

Presidential Authority and Nuclear Weapons: Taking Back Our Rights

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I. Introduction

Vice President Richard Cheney in a December 21, 2008 interview with Chris Wallace stated:

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

Vice President Cheney's statement accurately describes the unchallenged role that the President plays over the United States nuclear arsenal. It is an unfettered and unconstrained power that gnaws at the very core of American democracy. It is a power that the world has not seen before and no sovereign has ever held. It is a power that bodes ill not just for the United States but for the rest of the world.

As stated in Gary Will's book Bomb Power:

Lodging 'the fate of the world' in one man, with no constitutional check on his actions, caused a violent break in our whole governmental system... This was in effect a quiet revolution... The nature of the presidency was irrevocably altered by this grant of unique power. The President's permanent alert meant our permanent submission.ⁱⁱ

This paper will explore the underlying reasons for how the American people, including Congress, has surrendered their rights under the Constitution to “life, liberty, and the pursuit of happiness” to the sovereign. The paper will also address what we as lawyers and members of the academic community can do to redress this anti-democratic condition.

II. Constitutional Background

1. Congress’s War Power Authority

As seen in the Cheney quote above, Congress has delegated either expressly or tacitly its war making power ⁱⁱⁱ to the President regarding nuclear weapons. While Congress still retains some control over the allocation of funds for the development and manufacture of these weapons, the strategy, deployment and usage of these weapons is for the most part conducted by the Executive branch with little if any input from Congress let alone the American public.

While previous Presidents have argued that sole command and control of nuclear weapons is part of the President’s inherent powers as the Commander in Chief, Article II of the Constitution places major constraints on the President’s role as Commander in Chief when it states in part, “The President shall be Commander in chief of the Army and Navy of the United States”^{iv}. The Constitution says nothing about the President having sole authority over any weapon system. Historically speaking, The Commander in Chief was the military officer responsible for co-coordinating the country’s forces when the country was engaged in warfare, and nothing more. Congress has the sole power to declare war.^v

2. Examples of Surrender

The Nuclear Posture Review Implementation Study is a prime example of the non-involvement of the American public and Congress with the nuclear arsenal. The study was implemented to determine the numbers and targets for the United States' nuclear weapons^{vi}. The President in 2010 articulated the goal of reducing the numbers and the role of US nuclear weapons^{vii}. He then requested the Pentagon and other Executive branch agencies to implement this goal. Although there have been some Congressional hearings on the Implementation Study, few American citizens are even aware of its ongoing status. Yet the results of the study have enormous implications for the average citizen including but not limited to budgetary implications in this time of tight budgets. Perhaps more important is the complete absence of public debate over the role of these weapons, whether nuclear weapons should be a part of American war making capability, and deterrence theory.

Perhaps another example of how Congress and the American people have delegated war making to the President is in the doctrine of first use. The United States has never abandoned this doctrine which permits the President to launch nuclear weapons even before an actual nuclear attack has occurred.^{viii} While the President certainly has the power to respond to an emergency situation, it is debatable whether he has the same power to initiate a war on his own.^{ix}

3. Reason of State

The underlying rationale for much of Executive branch thinking regarding nuclear weapons is “the principle of constitutional reason of State (*raison d’etat*) defined as

...the doctrine that whatever is required to insure the survival of the State must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men.^x

Madison said it best when he stated government must be obligated to reign in itself.^{xi} The first ten amendment of the Bill of Rights were created to do just that,

i.e. constrain the power of the State. The President's ability to initiate thermonuclear warfare on his own is therefore "...contrary both to the letter and spirit of the Constitution."^{xii}

III. Reasons for Surrender

1. Complexity

American citizens and the Congress have surrendered their roles regarding nuclear weapon for many reasons. One such reason is the complexity surrounding the usage of such weapons. As stated by Robert Dahl

Admittedly, the control of nuclear weapons is an extreme case, not a representative one. Nonetheless, it serves to illustrate a general problem of extraordinary importance to all of us who believe in the possibility of democracy: Are institutions of contemporary democracy adequate to cope satisfactorily with the enormous complexity of public matters.^{xiii}

Dahl goes on in his book to identify two assumptions regarding the American public. The first assumption is that all adults are qualified to make decisions in a democracy, "...and that no minority among them is so clearly better qualified that its members are entitled to make all collective decisions." Dahl further states that members of a democracy may delegate decisions to persons better qualified, but the group still retains the right "...to judge which questions require delegation, to set the terms on which delegation is to take place, and to recapture the delegated authority when they chose." Dahl calls this assumption the "Strong Principle of Authority".^{xiv}

Dahl differentiates the above assumption about the body politic with the assumption "...that generally speaking most adults are not qualified to make binding collective decisions, whereas a minority among them is well qualified to do so...Drawing on Plato's term for his rulers in *The Republic*, we might call this assumption the Principle of Guardianship". Dahl goes on to state that *de jure* delegation of authority over nuclear weapons has become *de facto* alienation, because, according to Dahl,

