

MEMORANDUM

November 3, 2017

Subject: Legislation Limiting the President’s Power to Use Nuclear Weapons: Separation of Powers Implications

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Recent proposed legislation that would place limitations on the President’s power to employ nuclear weapons has prompted interest in questions related to the constitutional allocation of power over the United States’ nuclear arsenal. This memorandum examines the constitutional separation of powers principles implicated by legislative proposals that restrict the President’s authority to launch nuclear weapons.¹

I. Recent Legislation and Proposals to Restrict First-Use of Nuclear Weapons

Legislation proposed in the 115th Congress would limit the President’s ability to order a “first-use nuclear strike.”² On January 24, 2017, identical versions of a bill titled the Restricting First-Use of Nuclear Weapons Act of 2017 (Restricting First-Use Bill) were introduced in both chambers of Congress. The Restricting First-Use Bill would prohibit the President from using the “Armed Forces of the United States to conduct a first-use nuclear strike unless such strike is conducted pursuant to a declaration of war by Congress that expressly authorizes such strike.”³ The term “first-use nuclear strike” is defined as an “attack using nuclear weapons against an enemy that is conducted without the President determining that the enemy has first launched a nuclear strike against the United States or an ally of the United States.”⁴ While some have advocated that the United States adopt a broader “no-first-use” policy and pledge never to use nuclear weapons first against a nuclear-armed adversary,⁵ the Restricting First-Use Bill would

¹ This memorandum addresses constitutional separation of powers principles as they relate to proposed legislation that would modify the current system of nuclear weapons control by requiring congressional approval before the President could launch a nuclear strike in certain circumstances. For a discussion of the current system of command and control over nuclear weaponry, see CRS In Focus IF10521, *Defense Primer: Command and Control of Nuclear Forces*, by Amy F. Woolf.

² See H.R. 669, 115th Cong., § 3 (as introduced), S. 200, 115th Cong., § 3 (as introduced) [hereinafter collectively the “Restricting First-Use Bill”]. The memorandum addresses the Restricting First-Use Bill as introduced in the 115th Congress. Identical bills were also introduced in the 114th Congress on September 27, 2016. See S. 3400, 114th Cong.; H.R. 6179, 114th Cong.

³ Restricting First-Use Bill § 3(a).

⁴ *Id.* § 3(b).

⁵ See, e.g., Letter from Honorable Barbara Lee, *et al.* to President Barack Obama (Oct. 13, 2016), (continued...)

address the President's ability to act as the sole decision maker when authorizing use of the nuclear arsenal. The Bill would not address overall U.S. policy on first-use, nor would it modify directly the technical mechanisms through which nuclear weapons are employed.⁶

Section 2 of the Restricting First-Use Bill contains the findings and declarations of policy behind the proposed legislation, stating, among other things, that the “framers of the Constitution understood that the monumental decision to go to war . . . must be made by the representatives of the people and not by a single person.”⁷ Citing the description of the President's Commander-in-Chief authority contained in the War Powers Resolution,⁸ and noting the uniquely powerful capacity of nuclear weapons, Section 2 states that a “first-use nuclear strike would constitute a major act of war[,]” and, therefore, such a strike “would violate the Constitution” if conducted without a declaration of war by Congress.⁹

By its terms, the Restricting First-Use Bill appears to prohibit the first use of nuclear weapons in conflicts not authorized by a congressional declaration of war—a form of authorization for hostilities that has not been employed since World War II.¹⁰ The bill's restrictions would appear to apply, for example, to the first use of nuclear weapons in hostilities undertaken solely pursuant to the President's authority under Article II of the Constitution (discussed in more detail below) or pursuant to a statutory authorization to use military force, such as the 2001 Authorization for Use of Military Force issued in response to the terrorist attacks of September 11, 2001 (2001 AUMF)¹¹ or the 2002 Authorization for Use of Military Force Against Iraq (2002 Iraq AUMF).¹² Moreover, a declaration of war would not necessarily permit the first use of nuclear weapons under the Restricting First-Use Bill, as the Bill provides that the declaration of war must still “expressly authorize[]” a first-use strike.¹³

In addition to the Restricting First-Use Bill, media outlets have reported that some Members have considered legislative proposals that would prevent the President from employing nuclear weapons without the advice of certain Cabinet members,¹⁴ though no such proposal has been formally introduced or made public as of the date of this memorandum.

Congress has previously considered legislation limiting the President's ability to engage in first use of nuclear weapons on at least one other occasion. In 1972, Senator William J. Fulbright proposed an amendment (Fulbright Amendment) to the War Powers Resolution, discussed below,¹⁵ that would have

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<http://lee.creative.house.gov/download/letter-to-president-obama-on-nuclear-no-first-use-policy>.

⁶ For more background on the technical process for the launch of nuclear weapons, see CRS In Focus IF10521, *supra* note 1.

⁷ Restricting First-Use Bill § 2(a)(2).

⁸ Pub. Law No. 93-148, § 2(c), 87 Stat. 555 (1973) (codified in 50 U.S.C. § 1541(c)) (declaring Congress's view that “[t]he 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”). For additional background and information on the War Powers Resolution, see CRS Report R42699, *The War Powers Resolution: Concepts and Practice*, by Matthew C. Weed.

⁹ Restricting First-Use Bill § 2(a)(3)-(6).

