The United States Congress and Nuclear War Powers:

Explaining Legislative Nonfeasance

Scholarly debate over the role of the United States Congress in approving military action has focused on the respective war powers granted the executive and legislature by the United States Constitution. Although a voluminous literature has examined the institutional and partisan politics shaping their exercise, a conspicuous lacuna concerns nuclear war powers. Despite periodic but mostly ineffective reassertions of congressional prerogatives over war, the decision to employ nuclear weapons has been left entirely to presidential discretion since 1945. Explaining this consistent refusal by Congress to rein in the ultimate presidential power and exercise co-responsibility for the most devastating form of war relies less on disputatious constitutional grounds than on three arguments about congressional dysfunctionality, legislative irresponsibility, and the relative costs of collective action by federal lawmakers on perilous national security questions.

Keywords: *Congress; US Constitution; nuclear war; war powers; no first-use.*

Introduction

The 115th Congress (2017-19) saw two important expressions of heightened concern over the constitutional division over nuclear war powers in the United States. First, on 14 November

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2017, for the first time in forty-one years, the US Senate Foreign Relations Committee held hearings to consider possible changes to the president's authority to launch nuclear weapons. Second, Senator Edward Markey (D-MA) and Rep. Ted Lieu (D-CA) introduced legislation to delimit presidential discretion. HR669/S200, the *Restricting First Use of Nuclear Weapons Act of 2017*, stated that: 'Notwithstanding any other provision of law, the President may not use 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' (Lieu, 2017a). Heralded by non-proliferation advocacy groups as an important reassertion of democratic accountability, former US Secretary of Defence, William Perry, concurred that 'a decision that momentous for all of civilization should have the kinds of checks and balances on Executive powers called for by our Constitution' (Lieu, 2017b).

Although it has been claimed that a 'nuclear taboo' (Tannenwald, 2007) or 'tradition' (Paul, 2009), rather than their utility in deterrence (Mandelbaum, 1981), explains the non-use of nuclear weapons since 1945, some lawmakers have come to regard executive restraint as insufficient. The 115th Congress activity was a clear response to a poly-nuclear order, increasing great power competition and, above all, the bellicose rhetoric of President Donald J. Trump.

Three aspects of the revived interest in nuclear matters were nonetheless striking. First, though co-sponsored by 51 Democrats in the House of Representatives and nine Democrats in the Senate, once referred to the House Foreign Affairs Committee, no further action took place. Nor did the Senate Foreign Relations Committee recommend any changes to existing nuclear launch arrangements. Second, the Markey-Lieu bill's restrictive credentials were qualified. Its three pages made no effort to limit the president's capacity to

wage defensive nuclear war, in response to an attack. Third, the legislation did not prohibit 'first-use' of nuclear weapons – pre-emptive, in the face of imminent threat, or preventive, in the guise of 'anticipatory defence' - but sought to make such use contingent upon a prior congressional grant of authority, through a formal war declaration allowing for nuclear force.

To critics, the latest iteration of legislative inaction confirmed that Congress is serially guilty of constitutional nonfeasance: failing to do what it ought to under its Article One authority over initiating war. Although the Framers could not have anticipated nuclear weapons, the division of powers reflected their rejection of monarchical war-making. Thomas Jefferson, for instance, wrote to James Madison on 6 September 1789 that, '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' (Boyd, 1955, p. 397). But Congress has made no effort since 1945 to restrain the presidency letting loose the supremely dangerous dog of nuclear war.

The human, economic and environmental costs of even 'limited' nuclear exchanges are generally recognised to be catastrophic. Since the decision to use nuclear weapons is so momentous and consequential, what explains the consistent refusal of Congress to restrict the ultimate presidential power of commencing a nuclear war? This article argues that the explanation is less about competing claims of constitutional authority (serious though these are) than three distinct but related influences accounting for Congress's nonfeasance: the dysfunctionality of legislative intervention, congressional irresponsibility, and the relative costs of collective action, each of which is examined in turn.

