

Senate Foreign Relations Committee

Nuclear Weapons Authority¹

November 14, 2017

Transcription and annotations
by
Marc Howard Rich, Ph.D.
Christopher Newport University
Department of Communication

Authority to Order the Use of Nuclear Weapons. The Senate Foreign Relations Committee held a hearing to consider the rules and guidelines for the authority to order the use of nuclear weapons. Members considered the conditions under which the president could order the use of nuclear weapons and discussed the potential for legislation that would require congressional approval for the use of those weapons. [Summary provided by C-Span website, link below]

Timestamp from the original C-Span recording retrieved on March 9, 2018 from: <https://www.c-span.org/video/?437317-1/concerns-raised-presidents-stability-nuclear-weapons-authority-hearing&start=4387>

¹ *Nuclear Weapons Authority. Hearing Before the S. Foreign Relations Comm., 115th Cong.*

People identified at the hearing

Chairman:

Bob Corker (Chairman):
U.S. Senator (Class 1)
[R] Tennessee

Witnesses:

Robert Kehler:
General (Retired)
U.S. Air Force

Brian McKeon J.D.
Principal Deputy Undersecretary (Former)
Department of Defense, Policy

Peter Feaver Ph.D.:
Director
Duke University
Triangle Institute for Security Studies

Senate Foreign Relations Committee:

Ben Cardin (Ranking member):
U.S. Senator (Class 1)
[D] Maryland

Chris Coons:
U.S. Senator (Class 2)
[D] Delaware

Cory Gardner:
U.S. Senator (Class 2)
[R] Colorado

Ron Johnson:
U.S. Senator (Class 3)
[R] Wisconsin

Tim Kaine:
U.S. Senator (Class 1)
[D] Virginia

Edward J. Markey:
U.S. Senator (Class 2)
[D] Massachusetts

Jeff Merkley:
U.S. Senator (Class 2)
[D] Oregon

Christopher "Chris" S. Murphy:
U.S. Senator (Class 1)
[D] Connecticut

Jim Risch:
U.S. Senator (Class 2)
[R] Idaho

Marco Rubio:
U.S. Senator (Class 3)
[R] Florida

Jeanne Shaheen:
U.S. Senator (Class 2)
[D] New Hampshire

Tom Udall:
U.S. Senator (Class 2)
[D] New Mexico

Todd Young”
U.S. Senator (Class 3)
[R] Indiana

Beginning of video

Voiceover on video (0:00:00): Next, a hearing on the president's authority to order the use of nuclear weapons. The senate foreign relations committee heard testimony on the procedures currently in place, and legislation that would require congressional approval to use those weapons. This is two hours and 10 minutes. [inaudible conversations].

Bob Corker (0:00:45): The senate foreign relations business meeting will come to order. We are going to do just a little bit of business on the front end and hopefully take care of some business quickly. I know people have other meetings and then move to the hearing itself. We do thank our witnesses for allowing us to do this, and uh we're glad you're here. We have a number of items on the agenda today. We'll move a number of nominations and foreign service officer lists. We will also take up S.1928, the multilateral aid review act of 2017.² I want to thank Senator Coons for his leadership and hard work on this bill I want to also recognize Senators Isakson, Rubio,

² Multilateral Aid Review Act of 2017, S.1928, 115th cong. (2017-2018), Retrieved on May 8, 2018 from <https://www.congress.gov/bill/115th-congress/senate-bill/1928/text>

Young, Kaine, and Merkley for their contributions to this important bipartisan legislation before our committee.

This bill would establish a process for conducting objective reviews on how well multilateral institutions carry out their missions with our funding. The authority's sunset after four review periods and 11 years. Through this process we'll be able to evaluate their performance in an objective way. The review will look at performance, management, accountability and transparency, alignment with U.S. Foreign policy goals and efficiency.

The U.S. Spent around \$11 billion to support the work of these entities and we owe the U.S. Taxpayers good value for their money. These reviews will help us make better informed decisions about how to prioritize scarce resources and also provide solid ground for advocating for changes and reforms. Others such as the United Kingdom and Australia have done similar reviews of their multilateral contributions with good results, by the way, multilateral aid contributions with good results. I urge you to support this effort to promote greater accountability for our spending on multilateral entities. Senator Cardin do you have any comment you wish to make?

Ben Cardin (0:02:45): Yes I do, Mr. Chairman. But before I comment on the bill and nominations that are on our agenda, I want to comment regarding information statistics regarding the foreign service that has been made public over the last week.

Ambassador Barbara Stephenson of the American Foreign Service Association stated last week that, and I quote, "there is no denying that our leadership ranks are being depleted at a dizzying speed. Due in part to the decision to slash promotion numbers by more than half, the foreign service officer corps at state has lost 60% of its career ambassadors, since January, ranks of the career ministers are three-star equivalents are down from 33 to 19. The ranks our two-star ministers, counselors have fallen from 431, after Labor Day to 369 today, and are still falling."³ Ambassador Stevenson, who is president of the governing board of the FSA is imploring to us ask why. Why I feel like I have been asking "Why" in the administration and state department on at lot issues lately, including the personnel budget and reorganization matters.

I'm not getting a lot of answers. Just as one small example. The Trump administration lifted the federal hiring freeze in April of 2017, the state department and the USAID has elected keep its own hiring freeze in place. Why? My impression is that the morale is at an all-time low at the State Department and USAID. Causing a massive exodus of diplomatic and developmental expertise. Why is this happening? What is the department's leadership doing about it? Our president said recently we do not need to worry about the fact that many of the senior level positions of the state department remain unfilled because when it comes to foreign policy, his opinion is the only one that matters. Why on earth would he say that?

For the thousands of FSO's around the world, working to advance the ideal offered the United States, this was a horrible message. If this is the sort of high level decapitation of leadership going on at the defense department, with three and Four-Star officers resigning and younger

³ Barbara Stephenson, "President's views: Time to ask why," *The Foreign Service Journal* (December, 2017) 7. Retrieved on May 8 2018 from http://www.afsa.org/sites/default/files/flipping_book/1217/7/#zoom=z

officers and a list of personnel suffering low morale and leaving as well, or not even signing up, I can guarantee you that congress would be up in arms. Yet here there's silence. Why?

The state department and USAID, I would offer, are everybody bit as vital and critical an element to our national security as the department of defense. The intelligence community, our law enforcement and a myriad of others in the federal government who work tirelessly every day to protect our security, extend our prosperity and promote our values. Folks, this situation is alarming. We put our country in danger when we do not have adequate voice and resources so all of our country's national security tools.

Secretary Madeleine Albright once said “in a turbulent and perilous world the men and women of foreign service are the front lines every day on every continent for us.”⁴ This committee needs to continue to press this issue. It's our responsibility to make sure that we have the diplomatic assets in place in order to represent our national security.

Moving to the legislative volume, I want to thank Senator Corker and Coons for their efforts on this bill the multilateral institutions are a critical part of our foreign assistance effort to help us coordinate activities, leverage funds, and advance our national interests and values. If successful the multilateral aid review act will provide us with clear metrics, reliable data and solid analysis of our multilateral investments. Mr. Chairman I hope every member of the committee will read the bill because I think it does spell out what our expectations are in regards to carrying our mission, the right use of resources and that we review this on a periodic basis so that we make sure that our multilateral efforts are in our national security interests. I think this is an important bill and I applaud you for your work.

One last point if I might. I know we have a quorum, but one last point. We're getting near uh the end of this work period where we have one more work period remaining before we adjourn for the year. There is an extremely important bill that Senator Rubio and Baldwin have been working on, the just act, which would require additional state department reporting on European government efforts to return or provide restitution for property wrongly seized during the holocaust. I've said that it before but time is running out on this issue as people get much older, fewer are surviving and it's much more difficult to deal with restitution. I really applaud the work that was done on this bill and I know there are many members of the committee that are cosponsors, including senator Johnson, Young, Booker, Coons, Menendez and Markey and I would just urge the democratic and republican staff to try to get together with the sponsors to see whether we cannot move this bill through our committee these year and I appreciate the chairman's attention.

⁴ *Remarks by secretary of State Madeline K. Albright. 75th anniversary dinner of the United States Foreign service, May 24, 1999.* 106th Cong. Congressional Record, v 145, pt. 9, June 9, 1999 to June 17, 1999, at 12401. Retrieved on May 8, 2018 from <https://books.google.com/books?id=SmwXC0nU2pYC&pg=PA12401&lpg=PA12401&dq=madeleine+albright+in+turbulent+and+perilous+world+the+men+and+women&source=bl&ots=20dlF3kzOi&sig=HvJTXqDaPSqIOOctbzMG34P4ChY&hl=en&sa=X&ved=2ahUKEwjGpvXSsfbaAhVHnFkKHf5zCqEQ6AEwBnoECAAQOOQ#v=onepage&q=madeleine%20albright%20in%20turbulent%20and%20perilous%20world%20the%20men%20and%20women&f=false>

Bob Corker (0:07:47): thank you. I'd like to ask if it possible, because I know we have conflicts taking place at 10:15, if we could go ahead and move through the business and if people want to make comments afterwards I'm glad to hear it and obviously, we'll have a long hearing.

Um so, um let me just say, we had a very unsatisfactory meeting last week with the state department, our two staffs did. I think the concerns about the state department are bipartisan in nature. Don't think they're anywhere close to having a plan to present relative to the reforms they want to make there, and I do think uh that uh we need to be much more focused on holding them accountable, because I think many of the things you said, if not all but a many of them anyway are very true.

With that, I understand that Mr. Ueland for the Undersecretary of State Management has been held over and will be considered at the next business meeting. I would entertain a motion to approve the remaining nominations in block by voice vote includes Miss Lisa Johnson, Mr. Sean Lawler, Mr. Steve Goldsteen, Miss. Rebecca Gonzalez and two foreign service officer lists, and unless there's -- so moved and seconded.

All those in favor say aye.

Opposed.

Are there any recorded no's that any individuals would like on any of these nominations? Seeing none, the ayes have and it the nominations and promotions are agreed to.

Next we move to s1928. First, I would entertain a motion to approve the substitute amendment and be Portman Amendment on block by voice vote.

So moved.

Is there is a second?

Second.

So moved and seconded. The questions on the motion to approve the substitute amendment and be Portman Amendment on block all those in favor say aye.

Opposed.

With that, the ayes have it. The amendments are agreed to any further amendments?

Cory Gardner (0:09:53): Mr. Chairman. Thank you, Mr. Chairman. I appreciate the work of the committee on the multinational aid review act. I have two amendments here and I would like to thank senator Rubio for joining me as a cosponsor of both of these amendments.

One addresses the issue of Taiwan. It talks about using the United States voice and our vote in international organizations to make sure that we are advocating for the addition of Taiwan as an observer to such organizations and entities. We did it last year with Interpol and I believe we should stand up for Taiwan as a great partner and especially an important voice in these international organization.

The other amendment is addressing North Korea, and in a meeting that senator Markey and I hosted with the former – I guess a former resident of North Korea defector, a high-level defector

this deputy ambassador to United Kingdom said the one that that could make a difference in North Korea is... is cutting off diplomatic relations with North Korea other nations around the globe that haven't done that yet and isolating diplomatically North Koreans much as possible. And so, this amendment would use our voice and vote in international organizations and entities to do just that. To make sure that we are stressing the importance of diplomatic isolation of North Korean regime and I think these two amendments represent a significant contrast.

Because you have Taiwan, somebody we want to partner with somebody who is an incredible partner, somebody who abides by and respects the rule of law, that cannot participate in these international organizations and then you have one North Korea, that has been sanctioned almost greater than any other nation on this face of the planet by the United States, and yet they're allowed to be in the united nations. They're allowed to be a full part of the diplomatic community and so I think this is a good contrast where why is the nation that's testing nuclear bombs in violation of every sanction possible being treated better than Taiwan? That is a great international partner. So, I'm going to withdraw these two amendments for the sake of moving forward on 1928 but I do think it's important we continue this conversation. Thank you for the work you have been doing on this legislation

Bob Corker (0:11:49): thank you. I do want to point out that as a new member on this committee, you passed one of the most meaningful pieces of legislation ever been passed on North Korea. I know we have had legislation that has passed since that time, and I know there's a banking committee uh... uh... piece that has passed down on sanctions. I understand you're working very closely with us and with the sponsors of that bill to add your language there I want to thank you for being so focused on that part of the world and your leadership of that uh committee, and thank you for withdrawing these so we can work constructively towards another end on the bill I'm talking about. Is there a motion to approve the legislation as amended?