¹⁰ For a discussion on the potential factual scenarios that could be implicated by legislation restricting the first use of nuclear weapons, see Jeremy J. Stone, *Which Nuclear Scenarios are at Issue?*, in *FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?* 17-20 (Peter Raven-Hansen ed., 1987).

¹¹ Pub. Law No. 107-40, 115 Stat. 224 (2001) [hereinafter “2001 AUMF”].

¹² Pub. Law No. 107-243, 116 Stat. 1498 (2002) [hereinafter “2002 AUMF”].

¹³ Restricting First-Use Bill § 3(a).

¹⁴ See, e.g., Mike Lillis, *Pelosi Urges New Law to Limit President's Use of Nuclear Weapons*, THE HILL (Oct. 12, 2017), <http://thehill.com/policy/defense/355186-pelosi-urges-new-law-to-limit-presidents-use-of-nuclear-weapons>.

¹⁵ See *infra* § III.C.

prohibited the President from employing the first use of nuclear weapons without prior congressional approval or a declaration of war.¹⁶

II. Allocation of War Powers in the Constitution

The Constitution allocates powers related to the conduct of war and other armed conflicts both to Congress and the President, but the precise contours of each branch's respective powers have been the subject of ongoing debate since the founding era.¹⁷ Accordingly, the following section analyzes the constitutional allocation of war powers that could be implicated in the control over nuclear weapons.

A. Textual Sources of War Powers

Article I grants the legislative branch a series of powers related to the conduct of armed conflict and other military matters. Specifically, Article I gives Congress the power to “declare war, grant Letters of Marque and Reprisal, and Make Rules concerning Captures on Land and Water.”¹⁸ Congress is designated with the authority to “raise and support Armies,” “provide and maintain a Navy,” “make rules for the Government and Regulation of the land and naval forces,” “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” and “provide for organizing, arming, and disciplining the Militia.”¹⁹ Congress also possesses several enumerated powers related more broadly to foreign affairs,²⁰ as well as the power to “lay and collect Taxes . . . to . . . pay the Debts and provide for the common Defence[.]”²¹ Further, Congress is empowered “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .” as well as “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²² Finally, Congress has nearly plenary power over appropriations, including appropriating for the national defense or in the field of foreign affairs.²³

¹⁶ See 118 CONG. REC. 12,448 (Apr. 12, 1972).

¹⁷ In 1836, then-Congressman and former President John Quincy Adams wrote that the “division of powers between Congress and the President in the use of armed forces has not been an area of the law characterized by great certainty. Perhaps they can never be defined.” JOHN QUINCY ADAMS, EULOGY ON THE LIFE AND CHARACTER OF JAMES MADISON 47 (1836). More recently, in a 1971 hearing before a Senate subcommittee, then-Assistant Attorney General (and later-Chief Justice of the Supreme Court) William Rehnquist described the separation of war powers as “the most difficult area of the Constitution[.]” *Executive Impoundment of Appropriated Funds: Hearing Before the Subcomm. On Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 251 (1971) (statement of W. Rehnquist) [hereinafter “*Impoundment Hearings*”].

¹⁸ U.S. CONST. art. I, § 8, cl. 11. During the early years of the Republic, letters of marque were used by Congress to sanction private entities to engage in hostilities on behalf of the United States. See generally J. Gregory Sidak, *The Quasi War Cases and Their Relevance to Whether Letters of Marque and Reprisal Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL’Y 465, 468 (2005).

¹⁹ U.S. CONST. art. I, § 8, cls. 12-16.

²⁰ See *id.* cl. 3 (power to regulate foreign commerce); *id.* cl. 4 (power to establish rules for naturalization); *id.* cl. 10 (power to enact laws punishing piracy and felonies on the high seas); *id.* art. II, cl. 2 (requirement that the Senate give its advice and consent to the appointment of ambassadors and making of treaties).

²¹ *Id.* art. I, § 8, cl. 1.

²² *Id.* § 8, cl. 18.

²³ *Id.* § 8, cl. 1 (granting Congress the “Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”). Congress’s appropriations power is limited in that it cannot be used to impair power inherent solely in other branches of the government or to otherwise violate constitutional restrictions on congressional prerogatives. See, e.g., *United States v. Klein*, 80 U.S. (8 Wall.) 128, 147-48 (1872) (holding invalid an appropriations provision that effectively nullified some effects of a presidential pardon and that appeared to prescribe a rule of decision in court cases); *United States v. Lovett*, 328 U.S. 303, 317-18 (1946) (invalidating as a bill of attainder an appropriations provision denying money to pay salaries of named officials).

On the executive side, Article II states that the “President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States[.]”²⁴ The President’s other enumerated powers and responsibilities include the authority to receive ambassadors,²⁵ and to make treaties and appoint ambassadors with the advice and consent of the Senate.²⁶ Article II further provides that the President “shall give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient[.]”²⁷ The President is bound to “take Care that the Laws be faithfully executed”²⁸ and to “preserve, protect and defend the Constitution of the United States.”²⁹ More generally, the President is vested with the “executive Power[.]”³⁰ and the Supreme Court has interpreted Article II to grant the President broad powers in the field of foreign affairs,³¹ especially in matters in which it essential for the President “to speak for the Nation with one voice in dealing with other governments.”³²

The President’s power over military action is particularly well grounded in the context of defensive military operations.³³ In *The Prize Cases*,³⁴ the Supreme Court upheld the constitutionality of President Lincoln’s order to blockade certain southern ports following the outbreak of hostilities in the Civil War on the grounds that that “the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”³⁵

B. Evaluating Overlapping Powers Between the Executive and Legislative Branches

While the text of the Constitution makes clear that both the legislative and executive branches possess powers related to military operations, the limits of each branch’s respective power has long been the subject of debate.³⁶ Some commentators have argued that the plain text of Article I gives Congress the

²⁴ U.S. CONST. art. II, § 2, cl. 1.