Nuclear War Powers

Responsibility for nuclear war epitomises the more general problem of democratic accountability and foreign policy like no other. Walzer (1992, p. 271) summarised mass acceptance of mutually assured destruction as making us all 'hostages who lead normal lives.' US lawmakers since 1945 have in effect acted as political hostages suffering nuclear Stockholm Syndrome, declining to restrain the 'thermonuclear monarchy' (Scarry, 2016) by (re)applying the constitutional balance of powers to nuclear decisions.

The assumption of on-going international responsibilities by the US after 1945, growth of the national security state and permanent military, and development of nuclear weapons, vastly expanded presidential power (Wills, 2010). Although concern about the 'return' of the 'imperial presidency' remains episodic, the institution has never truly gone away in the nuclear age (Rudalevige, 2005). Periodic reassertions of congressional prerogatives have mostly proven ineffective in restoring constitutional equipoise on matters of war and peace in general (Fisher, 2004), and nuclear war, in particular (Ellsberg, 2017).

This is not to suggest that Congress is ineffective on influencing foreign and national security policy. Although some scholars document 'decline' on matters such as executive oversight (Fowler, 2015), others argue the legislature can and does exercise oversight, conduct investigations and bring to media and public attention important matters of national concern (Kriner & Schickler, 2016). Congress also, on occasion, defies presidential preferences and legislates more assertive measures, most notably on sanctions (Milner & Tingly, 2015). Moreover, multiple factors determine whether Congress adopts a supportive, strategic, competitive or disengaged orientation towards foreign policy (Carter & Scott, 2012).

Nonetheless, the growth of the security state has emphatically empowered the executive. Although explanations for presidents prevailing in the 'invitation to struggle' over

foreign affairs typically include presidential usurpation, congressional irresponsibility and judicial reluctance to adjudicate (Fisher, 2004, 2017a), these have been challenged. For example, Burns (2017) argued that rather than causing an erosion, presidents have responded to Congress's reluctance to deliberate about military affairs. Partisan and ideological polarisation has also assisted presidents accruing greater power, with lawmakers reluctant to oppose presidents of their own party or place institutional prerogatives ahead of partisan imperatives (Howell & Pevehouse, 2007; Gries, 2013). Compared to the early Cold War era, polarisation has strongly solidified party bonds and militated against independent legislative behaviour. Policy substitution also accounts for presidents' resort to militarised foreign policy options (Milner & Tingly, 2015).

The cumulative result has been a path dependency with a steady equilibrium favouring the White House. When punctuated by major events – such as the 11 September 2001 attacks – new equilibria typically resettle with enhanced executive authority. The brief reassertion of Congress during and after the Vietnam War was the exception that proved the rule. On issues of military intervention, especially, the congressional record has been one of active support for, or acquiescence in, what Fisher (2004) termed 'presidential wars.' Congress has not formally declared war since 1942 but it has either authorised presidential use of military force – often with broad and permissive resolutions, such as following 9/11 or in October 2002 on the Iraq War – or failed to halt unauthorised uses (over Haiti, Bosnia and Kosovo in the 1990s and Libya in 2011) (Hendrickson, 2015).

The minimal discussion of nuclear war powers in the academic and policy literature therefore represents a curious lacuna (Raven-Hansen, 1987). Even the National War Powers Commission of 2008 – chaired by former Secretaries of States James Baker and Warren Christopher – issued a report that made no mention of nuclear war or nuclear weapons in seventy-two pages of analysis and recommendations (Miller Centre of Public Affairs, 2008).

Similarly, the overwhelming focus of scholarly attention has been either conventional war or, in relation to 'future' war, unmanned aerial vehicles and cyber-warfare (Jensen 2014), rather than the elemental matter of whether and when presidential decisions to go nuclear require congressional approval.

