

Striking Russia if Russia Nukes Ukraine: Presidential War Power Beyond Its Outer Edge

DAKOTA S. RUDESILL*

TABLE OF CONTENTS

I. INTRODUCTION	1166
II. THE RISK OF RUSSIAN NUCLEAR USE ENDURES	1167
III. PRESIDENTIAL WAR AUTHORITY BEYOND ITS OUTER EDGE	1173
A. <i>The Legal Framework: Shared Power</i>	1173
B. <i>The Framework, Applied</i>	1178
1. <i>Congress Has Not Authorized Kinetic Force Against Russia</i>	1179
2. <i>“Repel Sudden Attacks” Presidential Authority Not Reasonably Available</i>	1179
3. <i>Anticipatory Self-Defense Presidential Authority Not Reasonably Available</i>	1182
4. <i>“National Interests” Presidential Authority Not Reasonably Available</i>	1186
a. <i>Russia Is Not Libya</i>	1186
b. <i>Considering Objections</i>	1187
IV. AVAILABLE ALTERNATIVES.....	1190
A. <i>Ready Options</i>	1190
1. <i>Diplomacy and Signaling</i>	1190
2. <i>Enhanced Aid to Ukraine</i>	1191
3. <i>Offensive Cyber Operations</i>	1192
4. <i>Covert Action</i>	1193
5. <i>Neutrality Act Relief for U.S. Fighters</i>	1193
6. <i>Military Intervention by Other NATO Countries</i>	1194
B. <i>Russia Should Remain Deterred</i>	1194
V. CONCLUSION.....	1196

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I. INTRODUCTION

Russia's full scale invasion of Ukraine in February 2022—underway for the better part of two years as of this writing—has prompted the most serious international security crisis in at least a half century, and the greatest risk of nuclear use and a Washington-Moscow nuclear exchange since the 1983 Able Archer war scare or the 1962 Cuban Missile Crisis.¹ In fall 2022, with concern growing about Russian resort to nuclear weapons against Ukraine, senior U.S. officials privately spelled out to the regime of Russian strongman Vladimir V. Putin the “catastrophic consequences” that would follow if Russia broke the 77 year-old taboo against use of nuclear weapons in armed conflict.² In official public warnings to the Kremlin, American and other NATO leaders maintained calculated ambiguity. In anonymous comments to the press, they threatened punitive conventional military strikes against Russian targets if the Kremlin crossed the nuclear threshold.³

Discussion has focused on the role these threats may be playing in dissuading Russia—at least so far—from committing an atomic atrocity against Ukraine.⁴ Neglected at least outside government has been an urgent legal question: whether it would be legal under U.S. law for the President to order the military to punish Russia for nuking Ukraine. That is the focus of this essay.

¹ For declassified documents and other information on the Able Archer War Scare, see *The Able Archer 83 Sourcebook*, NAT'L SEC. ARCHIVE, <https://nsarchive.gwu.edu/project/able-archer-83-sourcebook> [https://perma.cc/5QB4-ECDB]. For classic firsthand and analytical treatments of the Cuban Missile Crisis, see generally ROBERT F. KENNEDY, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* (1969); GRAHAM T. ALLISON & PHILIP ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1999).

² See David E. Sanger & Jim Tankersley, *U.S. Warns Russia of 'Catastrophic Consequences' if it Uses Nuclear Weapons*, N.Y. TIMES (Sept. 25, 2022), <https://www.nytimes.com/2022/09/25/us/politics/us-russia-nuclear.html> [https://perma.cc/7LEC-M322].

³ See Felicia Schwartz, *Kyiv's Western Allies Boost Nuclear Deterrence After Putin's Threats*, FIN. TIMES (Sept. 25, 2022), <https://www.ft.com/content/e7212f93-6635-40eb-a356-c8e1bb14cea3> [https://perma.cc/DT45-EPYG] (“[W]estern officials said that a nuclear strike against Ukraine would be unlikely to spark a [nuclear] retaliation in kind but would instead trigger conventional military responses from western states to punish Russia.”).

⁴ See e.g., Bryan Frederick, Mark Cozad & Alexandra Stark, *Escalation in the War in Ukraine* (2023) (evaluating potential Russian escalation to nuclear use and restraining role of *inter alia* threat of NATO military response), https://www.rand.org/pubs/research_reports/RRA2807-1.html; Stephen Collinson, *US Warnings Against Putin's Nuclear Threats Mark a Sobering Moment for the World*, CNN (Sept. 26, 2022), <https://www.cnn.com/2022/09/26/politics/us-warns-putin-nuclear-weapons-analysis/index.html> [https://perma.cc/XQ7D-BDP8].

My contention is that unless there are clear indications of a temporally imminent or initiated Russian follow-on armed attack on the United States, U.S. forces, or NATO allies, the simple fact of Russian nuclear use against Ukraine would not render a punitive kinetic U.S. military strike legal under U.S. law. Such a further outrage in a war already sodden with bloody evidence of Russian war crimes⁵ does not change the powerful reasons to conclude that the President as a question of U.S. law must either wait for clear indications of an additional Russian attack to the west in order to invoke the Commander in Chief's national self-defense constitutional authority, or else secure a force authorization from Congress. In my view, the discretionary nature of the U.S. attack and the colossal risk of escalation would make congressional authorization constitutionally imperative under the Constitution's vision of shared power in national security. Thankfully, alternatives exist, ones that are legal and may shape Russian decisions.

Part II explains that this legal question deserves focused engagement now. In this volatile and massively ramified war, the possibility of a Russian nuclear attack on Ukraine could revive at any point.

Despite sympathies on my part for Ukraine that could not be stronger, Part III argues that a presidential order to strike the Kremlin's forces or territory with kinetic weapons after a Russian atomic atrocity, without indication of a specific follow-on attack against the United States or our treaty allies and without new statutory authorization, would push presidential war authority beyond its outer edge. Under the Constitution's vision of shared congressional and presidential war power, none of the four bases for use of force abroad pursuant to the President's authority under Article II of the Constitution are operative.

Finally, Part IV will set out a range of alternatives to a U.S. kinetic attack that are legal and available. These overt and covert courses of action could impose a massive cost, and therefore in Kremlin minds ought to have a deterrent effect.

This essay concludes by cautioning any readers in Putin's regime from assuming that Russia would not pay an enormous price for nuking Ukraine or that force would be off of the President's menu of options. I am confident in the analysis here, but I acknowledge that U.S. President Joseph R. Biden and his lawyers may not agree. In short, if Russian leaders are worried about what NATO might do, they should stay worried.

II. THE RISK OF RUSSIAN NUCLEAR USE ENDURES

Based on public record, we can gather that the deep concern in NATO capitals in fall 2022 about Russian employment of one, or a small number, of

⁵ See, e.g., Lori Hinnant & Jamey Keaten, *U.N.-Backed Investigation Finds Evidence of Russian War Crimes in Ukraine*, ASSOCIATED PRESS (Mar. 16, 2023), <https://www.pbs.org/newshour/world/u-n-backed-investigation-finds-evidence-of-russian-war-crimes-in-ukraine> [<https://perma.cc/8DCL-RR4C>].

its thousands of relatively low-yield tactical nuclear weapons was driven by multiple factors.⁶ One was Kremlin desperation to win a failing, appalling costly, and incompetently executed war.⁷ Another was the intensification of Russian nuclear saber rattling.⁸ A third was intelligence indicating that Russian generals had discussed the circumstances under which Russia would break the taboo against nuclear attack that has existed for more than 75 years.⁹

In warning with “clear and specific” details “directly, privately at very high levels to the Kremlin that any use of nuclear weapons will be met with catastrophic consequences for Russia,” senior U.S. and allied officials were in fall 2022 practicing the verbal communication element of nuclear deterrence—dissuasion of nuclear use by threat of a response that would impose unacceptable costs on the aggressor.¹⁰ These warnings went farther than the broad public warnings issued by President Biden from the early months of Russia’s invasion.¹¹ Top officials in NATO states spoke on-the-record in alarming but general terms, while others were anonymously quoted threatening punitive military strikes by the United States and its allies.¹² Public discussion

⁶ See e.g., Stephen Collinson, *Biden Sends a Careful but Chilling New Nuclear Message to Putin in CNN Interview*, CNN (Oct. 12, 2022), <https://edition.cnn.com/2022/10/12/politics/joe-biden-nuclear-message-putin-cnntv-analysis/index.html> [<https://perma.cc/23CC-WJWD>]. For discussion of tactical nuclear weapons generally and analysis of relevant arms control efforts and options, see Dakota S. Rudesill, *Regulating Tactical Nuclear Weapons*, 102 GEO. L.J. 99 (2013). For discussion of Russia’s current arsenal of such weapons, see Hans M. Kristensen, Matt Korda & Eliana Reynolds, *Nuclear Notebook: Russian Nuclear Weapons, 2023*, 79 BULL. ATOMIC SCIENTISTS 174 (2023).

⁷ Peter Dickinson, *Putin’s Nuclear Saber Rattling Is a Sign of Dangerous Russian Desperation*, ATL. COUNCIL (Mar. 30, 2023), <https://www.atlanticcouncil.org/blogs/ukrainealert/putins-nuclear-saber-rattling-is-a-sign-of-dangerous-russian-desperation/> [<https://perma.cc/DBH8-Y8P9>].

⁸ *Id.*

⁹ See Helene Cooper, Julian E. Barnes & Eric Schmitt, *Russian Military Leaders Discussed Use of Nuclear Weapons, U.S. Officials Say*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/us/politics/russia-ukraine-nuclear-weapons.html> [<https://perma.cc/8HF3-BYLR>].

¹⁰ For a quote from Jake Sullivan, President Biden’s National Security Advisor, and similar comments from other officials in NATO member nations, see Schwartz, *supra* note 3. For discussion of nuclear deterrence, see Dakota S. Rudesill, *MIRVs Matter: Banning Hydra-Headed Missiles in a New START II Treaty*, 54 STAN. J. INT’L L. 83, 90–91 (2018); HERMAN KAHN, ON THERMONUCLEAR WAR 3, 7–13 (1961) (classic Cold War theorization of nuclear deterrence). A Cold War era critic of nuclear theology offered a more satirical but no less accurate definition of deterrence: “The international version of winning through intimidation; the policy of preventing enemy attack by threatening the same; preserving peace by preparing for death; a mutual genocide pact to prevent aggression.” JAMES J. FARRELL, THE NUCLEAR DEVIL’S DICTIONARY 33 (1985).

¹¹ See, e.g., Joseph R. Biden Jr., *What America Will and Will Not Do in Ukraine*, N.Y. TIMES (May 31, 2022), <https://www.nytimes.com/2022/05/31/opinion/biden-ukraine-strategy.html> [<https://perma.cc/WA3W-7ZDP>].

¹² See Schwartz, *supra* note 3.

and, reportedly, internal government deliberations focused on a potential U.S. conventional (non-nuclear) attack on Russian forces operating in or against Ukraine.¹³ Multiple options were mentioned by experts and former government officials, including conventional strikes on the military bases (on Russian soil) or forces (wherever they are) that launched the nuclear attack on Ukraine, and sinking the Russian Black Sea Fleet headquartered in Russian-occupied Crimea.¹⁴

Warnings from U.S. and allied officials, together with others from China and other powers, appear to have had a role in Russia's lack of resort to nuclear weapons in fall 2022, and to date.¹⁵ Apparently reduced risk of nuclear use is welcome news. So too is that Putin appears to be able to listen to signals from other world actors. Russia's strongman has been extremely isolated in recent years due to the pandemic, personal security worries during the war, and surrounding himself with sycophants, producing a disconnection from reality that likely facilitated Putin's failure to predict and therefore to plan for Ukrainian and international reaction to his full scale invasion.¹⁶ Putin is plainly prepared to spill massive amounts of Ukrainian and Russian blood to restore

¹³ See *id.*; Joseph M. Siracusa, 'Massive Conventional Attack': *The US Has Told Russia 'Through Back Channels' What America Would Do if Putin Uses Tactical Nuclear Weapons in Ukraine*, SKY NEWS (May 22, 2023) <https://www.skynews.com.au/insights-and-analysis/massive-conventional-attack-the-us-has-told-russia-through-back-channels-what-america-would-do-if-putin-uses-tactical-nuclear-weapons-in-ukraine/news-story/02047a613a3b687bba713492540142a2> [<https://perma.cc/E9A9-JUZA>].