[unknown] so move.

A second?

[unknown] second.

So moved and seconded. The question on the motion to approve s1928 as amended. Install favor say aye.

[multiple] aye.

Opposed? With that the ayes have it. The legislation as amended is agreed to that completes committee's business as unanimous consent. The staff be authorized to make technical and conforming changes. Without objection so ordered. With that the committee stands adjourned exactly at 10:15 as we said. We will see finance committee members later. Thank you so much, I appreciate it.

Chris Coons (0:13:05): Mr. Chairman. [Corker] yes, sir. If could I just briefly thank you for working with me on this bill. Thanks to senator Carden and everybody who has been a cosponsor. We spend ten billion a year of the united nations world bank and a lot of other organizations and I appreciate this approach and I appreciate senator Merkley's amendment that will make the whole methodology more transparent. I think we have to continue in a bipartisan way to make sure that what foreign aid we are investing is done well and wisely and I appreciate the opportunity to work together on the bill.

Bob Corker (0:13:33): well I...I appreciate being able to work with you on this, and I think people understand, too this also gives us the ability, with this data to strongly support those agencies that we believe ought to be strongly supported if they're producing good results. So, thank you. [Coons] thank you. With that, we will now move to uh to the hearing.

Begin Nuclear Weapons Authority hearing

Bob Corker (0:14:01): The hearing itself will actually come to order. We thank General Kehler, Dr. Feaver, Mr. McKeon for joining today and for sitting through the business meeting for the last fifteen minutes.

A number of members on both side of the aisle of this on and off the committee have raised questions about the executive's authorities with respect to war making, and the use of nuclear weapons, and from a diplomatic perspective, entering into and terminating agreements with other countries. As I've mentioned publicly, this is one in a series of hearings where our committee will examine all of these issues, but today it's my hope that we will remain focused on the topic at hand, the authority and the process for the use of nuclear weapons.

The congressional research service tells us this is the first time that the foreign relations committee of the senate or house has met on this topic since 1976, 41 years ago. Making the decision to go to war of any sort is a heavy responsibility for our nation's elected leaders. And the decision to use nuclear weapons is the most consequential of all.

The atomic energy act of 1946 and the recent practices recognize that the use of nuclear weapons must be subject to political control. This is why no general or admiral or defense secretary has the authority to order the use of nuclear weapons, only the president, the elected political leader of the United States, has this authority. The nuclear arms race between the United States and the Soviet Union during the Cold War dramatically elevated the risk of nuclear conflict. As the soviets developed massive numbers of nuclear weapons and the systems to develop them to the United States -- to deliver them to the United States, we plan for the unthinkable, how to get our missiles in the air without -- within those few minutes before their warheads could hit us and possibly destroy our ability to respond. In that kind of scenario there's no time for debate. Having such forces at the ready has been successful in deterring such an attack and for that we are grateful. But this process means the president has the sole authority to give that order.

Whether we are responding to a nuclear attack or not. Once that order is given and verified, there is no way to revoke it. To be clear, I would not support changes that would reduce our deterrence of adversaries or reassurance of our allies but I would like to explore as our predecessors in the house did some 41 years ago the realities of this system. Want to thank all of our distinguished witnesses and the members of this committee. For the seriousness with which they approach this topic before us today, and hope that together we can have a productive and enlightening discussion about this sober issue. With that I'd like to turn to my friend and our distinguished ranking member, senator Cardin.

Ben Cardin (0:17:01): well Mr. Chairman, thank you so much. I almost always in a perfunctory way thank you for holding hearings, but in this case, I really do believe that this is a critically

important discussion to have not just with ourselves in the United States senate but with the American people.

I must tell you, I am always amazed as to what subjects come up at town hall meetings that I hold throughout Maryland. Most of the subjects deal with the local economic or domestic issues. We don't normally get a lot of foreign policy questions at town hall meetings. But of late, I've been getting more and more questions about "can the president really order a nuclear attack without any controls?" That question is asked more and more by the American people. And of course, it's fueled by comments made by president trump in regards to North Korea.

Quoting the president in his august interview, "North Korea best not make any more threats to the United States. They will be met with fire and fury like the world has never seen."⁵ Or the president's comments "I will have no choice but to totally destroy North Korea." Now, many interpret that to mean that the president is actively considering the use of nuclear weapons in order to deal with the threat of North Korea. That is frightening. And as the chairman pointed out, based on my understanding of the nuclear command and control protocols, there are no checks, no checks, on the president's authority. The system as it is set up today provides the president with the sole and ultimate authority to use nuclear weapons. And that was developed because of the realities of the security of our country.

The nuclear command and... and control system we have in place is the result of three factors. The first was that the particular threat and challenge of the Cold War. For decades the United States faced a nuclear armed adversary in the Soviet Union with a large and capable nuclear force. The United States set upon a strategy of mutual assured destruction which placed decided command on the nuclear war command and control system. The second and related factor is this law as physics. An ICBM launch from Russia to the United States would have a thirty-minute flight time. There wasn't time to convene a special session of congress or to have the type of consultations that would infringe upon our ability to have actually a deterrent. This being the president's team have an incredibly short window to identify, assess, communicate, decide, and if necessary, launch a nuclear force. There was no time for cabinet meetings and no time for consultation. The Cold War may be long behind us, but such a scenario, based upon the need to deter a massive Soviet nuclear attack with little or more no warning time is the driving force between the current command and control architecture even today.

The final factor behind U.S. Nuclear command and control system rests with the fact that nuclear weapons, ever since their development, have always been considered unique. Not like any other military weapon. Starting under president Truman the point was made crystal clear that the White House was in charge of the atomic bomb and its uses, not the military. Nuclear bombs were not a military weapon whose use be use would be controlled by the armed forces but a strategic weapon under strict control of civilian and elected officials. The president as both the highest elected civilian official and commander-in-chief under the constitution, played unique role with this unique weapon. The president and only the president assumed the sole and unchecked power to launch nuclear attacks. As president Truman said you have got to understand that this isn't a military weapon. It is used to wipe out women and children and

⁵ Impromptu remarks made on Aug. 8, 2017 during a meeting on the Opioid crisis held at his New Jersey golf club. No transcript is available, but the substantive quote is contained in Senator Cardin's remark.

unarmed people and not for military uses, so we have got to treat this thing differently from rifles and cannons and ordinary things like that.

Nuclear weapons remain unique but today we face a different question than the one we faced during the Cold War. Given today's challenges we need to revisit this question on whether a single individual should have the sole and unchecked authority to launch a nuclear attack under all circumstances, including the right to use it as a first strike. The most likely attack we face is not a massive surprise nuclear attack by Russia or China, but a nuclear conflict that springs from an escalating conflict with the smaller nuclear forces such as North Korea. In this sort of circumstance, where the United States would not face the same sort of use them or lose them pressure we faced during the Cold War and maybe possible and certainly wise for the president to take the time to consult congress before the profound and historic decision to use nuclear weapons is made.

I would like to be able to tell my constituents and the American people we have a system in place that prevents an impulsive and irrational decision to use nuclear weapons. Unfortunately, I cannot make that assurance today. I look if you forward to hearing from our very -- three very distinguished witness's. I just would like to acknowledge Mr. McKeon's presence here as a former council to this committee under senator Biden. It's nice to have him back before our committee.

Bob Corker (0:22:49): thank you so much. Our first witness today is General Bob Kehler, Commander of the United States Strategic Command [hereafter referred to as STRATCOM] from 2011 to 2013. Thank you for being back with us today and thank you for your service to our country. Our second witness is Doctor Peter Fever, professor of political science at Duke University. Thank you so much for being here today. Our third witness is Doctor Brian McKeon,⁶ the acting undersecretary of defendant for policy during the Obama administration and once a staff member, as was mentioned, on this committee. Thank you for coming back. If all of you are very familiar, if you can summarize your comments in about five minutes, we would appreciate that. Any written materials you have without objection will be entered into the record and if you could just begin and proceed in the order introduced, we would appreciate it.

Robert Kehler (00:23:37):⁷ Thank you, and good morning, Mr. Chairman, good morning, senator Cardin, distinguishes members of the committee, it's my honor to appear today to discuss nuclear decision-making. I'm also really pleased to appear with these two outstanding panelists and colleagues to my right.

Command and control is a critically important component of our nuclear deterrent and I applaud you for taking the time to understand it better. At the outset I must say that the views I express this morning are mine, and no longer represent the department or strategic command or the U.S. Air Force. I will try to bring the perspective of almost four decades of military service and senior

⁶ Brian McKeon has a J.D. Degree from Georgetown University Law Center. Dr. McKeon's name card reads "The Honorable Brian McKeon." During this hearing he is frequently referred to as "Mister" rather than "Doctor" for reasons that are unclear.

⁷ Kehler's written testimony appears here https://www.foreign.senate.gov/imo/media/doc/111417_Kehler_Testimony.pdf

military command to my remarks today and much of that was in nuclear related duty. Let me also add that some of the nation's most closely guarded secrets are associated with nuclear weapons. With the plans associated with them and with the processes as well. So there are limits on what I can say, even if some aspects of this matter are discussed openly by others. In the interests of time, I would like to make just three brief opening remarks.

First, as this committee knows well, the U.S. Now faces more complex security problems and greater uncertainty than it did during the Cold War. Nuclear weapons are not gone from world affairs and it doesn't look to me like they're going to be gone from world affairs anytime soon. Russia and China are modernizing their forces as the bases of strategy designed to expand their positions at our expense and the expense of our allies. Russia frequently makes explicit nuclear threats to include the threat of nuclear first-use. China will soon deploy ballistic missile submarines opening a new chapter in their nuclear history. North Korea threatens our regional allies and forward based forces and is pursuing the capability to threaten the U.S. Directly. North Korea has also threatened nuclear first-use. Iran of course remains a country of interest. Other strategic threats like long-range conventional weapons, cyber weapons and threats against critical space assets have emerged and can arrive at our doorstep quickly but nuclear weapons remain important in the strategies of our potential adversaries.

The second point. While the U.S. Nuclear force is far smaller, postured less aggressively, and occupies a less prominent place in our defense strategy than it did during the Cold War, nuclear deterrence remains crucial to our defense and to strategic stability. There's an old saying that I've used many times over the year deterrence exists when an adversary believes they can't achieve their objectives, will suffer unacceptable consequences if they try, or both. U.S. Nuclear weapons prevent the coercive or actual use of these weapons against us in our allies which is their primary purpose, constrain the scope and scale of conflict, compel adversaries to ponder the consequences of their actions before they act and obviate the need for additional allies to acquire their own. No other weapon can replace the deterrent value of nuclear weapons. And the ability to command and control our nuclear forces under all conditions of crisis and conflict remains central to the credibility of the deterrent.

Third. U.S. Nuclear forces operate under strict civilian control. Only the president of the United States can order the employment of U.S. nuclear weapons and the president's ability to exercise that authority and direction is ensured by people, processes and capabilities that comprise the nuclear command and control system. This is a system controlled by human beings, nothing happens automatically.

That system is designed to do two very important things. First, it's designed to enable the authorized use of nuclear weapons while preventing the unauthorized use or the accidental use or the inadvertent use of them. And, two, to do so in the face of a wide variety of scenarios. Including a nuclear attack. And the challenge of the Cold War, which is a short notice massive attack, while, less likely today I would agree, still exists.

A colleague and mentor of mine always said that when you're looking at an adversary you have to look at capability and intent. Russians may not have the intent of attacking us today with a short notice massive attack but they retain the capability to do so and so long as they do, we have

to deter that capability. The nuclear decision process includes assessment, review and consultation between the president and key civilian and military leaders. Followed by transmission and implementation of any presidential decision by the forces themselves. All activities surrounding nuclear weapons are characterized by layers of safeguards, tests and reviews.