Yet nuclear decision-making offers more an emblematic than exceptional expression of the broader war powers debate. Argument over the necessity for preventive or pre-emptive actions in the strategic sense of war (rather than low intensity operations) was opened by the development of nuclear weapons. As Moss (2008, p. 153) noted, 'No longer could a president easily argue, as had Franklin D. Roosevelt on the morning of December 7 after seeing diplomatic cables suggesting an imminent Japanese attack, that the United States as a peace-loving country could not attack Japan but would have to await an attack.'

Trump's 'calculated ambiguity' during the 115th Congress over North Korea's nuclear programme provided a fitting coda to the confusing signals that Truman sent during the Korean War about nuclear weapons. At a White House press conference on November 30, 1950, Truman confirmed that there had been active consideration but rejection of atomic bombs as 'terrible weapons that should not be used on innocent men, women and children, who had nothing to do with military aggression.' When he explained that the use of atomic bombs did not depend on UN authorisation and 'the military commander in the field would have charge of the use of the weapons, as always', the White House had subsequently to issue a statement affirming that the release of the weapons had not been authorised (Hickey, 1999, p. 112-3).

Presidents since Truman have exercised monopoly power over nuclear decisions despite the Constitution according exclusive authority to declare war to Congress (Raven-Hansen, 1987). While the declaration clause was aimed at preventing offensive wars without

legislative consent, post-1950 presidents have initiated multiple undeclared wars and reserved nuclear decisions to the White House. Although Truman's order to use the atomic bombs in Japan was arguably within the authority of the congressional war declaration that brought the US into World War Two, his successors contemplated first use without believing they required prior authorisation (as did Truman during the Korean War). Nixon, for example, did so during Vietnam (Ellsberg, 2017, p.309). The George H.W. Bush administration also threatened Saddam Hussein with nuclear retaliation if his forces used biological or chemical weapons against the US and its allies, prior to the Gulf War in 1991 (although Bush had privately ruled out use of nuclear forces in advance, 'there was obviously no reason to inform the Iraqis of this' [Baker, 1995, p. 359]).

Practical decisions over nuclear war thus rest clearly with the president alone, as then Vice-President Dick Cheney attested:

> The President of the United States now for fifty years is followed at all times, twenty-four hours a day, by a military aid carrying a football that contains the nuclear codes that he would use, and be authorised to use, in an event of a nuclear attack on the United States. He could launch the kind of devastating attack the world has never seen. He doesn't have to check with anybody, he doesn't have to call Congress, he doesn't have to check with the courts (Wills, 2010, p. 4).

Less clear is whether this inter-branch imbalance has reflected not a failure of the Constitution but congressional will. According to Henkin (1996), Congress possesses authority to restrict the president's use of the armed forces through funding cut-offs (as occurred in 1973 in relation to Vietnam), prohibitions on foreign adventures (as occurred with the Boland Amendments from 1982-84 over policy toward Nicaragua), and establishing a legislative veto on presidential activity (though the exemplar, the War Powers Resolution,

remains mostly ineffectual). Outside national self-defence, where the president can legitimately use the armed forces without prior legislative assent, Congress can and should decide whether and when the nation will fight. Presidents have, however, strongly resisted 'micromanagement' and recognised neither the constitutionality nor applicability of the War Powers Resolution, even as they regularly submit notifications to Congress about the use of US forces 'consistent' with if not 'pursuant to' its provisions. The courts have also refused to adjudicate war powers issues, declaring them a 'non-justiciable' or 'political question' for the elected branches to resolve. As Henkin (1996, p. 68) noted, 'issues of War Power have become issues of conflict and cooperation in a "twilight zone" of uncertain or perhaps concurrent power.'

The 'no first-use' nuclear war legislation proposed in the 115th Congress occupies a especially murky constitutional twilight zone. Presidents would likely refuse to sign legislation restricting their authority, but lawmakers could overcome a veto through the required supermajorities. Presidential resistance notwithstanding, the constitutional issue turns on two related questions. Does restrictive legislation infringe the president's Article II Commander-in-Chief authority? And is there a distinction between defensive and offensive nuclear war that parallels conventional wars, precluding prior restrictions on retaliation but permitting those on anticipatory defence?

