

# F.A.S. PUBLIC INTEREST REPORT

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FIRST USE BY ONLY  
ONE DECISION MAKER

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## COMMON GROUND: PRESIDENTIAL FIRST USE IS WRONG

No one decision maker, not even the president, need be given the sole authority to initiate the use of nuclear weapons in conventional wars. He can and should be required to deal with Congress. From this simple observation, defended and developed in this FAS Public Interest Report by Director Jeremy J. Stone, and published simultaneously in Foreign Policy Magazine, much follows. In particular, one can find common ground for all those who have taken a sober look at the risks of first use of nuclear weapons.

Those who are flatly opposed to the first-use of nuclear weapons by the United States, under any circumstances, and who consider it a crime against humanity, will, we think, find support for their position in the judgment, below, that the current approach to first-use—letting the president decide it himself after consultation only with subordinates—is unnecessary and unlawful. We ask for their support even though the article endorses, as a substitute, group decision-making rather than a flat ban. This they can and should view as a way station, even as can those religious groups, such as the Catholic Bishops, who are not quite prepared to abandon first use outright.

Then there are those who believe that a conventional buildup in Western Europe would make strategically unnecessary, Western threats of first use of nuclear weapons. They, especially, oppose “early first use” and thus they recognize that existing and future conventional preparations can make unnecessary any precipitous first use of nuclear weapons. Thus, they will appreciate, we think, the force of our assertion that there is time to permit the president to consult with others besides subordinates and that, the time being available, it should be used.

Those who are struggling to reassert the war-powers of the Congress will come to understand, we hope, that conceding the right to the president of using nuclear weapons first in conventional wars is giving up the ultimate in war powers—unnecessarily and most undesirably. Thus we ask for their support. Of special importance, we observe that the Nuclear Planning Committee called for below—which provides Congress with a small group of members which could interface with the Executive Branch in a crisis—seems to be essential in other crises also, if Congress is to deal effectively in monitoring, controlling, and authorizing presidential war powers of other kinds.

Above all, we hope, all Americans of common sense will find this approach of spreading the responsibility for first use politically, strategically and morally sensible.

Finally, we are appealing to the legal profession (see pg. 11) to study the various issues presented within, over the next 12 months, with a view to buttressing our Constitutional case where it has merit. But there seems little doubt

that the Nation, the Congress, and the Supreme Court could achieve the results we seek if they wished.

Since a number of issues are raised in the complete presentation, there is certainly room for differences of opinion. But we think there are common themes that all can share and around which a coalition could grow. And these are that:

1) A nuclear war would be a new and qualitatively different war—compared with any conventional war from which it might arise.

2) No one decision maker, by himself or herself, should have the authority to turn undeclared conventional wars abroad into nuclear ones.

If, indeed, after reading this Report, you can share these views, we ask you to fill in and return the box on page 12 as an indication to us that we are on the right track and that, in principle, you might help us in some fashion.

One thing is certain. Congress cannot, by itself, recapture control over the first use of nuclear weapons without broad-based public agitation and support. A campaign against presidential first use will require no less public support and commitment than has the Freeze campaign or any other effort to secure dramatic change. Do let us have your reaction.

### IS PRESIDENTIAL FIRST USE UNLAWFUL? CAN CONGRESS COPE WITH FIRST USE?

On pages 2 to 9, a powerful case, in common sense and in law, is laid out that first use by the president is unconstitutional and unlawful in the absence of an unmodified declaration of war. As is developed in detail on pages 10-11, the case is not directed at so-called forestalling (pre-emptive) attacks but at situations in which conventional war is raging, and nuclear escalation abroad is contemplated—the classic case at which U.S. threats of first use have been aimed for four decades. It is argued that Congress could have, and should have, a Nuclear Planning Committee to which any president wishing to engage in first use of nuclear weapons would have to apply, and which would have the authority to permit, or fail to permit, a decision risking the entire nation. Such a committee could also be used to make “consultation with the Congress” meaningful on war-powers issues more generally. The Federation considers this issue of the authority for first use of nuclear weapons to be a major one and intends to pursue it; comments from the public and specialists are invited.

## PRESIDENTIAL FIRST USE IS UNLAWFUL

Few Americans question the right of the president of the United States to order promptly, alone, the use of nuclear weapons in response to the use of nuclear weapons against the United States, its forces, or its allies. In many such cases, little time would be available for consultations; most would concede the absolute necessity of giving a single decision maker, the president, the authority to respond in kind, that is, with nuclear weapons.

But what about the case in which the president is contemplating first use of nuclear weapons? Is there a comparable urgency justifying a comparable delegation of authority to the president to take this fateful act alone? Or would many hours be available for group decision making—as suggested by 1973 testimony of then-Deputy Secretary of State Kenneth Rush when he observed: "Judgments are possible within a certain range of probability. The assertion that our nuclear forces in Europe would be overrun, destroyed or used within two days is not within that range."

Most Americans have never focused on this question. Indeed, it is only recently that most Americans have recognized the extent to which the threat of first use of nuclear weapons has been a staple of U.S. plans for defending Western Europe. For the most part, American rhetoric has assumed that, since the United States would never be the aggressor, war would be forced upon the country. And accordingly, once war had begun, the president should have all authority to use all U.S. weapons.

There are, however, two alternative views. The first would assert that, in the absence of a declaration of war, unless an adversary had initiated the use of nuclear weapons, no single decision maker—the president or anyone else—should have the authority to order the firing of nuclear weapons alone and that congress has the authority, if it wants, to limit and control this power, as it can control any other war power. A second, more fundamentalist, point of view would assert that whether Congress likes it or not, it must be involved in any such decision. Indeed, according to this view it is unconstitutional, in the absence of a declaration of war, for the president to order first use of nuclear weapons without specific authority at the time from Congress or from its authorized representatives, such as a special nuclear planning committee created for the purpose.

These are no doubt startling assertions to many and may seem to some easy to ridicule. Nevertheless, there is reason to think that over the decades constitutional practice will, and should, drift in this direction. And for those supporters of the doctrine that the United States should never use nuclear weapons first, the proposal of at least giving a congressional committee a veto over first use of nuclear weapons has special advantages.