¹⁴ See, e.g., MATTHEW KROENIG, ATL. COUNCIL, MEMO TO THE PRESIDENT: HOW TO DETER RUSSIAN NUCLEAR USE IN UKRAINE—AND RESPOND IF DETERRENCE FAILS 3 (Sept. 2022), <https://www.atlanticcouncil.org/content-series/memo-to-the-president/memo-to-the-president-how-to-deter-russian-nuclear-use-in-ukraine-and-respond-if-deterrence-fails/> [<https://perma.cc/B5LS-AAPT>] (international relations scholar urges the U.S. President to be prepared to order a "limited conventional strike on the Russian forces or bases directly involved in the [nuclear] attack," which could involve U.S. strikes on Russian soil; also discusses U.S. nuclear strike); *This Week 10-2-22: FEMA Administrator Deanne Criswell, Sen. Marco Rubio & Gen. David Petraeus* (ABC News television broadcast Oct. 2, 2022), <https://abcnews.go.com/Politics/week-transcript-10-22-fema-administrator-deanne-criswell/story?id=90870039> [<https://perma.cc/H2XL-CDF7>] (former Army General and CIA Director Petraeus on sinking Russian Black Sea Fleet).

¹⁵ See Federick, Cozad & Stark, *supra* note 4, at vi ("main factors" that "appear to have restrained Russian escalation" include "acute concerns for NATO military capabilities and reactions" and "concern for broader international reactions" especially losing Chinese support); Stuart Lau, *China's Xi Warns Putin Not to Use Nuclear Arms in Ukraine*, POLITICO (Nov. 4, 2022), <https://www.politico.eu/article/china-xi-jinping-warns-vladimir-putin-not-to-use-nuclear-arms-in-ukraine-olaf-scholz-germany-peace-talks/> [<https://perma.cc/Z7TV-N356>] (warning from leader of one of Russia's closer geopolitical partners). China is the third most powerful nuclear state. *Which Countries Have Nuclear Weapons?*, INT'L CAMPAIGN TO ABOLISH NUCLEAR WEAPONS (2023) https://www.icanw.org/nuclear_arsenals [<https://perma.cc/VN69-JW5M>].

¹⁶ See Maura Reynolds, 'Yes, He Would': *Fiona Hill on Putin and Nukes*, POLITICO (Feb. 28, 2022), <https://www.politico.com/news/magazine/2022/02/28/world-war-iii-already-there-00012340> [<https://perma.cc/3VL8-RGPH>].

Russian imperial power over tens of millions of people who reject it, yet does not seem completely locked inside the bellicose, resentful, paranoid worldview that Kremlin watchers have warned could lead Putin to order an atomic atrocity against Ukraine.¹⁷

Although, in 2023, worry about Russian nuclear use declined,¹⁸ and the year's Ukrainian offensive has not achieved its objectives,¹⁹ it is "highly plausible" that nuclear use could be back on the table for Putin as the war grinds on.²⁰ As of when this piece went to press, there is no end of the war in sight.²¹ There is good reason to believe that the stalemate apparent in late 2023 is highly unstable.²² Russia's position could worsen, and Ukraine could find itself on the path to what it regards as victory—recapturing all of its territory, including

¹⁷ See, e.g., *id.* (expert Putin-watcher and former National Security Council official Fiona Hill believes Putin willing to use nuclear weapons).

¹⁸ See Ben Makuch, *Putin Unlikely to Use Nukes in Ukraine, Pentagon Says*, VICE (Feb. 28, 2023), <https://www.vice.com/en/article/bvmwk4/pentagon-putin-nukes-ukraine> [<https://perma.cc/W89W-BY9E>] (Undersecretary of Defense for Policy Colin Kahl testified before a congressional committee that he did not think it "likely" that Russia would cross the nuclear threshold, while also reiterating U.S. threats: "Any use of nuclear weapons in Ukraine, on any scale would be considered a world changing event that would bring about severe consequences far in excess of anything the Russians have experienced to date A lot of the restraints we've been operating under would no longer [continue] in a world where Russia crossed that threshold." (alteration in original)); KAROLINA HIRD ET AL., INST. FOR THE STUDY OF WAR, RUSSIAN OFFENSIVE CAMPAIGN ASSESSMENT 1 (Feb. 2023), <https://www.understandingwar.org/backgroundunder/russian-offensive-campaign-assessment-february-28-2023> [<https://perma.cc/R8KD-VP39>] (non-governmental experts in 2023 "assessed that Russian invocations of nuclear threats and nuclear doctrine are part of an information operation meant to discourage Ukraine and the West but do not represent any material Russian intent to employ nuclear weapons").

¹⁹ See Mansur Mirovalev, *'Strategic Objectives Not Achieved': Has Ukraine's Counteroffensive Failed?*, AL JAZEERA (Nov. 7, 2023), <https://www.aljazeera.com/news/2023/11/7/russia-looks-stronger-and-has-a-four-fold-advantage-in-manpower> [<https://perma.cc/8D8Z-RAGJ>] (Ukraine hoped to reach the Sea of Azov this year and cut Russia's overland access to occupied Crimea, but has not succeeded and instead has suffered a net loss of ground during the year).

²⁰ See Frederick, Cozad & Stark, *supra* note 4, at vii (as of late 2023, "Further deliberate escalation, including Russian nuclear escalation, is highly plausible" and "Fast-moving situations heighten escalation risks").

²¹ Holly Ellyatt, *How—and When—Ukraine's War with Russia Could End*, CNBC (Aug. 7, 2023), <https://www.cnbc.com/2023/08/07/when-and-how-will-ukraines-war-with-russia-end.html> [<https://perma.cc/6TVK-U2JJ>].

²² See, e.g., FREDERICK W. KAGAN, INST. FOR THE STUDY OF WAR, IF THE WEST CUTS AID TO UKRAINE, RUSSIA WILL WIN. IF THE WEST LEANS IN, UKRAINE CAN WIN 1 (Nov. 2023), <https://understandingwar.org/backgroundunder/if-west-cuts-aid-ukraine-russia-will-win-if-west-leans-ukraine-can-win> [<https://perma.cc/ZFX7-K345>] (the war does not reflect "a stable stalemate" and "The current balance is . . . in fact, highly unstable, and could readily be tipped in either direction by decisions made in the West" or in Russia).

Crimea and other parts of eastern Ukraine that Russia illegally annexed.²³ Rising domestic pressures on Putin to end the war,²⁴ another internal move against his regime akin to the June 2023 revolt by the Wagner Group militia,²⁵ renewed and mounting battlefield setbacks in a war that the Putin regime probably does not believe it can lose,²⁶ or deterioration of Putin's mental state could prompt renewed concern about Russian resort to nuclear weapons,²⁷ one of Russia's few real claims to power parity with the United States.²⁸ As the U.S. Intelligence Community advised in its 2023 annual threat assessment, these kind of stressors on the Russian regime could "trigger additional escalatory actions by Russia" and increased reliance on cyber, space, and nuclear capabilities.²⁹

²³ See PHILIP WASIELEWSKI, FOREIGN POL'Y RSCH. INST., FIGHTING TO WIN: UKRAINE, RUSSIA, AND THE WAR FOR SURVIVAL 3 (Aug. 2023), <https://www.fpri.org/article/2023/08/fighting-to-win-ukraine-russia-and-the-war-for-survival/> [<https://perma.cc/6ZXT-66KR>] ("Ukraine's primary war aim of restoring its territorial integrity is shared across its society."); Adam Schreck, *Putin Signs Annexation of Ukrainian Regions as Losses Mount*, ASSOCIATED PRESS (Oct. 5, 2022), <https://apnews.com/article/russia-ukraine-putin-international-law-donetsk-9fcd11c11936dd700db94ab725f2b7d6> [<https://perma.cc/MG4Z-DLPH>].

²⁴ Nick Reynolds, *Putin Faces Pressure in Russia to End War with Ukraine*, NEWSWEEK (Dec. 13, 2022), <https://www.newsweek.com/putin-faces-pressure-russia-end-war-ukraine-1766898> [<https://perma.cc/E7AP-D7Y4>].

²⁵ Molly Dunigan, *Putin Won't Wipe Out Prigozhin's Wagner Group. He Needs Mercenaries to Fight Russia's Wars*, USA TODAY (June 27, 2023), <https://www.usatoday.com/story/opinion/2023/06/27/russia-putin-need-wagner-ukraine/70358546007/> [<https://perma.cc/7VHY-DQRU>]. The head of the Wagner Group was subsequently killed in a plane crash, a probable assassination by the Kremlin meant to send a message to other potential usurpers. Oren Liebermann, Jim Sciutto, Katie Bo Lillis & Alex Marquardt, *U.S. Says It's 'Likely' Prigozhin Was Killed in Wednesday's Plane Crash*, CNN (Aug. 24, 2023), <https://edition.cnn.com/2023/08/24/politics/us-prigozhin-crash-assessment/index.html> [<https://perma.cc/B2N8-SPRM>]. A good inference is that such a murder reflects not confidence of the Putin regime about its position but instead enormous worry.

²⁶ See Marnix Provoost, *What Is Russia's Theory of Victory in Ukraine?*, MODERN WAR INST. (Mar. 31, 2023), <https://mwi.westpoint.edu/what-is-russias-theory-of-victory-in-ukraine/> [<https://perma.cc/PXU5-DP4P>] ("Because the war in Ukraine is framed as existential by the Russian regime, Ukrainian success may potentially lead to further escalation in Russia's mode of warfare. Indeed, Putin's regime does not seem to have the option of losing this war without far-reaching loss of face abroad and political repercussions in Russia."); Peter Dickinson, *Ukraine's Counteroffensive Is Making Real Progress on the Crimean Front*, ATL. COUNCIL (Sept. 27, 2023), <https://www.atlanticcouncil.org/blogs/ukrainealert/ukraines-counteroffensive-is-making-real-progress-on-the-crimean-front/> [<https://perma.cc/73N2-HSZD>].

²⁷ See Reynolds, *supra* note 16.

²⁸ See Taras Kuzio, *Putin's Failing Ukraine Invasion Proves Russia Is No Superpower*, ATL. COUNCIL (Nov. 1, 2022), <https://www.atlanticcouncil.org/blogs/ukrainealert/putins-failing-ukraine-invasion-proves-russia-is-no-superpower/> [<https://perma.cc/R866-LS3K>] (detailing Russia's many economic, military, and geopolitical weaknesses).

²⁹ See OFF. OF THE DIR. OF NAT'L INTEL., ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 12–16 (Feb. 2023) [hereinafter THREAT ASSESSMENT 2023].

The next time worries about Russian nuclear use grow, warnings from Washington, Beijing, and elsewhere may fall on deaf Kremlin ears.

In short, U.S. officials could again be faced with the question of how to respond to a Russian nuclear strike on Ukraine, and particularly whether that U.S. response should include use of force. The primary U.S. goal for such a punitive attack would be to raise the costs of Russia's atomic atrocity so high that Russia would refrain from further nuclear use, thereby restoring nuclear deterrence. The U.S. could also seek to damage Russian forces so deeply that the Kremlin could no longer effectively continue a conventional armed conflict.

