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## Updating Senator Borah: A Nuclear Kellogg-Briand Pact

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# UPDATING SENATOR BORAH: A NUCLEAR KELLOGG-BRIAND PACT\*

DAVID A. KOPLOW\*



*Thank you. It is a great pleasure to be with you today, and I am enormously gratified by the great honor of having the opportunity to participate in this symposium and to present this address.*

*My wife and I are also extremely grateful for the warm hospitality extended to us by the symposium organizers and the whole community, and we are very appreciative of your communal spirit, of the spectacular scenic beauty of northern Idaho, and of the vibrant intellectual community you have assembled here, attentive to both history and contemporary events.*

## Agenda

- I. Background of Senator William Borah
- II. The Kellogg-Briand Pact of 1928
- III. The Proposed Nuclear Kellogg-Briand Pact Today

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\* Remarks at Borah Symposium, on Tuesday, September 26, 2023 at the University of Idaho, Moscow, Idaho

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## I. INTRODUCTION

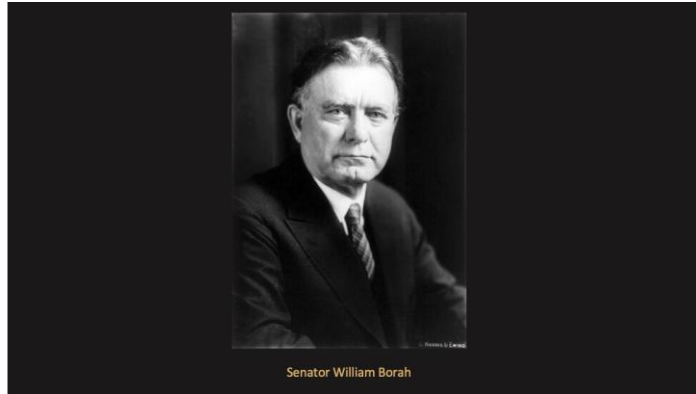
In recognition of the legacy of Senator William E. Borah, I would like to address three points with you today. First, a few words about Senator Borah – his background, his maverick personality and character, and especially his prominent role in U.S. politics and policy through the first half of the 20th century.

Second, I want to highlight what history regards as Senator Borah’s signature contribution to international law, peace, and security: the treaty known as the 1928 Kellogg-Briand Pact and the concept of nations outlawing war and formally renouncing it as a tool of national policy. As we’ll see, this posture was enormously popular and powerful in the early 20<sup>th</sup> century, and it captured the public imagination in the United States and globally in the aftermath of the unprecedented horror of World War I.

After World War II, however, the narrative was abruptly reversed, and the Kellogg-Briand Pact came to be almost universally condemned as foolish, naïve, and feckless – an absurd attempt to do something effective about the complex and tragic phenomenon of international war, simply by solemnly waving a piece of treaty parchment at it. For the past several decades, Kellogg-Briand has been deprecated as not merely idealistic, but as delusional and self-defeating, leaving the country and the world lulled into somnolence and unprepared for the aggression that precipitated World War II.

I will try to refute that characterization, to portray Kellogg-Briand and Senator Borah’s contribution to it as a major, positive turning point in the history of international armed conflict – at least, the intellectual history, if not the chronology of actual combat.

My third and main topic for today, therefore, will be to propose a modern extension or elaboration of the concept of that 1928 treaty, nearly a century after its creation, to accommodate the even more precarious and high-stakes international security circumstances we are living with today. In short, I will propose a “nuclear version” of the Kellogg-Briand Pact, a legally-binding international agreement to abolish nuclear war and to provide that it can never be fought. In my vision, this modern reincarnation would go beyond a simple declaration of rejection or outlawry, to address more broadly, and in a more practical way, the threats and opportunities of our era, but it would be clearly grounded in Senator Borah’s initial concepts.



## II. SENATOR BORAH

People in this community probably know the story of William E. Borah better than most. He represented this state in the U.S. Senate for six terms, from 1907 to 1940, winning overwhelming electoral majorities, and he was widely known as an eloquent and articulate champion of Western interests. He was a dominating and charismatic, if mercurial and solitary, force in the Senate, a plausible presidential contender in the 1920s and 1930s, and one of the most prominent figures in the national public consciousness during that era. In fact, by one contemporary account, only the potato did more than Senator Borah to spread the fame of the state of Idaho.