### Quite Different Questions

For a third of a century, believing that there was Soviet conventional superiority in Europe, U.S. presidents have threatened to respond to Soviet conventional attacks with American first use of nuclear weapons. These presidents threatened, in effect, to turn a conventional war, declared

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or undeclared, into a qualitatively different conflict—one fought with nuclear weapons. In such escalation of the struggle, they proposed to raise the immediate U.S. stakes in the war from risks to American armed forces in Western Europe to immediate risks both to the citizenry and to the republic itself. After all, no conventional war would lead to the destruction of the nation. But within hours of the president's first use of nuclear weapons, nuclear retaliation could lead to the end of the United States.

If it is not absolutely necessary to delegate such authority to a single individual, then this arrangement would seem to violate common sense. Individuals are prone to failures of judgment in much less tense situations, and some kind of check and balance would obviously be preferable.

Insofar as the fate of the nation is concerned, this matter was considered by the Founding Fathers. They recognized that the president was not a king and that the United States was not his kingdom, to do with and risk as he wished. Accordingly, they limited the power of the president. They recognized that the president needed the power to repel attacks that required immediate action. But the president was to turn to Congress for authority to go beyond such measures. The Constitution authorized Congress "to declare war," after which, but not before, the nation would be at risk. As retired Supreme Court Justice Arthur Goldberg has testified, "The President...constitutionally has no warmaking powers except perhaps to repel, as I have said earlier, a surprise attack, an emergency, following which he must immediately go to Congress." Consistent with this distinction, few would question the right of a president to respond with nuclear weapons to attacks with nuclear weapons. Such a response would be repelling a nuclear attack with like weapons and, most would presume, would need to be done almost immediately.

But the first use of nuclear weapons raises quite different questions. Since no conventional war is lost in minutes and since the tactical nuclear weapons based in Western Europe that are most at issue could not even be released in less than hours, the president would have time to discuss this fateful issue with officials other than subordinates—in particular with at least some members of Congress. Indeed, setbacks in a conventional war overseas would not cost the United States its existence, its freedom, or its ability to pursue the conflict over time and in other ways, as America did in two world wars. What then gives the president the right to initiate nuclear war, alone, without new authority from Congress, when nuclear war has not been forced upon the country by the nuclear weapons of others?

#### Controlling Presidential Actions

The conventional view asserts that the commander-in-chief clause in the Constitution gives the president the authority to order the use of any and all weapons once "war" has begun, and it treats any and all major conflicts as war. This view would treat the first use of nuclear weapons in such a conflict much as it would treat the first use of tanks or conventional artillery—as tactical decisions within the purview of the country's highest military authority, the commander in chief. This view also tends to

### PRESENT U.S. POLICY PERMITS FIRST USE

**U.S. official statements on first use never preclude it but assert, instead, that it will be done for defensive purposes only. When President Jimmy Carter addressed the subject before the United Nations on October 4, 1977, he put it this way:**

**"To reduce the reliance of nations on nuclear weaponry, I hereby solemnly declare on behalf of the United States that we will not use nuclear weapons except in self-defense; that is, in circumstances of an actual nuclear or conventional attack on the United States, our territories or armed forces or such an attack on our allies."**

assume that the war would be forced upon the United States and hence that congress need not declare war to authorize the commander in chief to make all the decisions in a state of war created by others. It fails to recognize the distinction between the authority of the executive branch to repel immediate attacks and its lack of authority to decide to pursue general hostilities.

No doubt this view would also point to the "inherent" powers of the president as chief executive. And it would point to a history in which the president has often waged war without congressional authority. Indeed, even with U.S. Marines being killed in Lebanon, Congress had trouble getting President Ronald Reagan to recognize the existence of the War Powers Resolution of 1973, a law designed to control just such undeclared wars. Has not time, at least, worn away such congressional pretensions to control war, if they ever existed?

Certainly, these claims did exist once. During the Revolutionary War, the Continental Congress designated George Washington its commander in chief but put him under the control not only of the Congress as a whole, but of a committee of the Continental Congress. His commission of June 19, 1775, stated:

And you are to regulate your conduct in every respect by the rules and discipline of war, (as herewith given you) and punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future congress of these United Colonies, or a committee of congress, for that purpose appointed.

In other words, commander in chief, as delegates understood the title, was subordinate to a strategy committee of the Continental Congress. And this position reflected more than the lack of an executive branch to which the Continental Congress could delegate guidance. It was consistent with the delegates' understanding of the term "commander in chief." Alexander Hamilton asserted in *The Federalist* No. 69 that commander in chief was to mean, under the new Constitution, "nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral."

During the last 200 years, while there have been no major conflicts between Congress and the president over war strategy, members of Congress have shown a con-

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sciousness of their oversight rights—for example, in investigations of Abraham Lincoln's pursuit of the Civil War and in investigations of Harry Truman's firing of General Douglas MacArthur during the Korean War.

In the case of Vietnam, on October 18, 1973, Congress actually passed legislation asserting that "on or after August 15, 1973, no funds heretofore or hereafter appropriated may be obligated or expended to finance the involvement of United States military forces in hostilities in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia, unless specifically authorized hereafter by Congress."

#### The War Powers Debate

Is the first use of nuclear weapons something appropriate for a first general or admiral or for that matter a chief executive to decide? Or is this decision something so fundamental in its risks for the nation that it would seem to exceed their authority? And in any case, could Congress pass legislation controlling that use as it limited the use of funds for hostilities in Southeast Asia?

During and after the war powers debate, a number of scholars addressed the issue of whether Congress could, by affirmative legislation, control presidential actions in the field of war. Former national security adviser McGeorge Bundy observed that Congress has "every right to assert itself on broad questions of place, time, and the size of forces committed." An eminent authority on the commander-in-chief clause, Columbia University Law Professor Louis Henkin, wrote: "In my view, he would be bound to follow congressional directives not only as to whether to continue the war, but whether to extend it to other countries and other belligerents, whether to fight a limited or unlimited war, today, perhaps even whether to fight a 'conventional' or a nuclear war." One scholar ventured that Congress could prevent a president at war in Vietnam from bombing Beijing or from employing biological weapons in a conventional war.