Finally, I think it's important to remember that the United States military doesn't blindly follow orders. The presidential order to employ U.S. Nuclear weapons must be legal. The basic legal principles of military necessity, distinction and proportionality apply to nuclear weapons just as they do to every other weapon. It was my job, and the job of other senior leaders like the secretary of defense and the chairman and the other combatant commanders to make sure the principles were applied to nuclear orders. As I close I want to urge caution as you consider these matters. Changes or conflicting signals can have profound implications for deterrence, for extended deterrence and for the confidence of the men and the women in the nuclear forces. Again, Mr. Chairman, thank you for inviting me. I appreciate being here today and I look forward to your questions.

Bob Corker (00:29:32): Thank you very much. Doctor Feaver.

Peter Feaver (00:29:35):⁸ Chairman Corker, ranking member Cardin and distinguished members of the committee. Thank you for the opportunity to discuss this important topic which I will refer to as nuclear command and control.

My bottom line is simple. In the past, congress has played a vital role in pushing the executive branch to strengthen command and control, and the time may be ripe for another close look. However, we must proceed with some caution because the topic is complex and susceptible to unintended consequences. I'll make four points.

First, at the heart of nuclear command and control is what might be called the "always/never dilemma." For nuclear deterrence to work we must have a high assurance that the country will always be able to present a creditable nuclear strike capability to our adversaries. Even in the most dire scenarios; however, because even a single nuclear detonation would be so consequential it might trigger an escalatory spiral that would lead to civilization threatening outcomes. We must also have a high assurance that there will never be an accidental or unauthorized use of nuclear weapons. The challenge is that measures designed to improve the always side of the equation can compromise the negative side and vice versa.

Pre-delegating the authority to use nuclear weapons and spreading that capability to do so to lower echelons may thwart an enemies first-strike planning, for example, but it would increase the risk that a weapon might be used in an unauthorized fashion or by someone confused the fog of battle. The history of nuclear command and control is a history of civilian and military leaders debating the proper balance between always and never. It is a history of occasional discoveries that the risks on one side or the other side of the ledger were greater than originally understood

⁸ Feaver's written testimony appears here
https://www.foreign.senate.gov/imo/media/doc/111417_Feaver_Testimony.pdf

and it is a history of improvements. Some, like permissive action links, pal's,⁹ which are coded locks that block the detonation of a weapon without the pin code and pressed by far seeing congressional advocates. These improvements that may have helped to forestall disaster.

This brings me to my second major point. We must be willing to invest the requisite funds to keep the technology up to date. But in the nuclear command and control business hardware is trumped by software, and software is trumped by wetware. Hardware refers to the technologies, like the pal's I just mentioned. And software refers to the rules and procedures that govern how the hardware is used. For instance, the code management system that determines who has the PAL codes and who is authorized to release them. Wetware refers to the human element. The reliability of people involved to enforce the rules, and the civil liberty relations that form the political context in which the software and hardware operate.

At the end of the day what would matter most is the human element: With¹⁰ the president's advisers to be in a position to provide timely council and would that council shape the president's decisions? Would the various echelons in the chain of command recognize a valid authenticated nuclear use order as being legal given the militaries deeply ingrained training to refuse to implement any illegal order? Indeed, would subordinate elements in the command and control system do what they are supposed to do, no more and no less, but with appropriate judgment?

This last point cannot be overemphasized. For decades now, it's been technically possible to build a nuclear command-and-control system that would eliminate the human element altogether. Every generation of strategic leaders has understood that such a system would be foolhardy in the extreme. The human element introduces risks, to be sure, but it also introduces the opportunity to mitigate risks.

This brings me to my third major point the best reforms to nuclear command and control would be ones that maximize the opportunity for the human element to mitigate risk by maximizing time for deliberation and assessment. Of course, efforts to extend decision times must not run afoul of the always/never dilemma.

I conclude with my fourth and final point. The time is right for a fresh look. Changes in communications technology and rapidly evolving cyberthreats alone would justify a fresh examination. Threats that were warned about five years ago have become urgent realities today. And finally, our divisive political environment has raised new doubts about the effectiveness of all our branches of government to wield the power they possess responsibly. In that context a thoroughgoing review of nuclear command.

Outside control could help shore up nuclear confidence in this area and experts have suggested many possible improvements that are worth considering. For instance, there are a variety of proposals that involve requiring certifications by additional cabinet officials of launch orders

⁹ Permissive Action Links. A security device that prevents the unauthorized detonation of a nuclear weapon. These take the form of locks on firing system or electronic codes that need to be entered into the weapon's system. Permissive action Links were originally a combination lock that prevented some part of the nuclear detonation and were first installed in 1959 in Europe based weapons.

¹⁰ I believe Feaver misspoke and intended to say "would" rather than "with."

under circumstances; however, all of these proposals raise important constitutional questions about usurping the president's authorities. Because of those actual operations of the current system are exceedingly complex, I would recommend great caution before legislating any particular fix. Nevertheless, I would recommend diligence and perseverance in oversight of the system to reassure our friends and to warn our enemies that the nuclear arsenal will function as it is intended. Thank you.

Bob Corker (00:35:23): Thank you very much, Mr. McKeon.

Brian McKeon (00:35:26): Mr. Chairman, Senator Carden and members of the committee thank you for your invitation to be here today. It is nice to be back in this room after spending so many years of my professional life working on the staff of this committee and I will digress briefly, Mr. Chairman, to say I am very impressed up quickly you mustered a quorum, having spent numerous hours waiting and waiting and waiting for that magic tenth senator to show up.

Bob Corker (00:35:47): Thank you. It's one of the rare times that occurred, but glad you [unintelligible, possibly "noticed"] that, so.

Brian McKeon (00:35:51):¹¹ I will briefly address the three questions and try not to duplicate my colleagues.

First, who has the authority to employ nuclear weapons? In one respect the answer is simple, the president does. He is 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, then further delegated to 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 bares 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. That is hardly the end of the inquiry.

The authority to employ nuclear weapons is closely intertwined with an equally momentous question. Who has the authority to take the country to war? Article one of the constitution gives congress the power to declare war, grant letters of marque and reprisal, and several other powers in regard to supporting and regulating the armed forces. To the president, article two provides he is the Commander-in-chief of the army and navy. The constitutional text structure in our history provides 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.

¹¹ McKeon's written testimony appears here
https://www.foreign.senate.gov/imo/media/doc/111417_McKeon_Testimony_REVISED.pdf

To be sure the president possesses the constitutional authority to defend against sudden attack, or to preempt an imminent attack. Article two does not give him carte blanche to take the country to war. In the modern era, the presidents of both parties have often made broad assertions of authority to take military action without prior authorization by congress in a manner that the framers would not have recognized.

Nonetheless we need not resolve this gentle debate to answer the specific question presented in today's world. In addition to the of global terrorism challenge, our major potential adversaries today number in one hand with Russia, China, North Korea, and Iran. Three of these countries possess nuclear weapons, and the fourth has pursued just such a capability. Therefore, conflict with any of these states could conceivably involve nuclear weapons use. Direct armed conflict with these countries would undoubtedly be war, in the constitutional sense, if initiated by the congress... excuse me, and if initiated by the United States would require authorization by the congress.

A recent executive branch opinion on the war power by the office of legal counsel of 2011 supports this conclusion.¹² It indicated that analysis of wither congressional authorization of use of military forces required would turn on the examination of, quote, the "nature, scope, and duration," end quote, of the conflict. and that specific congressional approval would be necessary in cases of, quote, "prolonged and substantial military engagements typically involving exposure of U.S. military personnel to significant risks over a substantial period of time." End of quote. It is hard to imagine an armed conflict scenario with any of these countries that would not meet that test.

The rapid advances of North Korea's nuclear and missile program and the escalating rhetoric between the president and 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 buttress by a recent letter to your house colleagues from the Vice Director of the Joint Staff, Rear Admiral Michael Dumont¹³ where he stated that a ground invasion¹³ would be required in order to locate and destroy all components of North Korea's nuclear weapons program. Given a high number of casualties that would occur in any conflict with North Korea, let alone during a ground invasion no reasonable argument could be made that that would not be war in the constitutional sense. The president and his senior administration officials have stated that time is running out to address the North Korea challenge. And in August the national security advisors suggested the

¹² Memorandum Opinion from Caroline D. Krass Principle Deputy Ass. Att'y Gen. to the Att'y Gen. Authority to use Military Force in Libya (April 1, 2011). (On file with the Justice Department)

https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf

While the phrase "nature, scope, and duration" is a reoccurring theme of the document, the long quote is found on page 8. Also of interest, the Legal Advisor Harold Hongju Koh also testified before the Senate Foreign Relations Committee on June 28, 2011 regarding Libya and War Powers. His written statement is found at <https://2009-2017.state.gov/documents/organization/167452.pdf> Full hearing can be found at <https://www.foreign.senate.gov/hearings/libya-and-war-powers>

¹³ Letter from Rear Admiral Michael J Dumont, U.S. Navy, Vice Director The Joint Staff, to The Honorable Ted W. Lieu, U.S. House of Representatives (October 27, 2017). (on file with the recipient's office) <https://lieu.house.gov/sites/lieu.house.gov/files/Response%20to%20TWL-RG%20Letter%20on%20NK.pdf>

possibility of a preventive war.¹⁴ such a war as distinct from a pre-emptive strike in the face of an impending attack would also require congressional authorization.

For context on these two questions I would answer third, “what is the current policy use of nuclear weapons?” In my prepared statement I highlight several elements of the results of the Nuclear Posture Review of 2010¹⁵ and the presidential employment guidance issue in 2013,¹⁶ which remained in place while the trump administration completes the Nuclear Posture Review ordered by the president in January.¹⁷ General Kehler has described some of these elements as well in his statement. Most important the 2010 NPR set the goal to reducing the role of nuclear weapons in the U.S. National security strategy. And it’s important to understand there is nothing that compels... nothing in the current guidance that compels the use of nuclear weapons in a high end conflict.

Finally, I would note 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 speech¹⁸ in which he said, “that given our non-nuclear capabilities and the nature of today’s threats it is 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 the president were confident that we could deter and defend ourselves against...and our allies against non-nuclear threats through other means.

In closing, thank you for the opportunity to be here and I look forward to your questions.

Bob Corker (00:41:10): Thank all three of you for that outstanding testimony. As usual I’m going to reserve my time for interjections, and turn to a ranking member.

Ben Cardin (00:41:20): let me also thank all three if you, not just for your appearance here today but for your service to our country on these very difficult issues. I want to preface my question with my strong belief that there is not a military solution to the crisis in North Korea. That any military option carries unbelievable risk factors. Wither it be conventional or the use of nuclear weapons. And I hope the president's trip to Asia has produced the openings to a diplomatic search that will recognize that both China and the United States should be looking for

¹⁴ This statement is in reference to an interview that National Security Advisor H.R. McMaster had on MSNBC with Hugh Hewitt that aired Aug. 5, 2017. Full transcript located at <http://www.hughhewitt.com/national-security-advisor-general-h-r-mcmaster-msnbc-hugh/>

¹⁵ Dep’t of Defense, Nuclear Posture Review 2010 (April, 2010). https://www.defense.gov/Portals/1/features/defenseReviews/NPR/2010_Nuclear_Posture_Review_Report.pdf

¹⁶ Dep’t of Defense, Report on Nuclear Employment Strategy of the United States Specified in Section 491 of 10 U.S.C (Jun. 12, 2013) <http://www.dtic.mil/dtic/tr/fulltext/u2/a590745.pdf>
Press Release, The White House Office of the Press Secretary, Fact Sheet: Nuclear Weapons Employment Strategy of the United States (June 19, 2013) (on file with the White House) <https://Obamawhitehouse.archives.gov/the-press-office/2013/06/19/fact-sheet-nuclear-weapons-employment-strategy-united-states>

¹⁷ This statement is in reference to Memorandum from The White House to the Sec. of Defense and the Director of the Office of Management and Budget, Presidential Memorandum on Rebuilding the U.S. Armed Forces. (Jan. 27, 2017) (on file at the White House). <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-rebuilding-u-s-armed-forces/>

¹⁸ Joe Biden: "Remarks by the Vice President on Nuclear Security," January 11, 2017. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. <http://www.presidency.ucsb.edu/ws/?pid=121419>.

off ramps to this crisis, and they have a lot in common. And China can change the equation in north Korea.