The 1787 convention changed the draft power of Congress to 'make' to 'declare' war, drawing a distinction between legislative (initiation and general rules) and executive (directive command of operations) functions. On nuclear matters, Congress has exercised its treaty power in refusing to ratify the Comprehensive Test Ban Treaty in 1999 but approving New START in 2010. Its authorising and funding power was used under Bill Clinton to terminate funding for low-yield 'mini-nukes', for Safeguard C (a programme preserving the ability to conduct atmospheric tests of nuclear weapons), and for construction of a Ground

Wave Emergency Network of communication relay stations to be used in the event of nuclear war (Isaacs, 1994, p. 10). Congress also refused to fund research on a Robust Nuclear Earth Penetrator during the George W. Bush administration.

Initiating war is formally for Congress but making war – including decisions on the means for its conduct – remains an executive function. Implicitly, by funding those nuclear weapons in the US arsenal and not restricting presidential autonomy on nuclear decisions, Congress has conceded that nuclear arms are another war-waging instrument available to the Commander-in-Chief. Can Congress therefore direct how the President exercises command by requiring or prohibiting certain military actions involving nukes?

Scholarly opinion is deeply divided. 'Congressionalists' contend that, under Article I, Section VIII, Congress has complete power over the military. The President's substantive command authority operates only where Congress has not provided specific direction (Prakash 2015). Congress can therefore prohibit use of nuclear arms without prior legislative permission, impose rules governing the circumstances wherein nuclear weapons are permissibly used, or decline purchase of weapons it does not wish made available. By contrast, 'presidentialists' (Yoo, 2005) argue that legislative restrictions on operational decisions infringe Article II: '[t]he 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.'

Neither side, on balance, fully persuades. The Constitution does give Congress the power to 'make Rules for the Government and Regulation of the land and naval Forces.' Nothing requires these 'rules' to coincide with presidential preferences, though presidents can use their veto power to resist them. The power to declare war includes the power to establish wartime goals and limit a war's scope (Henkin, 1996, p. 76). Enumeration of specific military

powers, however, does not imply that Congress has plenary directive authority over operations. Under the Articles of Confederation, Congress possessed powers of 'making rules for the government and regulation of the said land and naval forces, *and of directing their operations*' (emphasis added). Yet the Framers omitted the latter clause whilst retaining the former. This strongly implies that the power to 'direct (military) operations' is the president's alone. Since Congress possesses only specific powers, military matters not within these are necessarily the exclusive province of the Commander-in-Chief. Of these, the most prominent is 'directing operations', the power accorded Congress in the Articles but omitted in the Constitution.

If so, in purely constitutional terms, the defensive versus offensive nuclear war division represents something of a distinction without a difference. While Congress could claim 'no-first use' means that the military has not been 'called into the actual service' of the US, and hence presidential operational autonomy is not encroached upon, this is problematic. US administrations – including the Obama administration - have rejected a declaratory 'no first-use' policy, partly because of the strategic role of first-use in deterrence as part of a putative escalation ladder. In this sense, legislative restrictions could infringe the directive operational authority of a president in a potential conflict, even if this was non-nuclear in character, by denying him full operational control of the US arsenal (including threats).

Since its constitutionality is at minimum questionable, the case for restrictive legislation rests primarily on its merits as policy. Even if Cold War era strategic exigencies offered a compelling explanation for prior congressional inaction, however, the permissive approach to presidential nuclear decision-making since 1991 requires explanation. Or, as two proponents of reforming the launch process - to require the assent of the secretary of defence and attorney general - contended, 'In the past, the enormous stakes of nuclear decision-making were used to justify expanded presidential powers, but today, the better argument is

that the special challenges of nuclear decisions justify giving Congress some authority to regulate them' (Betts and Waxman, 2018, 127).

Explaining Non-Action by Congress

As Griffith (2013) argues, the practice of how America goes to war – conventional, nuclear or covert - is as much a product of congressional deference as presidential usurpation. Nuclear war powers epitomise this phenomenon. The political incentive structures and risk-reward balance facing lawmakers strongly disfavours congressional intervention.