Much of this authority stems from the right of Congress, as stated in Article I, Section VIII of the Constitution, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Referring to this clause, George Washington University Professor W.T. Mallison, Jr., observed:

It is appropriate to emphasize that the judgment as to what is "necessary and proper" is that of the congress, and not of the Supreme Court. The aggregate of the war powers of the Congress are, therefore, sufficiently comprehensive to enable the congress to have a large role in the conduct of the war. Based upon its expressed war powers combined with the "necessary and proper" clause, the Congress has power to conduct the war insofar as the war may be conducted under statutory authority as contrasted with the President's authority as Commander in Chief. This was recognized in the famous case of *McCulloch v. Maryland*—4 Wheaton 316, 1819—where Chief Justice [John] Marshall referred to the powers of the Congress to "declare and conduct a war" as among its enumerated powers.

### MADISON & JEFFERSON ON THE EXECUTIVE AND WAR

The Constitution supposes what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war in the Legislative...

—James Madison to Thomas Jefferson,  
April 2, 1798

"We have already given in example one effectual check to the dog of war by transferring the power of letting him loose from the Executive to the legislative body, from those who are to spend to those who are to pay."

—Thomas Jefferson to James Madison in 1789

Accordingly, most legal scholars would seem to admit the argument that the first use of nuclear weapons was so much more momentous than a tactical decision that Congress had the right to control that decision—if it wished to do so—and that it could control this decision by legislation.

Congress could, for example, legislate that under no circumstances was the president authorized to use nuclear weapons of any kind in any conflict in which they had not already been used by others. By passing a law—over the president's veto if necessary—it could simply remove nuclear weapons from the arsenal available in undeclared conventional wars abroad. If necessary, Congress could use the power of the purse to assert that no funds could be spent to use nuclear weapons except in specified contingencies.

Some will argue that such constraints will be meaningless in war, especially in issues involving nuclear war. But a closer examination of the situation suggests otherwise. No president is going to use nuclear weapons first believing that it will lead to the destruction of the nation. On the contrary, the chief executive will be hoping and expecting that escalation will not result. Accordingly, the president will ponder being held accountable to the nation for the risks to be taken and for the extent these actions will be in violation of law. If legislation exists precluding the contemplated actions, the president will be to that extent discouraged, deterred, and dissuaded from going forward. Indeed, in that event subordinates might not follow the president's orders; the Secretary of Defense, the Joint Chiefs of Staff, and all the others in the chain of command are sworn to uphold the Constitution and the law, not merely to obey the president.

The Federation of American Scientists (FAS) raised this issue in its January 1972 newsletter, inspired by the war powers bill and the relevance of first use to war powers. In turn, then-chairman of the Senate Foreign Relations Committee, Senator J. William Fulbright (D.-Arkansas), announced in the committee report on the bill: "I concur wholly with the Federation of American Scientists that Congress must retain control over the conventional or nuclear character of a war." He proposed to substitute provisions that would assert that, in the absence of a declaration of war, "the president may not under any cir-

cumstances use nuclear weapons first without the prior, explicit authorization of the congress." The Senate amendment was defeated 68-10 partly because it had never been offered earlier in committee.

FAS raised this issue again in 1975, after Secretary of Defense James Schlesinger threatened first use of nuclear weapons in Korea in the event of a North Korean attack. A bill, never offered, was discussed in the November 1975 *FAS Public Interest Report*, which would have created a relevant oversight committee of Congress to be consulted during hostilities, while Congress was being convened and thereafter. Indeed, W. Taylor Reveley III's 1981 volume *War Powers of the President and Congress* concluded that for Congress to be effectively involved in national security emergencies it must be willing to delegate to certain of its leaders, convened as a "Joint Foreign and Military Affairs Committee," the right to represent Congress as a whole. In sum, during the 1970s Congress had the authority to pass the affirmative legislation necessary to control nuclear first use but lacked the will.

But perhaps Congress has no choice. A presidential order to use nuclear weapons first during conventional hostilities would be more than just a major tactical and strategic decision, which Congress has the authority to limit. What a president would do in reality would be to start a nuclear war that would be qualitatively different from the ongoing conventional fighting. Certainly this description would be true of a conflict in Europe. A war that might otherwise engulf U.S. allies and armies would threaten to destroy the United States as well. First use in effect moves the nation into the line of fire—into the war zone. A war that promised to take days and weeks to run its course now may be over in minutes and hours. A war that would leave most of the population in Europe alive now threatens to leave most of them dead.

This is, in short, an entirely new war in common-sense terms. What about legal terms? In legal terms the president who uses nuclear weapons first, without a declaration of war, would have gone from trying to "repel" an attack on U.S. forces and allies abroad to initiating just that kind of much wider commitment that the Founding Fathers wanted to be made by Congress. And obviously, even they never contemplated the immediacy and the magnitude of the risks that this one person would be taking with the nation itself.

In the central case to which all this analysis is really directed—the case of NATO—the original understanding of the NATO treaty was clear: A declaration of war was required before the United States could become fully engaged. True, Article V of the NATO treaty declares that an "armed attack" against any of the parties is an armed attack against each of them. But the chief architect of the treaty, Secretary of State Dean Acheson, explained in Senate ratification hearings on April 27, 1949:

This naturally does not mean that the United States would automatically be at war if one of the other signatory nations were the victim of an armed attack. Under our Constitution, the Congress alone has the power to declare war. The obligation of this Government under article V would be to take promptly the action it deemed necessary to

### **FIRST USE CRIME AGAINST HUMANITY**

**In 1961, the United Nations General Assembly voted by 55 to 20 with 26 abstentions that:**

**"The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations..."**

**and that:**

**"Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization."**

restore and maintain the security of the North Atlantic area. That decision would, of course, be taken in accordance with our Constitutional procedures.

Indeed, Article XI of the treaty confirms that the treaty "shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes," which is what Acheson had explicated.