So I hope that is where we are headed because the use of any military option has extreme risk. So this is not a hypothetical discussion. What concerns me is that the president may be getting military options. And the use of conventional weapons could lead to an extreme number of casualties in Japan or in South Korea. So there may be a discussion about whether a nuclear first-strike could prevent that from occurring, or have a less of a chance of that occurring. So this is not a hypothetical discussion. So, General, I was particularly impressed by your statement which says “in addition, the legal principles of military necessity, distinction, and proportionality also apply to nuclear plans, operations, and decisions. So, how is the president legally restrained if that all on the use of a nuclear first strike as a result of the orders that are there under command that it must be proportional?”

Or that there is a distinction that requires this military necessity? Is there any real restraint on the part of the president on choosing a nuclear first strike in a circumstance in North Korea?

Robert Kehler (00:43:39): Senator, I think there are. I think there are always legal constraints when any military option is being considered. There has been a long standing debate about nuclear weapons and morality and legality and where nuclear weapons fit in all of that. Given that things changed in August of 1945 and there has been...uh...I think a longstanding policy view from the United States that nuclear weapons are not inherently illegal. They can be used illegally. But the question is under what circumstances and what situation. And what I can tell you is that when I was involved, as the commander of STRATCOM [Strategic Command], in planning...uh, pre-planning options that we were ordered to do. The president directs...every president has directed the military to pre-plan some options. More as time has passed for additional flexibility etcetera etcetera. We involved our legal advisors in every step of that process...[interrupted]

Ben Cardin (00:44:51): I'm sorry to interrupt you but there. So is discussion taking place at the national security council level with legal advisers with military advisers. And the advice is that under the guidelines on proportionality and necessity that this is not appropriate for a use of a nuclear first-strike. Is there action that can be taken by those advisers if the president overrules that decision and says “no, we are going with a nuclear attack”?

Robert Kehler (00:45:22): Other than to state their view about the legality of the move. The president retains constitutional authority to order some military action.

The military...you would be in a very interesting constitutional situation I believe because, again, the military is obligated to follow legal orders, but is not obligated to follow illegal orders. The question [unintelligible]...[interrupted]

Ben Cardin (00:45:53): who would make that judgment on behalf of the operational command under DOD?

Robert Kehler (00:45:59): Well that's one of the things that would be on the plate of the Commander of Strategic Command. I always believed that that was on my plate. That ultimately, it's very difficult...[interrupted].

Ben Cardin (00:46:08): So, let me just drill down on this. If you believed that this did not meet the legal test of proportionality, even if ordered by the president of the United States to use a nuclear first-strike. You believe that under...because of legalities you retain that decision to disobey the commander-in-chief?

Robert Kehler (00:46:30): Yes. If there is an illegal order presented to the military, the military is obligated to refuse to follow it. Now the question is just the one you described. Is the process leading to that determination and how you arrive at that? And I would concede to you that would be a very...um... that would be a very difficult process and a very difficult conversation. But in the scenario that you are painting here I would also argue that there's time for that. There's time for that kind of deliberate conversation on these matters.

Ben Cardin (00:47:08): And just to complete this cycle. Part of this is the protocols that have been established under executive orders on the use of nuclear that require a legal...the proportionality that you are talking about. Others is the inherent responsibility of military command to follow only orders that are lawful. Is that... am I reading that correct? [overlapping with Kehler's response]

Robert Kehler (00:47:31): That's right, YES.

Ben Cardin (00:47:32): So, there's two different sets because you may very well be getting opinions from the commander in... from the White House that this is legal but you would have to make your own independent judgment based upon history and based upon falling on illegal orders.

Bob Corker (00:47:48): I'm going to use my first introduction here. So, so in the event...um... somebody in your former position received an order that had not... that you knew had not been vetted through the national security council, for instance. That discussions had not taken place. That just... you got a call out of the blue. Things were tense in a particular area and you received that order would you consider that to be legal or not legal?

Robert Kehler (00:48:16): I never felt, senator, that I ever had to vet orders through the national security council. I felt, as a military senior leader, that I had three obligations. One obligation was to provide my military advise. One obligation was to raise any concerns that I had if they were legal concerns to raise those concerns. And then the third obligation I had was related to the legality of the order. Either follow a legal order or refuse to follow a legal order.¹⁹ I had legal advisors myself. I fully expected that we would involve the secretaries' legal advisors, the chairman's legal advisers. Where DOD took that from there I...was sorta their issue to take. But this, I would certainly have been in consultation with the secretary of defense and the chairman.

¹⁹ It appears that Kehler is defining "legal" in this case as "the person sending the order has decision authority" rather than "an order that would withstand legal vetting."

Bob Corker (00:49:06): Senator Johnson.

Robert Johnson (00:49:07): Gentleman I want to continue down...along this line of questioning. From my standpoint there is really two basic scenarios. The scenario where we are under imminent attack, there is an attack that is imminent. And then one where it is more pre-emptive. Where there is time, you said there always would be time, there may not always be time correct?

Robert Kehler (00:49:27): I did not mean to suggest that there would always be time, I agree with that.

Robert Johnson (00:49:32): So when we are... when the president would determine that we are under the threat of almost an imminent attack he has almost absolute authority, correct?

Robert Kehler (00:49:43): Yes, I... context matters here, and...yes.

Robert Johnson (00:49:50): So is there any process to assess imminent at that moment?

Robert Kehler (00:49:57): So, I'm a former commander not a lawyer so...[interrupted]

Robert Johnson (00:50:01): [jovial] I... I'm an accountant so...

Robert Kehler (00:50:02): so...so... let me just say this to try to shed some light on this. Context matters here. If in fact in a range of scenarios where nuclear weapon use is possible or there is a potential for nuclear weapons use. U.S. policy has helped us clarify over the years under what circumstances we might expect to use nuclear weapons. For example the 2010 Nuclear Posture Review said "extreme circumstances when vital nuclear interests are at stake."²⁰ As a commander I had that in my mind as... as a context for nuclear weapons. And if we had tactical warning that an attack was underway then we were into a playbook basically that had been vetted for its legal viability etc. etc. etc.

Robert Johnson (00:50:59): So so so we we've somewhat defined imminent. I mean obviously if you see radar say that...

Robert Kehler (00:51:04): Absolutely.

Robert Johnson (00:51:04.5): ... this is a launch that's obviously imminent. What if it's right before?

²⁰ The exact quote from the 2010 NPR is either "Indeed, the United States wishes to stress that it would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners" (viii-ix), or "Indeed, the United States wishes to stress that it would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners" (16).

https://www.defense.gov/Portals/1/features/defenseReviews/NPR/2010_Nuclear_Posture_Review_Report.pdf

Robert Kehler (00:51:09): well. There's also the conditions when you have strategic warning. Where we have solid warning that something will happen.

Robert Johnson (00:51:19): that's already game planned out in terms of what strategic warning is that would... it was imminent

Robert Kehler (00:51:24): well it's not precisely defined. But I think it would certainly be one of those matters under consideration. Tactical warning, by the way, carries with it some amount of time urgency. Either for the survival of the decision maker or for a decision on what to do in terms of responding. Strategic warning is not as time urgent and so more time gets introduced into these scenarios as you go from the most extreme stressing scenario back to the left.

Robert Johnson (00:51:55): So so that's the next scenario where it's more strategic and you have time. And lets say you get presidential order to launch...

Robert Kehler (00:52:07): Right

Robert Johnson (00:52:08): ...but you're in the position and you know that it has not gone, you have not found the process. It's not been properly vetted. In that case, in your position you don... you believe that is an illegal order... [interrupted]

Robert Kehler (00:52:17): No, I believe you have to determine wither that's illegal ord... [interrupted]

Robert Johnson (00:52:20): But you... you would have that... you believe that is your responsibility. You have the authority to say...

Robert Kehler (00:52:24): yes.

Robert Johnson (00:52:24.5): ... this is not legal because we have not followed the steps we haven't gone through the process.

Robert Kehler (00:52:29): I would have said that "I have a question about this" and I would have... uh... I would have... said "I'm not ready to proceed."

Robert Johnson (00:52:40): And then what happens?

Robert Kehler (00:52:42): Well [muffled laughter from Kehler, continues throughout statement] you know, as I say. I don't know exactly...no... fortunately we have never... these are all hypothetical scenarios. I mean they are real in terms of...

Robert Johnson (00:52:54): But but we are holding a hearing on this so...

Robert Kehler (00:52:56): they are all... exactly [in response to Johnson's interjection]... This is the human factor I...our system. The human factor then kicks in, it's what Dr. Feaver said. There's a human element to this. And at that point I think. As with any military order it doesn't

matter really. The consequences are higher if it is an order on nuclear weapons but it's the same principle on any order.

Robert Johnson (00:53:23): so the point is there is a lot of human intervention between a presidential order when there is time, it's not imminent, to really ask the questions. To lay out the facts. "we haven't gone through this process" "it's not well thought out" "it's not proportional" uh... so we can have a little comfort that even though the president has the authority, there are limits to that even within this context when there is time.

Robert Kehler (00:53:46): I believe that is true and even if time is compressed there are circumstances that I could envision where I would have said the same thing which is "wait. Stop!" Um. "We need to resolve these issues" or "we need to address this question," or whatever. And the process provides for that, in that it's ultimately an interaction among human beings. The decision authority resides with the president, however.

Robert Johnson (00:54:19): Thank you for those answers, thanks for your service.

Robert Kehler (00:54:20): yes sir.

Bob Corker (00:54:24): let me just before we move to the next. The person who is in your position as a senate confirmed, it's a senate confirmed position. Is that right?

Robert Kehler (00:54:33): yes sir. That's right.

Bob Corker (00:54:34): and the... typically the person...that's put into your position is recommended by the military or by the so... how, how does it typically work?

Robert Kehler (00:54:44): Well I can tell you how it worked for me. Uh... uh... the secretary of defense in my case the secretary of defense interviewed a number of candidates, decided on a candidate to recommend to the president. There was a process that was gone through there at some level...um...and I became the president's nominee to the senate, and then you all operated by...

Bob Corker (00:55:11): most most most of the people who ended up being in these positions, are they people that have moved up through the defense mechanisms... uh... solely? This is not a political position typically. It's a position that's based on merit.

Robert Kehler (00:55:24): It is NOT a political position. And it's a position that is based on... I believe experience. And I would like to think merit as well. But certainly experience. Certainly uh... I... there are a lot of factors that go into selection for senior command. That's a great question I think for you to post to other witnesses who have been in a position to select senior commanders. I was the beneficiary of that selection.

Brian McKeon (00:55:52): Mr. Chairman I can tell you that from at least my vantage point in the Pentagon but also as chief of staff with the National Security Council the process General Kehler describes is the process the secretary and the chairman huddle and look at various

candidates from the services for the four-star combat and commands. And under President Obama he personally interviewed most of the candidates who were recommended for selection.

Robert Kehler (00:56:16): And typically, Mr. Chairman, in recent years the commanders of some of those combats and commanders have been typically Four Stars on the second or third assignment. So, I was not a first time Four Star when I was nominated to take command of strategic command. That was my second Four Star assignment.

Bob Corker (00:56:33): Thank you. Senator Udall

Tom Udall (00:56:35): Thank you Mr. Chairman, and thank all the witnesses for being here today. The...um...the first use of nuclear weapons would appear to be a clear declaration of war. Certainly, the recipient of a U.S. nuclear attack would perceive it that way. Under the U.S. constitution only congress can declare war. Should congress require the president to seek authorization for the first use of nuclear weapons? Why or why not? Mr. McKeon why don't we start with you.

Brian McKeon (00:57:11): Well senator, as I laid out in my opening statement it is my view certainly if the United States were to initiate war with another nuclear state, and... we conceive the use of nuclear weapons might be possible that's war in the constitutional sense that congress should be authorized. If we are under attack from a nuclear state using nuclear weapons, that's a different question and the president would have the authority under article 2 to respond wither with a conventional or nuclear weapons. The hardest question is the...the in between question in what Senator Johnson was getting at is where do you define imminence on the continuum?

Tom Udall (00:57:52): How you define it?

Brian McKeon (00:57:53): Well, it would be very fact specific... uh to give you a bit of lawyers dodge. But...that... kinda the most obvious case is we... we, see a of missile on a launch pad or several missiles on several launch pads and we have good intelligence that they intend them to not test them but launch them at the United States that seems like a pretty clear case of imminence. And then you would move down the continuum away from that to where it becomes less imminent and more, looks more like a preventive attack.