Congressional Dysfunctionality

Although scholars have lamented the failure of Congress to enforce its constitutional authority, there are good reasons why it has proven unable to muster collective action. Congressional involvement in nuclear war decision-making would prove especially unwieldy and unwise, in three respects.

First, implicit in the arguments for greater influence is the assumption that Congress can and would overcome the parochialism, hyper-partisanship and irresponsibility that critics identify as hallmarks of its contemporary dysfunction. Undoubtedly, much sniping at Congress is unfair. Many legislators are hard-working public servants, pursuing good public policy as well as re-election. That said, collective action in the public interest is not a legislative leitmotif. Many bemoan Congress as 'broken' and 'failing America.' To understate, it is difficult to envisage how 'a supine, reactive body more eager to submit to presidential directives than to assert its own prerogatives' (Mann and Ornstein, 2008, p. 16) would be fully repaired and functional on as consequential a matter as nuclear war.

From Truman to Reagan, instances of congressional deference to the executive branch owed much to intra-party divisions and Cold War geo-politics. But America's separated system of government has encountered substantial problems in accommodating the partisan polarisation of recent decades (Mann and Ornstein 2012). Partisanship typically plays the major, if not entirely determinative, contribution in debates over authorising military action (Howell and Pevehouse, 2007). But this can often abet indecision as well as deference or obstruction. Perhaps the most graphic illustration is that neither a renewal nor replacement for the 9/11 Authorisation for the Use of Military Force has been enacted. In September 2017, the Senate voted down, by 61-36, a measure to amend the National Defence Authorisation Act to attach a six-month sunset to the 2001 and 2002 AUMFs and establish anew what war powers the presidency possessed to combat transnational terrorist groups (Carney, 2017).

Second, the timing and content of statutory intervention has proven problematic. At what point should Congress optimally intervene in a developing nuclear threat? Like the legislatures of fellow nuclear democracies (the UK, France, India and Israel), Congress is constructed neither for active involvement in crisis situations nor tactical decision-making. These remain essentially, if not inherently, executive tasks. Deliberation may be an activity at which it excels, but subtlety, secrecy and dispatch are not reliable attributes of congressional behaviour. For lawmakers to undertake action in the middle of a tense international confrontation could hinder rather than help the president's diplomatic hand. For the legislature to intervene outside crisis conditions, however, might be counter-productive, helping to precipitate a crisis it intended to postpone by signalling potential US aggression or failing to anticipate important contingencies in the permissible uses of nuclear weaponry for which it legislated.

In neither case is it clearly apparent exactly what 'added value' would accrue in securing the national interest. A 'seat-of-the-pants' crisis provision would, probably, be

epiphenomenal to where the action really was in terms of high level negotiations, whether direct or (as in the Cuban Missile Crisis) through back-channels. A 'blank cheque' provision, permissive and permanent, would make minimal difference to the president's autonomy, beyond giving it a congressional imprimatur in perpetuity (absent stipulated cut-off dates).

Third, exactly what Congress would be authorising would be a matter for lawmakers. But similar problems arise on a potential authorisation for using nuclear arms as those Congress has confronted – or declined to confront - on conventional warfare. Either the authorisation is so broad as to admit of almost any contingency (the criticism commonly levelled at the post-9/11 AUMF) - in which case its restrictive qualities are mostly fictional - or it prescribes so many conditions as to leave the president and Pentagon hamstrung, lacking the necessary or desirable discretion to threaten or execute optimal policies.

The proposed 'no first-use' legislation is especially problematic, as it requires a war declaration. Unless Congress is able and willing to alter its practice of (sometimes) authorising military action and rediscover the 'lost art of declaring war' (Hallett, 1998), the president would theoretically be unable to make first use of nuclear weapons at all. In the event of, for example, 'hybrid war' by Moscow against a Baltic state, a NATO military response is unlikely to warrant a formal US declaration of war on Russia. Similarly, a North Korean strike against South Korea or Japan would invite a US military response, but not a war declaration. It is therefore unclear whether the real intention of proponents of restrictive legislation is to prohibit presidential discretion over offensive nuclear war completely – a 'no first-use' policy by stealth – or 'merely' to subject this to legislative approval.