Nevertheless, although the line of argument supporting prompt involvement of Congress in declarations of war is a strong one, especially in cases like that of NATO where no attacks have been made on U.S. territory, there is no assurance that a future president would, in fact, ask for such a declaration before the war had escalated to the nuclear level. On the contrary, although obligated to use all available time to consult with the 15 other countries in NATO—an organization that has historically taken its decisions unanimously—and although consulting thoroughly with subordinates, the president may not turn formally to Congress at all even in those cases where time clearly permits asking the full Congress for a declaration of war. This failure to turn to Congress has happened before.

The Vietnam and Korean wars alone show the readiness of the executive branch to exploit lesser authority than declarations of war to involve the country in war. Attacks on U.S. forces or misinterpretations of Article V might be used to maintain America's undeclared involvement beyond the period in which Congress could be consulted. The temptation to do so would be enhanced by the fear that a declaration of war, unmodified by any limit, would be excessive and destabilizing in a conflict that both sides would be trying to contain, even as they tried to conduct it.

Further, the War Powers Resolution, while not permitting the war power to be inferred from treaties, does permit the introduction of forces into hostilities in a "national emergency created by attack upon the United States, its territories or possessions, or its armed forces." Thus attacks upon U.S. armed forces in Western Europe, inevitable in any major attack upon NATO, could be used with the authority of this congressional statute to justify the continuation of hostilities. As Bundy put it:

I think a major attack from the East would bring on war without much further "constitutional process," and I think

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we understand it that way... We have not fully answered the question of the role of the Congress in a case where there may be a major military action in contemplation which is not so much a response to an instantaneous threat as it is a decision as to how to deal with a gradually deepening crisis.

Consequently, if the Soviet Union attacked NATO, Congress might not, in fact, get an opportunity to express itself. And as the conflict escalated, first use of nuclear weapons, always under consideration, might be ordered by the president.

In such circumstances, the president would certainly argue that the purpose of the first use would be indeed to repel immediate attacks and not to "declare war." The president's lawyers would note that in 1787 the draft constitution was amended at the Constitutional Convention to give Congress only the right to "declare war" rather than to "make war" so as to leave "to the Executive the power to repel sudden attacks" that might not permit recourse to the Congress.

In fact, however, the initial nuclear weapons used in Europe would represent primarily an announcement of readiness to wage general and indeed nuclear hostilities, not a military effort to contain or repulse the attack. The strict military utility of the initial nuclear weapons to repel the attack, as in the destruction of tanks or command posts, would be minor indeed in comparison to their political utility in dissuading the other side's political leadership from continuing. First use—as opposed to later uses of nuclear weapons—would be an attempt to dissuade the other side's political leaders from continuing their conventional attack by forcing them also to escalate to nuclear weapons or to cease and desist entirely. It would thus be an effort—a quite dangerous effort—to decide the conflict itself. As Schlesinger put it in May 1975, first use is relevant only when defeat appears imminent:

The first use of theater nuclear forces, even in very limited ways, carries grave risks of escalation and should be considered only when the consequences of conventional defeat would be even more serious. If the alternative is, for example, major loss of NATO territory or forces, NATO political leaders may choose to accept the risks of first use.

Thus first use would usurp the Congress's right to deter-



President Lyndon B. Johnson  
Wise Enough?

mine whether the nation wishes to go beyond normal efforts to repel the attack to such extraordinary methods as would gamble its very existence. Such presidential misuse of the right to repel attack is analogous to an early president's arguing that continued attacks on U.S. merchant vessels by, for example, the French, could not be repelled in any fashion short of direct attacks on France or its allies and that this observation was sufficient to justify such attacks without further authorization. As Reveley has put it, the first use of nuclear weapons would be far more akin to the initiation of a new military venture than it would be an expansion of the existing one.

And since the United States itself, in this European scenario, would not have been attacked directly, it seems quite unlikely that James Madison and those who supported him would consider this line of argument a fair use of their "repel" amendment. As the distinguished scholar Edward Corwin put it in *The Constitution*, "It was clearly the original understanding of the Constitution that under it all measures of hostility toward another government, not justifiable immediately as acts of self-defense, must have the sanction of Congress." Thus the president does not seem to have the authority, without specific congressional permission in the event itself, to risk the entire nation by moving the conflict onto this new and risky plateau.<sup>1</sup>

It is worth emphasizing that the earlier cases in which presidents fought undeclared wars did not risk attacks upon American territory in response—and certainly did not risk prompt and massive responses, much less the totally destructive response now possible. Moreover, in any case, unconstitutional military actions of the past do not justify unconstitutional actions in the future.

#### A Constitutional Solution?

The view expressed here is completely consistent with that of those scholars who demand and expect a declaration of war before the nation is fully committed to war because this view admits that such a congressional declaration, if unmodified by references to nuclear weapons, is a *carte blanche* authorization for the president. (The U.S. declarations of war have sometimes involved special instructions and could presumably be adopted in the future with limitations. In 1812 when war was "declared to exist," the president was authorized not only to use "the whole land and naval force" against Great Britain but also

<sup>1</sup>One can, of course, question the constitutionality of a claim of executive branch power without asserting any specific route to a Supreme Court test of that claim—or even asserting that such a route exists. But since the issue may seem excessively academic to many if no such routes exist, one should be mentioned.

It is possible to imagine someone being indicted for sedition for an overly pointed enunciation of the views expressed here. Their enunciation could in one fashion or another be alleged to constitute an improper effort to advise and counsel refusal of duty—firing nuclear weapons first—to members of the military forces. Such advice, if given with criminal intent, is prohibited by a statute, 18 U.S.C. Section 2387. But a Supreme Court could not justly affirm a conviction for sedition without deciding whether the orders at issue were lawful—and hence whether they were, in particular, constitutional. It can hardly be sedition to urge disobedience to unlawful orders! Indeed, if one accepts the precedent of the Nuremberg War Crimes Tribunals, disobedience of unlawful orders is an obligation of military officers and civilian officials. Thus an action for sedition seems, at least, one possible route to a court test.



to issue letters of reprisal. In 1898 war was "declared to exist" against Spain after Spain declared war on the United States. The president was not only "directed and empowered to use the entire land and naval forces" but also authorized to call up the militia as necessary.)

