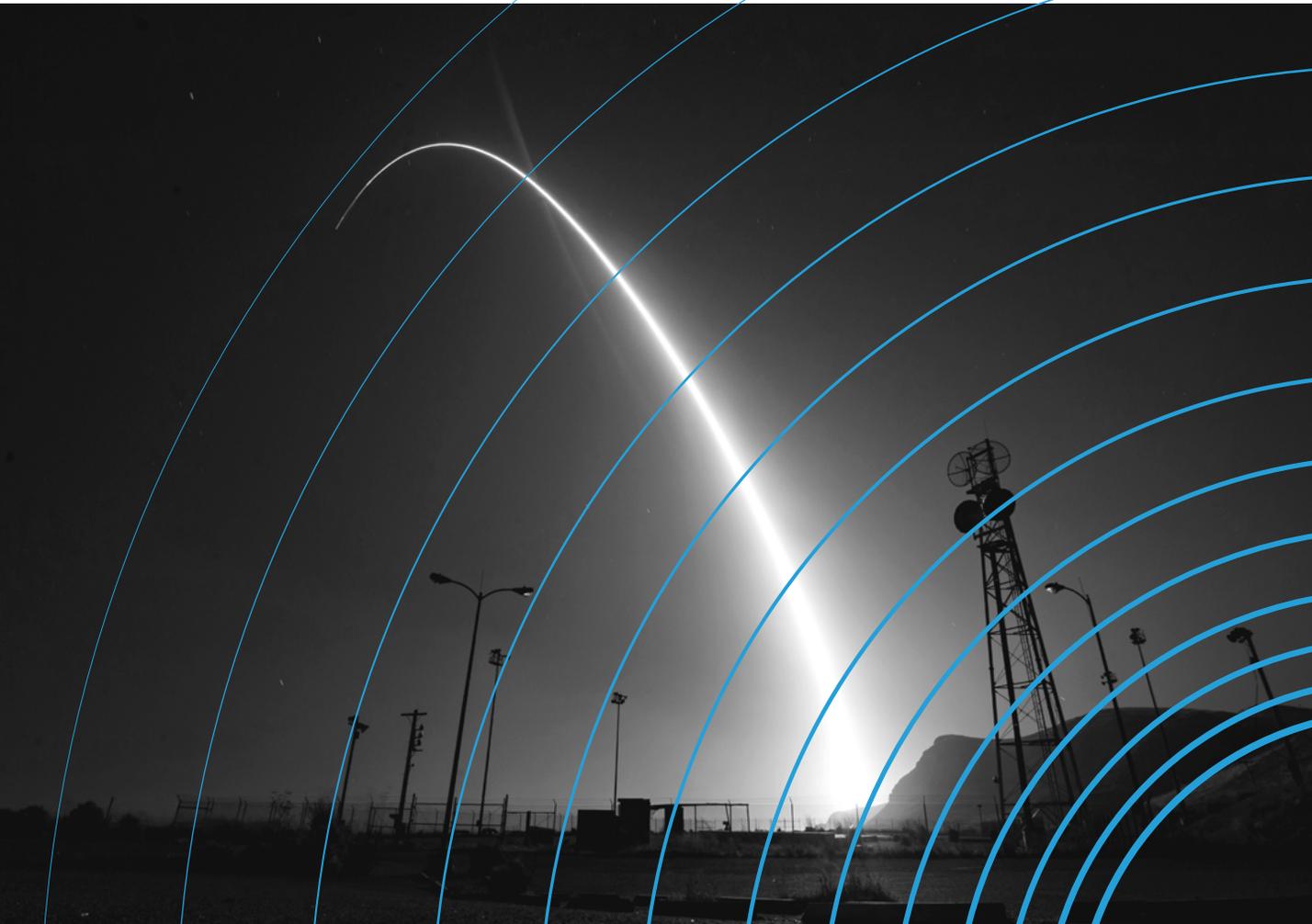




# SHOULD PRESIDENTIAL COMMAND OVER NUCLEAR LAUNCH HAVE LIMITATIONS? IN A WORD, NO.

Rachel Elizabeth Whitlark



In this featured roundtable essay for Vol. 2, Iss. 3, Rachel Elizabeth Whitlark discusses sole presidential authority for launching a nuclear weapon and urges caution before legislating oversight of this authority.