Tom Udall (00:58:25): Mr. Feaver and General [Robert Kehler]

Peter Feaver (00:58:27): Well, what I would say is distinguish between scenarios where the military wake up the president, versus scenarios where the president is waking up the military.

Where the military waking up the president and warns him that there is about to be an attack or that we are experiencing attack in those settings the president has a very limited time window to make a decision. He would make a decision. He alone would have the authority to make the decision. And I think we all believe that this system would carry out the order that he gave. The electorate on election day chose him to make that decision.

But in the other context where the president's waking up the military. Maybe in an extreme funk saying, "I am angry and I want something done." In that setting he requires the cooperation of a lot of people who will be asking exactly the questions that General Taylor outlined. What's the of context and why is this? And the president alone could not affect the strike. He would require lots of people cooperating with him to make the strike happen. And they'd be asking the questions that would slow down that process.

And so the context matters greatly for this. Our experience is that the president has asked for authorization when he is initiating a conflict. That's what President Bush did in 2002. And I believe that there was that kind of context, the president would expect to go to congress for authorization for something in that style.

Tom Udall (01:00:09): Now... the...the um... per the U.S. Air Force instruction two-person concept is designed to prevent an accidental or malicious launch of nuclear weapons by a single individual. In the nuclear chain of command the only exception to this rule is the president. would it not make sense to require at least one other person sign off on a decision to launch a first strike for example a constitutional officer, such as the vice president? [signals to Brian McKeon]

Brian McKeon (1:00:45): uh, Senator...I... there is an adage in the of law... uh... which you may be familiar with, that hard cases make bad law. And this is a hard case. Uh... and I think taking away the president's authority as commander-in-chief or diluting it in some respect by requiring him to go to another constitutional officer in a formal sense, I'm not sure that's a wise course. I do think, as I said, it would be a rare case where the president would not consult with all of his senior advisors to include the vice president. It it's just automatic in the system wither there is time... considerable time or not that that would occur. [brief vocal interruption from Udall] that would be very unusual if it didn't.

Tom Udall (01:01:29): Do you all disagree or agree with that?

Peter Feaver (01:01:32): I do not disagree. I think that any law that you pass that raises constitutional questions will be very difficult: one, to get passed, and two, very difficult to implement. You want to make sure you don't propose a legislative fix that undermines the nuclear deterrent and thus compromises the effectiveness of why we have nuclear weapons.

Robert Kehler (1:01:53): And I agree with both of my colleagues, there...there are two different questions really at work here. One is a question of constitutional authority. And...and what the Commander-in-chief is...is... uh, allowed to do as the Commander-in-chief and the other is...is a... is a principle and a set of process and procedure that insure that the... that the authorized use remains at the most senior civilian authority and that unauthorized or...or accidental use cannot occur.

Tom Udall (01:02:26): Thank you. Mr. Chairman.

Ben Cardin (01:02:28): Thank you. Senator Young.

Todd Young (1:02:32): Thank you Mr. Chairman and I thank all of our panelists for being here today. Uh, General Kehler I just want to follow up on what has been much discussed here.

In your written statement you indicate

The legal principles of military necessity, distinction, and proportionality also apply to nuclear plans, operations, and decisions. Legal advisors are deeply involved with commanders at all steps of the deliberate and crisis action processes to offer perspective on how force is to be used as well as the decision to use force.²¹

So um. A few observations and I'll give you General and... um... you Mr. McKeon since you are the attorney on the panel to respond to any you like.

Number one it is unclear to me what the legal standard is...uh...for...uh... a person to determine whether or not these legal principles have been satisfied. So is the standard that no reasonable person could conclude the order was necessary or proportional or is there some other legal standard or is that left strategically vague?

The second observation is it is unclear what the commander-in-chief's recourse would be. If in fact, a military person decided not to move forward with these orders based on principle reasons that are grounded in...uh... the legal principles of military necessity and proportionality? That is, what if a military person regards the order as illegal, decides to do what we are taught in the military to make known their decision and refuses to obey that order. What recourse does the Commander-in-chief then have in the wake of such a decision?

And and then, the last observation is that I am unaware of... uh...and and...uh... perhaps most others are as well, I'm unaware of any sort of what I'll call discernment training. That is the training of our military personnel to be able to apply these legal principles to different circumstances. To different military contingencies. Considering legal questions in advance, to me seems distinct from making firm legal determinations in advance. And... um going through a series of um wargames or contingencies could help sharpen one's ability to apply the facts of different complicated global circumstances to these legal principles.

So with that if you would like to comment on any of those observations why don't I start with Mr. McKeon as the councilor to the president.

Brian McKeon (01:05:42): Senator Young, on the second question about legal recourse. If you have a commander saying that he did not believe it was a legal order the chain of command runs from the president to the secretary to the combat commander. The chairman of the joint chiefs is not in that chain of command.

And I would suppose that the first recourse would be to call the secretary of defense to tell him to order the commander to do it. And then if the commander still resisted you either get a new secretary of defense or you get a new commander. But you would have a real constitutional crisis on your hands if that occurred.

²¹ Kehler's written statement, page 5. Link provided above.

I'm unaware that there is a strict legal standard like no reasonable person on the judgement of proportionality and distinction because it's not an instance that would get litigated very often. Although, General Kehler may be more familiar with UCMJ cases than I am because I'm not a DOD lawyer, I was a lawyer in this committee.

Um... it would be a judgment based on senior military officers like the chairman who would be in the conversation the combat commander and their legal advisors all of whom would have between 30-40 years of military service and experience and understand how to make these assessments. I think that's the best answer I can give you.

Todd Young (1:07:07): Thank you. Uh, General do you have anything to add, uh and also perhaps you could answer the question. Of course these would be highly classified training regiments but um ah, if you would prefer to brief me in a classified setting but about our ability to train people to discern uh when proportional, necessary, orders have been [trails off].

Robert Kehler (1:07:36): right, well we certainly do train everybody in the military on what we collectively call the law of armed conflict. And that training occurs... probably somewhere every day. It includes the nuclear forces it includes everyone wearing a uniform. And so that...this is not foreign concept to people who wear our uniforms.

In terms of what is legal precedent here I frankly can't answer that off the top of my head. I don't know. And with the legal standard is for determining distinction, proportionality, and military necessity I can't describe that off the top of my head either. What I can say is for nuclear decision-making at the highest level it's a, it's a... consultative process. And there are senior people involved in that process where my expectation always was: if there was a question about legality.

First of all, if this was something we had planned then those issues have been addressed and resolved prior to the time that the plan becomes part of a playbook that says "hey, you can pick this one, because we have already been through all of that for this, or this, or this" and there are many options have been preplanned. If we were doing crisis action planning we would do the same thing. We would follow through, that happens faster but we would follow-through with the same thing, the same legal standards would be applied.

I always assumed that if issues got raised at the most senior level that we would be able to resolve those issues and then as was described, the chain of command is operative here.

Ben Cardin (01:09:12): Thank you. Thank you both very much. Senator Murphy.

Christopher "Chris" S. Murphy (1:09:16): Uh...thank you Mr. Chairman for convening this hearing. This is fascinating. Thank you all for being here today. Let me just pull back the cover for a minute... um... for this hearing. Um.

We are concerned that the president of United States is so unstable. Is so volatile. Has a decision-making process that is so quixotic that he might order a nuclear weapons strike that is wildly out

of step with U.S. National security interests. So let's just recognize the exceptional nature of this moment and the discussion that what we're having today.

I want to maybe pin together um some of the questions that have been asked here... uh, in a little bit of a more pointed form. We have been talking about the ways in... the reasons that an individual in the chain of command may decide to refrain from carrying out a particular order because of its illegality. I think senator young raised some very good concerns around the difficulty of evaluating wither a particular order is necessary or proportional.

But...llllll... let me ask a simple question. Is one of the question that is asked in determining wither an order is legal...um ... is...whether or not if there is a declaration of war that allows for that military action to take place? Would there have to be an independent legal determination made by those in the chain of command that there was an operational declaration of war in the absence of an attack or imminent threat?

Robert Kehler (1:11:10): [suppressed laughter] Senator, you're looking at me... I... Are you asking me?

Christopher "Chris" S. Murphy (1:11:13): sure.

Robert Kehler (01:11:14): Great. Uh, I... so the... the authority to use force... uh... and wither or not there is a declaration of war comes back to context here. At least from my perspective. I've always viewed the use of nuclear weapons as fitting in with our declaratory policies. Which is we would be in extreme circumstances. And it was described pretty well, it was described the last nuclear posture review.²² But subsequent to that it was described in other various ways by the United States various administrations over time that we would be in some kind of extraordinary or extreme circumstances. And we would be dealing with national interests that are at stake here.

I can't go back and recite the authority that's been granted in the past to respond with nuclear weapons but my belief, and I could be wrong here, was that this issue of strategic and tactical warning has been addressed in prior ethics and that... uh we were on...we were NOT on shaky legal ground if we were talking about response to strategic or tactical warning.

Christopher "Chris" s. Murphy (1:12:38): But the question is to wither there is legal authority. Is part of the decision-making process regarding the legality of a particular order that the chain of command is being asked to carry out. And Dr. Feaver you agree?

Peter Feaver (1:12:52): Right, one of the things that the officers will ask themselves is under what authority are we conducting this...uh operation and that would require referring back to "what are the authorities?" They could reach the judgment that it's the inherent authorities in Article Two of the commander-in-chief clause. And so you would require a legal judgement and there's legal staffs throughout the chain of command.

²² Kehler is referring to the 2010 NPR section on "Reducing the role of U.S. Nuclear weapons" pp. 15-19.

What would be the case though is it wouldn't be the president alone persuading a single military officer, alone, on the other side of the telephone. There would be a large group of advisers and legal advisors weighing in on this and that's an important part of the context that is sometimes lost in the media coverage. There would be a lot of people under this scenario that you describe. Not imminent, not waking the president up, but we have time to decide this. Many many people would be weighing in including many lawyers.

Christopher "Chris" s. Murphy (1:13:51): I think Mr. McKeon answered this to an extent but I'll ask you Dr. Feaver. Would the possession of a nuclear weapon capable of reaching United States constitute an imminent attack in your opinion? The simple possession of a weapon capable of...nuclear weapons capable of hitting the United States. Does that constitute an imminent attack?

Peter Feaver (1:14:14): I'm not a lawyer so I could not judge wither that would meet the legal test. I think it would in most people's minds constitute a grave threat to U.S. National security particularly if it was a North Korean nuclear warhead topped of a North Korean missile that was capable of reaching the United States I think most Americans would view that as a grave threat to our national security whether if that would meet the legal test of imminence would require legal judgement, and ill defer to council on my right [gestures to Mr. McKeon].

Christopher "Chris" s. Murphy (1:14:44): Mr. McKeon.

Brian McKeon (1:14:47): Senator, the mere possession of nuclear weapon I do not think would meet that test. I think there would be time and required for congressional authorization if the decision were taken that the mere possession of a nuclear weapon by a state such as North Korea was unacceptable to U.S. National security. They have a nuclear weapon today, we know that much.

Christopher "Chris" s. Murphy (1:15:09): Thank you. Mr. Chairman.

Ben Cardin (01:15:10): Senator Rubio.

Marco Rubio (01:15:12): thank you Mr. Chairman. Thank you all for being here. I want to say at the outset that this is an important conversation, but one we should tread lightly on. Um, our allies who rely on U.S. Defense assurances are watching and if we create doubt in their mind about the capability or willingness of the United States to live up to those commitments in any way, and I'm not claiming that is what anyone is doing, I think that could have repercussions that that are significant. Including encouraging some of them to perhaps pursue their own deterrent capability if they come to doubt our political ability and our willingness to live up to our commitments, actually, making the world more dangerous not less dangerous.

I also think our adversaries are watching and I'll get to that part in a moment. But I think if anyone out there thinks they can somehow get away with something because in politics of the United States to prevent the commander-in-chief from acting expeditiously, that could also encourage miscalculation. Particularly on behalf of people that are isolated from the world, don't

get a lot of information and never had anyone telling them they are wrong or no. And I have one person particularly in North Korea that concerns me in that regard.

I don't think there's a debate about imminent attack or under attack. I think we all... I would agree...I...I... think we all agree that the president of United States has to have the capability to quickly respond if we are under attack and/or under potential imminent attack. And... and... Obviously there can be debate about it.