We have in fact turned over to a small group of people decisions of incalculable importance to ourselves and mankind, and it is very far from clear how, if at all, we could recapture a control that in fact we have never had. Thus, in this crucial area, and there may be others, we have perhaps unwittingly adopted the Principle of Guardianship.^{xv}

Dahl goes on to state

That decisions on nuclear strategy and other complex issues are made by the few rather than the many—quite likely by a meritorious few—is not simply a consequence of an effort to prevent discussion and participation by a broader and more representative selection of the *demos*, though that may be part of the explanation. If only that were true, however, solutions would be much easier to suggest. But it is instead mainly a consequence of the fact that the democratic process is not well equipped to deal with questions of exceptional complexity.^{xvi}

Dahl is somewhat correct when he acknowledges that there has been an effort “...to prevent discussion and participation by a broader and more representative selection of the *demos*”, but as seen below, he does not credit this “effort” sufficiently enough as an explanation for why Americans have surrendered their rights over nuclear weapons to the Executive branch.

2. Secrecy

As stated by Dr. Robert Jay Lifton

The myth of the ‘bomb secret’ is integral to the entire structure of illusion and deception around security. It enables a small group of bomb managers to assume a priestlike stance as exclusive possessors of secrets too arcane and too sacred to be made available to the rest of us. And, the assumption goes, by their vigilance in

protecting those secrets from everyone, their own countrymen as well as foreign adversaries, they guarantee everyone's safety.^{xvii}

The secrecy surrounding the American nuclear arsenal started with the inception of work on the atomic bomb during World War II. Not even the Vice President of the United States knew about the Manhattan Project until after the death of President Roosevelt. A further example of the secrecy surrounding the nuclear arsenal is the doctrine of "born secret" as encapsulated in the Atomic Energy Act. Under this statute any information about nuclear weapons is considered "Restricted Data" from the moment it is created^{xviii}, irrespective of whether the idea has been put down on paper. This is completely different from how any other idea that is committed to a document is treated, i.e. other documents are subject to a review to determine whether it should be classified and at what level after having been written down. There is nothing like this anywhere else in American law.

2. Trust in the Leadership

A key ingredient in many voter's minds in electing a President is whether he or she has the requisite capacity to be in control of the "football". As most voter's know, the "football" contains the authorization codes for launching the United States' nuclear arsenal. Implicit in vesting this power in one person is trust, i.e. trust that the President will only use this awesome power in exactly the right circumstances.

Unfortunately for the President, the command and control of the nuclear arsenal is "a ...series of structures so extensive, elaborate and intricate as to be virtually unmanageable"^{xix} Just how intricate this system is was pointed out to the author in a conversation with General James Cartwright, former Vice Chairman of the Joint Chiefs of Staff. In response to whether hackers could get into the command and control system for launching nuclear weapons during an incident in 2010 when the President lost contact with 50 nuclear warheads^{xx}, General Cartwright stated that the system is so bound with procedure that it would be virtually impossible to do this.^{xxi} While on the one hand it is comforting to know that hackers would have a very difficult time in launching America's arsenal, it is less comforting to know how cumbersome and antiquated the system is.

3. Psychological Reasons

A strong argument can be made for the surrendering of power over the bomb to the Executive Branch (it should be noted here that even the President does not

have complete control over the American nuclear arsenal as the military is responsible for the physical control of the weapons and is the center for the planning, deployment and usage of the weapons) as being predicated on psychological grounds. Chief among these grounds are numbness, avoidance and guilt.

A. Numbness to the Nuclear Shadow

Professor Lifton discusses in detail how the American public has learned “to live with the bomb”. He explains that classic Freudian defense mechanisms are on display in this regard, by citing repression, suppression, isolation, denial, undoing, reaction formation, and projection. While it is not the role of this paper to go into what each of these defense mechanism is, Professor Lifton explains that there is even an

...anesthetizing quality of the language of nuclear weapons”, sometimes referred to as ‘nukespeak’. What are we to make of terms like ‘nuclear exchange’, ‘escalation’, ‘nuclear yield’, ‘counterforce’, ‘megatons’, or of ‘window of vulnerability’...Quite simply, these words provide a way of talking about nuclear weapons without really talking about them. In them we find nothing about billions of human beings incinerated or literally melted, nothing about millions of corpses. Rather, the weapons seem ordinary and manageable or even mildly pleasant (a “nuclear exchange” sounds something like mutual gift-giving”).^{xxii}

B. Avoidance

Once again Dr. Lifton offers psychological insight as to why the American public does not want to deal with the “problem” of nuclear weapons. Most people want to avoid the image of extinction, content with living their everyday lives rather than imagining “exterminating ourselves as a species with our own technology.”^{xxiii} Not thinking about these weapons also avoids dealing with the “structural absurdity” associated with deterrence, i.e. “the United States stands poised to destroy virtually all of human civilization...in the name of destroying one (whatever the adversary *de jour* might be) another”.^{xxiv} This has lead to a sense

of helplessness^{xxv}, as well as guilt and shame for being a part of potential mass murder on a scale difficult to imagine^{xxvi}.