In the United States, the president has sole authority to order the launch of nuclear weapons. This feature of the American foreign policy apparatus is unique, especially relative to other war powers, which are shared by the executive and legislative branches. While there are checks in place for procedural verification to be sure that orders from the president are carried out appropriately, there are few institutional regulations to certify that justification exists for a nuclear attack. This means that one individual — the president — has near total autonomy over what might be the most important element in national security. Though congressional calls to limit presidential authority over this power are not new,<sup>1</sup> they have grown increasingly frequent since President Donald Trump's election. Today, multiple proposals from politicians and scholars alike recommend imposing limitations on presidential authority to mitigate against potentially dangerous impulses.<sup>2</sup>

While passing a law to require congressional or military-legal approval before a nuclear launch could take place may seek to address fears of an unjustified attack, taking such steps would be misguided. Specifically, it would introduce complexity and dangerous time delays that would, as an unintended consequence, undermine deterrence, the quintessential purpose of nuclear weapons in the United States. That said, there are ways to build more oversight of the president's nuclear authority while still maintaining the critical deterrence mission.

### Presidential Authority

From the moment consideration begins, a president can launch nuclear weapons in mere minutes. To initiate the process, the president discusses the situation with key members of the defense establishment, including the secretary of defense, the head of U.S. Strategic Command (responsible for strategic nuclear weapons in the U.S. arsenal), and the combatant commanders whose geographical jurisdictions might be relevant to the mission at hand. As a group, these individuals are critical for discussing attack plans and targeting, as well as for offering advice and counsel to the president, who alone must make the eventual determination for how to proceed. Embedded in the deliberations are legal considerations, as the military personnel are bound by the Law of Armed Conflict,<sup>3</sup> which demands necessity, distinction (between civilian and military targets), and proportionality for any use of force. As such, legal expertise is woven into military activities, including nuclear missions, from the planning stage to the execution. From the initial deliberation, if an order is given, it is verified by the Department of Defense and communicated to the relevant launch crews, who carry it out.<sup>4</sup>

Two sets of actors seem to be missing from or lacking formal roles in this process. The first is Congress. For foreign and military matters, the U.S. Constitution deliberately enshrined a system of shared powers between the executive and legislative branches.<sup>5</sup> Article I gives Congress the power to declare war, raise and support armies, and provide and maintain navies. Article II reserves the role of commander-in-chief of the Army and the Navy for

1 In 1972, Sen. William Fulbright sought to pass legislation prohibiting presidential use of the nuclear armed forces absent a declaration of war by Congress.

2 Owen Daugherty, "Dems Reintroduce Bill to Prevent Nuclear First Strike Without Congressional Approval," *The Hill*, Jan. 29, 2019, <https://thehill.com/policy/defense/427546-dem-lawmakers-reintroduce-bill-to-prevent-president-from-launching-nuclear>; Richard K. Betts and Matthew Waxman, "Safeguarding Nuclear Launch Procedures: A Proposal," *Lawfare*, Nov. 19, 2017, <https://www.lawfareblog.com/safeguarding-nuclear-launch-procedures-proposal>; Lisbeth Gronlund, David Wright, and Steve Fetter, "How to Limit Presidential Authority to Order the Use of Nuclear Weapons," *Bulletin of the Atomic Scientists*, Jan. 23, 2018, <https://thebulletin.org/2018/01/how-to-limit-presidential-authority-to-order-the-use-of-nuclear-weapons/>.