I think it's also important for us and context of this new posture review to know the traditional Cold War threat of a massive exchange between the U.S. and the then Soviet Union... uh... is probably not likely in the short term. I think the likelier threats remain that the use of Russia tactical battlefield weapons, to de-es... to escalate in order to de-escalate a battlefield event, a terrorist organization comes into possession of a nuclear device or some other weapon of mass destruction, and then a rogue regime that doesn't have any of these safeguards we've talked about. It is basically one guy who has a bad night, gets up and decides he wants to do something about it.

So these are, these are things that I think is important to understand. I think the whole debate is about first use. And I want to touch on a topic that was first innovated during the Cold War in the context of an overwhelming conventional advantage of the Warsaw pact. But we also saw it operative in the first gulf war, and that's the notion of calculated ambiguity. And I believe it served us on both ends particularly in '91 when Saddam Hussein was perhaps tempted to use biological and/or chemical weapons. One of the reasons why perhaps he did not pursue is because there is calculated ambiguity about whether or not that would trigger a U.S. Nuclear response. And I think we can all foresee what that conflict would have looked like when they have deployed biological and/or chemical agents that he had in his possession... could potentially have used.

Is calculated ambiguity still an important concept in the 21st century? uh...The notion that adversaries should have doubt in their mind about whether or not the United States retains the right to strike first. Should they either use a weapon of mass destruction and or move in a dangerous direction. It calculated ambiguity still useful and still operative in this set of threats that we now face? [reaches for glass of water]

General C. Robert Kehler (01:18:23): senator I believe that...that...uh, it enhances our deterrents to have some doubt in the mind of an adversary about under what conditions we would use a nuclear weapon.

Peter Feaver (01:18:39): Senator, I agree and I go further to say that President Obama, who was no fan of nuclear weapons and who moved us back on the nuclear threat index in his 2010 nuclear posture review, nevertheless, left in place calculated ambiguity on... in precisely these scenarios. And his rewriting of it was taken to mean we would not threaten countries who are attacking us with nonnuclear weapons but a close reading of what he was decided left in place enough ambiguities to achieve precisely the deterrent effect that you described. And that was from a president who was openly hostile to nuclear weapons.

Unclear but I believe it is Brian McKeon (01:19:24): Yes, is the answer to question.

Marco Rubio (01:19:26): The last point in the 40 seconds I have left that I just want to touch on is this whole notion of if it is legal, you have a right. And I think we all understand what that means. You can't...If military officials are ordered to go into a village of innocent civilians and kill everybody, that clearly violates the law that governs armed conflict.

I think there is also some danger in that regard here. We have to be careful how we talk about that as well. We cannot have a bunch of bunko lawyers that basically...or activists up and down the chain who decide that they're going to disobey any order that they disagree with. We can foresee that something that could spin out of control. And ultimately in this republic, we have elections and one of the things that voters think about when they elect someone to the office of president of the United States, is whether or not they want to entrust them with this capability. So it is good that people are aware of the issue but I think we need to be very careful when we talk about that component of it. Thank you.

Bob Corker (01:20:17): I agree, I just want to say...I... I don't think you were here for my opening comments. I cannot agree more that both our adversaries and those who are our friends, that we need to be careful in how we discussed this. We do not want any of them to fear that somehow the ability to make decisions that benefit our country and them... or dis-benefit them if they are acting against us is being taken away. I could not agree more. Senator Markey.

Edward J. Markey (01:20:50): Thank you, Mr. Chairman, and thank you for having this very important hearing. I requested this several weeks ago and I just think it is important that you have such an important discussion because few questions are as important to us national security as the question of presidential authority to use nuclear weapons. Not only to deter or defend against nuclear attempt but also to start a nuclear war.

Nuclear weapons for deterrence, not war fighting, launching of the weapons first would be an unprecedented act of aggression and war, wither limited or massive. Any first-use nuclear strike would devolve into retaliatory strikes and war causing unimaginable deaths, suffering and destruction. Absent a nuclear attack upon the United States, or our allies, no one human being should have the power to unilaterally unleash the most destructive forces ever devised by humankind. Yet, under existing laws, the president of the United States can start a nuclear war without provocation. Without consultation and without warning. It boggles rational mind.

I fear that in the age of trump, the cooler heads in strategic doctrine that we once relied upon as our last best hope against the unthinkable seemed less reassuring than ever. In other areas of government our constitution system of checks and balances ensures that the president does not have sole power to make extreme decisions without some level of national consensus. But on the president's sole authority to start a nuclear war, even in the absence of a nuclear attack against our country, no one can tell the president no. Not Secretary James Mattis or [Rex] Tillerson. Even General Kelly, the chief of staff cannot control the president twitter tantrums.

As a result, many Americans share my fears of the president's bombastic words could turn into nuclear reality. The fact that any American president has the unilateral ability to start a nuclear war is why I have introduced legislation cosponsored by 13 of my senate colleagues to restrict any president's authority to launch a first use nuclear strike without congressional authorization. The founding fathers leave that congress had an integral role in any decision to start a war and today, more than ever, it is imperative that congress reassert that constitutional authority. Mr. McKeon, is the president legally required to consult the approval from anyone else before ordering the launch of a nuclear weapon?

Brian McKeon (01:23:36): Senator Markey, in the context that you described, in the absence of an attack or an imminent attack, I think the constitution requires him to come to congress to get that authority.

Edward J. Markey (01:23:46): Does the protocol for the president to launch a nuclear weapon change if we are under nuclear attack or deciding to launch a first use strike? It is different when we are not under attack.

Brian McKeon (01:23:59): Those are two very different questions.

Edward J. Markey (01:24:02): Two different questions?

Brian McKeon (01:24:03): If we are under attack the president would have the authority under Article 2 to defend the country. And there is no distinction between his authority to use conventional or nuclear weapons in response to such an attack.

Edward J. Markey (01:24:15): Is the informal process by which anyone in the chain of command from the secretary of defense down to the Submariner or Airmen actually initiating the launch sequence that may object to or legally refuse to carry out a presidential order or launch a nuclear weapon?

Brian McKeon (01:24:32): Well, as General Kehler has described the officers in the chain of command, the senior officers and the secretary could raise objections if they believe the order was illegal. I think the system is designed to protect the first or second lieutenant, 23-year-old Air Force officer sitting in a launch control center from having to make that grave decision it is really the Four Stars and the Secretary who need to bear that burden.

Edward J. Markey (01:24:57): Because disobeying such an order would be considered a violation of federal law in a uniform...uh...under the United States code on the uniform code of military justice. So under, in your testimony, you say that in august, the national security advisor, Mr. McMaster suggested the possibility of a preventive war.²³ Which would require a congressional authorization.

In other words, if there had been a decision that was being made by the president, uh to use nuclear weapons, maybe small, tactical nuclear weapons to hit the nuclear weapons system in known locations, in North Korea, as part of a preventative nuclear war, it is your opinion that the

²³ MSNBC interview on Aug 5, 2017. Full transcript in note above.

president would have to come to the United States congress in order to receive congressional approval. Is that correct?

Brian McKeon (01:26:01): Yes, correct.

Edward J. Markey (01:26:02): So, when General McMaster talks in those terms, preventative war, then... un, and that is, I think what most people are most concerned about. This question of the president actually using them. As part of that kind of a scenario. There is in your opinion a constitutional responsibility for the members of congress who have to have voted on that before such a nuclear war is commenced by the United States.

Brian McKeon (01:26:34): Correct. And in my view, the president would lack the authority. We had hearings not in this committee but in the judiciary committee in 1991 when I was working for Senator Biden and the Chairman of that committee. One of the witnesses Harold Koh was later the legal advisor of the State Department said something that stuck with me ever since, which is, silence has a sound. If the sound from congress is silence then the answer is no.

Edward J Markey (01:27:01): Yah, well the sound of silence has finally ended after since 1976 to today on this issue and I think, Mr. Chairman, you deserve much praise for having this very important discussion. Thank you.

Bob corker (01:27:13): Thank you so much for your interest in the topic and for pursuing this for so many years. senator Kaine.

Tim Kaine (01:27:20): Thank you, Mr. Chairman. I also want to thank you for having this hearing. I have a strong belief that under initiations of both parties and under congress of both party's leadership, there's been a significant, kinda creeping abdication of power and the war peace diplomacy space from congress to the president.

There are article 2 powers that are very important with respect to being the Commander-in-chief and with respect to conducting diplomacy. But there is also very strong congressional purgatives -- in the power to declare war but also to oversee treaties and other diplomatic matters. And in recent years, I think this committee has started to pull some of that power back to this in the Pennsylvania avenue in important ways and that is what the Iran review act did.

President Obama at the time was asserting an ability to do this deal with Iran on the nuclear program without seeking the vote of congress and we felt that no congressional imprimatur was very unwise. And we pulled that back. We've done that with respect to Russia sanctions and the current administration tried to pull back a little bit of the oversight responsibility. I've been engaged in an effort with colleagues and the char has recently held a very important hearing on the question of the 9/11 authorization wither it still applies to military operations against other non-state terrorists' organizations and Al-Qaeda. And I view this hearing as much the same way, [to] try and make sure we all share an understanding of what current protocols are, but then ask ourselves whether congress is taking the steps we need to... to make sure we are not advocating the article and responsibilities that we were granted by Madison and other founders in 1787.

General Kehler, I was really interested in your testimony about your...just from a military standpoint as someone who is in command of STRATCOM, as a leader, your thought about an order, if a president gives an order and you would grapple with whether or not you viewed it to be lawful. The question of legality and lawfulness starts with the constitution.

You and we have taken an oath to the constitution. Not to a flag, not to a president, not to a party we take an oath to a constitution. So clearly, if you thought an order violated the constitution, I assume that was incorporated in your testimony but I wonder about your thought about internal protocols. If it is more than just the constitution but you were to feel that in order to use a nuclear weapon say, violated internal protocol that had been agreed upon in the military. With respect to proportionality or some procedural protocol. Is that the kind of using it as a hypothetical, would that be kind of the thing that might make you decide, "no, I cannot execute on that order." And I am interested in understanding if there is a widely shared view of what this line between a lawful order and an unlawful order would be.

Robert Kehler (01:30:11): [cough, clearing of throat] Excuse me senator. Senator the, this issue about legality of orders exist at every level of command. No matter what the order is to use nuclear weapons or whether to use some other kind of weapon, perform some other kind of operation, the principle remains the same.

In order for our military to follow the orders of the civilian leaders, then those orders have to be two things. A couple of tests. One test is that it has to come from someone who has command authority. And second, it has to meet the legal test of the law of armed conflict. So issues about the extent of presidential authority, etc. are really constitutional issues for all of you to hammer out and then provide to the military. That is the way I think that works.

And then second though, when these issues are in military decision-making, I always had a legal advisor by my side. I think you'd find the commanders across the board these days, have legal advisors by their side. Secretary of defense and people who would be part of a conference having a conversation about nuclear decisions, legal advisors would be part of that conversation. And certainly, my experience with this has been that legal advisors are not reluctant to raise their hand and say, before we go further, here are the things you need to consider about legality.

I think Brian's points about "at what point do we need congress to weigh in, etc." While they may not be at the fingertips of every military commander, they are certainly discussed in the military legal profession. And so, I was never concerned that I would not have the appropriate legal advisor at hand and that legal concerns would not be part of that conversation.

Tim Kain (01:32:14): Doctor Feaver, I'm about out of time but if you would like to answer that.

Peter Feaver (01:32:17): So the military has an obligation to follow legal orders. And there is a presumption that the orders that come through the chain of command are and from competent authority are legal. But those orders are simultaneously vetted by the legal advisors as General Kehler said. But as Senator Rubio pointed out, it does not mean that every order that comes down is an opportunity to discuss and debate between the chains of command.

There is a presumption that the orders are legal. And when there is an extraordinary order like in order to launch a nuclear weapon, that would require a lot of attention. And it would galvanize attention. The second point I would make is, you may chairman want to have lawyers back to talk about what are the legal authorities that are extant now regarding conflict on the Korean peninsula. We are still in under an armed hostility. Just in an armistice from the First Korean war and there have been multiple un security council resolutions all of which provide some legal basis for action, U.S. Action. And I'm not a lawyer to adjudicate those but I'm sure that the DOD lawyers are looking at those issues.