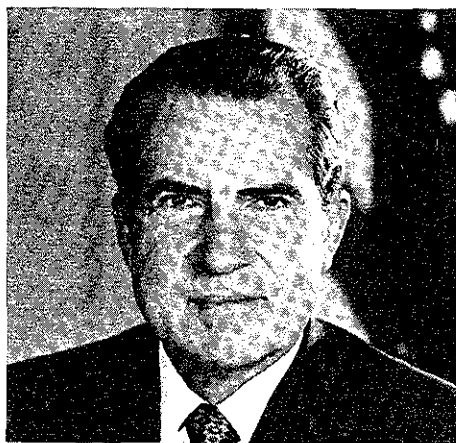
But many observers do not demand, expect, or even want a declaration of war. What are they to do about the president's otherwise unfettered authority to use nuclear weapons first without congressional involvement? They well understand that the critical issue in the modern day is not the declaration of war per se but the first use of nuclear weapons. As Representative L.H. Fountain (D.-North Carolina) once asked, "The use of such weapons would amount to a declaration of war, would it not?" Is there a constitutional solution that involves Congress but does not require a full-scale declaration of war or, indeed, full-scale involvement of Congress?

Some may share my view that a decision to use nuclear weapons first made by the president alone or with subordinates is and ought to be unconstitutional, even if the only alternative is the involvement of the entire Congress without any rules to expedite its procedures or to act in secret. Anticipated losses of allied territory in a conventional war abroad do not justify departing from the constitutional requirement of involving Congress. And a constitution that prevents a country that is in no danger of conventional invasion from risking destruction unnecessarily and on the decision of one person has much to be said for it.

But for those who accept the reasoning but dislike consulting Congress as a whole, an intermediate position would be to create a special committee of Congress that could grant the authority for any first use of nuclear weapons. Such a nuclear planning committee, containing a dozen or so members and composed of the two senior members from each of the most relevant existing committees of Congress, could act expeditiously and even secretly in any crisis precipitated by a conventional war. Congress should create such a committee and should find the statute constitutional because the alternative would be to leave the nation torn between the perceived unconstitutionality of one-person control that produced the statute and the perceived impracticality of control by the full Congress that inspired the committee.

#### 1975 Bill

With this in mind, the bill drafted by the FAS in 1975 proposed as a solution this provision: "In any given conflict or crisis whatsoever, so long as no nuclear weapons have been used by others, the President shall not use nuclear weapons without consulting with, and securing the assent of a majority of, a committee" composed of the speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and the chairman and ranking member of the Senate and House committees on armed services, the Senate Committee on Foreign Relations, the House Committee on International Relations, and the Joint Committee on Atomic Energy. Moreover, "nothing herein shall preclude the President from using nuclear weapons first if Congress



President Richard M. Nixon  
Trustworthy Enough?

adopts a declaration of war that explicitly suspends the authority granted in this act."

Another provision was added calling for annual reports from the president to the committee with the thought that a presidential failure to do so would set a possible stage for a peacetime legal test of the constitutionality of the statute. Under this proposal, the secretary of defense or chairman of the Joint Chiefs of Staff, through whom the order to initiate the use of nuclear weapons would pass, would check with the secretary of state to verify that the committee vote had been affirmative. This certification procedure would be in effect a two-key system at the top of the chain of command between the president and the secretary of state.

The Supreme Court, it is true, has ruled against one-house vetoes and, a fortiori, against committee vetoes in its decision in the case of *Immigration and Naturalization Service v. Chadha*. In deploring a "convenient shortcut," the *Chadha* decision justified what it called "governmental processes that often seem clumsy, inefficient, even unworkable" on the grounds that the records of the Constitutional Convention and the debates in the states showed a determination that legislation be a "step-by-step, deliberate and deliberative process." But the convention obviously had no emergency peacetime action in mind.

Indeed, the use of the word "shortcut" reveals the Court's premise that Congress has the capacity in due course to change any government regulations through its traditional means. Such reasoning does not extend to the question at hand. The first use of nuclear weapons may not be so immediate an issue that one decision maker need be given the authority to decide it, but it is a time-urgent matter and does not permit the usual congressional procedures. Nor does this question involve a veto over regulations; instead, it is a committee method of effecting a constitutionally granted congressional authority over war.

The Supreme Court has argued similarly that wartime justified congressional delegations of authority to the executive branch that would not otherwise have been justified. The Court asserted in 1948 in *Lichter v. United States*, for example, that "a constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." And Corwin has asserted, "Likewise in wartime the constitutional ban on the delegation by Con-

(Continued on page 8)

(Continued from page 7)

gress of its powers to the President is in almost complete abeyance. What are termed the 'cognate powers' of the two departments may be merged by Congress substantially at will."

Does this delegation always have to be from Congress to the executive or could the merging of cognate powers take the form required by the creation of the proposed congressional committee?

There may be additional ways to permit Congress to fulfill its constitutional function in a fashion that the Court could accept, and scholars should think creatively about this issue. The rules of each house of Congress, for example, are normally not subject to judicial review. Perhaps during hostilities these rules can be manipulated to transmute action of this unique bicameral committee into the functional equivalent of congressional action in some kind of superexpedited procedure.

After all, a sustained refusal of the Court to sanction any congressional involvement in the first use of nuclear weapons short of a full-scale formal declaration of war could leave the nation with what some would consider no satisfactory defense. And, in particular, it could leave Congress with no effective method of implementing in a timely and flexible fashion a power conceded to belong to it. These issues are too serious for a proposal concerning them to be ruled unconstitutional simply because it has to be distinguished from everyday legislation. Accordingly, it seems clear that a court that wished to do so could accommodate this position. Whether it would wish to do so could depend on public opinion and the position of the other two branches.

#### Spreading the Responsibility

The proposal for a planning committee has a number of practical advantages as well as constitutional ones. A committee veto represents, in perspective, a natural evolution from the current posture to the no-first-use posture that so many citizens are coming to desire. Rather than move in one giant step from presidential authority for first use to a world in which the entire U.S. political system pledges never again to use nuclear weapons first under any authority, the committee approach spreads the responsibility for first use, making it less likely to occur by putting an additional lock on the trigger. (The committee would have no authority to propose, urge, or insist on the first use of nuclear weapons but only to accede to or oppose presidential recommendations.)