Legislative Irresponsibility

A second explanation of congressional refusal to assert its prerogatives is irresponsibility (or blame avoidance). Lawmakers have only reluctantly assumed co-responsibility for military action abroad that may entail large-scale losses of US personnel. The institutional competence of Congress for informed judgment forms a corollary aspect.

To the extent that the appeal of congressional restrictions rests on the desire for independent judgment, the evidence of independence is modest. While mistakes from the Iranian revolution to the Iraq War demonstrate that the executive is not immune from making faulty judgements based on intelligence, its stock of information remains immeasurably greater. Moreover, congressional staff lack confidence in the institutional capacity of the legislature to do its job. Facing more informational and policy demands, a combination of staff reductions, turnover, modest compensation, and lagging technological infrastructure has limited responsiveness. Only six per cent of senior aides were "very satisfied" that "Members have adequate time and resources to understand, consider and deliberate policy and legislation" (CMF 2017). When it comes to exercising effective oversight on military action, it may not be too cynical to suggest that lawmakers have irresponsibly avoided asserting their institutional prerogatives because they have not wished to pay for the rope that hangs them (Mann & Ornstein, 2006).

Partisan imperatives again overlay institutional ones. With the atrophy of the ideological centre, unrelenting partisanship undercuts what confidence may be ventured about dispassionate legislators defying their president (or supporting a president of the other party) on matters of nuclear war. In an era of heightened partisan competition, closely contested elections and 'insecure majorities' (Lee, 2016), lawmakers of one party have rarely been willing to place the institutional integrity of Congress above their partisan imperatives. Democrats may wish to limit the nuclear discretion of a Republican, but not a Democratic, president, and vice versa.

If, on the other hand, reasserting congressional authority is premised less on independence than on lawmakers' credentials as delegates faithfully reflecting their constituents' will, the decisional problem is relocated to the public. Proponents of congressional restrictions seem to believe that presidential adventurism would be constrained by a reluctant or war-weary public. But there exists limited evidence that the public (as opposed to 'attentive publics') actively influences decision-makers, other than setting the broadest parameters for action on foreign policy and the priority it should be accorded. As Mandelbaum (2016, 81) noted, 'Foreign policy is to public policy in general what foreign films are to Hollywood extravaganzas: a minority interest.'

Moreover, the logic of a restraining public is triply problematic in terms of empirical support.

First, the dovish qualities of the American public are unclear. Mass attitudes on nuclear war have proven complex. For example, in 2002, a *Washington Post*-ABC News Poll found that six in ten Americans favoured a nuclear response acceptable 'if Hussein orders use of chemical or biological weapons on US troops' (Morin, 2002). An August 2016 poll found that while 17 per cent of Americans believed the US should never use nuclear weapons in any circumstances, 50 per cent believed they should only be used in response to an attack on America, 18 per cent favoured using them in some circumstances where the US has not suffered an attack, and 16 per cent were unsure (*YouGov*, 2016).

Second, the direction of the causal links on military matters is somewhat opaque. Opinion is divided over whether Americans are fatality-, casualty-, or defeat-phobic, and whether mass responses to military intervention are more to events (Gelpi, Feaver & Reifler, 2009) or elite cues (Berinsky, 2009). On the latter reading, the causal chain runs more from

elites to the public than vice versa: when partisan elites are broadly united, the public follows suit; when the political class is divided, it also splits along partisan lines.