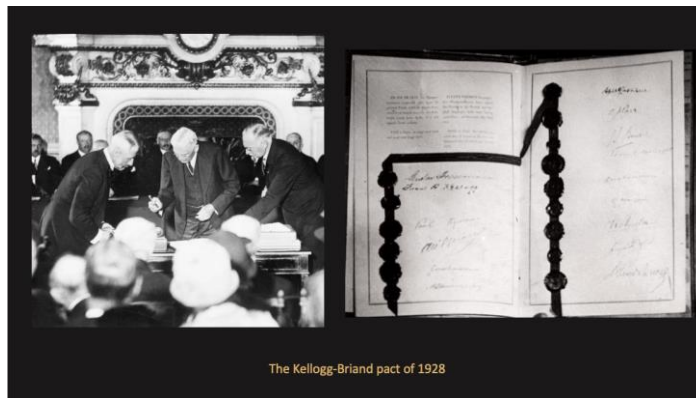
On the other hand, all that was long enough ago that most of you, and most of your parents, and probably most of your grandparents never saw a ballot with his name on it. So it's worthwhile to retrieve some of his political legacy.

Senator Borah is hard to pigeonhole politically, both in his era and today. He was surely a conservative Republican, but he was also a progressive reformer, as that term was used back then. He was independent, certainly not a rigid party loyalist, frequently butting heads with party leaders, cabinet officials and presidents. He is most well known as a leading "Irreconcilable" – a stalwart opponent of Treaty of Versailles, the League of Nations, and the World Court -- but he was also an indispensable champion of the global peace movement. He is best remembered as the paradigmatic isolationist, resisting all manner of transnational entanglements for his country, but he also sponsored this huge innovation in public international law, the Kellogg-Briand Pact.

He was, by character, more successful as an uncompromising obstructionist and dissenter, except that he was also the indispensable leader in making that treaty happen, and in shepherding it deftly through the Senate, ultimately achieving a remarkable 85-1 ratification vote. One more of his internal contradictions that I particularly note: although he is depicted on this university's promotional literature

with a snappy silhouette and a fine carved bust, even his wife was heard to comment that he was never a very sharp dresser.

Senator Borah was surely a product of his time and place (as are we all), but his legacy endures, and I argue that at least one part of it can be usefully drawn upon, resuscitated, and extended in the nuclear era. Borah always said that as a legislator, he was proudest of the proposals and pending legislation that he had stopped, rather than of the bills that he had sponsored – but today, I'd like to extrapolate from his signature achievement into the modern era.



### III. THE KELLOGG-BRIAND PACT

This treaty, the 1928 Kellogg-Briand Pact (or the Pact of Paris), was rooted in the global “outlawry” movement – a groundswell to declare that the practice of war was internationally outlawed and rejected. This was an immensely popular sentiment at the time, both globally and in the United States. It’s hard to think of a comparable grass roots political cause today – this really captured the *zeitgeist*, as a non-partisan, bottom-up public policy, animated by mass popular attention, petition drives, civic association meetings, and incessant public agitation. Policy elites and scholars joined in, too, and eventually practical politicians took up the scent – animated perhaps by the sentiment “There go the people; I must hasten to catch up with them, for I am their leader.”

People really thought that a public declaration renouncing war would make a difference; they did not consider it fatal, or even problematic, to call this idealism. It was to be rooted in the moral fiber of the citizenry and their insistent demands that their governments perpetually refrain from such violent and expensive self-destruction. As one leading advocate of the outlawry movement proclaimed, “We should have, not as now, laws *of* war, but laws *against* war; just as there are no laws *of* murder or *of* poisoning, but laws against them.”



Brief musical interlude.