This approach substitutes a less controversial issue of "no one decision maker" for a relatively difficult effort to secure a declaration of no first use under any circumstances. Moreover, where the no-first-use declaratory policy of one president can be reversed by a later president or ignored in a crisis, the legal and bureaucratic process created by a committee would be much harder to ignore. Those who want above all to suppress the possibility of U.S. first use of nuclear weapons ought to think carefully about which road is more effective.

In spreading the responsibility for Western first use, rather than banning it, the approach of committee over-



President Ronald Reagan  
Competent Enough?

sight avoids rupturing U.S. commitments to NATO. As before, the United States would have the right to use nuclear weapons and the obligation to respond in NATO in accordance with its constitutional responsibilities. America would simply have reconsidered what those processes are and would have adjusted its internal governmental processes accordingly. Washington would not have withdrawn its main weapon from the West's protective arsenal. And since all other NATO countries value highly their rights to be consulted on just such matters, they could hardly complain too heatedly if America's own government consultation were extended to a congressional committee. (Indeed, this approach suggests the desirability of more firmly spreading responsibility for any use involving a given NATO country by giving that country a veto over the first use of nuclear weapons on or from its territory—a right now left rather vague.)

Nor does it seem that this approach would undermine deterrence in any significant way. By comparison, the U.S. decision to protect against unauthorized use of nuclear weapons by installing "permissive action links," electronic locks on individual nuclear weapons, probably did far more to allay Soviet fears of an early first use of nuclear weapons than would this method of preventing unauthorized presidential first use. The threat of a timely and even of a surprise first use of nuclear weapons remains because the committee could function in secret. Moreover, an announcement that the committee had given its authorization to the president could represent, like a revolver being drawn from a holster, an optional sign of warning. Such a signal clearly would be preferable to the demonstration firing of a nuclear weapon sometimes discussed as a possible method of showing NATO determination if a conventional war were to reach a point of no return. Such a firing would create all the dangers of a verbal announcement as well as the danger of being interpreted by the other side as a precursor to a general firing combined with the finality of having jumped the nuclear fire gap.

But the congressional authorization procedure would lower the popular perception of the likelihood of U.S. first use of nuclear weapons. One benefit could be more support for the alliance among that younger West European generation that fears America's trigger-happiness, thus



off-setting to some degree whatever opposition can be expected from allied governments. Yet this proposal's fate should not turn on whether West Europeans approve it; America's obligations to its own security, its own Constitution, and its own judgment on how best to assist in the defense of Western Europe should be the decisive factors.

There would be other political advantages. Presidents who do not wish to use nuclear weapons first could find political shelter in their inability to get support from a congressional committee. Recall that President John Kennedy is said to have told his brother Robert that he would be impeached if he did not win the Cuban missile crisis. At least under this system presidents will find it easy to orchestrate a spreading of the responsibility for restraint.

Not least important, since the secretary of state would have the responsibility to certify to the secretary of defense that the congressional committee had opted for giving its authority, the specter of aberrant behavior on the part of a psychologically exhausted, politically committed, and deeply involved individual in a drawn-out crisis would be to that extent laid to rest. This possibility was a matter of some concern to lower-level officials immediately before President Richard Nixon's resignation, even though no military conflict existed.

This proposal can also be seen as a long-overdue measure drawing Congress into the decision-making process on nuclear issues. Two decades ago, then-Secretary of Defense Robert McNamara saw a similar need to draw NATO into an understanding of nuclear issues and to share responsibility with alliance members. From this notion came the idea of a nuclear planning group. The committee approach would represent, in a way, a long-overdue analogous development at home.

Obviously, conservative opponents of this approach will consider it an outrageous usurpation of presidential power. Perhaps less obvious is the inevitable hostility toward this idea from many on the Left. Arms control advocates who oppose first use of nuclear weapons have in the past considered congressional involvement to be an all-too-easy way to authorize and legitimate first use. They inaccurately assume that hawkish members of Congress are all too eager to risk the country's existence. And they often mistake the congressional veto approach herein advocated for a system in which Congress gets the right to encourage first use.

One cannot help but believe, however, that the Founding Fathers would look down with favor on some return to constitutional practice in, at least, this ultimate case of when and how America is taken into the ultimate war. During Jefferson's presidency, in the midst of a dispute with Spain about the Florida border, he advised Congress, "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided." Nuclear force in a conventional war abroad would seem to be precisely force in a degree that "could be avoided" while congressional authority was awaited. □

—Jeremy J. Stone

## FAS ELECTION RESULTS

Vice Chairman John Holdren has succeeded Frank von Hippel as Chairman of the FAS Council; von Hippel, who served the maximum two two-year terms as Chairman has been appointed Vice Chairman of the FAS Fund Board of Trustees and will continue as FAS Director of Scientific Research in addition to his duties as Professor of Public and International Affairs at Princeton University's Woodrow Wilson School

Incoming Chairman Holdren, 40 years old, is Professor of Energy and Resources at the University of California at Berkeley and is also Chairman of the U.S. Pugwash Committee. A winner of the FAS Public Service Award in 1979 for "the Pursuit of Excellence in the Analysis of Energy Policy," he is a specialist in both energy and arms control. He is also the recipient of the MacArthur Foundation "genius" award.

The membership selected Matthew Meselson, Professor of Molecular Biology at Harvard as Vice Chairman. Meselson, also a holder of the MacArthur Foundation "genius" award, is the nation's foremost specialist in issues of chemical and biological warfare. A winner of the FAS Public Service Award in 1972 for his work in securing U.S. ratification of the Geneva Protocol, he has also won medals and awards for his scientific work and for his public policy work from the New York Academy of Sciences and the National Academy of Sciences.