Third, whatever the proximate source, the public's perceived sensitivity to military losses has affected recent US policies, from weaponizing economic and financial sanctions to greater use of drones (Milner & Tingley, 2015). But public sensitivity is predominantly to US, not non-American, losses. Replaying the 1945 example of a Truman-esque trade-off between using nuclear weapons on an enemy and causing mass civilian deaths or losing substantial numbers of US troops in a conventional war, recent work – applying the trade-off to a hypothetical case involving Iran - showed most Americans preferring the nuclear option. 'Today, as in 1945, the US public is unlikely to serve as a serious constraint on any president who might consider using nuclear weapons in the crucible of war,' Sagan and Valentino (2017, p. 79) concluded. Relying on Congress as an instrument of the popular will may ratify rather than restrain presidential action.

Relative Costs

International diplomacy is invariably a 'two-level' game (Putnam, 1988). As such, five potential costs attend whatever benefits might accompany an enhanced congressional role on nuclear decisions, tilting the risk-reward balance against legislative intervention.

First, there are powerful reasons why no president has ruled out first-use of the nuclear arsenal. However much the international strategic deck may appear stacked against him, a president exercising unfettered decisional discretion has a powerful card in the highest-stakes international poker, not least the ability to bluff and threaten. For diplomacy to be contingent on congressional legislation could compromise Washington's hand. Successive administrations have taken to heart George F. Kennan's advice to students at the National

War College in 1946: ‘You have no idea how much it contributes to the general politeness and pleasantness of diplomacy when you have a little quiet armed force in the background.’

Second, Trump’s ‘belligerent minimalism’ (Lynch 2016) has confirmed a widespread assumption of presidents’ hawkishness. But Congress does not always place presidential dogs of war on short legislative leashes. After 9/11, for example, Congress was – initially – strongly supportive of the Bush administration’s assertive response. Previously, presidents (Truman during the Korean War, Eisenhower from 1953-61, and JFK in 1962) acted as moderating forces upon more belligerent actors from the National Security Council and uniformed military to Congress. For example, during the only consultation with Congress to occur during the Cuban Missile Crisis, its members were more bellicose than Kennedy (Fursenko & Naftali, 1997, pp. 244-5). While, in discharging its constitutional duties, Congress has often been feckless, the historical record belies stereotyping all presidents as reckless. Presidential discretion allows consideration of options that a collective process might otherwise dismiss as politically prohibitive.

Third, co-decision-making risks the possibility of a constitutional crisis arising to exacerbate a national security showdown. In the event of a deadlocked Congress, what guidance should a judicious and responsible president follow – especially where his national security principals were unanimously in concurrence on the imperative for nuclear force? The domestic crisis would be even greater were the congressional margins of approval to be narrow – to allow or disallow first-use – or, especially, where the two legislative chambers disagreed with one another. In this, one could imagine something like the 1991 vote to authorise military action in the Gulf when, had a mere three votes in the Senate switched sides, the Senate would have refused authorisation that the House approved.

Fourth, but related, is how desirable it would be to see a key matter of national security being played out in public, to a fragmented press and irresponsible social media. Whatever benefits might accrue to international perceptions of the majesty of US democracy could well be outweighed by the delays and signals that acrimonious deliberation could send. If a greater role for Congress is provided, there also exists a risk that US foes may act on misguided assumptions or irrational calculations. An enemy might well take false succour from an abrasive and divisive debate that suggested hesitancy at the highest levels about using force. Such a debate could incentivise a desperate, collapsing or miscalculating regime to advance precipitate military and other actions that it wrongly considered safe from retribution: the classic 'use-it-or-lose-it' proposition.

A fifth, final, and perhaps decisive consideration is whether congressional restriction of presidential unilateralism, while admirable from a democratic viewpoint, is otiose from a functional one. That is, faced with a security crisis of such magnitude that first-use was seriously contemplated, how far would a president feel fatally constrained by the absence of congressional permission? Might such a president echo the claim of George H.W. Bush in 1992, looking back on Desert Storm and contrasting its success to domestic policy stasis by explaining that, 'I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait' (Bush, 1992)? If the primary purpose of legal constraints is to raise the political price paid for their violation, this is - however improbable – not impossible. A country against which a US president felt it necessary to contemplate using nuclear weapons would typically have appeared on the public's radar long in advance. In the handful of nations against which it is remotely possible to imagine such a strike occurring – North Korea, Iran, Russia, China and Pakistan - these countries invariably register low in 'thermometer' ratings of American affections (Norman, 2016). Added to which, any situation in which the use of such weapons was possible would have arisen

against a dedicated White House campaign to set the preparatory groundwork for action. Shocking as the use might be, it would likely not come as a shock.