²⁵ *Id.* § 3.

²⁶ *Id.* § 2, cl. 2.

²⁷ *Id.* § 3.

²⁸ *Id.*

²⁹ *Id.* § 1, cl. 1.

³⁰ *Id.*

³¹ *See, e.g.,* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). For a recent Supreme Court analysis of the branches’ respective powers in the field of foreign affairs, see *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087-90 (2015).

³² *See* *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000); *see also* *Zivotofsky*, 135 S. Ct. at 2086.

³³ *See, e.g.,* *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring) (“[T]he President, as commander in chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval.”), *cert. denied*, 531 U.S. 815 (2000); *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 32 Op. O.L.C. 1, 28-29 (2006) (“Among the President’s most basic constitutional duties is the duty to protect the Nation from armed attack. The Constitution gives him all necessary authority to fulfill that responsibility.”); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 47-48 (1996) (“Without awaiting a Congressional declaration of war, or other authorization from Congress, the power of the President to use the troops or do anything else necessary to repel invasion is beyond question.”). Records of the Constitutional Convention indicate that James Madison and other Framers gave Congress the power to “declare” rather than “make” war in order to ensure that the President had the constitutional authority to repel sudden attacks. *See* 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 318-19 (rev. ed. 1937). And the text of the War Powers Resolution acknowledges that the “constitutional powers of the President as Commander-in-Chief” include the authority to introduce U.S. troops into hostilities in the event of “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.” 50 U.S.C. § 1541(c).

³⁴ 67 U.S. 635 (1862).

³⁵ *Id.* at 668.

³⁶ *See supra* note 17.

power to regulate whether and how the military can use certain weapons,³⁷ while others contend that such legislation would interfere with the President's authority over strategic "battlefield decisions."³⁸ When faced with a potential separation of powers conflict of this nature, prominent legal scholars once argued that the powers of each branch of government were mutually exclusive.³⁹ In recent decades, however, the Supreme Court has adopted the reasoning of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*⁴⁰ that stated that the President's constitutional powers "are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress."⁴¹ *Youngstown* addressed a challenge to the President's authority to issue an executive order directing the Secretary of Transportation to take possession of private steel mills to ensure production during the Korean War,⁴² and most subsequent Court decisions citing to *Youngstown* have similarly assessed the permissibility of executive action that has not been clearly authorized by statute.⁴³ However, the Supreme Court has also cited Justice Jackson's concurrence in evaluating the scope of the President's authority when legislation enacted by Congress clearly prohibits the President's actions.⁴⁴

Justice Jackson's opinion sets forth a tripartite framework for evaluating the constitutional powers of the President. The President's authority is (1) at a maximum when acting pursuant to authorization by Congress;⁴⁵ (2) in a "zone of twilight" when Congress and the President "may have concurrent authority, or in which its distribution is uncertain," and Congress has not spoken on an issue; and (3) at its "lowest ebb" when taking measures incompatible with the will of Congress.⁴⁶ In a Category 3 or the "lowest ebb" scenario, when Congress has enacted legislation that would prohibit the President from taking a desired action, the Jackson opinion has been interpreted to establish that the President may claim constitutional authority only in matters involving exclusive presidential prerogatives.⁴⁷ In such a case, the President must possess a constitutional power that is "at once so conclusive and preclusive" that the President's

³⁷ See *infra* § III.B.

³⁸ See *infra* § III.A.

³⁹ See JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES §§ 703-706, at 470-73 (1st Ed. 1868); see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 1019 (2008) [hereinafter "*Constitutional History*"].

⁴⁰ 343 U. S. 579 (1952).

⁴¹ *Id.* at 635 (Jackson, J., concurring).

⁴² See Exec. Order No. 10340, 71 Fed. Reg. 3139 (Apr. 10, 1952).

⁴³ See, e.g., *Medellin v. Texas*, 552 U.S. 491, 523-24, 529 (2008); *Dames & Moore v. Regan*, 453 U.S. 654, 660-62, 668-69 (1981).

⁴⁴ See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083, 2096 (2015) (citing and relying, in part, on Justice Jackson's concurrence in *Youngstown* and holding that a provision in the Foreign Relations Authorization Act, Fiscal Year 2003 interfered with the exclusive recognition power of the President).

⁴⁵ An argument could be made that Congress delegated to the President the power over nuclear weapons in the Atomic Energy Act of 1946, and therefore President's power in this field is at a maximum. Cf. Peter Raven-Hansen, *Nuclear War Powers*, 83 AM. J. INT'L L. 786, 790 (1989) (analyzing whether Congress has delegated the power over nuclear weapons to the President). In that legislation, Congress assigned to the President the power to "direct the [Atomic Energy] Commission to deliver such quantities of special nuclear material or atomic weapons to the Department of Defense for such use as he deems necessary in the interest of national defense." 42 U.S.C. § 2121(b). Regardless of the nature of the President's current authority over the nuclear arsenal, this memorandum examines constitutional implications if Congress were to enact additional legislation expressly limiting or conditioning any such authority.

⁴⁶ *Youngstown Sheet & Tube Co.*, 343 U.S. at 635-38 (Jackson, J., concurring).