Elected to the Council for the usual four year terms were defeated candidate for Vice Chairman, Gerald Holton, Professor of Physics and History of Science at Harvard University; Ruth Adams, Editor of the *Bulletin of the Atomic Scientists*; John Harte, Professor of Energy and Resources at the University of California at Berkeley; Jerry Hough, Professor of Political Science, Duke University; Christopher Paine, Senior Policy Analyst for Physicians for Social Responsibility; Carl Sagan, David Duncan Professor of Astronomy and Space Sciences, Director of the Laboratory for Planetary Studies at Cornell University.

Retiring from the Council are: Dr. Earl Callen, Dr. Barry M. Casper, Dr. Lee Grodzins, Dr. Henry C. Kelley, Dr. Robert S. Pindyck, and Dr. George Silver.



John Holdren

## WHICH NUCLEAR SCENARIOS ARE AT ISSUE?

From the point of view of Constitutional law, the following nine cases can be distinguished:

1). (Second Strike) The Nation is attacked with nuclear weapons.

Here the president would be accorded the right to respond without further authorization from Congress on the theory that he was simply repelling an attack with like weapons.

2). (Irrevocable Launch) The president determines that nuclear weapons have been "irrevocably launched" against the United States.

Here the issue is the constitutionality of "launch-on-warning". If one believes that a determination can be made with certainty that opposing nuclear weapons have indeed been irrevocably launched, one can argue that the president ought not to be obligated to wait for their impact before moving to repel the attack. If, on the other hand, one sees in such policies much more likelihood of inadvertent war than of effective countering of such an attack, one might have another view. For the purposes of this article, "irrevocable launch" against the United States could be accepted as a justification for nuclear first use without damage to the fundamental points being made.

3). (Pre-emptive Forestalling Attack) The president believes that he has information that a nuclear attack is about to be made on the United States and, while nuclear weapons have not been irrevocably launched against us, he wishes to launch a pre-emptive "forestalling" attack.

According to certain constitutional authorities, such as Louis Henkin, such forestalling attacks are "probably constitutional". They are not very likely in cases involving the Soviet Union since no plausible forestalling attack against that nation is likely to have sufficient certainty of success in reducing retaliatory damage to persuade a President to attempt it—no advance information being that certain in any case. The president is far more likely to alert U.S. forces and to advise the Soviet Union that the forces are alerted—thus to attempt a *political* forestalling of the attack rather than a military one.

Nevertheless, as above, including a forestalling attack against an enemy country as being among the president's prerogatives without further consultation with Congress does not interfere with the essential point being made in this newsletter.

4). (Second Strike Abroad) U.S. forces abroad, for example in Europe or Korea, were attacked with nuclear weapons.

The president could, presumably, use a similar authority to repel the nuclear attack on U.S. forces by employing nuclear responses on enemy forces. In the European theater, as opposed to the Korean one, such a bilateral use of nuclear weapons would have a high likelihood of escalation to general nuclear war between the superpowers and, accordingly, the president would be usurping, in practice, Congress's right to determine whether it did, indeed, want to risk the Nation in that way. One possible solution would be to have Congress legislate restraints on the firing of

## BRITISH & FRENCH USE

The use of nuclear weapons by the French or the British in a European war would, presumably, free the President to use nuclear weapons. His use would not, in that war, be a first use and, in practical terms, the war could be out of control already in terms of nuclear escalation.

According to the British Government, "The final decision about their (nuclear weapons) use rests solely with the British Prime Minister" who would consult with the Cabinet and the Sovereign depending upon the circumstances, particularly the time available. (See *Authority to Order the Use of Nuclear Weapons by Congressional Research Service, Library of Congress, December 1, 1975*).

In the case of France, first use is left in the hands of the President of the Republic.

nuclear weapons at the Soviet Union itself unless and until the Soviet Union had launched nuclear weapons at the United States. This would limit the president to repelling the attack in the theater and would lower the likelihood of escalation to general nuclear war between the superpowers. (Such a policy of "no-first-strike" at the other's homeland has been urged by a number of specialists, including Paul C. Warnke.)

5). (Forestalling An Attack Abroad) The president asserts the right to use nuclear weapons first in the European Theater in order to forestall an allegedly impending nuclear attack against U.S. forces.

This scenario raises the above questions and, in addition, the possibility that a president might use the loophole of a forestalling attack to achieve the functional equivalent of that first use in Europe which is the subject of this newsletter.

However, the nuclear first use that would occur in the two cases would seem quite different. A true forestalling attack in the European arena would presumably require attacking a large number of Soviet nuclear weapon sites in Eastern Europe and the western Soviet Union. On the other hand, contemplated first uses in Europe that are truly at the Western initiative are more likely to involve "demonstration" nuclear firings of an isolated kind or "tactical" uses designed, in fact, to show readiness to breach the nuclear threshold. Under these circumstances, it is, again, possible to admit even forestalling nuclear attacks in a theater without giving up on the principles being advocated here. The wisdom, however, of conceding the right to the president of nuclear forestalling attacks in Europe on his own authority is highly questionable since it means risking the Nation, in the resultant escalation, in the absence of even an alleged attack on the Nation itself.

6). (Conventional War Abroad) In an on-going conventional war, or otherwise, Congress enacts a declaration of war that is unlimited by any relevant constraining references to the use of nuclear weapons.

In this event, the president presumably has the authority to use all weapons available at his discretion unless the congress intervenes subsequently and countermands this

### DoD CLAIMS ALL POWER

On August 23, the General Council of the Department of Defense advised F.A.S. by letter that it would not support our "call for an additional procedural requirement" before NATO could use nuclear weapons because it would have a "probable adverse effect" on NATO deterrence policy.

Referring to F.A.S.'s case in which the president possessed no declaration of war, DoD nevertheless claimed, with no legal argumentation whatsoever, the right to use "conventional weapons, non-strategic nuclear weapons, and strategic nuclear weapons" because the "current deterrence policy rests upon the doctrine of flexible response."

authority.

7). (Conventional Attack At Home) A conventional attack on U.S. territory is deemed to have thrust war upon the Nation without any Congressional declaration of war.

Perhaps, in the pre-nuclear era, attacks upon our territory might have produced a state of war that needed no Congressional recognition. Perhaps President Roosevelt was not really required to ask Congress for a declaration of war against Japan despite Pearl Harbor except as a recognition of a pre-existing state of war.