The massive risk is that a U.S. attack would have the opposite effect: precipitation of Russian retaliation against U.S. forces or NATO allies. That, of course, could lead to a general Russia/NATO conventional war, one that would be costly for both sides but an already battered Russian military would be unlikely to win. Desperate Russian resort to use of tactical nuclear weapons could ensue, followed by NATO retaliation in kind to restore deterrence. Use of strategic nuclear weapons against the homelands of the nuclear-armed American, British, French, or Russian combatants would loom—potentially civilization-ending further rungs up the escalatory ladder.

Overstating nuclear risk is an obvious hazard, and so too is ignoring it. It is imperative to think carefully now about possible Russian moves, U.S. options, and potential consequences. A central reality here is that no NATO/Russia war nor any nuclear war has ever been fought, and therefore nobody really knows whether escalation could be controlled. How much the risks may shape Putin's reaction to the United States striking a bomber base in Russia, sinking the Black Sea Fleet, or devastating its dug-in ground forces in occupied Ukraine is a vital matter for assessment by experts on Russia, nuclear weapons, and international security. In our republic, these are also first-order questions of geopolitics for our government and for our citizenry.

In a nation under the Constitution and the rule of law, that thinking and dialogue must involve analysis of the legality of potential U.S. courses of action. To date, the public conversation about the Ukraine war and international law has been robust, but engagement with enormously important questions of U.S. law much too thin.³⁰ Specifically and remarkably, there has been virtually no

<https://www.dni.gov/files/ODNI/documents/assessments/ATA-2023-Unclassified-Report.pdf> (on file with the *Ohio State Law Journal*).

³⁰ Bright spots in terms of analysis of a number of questions of U.S. law—especially regarding sanctions and asset seizures—have been covered by the national security publications *Just Security* and *Lawfare*. See, e.g., Carla Crandall, *The Future Battlefield: Governed by International Law or Kriegsraison?*, JUST SEC. (Sept. 21, 2023), <https://www.justsecurity.org/88368/the-future-battlefield-governed-by-international-law-or-kriegsraison/> [<https://perma.cc/578V-ERFL>]; Paul Stephan, *Justice and the Confiscation of Russian State Assets*, LAWFARE (Mar. 10, 2023), <https://www.lawfaremedia.org/article/justice-and-confiscation-russian-state-assets> [<https://perma.cc/7R6N-3JUZ>]. These questions have also been considered at a handful of law school symposia, including the one at The Ohio State University for which this essay

public analysis of the legality under U.S. law of the punitive strikes on Russia that top officials have apparently threatened and could again. That is especially problematic because the legal case is weak.

III. PRESIDENTIAL WAR AUTHORITY BEYOND ITS OUTER EDGE

The U.S. legal framework regarding national security and specifically use of force reflects the U.S. Constitution's vision of shared power. As applied, the framework strongly suggests that a U.S. military attack on Russian targets, absent indication of an initiated or temporally imminent Russian attack on the United States, U.S. forces, or NATO allies, would not be legal unless authorized by Congress. Discretionary use of force that could foreseeably escalate to a general war—one imperiling national survival and human existence—without congressional authorization pushes presidential war authority beyond its outer edge.

A. *The Legal Framework: Shared Power*

The military instrument of national power is subject to control by both Congress and the president. Article I of the Constitution vests Congress with the powers to “declare War,” create and maintain the federal armed forces, “make Rules” for them, and appropriate, condition, and terminate spending.³¹ Article II of the Constitution gives the president the roles of commander in chief of the federal armed forces and chief executive charged with conducting foreign affairs.³² Article II has been understood since the Founding to include the power to “repel sudden attacks,” and the “gloss” of more than two centuries of constitutional practice reflects presidential power to order other uses of force not prohibited by statute that do not rise to the level of “War” in the

has been prepared. *See, e.g.*, Dakota Rudesill, Zach Price, Daniel Maurer & Heidi Gilchrist, Law Professors, Panel on U.S. National Security Law at the Ohio State Law Journal Symposium: The Ukraine War and Its Legal Ramifications (Feb. 24, 2023); 2023 Criminal Law Symposium: Russia, Ukraine, and the Challenge of Wartime Accountability, Texas Tech University School of Law (Apr. 14, 2023).

³¹ U.S. CONST. art. I, §§ 8, cl. 11–14, 9, cl. 7. For discussion, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 115 (2005) (powers to declare War and create and structure the military); Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 U. CIN. L. REV. 391, 391 (2018) (power to write Rules for U.S. forces); WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 7, 181 (1994) (appropriations power).

³² U.S. CONST. art. II, § 1, cl. 1 (Executive Vesting Clause); *id.* art. II, § 2, cl. 1 (Commander in Chief Clause).

constitutional sense.³³ War and other national security matters are, in short, a realm of shared power.³⁴

Under the *Youngstown* framework familiar to lawyers (and hopefully as well to their well-briefed principals and colleagues), a presidential decision is at its apex of constitutionality when invested with both Article I and II support: Congress has authorized the president's order.³⁵ This is a constitutionally happy *Youngstown* Category 1 situation.³⁶ When the president acts but Congress is silent, the commander in chief's actions instead fall into Category 2, a "zone of twilight" in which the president must rely only on what Article II allows a president to do on their own.³⁷ A presidential act here in the murky constitutional dusk could be legal, or not, depending on the issue and action.³⁸ Where the president acts contrary to "the express or implied will of Congress,"

³³ At the Constitutional Convention, on Aug. 17, 1787, Madison and Gerry moved for a textual change giving Congress the power to "declare" rather than "make" war with the understanding that this would leave "to the Executive the power to repel sudden attacks." Their amendment was approved seven votes to two, with one absent. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed., 1937); *see also* AMAR, *supra* note 30 (discussion); Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 6 (2011) [hereinafter OLC Libya Opinion] (concluding, based both on the "historical gloss of executive Power" and past presidential deployments unauthorized by Congress, that the Constitution permits presidential use-of-force declarations without Congress's authorization).

³⁴ For discussion, *see* JAMES E. BAKER, IN THE COMMON DEFENSE 176–83 (2007); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 112, 135–36 (1990).

³⁵ *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (framework for analyzing interactions of legislative and executive powers in national security matters); *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 692–96 (2008) [hereinafter Barron & Lederman, *Lowest Ebb Part I*] (Part I provides the deepest engagement with *Youngstown* in the legal academic literature); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 951–93 (2008) [hereinafter Barron & Lederman, *Lowest Ebb Part II*]; Heidi Kitrosser, *It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1401, 1404 (2010) (providing an example of the framework as applied).

³⁶ *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring).

³⁷ *Id.* at 637.

³⁸ *See* *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 30–32 (2015) (*Youngstown* framework clear that the President is generally bound by statute, but the President's diplomatic recognition power here was impermissibly constrained by statute); *Hamdan v. Rumsfeld*, 548 U.S. 557, 591–93 & n.23 (2006) (Commander in Chief order to military regarding detainees during post-9/11 armed conflict is illegal under statute and *Youngstown* framework); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–79 (1804) (in Founding Era case that predates and anticipates *Youngstown* doctrine and its Category 3, Commander in Chief's order to Navy to seize ships during naval hostilities with France illegal as implicit violation of statute).

the president's power is in Category 3 and at its "lowest ebb."³⁹ Ambiguity persists regarding the exact contours of specific Article I and II powers when in conflict here at presidential power's low tide mark. Even so, the overwhelming balance of evidence from the Founding Era to this century and the majority view of separation of powers doctrine are clear on this principle: the Executive Branch is subject to statute in matters of national security, and those statutory limitations generally prevail.⁴⁰

In 1973, Congress (over President Nixon's veto) enacted the War Powers Resolution (WPR), a framework statute to govern introduction of U.S. forces into hostilities.⁴¹ Congress' project was to reassert the Article I branch's role after decades of expanding presidential discretion during World War II and the Cold War, and particularly the war in Southeast Asia.⁴² The WPR is often misunderstood to authorize the president to wage war for 60 to 90 days.⁴³ In reality, however, the plain text of the WPR in Section 8(d) is crystal clear that it is not a force authorization.⁴⁴

Instead, the WPR stipulates limits and process requirements on presidential use of force under Article II authority and provides interpretive rules, such as Section 8(a) on how to read legislation and treaties together with the WPR.⁴⁵ The WPR in Sections 3 and 4 requires the president to consult with Congress and submit reports about introduction of forces into hostilities, and in Section 5(b) requires that forces be withdrawn within 60 to 90 days (the "clock") unless force is authorized by Congress.⁴⁶ The WPR also stipulates in Section 2(c) that

³⁹ *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

⁴⁰ Barron & Lederman, *Lowest Ebb Part I*, *supra* note 35, at 786–91. *But see* Zivotofsky, 576 U.S. at 32 (Zivotofsky's holding for the President's powers is an outlier, and concerns the Art. II diplomatic recognition power rather than the commander in chief power). For an overview of the debate about collision of Art. I and II national security powers in Category 3, see Dakota S. Rudesill, *Nuclear Command and Statutory Control*, 11 J. NAT'L SEC. L. & POL'Y 365, 403–06 (2021).

⁴¹ War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973); Statement by President Richard M. Nixon Accompanying his Veto of the War Powers Resolution, 1 PUB. PAPERS 352–54 (Oct. 24, 1973), *reprinted in* STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS, PETER RAVEN-HANSEN & STEPHEN I. VLADECK, NATIONAL SECURITY LAW 352–54 (6th ed. 2016).

⁴² See BAKER, *supra* note 34, at 183 (Southeast Asia wars as partial prompt).

⁴³ See KOH, *supra* note 34, at 39 (lack of action by Congress after initial introduction of U.S. forces into hostilities has regrettably "freed the executive branch to treat that statutory limit as de facto congressional permission to commit troops abroad for a time period of up to sixty days"); see also War Powers Resolution § 5(b). But that de facto permission is not de jure *authorization* by the WPR. See *id.* § 8(d).

⁴⁴ War Powers Resolution § 8(d). This provision means that use of force without specific new congressional authorization prior to reaching the 60–90 clock's limits happens on the basis of the president's Art. II constitutional authority, not a grant of Art. I authority via the WPR.

⁴⁵ *Id.* § 8(a).

⁴⁶ *Id.* §§ 3, 4, & 5(b).

congressional authorization for force is found only in war declarations and specific statutory authorizations.⁴⁷

A law that itself provides nothing and instead only imposes limits on authority provided elsewhere or in the future is not uncommon. Indeed, it is hard-wired into the Constitution's war powers provisions: the Army Appropriations Clause in Article I, Section 9, Clause 7 bars availability of funding for the Army for more than two years.⁴⁸ No credible argument can be made that this clause implicitly provides the Army two years of funding. Authority to spend particular dollars takes a separate act of Congress. Similarly, the Posse Comitatus Act (PCA) generally bars use of the federal armed forces to do law enforcement.⁴⁹ The PCA plainly does not implicitly authorize use of the federal armed forces to do things other than law enforcement, nor does it implicitly authorize the military on non-federal duty (e.g., the National Guard on state duty) to do law enforcement. Authorization for those other activities must be found in other federal or state laws. The WPR is similar to the Army Appropriations Clause, the PCA, and other laws in its limitation-without-implicit-authorization effects.

In any event, the WPR in Section 8(d) goes farther. It explicitly states a negative: that the WPR does *not* provide a drop of authority to the president to use force.⁵⁰ One cannot infer a Yes from such a clear statement of No.

