

*Statement of Brian P. McKeon
Hearing on Authority to Order the Use of Nuclear Weapons
Committee on Foreign Relations
United States Senate
November 14, 2017*

Mr. Chairman, Senator Cardin, members of the Committee, thank you for inviting me to address important questions regarding the authority to employ nuclear weapons. I bring to this issue experience both as a lawyer -- as chief counsel for the Democratic members of this Committee for 12 years -- and as a policymaker in the Executive Branch, with service in three different national security positions in the White House and the Defense Department during the Obama administration, where I was regularly engaged in nuclear weapons policy matters. My position in the Defense Department ended on January 20 of this year; I speak only for myself and not the Department.

I commend you for examining this issue, as well as the broader question of war powers, as you did last month with the Secretaries of State and Defense, and in June with outside witnesses.

I will briefly address three questions.

First, who has the authority to employ nuclear weapons? In one respect, the answer is simple: the President does. As Commander in Chief of the armed forces under the Constitution, he is the sole authority within the Executive Branch for such a decision. Some authority in military operations is delegated to the Secretary of Defense, and then further delegated to the appropriate combatant commanders. The authority to use nuclear weapons, however, remains with the President. That is as it should be in a republic, given the gravity of the decision and the consequences of any nuclear use.

It bears emphasis that the President would not make this decision by himself. The system for decision is designed to ensure that the President consults with the National Security Council and his other senior civilian and military advisers, and I would expect that to occur in every case where the use of nuclear weapons is contemplated. If the order is given, the chain of command runs from the President to the Secretary of Defense to the Commander of U.S. Strategic Command in the case of strategic weapons, and, in the case of non-strategic weapons in Europe, to the Commander of U.S. European Command; the Chairman of the Joint Chiefs is not in the chain of command. If time and circumstances permit, I would also expect any President to consult with leaders of key allies, particularly in the region of potential conflict.

That is hardly the end of the inquiry. The authority to employ nuclear weapons is intertwined with an equally momentous question: who has the authority to take the country to war? The members of this committee well understand the basic constitutional framework, given your jurisdiction over the war power under the Senate rules. Article I of the Constitution gives Congress the power to declare war, grant letters of marque and reprisal, and several other powers with regard to supporting and regulating the armed forces. To the President, Article II provides that he is the Commander in Chief of the Army and Navy.

In my view, and the view of many respected scholars, the constitutional text, structure and our history provide Congress with primacy in this sphere. This power is not merely limited to formal declarations of war -- which Congress has not done since World War II -- but to authorizing most uses of military force. To be sure, the President possesses the constitutional authority to defend the country against sudden attack, or to pre-empt an imminent attack. But Article II does not give him *carte blanche* to take the country to war.

In the modern era, presidents of both parties have often made broad assertions of authority to take military action without prior authorization by Congress, and have given a narrower reading to the Declaration of War clause, in a manner the Framers would not have recognized.

Nonetheless, we need not resolve that general debate to answer the specific question presented in today's world. In addition to the global terrorism challenge, our major potential adversaries today number on one hand: Russia, China, North Korea and Iran. Three of these countries possess nuclear weapons; the fourth has pursued such a capability. Therefore, conflict with these states could conceivably involve nuclear weapons use. Direct armed conflict with these countries would undoubtedly be "war" in the constitutional sense, and if initiated by the United States, would require authorization by the Congress. Quite apart from the legal requirement, as a matter of politics and policy, any President *should* want the Congress, as the body directly representative of the American people, to provide its support -- to join in the decision and the responsibility for such a national commitment of blood and treasure.

A recent Executive Branch opinion on the war power -- by the Office of Legal Counsel in 2011 regarding the military operation in Libya -- supports this conclusion. It indicated that analysis of whether congressional authorization of a use of military force is required would turn on examination of the "nature, scope, and duration" of the conflict, and that specific congressional approval would be necessary in cases of "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period [of time]." It is hard to imagine an armed conflict scenario with any of these countries that would not meet this test.

The rapid advances of North Korea's nuclear and missile program, and the escalating rhetoric between the President and the North Korean leader, are no doubt foremost in your minds. In the North Korean context, the view that Congress would need to authorize a war is buttressed by the recent letter to your House colleagues from the Vice Director of Joint Staff, Rear Admiral Dumont, where he stated that a ground invasion would be required in order to locate and destroy all components of North Korea's nuclear weapons program. Given the high number of casualties that would occur in *any* conflict with North Korea -- let alone during a ground invasion -- no reasonable argument can be made that this would not be "war" in the constitutional sense.

The President and senior administration officials have stated that time is running out to address the North Korean challenge, and in August, the National Security Adviser suggested the possibility of a preventive war. Such a war -- as distinct from a pre-emptive strike in the face of an impending attack against the United States -- would also require congressional authorization.

For context on these two questions, I would answer a third: what is the current policy on use of nuclear weapons? The Trump Administration is working on a Nuclear Posture Review ordered by the President last January. For now, my understanding is that the policy set by the Obama Administration continues to obtain.

That policy is set forth in the report of the Nuclear Posture Review (NPR) in 2010 and presidential employment guidance issued in 2013. While the specific guidance to the commanders is classified, the NPR report is unclassified, and the Defense Department submitted an unclassified summary of the employment guidance to the Congress in 2013. A few elements of these documents bear highlighting.

The 2010 NPR set forth a goal of reducing the role of nuclear weapons in the U.S. national security strategy, and stated that, among other things:

- The United States would only consider use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners.
- The United States will continue to strengthen conventional capabilities and reduce the role of nuclear weapons in deterring non-nuclear attacks, with the objective of making deterrence of nuclear attack on the United States or our allies and partners the sole purpose of U.S. nuclear weapons.
- The United States updated the longstanding "negative security assurance" by stating that it will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the Nuclear Non-Proliferation Treaty and in compliance with their nuclear non-proliferation obligations.

Additionally, the employment guidance directed the Department of Defense to:

- Conduct deliberate planning for non-nuclear strike options to assess what objectives and effects could be achieved through such options.
- Examine further options to reduce the role that Launch Under Attack plays in U.S. planning, while retaining the ability to do so if directed.

Finally, the Obama Administration did not adopt a formal policy of "no first use" of nuclear weapons, although in the final month of the Administration, Vice President Biden gave a speech in which he said that given our "non-nuclear capabilities and the nature of today's threats, it's hard to envision a plausible scenario in which the first use of nuclear weapons would be necessary." He went on to say that he and President Obama were "confident we can deter -- and defend ourselves and our Allies against -- non-nuclear threats through other means."

In closing, I am grateful for this opportunity to appear before you today. I look forward to your questions.