But in the nuclear age, if Hawaii were attacked again by a nuclear power, there are two quite different states of war that might be produced, depending upon whether nuclear weapons had or had not been employed. Thus in the nuclear age, a conventional attack by a nuclear power is not an unlimited attack and would presumably not establish a state of total war in and of itself. It would be a more limited act. And since this more limited act might not require, or make wise, an unmodified or unlimited declaration of war from Congress, it can hardly, in and of itself, be the basis of a presidential presumption of total or unlimited war. Accordingly, it is argued here that first use is not constitutional, in the absence of a declaration of war, even after a conventional attack on U.S. territory. And this certainly accords with the common-sense fact that no such conventional attack on our Nation will win a conventional war against us within a time period that would preclude consulting Congress—much less destroy the Nation, which nuclear war threatens to do.

8). (Conventional Attacks Abroad with Treaty) A conventional attack on our allies is deemed, via a Treaty like the NATO treaty, to be an armed attack against the U.S. that justifies presidential first use.

It is argued here that these treaties do not pre-empt the right of Congress to determine the extent and nature of our military involvement in the event itself. The Treaties are not declarations of war in advance. For one thing they are not approved by Congress but only ratified by the Senate, whereas declarations of war must be passed by Congress itself. More generally, as in the case of the NATO treaty, Congress has been advised of quite the opposite. The view here is that declarations of war in advance, in any form, are at variance with the intentions of those who drafted the Constitution.

9.) (Conventional Attack Abroad without Treaty) A conventional attack occurs on our forces abroad and there is no treaty binding our response.

Here, a fortiori, the president should not have the right to use nuclear weapons first because it goes beyond force immediately necessary to repel attacks.

It is, perhaps, possible to concoct cases in which the nuclear weapon is necessary to forestall or prevent defeat of local forces somewhere—and, indeed, to find a scenario in which the opposing forces are so little linked to the immediate use of nuclear weapons in response that no risk of nuclear escalation exists.

But the precedent against the use of nuclear weapons has become a most important bulwark of U.S. security. (If nuclear weapons are never used, the U.S. is likely to survive indefinitely but, on the other hand, if these nuclear weapons come to be used generally, we could lose the entire Nation.) Should the president be authorized—is the president authorized—to cross such an important threshold without turning to Congress?

It should be observed that another weapon of mass destruction—biological weapons—was foresworn in all contingencies and unilaterally! America does not take, and need not take, the view that every weapon that might conceivably do some good in the short run needs to be kept available, much less authorized, for instantaneous use by the president. JJS □

### HELP NEEDED IN PURSUING LEGAL ISSUES

This article raises a host of legal issues concerning: the president's war powers (both as framed in the Constitutional Convention and as practiced subsequently); the legality of various kinds of expedited congressional participation in first use decisions in light of the recently declared unconstitutionality of legislative vetoes; and the practicality of testing the article's thesis in the courts. The Federation has asked George Washington University law professor and former FAS Council member Peter Raven-Hansen to identify the key legal issues and to help coordinate volunteer research about them over the next twelve months. FAS hopes that volunteers from the academic and legal communities will prepare papers on each of the key issues in anticipation of a tentatively scheduled October 1985 conference in Washington at which the papers will be presented and debated. Ideally, FAS seeks two papers on each discrete issue with a view to airing opposing conclusions and perspectives. Authors of suitable papers would be invited to the conference and selected papers would, in due course, be published together in book form.

*Legal scholars interested in participating, or practicing lawyers interested in preparing position papers as a pro bono commitment, should contact Jeremy J. Stone at FAS and/or Professor Raven-Hansen at George Washington University's National Law Center (202) 676-8171.*

**PRESIDENTIAL FIRST USE IS WRONG**

*The first use of nuclear weapons in an on-going conventional war risks the Nation. Yet, today, even without a declaration of war, presidents claim the right, without consultation or further authority from Congress, to turn conventional wars abroad into general nuclear war. Since no conventional war is lost in hours, the president would have time to involve all or parts of Congress. And, therefore, he should.*

*The president is not our king and this is not his kingdom, to risk or not as he wishes.*

**Does this make sense to you?**

Do you share the Federation's concern over the possibility that a president might, without further authorization, expand an undeclared conventional war into a nuclear war by ordering first use of nuclear weapons? If so, we need your help. Please complete the following form:

I would like to assist the Federation in calling the attention to this issue, and in persuading the government to focus on it. With this in mind, list me as a supporter of the general propositions outlined above.

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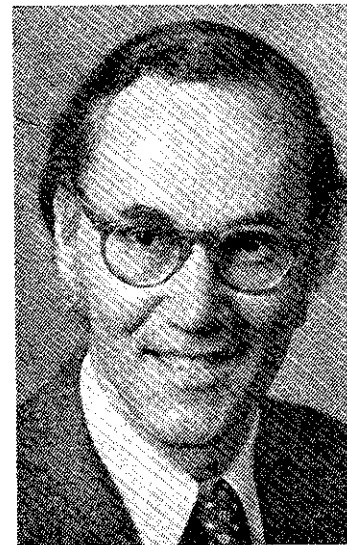
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Robert Scrivner

**ROBERT SCRIVNER DIES AT 48**

On the opening day of the U.S.-Soviet conference on military uses of space which FAS was hosting in May, Robert Scrivner, Director of the Rockefeller Family Fund which had made this FAS project possible, died of cancer after a struggle of some months.

Robert Scrivner was the complete foundation funder. He understood everything he was told immediately and the rest he intuited. He consulted widely. With copious notes, he recorded all considerations. He wasted no one's time. He had empathy for all. Above all, he had a proven track record of success in choosing useful projects. And with the respect he was accorded for his skills, he recruited other foundations and funders to the projects of his choice.

After the famous Conference on Nuclear Winter and the possibility of the destruction of our planet—a conference to which he had persuaded innumerable others to contribute—an FAS official turned to Bob and said about our species and the prospects for its continuance:

“Well, Bob, they can't say you didn't warn them.”

Reflecting on this, perhaps his epitaph should record: “He warned Humanity.”

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