The WPR in Section 8(a)(1-2) is also explicit that congressional authorization shall not be inferred from funding provisions or treaties.⁵¹ Section 8(a)(2) was enacted in response to contrary claims by Presidents Truman and Johnson, and governs interpretation of the NATO Treaty's Art. 5 collective self-defense provision.⁵² Article 5 stipulates that each alliance member shall consider "an armed attack against one . . . an attack against them all" and respond.⁵³ Note too, however, that Articles 4, 5, and 11 of the NATO treaty leave evaluation of whether an attack has happened and how exactly to respond to the alliance's collective decision-making process and to each member state's "respective constitutional processes."⁵⁴ As Michael Glennon has demonstrated,

⁴⁷ *Id.* § 2(c).

⁴⁸ U.S. CONST. art. I, § 8, cl. 12; *see also* AMAR, *supra* note 30, at 116 (discussion).

⁴⁹ Posse Comitatus Act, 18 U.S.C. § 1385; Joseph Nunn, *The Posse Comitatus Act Explained*, BRENNAN CTR. FOR JUST. (Oct. 14, 2021), <https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained> [<https://perma.cc/X6WZ-XWH6>] (explaining that "posse comitatus" means law enforcement body, thus the act so named generally prohibits the use of federal military personnel in such capacity).

⁵⁰ War Powers Resolution § 8(d).

⁵¹ *Id.* § 8(a)(1)–(2).

⁵² North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; Michael J. Glennon, *The NATO Treaty Does Not Give Congress a Bye on World War III*, LAWFARE (Mar. 23, 2022) [hereinafter Glennon, *World War III*], <https://www.lawfaremedia.org/article/nato-treaty-does-not-give-congress-bye-world-war-iii> [<https://perma.cc/XA6F-YHHQ>] (explaining the WPR legislative history).

⁵³ North Atlantic Treaty, *supra* note 52, art. 5.

⁵⁴ *See id.* arts. 4, 5, 11.

neither the NATO Treaty nor any other sweeps aside the U.S. legal framework for use of force and Congress' role in it.⁵⁵

The WPR's normative force has been weakened by not unreasonable but highly questionable and situationally convenient executive branch interpretations, ones that have leaned hard toward interpretation of the statute in a manner favorable to their client, the president.⁵⁶ So too the WPR has suffered from undefined terms, congressional acquiescence to self-serving executive interpretations, and judicial avoidance of war powers matters.⁵⁷ Even so, the overall pattern of practice has mostly been one of presidential compliance, including by presidents who have stated constitutional objections.⁵⁸ The WPR and its clear textual stipulations remain the law of the land.⁵⁹

Returning to the *Youngstown* framework: where Congress has not expressed its will, presidential use of force operates in the constitutional twilight of

⁵⁵ See Glennon, *World War III*, *supra* note 52; Michael J. Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT'L L. 509, 511–12, 530 (1986).

⁵⁶ One of several examples is the Justice Department's memorandum opining that the President did not violate the WPR by not beginning to remove U.S. forces from hostilities against Serbia in 1999 (Operation Allied Force, to protect Serbia's Kosovar minority) at the 60-day mark as required by the WPR, even though Congress had not authorized force. *See* Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 365 (2000). The plain text of section (a)(8)(1) of the WPR anticipated and explicitly barred the interpretation OLC adopted: use of force in Kosovo was impliedly authorized and the WPR provision pushed aside by a later appropriations act funding the war. The funding law also did not make explicit reference to the WPR as the WPR stipulates for subsequent congressional action to satisfy its statutory authorization requirement. Rejected here was the canon of statutory interpretation against inference of amendment or repeal of a statutory provision by a later one that does not explicitly address the earlier law. Generally, this Presumption Against Implied Repeals canon would run up against the Second-in-Time canon that provides that later acts prevail. This otherwise equal canon battle is most easily resolved here by the rule of construction in the earlier statute specifying the circumstances under which a later act satisfies its requirements. For one scholar who anticipated this scenario, see JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 128–29 (1993). Finally, OLC did the rule of law and transparency no favors by justifying President Bill Clinton's disregard for the 60-day requirement a year and a half after U.S. air strikes ended and as President Clinton was about to leave office. Neither the Congress nor the courts acted to impose any costs on the Executive.

⁵⁷ *See Reclaiming Congressional War Powers: Hearing Before the H. Comm. on Foreign Affs.*, 117th Cong. 3–4 (2021) (statement of Oona A. Hathaway, Professor of L., Yale L. Sch.), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3808779 (decrying congressional acquiescence and urging Congress *inter alia* to define “hostilities” in the WPR).

⁵⁸ *See, e.g.,* BAKER, *supra* note 34, at 184–85 (executive branch reports consistent with the WPR even while having constitutional objections to the statute).

⁵⁹ There is a rich and longstanding debate about the WPR. *See, e.g.,* Statement by President Richard M. Nixon, *supra* note 41 (claiming the WPR is unconstitutional). *See generally* Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984) (defending the WPR's constitutionality).

Category 2.⁶⁰ A presidential order moves to *Youngstown* Category 3's zone of conflict with Congress' constitutional powers as expressed in the WPR if Congress does not authorize force and the president does not comply with the 60–90 force removal clock.⁶¹ In Category 2 or 3, the Department of Justice's Office of Legal Counsel (OLC) has made clear that military action rising to the level of "war" implicate Congress's power to Declare War.⁶² Although OLC predictably hedges to protect its presidential client's flexibility ("a planned military engagement that constitutes a 'war' . . . may require prior congressional authorization"), and there is a rich related longstanding scholarly conversation, the thrust of the Justice Department's precedents appears to align with the best originalist evidence and balance of scholarly opinion: that the president relying only on Article II authority cannot take the country into an optional major military conflict.⁶³ The importance of congressional authorization—that is, a decision for war that carries the investment of both elected branches of government that under the Constitution share power in national security—logically grows with a military operation's intensity and escalatory risk, as it does further with the extent to which the use of force is a matter of choice rather than resistance to a foreign armed attack on the nation.

B. *The Framework, Applied*

There are four circumstances in which the president can constitutionally order the military to use force abroad. They are set out below and applied to our scenario. Here is the bottom line: Absent initiated or clear evidence of an initiated or truly imminent Russian attack on the United States or its forces (and possibly against NATO allies), and absent congressional authorization, the legal basis is weak for a U.S. punitive attack on Russia simply because Russia uses a nuclear weapon against Ukraine. This is due primarily to the escalation risk to world war, and also to the discretionary nature of the U.S. strike. This analysis considers overt *kinetic* U.S. action, meaning employment of military weapons to blow things up.⁶⁴

⁶⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

⁶¹ *See id.*; War Powers Resolution, Pub. L. No. 93-148, § 5(b) 87 Stat. 555 (1973).

⁶² U.S. CONST., art. I, § 8, cl. 11; OLC Libya Opinion, *supra* note 33, at 31 (describing the meaning of the Declare War Clause and interaction with presidential powers).

⁶³ *See, e.g.*, OLC Libya Opinion, *supra* note 33, at 31 (Declare War Clause can limit unilateral presidential war power); Barron & Lederman, *Lowest Ebb Part I*, *supra* note 35, at 699 n.20 (identification of quality academic sources); Peter M. Shane, *Learning McNamara's Lessons: How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281, 1284 (1997) (reserving the "clearest cut case"—our scenario—from the scholarly debate and use of force questions the courts typically avoid: "the massive use of force against an enemy capable . . . of marshalling substantial force").

⁶⁴ A kinetic attack could involve conventional or nuclear weapons. There are no indications that the Biden Administration has contemplated a U.S. nuclear strike on Russia in response to Russia using nuclear weapons against Ukraine.

1. *Congress Has Not Authorized Kinetic Force Against Russia*

No war declaration, no authorization for the use of military force (AUMF), and, as explained above, no part of the WPR authorizes use of kinetic force against Russian targets.⁶⁵ As the statute books stand today, a U.S. punitive strike on Russian forces would therefore not be in constitutionally sunny *Youngstown* Category 1.⁶⁶ Nor does any statute expressly prohibit it. So, a U.S. attack would also not fall into *Youngstown* Category 3's zone of presidential defiance of Congress.⁶⁷

Instead, a presidential order to attack Russian targets after Russia nuked Ukraine would most likely fall into the constitutional zone of twilight and congressional silence, *Youngstown* Category 2. Here, on the basis of Article II authority alone, three further potential bases exist for the president to order use of kinetic force. In the scenario we are analyzing, the legal authority to use force provided by these three flavors of Article II power we can fairly appraise as highly questionable to zero.

2. *“Repel Sudden Attacks” Presidential Authority Not Reasonably Available*

As noted, since the Founding, the president has been understood to possess authority to order federal forces into action to “repel sudden attacks”—to counter surprise military aggression against U.S. territory, forces, or persons.⁶⁸ Temporal and self-preservation considerations are at the heart of this non-

⁶⁵ See, e.g., War Powers Resolution § 8(d).

⁶⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

⁶⁷ *Id.* at 637. One could argue that Congress's authorization of use of cyber weapons against Russia—discussed *infra* note 124 and surrounding text—suggests that use of kinetic weapons against Russia is against the “implied will” of Congress and therefore in *Youngstown* Category 3. *Id.* The theory here would be that Congress has already considered the question of use of force against Russia and has chosen to authorize cyber weapons but not kinetic weapons. Essentially operating here is the statutory interpretation principle *inclusio unius exclusio alterius*: inclusion of one thing means exclusion (and prohibition) of others. This principle animated the leading Supreme Court Founding Era war powers case, *Little v. Barreme*, in which Chief Justice John Marshall for a unanimous Court overturned President John Adams' order to the Navy to intercept warships going to and from French ports because statute had only authorized interception of American ships going to French ports. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804). Viewing the cyber statutes as analogous to the statute in *Barreme* is a reasonable argument. A response that argues instead for inferring statutory silence and therefore a *Youngstown* Category 2 circumstance is that the cyber statutes were enacted in the 2010s primarily with cyber predations in mind, and before our posited Russian nuclear attack on Ukraine. See *infra* note 133 and surrounding text. Essentially, the response would claim that Congress has not faced and therefore not spoken on the question of whether to authorize force against Russia in response to a Kremlin atomic atrocity.

⁶⁸ See *supra* note 33 and accompanying text.

textual but obvious constitutional rule of necessity: the need to be able to resist adversary attacks launched before Congress's many members can gather, deliberate, and exercise their Article I constitutional responsibility to make decisions about war and peace.

However monstrous, a nuclear attack by a second country on a third country, especially one far from U.S. shores and not in NATO, is not an armed attack on the United States. With the exception of a handful of Marines and other personnel at the U.S. Embassy in Kyiv, the United States has no military forces in Ukraine that a nuclear strike there could harm or be understood to be directed against.⁶⁹ Western aid to Ukraine, although voluminous, also does not make a Russian attack on Ukraine a use of force against any other country, nor make any other state a party to the current Russia-Ukraine armed conflict, no matter how often Russia's authoritarian rulers claim that NATO has entered the war.⁷⁰

Although there is little chance of Ukraine being admitted to NATO before the war ends,⁷¹ if Ukraine were a NATO member when nuked by Russia, or if we were evaluating a Russian attack on a current NATO state under U.S. law, that would probably change the analysis. To be sure, an attack on a NATO ally does not automatically put the United States at war, nor does it sweep aside the U.S. legal framework or remove the role of Congress in choosing the U.S.