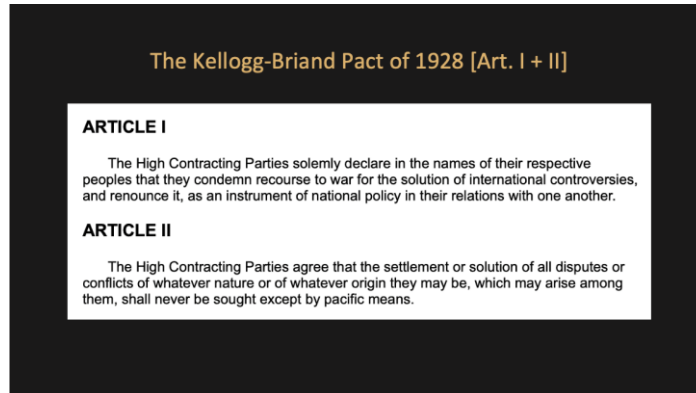
This clip from a 1956 Pete Seeger song, “Last Night I Had the Strangest Dream,” expresses some of the popular passion behind the movement, and the sentiment that anything was possible. Humanity had adopted legal codes prohibiting slavery, piracy, dueling, and other malign but deeply rooted human activities, and those laws had changed patterns of behavior; the same metamorphosis could be meaningfully accomplished with war.

There are not many songs about treaties. There are songs about falling in love, falling out of love, losing your dog, wrecking your truck – but not many about legally binding international agreements between states.

[Covered by Kingston Trio, Johnny Cash, Simon & Garfunkel]

Last night I had the strangest dream  
I ever dreamed before  
I dreamed the world had all agreed  
To put an end to war  
I dreamed I saw a mighty room  
The room was filled with men  
And the paper they were signing said  
They’d never fight again

And when the papers were all signed  
And a million copies made  
They all joined hands and bowed their heads  
And grateful prayers were prayed  
And the people in the streets below  
Were dancing round and round  
And guns and swords and uniforms  
Were scattered on the ground.



The text of the Kellogg-Briand Pact is extremely short and to a modern eye, drafted in an unsatisfyingly archaic and incomplete style. It offers a lot of wind-up (with a preamble and extensive procedural annotations) but relatively little delivery (only two operational passages, each only one sentence long, totaling just 78 words):

Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

To a modern treaty lawyer, this is nearly gibberish. What exactly does it mean to “condemn” and to “renounce” war? What is implied by renouncing war “as an instrument of national policy”? For that matter, what counts as “war” for this purpose? What “pacific means” for resolving disputes are available and contemplated? Most important of all, what are the consequences of a breach – what should happen if one country – a party to this treaty or not – commits aggression against its neighbor; does the victim (and its allies) have the privilege to “unrenounce” war in self-defense?

The vague and inartful text does not answer these questions, nor does it incorporate any measures of disarmament, which might have contributed to reducing the parties’ capacities for initiating war. In stark contrast, modern national security treaties are behemoths, running scores or hundreds of pages in length, laden with voluminous definitions of terms, creating new international institutions to monitor and administer the treaty, and most of all incorporating reams of provisions regarding verification of compliance by insisting on data exchanges, on-site inspections, and monitoring by satellites or other “national technical means.” Kellogg-Briand included none of that.



This treaty was initially proposed by Aristide Briand, the peripatetic French Foreign Minister, who had shared the 1926 Nobel Peace Prize for his work in crafting the Locarno Treaties, which established an interlocking network of security assurances in Europe. His original concept here was a bilateral U.S.-France instrument, but Borah and U.S. Secretary of State Frank B. Kellogg insisted on making it multilateral, open to all countries.

Interestingly, the negotiations and the sequential articulation of the treaty text occurred entirely through the international exchange of written diplomatic notes over a period of about eight months. Kellogg, in particular, resisted any face-to-face negotiations, principally because he feared that process would engage the participation of lawyers, who would inevitably burden the enterprise with unnecessary complexity and detail. He was probably correct about that apprehension.

Importantly – although almost invisibly in the treaty text – Kellogg-Briand did not really purport to preclude all war, only aggressive war. Each party understood that all states reserved their inherent right of self-defense -- the ability to respond forcefully if attacked (or if an attack were made against a state to which it was allied via other mutual defense treaties). And the right of self-defense was understood in quite broad terms: Kellogg assured the U.S. Senate that the Monroe Doctrine remained intact, ensuring the American right to defend the Western Hemisphere (including via what we would today recognize as intervening in the internal affairs of another sovereign). Great Britain likewise overtly retained its special supervisory rights over the empire (some members of which nonetheless signed the treaty separately).