Tim Kain (01:33:35): thank you, Mr. Chairman.

Robert Kehler (01:33:36): Mr. Chairman, one more thing to this? I know the senator is out of time. If I was not getting legal input, I was asking for it. And my obligation, my responsibility as the commander of strategic command was to clear up any of those concerns on behalf of the operating forces, they are not in a position really to make a legal determination with an order that is given to them. So for example, spent a lot of time and missile launch control center over my early parts of my career. I had no way to know whether the target that I was being told to strike was a legal target or not a legal target. I was relying on people above me in the chain of command to carry that out. And my view as the commander strategic command was, that was my responsibility to do.

Bob Corker (01:34:29): If I can go back. Doctor Feaver. What was your last admonition to make?

Peter Feaver (01:34:36): It was not an admonition but a suggestion sir [restrained laughter from Feaver].

Bob Corker (01:34:38): I took it as an admonition.

Peter Feaver (01:34:41): there were many questions about what would be the legal authority for us military action on north Korea particularly with regards to nuclear weapons. And while it would certainly be politically advisable that the president go to congress to get new authorization for any new hostilities, it is at least possible, and not a lawyer so I'm suggesting that lawyers be consulted on "what is the legal basis that is already existing because of prior un security council resolutions that authorized the First Korean War which is not over. It is just any cease-fire." And then subsequent un security council resolutions regarding North Korea's illegal nuclear program.

Bob Corker (01:35:22): very good. [Nods toward Brian McKeon] yes, sir?

Brian McKeon (01:35:25): I would just like to comment briefly on Senator Kaine's issue. Four-Star Generals are not shrinking violence. And, I can recall a circumstance, I won't identify the commander, and it was not a nuclear issue. Where combatant commanders looking down the road and seeing the scenario where he saw he was going to get some order and he was wondering whether that would be an illegal order and he started asking questions months in advance of the office of General counsel in OSD. So I... obviously it is a human system, the human system can

break down. But we have people don't get to be four-star Generals unless they are strong individuals.

Bob Corker (01:36:06): Thank you. Senator Risch.

Jim Risch (01:36:08): Thank you, Mr. Chairman. First of all, I would like to thank all three of you for your thoughtful analysis of the issues here. I do want to state for the record, however, that every single word that has been uttered here this morning in this hearing is going to be analyzed in Pyongyang. And they are going to look very carefully at how we, the American people, view this. And for those who are doing the analysis, I want to underscore that our discussion here today from is not as practical as it is academic.

We all have strong ideas about the power of the first branch congress and the second branch, the president and the military. The constitution was written in a day when things were much different than they are today. Moved much slower than they are today. Every time that the president has used force, he has been backed by the American people and by congress. So I want to make sure that Pyongyang understands that this talk about lawyers in this talk about standards and proportionality and all the other things we all talk about, is not a discussion that is going to take place in the heat of battle in today's world.

These decisions have to be made in moments and it is not going to be made by courts or by lawyers or by congress. It will be made by the commander-in-chief of the American forces. And he is going to do that as you pointed out, in all likelihood with the expert that he is surrounded himself with. But nonetheless, he will make that decision and Pyongyang needs to understand that they are dealing with a person who is commander-in-chief right now who is very focused on defending this country and he will do what is necessary to defend this country.

So lest people be confused as most people would be, and I have sat through scores of hours of arguments about the power of the commander-in-chief, the power of congress, etc. From a very practical standpoint, the president of the United States is going to make this decision and he is going to make it quite quickly if he has to. And so I want everyone to understand how this works. And it isn't a grave situation, isn't a situation where lawyers are going to get involved and argue about proportionality and all of these other standards we talked about. This unfortunately, we live in a world that is full of realistic decisions that have to be made. And they will be made. Thank you, Mr. Chairman.

Bob Corker (01:39:04): I think that is the reason we're having this hearing., thank you so much. Senator Merkley.

Jim Risch (01:39:07): Mr. Chairman I have a few minutes left let me respond to that. I agree with that and I think we should have a hearing but the problem I have with that is there are legitimate disputes over the power of the president and the power of congress when it comes to this sort of thing. I want everyone to understand, particularly those in Pyongyang that these are pragmatic decisions that have to be made and will be made and they are not going to be crowded by arguments of an army of lawyers on each side arguing what is proportional in what isn't. You can argue wither that is right or wrong. But that's the facts, those are the facts on the ground.

Bob Corker (01:39:46): I think that is correct and um, I don't think there's any question and one of the reasons we have had some of, passed some of the pieces of legislation that we have through the years. Whether it's the Iran Review Act, or the Russian sanction bills that we just passed. Is that through the years, there's no question that there is a tremendous tilt to the executive branch and certainly still is and will always as related to war, there's no question. But that is the purpose of the hearing and I think it has been a good one to ferret out some of these issues and to cause us to think more fully about what happens during these periods of time. Senator Merkley.

Jeff Merkley (01:40: 30): thank you, Mr. Chairman. Doctor Feaver, I believe you said something to the effect that in the case where you have time to consider in response, the cooperation of many strategic commanders is required to execute an order. Is that more or less accurate? Does that essentially sustain the vision that there has to be a person between the president and the nuclear briefcase who cooperates in order for that briefcase to be utilized?

Peter Feaver (01:41:00): I can't speak in open session about the particularities but I will say that the system is not a button that the president can accidentally lean against on the desk and immediately cause missiles to fly. As some people in the public I think are afraid it would be. It requires the president to work with military aids who are attending him and have possession of the materials that he needs and it requires personnel at all levels of echelon command all the way down to the missile silo to carry out an order. The president by himself cannot press a button and cause missiles to fly. He can only give an authenticated order. Which others would follow and then cause missiles to fly.

Jeff Merkley (01:41:49): in the context, you put the condition in the when you have the time to consider a response. So when you do not have the time to consider a response there has been a lot of conversation here today about reacting on the short order to an assault. Is it still the case that you have to have the cooperation of strategic commanders to execute an order?

Peter Feaver (01:42:14): yes. But in those settings, that is where the military is waking up the president. Because they are the ones who had been monitoring the intelligence picture. They are the ones who are getting the warning that a missile launch against the United States is about to happen and so they are already cooperating by waking up the president, advising him or her of the situation and presenting them the range of options. So I would code that is cooperating with the president in order to give the president the options of making a decision.

Jeff Merkley (01:42:46): those are the types of scenarios that really give people nightmares. There's been over a dozen such scenarios of false alarms where there were folks on both sides, the Russian side and the American side have been extremely worried that a major attack was underway with minutes to spare.

I would like to enter into the record, an article that details more than dozen such events.²⁴ There is the famous moonrise incident in 1960, there's a training video error of 1979, there's a case when Boris Yeltsin actually activated a nuclear briefcase in response to a nuclear research missile being launched by the Norwegians. The...um and it is those cases that give people great worry. And part of the point of a nuclear triad, this hasn't been mentioned today so want to make sure it is mentioned.

Part of the point was to have forces that could survive an initial attack, submarines and bombers that carry weapons. So that you didn't have to make a decision within a couple of minutes. We had assured retaliation with at least two legs of the triad. That were more survivable. Can I just get a response as to whether that's a reasonable analysis?

Peter Feaver (01:44:07): I think that is senator and I think it's precisely why no previous strategic leader decided to put in place an automated response. They always wanted a human in the loop and in the cases that you mentioned, and others, it was a human assessment that concluded "this was not real. We have time to wait." And that is why I would support and advocate for anything that can be done to extend that time. Whether through better missile defense, more hardened communications technologies, so more people can be brought in updating other aspects of the command-and-control system. So that there's time for the human element to make the assessments necessary to reach the right decision. We've had too many close calls over the course of the cold war. But they were avoided in the end by wise human decision.

Jeff Merkley (01:44:59): in some cases, yes. I will not go into details. But so in the 2010 nuclear posture review, is it not the position of the United States that we essentially are saying we would not use a nuclear first strike against a non-..uh... an NPT, Non-Proliferation-Treaty participant who does not have nuclear forces?

Peter Feaver (01:45:21): I written an op-ed in the *New York Times* about this at that time.²⁵ this is how it was covered in the media but when you read it closely, I believe it still leaves wiggle room in particular because it says, those countries in compliance with their nonproliferation treaty obligations and it leaves opaque, who determines whether they are in compliance. I inferred from that opaquesty that it was the White House would determine whether they were in compliance. Which is a loophole that gives the president the strategic ambiguity that he might wish for deterrence purposes.

Jeff Merkley (01:45:54): part of the reason for the discussion over no first use is because it creates more confidence among other nations that are nuclear arms. Not to perceive a false attack by the United States as occurred in the case in 1995 case in which Yeltsin activated their nuclear briefcase. Do you see any value or any value in strengthening the perception that the us by policy would not utilize nuclear weapons in a first strike?

²⁴ "Fact Sheet: Close Calls with Nuclear Weapons," *Union of Concerned Scientists* (April, 2015). Accessed on May 8, 2018 from

<https://www.ucsusa.org/sites/default/files/attach/2015/04/Close%20Calls%20with%20Nuclear%20Weapons.pdf>

²⁵ This may be the article Peter D. Feaver "Obama's Nuclear Modesty," *New York Times*, (April 8, 2010). Retrieved on May 4, 2018 from <https://www.nytimes.com/2010/04/09/opinion/09feaver.html>

Peter Feaver (01:46:31): I do see some value from such insurance but I also see some costs. I think that is why every previous administration, including president Obama who might have been expected to adapt in no first use policy, chose not to at the end adapt a blanket no first use policy. I doubt that this administration would either. If president Obama couldn't be convinced that it was worth the risks, I doubt that president trump would be.

Jeff Merkley (01:46:58): there is a longer conversation about the pros and cons of that but that I am out of time, thank you.

Bob Corker (01:47:02): thank you. Thank you so much, Senator Shaheen.

Jeanne Shaheen (01:47:04): thank you mister chairman, thank you for holding the hearing and thank you gentleman for being here today. Um, Doctor Feaver, in your written testimony said that even a single nuclear detonation would be so consequential and might trigger an escalatory spiral that would lead to civilization threatening outcomes. Can I just ask if everyone on the panel agrees with that?

Robert Kehler (01:47:30): I would agree with it in principle I think. One of the, one of the deterrence features of course that has been with nuclear weapons since the beginning, is the high-risk that any nuclear use will not be controlled. Or could not be controlled. Although we have the place... [interrupted].

Jeanne Shaheen (01:47:55): Absolutely. And that is what helps contribute to the deterrent factor.

Robert Kehler (01:47:59): it does. But we have in place means to try and control it if deterrence ever fails.

Jeanne Shaheen (01:48:04): Mr. McKeon do you agree with that?

Brian McKeon (01:48:07): I agree. I agree with Peter's statement.²⁶

Jeanne Shaheen (01:48:09): I think it is that statement that is so concerning and certainly gives me pause and others pause and I think it's one of the reasons for the hearing.

When we have an administration where the national security advisor has suggested that we can have a preventative war on the Korean Peninsula when the president has said that he is ask our military leadership to come up with plans to address North Korean regime. It suggests that what we are talking about is a nuclear war, a first strike. And certainly the potential for that to escalate as everyone has suggested, is very difficult to even contemplate.

And I think one of the challenges is that we are dealing with a president, as Senator Cardin has said, who has not seemed to be willing to accept advise on an issue, on many issues affecting

²⁶ It appears that Brian McKeon momentarily mixed up Robert Kehler with Peter Feaver, although this appears to be simply a slip of the tongue rather than any substantive confusion over who was speaking.

power. And while I agree with Senator Risch's comment that if the United States is threatened we would want the president to act, I want the president to act in a way that acknowledges input from a lot of experts. And not to act based on a twitter post and the anxiety that produces contributes to the concern about whether we are in a situation where we need to look at...um...in congress a first nuclear strike policy and banning that.

So, you talked about the importance of calculated ambiguity. Senator Rubio raised that. And the importance of that in enhancing deterrence and making war less likely. Can you imagine a policy that would both limit the president's authority to use nuclear weapons and at the same time, not weaken the deterrence value of our nuclear arsenal?