⁴⁷ See *Zivotofsky*, 135 S. Ct. at 2083 (stating that, to take measures incompatible with the will of Congress, "the President's asserted power must be both 'exclusive' and 'conclusive' on the issue") (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637-38 (Jackson, J., concurring)); see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 721 (2008) [hereinafter "*Original Understanding*"] (analyzing the contours of the "preclusive core" of executive war powers).

actions are “beyond control by Congress.”⁴⁸ Stated another way, “when a Presidential power is ‘exclusive,’ it ‘disabl[es] the Congress from acting upon the subject.’”⁴⁹

Although not in the field of war powers and armed conflict, the Supreme Court’s 2015 decision in *Zivotofsky v. Kerry* is perhaps the only example of where the Court recognized the President had an exclusive power with which Congress could not interfere in the field of foreign relations.⁵⁰ There, the Court concluded that the President has exclusive authority to recognize the territorial bounds of a foreign state, and Congress could not take certain actions that were viewed to interfere with the President’s recognition power.⁵¹ But the Court also acknowledged that Congress could utilize its constitutional powers, including its “central role in making laws,” to respond to and minimize the impact of the President’s recognition decision if it disagreed with the President’s policy.⁵²

C. War Powers that are “Beyond Control by Congress”

Applying the *Youngstown* framework to the context of armed conflict, there is significant disagreement among scholars as to which—if any—war powers allotted to the President are so “conclusive and preclusive” as to be beyond congressional control.⁵³ The lack of clarity exists, in part, because courts often have been reluctant to resolve wartime disputes between the executive and legislative branches, and instead have concluded that they lack jurisdiction over such cases.⁵⁴ Courts have relied on a variety of doctrines, including the political question doctrine, the equitable/remedial discretion doctrine, ripeness, mootness, and congressional standing concerns as grounds for dismissal without reaching the merits of such suits.⁵⁵ CRS has not identified a case in which a court deemed an Act of Congress to be an

⁴⁸ *Youngstown Sheet & Tube Co.*, 343 U.S. at 637-40 (Jackson, J., concurring).

⁴⁹ *Zivotofsky*, 135 S. Ct. at 2095 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637-38 (Jackson, J., concurring)).

⁵⁰ In a dissent joined by Justice Alito in *Zivotofsky*, Chief Justice Roberts noted that the majority recognized, for the first time, that the President has exclusive authority “to act in defiance of an Act of Congress in the field of foreign relations.” See *id.* at 2095 (Roberts, C.J., dissenting). *Zivotofsky*, however, was limited to the President’s recognition power, and did not resolve issues related to the President’s authority as Commander in Chief or more generally respecting the President’s authority in the field of military operations. See *id.* at 2081-96. Some believe *Zivotofsky* will serve as “useful precedent” in resolving separation of war powers disputes. See Jack Goldsmith, *The Supreme Court 2014 Term: Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 142 (2015).

⁵¹ See *Zivotofsky*, 135 S. Ct. at 2094-96 (invalidating § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. Law No. 107-228, 116 Stat. 1350, 1366 (2002)).

⁵² See *id.* at 2087 (“Although the President alone effects the formal act of recognition, Congress’ powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President’s recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.”).

⁵³ Compare *Constitutional History*, *supra* note 39 (surveying a history of assertions of preclusive commander-in-chief authority and contending that such claims are recent phenomena), with John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 182 (1996) (arguing that the Framers created a constitutional framework designed to encourage presidential initiative in war).

⁵⁴ See, e.g., *Doe v. Bush*, 323 F.3d 133, 138-40 (1st Cir. 2003), *reh’g denied*, 322 F.3d 109 (2003) (dismissing challenge to the constitutionality of the 2002 AUMF as unripe); *Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000) (affirming dismissal for lack of standing in a lawsuit by Members of Congress challenging the President’s authority to direct the military to participate in hostilities in Yugoslavia); *Ange v. Bush*, 752 F. Supp. 509, 510 (1990) (dismissing challenge to President’s authority to deploy servicemember to the Persian Gulf during the First Gulf War as a non-justiciable political question). See also CRS Legal Sidebar WSLG1700, *UPDATE: Smith v. Obama: A Servicemember’s Legal Challenge to the Campaign Against the Islamic State*, by Stephen P. Mulligan (discussing a district court dismissal of a servicemember’s challenge to the President’s legal authority to conduct operations against the Islamic State on the grounds that the plaintiff lacked standing and the case presented a non-justiciable political question).

⁵⁵ See *supra* note 54. See also CRS Report RL30352, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, by Michael John Garcia (discussing various challenges brought by Members of (continued...))

unconstitutional infringement upon an exclusive power of the President to conduct military operations under the Commander in Chief Clause or elsewhere in Article II.