But Borah insisted that the treaty could not include any explicit carve-out for self-defense against aggression. He thundered that the outlawry of war was grounded in an absolutist moral philosophy that drew upon the strength of the citizenry, who would demand that their respective governments clearly and permanently abandon the war habit. The most reliable mechanism for enforcement of the peace, he asserted, would reside in the people's visceral insistence that their



states pursue only peace – not through the hypertrophy of stronger military forces and the erection of offsetting military alliances and commitments.



The Kellogg-Briand Pact was joined initially by its 12 designated High Contracting Parties and eventually by dozens of other states, including virtually all the leading sovereign powers of the day, including Russia, China, Japan, all of Europe, and their respective colonies and dependencies. By some accounts, it was the most ratified agreement in history, up to that time. The treaty is permanent; it is still in force today for 66 countries, although largely superseded by the U.N. Charter as the standard-setter regarding the initiation of international uses of force, the *jus ad bellum*.

To a skeptic, the absurdity of the Kellogg-Briand Pact was revealed only shortly after the ink had dried on the signature lines. Within a decade, Japan's aggression against China, Italy's aggression against Ethiopia, and Germany's aggression against Austria, Czechoslovakia, and Poland swept aside the underpinnings of outlawry ideal. The treaty's condemnation and renunciation proved to be the weakest of reeds when the tides of global warfare suddenly rose again.

In hindsight, World War I was widely seen at the time as an "accidental" war that nobody really wanted, nobody expected, and nobody benefited from – the world had mistakenly stumbled into a conflagration that could readily have been avoided. In response, the Versailles Treaty handcrafted a series of lawyers' procedural fixes, including a determination that war was to be only a "last resort," after all peaceful means of resolving a dispute had been exhausted; mandatory recourse to newly-established international alternative dispute resolution mechanisms such as arbitration; and a required three-month "cooling off period" before military hardware could legally be mobilized and exercised.

Another pop culture interlude: As a total aside here – completely breaking the flow of my real presentation, but maybe useful just to check in and see if you're still paying attention – this concept of a cooling off period, and other stalling tactics to try to interrupt what might otherwise become an irresistible cascade toward war, may remind some of you of another famous similar comment in a very different context.



In the January 17, 1969 episode of Star Trek, called “The Mark of Gideon,” Mr. Spock explains to Dr. McCoy that the first, fundamental “purpose of diplomacy is to prolong a crisis” – because as long as it is merely a crisis, it is not yet a war, and nobody is shooting and killing.

That’s what the League of Nations was undertaking, at a much earlier star date – to prolong crises and delay and divert the starting of wars.

Now we return to our originally scheduled programming.



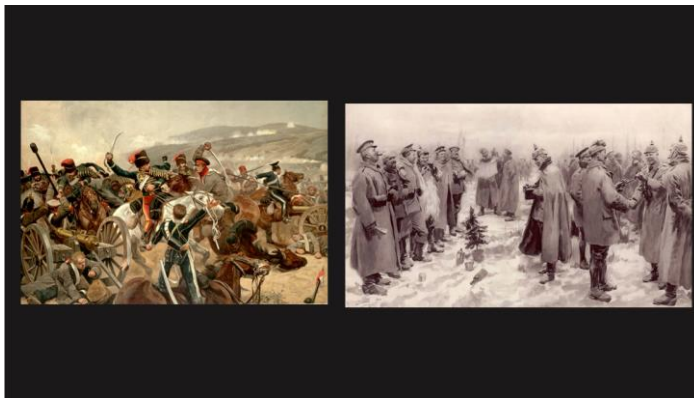
These post World War I procedural stratagems were, in my view, quite creative; I give the authors full credit for building upon the early 20<sup>th</sup> century faith in democracy and democratic institutions and in the liberal understanding of the efficacy of law and legal mechanisms.

But World War II was a different sort of war, incited by different kinds of causes – it was a war of deliberate aggression, built upon a sense of grievance and racism, and in selfish nationalistic pursuit of resources and glory, not a no-fault accident. So it should not be surprising that the post-World War I intellectual and political

constructs proved inadequate for these very different circumstances and challenges.



