Part III

Creating Barriers to the Use of Nuclear Weapons

CHAPTER 10

The No-One-Decision-Maker Approach to No First Use of Nuclear Weapons

A new approach to the control of the first use of nuclear weapons is conceived in which a leadership committee of Congress would be required to agree before a president could turn an undeclared conventional war abroad into a nuclear war; in different periods this is run up a flagpole in three different ways. But none works. In the end, a leadership committee* without *nuclear powers has only minor success.

In late 1971 a bill was being discussed in Congress that sought to limit to thirty days the president's authority to employ armed forces in combat without a declaration of war. While taking a shower, it suddenly occurred to me that the most important war power the president had was his ability to introduce nuclear weapons into a foreign conventional conflict without a declaration of war. Why shouldn't Congress address this? Why shouldn't Congress be required, somehow, to give its assent before the United States escalated a foreign conventional war into a general nuclear war? The United States itself not being under direct attack in the war abroad, and because no conventional war can be lost in a day or two, there would be time for consultations. Thus began one of the most frustrating and interesting campaigns, including three quite different efforts made over two decades.

This was, in fact, a quite original approach to first use of nuclear weapons, which appeared nowhere in the literature. It was not the

U.S.-Soviet ban on first use discussed as early as 1963 by Morton H. Halperin. Nor was it the unilateral forswearing of the first use of nuclear weapons advocated by many doves. It was, instead, a method of putting an additional "lock" on the revolver by involving Congress.[122]

The greatest strategic problem of the Cold War was the danger that Warsaw Pact conventional forces would overwhelm Western Europe. NATO's original approach had been based on building conventional forces to match those of the USSR and its allies. But this strategy proved beyond NATO's will and capability, and accordingly, during the period of unquestioned U.S. nuclear superiority, the NATO strategy evolved into the so-called trip-wire response, in which any Soviet aggression could induce a full-scale nuclear attack by the West.

By 1967, U.S. superiority had waned, however, so NATO turned to a strategy of "flexible response," which claimed to have the advantage of facing an enemy with "great uncertainty" about what NATO would do if attacked.[123] But if a president authorized the first use of nuclear weapons in such a conflict, he would be, I reflected, escalating a foreign conventional conflict that posed no immediate threat to U.S. survival, into a nuclear war that threatened to destroy the United States immediately. And since the Russians could not overwhelm Europe within hours or a few days, should not the president secure, somehow, the authorization of Congress before making war to this extent? This was the original idea, that escalation to nuclear war was tantamount to launching a new war.

I got the comments and suggestions and, above all, the endorsements for a statement of a very distinguished group of experts; we released our statement at a December 9, 1971, press conference.[124] We emphasized that this new policy would not undermine the U.S. threat to engage in nuclear retaliation for nuclear attack. We even agreed to support firing nuclear weapons on presidential authorization if faced with an "irrevocable launch" from the other side; our entire concern was with nuclear responses to foreign *conventional* hostilities.[125]

In due course, the Senate Foreign Relations Committee reported out the War Powers Bill. In the committee report, Chairman Fulbright wrote, "I concur wholly with the Federation of American Scientists that Congress must retain control over the conventional or nuclear character of a war," and he proposed amending a section of the bill.[126]

Fulbright subsequently offered a floor amendment providing that except in a declared war or "in response to a nuclear attack or to an irrevocable launch of nuclear weapons, the President may not use nuclear weapons without the prior, explicit authorization of the Congress." The amendment was defeated 68–10. Accordingly, the first effort to adjoin this idea to a War Powers Bill failed. But we felt that the Senate had not been prepared for this vote, and indeed, no hearings had been held. We waited for this defeat to cool down.

Four years later, in the spring of 1975, the issue of first use of nuclear weapons arose through threats made by Secretary of Defense James Schlesinger against the North Koreans. Aroused by this, Congressman Richard L. Ottinger (D, New York) introduced in the House of Representatives a resolution, H.J.Res. 533, simply stating that "Congress declares it to be the policy of the United States to renounce the first use of nuclear weapons." More than one hundred congressional cosigners put their name on it until they were advised that it had long been U.S. policy to threaten first use of nuclear weapons in Europe to discourage an invasion. They promptly withdrew their support.[127] *The Washington Post* had an editorial calling this "The First-Use Hubbub."[128]

On August 6, 1975, the thirtieth anniversary of the bombing of Hiroshima, I decided to travel to Japan to issue a press release explaining to the Japanese what the original atomic scientists had been doing since the bombing to prevent a recurrence. The press conference, called by the mayor of Hiroshima, was well received, with some Japanese newsmen bowing low and backing out—a show of respect never seen in the National Press Club in Washington! More relevant to my planning, I learned that the famous Huntley Brinkley

Hosting, at FAS headquarters, the mayors of Hiroshima (Takeshi Araki) and Nagasaki (Yoshitaki Morotani) in 1976 following the author's press conference in Hiroshima in 1975 opposing "one decision-maker" for first use of nuclear weapons

NBC news show had picked up my complaint, from Hiroshima, that "no one decision maker should be permitted to set in motion a process that might kill more than one billion people." Getting heard at home sometimes requires speaking abroad.