While there is no definitive judicial decision on which facets of the President's war powers (if any) are beyond the reach of Congress, the Supreme Court has indirectly addressed the issue in prior rulings. In a concurring opinion in a Civil War-era case, *Ex parte Milligan*,⁵⁶ Chief Justice Salmon P. Chase stated:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, 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.⁵⁷

More recently, in a 2006 decision, *Hamdan v. Rumsfeld*,⁵⁸ the Court favorably quoted another portion of Chief Justice Chase's concurring opinion in *Milligan*, stating:

[N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences⁵⁹

However, it should be noted that, while *Milligan* and *Hamdan* addressed the President's wartime authority to detain and try alleged combatants or their conspirators, the Court in both cases concluded that the President's powers were confined by statute, and the President exceeded that statutory authority.⁶⁰ Accordingly, the discussion of exclusive presidential powers over the "conduct of campaigns" in these cases may not have been necessary to the Court's holdings and could be considered non-precedential *obiter dicta*.⁶¹ Nevertheless, non-binding statements from the Supreme Court can be deemed persuasive.⁶²

Many commentators agree that the President has the exclusive power to conduct at least some aspects of armed conflict, and that Congress could conceivably impermissibly intrude upon those powers if it, for example, were to issue military orders directly to subordinate officers.⁶³ Although there is disagreement

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Congress to executive action which purportedly contravenes the War Powers Resolution); *Whitney v. Obama*, 845 F.Supp.2d 136, 140 (D.D.C. 2012) (rejecting on mootness grounds a challenge by private parties alleging that U.S. operations in Libya violated the War Powers Resolution).

⁵⁶ 71 U.S. (4 Wall.) 2 (1866).

⁵⁷ *Id.* at 139 (Chase, C.J., concurring in the judgment).

⁵⁸ 548 U.S. 557 (2006).

⁵⁹ *Id.* at 591-92 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) at 139 (Chase, C.J., concurring in the judgment)).

⁶⁰ In *Milligan*, the Court held, *inter alia*, that President Lincoln exceeded his authority under the Habeas Corpus Act of 1863 by suspending the Writ of Habeas Corpus for a non-prisoner of war (as defined in the statute). *See Ex parte Milligan*, 71 U.S. at 131. In *Hamdan*, the Court held that a military tribunal established pursuant to a presidential order to try suspected terrorists for violations of the law of war was "illegal" because it did not comply with the requirements of the Uniform Code of Military Justice. *See Hamdan*, 548 U.S. at 625. The court did not directly pass on the constitutionality of the statutes in these cases, but it nevertheless held that they were binding on the President.

⁶¹ *Obiter dictum* (plural *dicta*) is a judicial statement in an opinion that is not necessary to the holding of the case and therefore not considered precedential, but may be considered persuasive. *Obiter Dictum*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁶² *See, e.g.*, *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) ("It may be dicta, but Supreme Court dicta tends to have somewhat greater force-particularly when expressed so unequivocally."); *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856, 861 (1st Cir. 1993) ("Carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.").

⁶³ *See, e.g.*, *Constitutional History*, *supra* note 39, at 1101 ("[I]t is difficult to construe the words of the Commander in Chief Clause *not* to establish some indefeasible core of presidential superintendence of the army and the navy[.]"); *accord Swaim v. United States*, 28 Ct. Cl. 173, 221 (1893) ("Congress may increase the Army, or reduce the Army, or abolish it altogether; but so (continued...)").

on the issue,⁶⁴ many commentators also believe that legislation that would direct the President to make tactical or strategic decisions on how to combat an enemy—often called “battlefield” decisions—would interfere with the exclusive powers of the President.⁶⁵ But while Congress may be limited in its power to enact legislation directing the President to make certain decisions in the context of an armed conflict, Congress may still retain its discretion to influence military strategy more indirectly through its power of appropriations.⁶⁶ As a matter of historical practice, Congress has used the power of the purse on several occasions to effectively prohibit or compel the termination of military operations, or to otherwise limit the deployment of U.S. troops.⁶⁷

III. Application of Constitutional Principles to the Legislation Restricting the President’s Power to Employ Nuclear Weapons

Given the relative dearth of judicial opinions describing which war powers are in the sole purview of the President, there does not appear to be judicial precedent that fully resolves the constitutional issues implicated by legislation restricting the President’s power to employ nuclear weapons. Moreover, commentators evaluating proposed legislation limiting the President’s authority to use nuclear weapons have reached dramatically differing conclusions on the constitutionality of such proposals.⁶⁸

A. Arguments that Legislation Restricting Use of Nuclear Weapons Would Infringe on Exclusive Executive Authority

Among those who believe that legislation limiting the use of nuclear weapons would infringe on the President’s constitutional war powers, a leading argument has been that such measures would interfere with the President’s power to make strategic decisions on how best to subdue an enemy.⁶⁹ Although Congress likely has the authority to limit the President’s ability to use nuclear weapons by prohibiting the use of appropriated funds for such weapons’ development and maintenance,⁷⁰ the Restricting First-Use Bill would place direct limits on the Executive’s ability to utilize weapons that are currently in the

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long as we have a military force Congress cannot take away the power of supreme command”), *aff’d*, 165 U.S. 553 (1897). For additional examination of the limits on Congress’s power to issue and control military orders, see CRS Report R41989, *Congressional Authority to Limit Military Operations*, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola, at 2-3.

⁶⁴ See Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319, 1324 n.13 (2005) (“Although the notion that the President must have exclusive tactical control of the movement of forces on a battlefield seems near universal, there is nothing obvious about it.”); *Original Understanding*, *supra* note 47, at 753-55 (criticizing the conclusion that Congress has no authority to issue legislation that interferes with “battlefield” decisions).

⁶⁵ See, e.g., WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 154-57 (1994) (“[T]here is broad scholarly consensus that Congress may not interfere with the President’s day-to-day command” or “tactical control of day-to-day combat operations”); MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY 84 (1990) (concluding that the President has exclusive authority over “operational battlefield decisions”).