3 "Law of War Manual," Department of Defense, June 2015 (Updated December 2016), <https://www.hsdl.org/?view&did=797480>.

4 For a high-level overview of the process, see David Merrill, Nafeesa Syeed, and Brittany Harris, "To Launch a Nuclear Strike, President Trump Would Take These Steps," *Bloomberg*, Jan. 20, 2017, <https://www.bloomberg.com/politics/graphics/2016-nuclear-weapon-launch/>.

5 "Balance of U.S. War Powers," Council on Foreign Relations, accessed May 30, 2019, <https://www.cfr.org/backgrounder/balance-us-war-powers>.

the office of the president. While only Congress can declare war, presidents have repeatedly ordered forces into action without congressional approval. Likewise, although the Constitution is silent on nuclear matters for obvious reasons, the president's commander-in-chief authority has extended to control over nuclear use. One key motivation for this policy follows from the founders' desire to enshrine civilian control over the military. Nuclear authority specifically derives from World War II, when the president's commander-in-chief authority extended, by default, to Harry Truman's nuclear launch decision in 1945.<sup>6</sup> Since then, when issues have arisen regarding which war powers of the president are beyond congressional control, little has been resolved, perhaps because the judiciary has been wary of wading too far into this debate.<sup>7</sup>

In light of this lack of a formal role for Congress in nuclear command authority, on Jan. 29, 2019, Sen. Ed Markey and Rep. Ted W. Lieu reintroduced a bill first brought forward during the Obama administration that seeks to prevent the president from launching a nuclear first strike without congressional approval.<sup>8</sup> There are 82 House co-sponsors and 13 in the Senate.

## **The central paradox of the Cold War was that, in order to prevent nuclear use, America had to be prepared to use nuclear weapons. This paradox remains in place today and must stay front and center.**

Functionally, the bills seek to legally prohibit the president from using nuclear weapons without first determining that an enemy has launched a nuclear attack against the United States. Absent such a determination, the launch of nuclear weapons must be preceded by a congressional declaration of war that explicitly authorizes nuclear use.

The second set of actors without a formal role in the process is the secretary of defense and the attorney general. In light of this, a second proposal, authored by Columbia University professors Richard

Betts and Matthew Waxman, supports requiring additional authentication of a presidential order to use nuclear weapons,<sup>9</sup> and does so by formalizing a role for the defense and legal leadership. Betts and Waxman advocate two added layers of verification. First, the defense secretary, or her/his designee, would certify that the order to launch nuclear weapons was valid, i.e., that it was actually from the commander-in-chief. Second, the attorney general, or her/his designee, would certify the order was legal. Through these measures, the defense and legal authorities would have a formal role beyond their current advisory capacity.

### **Dangerous Limitations**

Beyond constitutional concerns, there are substantive reasons to be skeptical of limiting presidential authority in this arena. Specifically, from a national security perspective, it is useful to have the ability to conduct war in the hands of a single person because of the relative speed with which one actor can mobilize when compared to the speed of 535 people. When threats manifest, it is often the case that speed and secrecy are paramount considerations for a state deciding how to respond. To that end, national security decisions like mobilizing for war could suffer — through leaks and lengthy discussion and debate — if they must occur within the halls of Congress. Speed, stealth, and nimble deliberations can be

incredibly important for executing foreign policy and military operations. This remains the case both for consideration of nuclear strikes as well as for conventional scenarios, as these features are central to deterrence. Any changes to the existing system that could undermine deterrence should be avoided.

Indeed, perhaps the most critical consideration is the need to ensure and promote the deterrence and assurance operations that are the principal goals of the nuclear mission. Deterrence functions by convincing a state's adversary that the costs and

6 Nikolai Sokov and Miles A. Pomper, "It Is Time to Update the President's Nuclear Command Authority," *National Interest*, Oct. 4, 2018, <https://nationalinterest.org/blog/skeptics/it-time-update-presidents-nuclear-command-authority-32632>.