⁶⁹One classified U.S. document leaked in early 2023 mentioned 14 U.S. Special Operations personnel at the U.S. Embassy, reportedly to provide protection for the many U.S. officials who visit wartime Kyiv and to facilitate communications with the Ukrainian government. See Luis Martinez, *US Special Operations Team Working Out of Embassy in Ukraine: Sources*, ABC NEWS (Apr. 12, 2023), <https://abcnews.go.com/Politics/us-special-operations-team-working-embassy-ukraine-sources/story?id=98543007> [<https://perma.cc/VP5Y-W7ZL>]. The usual embassy security detail of Marines would add to that number. See *Marine Security Guards*, U.S. DEP'T OF STATE, <https://www.state.gov/marine-security-guards/> (on file with the *Ohio State Law Journal*). It not plausible, however, that Russia would incinerate much of a major capital city in the first nuclear attack in over 75 years in order to attack few dozen U.S. troops plus embassy staff. Could the "repel sudden attacks" Article II authority discussed at the constitutional convention be triggered by Americans being incidentally hurt or injured in an attack by a second country on a third? Conceivably, yes. See *The Prize Cases*, 67 U.S. (2 Black) 635, 697 (1862) (Commander in Chief may exercise judgment about how to respond to sudden attacks, in case in which sudden attack was directed against U.S. forces and military installation). But lacking any indication that the attack was intended to harm the Americans, and also lacking good evidence of an impending follow-on "sudden attack" that actually is directed against U.S. territory, persons, or allies, there is no reason to think that such harm to Americans would toss to the side Congress's authority to speak on questions of war and peace under Article I of the Constitution.

⁷⁰See *Putin Falsely Claims it Was West That 'Started the War' in Ukraine Almost a Year After He Ordered Invasion*, CBS NEWS (Feb. 21, 2023), <https://www.cbsnews.com/news/putin-ukraine-war-speech-today-blames-us-nato-after-one-year-invasion/> [<https://perma.cc/2WYM-YLDS>].

⁷¹See Jeremy Herb, *Biden Says War with Russia Must End Before NATO Can Consider Membership for Ukraine*, CNN (July 9, 2023), <https://www.cnn.com/2023/07/09/politics/joe-biden-ukraine-nato-russia-cnn-tv/index.html> [<https://perma.cc/78A7-6WBK>].

response.⁷² The facts and intelligence would matter. Having said that, a Russian attack directed against a NATO ally would raise a strong inference that the president's Article II "repel attacks" authority is operative. The argument would be that NATO is so integral to U.S. security that an attack on NATO is tantamount to an attack on our shores or forces. Additionally, a reasonable theory would be that such a Russian attack, especially a sizable one, anticipates near-term combat with U.S. forces. That is because the Russian attack would come in context of the seven decade U.S. commitment to NATO's defense, Article 5 of the NATO treaty, and reaffirmations such as President Biden's during the Ukraine War that "every inch of NATO territory will be defended."⁷³ U.S. military personnel are based in or frequently visit every NATO state, in many instances in large numbers.⁷⁴ Yet even in this fraught circumstance, the Constitution and WPR would still speak, counseling the president (either in advance of U.S. use of force or as soon as possible thereafter) to consult with Congress and seek Congress' authorization for combat with Russia that Biden has warned could mean World War III.⁷⁵

Again, however, Ukraine is not today a NATO member,⁷⁶ much less within the ambit of the U.S. territory, forces, and persons the president can defend from sudden attacks without congressional authorization. That is so even if Putin launches a nuclear assault on the fiercely independent nation he has referenced in vile gendered terms as "my beauty" who has to do her "duty" and submit to forced re-marriage to Russia.⁷⁷

What about incidents at sea and in the air, including minor contact between Russian and U.S. forces that causes loss of U.S. military hardware? This is not a hypothetical. In March 2023, for example, the U.S. Department of Defense released a video supporting its claim that two Russian fighter jets buzzed, dumped fuel on, and then struck and damaged the propeller of a U.S. drone in international airspace over the Black Sea.⁷⁸ Evidently believing that the

⁷² See *supra* notes 52–55 and surrounding text.

⁷³ See Bloomberg Television, *Biden Says U.S. Will Defend 'Every Inch' of NATO Territory*, at 00:48, YOUTUBE (Feb. 24, 2022), <https://www.youtube.com/watch?v=XHPokI1FsFE> [<https://perma.cc/VCR7-74RA>].

⁷⁴ See Becky Sullivan, *Explaining the U.S. Military Presence in Europe as 2,000 More Troops Deploy*, NPR (Feb. 4, 2022), <https://www.npr.org/2022/02/04/1078241901/us-troops-europe-ukraine-russia-crisis> [<https://perma.cc/YU45-8UQU>].

⁷⁵ See Aaron Blake, *Why Biden and the White House Keep Talking About World War III*, WASH. POST (Mar. 17, 2022), <https://www.washingtonpost.com/politics/2022/03/17/why-biden-white-house-keep-talking-about-world-war-iii/> [<https://perma.cc/HLZ9-54FQ>].

⁷⁶ See *NATO Member Countries*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/topics_52044.htm [<https://perma.cc/LW7B-S885>].

⁷⁷ See Nathan Hodge, *Putin's Use of Crude Language Reveals a Lot About His Worldview*, CNN (Feb. 8, 2022), <https://www.cnn.com/2022/02/08/europe/putin-coarse-remarks-ukraine-intl/index.html> [<https://perma.cc/WJ6B-493U>].

⁷⁸ See Karl Ritter, Aamer Madhani & Dino Hazell, *Pentagon Video Shows Russian Jet Dumping Fuel on US Drone*, ASSOCIATED PRESS (Mar. 16, 2023), <https://apnews.com/article/russia-ukraine-war-drone-us-intercept-b28e38a7cd046f8685b89>

damaged drone could not return to base, U.S. officials say they wiped the drone's software remotely and ditched it in nearly mile-deep waters.⁷⁹

A maximal reading of such an incident is that it is a Russian armed attack on U.S. forces, triggering the president's power to repel attacks.

A more measured reading is that the drone incident was harassment of an un-crewed piece of U.S. military equipment that lacked obvious intent to destroy the drone or bring the United States into the war. The Russian action killed no one.⁸⁰ It did not involve the Russian jets firing their missiles (clearly visible in the video).⁸¹ The incident has not been followed by Russian attacks on U.S. other NATO forces, nor by any indications on the public record that the U.S. intelligence community believes the drone incident was part of some larger slow-rolled Russian military assault on NATO.⁸² The United States did not issue public threats to use force in response.⁸³ Instead, top U.S. and Russian defense officials resumed phone consultations for the first time in five months.⁸⁴

In view of Congress's constitutional role and the risk of superpower war, damage to a drone or a handful of other non-lethal or otherwise small-scale incidents in international waters or airspace cannot justify a unilateral presidential decision for war if Russia subsequently nuked Ukraine. Ordering U.S. drone operators and pilots to take defensive action in response to any future harassment or overt attack is one thing. The president on their own additionally ordering punitive strikes on Russia that could foreseeably escalate to planet-killing thermonuclear war is something else. Loss of a piece of metal, rubber, and plastic does not transform a Russian nuclear attack on Ukraine into an initiated or impending attack on the United States, our people, or NATO allies, nor waive or make impractical Congress's "declare War" power.⁸⁵ The existential and constitutional stakes are simply too great.

In short, the "repel sudden attacks" authority is all but assuredly not available simply because Russia employs a nuclear weapon against Ukraine, even when viewed together with one or more minor and ambiguous incidents that cause loss of U.S. equipment.

3. Anticipatory Self-Defense Presidential Authority Not Reasonably Available

An overall third theory for legal authority to use force, and second category of Article II presidential authority, is also likely not available, based on all we

a3038973e49 [<https://perma.cc/TF4Q-A34K>].

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *Id.*

⁸⁵ *See supra* notes 62–63 and accompanying text.

know today: the (contested) idea that the president's repel attacks authority also provides latitude to engage in anticipatory or preemptive self-defense against imminent threats.⁸⁶

Nuclear use by one foreign state against another foreign state does not necessarily mean that a second follow-on attack on the United States, its forces, or allies is impending. Indeed, the data in this conflict paints a clear and contrary picture. Russia first invaded Ukraine almost a decade ago, and not one of tens of thousands of Russian attacks has to date been followed by a clear armed attack on U.S. or its NATO allies.⁸⁷ Not one. There is no logical reason to think that pattern changes if Russia crosses the nuclear threshold in regard to Ukraine. Why does conventional and nuclear deterrence automatically collapse? Whatever anticipatory self-defense prerogative (not to have to wait for the enemy's imminent first blow to land) that may logically flow from the "repel sudden attacks" power, understood by the Framers to lie with the Commander in Chief to defend the country before Congress could assemble,⁸⁸ does not automatically invest the president with the power to escalate to a nation-imperiling and civilization-imperiling global war because a geopolitical competitor uses a particular weapon against a non-ally country favored by U.S. policy.

If a Russian nuclear strike on Ukraine is accompanied by clear indications of imminent Russian expansion of the war to include the United States, *that* would trigger the president's anticipatory self-defense powers. But based on the public record today, we have no reason to believe that Putin has decided on a two-step expansion of the war: nuking Ukraine and then immediately attacking the territory or forces of the United States or other NATO states.⁸⁹

The strongest argument for an Article II preemptive or anticipatory self-defense power goes like this. Russia has global-range nuclear and conventional forces that can be launched in minutes.⁹⁰ Russia also has a large army in Ukraine in range of U.S. forces on the territory of NATO allies,⁹¹ has made repeated

⁸⁶ See Bonnie Kristian, *The Imminence Ploy*, WEEK (Jan. 10, 2020), <https://theweek.com/articles/888690/imminence-ploy> [https://perma.cc/7UGD-XWAD] (arguing against a broad interpretation of the "imminence" power).

⁸⁷ See SAMUEL CHARAP & MIRANDA PRIEBE, RAND CORP., *AVOIDING A LONG WAR 5* (Jan. 2023), <https://www.rand.org/pubs/perspectives/PEA2510-1.html> [https://perma.cc/ECR5-LEG5].

⁸⁸ See Farrand, *supra* note 33, at 318 (constitutional convention notes); Kristian, *supra* note 86 (discussion of imminence and use of force).

⁸⁹ For example, there was nothing to suggest this in the Director of National Intelligence's annual Worldwide Threat Assessment for 2023. See *THREAT ASSESSMENT 2023*, *supra* note 29, at 12–16.

⁹⁰ See Kristensen, Korda & Reynolds, *supra* note 6, at 174.

⁹¹ See *1st US Army Garrison on NATO's East Flank Formed in Poland*, ASSOCIATED PRESS (Mar. 21, 2023), <https://apnews.com/article/poland-us-security-military-nato-garrison-base-57a3db8e7e9073ed8fe7eb5b67e5f115> [https://perma.cc/8QBP-F9TG]; CHARAP & PRIEBE, *supra* note 87, at 5.

verbal threats against NATO,⁹² and caused the loss of U.S. military equipment.⁹³ In this circumstance, a Russian nuclear attack on Ukraine could suggest Russian willingness to make dangerous moves. The president therefore needs the authority to decide when to strike first in order to intimidate Russia into a more responsible course, to destroy Russian military capabilities, or both. Judgement about that generalized long-term threat, this argument would go, lies with the president, because the president may have to act suddenly on secret information, especially in our age of hypersonic missiles and global-range nuclear forces continually on alert and ready to fire.⁹⁴ A lawyer here would cite *The Prize Cases*, in which the Supreme Court during the Civil War upheld President Lincoln's use of force against the slaver confederate insurrectionists that had attacked U.S. forces, on the theory that it is up to the Commander in Chief to assess the threat and decide what level of force is required.⁹⁵

This argument ought to fail, for two reasons. First, *The Prize Cases*, although including ringing dicta, upheld presidential use of force in a dramatically different situation. The confederates moved first in the Civil War, overthrowing the Constitution in half the country and then using lethal force by attacking U.S. forces at Fort Sumter and instituting privateering.⁹⁶ War was forced upon the nation, and Article II "repel attacks" authority plainly operative.⁹⁷ (Additionally, Lincoln had statutory authority).⁹⁸ *The Prize Cases* is therefore an easy case under constitutional separation of powers doctrine, and easily distinguishable. It was also not about pre-emption, much less presidential authority to attack a second country for attacking a third country. Second, that Supreme Court opinion, plus mere possession by other countries of forces capable of striking U.S. or other NATO territory and plus use of force against third parties, is not a way out of the use of force framework or the constitutional values, long line of landmark *Youngstown* cases, and the Article I congressional responsibilities it reflects.