Under such conditions, presidents could plausibly relegate the prospect of impeachment or removal under the 25th Amendment to a second or third-order concern (assuming the president and the US survive, that is). It is highly unlikely that a measure taken in good faith by the Commander-in-Chief on national security grounds would meet with overwhelming public disapproval. Although, if a president breached a 'no first-use' law, he would have violated his constitutional oath 'to take care that the laws be faithfully executed,' it is not *prima facie* clear that impeachment would result. The core concept informing 'high crimes and misdemeanours' is abuse of political power in violation of the best interests of the nation. Politically, it would be unlikely in such a polarised era that a party could easily secure a majority in the House for impeachment and a two-thirds supermajority in the Senate to convict under such post-conflict conditions. In short, presidents using nuclear weapons in a first-strike capacity may have little to fear politically for the consequences of even illegal actions. As JFK worried in 1962, the greater concern over impeachment could conceivably stem not from excess presidential zeal for military action but excess caution: failing to act assertively in the face of a crisis demanding resolution. As such, lawmakers may have been – and remain - understandably reluctant to expend substantial or valuable political capital seeking the Pyrrhic victory of restrictive but risk-laden legislation that presidents would likely anyway ignore.

Conclusion

Strong concern for the limits of human reason, virtue and wisdom led the Framers to place a high premium on checks and balances in the US Constitution. It is therefore mildly ironic

that, after decades of mostly failing to restrain presidential war powers in major, protracted and low-intensity conventional conflicts, Congress should turn its attentions to nuclear war. Although critics of presidential wars may lament the constitutional imbalance that has arisen, from the 'police action' in Korea in 1950 to the 'war on terror' today (Fisher, 2017b), as Justice Jackson cautioned in *The Steel Seizure Cases* (*Youngstown*, 1952), '[O]nly Congress itself can prevent power from slipping through its fingers.'

Despite the anomaly of the ultimate presidential power being subject to minimal checks or balances, legislative deficiencies augur badly for a positive congressional contribution to nuclear war decision-making. There exists no means that is simultaneously constitutional and practical by which Congress can productively share co-decisional authority with presidents and become a 'net provider' of US nuclear security. The Senate Foreign Relations Committee in November 2017 took no further action on changing the nuclear launch procedures in part because expert testimony rejected legislative restrictions on the president's nuclear-weapons authority, deeming it impossible to craft legislation that could constitutionally limit the president's power to launch a first strike without also limiting the deterrent effect of the US nuclear arsenal (US Senate 2017).

Whatever the problems surrounding presidential discretion, the reasons for congressional nonfeasance remain stubbornly intractable. Process cannot be divorced from policy. Although there are good reasons to oppose first-use, ethically (avoiding a sneak 'nuclear Pearl Harbour') and practically (conventional weaponry can now eliminate many of the targets that nuclear weapons are designed to destroy), no administration has been willing to do so. Requiring congressional checks on first use would be a hedge against a 'low-risk, high-impact' event: an impetuous president ordering offensive nuclear war. But 'no first-use' legislation is ultimately neither sufficient nor necessary to preclude preventive nuclear war. The only completely reliable and durable solution to the problem purposeful or accidental

nuclear catastrophe is for the nine nuclear powers to eliminate the weapons. But in the new poly-nuclear era of increasing geo-political conflict, that prospect – however desirable – is remote. While efforts to address the political factors sustaining nuclear weapons are necessary, these cannot occlude the need for maintaining effective deterrence and reassurance mechanisms in the meantime (Roberts, 2016). Although the 'Doomsday Clock' ticked even closer to midnight after January 2017, the hour for 'no first-use' legislation has not yet arrived.

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