7 For a discussion of these constitutional and legal issues, see, Stephen P. Mulligan, "Legislation Limiting the President's Power to Use Nuclear Weapons: Separation of Powers Implications," Congressional Research Service, Nov. 3, 2017, <https://fas.org/sgp/crs/nuke/separation.pdf>.

8 "Restricting First Use of Nuclear Weapons Act of 2017," H.R. 669, 115th Congress (2017–2018), <https://www.congress.gov/bill/115th-congress/house-bill/669/all-info>; "Restricting First Use of Nuclear Weapons Act of 2017," S. 200, 115th Congress (2017–2018), <https://www.congress.gov/bill/115th-congress/senate-bill/200>.

9 Betts and Waxman, "Safeguarding Nuclear Launch Procedures."

risks of its threatened reaction to an attack outweigh any benefits an aggressor might stand to gain.<sup>10</sup> The central paradox of the Cold War was that, in order to prevent nuclear use, America had to be prepared to use nuclear weapons.<sup>11</sup> This paradox remains in place today and must stay front and center.

Critical to this paradox is what academics describe as the always/never dilemma.<sup>12</sup> This refers to the notion that the nuclear arsenal must always work as intended, but simultaneously never work by accident or via unauthorized use. For deterrence to work, both the possessor of the arsenal and its adversaries must believe this to be the case. If not, a commander-in-chief cannot be confident that the arsenal will work when needed. Such doubts could cause an adversary to launch a preemptive attack. Steps to undermine this balance paradoxically increase the risk of nuclear use and make the United States less safe. If, for example, the president orders a nuclear launch, but congressional dawdling fails to authorize the command (or fails to do so in a timely manner), then the “always” is undermined. As a consequence, adversaries will begin to doubt the readiness of the United States to fight to defend its interests and might seek to capitalize on this vulnerability.

Beyond this core dilemma, there are many indirect ways in which nuclear deterrence is fundamental to U.S. national security. Protecting the American homeland is only the most obvious. The nuclear arsenal also protects against enemy coercion. Furthermore, it protects allies and interests beyond the homeland. Nuclear weapons, because of the immense dangers they pose in the context of escalation, also prevent conflicts spiraling out of control.<sup>13</sup> The U.S. nuclear arsenal, moreover, prevents nuclear proliferation to new states, as the American arsenal is extended to allies through guarantees that the United States will use it to protect them from enemy (nuclear) attack. As

candidate and later President Trump discovered,<sup>14</sup> making statements perceived to undermine these guarantees can make allies very nervous and prod them into revisiting their own nuclear capabilities.<sup>15</sup> Any steps taken to undermine the American deterrent will, therefore, have significant direct and indirect consequences. In short, limiting presidential authority could jeopardize U.S. security by exposing it to blackmail, raising the risk of escalation, undermining alliance commitments, and endangering nonproliferation goals.

## A System for the Future

This is not to suggest that the existing system is perfect and should be left entirely as is. Rather, there are modifications to consider to improve launch authority for today’s environment.

First, the country should take steps to ensure that its current and future leaders — who are increasingly less likely to have grown up during the Cold War or to have served in the military, and thus are less likely to be knowledgeable about nuclear weapons — are educated about the strategic and specifically nuclear choices made during and after the Cold War. John F. Kennedy — himself a foreign affairs junkie, former service member during World War II, and deeply thoughtful individual regarding nuclear weapons<sup>16</sup> — still balked when he learned that casualty estimates for one Soviet missile striking near an American city stood at 600,000.<sup>17</sup> As new generations of leaders with different formative experiences and far less nuclear knowledge come into office, such information needs emphasizing.

Second, the U.S. government should examine existing procedures to explore avenues to improve the decision-making process itself. This could include training and contingency planning so leaders are more aware of the scenarios they might

10 Glenn Herald Snyder, *Deterrence and Defense: Toward a Theory of National Security* (Princeton, NJ: Princeton University Press, 1961).