The debate about the precise contours of separation of powers in national security is a rich and longstanding one, but we can be confident that it was not the vision of the Framers or the structure of the Constitution they wrote that the president can incant the magic words "Article II" and "I predict an adversary

⁹² See, e.g., Zahid Mahmood, *Putin Warns NATO Over Being Drawn into Ukraine War, Says Russia Has More Nuclear Weapons*, CNN (June 17, 2023), <https://www.cnn.com/2023/06/17/europe/nato-danger-ukraine-war-putin-intl-hnk/index.html> [<https://perma.cc/FWT4-JQ4P>].

⁹³ Ritter, Madhani & Hazell, *supra* note 78.

⁹⁴ See THREAT ASSESSMENT 2023, *supra* note 29, at 14, 28; David Vergun, *General Says Countering Hypersonic Weapons Is Imperative*, U.S. DEP'T OF DEF. (May 10, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3391322/general-says-countering-hypersonic-weapons-is-imperative/> [<https://perma.cc/2V4N-KNE9>].

⁹⁵ *The Prize Cases*, 67 U.S. (2 Black) 635, 697 (1862).

⁹⁶ *Id.* at 669.

⁹⁷ *Id.* at 647, 691.

⁹⁸ *Id.* at 691.

attack at some point” and then legally order the military to attack anyone, anywhere, at any time, generating war of any scale of the president’s choosing, subject only to re-election defeat, impeachment and removal, or (today) removal by the cabinet for incapacity under the 25th Amendment.⁹⁹ Whatever power that would allow for a far-sighted president to pre-empt in good faith a temporally distant potential attack would impermissibly carry, too, a presidential power of war-at-whim. It would mean presidential license to murder. Unilateral presidential power to initiate an optional war with 1790s superpower Spain or with 2020s nuclear superpower Russia is not one that President George Washington would recognize, nor one consistent with the president’s sacred oath to protect and defend the Constitution.¹⁰⁰ Even the George W. Bush administration went to Congress for legal authority to attack Iraq in 2002–03 after some of its officials floated theories of nearly unlimited presidential power to initiate war, because those theories are simply not sustainable politically nor in accord with the law or the Constitution’s ethos.¹⁰¹

Our constitutional vision—reflected in the Constitution’s text, structure, purpose, original understanding, interpretation, and the practice “gloss” of history—commands that the president make the highest quality good-faith determination that a foreign attack is temporally imminent and that there is simply not time for Congress to act. (And Congress can act quickly—it declared war the day after Japan bombed Pearl Harbor and authorized force three days after 9/11).¹⁰² If the available intelligence does not suggest imminent attack, then the president must withhold initiating full “War” in the constitutional sense and get congressional authorization. Such presidential fidelity to the Constitution’s vision of shared power is especially imperative when a discretionary use of force could foreseeably escalate to large-scale conventional war, to nuclear war, and the end of the nation and human civilization.

In short, absent statutory authorization, and absent clear indication that Russia, after using nuclear weapons against Ukraine, is *additionally* moving toward imminent attack on the United States or its forces or NATO allies, it

⁹⁹ See U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 4; *id.* amend. XXV, § 4.

¹⁰⁰ As OLC has acknowledged, President Washington thought his Article II “authority extended to offensive operations undertaken in retaliation for Indian atrocities” against Americans but also wrote that “no offensive expedition of importance can be undertaken [against the Creek Indians] until after [Congress] shall have deliberated upon the subject, and authorized such a measure.” See Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 331 n.4 (1995). The risks to the new nation of war with the Creek Indians of 1793 paled in comparison with those of war with the global superpowers of that time. None, of course, had nuclear weapons.

¹⁰¹ See Mark J. Rozell & Mitchel A. Sollenberger, *The Unitary Executive Theory and the Bush Legacy*, in TAKING THE MEASURE: THE PRESIDENCY OF GEORGE W. BUSH 36, 36 (2013); Authorization for the Use of Military Force Against Iraq, Pub. L. 107-243, § 3, 116 Stat. 1498, 1501 (2002).

¹⁰² See generally Declaration of War Against the Empire of Japan, Pub. L. 77-328, 55 Stat. 795 (1941) (passed on Dec. 8, 1941); Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001) (passed on Sept. 14, 2001).

would be a violation of the president's constitutional oath to hit Russia after a Kremlin nuclear attack on Ukraine on the basis of a threat preemption theory.

4. *"National Interests" Presidential Authority Not Reasonably Available*

Finally, a fourth overall basis for use of force under U.S. law, and a third (and also contested) variety of Article II Commander in Chief authority in *Youngstown's* Category 2 of congressional silence—the generalized power of the President to use force to protect important national interests—is also highly questionable in our Russia-nukes-Ukraine scenario.

a. *Russia Is Not Libya*

The Justice Department's Office of Legal Counsel and longstanding practice recognize presidential authority to employ the U.S. military, including in hostilities, without advance congressional authorization and without an imminent self-defense rationale in order to protect a variety of national interests.¹⁰³ Relevant such interests include promotion of international peace and security, deterrence of use of weapons of mass destruction, and protection of the credibility of vital international organizations such as NATO and the United Nations.¹⁰⁴

These and other rationales have undergirded OLC recognition of the legality of non-self-defense presidential uses of force in Libya, Panama, Somalia, Haiti, Syria, and Bosnia, but these cases can be distinguished.¹⁰⁵ Under OLC's criteria, those U.S. military actions were not intense or perilous enough to implicate Congress' power to Declare War.¹⁰⁶ OLC typically looks at factors including the scope and duration of the operation, the risk to U.S. personnel, and the risk of escalation.¹⁰⁷ By each of these metrics, a U.S. strike on Russian forces would be different. Whereas none of the countries mentioned above had any real power to attack the United States, in the Russian case the risk of escalation to global war is immense.¹⁰⁸

One could reasonably expect the Kremlin to conclude that it had to respond in kind to an American conventional attack. The U.S. Director of National Intelligence has warned of greater Russian reliance on its nuclear forces as its

¹⁰³ See, e.g., OLC Libya Opinion, *supra* note 33, at 27–28.

¹⁰⁴ See, e.g., *id.*, at 33; Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 152 (2002).

¹⁰⁵ See Robert Chesney, *A Point-by-Point Summary of OLC's Libya Memo*, LAWFARE (Apr. 7, 2011), <https://www.lawfaremedia.org/article/point-point-summary-olcs-libya-memo> [<https://perma.cc/VGK7-W53B>].

¹⁰⁶ See *id.*

¹⁰⁷ See OLC Libya Opinion, *supra* note 33, at 27, 38.

¹⁰⁸ Chesney, *supra* note 105; THREAT ASSESSMENT 2023, *supra* note 29, at 14–15.

conventional forces suffer heavy damage in the Ukraine war.¹⁰⁹ That suggests that the Kremlin may feel compelled to resort relatively quickly to nuclear weapons in a war with NATO.¹¹⁰ It is conceivable that Putin at a desperate moment may see U.S. entry into the war as a gift and further escalation as a good gamble. Russia has already failed to achieve its aims in initiating the war, and, as the perpetrator of a horrific criminal war of aggression and conquest, is having difficulty presenting itself as a victim.¹¹¹ A U.S. attack on Russia for nuking Ukraine could change the game. It would play into Russia's narrative of resisting NATO aggression, giving Russia an opening to change the subject from its monstrous war crimes to date and from its atomic attack on Ukraine.¹¹² Russia may even push to escalate combat with the United States and its NATO allies—to “escalate to de-escalate”—hoping to scare NATO into suing for a peace (and strong-arming Ukraine into accepting a peace) that would recognize Russian conquests in Ukraine.¹¹³

Of course, as the classic Clausewitzian factors of fog, friction, chance, and escalatory “moral” pressures of hostility, anger, and fear distort decision-making during an unprecedented full war between nuclear superpowers, nobody knows whether the war's violence could be controlled and cabined to limited policy purposes.¹¹⁴ The risk of escalation to a general earth-ending nuclear exchange that no one on earth wants would loom. Russia is not Libya.

Civilizational peril augers hard toward maximal aversion from a discretionary unilateral presidential war with Russia and toward fidelity to the Constitution's vision of shared power with Congress.

b. *Considering Objections*

Practitioners, scholars, and students of war powers law may reasonably wonder if several factors—the intended limited scope of a U.S. punitive attack, the Korean War case, our national interests in NATO and the UN, and the transnational effects of nuclear weapons—may provide support for a “national interests” argument for unilateral presidential war power in our scenario. These are not unreasonable considerations. But they are highly questionable and ought not carry the day.

First, should it not matter that the intended scope of a punitive U.S. military strike on Russian targets would be limited to destroying a defined set of Russian

¹⁰⁹ See THREAT ASSESSMENT 2023, *supra* note 29, at 14.

¹¹⁰ *Id.*

¹¹¹ See *NATO-Russia Relations: The Facts*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/topics_111767.htm [<https://perma.cc/88XK-6Z62>].

¹¹² *Id.*

¹¹³ See Mary Glantz & Mona Yacoubian, *Is Russia Escalating to De-Escalate?*, U.S. INST. OF PEACE (Oct. 5, 2022), <https://www.usip.org/publications/2022/10/russia-escalating-de-escalate> [<https://perma.cc/P5ZW-7L62>].

¹¹⁴ See CARL VON CLAUSEWITZ, *ON WAR* 76–77, 81, 84–87, 101, 104, 114, 119–21 (Michael Howard & Peter Paret trans., Princeton Univ. Press 1984).

forces? What if the planned duration and number of conventional missiles and bombs to be employed in the U.S. operation against Russia in service of the “national interest” in restoring the 77-year-old taboo against use of nuclear weapons were less than or equal to the duration and intensity of U.S. operations that OLC has in the past viewed as not amounting to “war” in the constitutional sense? U.S. intentions certainly are part of OLC’s analysis.¹¹⁵ But OLC’s criteria also included the escalation risk, and relatedly risks of harm to U.S. personnel.¹¹⁶ Those factors make hitting Russia nothing like hitting Libya; as Biden himself has said, fighting Russia in Ukraine could mean World War III.¹¹⁷ Any deliberate U.S. kinetic military attack on a nuclear peer would be inherently precipitous.

Second, on the Korea case: If Biden administration lawyers have written a sinking-the-Black-Sea-Fleet memo that supports unilateral presidential authority to attack Russia if Russia nukes Ukraine, they probably have cited the Korean War as a precedent. The analogy in some ways fits. In 1950, President Harry S. Truman committed U.S. forces to war in Korea after one foreign country (North Korea) attacked another (South Korea), in defense of the international peace and security interests recognized by a U.N. Security Council resolution that authorized defense of South Korea as a matter of international law.¹¹⁸ Under U.S. law, Truman sent a massive U.S. force to wage war on Art. II authority alone, without statutory authorization.¹¹⁹ But the Korea comparison is dated and inevitably problematic. First, North Korea in 1950 had no way to escalate to strikes on the United States. Even though Soviet fighter jets did enter the war,¹²⁰ the main North Korean adversary was vastly less powerful than Putin’s nuclear superpower. Second, the Korean War is a singular outlier in our constitutional history, the only time a full war has been waged without a war declaration or AUMF-type statute, and without attack on the United States or U.S. forces. Presidential and congressional neglect of their constitutional duty three-quarters of a century ago is as much an indictment of American politicians of the time as it is a presidential power precedent.¹²¹ Third, Congress could at that time get a good deal of the way to formally authorizing the war in Korea by

¹¹⁵ See, e.g., OLC Libya Opinion, *supra* note 33, at 27.