Still, my thesis for you today is that the Kellogg-Briand Pact did accomplish something important and enduring; it was a vital turning point in the intellectual history of international relations and warfare. It (and here, I include not just this single treaty, but also the League of Nations, the Permanent Court of International Justice, and the associated legal and political institutions of that era, as well as the global populist froth that generated those innovations) collectively changed the way people and countries think about and talk about war – and those changes made an abiding difference.



Previously, before the watershed era of the Kellogg-Briand Pact, war had been thought about mostly as something that “just happens” to countries and to people. (I admit that I am greatly simplifying a complicated story here, about the “just war” tradition, other important legal/social philosophies, and about occasional bursts of moralistic or theological enthusiasm for banishing the scourge of war, but let me try to make a big-picture point.) War was largely seen as a “normal” phenomenon that people simply had to endure. In fact, with a little poetic license, we might say that many people had traditionally come to look at war somewhat

similarly to the way they might think about a long, cold, hard winter: Both phenomena were difficult, uncomfortable, and expensive; quite possibly fatal; but part of the settled order of things; inherent in life, beyond human control; and at least providing occasional opportunities for exhilarating and heroic adventure.

As war got even more horrible, however, and as democracy proliferated, there was a greater interest, instead, in avoiding war, in recognizing it as something subject to human volition, something unusual, something that had to be justified, and had to have a legal basis (and there were not very many rationales that would count as a sufficient legal basis.) Kellogg-Briand is the culmination of that logic, declaring that war is an extraordinary circumstance, not something we have to put up with, and that the first and highest task of governments is to avoid such cataclysmic violence. Outlawry – declaring war to be intolerable – is the apex expression of human control over this pernicious phenomenon.

You may say this is mere symbolism, not a practical basis for international relations. Borah would have disagreed – he saw renunciation of warfare as the only practical method of expunging it from the human experience. And he (or I) might also assert that symbolism is not “mere” – consider why we pledge allegiance to the flag, as well as to the republic for which it stands, or why we wear wedding rings and religious jewelry. Symbols and intellectual framings do matter.

Nonetheless, for many practical-minded people, the Kellogg-Briand Pact now represents the very height of foolishness, the fatuous hope that the bare sinews of law and a bald declaration of renunciation would translate into meaningful change in the real world. They say that it is absurd to think that totalitarian, evil-minded states (then or now) would faithfully respect the rule of law, and that it would be contemptible for true democracies to depend upon such an illusion. In inside-the-beltway literature, Kellogg-Briand is emblematic of a sleepwalking reliance upon mere words, rather than upon weapons, deterrence, and eternal vigilance.



The more robust (or more macho) statement, variously attributed to Plato and other luminaries, is “If you want peace, prepare for war.” There is much merit to that aphorism, and vigilance and readiness are important in a complex and conflict-filled world. But the obverse slogan, printed on the pen that was used to sign the Kellogg-Briand Pact in 1928, has merit, too: “If you want peace, prepare for peace.” We can never achieve such an important goal if we fail to visualize it and exert constant, diligent efforts to achieve it.

In fact, human and national behaviors have notably changed in this regard: international war has become a lot less common today. Rigorous analysis by Oona Hathaway and Scott Shapiro at Yale Law School has shown that the incidence of state vs. state warfare has declined dramatically – the period since World War II has become much less war-prone than the previous centuries. It may be hard to grasp this important alteration in geopolitical affairs today, when we are outraged by the horror of Russia’s aggression in Ukraine, and when so many other potential hotspots fester. But an important empirical point is how rare this sort of atrocity has become: in the modern era, the specter of one state invading another has become blessedly anomalous, and when it does occur, the world condemns it. The Kellogg-Briand Pact, and the intellectual and grass-roots revolution it represents, provide an important part of the explanation.

William Borah died in January 1940, only months after the Nazi invasion of Poland started World War II, but well before the United States formally entered the conflict. His crowning diplomatic achievement in the Kellogg-Briand Pact was largely consigned to the rubbish heap of history, as a failed, quixotic effort to spin meaningful international legal obligations out of gossamer human intentions and aspirations. Kellogg-Briand did not succeed in ending all war – any more than World War I, heralded as “the war to end all wars,” did. But it made an appreciable dent in the problem.