⁶⁶ Article I, Section 9, clause 7 provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]” U.S. CONST. art. I, § 9, cl. 7. For historical examples of congressional use of appropriations power to influence and restrict military operations, see CRS Report R41989, *supra* note 63, at 27-32.

⁶⁷ See CRS Report R41989, *supra* note 63, at 27-32.

⁶⁸ Compare sources cited, *infra*, notes 69-75 with sources cited, *infra*, notes 83-85.

⁶⁹ See Robert F. Turner, *Congressional Limits on the Commander in Chief: The FAS Proposal*, in FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 10, at 45-56.

⁷⁰ See *supra* note 66. Cf. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015) (noting in *dicta* that, even though the President had exclusive power of recognition of foreign governments, Congress could still influence foreign affairs and United States’ relations with recognized countries through, among other authorities, the power of the purse).

military arsenal. If it were to be accepted that regulating tactical “battlefield decisions” is beyond the reach of Congress,⁷¹ it could be argued that the Bill and similar proposals unconstitutionally infringe upon the President’s ability to select which weapons can be used to defend the United States from attack.⁷²

As one legal commenter argued:

Just as Congress would exceed its authority by enacting legislation directing the President during hostilities to deploy a particular unit from one hill to another, it would also exceed its proper authority by seeking to direct the President (at least in a defense setting) to use or not use a particular weapon in the existing arsenal against an armed enemy.⁷³

Some legal opinions from the Department of Justice (DOJ) could be read as consistent with, and may potentially go beyond, this conclusion. In a 1941 opinion, then-Attorney General (and later Justice) Robert Jackson opined that “the President’s responsibility as Commander in Chief . . . undoubtedly includes the power to dispose of troops *and equipment* in such manner and on such duties as best to promote the safety of the country.”⁷⁴ In a 2001 memorandum to the President shortly after the terrorist attacks of September 11, 2001, DOJ’s Office of Legal Counsel (OLC) concluded that determinations as to the “amount of military force to be used in response [to a terrorist threat], or the method, timing, and nature of the response . . . are for the President alone to make.”⁷⁵ If the President is vested with the exclusive and “plenary power to use military force” described in the 2001 OLC memorandum, proposed legislation like the Restricting First-Use Bill would likely be understood by the Executive to impermissibly intrude on the powers of the executive branch. Notably, however, there is no consensus among scholars that the 2001 OLC memorandum accurately reflects the allocation of war powers under the Constitution.⁷⁶

Legislation that limits the president’s power to use nuclear weapons in a defensive setting could be more likely to test constitutional limits on separation of powers. As discussed above,⁷⁷ the Supreme Court upheld the constitutionality of President Lincoln’s blockade during the Civil War in *The Prize Cases*, even though Congress had not authorized the action through a formal declaration of war.⁷⁸ Because the Restricting First-Use Bill would appear to constrain the President’s power to use nuclear weapons even in response to a non-nuclear armed attack on the United States,⁷⁹ such legislation could implicate the President’s augmented defensive war powers. However, *The Prize Cases* concerned President’s Lincoln’s orders given in the *absence* of congressional action rather than in the face of an express constitutional

⁷¹ Not all scholars agree the President has exclusive authority over such “battlefield” decisions. *See supra* note 64.

⁷² *See Turner, supra* note 69, at 46.

⁷³ *Id.*

⁷⁴ Training of British Flying Students in the United States, 40 Op. Att’y Gen. 58 (1941) (emphasis added); *see also* Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 O.L.C. 182, 185 (1996) (concluding that Congress “may not unduly constrain or inhibit the President’s authority to make and to implement the decisions he deems necessary or advisable for the successful conduct of military missions in the field.”).

⁷⁵ The President’s Constitutional Auth. to Conduct Military Operations Against Terrorists & Nations Supporting Them, 25 O.L.C. 188, 2001 WL 34726560, at *19 (2001).

⁷⁶ *See, e.g.,* Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1240-44 (2005) (challenging, among other things, the conclusions of OLC’s 2001 memorandum). Although the OLC has not withdrawn the memorandum cited in note 75, *supra*, the DOJ has stated that certain positions by that office in the aftermath of the September 11, 2001 attacks do not necessarily reflect the current views of the OLC. *See* Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2011 (Jan. 15, 2009), 2009 WL 1267352.

⁷⁷ *See supra* § II.

⁷⁸ *The Prize Cases*, 67 U.S. 635, 668 (1862).

⁷⁹ The Restricting First-Use Bill would allow the President to deploy nuclear weapons without congressional approval in response to a nuclear attack on the United States, but would not appear to allow for the President to use nuclear weapons in response to non-nuclear hostilities. *See supra* § I.

disapproval of presidential action as would be the case in the proposed legislation discussed in this memorandum.

Legislation that would require the President to consult with one or more Cabinet members before conducting a nuclear strike could implicate unique concerns related to the President's commander-in-chief role.⁸⁰ It could be argued that requiring the President to consult with other officials, such as the Secretary of Defense, before launching a military strike could unconstitutionally undermine the President's commander-in-chief role at the apex of the military.

Finally, if a court were to conclude that the President possesses the authority to "speak for the Nation with one voice" on U.S. policy regarding the use of nuclear weapons (as it has in past cases in the context of foreign relations),⁸¹ a law restricting the President's ability to employ nuclear weapons could be seen by some to potentially intrude upon that power.