¹¹⁶ See *id.* at 38.

¹¹⁷ *Id.*; Blake, *supra* note 75 (quoting Biden).

¹¹⁸ *US Enters the Korean Conflict*, NAT’L ARCHIVES (May 19, 2021), <https://www.archives.gov/education/lessons/Korean-conflict> [https://perma.cc/ERS2-S7T2].

¹¹⁹ See *id.*

¹²⁰ David Kindy, *The Day Soviet Aircraft Attacked American Pilots*, SMITHSONIAN MAG. (Apr. 9, 2021), <https://www.smithsonianmag.com/smithsonian-institution/seventy-years-ago-soviet-mig-15s-attacked-american-pilots-180977440/> [https://perma.cc/8YE7-UX8J].

¹²¹ See ELY, *supra* note 56, at 10–11 (The Korean War was a departure from a century and a half of consistent understanding that Congress must authorize wars, and “Usurpation isn’t precedent, it’s usurpation,” here facilitated by congressional acquiescence driven by the politics of the moment).

robustly funding it through appropriations and extending conscription.¹²² That is because such implicit authorizations for the Korean War preceded the WPR's standing ban on inference of force authorization from funding bills, a restriction enacted precisely because Congress regretted expansion of presidential war power during the Cold War.¹²³ The legal context today is therefore different. If Truman's war in Korea was on the line between *Youngstown* Categories 1 (congressional authorization) and 2 (silence), thanks to the WPR, a strike on Russian forces tomorrow because Russia nukes Ukraine today would be in Category 2 (where again constitutionally the president needs congressional authorization for a discretionary war) until the 60-90 day clock runs, and thereafter in Category 3 (contrary to statute, the WPR).

Third, what about international organizations? OLC has cited protecting the credibility of NATO and the UN as national security interests that justify presidential use of force.¹²⁴ An argument here would be that Russian use of nuclear weapons against a country that NATO is actively aiding and that borders NATO would be intimidating to our allies and an inherent affront to the alliance. Another argument is that a Russian atomic atrocity against Ukraine would similarly be a massive affront to the credibility of a UN General Assembly that has passed multiple resolutions calling for an end to Russian aggression, and would surely pass others condemning a Russian nuclear attack.¹²⁵ These are legitimate considerations, but ones that ultimately cannot stand against the escalation risk to full "war" that implicates the Declare War Clause.

Fourth and finally, what about other nuclear weapon effects? These include radioactive fallout and environmental damage, deep emotional suffering of terrified people worldwide due to horrifying post-nuclear images from Ukraine and spiking fear of a civilization-ending nuclear holocaust, and economic disruption and potential social disorder as people around the globe rush to prepare to survive a nuclear war.¹²⁶ These are all predictable secondary effects of Russian nuclear use that would flow across borders and therefore impact

¹²² See ELY, *supra* note 56, at 11.

¹²³ See John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1379, 1418–19 (1988). Note, too, the WPR's rejection of inference of use of force authority from treaties. War Powers Resolution, Pub. L. No. 93-148, § 8(a), 87 Stat. 555 (1973) This was in part a response to the Truman Administration citing the UN Charter and action by the UN Security Council pursuant to it as authority to use force under U.S. law because the United States is a signatory to the Charter. See Glennon, *supra* note 55, at 525, 542.

¹²⁴ See OLC Libya Opinion, *supra* note 33, at 27, 33–34.

¹²⁵ See Press Release, General Assembly, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, U.N. Press Release GA/12407 (Mar. 2, 2022), <https://press.un.org/en/2022/ga12407.doc.htm> [<https://perma.cc/E5DG-SY97>]; *UN General Assembly Calls for Immediate End to War in Ukraine*, UN NEWS (Feb. 23, 2023) <https://news.un.org/en/story/2023/02/1133847> [<https://perma.cc/77UP-QS2Y>].

¹²⁶ See Rudesill, *supra* note 6, at 157–59 (any nuclear use would have these strategic effects).

international peace and security. Here again, these are legitimate factors that suggest use of force to restore deterrence of Russian nuclear use. But they must be weighed against other considerations that cut harder the other way. It is probably just as or more likely that a U.S. attack on Russian forces would drive up risks of a wider war, and therefore much larger risk of environmental damage and human suffering worldwide. And, these considerations cannot erase Congress' equities regarding discretionary wars under the Constitution's vision of shared power.

In short, the enormity of the potential peril, and the possibility of unilateral presidential action denying Congress the opportunity to exercise *ex ante* its constitutional powers regarding a discretionary war are powerful considerations that out-balance any "national interests" theory of Article II power to sink the Black Sea Fleet and then wage whatever game-changing Third World War to which Putin might foreseeably thereafter decide to escalate in response.

IV. AVAILABLE ALTERNATIVES

It would be constitutionally irresponsible for any President to take the United States and the world into a discretionary full war with Russia on their own. But that does not mean that the U.S. war powers framework prevents the United States from making Russia pay a high price for a nuclear attack on Ukraine. Far from it. There are multiple legal and readily available alternatives, ones that make clear that Russia should expect that the U.S. response would impose on Russia a great cost for an atomic atrocity against brave, righteous Ukraine. Some have surfaced in the public discussion, while others have not.

A. Ready Options

1. Diplomacy and Signaling

The first and easiest option is to continue to send warning signals to Russia, while maintaining some calculated ambiguity about what exactly the United States might do.

President Biden and his team can in good faith continue to threaten catastrophic consequences with as much or as little elaboration as they choose. Although senior U.S. officials say they have spelled out the catastrophic consequences of Russian nuclear use,¹²⁷ they have probably in these private conversations left some ambiguity as well. And, even if the Biden administration *agrees* with this essay's legal analysis, they may still be as specific or ambiguous as they like in their public or private diplomacy. Specific or ambiguous threats could reasonably encompass any of the options I will list here. Alternatively, knowing that Congress could authorize force, the administration could also warn of a limited but devastating U.S. military

¹²⁷ See Sanger & Tankersley, *supra* note 2.

operation that could do any or all of the following: sink the remains of the Black Sea Fleet,¹²⁸ clear the skies over Ukraine of Russian aircraft,¹²⁹ or destroy hundreds of Russian tanks that are now dug-in in southern Ukraine and therefore sitting ducks for U.S. conventional precision weapons.¹³⁰ In any event, U.S. officials are under no obligation to clarify for the Kremlin exactly what actions they are willing to take under Article II presidential authority alone, how they plan to work the levers of American government, or how likely it is that Congress would actually pass a force authorization in response to a hypothetical Russian nuclear attack on Ukraine.

Diplomacy can also be combined with other overt and covert steps.

2. Enhanced Aid to Ukraine

Expanded aid to Ukraine can take the form of better military gear (fighter aircraft, better air-to-air and air-to-ground missiles for fighter aircraft, advanced U.S. drones, more tanks, weapons to destroy Russian electronic warfare systems, together with permission to use U.S. weapons in attacks into Russian territory), expanded intelligence support (such as giving Ukraine more and better information, including to hit targets inside Russia), economic steps (more seizures of Russian assets and accelerated expulsion of Russia from the global economy), and diplomatic initiatives (one thrust reportedly floated by Biden administration officials is, after a Russian nuclear detonation, pulling China, India, and other states throughout the world into the NATO-led diplomatic and economic response, worsening Russia's isolation).¹³¹

¹²⁸ See Ken Dilanian, Courtney Kube & Carol E. Lee, *U.S. Intel Helped Ukraine Sink Russian Flagship Moskva, Officials Say*, NBC NEWS (May 5, 2022), <https://www.nbcnews.com/politics/national-security/us-intel-helped-ukraine-sink-russian-flagship-moskva-officials-say-rcna27559> [https://perma.cc/SM3Y-GKTV].

¹²⁹ See Mark F. Cancian, *Will Russia Control the Skies over Ukraine?*, CTR. FOR STRATEGIC & INT'L STUDS. (Apr. 25, 2023), <https://www.csis.org/analysis/will-russia-control-skies-over-ukraine> [https://perma.cc/3DA7-L6SJ].

¹³⁰ See Andrew E. Kramer, *In Southern Ukraine, Signs of Low Russian Morale Amid Retreat*, N.Y. TIMES (Oct. 11, 2022), <https://www.nytimes.com/2022/10/10/world/europe/ukraine-war-south.html> [https://perma.cc/P2V8-ZEXP].

¹³¹ See Kagan, *supra* note 22, at 2–4; Gordon Lubold & Nancy A. Youssef, *Bipartisan Group in Congress Urges Pentagon to Send Ukraine Advanced Drones*, WALL ST. J. (Nov. 11, 2022), <https://www.wsj.com/articles/bipartisan-group-in-congress-urges-pentagon-to-send-ukraine-advanced-drones-11663862902> [https://perma.cc/2QGN-ZUFU]; Michael O'Hanlon, *Deterring Putin from Going Nuclear*, HILL (Oct. 9, 2022), <https://thehill.com/opinion/national-security/3678012-deterring-putin-from-going-nuclear/> [https://perma.cc/ZCS5-G3UQ] (urging among other things accelerated expulsion of Russia from the global economy); Sanger & Tankersley, *supra* note 2 (enhanced diplomatic and economic isolation).

3. *Offensive Cyber Operations*

The first of three alternatives to a U.S. kinetic military attack that would still involve force being used against Russia is offensive cyber operations. Based on the public record, U.S. cyber weapons could inferentially cause extensive confusion, disruption, and damage to Russian computer networks and the systems that depend on them (military, intelligence, domestic security, political, and economic).¹³² Here, the president would be comfortably in *Youngstown's* Category 1 because Congress in a series of provisions over the past decade has authorized use of cyber weapons. Note especially two provisions: Section 1642 of the National Defense Authorization Act (NDAA) for Fiscal Year 2019 authorized cyber operations to defeat and deter ongoing cyber attacks by Russia, China, North Korea, and Iran, and Section 954 of the NDAA for Fiscal Year 2012 authorized “offensive cyber operations in cyberspace to defend our Nation, Allies and interests.”¹³³ U.S. cyber operations against Russia could be clandestine or overt, and undertaken at a time and in a manner of the president’s choosing. As long as criteria and limits established in these statutory “Rules for the Government and Regulation of the [cyber] land and naval Forces” are observed (including compliance with the law of armed conflict and WPR),¹³⁴ nothing prevents the president from including punishment of a Russian nuclear attack as one factor in planning cyber operations authorized by these provisions to respond to longstanding and ongoing Russian predations against U.S.

¹³² See Ken Dilanian & Courtney Kube, *Biden Has Been Presented with Options for Massive Cyberattacks Against Russia*, NBC NEWS (Feb. 24, 2022), <https://www.nbcnews.com/politics/national-security/biden-presented-options-massive-cyberattacks-russia-rcna17558> [<https://perma.cc/K3TZ-L5FL>]; Sean Lyngaas, *US Confirms Military Hackers Have Conducted Cyber Operations in Support of Ukraine*, CNN (June 2, 2022), <https://www.cnn.com/2022/06/02/politics/us-hackers-ukraine-support/index.html> [<https://perma.cc/2GAW-SABG>].