I now began to think of embodying our idea in a congressional resolution.[129] On returning from Hiroshima, I tried to generate support from like-minded groups. The Arms Control Association (ACA) pitched in by declaring that "persons other than the President should be directly involved, and not merely 'consulted,' in the decision to be the first adversary to use nuclear weapons in a given situation. As a practical matter these other people should be members of Congress."[130] But the Council for a Livable World (CFLW) was not helpful, even after being approached by Senator Alan Cranston (D., California), whom its board members loved. All CFLW would endorse was that "a resolution along the lines under consideration by Senator Cranston and the FAS" should be aired at hearings discussing a variety of ways to "strengthen the line between nuclear weapons use and nonuse"; they added that they would like to participate in the hearings.[131]

In effect, this "no-one-decision-maker" proposal was caught between the millstones of the hawks (who saw it as undermining the deterrence of conventional attack) and the doves (who saw it as somehow constructing a mechanism that *could* authorize first use, which they opposed completely). It was, accordingly, a proposal without a political base. ACA was an exception that proved the rule since its members represented, really, an alumni association of the Arms Control and Disarmament Agency—doves but disabused through government experience.

Senator Cranston was interested in introducing something along our lines, but the staff members with whom I was put in touch were dragging their heels—they thought it would undermine his campaign to become the Senate democratic whip. Meanwhile, Congressman Les Aspin, who later became chairman of the Armed Services Committee and then secretary of defense, was working on a resolution that would preclude first use without a declaration of war.

Nothing happened. I discouraged Les's effort in favor of Alan's. And then Senator Cranston decided to modify the issue in a way that I could not support, and the whole thing collapsed.

Eight years passed. I cannot now recall the genesis of the idea to throw the matter into the courts—I think it was a letter from an activist in Pennsylvania. But the point was to abandon efforts to have Congress pass an affirmative resolution and, instead, to assert that the president did not have the authority, in the first place, to act other than as we wished, in consultation with Congress.

I began preparing an article that, in the end, was entitled "Presidential First Use Is Unlawful."[132] The gist of the article was to follow a line of President Jefferson's: "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided." Or, as the late Supreme Court justice Arthur Goldberg testified, "The President . . . constitutionally has no war-making powers except perhaps to repel, as I have said earlier, a surprise attack, an emergency, following which he must immediately go to Congress."

During the 1975 effort, the Defense Department had written to FAS supporters, saying that the basic authority to order the use of nuclear weapons "is vested in the President, the authority being inherent in his role as Commander-in-Chief." Sometimes, they also invoked a perverse implication of a section of the Atomic Energy Act of 1946 aimed at civilian control that gave the president the authority to move nuclear weapons from civilian hands to the

military when needed.[133] It was interpreted as legislative authority to "use" nuclear weapons.[134] The Defense Department pointed to the vote we earlier lost 68–10 as giving added authority.

But we argued that first use "in effect moves the nation into the line of fire—into the war zone" and was an "entirely new war in common-sense terms." In legal terms it was moving from trying to "repel" an attack on U.S. forces abroad to "initiating just that kind of much wider commitment that the Founding Fathers wanted to be made by Congress."[135]

The NATO Treaty itself was not at all an "automatic" declaration of war. As Dean Acheson testified in ratification hearings on April 27, 1949:

> This naturally does not mean that the United States would automatically be at war if one of the other signatory nations were the victim of an armed attack. Under our Constitution, the Congress alone has the power to declare war. The obligation of this Government under article V would be to take promptly the action it deemed necessary to restore and maintain the security of the North Atlantic area. That decision would, of course, be taken in accordance with our Constitutional procedures.

Foreign Affairs magazine, to whom my article was first entrusted, could not decide whether it agreed or not. William P. Bundy, the editor, wrote that my manuscript had thrown him a "knuckle ball" and that "an idea this big must not come off half-cocked. For that very reason I am keeping our exchanges for the moment to myself." After long delays, I turned to *Foreign Policy*. (When advised that *Foreign Policy* had decided to publish it, a staff member of the older, more prestigious *Foreign Affairs* commented, "Well, they have less to lose.")