11 C. Robert Kehler, "Statement of General C. Robert Kehler United States Air Force (Retired) Before the Senate Foreign Relations Committee," Nov. 14, 2017, [https://www.foreign.senate.gov/imo/media/doc/111417\\_Kehler\\_Testimony.pdf](https://www.foreign.senate.gov/imo/media/doc/111417_Kehler_Testimony.pdf).

12 Peter D. Feaver, "Command and Control in Emerging Nuclear Nations," *International Security* 17, no. 3 (1992): 160–87, <https://www.jstor.org/stable/2539133>.

13 Robert Jervis, *The Meaning of the Nuclear Revolution: Statecraft and the Prospect of Armageddon* (Ithaca, NY: Cornell University Press, 1989); Charles L. Glaser, *Analyzing Strategic Nuclear Policy* (Princeton, NJ: Princeton University Press, 1990).

14 "Transcript: Donald Trump Expounds on His Foreign Policy Views," *New York Times*, March 26, 2016, <https://www.nytimes.com/2016/03/27/us/politics/donald-trump-transcript.html>.

15 Gene Gerzhoy, "Alliance Coercion and Nuclear Restraint: How the United States Thwarted West Germany's Nuclear Ambitions," *International Security* 39, no. 4 (Spring 2015): 91–129, [https://doi.org/10.1162/ISEC\\_a\\_00198](https://doi.org/10.1162/ISEC_a_00198).

16 Rachel Elizabeth Whitlark, "Nuclear Beliefs: A Leader-Focused Theory of Counter-Proliferation," *Security Studies* 26, no. 4 (2017): 545–74, <https://doi.org/10.1080/09636412.2017.1331628>.

17 Richard Reeves, *President Kennedy: Profile of Power* (New York: Simon & Schuster, 1993), 175.

encounter. Decision-making under stress is far from ideal,<sup>18</sup> and, especially for leaders with limited foreign policy exposure and experience, there may be a bias toward issuing a nuclear attack since the system was designed to launch before an enemy attack struck the American homeland.<sup>19</sup> Particularly worrisome are leaders with limited understanding of nuclear dynamics. That said, conducting such training exercises might be especially complicated in today's polarized news environment, where the risk of leaks is omnipresent. Politicians will not be inclined to practice decision-making scenarios if poor performance or missteps might cause personal embarrassment or political punishment. Nevertheless, it is worth exploring if practicing making the tough decisions a leader might encounter can give additional confidence to both leaders who might face such situations in the future as well as to observers assessing how the leader might respond.

Taking demonstrable and behind-the-scenes steps to improve both nuclear education and training can be productive: enhancing deterrence by convincing adversaries that clarity and deliberate actions remain features of the system, despite changes that have taken place in the international environment since the height of the Cold War.<sup>20</sup> Such measures can also help assuage any concerns inside the force itself, in Congress, and among American citizens that these critical issues are not being taken seriously.<sup>21</sup>

It is also worth mentioning that there are some relevant policies already in place, including specifications of the circumstances under which the United States will use nuclear weapons. According to the Defense Department's 2018 *Nuclear Posture Review*,<sup>22</sup> nuclear use is circumscribed for all but the most extreme circumstances to defend U.S. vital interests. It articulates that deterrence is the sole purpose of nuclear weapons, and pledges to augment

the conventional capabilities the United States will use in combat. Moreover, the document articulates negative security assurances, commitments not to use nuclear weapons against non-nuclear weapons states in good standing with their Nuclear Non-Proliferation Treaty obligations. President Barack Obama pledged this commitment and Trump has reaffirmed it.

## A Role for Congress?

Legislating congressional oversight of presidential authority to launch nuclear weapons or building additional limitations into the command authority to fetter the president's unilateral discretion is a mistake insofar as it undermines deterrence. But this is not to say that there is no role for Congress. Rather, as with most matters of foreign affairs, there are constructive ways for Congress to participate.