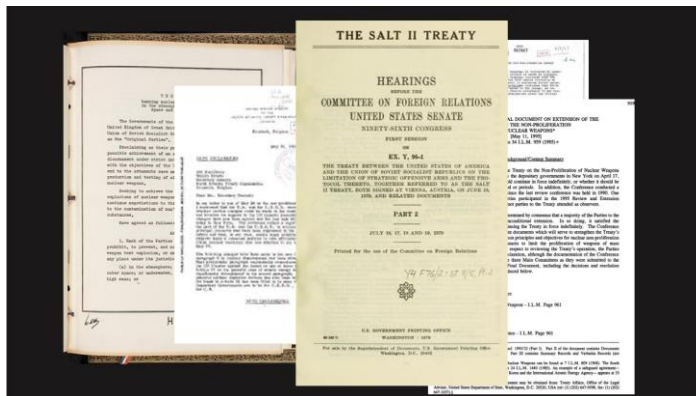
I would now like to devote the remainder of my time to the effort to revive and resuscitate that treaty, and to expand it to confront the even more dangerous and absurd national and international security situation we face today. I propose a “Nuclear Kellogg-Briand Pact,” to renounce and abolish nuclear war and to declare that it can never be fought. I advocate a new treaty (assuredly a much longer, more

elaborate and fully lawyerized instrument) that would go beyond just a blunt declaration of outlawry by grafting on additional obligations and procedures to make the international arrangements more robust and reliable, as I will detail in a moment. But my concept is derived, both in inspiration and in content, from Senator Borah's original vision.

#### IV. NUCLEAR KELLOGG-BRIAND



The practice of nuclear arms control has been a hardy perennial in global security proceedings. The United States, the Soviet Union or Russia, and other treaty partners have generated an unbroken chain of binding instruments dating back to SALT I in 1972, SALT II in 1979, START I in 1991, and New START in 2010.



The alphabet soup of nuclear treaties includes ABMT, NPT, INFT, LTBT, and CTBT – each of which carries its own stories and each of which, I suspect, Senator Borah would have instinctively opposed.

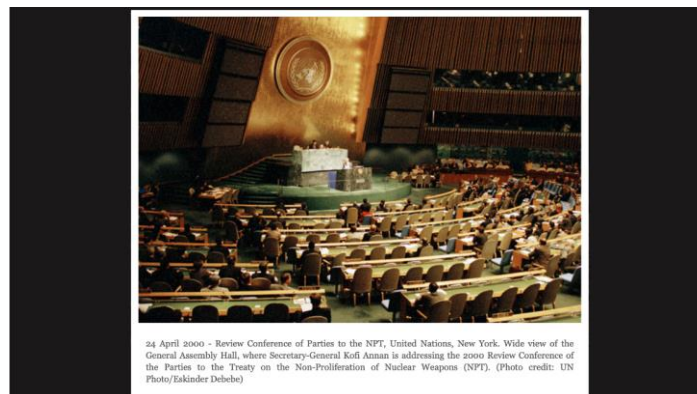


That handiwork has succeeded in reining in J. Robert Oppenheimer's catastrophic creation in important ways. No nuclear weapons have been detonated in combat since the 1945 destruction of 100,000 people in Hiroshima and 75,000 in Nagasaki. There have been no test detonations of nuclear weapons in the atmosphere since 1980, relieving generations of people from toxic radiation such as elevated levels of strontium-90 contaminating mothers' milk.



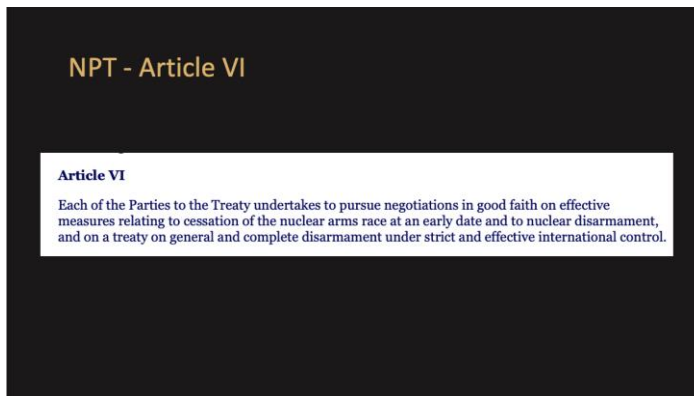
Most graphically, the world's total inventory of nuclear weapons has been dramatically drawn down, from a Cold War high of over 70,000 devices (almost all held by the United States and the U.S.S.R) in 1985 to about 12,500 today – a reduction of over 80%.

