁸³ See Oona A. Hathaway, *The Soleimani Strike Defied the U.S. Constitution*, ATLANTIC (Jan. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/soleimani-strike-law/604417/>.

¹⁸⁴ See Marko Milanovic, *The Soleimani Strike and Self-Defence Against an Imminent Armed Attack*, EJIL: TALK (Jan. 7, 2020), <https://www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack/>.

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

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.¹⁸⁸ 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,¹⁸⁹ will reportedly soon announce whether his administration will adopt the policy in the upcoming Nuclear Posture Review.¹⁹⁰ 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

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).

¹⁸⁹ See, e.g., Joseph R. Biden, Jr., *Why America Must Lead Again*, FOREIGN AFFS. (Mar. 2020), <https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again> (“I believe that the sole purpose of the U.S. nuclear arsenal should be deterring—and, if necessary, retaliating against—a nuclear attack.”).

¹⁹⁰ See Pifer, *supra* note 54.

enter the United States into war.¹⁹¹ Any first use of nuclear weapons against a nuclear armed state,¹⁹² whether with tactical or strategic warheads, would invite retaliation in kind and engender significant strategic consequences.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.¹⁹⁴ During the Quasi War with France, Congress authorized only a limited war and prohibited military actions beyond its authorization.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.

¹⁹¹ See Prakash, *supra* note 89, at 48.

¹⁹² The 2018 Nuclear Posture Review precludes the use of nuclear weapons against a non-nuclear weapons state. DEP'T OF DEF., *supra* note 32, at 21, <https://uploads.fas.org/media/2018-Nuclear-Posture-Review-Version-2.pdf>.

¹⁹³ See Section IVB of this article for further discussion of the strategic consequences of nuclear first use.

¹⁹⁴ See *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800).

¹⁹⁵ See CONG. RSCH. SERV., *supra* note 162, at 5.