First, Congress should recognize that there are already some checks that exist to limit rogue presidential behavior. Specifically, the 25th Amendment provides procedures for replacing the president (or vice president) in the event of death, resignation, removal, or incapacitation. It has been used three times previously, though not because of a president's mental state.<sup>23</sup> When Nixon's mental capacity was in question at the end of his presidency, key individuals, including a senator and Nixon's own secretaries of defense and state stepped in (though with questionable legal authority) to ensure that Nixon did not hastily order a nuclear attack.<sup>24</sup> At present, while there is an almost infinite list of policy disagreements one might have with Trump, few seem to believe that this is currently an appropriate consideration.<sup>25</sup> Should the situation change, or if a clearly illegal order is issued by the president, then the

18 Irving L. Janis and Leon Mann, *Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment* (New York: Free press, 1977); Margaret G. Hermann, "Indicators of Stress in Policymakers During Foreign Policy Crises," *Political Psychology* 1, no. 1 (Spring 1979): 27–46, <https://www.jstor.org/stable/3790849>.

19 Albert Wohlstetter, "The Delicate Balance of Terror," *Foreign Affairs*, no. 37 (1959): 211, <https://www.jstor.org/stable/20029345>.

20 I do not mean to minimize the difficulty of pursuing some of these recommendations, especially given classification and politicization concerns. Rather, I seek to suggest that these are more fruitful avenues for consideration, even if difficult, inasmuch as they may improve the existing system without undermining deterrence.

21 Kehler, "Statement of General C. Robert Kehler United States Air Force (Retired)."

22 The nuclear posture review is the Department of Defense's process to determine what role nuclear weapons should have in the U.S. arsenal. Reviews generally happen with each new presidential administration or quadrennially. The 2018 document is accessible here: *Nuclear Posture Review*, Department of Defense, February 2018, <https://media.defense.gov/2018/Feb/02/2001872886/-1/-1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.PDF>.

23 David Greenberg and Rebecca Lubot, "Stop Talking About the 25th Amendment. It Won't Work on Trump," *Politico Magazine*, Sept. 8, 2018, <https://www.politico.com/magazine/story/2018/09/08/trump-25th-amendment-constitutional-crisis-219739>.

24 Garrett M. Graff, "The Madman and the Bomb," *Politico Magazine*, Aug. 11, 2017, <https://www.politico.com/magazine/story/2017/08/11/donald-trump-nuclear-weapons-richard-nixon-215478>.

25 Articles of impeachment for a high misdemeanor, felony, or treason are a different matter. This is not to ignore the resistance evidently occurring within the Trump administration itself. Even from within, however, discussions of the 25th Amendment appear to have been set aside at least for the time being. "I am Part of the Resistance Inside the Trump Administration," *New York Times*, Sept. 5, 2018, <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html>.

25th Amendment would be an appropriate recourse.

Second, Congress can and should step up in its oversight and consultative capacities more generally. The first means of doing so would be to consider a new Authorization for Use of Military Force, which is needed to govern current and future military action. The current authorization was passed in the aftermath of the Sept. 11, 2001, attacks and authorizes the use of force against those responsible. Given that the strategic environment has changed dramatically since then and the United States is still involved in at least two wars tangentially related to 9/11, it is high time for Congress to consider reasserting its authority over military action. Even though it is not related to the nuclear arsenal specifically, a new authorization would send an important signal demonstrating the seriousness with which Congress is taking its Article I responsibilities.