B. Arguments that the Restricting First-Use Bill is Constitutional

Proponents of the constitutionality of legislation limiting presidential power over nuclear weapons argue that, taken collectively, Congress's many enumerated powers related to armed conflict⁸² yield broad authority to place restrictions on the manner in which wars are carried out and, therefore, allow Congress to limit the President's use of nuclear weapons.⁸³ As one legal scholar has summarized:

Congress must make the initial determination of whether—or the extent to which—we should have any armed forces, the character of those forces and, it would seem the general uses to which those forces may be applied. The power is, after all, to raise govern and regulate. . . . [The President] lacks the general authority to use authorized forces or weapons in a manner inconsistent with specific congressional determinations.⁸⁴

Some commentators have gone so far as to argue that Congress's war-making powers are so extensive that the Executive's first-use of a nuclear weapon without a declaration of war would violate the Constitution,⁸⁵ although some have expressed disagreement with this position.⁸⁶ Others contend that Congress's powers to "raise and support Armies" and "provide and maintain a navy[.]" standing alone, confer Congress with the constitutional authority to restrict the use of nuclear weapons.⁸⁷ These scholars

⁸⁰ See, e.g., Lillis, *supra* note 14 (discussing potential legislation that would require the President to consult with Cabinet officials before launching a nuclear weapon).

⁸¹ See *supra* § II.A and note 32.

⁸² See *supra* notes 18-23.

⁸³ See William C. Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, 13 J. LEGISL. 1, 4 (1986); Michael J. Glennon, *The NATO Treaty: The Commitment Myth*, in *FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?*, *supra* note 10, at 52. See also Jeremy T. Stone, *First Use is Unlawful*, 56 FOREIGN POL'Y 95, 99-100 (1984) ("[M]ost legal scholars would seem to admit . . . that Congress . . . could control the [first use of nuclear weapons] by legislation."); Stephen L. Carter, *The Constitution and Prevention of Nuclear Holocaust: A Reaction to Professor Banks*, 13 J. LEGISL. 206, 214 (1986) ("The Congress might prohibit any use of nuclear weapons (except to respond to nuclear attack) without congressional provisions. . . . Or the Congress might impose rules governing the particular set of circumstances in which nuclear weapons should be used.")

⁸⁴ Allan Ides, *Congressional Authority to Regulate Use of Nuclear Weapons*, in *FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?*, *supra* note 10, at 75.

⁸⁵ Arthur S. Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA. L.J. 32, 32 (1982) ("To permit the President alone to have the power to trigger thermonuclear war is contrary both to the letter and the spirit of the Constitution."); Stone, *supra* note 83, at 95 ("[A]ccording to this view it is unconstitutional, in the absence of a declaration of war, for the president to order a first use of nuclear weapons without specific authority at the time from Congress.")

⁸⁶ See Turner, *supra* note 69, at 45 (stating that the argument that only Congress has the right to control the deployment of nuclear weapons "fails to pass even the 'straight face' test").

⁸⁷ See Stephen L. Carter, *War Making Under the Constitution and the First Use of Nuclear Weapons*, in *FIRST USE OF NUCLEAR* (continued...)

reason that Congress's discretion to determine which military forces and weaponry it will bring into existence necessarily subsumes the "lesser authority" to define how the President may utilize those forces and weapons.⁸⁸

Supporters of legislation limiting presidential power often cite early Supreme Court jurisprudence from the "Quasi War" with France in which the Court held that Congress could authorize a "limited" or "partial" war in response to hostilities by a foreign nation.⁸⁹ But while the Court upheld the right of Congress to define by statute the proper targets of military force in these cases, the statutes at issue did not appear to place limits on which weapons or other means of combat were available to the President.⁹⁰ Thus, the "Quasi War" cases could be interpreted to recognize Congress's authority to enact legislation limiting the *objects* of military force, but they may not necessarily stand for the proposition that Congress can limit the *means* by which the President may use military force in pursuit of those objects.

Although the "Quasi War" cases might not provide definitive guidance as to Congress's authority to restrain the Executive's use of nuclear weapons, these and other cases generally illustrate the Supreme Court's longstanding recognition of Congress's power to constrain the President's wartime activities. For example, in *Little v. Baraeme*,⁹¹ the Court, in an opinion by Chief Justice Marshall, held that the seizure of certain American ships believed to be trading with France exceeded the President's authority granted by statute, even though, in the absence of such a statute, the President may have had constitutional authority for such a seizure.⁹² And in wartime detention cases from the Civil War (*Milligan*) and the post-9/11 conflict with Al Qaeda and associated forces (*Hamdan*), the Court determined that the President's detention power was limited by statute.⁹³ These cases, coupled with the fact that the Supreme Court has never invalidated a statute on the grounds that it interferes with an exclusive power of the President to carry out military operations, could support the position that Congress has the authority to limit the President's use of nuclear weapons.

C. Debate over the Fulbright Amendment to the War Powers Resolution

The Senate floor debate over Senator William Fulbright's 1972 proposal to limit the President's power to employ nuclear weapons represents a microcosm of the broader debate by scholars and policymakers over the constitutionality of legislation restricting the President's power over the nuclear arsenal. The Fulbright Amendment stated the following:

In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be employed by the President only—

(1) To respond to any act or situation that endangers the United States, its territories or possessions, or its citizens or nationals when the necessity to respond to such act or situation in

(...continued)

WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?, *supra* note 10, at 119.

⁸⁸ Glennon, *supra* note 83, at 52; *accord* Carter, *supra* note 87, at 114 ("If the Congress cannot place restrictions on the military forces which in its discretion it brings into being, then there seems little point in vesting that body the power to create the forces in the first place.").