Foreign Policy, by contrast, held a news conference upon publishing the article in the fall of 1984 and submitted it for a prize. I persuaded the noted constitutional lawyer Raoul Berger to join me at the press conference, at which he said, "The president can only repel attacks, not engage in wider wars, without authority from

Congress, and a nuclear war would obviously be a qualitatively wider war than any conventional one."[136]

How were we to get the public to take this legal issue seriously? One way, mentioned in a footnote in my article, was to have someone "indicted for sedition for an overly pointed enunciation of the views expressed here." Under this method, a radical activist would appeal to military officers not to obey orders to fire nuclear weapons in conventional hostilities unless Congress had declared war or some equivalent. This had been done in Great Britain in May 1985, when twenty-two persons sent a message, "To Members of the Armed Forces," saying "first use" of nuclear weapons was illegal under international law.[137] They quoted from the *British Manual of Military Law*, which states that members of the armed forces were "bound to obey lawful orders only."[138]

Such advice to disobey, in America, if proffered with criminal intent, is prohibited by a statute, 18 U.S.C. Section 2387, which states the following:

> (a) Whoever, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:
>
> (1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States is subject to a fine of not more than $10,000 or ten years imprisonment.

But for the same reason such a person, if convicted, might have some standing to contest the presidential power.[139]

The sedition approach would certainly have gotten publicity, especially since the military services were intensely nervous about the propagation of the disease of "authorization uncertainty." In September 1975, a decade earlier, in a class for Air Force officers who would later work in underground Minuteman missile silos, a major

named Harold L. Hering had asked a simple, honest, straightforward, and highly moral question: "How can we be sure that the order entering the command post is a properly authorized one?" The Air Force immediately began moving him out of the service.

In hearings on his case, Hering said he was concerned about the need for checks and balances that would take into consideration the nature of nuclear warfare, "when time limitations would leave a missile combat crew without visible evidence, such as a formal declaration of war by Congress, that a launch order was in keeping with constitutional guidelines."[140] Hering had not refused to launch a nuclear weapon and was not a conscientious objector, but he had made a formal request to know what safeguards existed to protect against an unlawful launching "by a President gone berserk or by some foreign penetration of the command system."

We spoke up in Hering's defense.[141] He was retired despite internal appeal; a board of inquiry ruled against him on the two counts that he had failed to "discharge his assignments properly" and that he had a "defective attitude toward his duties." He decided not to seek the legal funds necessary to file an appeal.

Hering's experience showed that the sedition tack touched a very sensitive nerve. But in the mideighties, as before, I did not have the stomach for such an approach. I was not radical enough. During the Vietnam War, I had even opposed civil disobedience in a debate in *Commonweal* magazine over what actions were appropriate in opposing the war. While others urged "disobedience now," I argued, "Probably there are no short cuts."[142] So, from my point of view, the immediate task was to try to round up some support by real lawyers.

Constitutional Lawyers Debate Presidential First Use

So joining with the Lawyers Alliance for Nuclear Arms Control, FAS ran a November, 1985, weekend symposium at the Airlie House

Conference Center for constitutional lawyers, pro and con. Edited by Peter Raven-Hansen, a collection of the papers was later published under the title *First Use of Nuclear Weapons: Under the Constitution, Who Decides?*[143]

Some of the constitutional lawyers convened at Airlie House, Airlie, Virginia, to discuss the constitutionality of presidential first use of nuclear weapons.* From left: *Stanley Brand, Chairman Peter Raven-Hansen, Robert Turner, Allan Ides, and Stephen Carter

Since the last time I had raised this issue, the Supreme Court had reached, in 1983, a far reaching decision invalidating about two hundred statutes that, some thought, put a stake through the heart of my proposal as well. The case in question, known as the Chadha case, entered the courts in 1974—around the same time Senator Cranston was trying to work up a bill on first use—and it was finally decided in 1983, the year before my *Foreign Policy* article appeared. In essence, the Supreme Court ruled that Congress could not pass laws that included a provision that delegated to a house of Congress, or a committee of Congress, the right to veto regulations subsequently adopted by the executive branch to implement the law in question. In other words, the Supreme Court ruled that, if Congress did not like the way the executive branch was implementing a particular law, it would have to pass an entirely new law to stop it and could not control the law's implementation through oversight by a subset of Congress. This seemed to suggest that Congress could not ever delegate to a subset of itself—which was, of course, essential to a leadership committee's functioning in this nuclear realm. The court's decision deplored such a "convenient shortcut" in legislative processes and pointed out that, in the fullness of time, Congress could pass a new law changing any unwanted regulations. But what we were proposing was not a convenient shortcut but an essential streamlining. The answer seemed simple enough to me:

> The first-use of nuclear weapons may not be so immediate an issue that one decision-maker need be given the authority to decide it, but it is a time-urgent matter and does not permit the usual congressional procedures. Nor does this question involve a veto over regulations; instead, it is a committee method of effecting a constitutionally granted congressional authority over war.[144]