Brian McKeon (01:50:37): in thinking about this hearing, Senator Shaheen we struggle to come up with constructs that make sense and it is hard to develop a principled way to constrain the commander-in-chief power within the executive branch. As I said earlier I think hard cases make bad law and I think if we were to change the decision-making process in some ways because of a distrust of this president, I think it would be an unfortunate precedent for future presidents. And I say that as someone who worked in this chamber for twenty years. I feel strongly about congressional powers and...in this sphere.

Jeanne Shaheen (01:51:22): Doctor Feaver.

Peter Feaver (01:51:23): I think there are proposals that are floating out there that are worth looking at. There is a group of academics like myself who study this issue and we have been kicking around various proposals that would delimit the scenarios so it wouldn't set aside the reprisal, the launch under attack scenarios and then just where there's plenty of time then specifying various protocols for authenticating in order for validating that the orders legal and things like that.

Each of these proposals raises important questions about article 2. And so they would have to be closely vetted. But I think there are proposals like that that could be examined and might improve. However, there are some things that unambiguously would help and that is, modernizing the technology in the command and control system which is overdue in some areas for upgrade. These are very expensive but precisely because of the reason that you said senator that an accident of an unauthorized use would be so catastrophic it's an investment worth making.

Jeanne Shaheen (01:52:30): General Kehler.

Robert Kehler (01:52:31): Senator, we've talked about a lot of potential scenarios this morning. My view on this is, it is not possible to envision all of the scenarios in advance. And when we try to come up with ways to place limits on various scenarios, my concern would be that we are creating some detriment to the overall deterrent.

As unfortunate as it is, the big paradox of the nuclear age is still here. I said that in my written testimony. In order to prevent their use, which is the objective here. We have to be prepared to use them. And for us to presuppose all of the scenarios under which we would want to somehow limit the power of the commander-in-chief, I would just urge you to be very cautious here for the

reasons that were raised today. It has implications for the deterrent, it has implications for extended deterrence, and it has some implications if these just remain unresolved issues, it has implications for our own military men and women and the confidence and trust that they place in the chain of command.

So certainly, I believe we always get better by having these conversations and debating and doing all the things that we've done throughout the cold war and beyond. I would just urge you to be cautious about suggesting changes to this particular system. Again, my perspective from my view was that the process accounts for the kind of scenarios that we have been talking about today. Certainly, accounts for tactical warning that attack is underway and we have preplanned options and the vetting has been done. It accounts for the potential for using before an adversary weapon has been used...[Interrupted]

Jeanne Shaheen (01:54:31): and and and I certainly hear the caution that each of you are giving us. But doesn't it also suggest that it's important for the commander-in-chief to also be cautious in how he talks about this issue so that there is not a miscalculation on the part of our aggressors who would do us harm about what the real intent here is.

Brian McKeon (01:55:02): I fully agree with you on that senator. The statements the president makes through his twitter account no doubt cause concern and confusion on the other side of pacific. They don't have a constellation of satellites to see where we are moving our forces. When he says, "an armada is coming," that obviously has to give them some pause. And people may say "well what he says on the twitter account doesn't matter. We have policies, we have the leadership of the national command authority. The secretary and the chairman. Won't they take care of it?" That doesn't compute in Kim Jong-Un's mind that what the president says doesn't matter. So, I would be very worried about a miscalculation based on continuing use of his twitter account with regard to north Korea as I understand you are.

Jeanne Shaheen (01:55:55): thank you, thank you Mr. Chairman.

Bob Corker (01:55:57): thank you, let me...uh, so...so as I understand it. This, first of all it's been, from my perspective, a great hearing. Very balanced and I think obviously informative after 41 years of not having a hearing on this topic and I appreciate all those, including CRS²⁷ that somewhat encouraged us to do so. If in fact you feel like you did.

I think that Mr. McKeon and General Kehler basically, you're saying you don't see legislative changes that ought to be made at this time. I think that is where you both are. And doctor Feaver, think what you are saying was really not legislative changes as it relates to the power that the commander-in-chief has. You are talking to other types of more pragmatic changes as it relates to just the decision tree, is that correct? After the command has been given?

Peter Feaver (01:56:55): I would be wary of legislative fixes because there second and third order effects that are hard to anticipate. and the history of the nuclear command and control

²⁷ Congressional Research Service. A non-affiliated legislative branch agency within the Library of Congress that provides policy and legal analysis for committee's and members of congress.
<https://www.loc.gov/crsinfo/>

system is discovering that changes that had been made and well-intentioned at one level producing an unexpected result in another aspect.

So I would be wary of legislative fixes but it doesn't mean I wouldn't review them. I think there could be proposals out there. And part of the value is reassuring the American public that they have a nuclear arsenal that is well-maintained and well-guarded against unauthorized use. I think the senators are channeling some concerns that the public has about this and reviewing and then decided not to make a change legislative fix would go some distance to reassuring the public.

Bob Corker (01:57:45): There's another component but... go ahead, I'll let you, go ahead. [signaling to Brian McKeon]

Brian McKeon (01:57:47): Just to comment on what you said Mr. Chairman. I am wary of a legislative change on the decision-making process. But the larger conversation we've had in this hearing about the war power, really falls on you and your colleagues here in this body that continue to step forward and make the case for the constitutional imperative.

In both the Gulf War in 1990, 91 and even the Iraq War in 2002. The executive branch is rather grudging in agreeing to have, acceding to a congressional vote and authorization. George H. W. Bush either before or right after said something disparaging about "I don't need some old goat and Congress going to war against Iraq."²⁸ The institutional instinct in the executive branch will always be "we can do this under article 2." And you will need as a political body, to continue to serve your rights to make the case that we've discussed.

Bob Corker (01:58:47): thank you. [Signals to Robert Kehler]

Robert Kehler (01:58:48): I agree with the point that have been made. I would not recommend any legislative changes at this point as well. But I would recommend a couple of things that I know are being openly talked about by my colleagues were still wearing uniforms. And one of those is, we can always do a better job I think in training our people involved in the processes in terms of...uh... the, where the safeguards are. And the fact that the point of trying to make this morning about raising the legality issue is to remind everyone that the military does not blindly follow orders. And that is true with nuclear orders as well. I think that should be a reassuring piece for the American public and it ought to be reassuring to our allies and our adversaries as well. The final thing I would do is, it is time to invest...I know this this committee doesn't have jurisdiction...but it is time to invest in the nuclear command and control and communications system it's been, uh...it has suffered from a lack of investment for too long and I think it is very important that Congress be on board to modernize that system as a high priority as well as the forces.

²⁸ The officially transcribed quote is "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait." That statement was given to the Texas State Republican Convention in Dallas Texas on June 20, 1992. Full text of his speech can be found on *The American Presidency Project* <http://www.presidency.ucsb.edu/ws/?pid=21125>

Bob Corker (01:59:59): Ah, If I could. Just um... That coincides with what I wanted to close with. when we did the New Start Treaty.²⁹ Um, I was part of a group on our side of the isle that approved that treaty and as part of that, and I'm glad I did by the way it was the right thing to do. Um, as part of that we pushed the administration toward modernization. Um, would all three of you agree that to have um, in our nuclear arsenal is coming down and we want to make sure that these weapons and in many cases created fifty years ago. We want to make sure that IF they are called upon to be used they will actually do the things that they are intended to do. And would all three of you agree that continued modernization of our nuclear arsenal is something that protects our nation and insurers that in the terrible event they're ever necessary we have the capability of delivering?

Robert Kehler (02:00:57): Yes, I do.

Peter Feaver (02:01:00): Yes, people who are worried about nuclear war should be in favor of reasonable modernization measures that will provide greater safety and security in our existing system.

Brian McKeon (02:01:11): Mr. Chairman I would use the word recapitalization of both the warheads and the platforms of the triad. On the latter all the platforms of the triad are aging out simultaneously and there are plans in place to replace them over the next decade and that would be an expensive proposition that will be well debated but if the policy decision is made to maintain a triad then those investments and those platforms will need to be made.

Bob Corker (02:01:36): I just would say this for the American people I... um, many of us have visited uh, the facilities where these are modernized and developed and it's amazing that some of the guidance systems uh, that, uh, have been in existence but not much more sophisticated than the tubes on the black-and-white television. We need to continue to invest and make sure we are using the proper technologies. So in the unfortunate case of them being utilized they will actually be there for us and other countries are aware of our need to modernize also. So with that...
[interrupted]

Edward Markey (02:02:12): Mr. Chairman if I may interject. May I just for a minute...interject.

Bob Corker (02:02:18): You may.

Edward Markey (02:02:19): Thank you, thank you Mr. Chairman. Um... again I want to divide this question for the committee. Between an imminent attack upon the United States where the president has the authority to protect our country, that is and should be the case. From a president launching a pre-emptive nuclear war against another country. And I think that's really what is most concerning to the American people. That no one human being should ever have that power.

²⁹ Treaty between the United States and Russia. Called CHB-III in Russia. Drafted in 2009 and signed on April 8, 2010 in Prague. <https://www.state.gov/t/avc/newstart/>

So from my prospective right now given what General McMaster's said about the potential for an event of war³⁰ that means that there could be plans in place right now in the White House given to the president to launch a pre-emptive war against North Korea using American nuclear weapons without consulting with or informing congress whatsoever. By aggregating that power to the executive branch in clear violation of United States constitution. In clear violation of the United States constitution.

And so, to the extent at which we are having this discussion. And there is legislation that is pending before congress to ensure that congress reasserts its authority to ensure that a nuclear war has not begun in the name of the United States by this president or any president. I think that's a legitimate constitutional prerogative that I think we should be reasserting. I don't think that we should be trusting the Generals to be a check on the president, I don't think we should be trusting a set of protocols to be protecting the American people from having a nuclear war launched on their behalf, I don't think we should be relying upon a group of individuals to be resisting an illegal order when they have all pretty much been hired by the president to have the jobs in which they have. There is going to be a homogeneity inside of that decision-making process Mr. Chairman. That does not in fact offer real resistance if the president absolutely insists upon his way. That is just the reality of it.

So I agree with Mr. McKeon that it's the...should be the congressional prerogative to declare a nuclear war. I think that, uh, that is something that we should just continue here to explore given the assertions made by the national security adviser³¹ and I would think that our other two witnesses would agree that if there is a pre-emptive nuclear war which is being considered that congress does have the constitutional responsibility although it has been left, as Mr. McKeon said, in ambiguity. An atmosphere of ambiguity and president after president has been created around wither or not they were going to defer to our authority. So this is the hearing, this is the place, I am glad you are kicking it off but I don't think the assurances that I have received today will be satisfying to the American people. I think they can still realize that Donald Trump can launch nuclear codes just as easily as he can use his twitter account without the check and balance of the United States congress would be seeking a constitutional responsible to exercise. So I this is a historic hearing and I hope there's more to follow. Thank you sir.

Bob Corker (02:06:13): thank you, thank each of you for being here again I cannot imagine having a more balanced panel. Uh, a more sober panel. I think this was edifying for members of the committee but also the American public. We thank you for that. We thank you for your service to our country and being here, and your previous service in other ways. And I think you know that there is typically follow-up questions. If you could first of all sitting committee members will close that process at the close of business on Thursday.³² to the extent that you could answer those fairly promptly we would appreciate it. I think you contributed greatly to the national debate and the dialogue today and we thank you very much for that. And with that the meeting is adjourned.

³⁰ This may be in reference to comments that General McMaster made on MSNBC on Aug. 8, 2017. Link provided above.

³¹ Again, General McMaster

³² November 16, 2017. Two days after the hearing.

...(02:06:57): [gavel drops].

[inaudible conversations] [inaudible conversations] [inaudible conversations].

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Transcriber note:

Marc Howard Rich received his B.A. in communication from Christopher Newport University in '08 and his M.A. and Ph.D. in communication from The University of Colorado at Boulder '10, '15. His Master's thesis explored the concept of deterrence and strategic ambiguity during the Cuban Missile Crisis and was co-authored with his advisor, Robert T. Craig, in *Communication Theory*. His Dissertation explored the concept of nuclear secrecy within a democratic society creating an operational form of Habermas's concept of radical democracy that was applied to the debate surrounding Carter's Presidential Directive 59. He researches democracy and nuclear weapons policy as well as theoretical pragmatic approaches to the paradox of pluralism. He currently teaches communication at Christopher Newport University.

He is not the Marc Rich who teaches communication in California Long Beach, but he hears that Marc is a very nice guy.