⁸⁹ See *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J., seriatim op.); *Talbot v. Seeman*, 5 U.S. (1 Cr.) 1, 28 (1801); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176-79 (1804).

⁹⁰ The statutes at issue allowed the President to authorize the military to seize certain French vessels and American vessels bound for French ports. Act of May 28, 1798, ch. 48, 1 Stat. 561, 561; Act of June 28, 1798, ch. 62, § 1, 1 Stat. 574, 574; Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578, 578; Act of Feb. 9, 1799, ch. 2, § 1, 1 Stat. 613, 613-14.

⁹¹ 6 U.S. (2 Cranch) 170 (1804).

⁹² *Id.* at 177-78. See also CRS Report R41989, *supra* note 63, at 7-8 (discussing *Little*).

⁹³ See *supra* § II.C. For further examination on the Court's ruling in *Hamdan*, see CRS Report R41989, *supra* note 63, at 13.

his judgment constitutes a national emergency of such a nature as does not permit advance congressional authorization to employ such forces; but, except in response to a nuclear attack or to an irrevocable launch of nuclear weapons, the President may not use nuclear weapons without the prior, explicit authorization of the Congress[.]

While much of the Senate debate on the Fulbright Amendment addressed non-constitutional concerns,⁹⁴ several Senators remarked on whether the proposed legislation might infringe on the exclusive powers of the Executive. Like the broader scholarly debate, Senators argued both for and against the power of Congress to limit the President's first use of nuclear weapons, but no consensus was reached.

Senator Fulbright advocated for the constitutionality of his proposed amendment and argued that Congress had the power to limit the use of nuclear weapons as an extension of Congress's power to declare war and to make rules related to the Armed Forces.⁹⁵ Noting that the Constitution is silent as to which branch of government has exclusive power to use nuclear weapons, Senator Fulbright argued that the "control of the use of weapons used by the country seems to me to be within the power of Congress to determine."⁹⁶

Two Senators voiced concerns that the Fulbright Amendment may infringe on the President's constitutional powers. Senator Javits conceded that he had not yet come to a definitive answer on the constitutional question,⁹⁷ but stated:

It is one thing to deny a weapon. We can prevent a weapon from going to the arsenal of the United States. That goes for tactical as well as strategic nuclear weapons. Indeed, we have had a tremendous struggle on this floor with respect to denying a nuclear weapon or a weapons system. But . . . that weapon or weapons system, once having been placed by Congress in the arsenal of the United States, there is a question in mind whether we can then instruct the President as to whether, when, or how to use or not to use it. That may be a Commander in Chief prerogative, so long as he has authority to use any weapon in hostilities.⁹⁸

Senator Cooper, the final Senator to address the constitutional question, argued that the Fulbright Amendment exceeded the constitutional power of the legislative branch:

I do not think that writing this language into a statute can in any way limit the constitutional authority of the President to use nuclear weapons if he thought it necessary to protect the existence of our country. We cannot by statute deny the constitutional power of the President.⁹⁹

The Senators did not reach a consensus on the constitutional question, and the Fulbright Amendment ultimately was defeated in the Senate by a vote of 68-10.¹⁰⁰ But the arguments raised on the Senate floor potentially preview the unsettled questions implicated in legislation limiting the President's power over the nuclear arsenal.

⁹⁴ See, e.g., *id.* at 12,453 (statement of Sen. Eagleton) (arguing that the War Powers Resolution was not the proper vehicle for a restriction on first use of nuclear weapons); *id.* at 12,451 (statement of Sen. Javits) ("I do not believe that this is the time or the place to make the decision that we will not use a nuclear weapon under any circumstances[.]").

⁹⁵ *Id.* at 12,444-45 (statement of Sen. Fulbright).

⁹⁶ *Id.* at 12,445.

⁹⁷ *Id.* at 12,451 (statement of Sen. Javits) ("I have deep concern, and I am not trying to conclude the question, as to whether the President of the United States with his constitutional authority as Commander in Chief can be prevented from using a nuclear weapon in our arsenal in defense of the United States or in defense of the Armed Forces of the United States.").

⁹⁸ *Id.*

⁹⁹ *Id.* at 12,454.

¹⁰⁰ *Id.* at 12,456.

IV. Conclusion

Legislation limiting presidential power over nuclear weapons implicates the historic debate over the separation of war powers between the legislative and executive branches that has been ongoing since the founding era and has been described as the “most difficult area of the Constitution.”¹⁰¹ Although it seems well within Congress’s constitutional authority to end the production of nuclear weapons through, for example, the power of the purse,¹⁰² there is no clear answer on whether legislation limiting the President’s power to employ those nuclear weapons that are already in the military arsenal would violate separation of powers principles. Nor is there certainty that a court would resolve a conflict given that judicial involvement in wartime disputes between the branches is relatively rare, and issues of standing and justiciability may preclude judicial consideration of many disputes concerning the allocation of war powers.¹⁰³ In these circumstances, many scholars believe that separation of powers disputes are likely to be resolved, if at all, through a negotiated resolution between the executive and legislative branches rather than through a judicial determination.¹⁰⁴

¹⁰¹ See *Impoundment Hearings*, *supra* note 17, at 251; see also *supra* § II.B.

¹⁰² See *supra* note 66.

¹⁰³ See *supra* notes 54 and 55.

¹⁰⁴ See, e.g., *Original Understanding*, *supra* note 17, at 722.