¹³³ See, e.g., National Defense Authorization Act (NDAA) for Fiscal Year 2019, Pub. L. No. 115-232, § 1642, 132 Stat. 1636, 2132 (2019) [hereinafter NDAA 2019] (authorizing “appropriate and proportional” cyber operations in response to Russian, Chinese, North Korean, and Iranian cyber attacks); National Defense Authorization Act (NDAA) for Fiscal Year 2012, Pub. L. No. 112-81, § 954, 125 Stat. 1298, 1551 (2011) [hereinafter NDAA 2012] (providing the authorization to “conduct offensive cyber operations in cyberspace to defend our Nation”). For discussion, see ROBERT CHESNEY, HOOVER INST., *THE DOMESTIC LEGAL FRAMEWORK FOR U.S. CYBER OPERATIONS* 5–6 (July 2020), <https://www.hoover.org/research/domestic-legal-framework-us-military-cyber-operations> [<https://perma.cc/3WE3-MVP8>]; Gary Corn, *Cyber Conflict: From Apathy to Action*, AM. BAR ASSOC. (Jan. 6, 2023), https://www.americanbar.org/groups/law_national_security/publications/aba-standing-committee-on-law-and-national-security-60-th-anniversary-an-anthology/cyber-conflict-from-apaty-to-action/ [<https://perma.cc/29YF-9UCY>].

¹³⁴ See Rudesill, *supra* note 31, at 472–75 (explaining that Art. I, sec. 8, cl. 14 of the Constitution provides authority for Congress to write rules for cyber operations); NDAA 2012, *supra* note 133; NDAA 2019, *supra* note 133.

networks and elections and to advance the U.S. interest in the failure of Russia's war on Ukraine.¹³⁵

4. *Covert Action*

Here again in *Youngstown* Category 1, the president could under existing statute authorize a wide array of clandestine activities “to influence political, economic, or military conditions abroad” that the former KGB man running the Kremlin would find distasteful.¹³⁶ These could be carried out inside Ukraine, inside Russia, or elsewhere worldwide. Based on the public record of past covert actions, ones here could involve information operations, sabotage, or other direct actions.¹³⁷

5. *Neutrality Act Relief for U.S. Fighters*

Another option for bringing force to bear on the Russian bear would be to encourage Americans on their own initiative to go to Ukraine and fight against the invaders, which Ukrainians aptly term “Orcs.”¹³⁸ Generally in relevant part, the Neutrality Act of 1794 as amended bars Americans on their own accord from joining foreign militaries, joining foreign wars in which the U.S. is not a belligerent, or launching their own private military expeditions.¹³⁹ The statute has an exception, however, if Americans first leave U.S. jurisdiction.¹⁴⁰ During World War II and at other points in history, the U.S. Government has looked kindly on or at least not officially objected to Americans joining foreign forces to fight authoritarians.¹⁴¹ It could do so again. Or Congress could pass a bill

¹³⁵ See THREAT ASSESSMENT 2023, *supra* note 29, at 12, 15 (Russian cyber operations); Biden, *supra* note 11 (U.S. interest in Ukraine).

¹³⁶ See 50 U.S.C. § 3093(e); Dave Lawler, 20 Years of Putin: Tracing His Rise from KGB to Kremlin, AXIOS (Dec. 31, 2019), <https://www.axios.com/2019/11/25/vladimir-putin-20-year-anniversary-president> [<https://perma.cc/PM7A-E99D>] (analyzing Putin's past as a KGB agent).

¹³⁷ See W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 10–16 (1992) (examples of past U.S. covert actions).

¹³⁸ See Mansur Mirovalev, ‘Orcs’ and ‘Rashists’: Ukraine’s New Language of War, AL JAZEERA (May 3, 2022), <https://www.aljazeera.com/news/2022/5/3/orcs-and-rashists-ukraines-new-language-of-war> [<https://perma.cc/RQ3R-CGD5>].

¹³⁹ See 18 U.S.C. §§ 958–60.

¹⁴⁰ See Dakota S. Rudesill, *American Fighters, Ukraine, and the Neutrality Act: The Law and the Urgent Need for Clarity*, JUST SEC. (Mar. 15, 2022) <https://www.justsecurity.org/80612/american-fighters-ukraine-and-the-neutrality-act-the-law-and-the-urgent-need-for-clarity/> [<https://perma.cc/VNQ2-HZ8Z>].

¹⁴¹ *Id.* (identifying that after people in the United States were involved in the failed 1961 Bay of Pigs effort to overthrow the Soviet-backed Castro regime in Cuba, then-Attorney General Robert F. Kennedy explained that “the neutrality laws were never designed to prevent individuals from leaving the United States to fight for a cause in which they believed” and the Act would allow Cuban refugees in the United States to return to Cuba “to

introduced in the last Congress that would waive the Neutrality Act regarding service on the Ukrainian side in this war.¹⁴² Other incentives might be provided as well to facilitate defense of Ukraine by volunteer American veterans who gained combat experience over the past two decades in Iraq, Afghanistan, and elsewhere.¹⁴³

6. *Military Intervention by Other NATO Countries*

A final potential alternative to a U.S. kinetic strike on Russian forces is greater involvement on the Ukrainian side by U.S. NATO allies. One option would be deployment of a NATO force into Ukraine not to fight Russia but to fortify a defensive line and prevent any future Russian advances.¹⁴⁴ Another would be U.S. NATO allies using force against Russia on their own. Of course, that would carry large risk of involvement of the United States, thanks to our country's commitment to defend NATO.¹⁴⁵ But the United States has not joined other military actions of its NATO allies,¹⁴⁶ so at least in theory this would be an option short of an overt kinetic attack by the United States.

B. *Russia Should Remain Deterred*

Of course, President Biden may not actually be limited to the alternatives to a U.S. conventional attack on Russian targets that I have just outlined. Congress could authorize force after a Russian nuclear strike on Ukraine. And the president may well act on his own Article II authority.

In that regard, I want to be clear: readers in Russia should have zero confidence that the Biden administration agrees with me that the president could not order military strikes without congressional authorization. I am confident in

engage in the fight for freedom"); KENNETH C. KAN, *FIRST IN THE AIR: THE EAGLE SQUADRONS OF WORLD WAR II*, at 4–7 (2007), <https://media.defense.gov/2010/Sep/28/2001330139/-1/-1/0/AFD-100928-005.pdf> [<https://perma.cc/D8Q6-C9NY>] (stating that U.S. government officially “would not object” to Americans leaving the country to join the British Royal Air Force Eagle Squadrons during World War II, did not enforce the Neutrality Act against them, and allowed them to get flight training in the United States, reflecting Roosevelt Administration desire to help the British fight Nazi Germany).

¹⁴² Volunteer Fighters Exemption Act, H.R. 7039, 117th Cong. § 2(a) (2022).

¹⁴³ See Rudesill, *supra* note 140.

¹⁴⁴ See O’Hanlon, *supra* note 131 (discussing a version of this idea).

¹⁴⁵ North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

¹⁴⁶ For example, the British and French intervention in Egypt in 1956, and the British war with Argentina over the Falkland Islands in 1982. For background on these conflicts, see Office of the Historian, *The Suez Crisis, 1956*, U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1953-1960/suez> [<https://perma.cc/X3VA-HQNA>]; *Historical Spotlight: The Falklands War*, NAT’L GEOSPATIAL-INTEL. AGENCY, https://www.nga.mil/history/Historical_Spotlight_The_Falklands_War.html [<https://perma.cc/2MSZ-6PTC>].

this analysis, but recall from Part II.A that the Justice Department's opinions appear to give the president some potential wiggle room. The president and his lawyers could disagree with me. I have spoken with no one in the Biden administration about this matter or about reported table-top exercises in 2022 that gamed out potential Russian nuclear moves and U.S. responses.¹⁴⁷ I speak only for myself.

In short, to the extent that the Kremlin is deterred by the Biden administration's warnings to date, it should stay deterred.

There are many other reasons, as well, for Putin not to reach for his nuclear "button." China and other states that still work with Russia have warned him against nuclear use.¹⁴⁸ If he disregarded those warnings, Russia's isolation would only grow. And a nuclear attack could badly backfire at home: such a terrifying move could heighten worries of nuclear war and anxiety about Putin's judgment and mental state, fueling civil unrest and even motivating his already half-wrecked military to remove him. Finally, a nuclear attack on Ukraine is a strategic dead end. The defiant Ukrainian response to date to the Russian invasion and the British response to Nazi terror bombing are data points that strongly suggest only fiercer Ukrainian resolve.¹⁴⁹ A Russian nuclear attack would underscore for Ukrainians the war's mortal stakes and Russia's hideous imperial brutality. For its part, after crossing the nuclear threshold and not seeing Ukrainian capitulation, Russia would be out of good options. Putin could not keep pounding Ukraine with nuclear weapons without radioactive fallout risk to Russian troops in eastern Ukraine, to Russian territory and civilians only slightly farther east, and to Iran, China, and other countries whose continued support Russia needs desperately.¹⁵⁰ Nor could such a "Mad Vlad" keep pushing the nuclear button without further driving up risk of his removal or assassination by alarmed domestic or foreign actors.¹⁵¹

¹⁴⁷ See Sanger & Tankersley, *supra* note 2.

¹⁴⁸ See *supra* note 15 and accompanying text.

¹⁴⁹ See Olga Tokariuk, *How Ukrainian Citizens Are Mobilizing to Provide Aid and Supplies in the Fight Against Russia*, TIME (Mar. 11, 2022), <https://time.com/6156886/Ukrainian-citizens-mobilizing-against-russia/> [<https://perma.cc/HAB8-UDX7>]; Venetia Rainey, *Blitz Spirit in Spotlight for 70th Anniversary Show*, REUTERS (Sept. 17, 2010), <https://www.reuters.com/article/us-exhibitions-london-blitz-idCATRE68G34920100917> [<https://perma.cc/Q8QK-B9GX>].

¹⁵⁰ See *Why China's Stand on Russia and Ukraine is Raising Concerns*, ASSOCIATED PRESS (Feb. 20, 2023), <https://apnews.com/article/russia-ukraine-politics-government-antony-blinken-china-6ad43aa87f086acce31a1de63c6caf15> [<https://perma.cc/SE2V-X5MU>].

¹⁵¹ See Harry Cole & Paul Sims, *Nuclear Option: Fears Mad Vlad on Brink of Detonating Nuke Over Black Sea in Show of Force as Defense Sec Scrambles to Washington*, U.S. SUN, <https://www.the-sun.com/news/6473980/vladimir-putin-nuclear-weapons-black-sea-ben-wallace/> [<https://perma.cc/W7Q4-UAEV>] (Oct. 19, 2022); Andrey Baklitskiy, *What We Learned from Recent Calls for a Russian Nuclear Attack*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 20, 2023), <https://carnegieendowment.org/politika/90232> [<https://perma.cc/N7VT-LQXJ>].

V. CONCLUSION

I could not be more sympathetic to Ukraine's plight, more admiring of its resistance to an invasion of conquest launched to capture territory and to reverse Kyiv's progress toward becoming a Western free market republic, or more supportive of expanded U.S. aid to Ukraine. Russian nuclear use would only further underscore the monstrousness of Russian war aims and methods, the righteousness of the Ukrainian cause, and the urgency of continued and expanded global support for Kyiv.

Those are moral and policy thoughts. They are distinct from the legal question of whether the president could—without congressional authorization and without clear indication of a follow-on Russian attack on U.S. territory, forces, or allies—launch a military attack on the military of a peer nuclear power that has attacked a third party. I think the answer to that question is plainly no. Of course, the analysis changes if the facts change.

Our Constitution, like the rule of law and our future as a nation, depends on the constitutional conscience of decision-makers and their advisors. Ethos and integrity matter here more than formal processes, more than the textually undefined constitutional terms "Commander in Chief" or "declare War," and much more than textually absent concepts such as anticipatory self-defense. By all indications, President Biden is a person of deep constitutional conscience. It is my hope that he would agree with my analysis of the use of force framework as applied, and—absent an initiated or temporally imminent attack from Russia—look to alternatives to an overt U.S. military attack on Russian military units or territory in the event that Russia specifically threatens or carries out an atomic atrocity against Ukraine.