Third, in terms of congressional consultation, steps akin to the Betts-Waxman proposal to more formally include the secretary of defense and attorney general in the deliberative process could be appropriate. Instead of being inserted into the authorization process for a nuclear launch order, however, they would be mandated to consult with Congress far earlier in the process. Specifically, officials from the defense and legal communities, including the top cabinet leadership, should engage with Congress during peacetime to be sure that use of force scenarios are well explored and time is allotted for discussion and consultation. Doing so might offer a more reasonable solution than formally inserting these officials into the launch process. While, admittedly, getting their buy-in would hypothetically take less time than securing the approval of the whole of Congress, even this inserts time-delaying complications into the launch command that may be ill-advised for the reasons described above. It may also be unnecessary since these agencies and their perspectives are already built into the process via the strategic elements, combatant commands, and the legal authorities that oversee all military actions. Additional advanced consultation with congressional leadership, and especially leaders of key committees relevant to defense and foreign affairs, offers a useful middle ground.

Fourth, and related, Congress should draw upon its authority over the power of the purse to amplify its voice in nuclear discussions.<sup>26</sup> Through the purse, Congress has the ability to control the modernization of the American nuclear arsenal. This authority gives the legislative branch enormous power and influence. If Congress feels that the president has

cut it out of key deliberations with respect to the modernization process, then the White House's requests and directives in this area should be taken seriously and not given carte blanche approval. Instead, agreeing to fund new weapons could be tied to increased oversight or consultation procedures. In this way, the president would be mandated to discuss war plans and scenarios where nuclear weapons might be employed. Only then would he or she get the new funding requested.

Finally, Congress can institute regular review of command and control systems, which seems especially necessary given the increased complexity of the international arena in the post-Cold War period. Today, there are more adversaries armed with nuclear weapons, cyber concerns, and non-state challenges, all of which result in a more complicated strategic landscape than when all of America's energies were focused on the Soviet threat. Time and money should be spent making sure that hardware, software, and wetware (human) systems are ready to face the evolving threat environment. By having hearings, seeking expert testimony, and conducting conversations with key administration officials, Congress can catalyze important discussions and build support for modifications deemed necessary.

## Conclusion

As Congress considers ways it can involve itself in the question of presidential nuclear authority, it should pause and take caution before legislating oversight of presidential launch authority. Not only might such legislation be unachievable given the constitutional questions surrounding Articles I and II, but it might also be practically impossible as presidents have often found work-arounds in the face of such congressional assertions of power. For example, as securing congressional approval for war has proven difficult since World War II, successive presidents have deemed all subsequent military actions "extended military engagements" or not sought authorization in the first place. Indeed, presidents have circumnavigated Congress repeatedly since 1945. Moreover, it remains unclear if in today's volatile partisan environment any president could get congressional authorization to launch nuclear weapons even with an infinite timeline. This fact would weaken the United States tremendously in the eyes of adversaries looking to make offensive or coercive gains. The ability to exploit the domestic political environment within the United States would play into their hands.

26 Mulligan, "Legislation Limiting the President's Power to Use Nuclear Weapons."



In today's complicated and evolving strategic environment, changes are necessary to continuously improve one of the United States' most important strategic procedures. Such improvements should not include legislating congressional authorization or other unnecessary fettering of the president's sole launch authority. These sorts of steps would undermine the credibility of the nuclear deterrent, the lynchpin of U.S. national security policy. Instead, more concerted attention should be given to nuclear matters, including steps like mandating deliberation with key legislative leaders and improving education of national leaders regarding the use of nuclear weapons during the Cold War and now. More cross-pollination and discussion between the two branches of government that share war powers in this critical arena during peacetime is essential. Additionally, nuclear deterrence should not be made into a political wedge issue. Leaders may disagree about related issues, like arsenal size or how to confront proliferation challenges,<sup>27</sup> but launch authority is not a political matter. Instead of altering policy out of concerns about a single president's tendencies, the U.S. government must design a policy that puts the best interests and national security of the United States front and center today and into the future. Launch authority is critical for nuclear deterrence and that deterrent has myriad purposes. We should all be wary of taking steps that could potentially undermine those important goals. ●

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*Photo: [U.S. Air Force](#)*

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27 Whitlark, "Nuclear Beliefs."