Professor Allan Ides of the Loyola Law School in Los Angeles agreed and said the statute was, from a legal point of view, a combination of two acceptable elements. The first was a congressional ban on first use of nuclear weapons. He argued that such a total ban did not interfere with any implementing regulations of the executive branch and so was not at odds with the Chadha decision. The second element was a grant of specific authority to a committee (in this case the leadership committee) to *revoke* that ban. (He argued that Chadha did not prevent revoking because revoking the ban gave the executive branch *more* authority.) They pronounced it constitutional. Charles Tiefer, the deputy general counsel to the clerk of the House of Representatives, also held that the committee-delegation aspect of the statute was constitutional. He took an even more fundamental point of view. He said that the famed Chadha decision did not—and was not meant to—apply to statutes in a wide range of foreign policy areas where the congressional and the executive branch share constitutional authority.

Not surprisingly, conservative legal scholars did not agree. Professor John Norton Moore of the University of Virginia had genuine doubts whether even the congressional ban on first use was constitutional in the absence of some relevant piece of international law enhancing Congress's authority. He also viewed the committee delegation as unconstitutional and the proposal as one that interfered with the commander in chief's operational authority to use weapons consigned to him.

It was a split decision—but one that advanced these notions from a private campaign initiated by a nonlawyer and a group of

scientists to something that deserved legal attention. Unfortunately, we did not secure the critical mass of senior constitutional experts that would have permitted a march on Congress. And we did not find a clear way to force the case into the courts.

Fourth Approach: Leadership Committee of Congress

It was clear by now that there was no political will in Congress to control the first use of nuclear weapons. But what if we sought to create a leadership committee of Congress *without regard to nuclear weapons*? Perhaps, once created, it could be later used for the purpose we desired. We began thinking of a congressional leadership committee for consultation with the president in national emergencies. We began emphasizing that there was a class of time-urgent issues on which Congress, as a whole, might be unable to consult effectively and on which a leadership committee might be useful. These included not only war-powers issues but also national emergencies of other kinds in which the Congress could not be assembled to function in a timely fashion. In 1985, with the help of a consultant, Scott Cohen, the former chief of staff of the Senate Foreign Relations Committee (under Senator Charles Percy—R, Illinois), we began a campaign to set up such a committee.

A series of presidential actions ensued (Grenada, October 26, 1983; Libya, April 14, 1986; Panama, December 19, 1989; Iraq, August 8, 1990). After each of these episodes, Scott and I asked leading members of Congress whether they thought there should be some delimited body within Congress with which the president should consult before undertaking such actions. People's eyes would open with interest for a few days after such emergencies but then glaze over again.

In fact, in each such emergency, the president would normally "consult" in some pro forma way, usually by informing a selected

but unspecified collection of congresspeople of his own choosing. And they would have no opportunity to talk among themselves, as a committee, about what to do. President Reagan, for example, invited fifteen congressional leaders to the White House before bombing Libya. They were informed that FB-111's based in England had been dispatched on a bombing mission two hours earlier.

In response to his questions to the administration, Robert Byrd, the majority leader, was told that no one in Congress had been consulted in this case despite the fact that the third section of the War Powers Act states, "The President in every possible instance shall consult with Congress before introducing U.S. Armed Forces into hostilities."[145] Byrd promptly wrote the president a letter, cosigned by the chairmen of the Foreign Relations, Armed Services, and Appropriations Committees, suggesting that the War Powers Act be "refined" to define a specific consultative body; he suggested members of Congress occupying eighteen specific positions—the same ones we had urged earlier.[146]

Finally, on August 19, 1990, Scott and I wrote a relevant op-ed piece for *The New York Times*[147] entitled "If Congress Is Afraid to Declare War." We said that the congressional designation of the relevant consultative group was just a matter of "good housekeeping" for Congress and that it required no new law and no fight with the executive branch. Our piece ended by observing that Congress could do more in the war-powers area; but, we wondered, "Can it in good conscience do less?"

This seemed to get action. Six weeks later, on October 2, Congress took the initiative. A leadership announcement designated eighteen members who had been asked by the leadership "to make themselves available as a group for regular consultation with the President," and the Senate majority leader encouraged the president "to consult on a regular basis" with the group.[148] So a precedent was set, at least for that session.

. . .

In retrospect, if I had been more determined and more radical, I think I would have found someone to engage in sedition—I might

even have engaged in it myself. But the risks and costs would have been large. Raoul Berger had counseled accurately: "The notion of having army officers act contrary to presidential orders would alienate many of your well-wishers."[149] There were also many ways in which the courts could have addressed the sedition issue without resolving the fundamental political issues of first use. The sedition strategy seemed, in the end, a prescription for fruitless martyrdom.

In any case, the subject of the first use of nuclear weapons was an important one. I do not regret the time spent on it. And, as the reader will see in the next chapter, I made one last effort, in quite a different way, to put the world on the road to no first use.