IV. Taking Back Our Right

As lawyers and academics we stand in a unique position to regain control over our lives as it pertains to nuclear weapons. Recapturing this right can be accomplished through litigation on the part of lawyers and writing and speaking out on behalf of academics.

A. Litigation

The Freedom of Information Act (FOIA) is a statute which has been utilized to obtain documents regarding the failure of the President to be in control of 50 nuclear warheads for a little under one hour.^{xxvii} The litigation^{xxviii} has resulted in well over a thousand pages of documents being produced by Global Strike and STRATCOM, which revealed that the reason the President was not able to control the 50 warheads was "...caused by the improperly seated CMPG-A card."^{xxix} What this means in plain English was that because a motherboard was out of kilter a few inches the whole system to launch nuclear weapons capable of killing 20 million people malfunctioned. This information and its chilling conclusion would not be available to the American public without the filing of the lawsuit.

B. Academics

Most academics have bought into the concept of nuclear deterrence and the inability to put "the genie back into the bottle", rarely speaking out about achieving a nuclear weapons free world. This unfortunate state of affairs is in no small part due to the numbing and avoidance principles mentioned above. Academics, however, have played crucial roles in previous Administrations, as well as the current one. Indeed, President Obama has reached out to academia on numerous occasions for guidance with health policy and the economy. Surely academia can advise the President on a topic such as nuclear weapons, a topic he already has a strong interest in. Writing papers and holding seminars are but two ways an organized effort can be sustained to reach the President's ear and establish the intellectual underpinnings for a nuclear weapons free world.

V. Conclusion

A nuclear weapons free world is a possibility which can only be achieved in part through a change of thinking that only the President has the right to determine when and how nuclear weapons can be deployed and utilized. The very security of our country and every person's fundamental right to existence must be asserted by two groups most capable of doing this, lawyers and academics. Indeed, the very existence of Mankind depends on such an effort.

ⁱ Bomb Power, The Modern Presidency and the National Security State, Garry Wills, The Penguin Press, New York, 2010, page 4

ⁱⁱ Ibid, page 46

ⁱⁱⁱ Article I, Section 8, US Constitution

^{iv} Article II, Section 2, US Constitution

^v Article I, Section 8, US Constitution

^{vi} "Fact Sheet; The Nuclear Posture Review Implementation Study", February 11, 2018, The Center for Non-Proliferation and Arms Control

^{vii} Nuclear Posture Review Report, Department of Defense, April, 2010

^{viii} "No First Use, The Next Step for U.S. Nuclear Policy", Michael S. Gerson, "International Security", Vol. 35, No. 2, Fall 2010, p. 7-47

^{ix} Nuclear Weapons and Law, Edited by Arthur Selwyn Miller and Martin Feinrider, Greenwood Press, 1984, p.244

^x Ibid, p. 245

^{xi} The Federalist No. 51, at p. 349, James Madison, J. Cooke edition, 1961

^{xii} Miller/Feinrider, Op cit, p. 246

^{xiii} Controlling Nuclear Weapons, Democracy Versus Guardianship, Robert Dahl, Syracuse University Press, 1985, p.

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^{xiv} Ibid, p. 6

^{xv} Ibid, p. 6-7

^{xvi} Ibid, p. 7-8

^{xvii} Indefensible Weapons, The Political and Psychological Case Against Nuclearism, Robert Jay Lifton and Richard Falk, Basic Books, Inc. New York, 1982, p. 31

^{xviii}

(y) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 [42 USCS § 2162].

42 USCS § 2014 (y)

^{xix} Lifton/Falk, Op cit, p. 9

^{xx} "Could Terrorists Launch America's Nuclear Missiles", Bruce Blair, "Time Magazine", November 11, 2010

^{xxi} Conversation with General James Cartwright and the author, October 14, 2012

^{xxii} Lifton/Falk, Op cit, p. 103-107

^{xxiii} Lifton/Falk, Op cit, p. 57

^{xxiv} Lifton/Falk, Op cit, p. 4

^{xxv} Lifton/Falk, Op cit, p. 10

^{xxvi} Lifton/Falk, Op cit, p. 78

^{xxvii} “Launch Facilities Down and FOIA: A Case Study in Using Litigation to Achieve a Nuclear Weapons Free World”,
A Paper Presented by Jules Zacher, Esquire at the Ethics of Secrecy and the Rule of Seminar, University of
Pennsylvania Law School, May 18, 2012,

^{xxviii} *Speaking Truth to Power vs United States Strategic Command*, United States District Court for the Eastern
District of Pennsylvania, Civil Action No. 12-4020

^{xxix} *Final Report, LCC B-01 Command and Control Communications Anomaly Analysis*, F.E. Warren AFB, LCC 5B01,
Select Project 11-004, November 15, 2010, p. 10