But the nuclear genie has hardly been squeezed back into the bottle. Today, nine countries possess nuclear weapons, another one seems poised on the brink, and many more countries husband the technical, industrial, and natural resources necessary to join them swiftly, should they so decide. The nine possessors are mostly furiously recapitalizing and expanding their nuclear forces, rather than continuing to reduce them. Daily headlines from the war in Ukraine remind us that Vladimir Putin's flailing aggression might resort to nuclear weapons – that horrific prospect continues to loom daily over the battlefield.



Conversely, alongside this threatened proliferation, the global popular effort to eliminate nuclear weapons has enjoyed a long legacy, too. Indeed, campaigns to abolish atomic, and then nuclear, weapons are as old as the weapons themselves – even many of the pioneers in the field recoiled at the destructive power they had unleashed in 1945, and joined the widespread public efforts seeking to stifle their own creation.

As a lawyer, I am particularly focused on the legal expressions of the goal of nuclear disarmament, and on the legally-binding global commitment to pursue and to accomplish that abolition. The 1968 Nuclear Non-Proliferation Treaty (NPT) is the single most important nuclear arms control treaty ever fashioned. In it, the countries that do not possess nuclear weapons (the vast majority of parties to the treaty) promise never to manufacture or otherwise acquire those arms, and to submit to intrusive international inspections to verify their continued abstention. In return, the five countries recognized by the treaty as possessing nuclear weapons (the United States, the Soviet Union/Russia, China, the United Kingdom, and France) agree to share the peaceful benefits of nuclear energy (such as for generating electricity and for nuclear medicine) and promise to constrain, and to eliminate, their own nuclear arsenals.



Article VI of the NPT contains the critical disarmament pledge: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

The NPT has attracted 191 parties (including virtually everyone in the world except the four key holdouts: India, Israel, North Korea, and Pakistan). Article VI represents an essential element in the *quid pro quo*: as most states undertake never to acquire nuclear weapons, the five acknowledged possessors undertake to eliminate theirs.

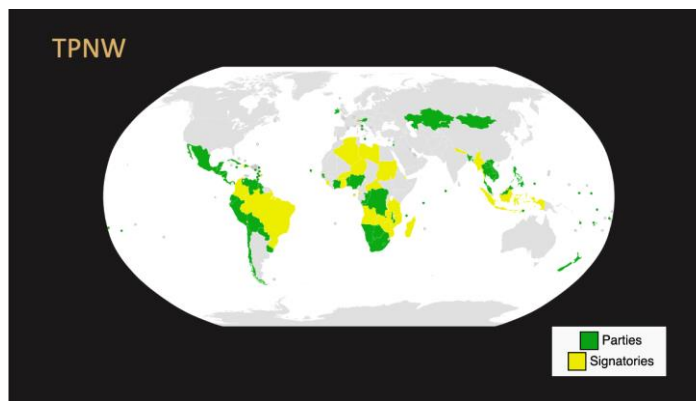


The first rule of the international law applicable to treaties is “*pacta sunt servanda*” – treaties are to be honored, legal commitments must be fulfilled in good faith. If one party (or one set of parties) fails to carry out its legal obligations, how can it expect its treaty partners to continue their own reciprocal performance?

Article VI is surely vague; I argue only that it is not hopelessly vague. Some of the same types of drafting criticisms and interpretive puzzles that we considered about the Kellogg-Briand Pact emerge here, too. What does it mean to negotiate “in good faith”; what are the contemplated “effective measures”; what counts as “an early date”?

In my view, the linguistic vagueness and interpretive uncertainties embedded in article VI might originally have provided some wiggle room for the nuclear weapons-possessing states to temporize in accomplishing the ultimate goal of nuclear disarmament. But now, having passed the 50<sup>th</sup> anniversary of the signing of the NPT, no one can contend with a straight face that the goals are being achieved at “an early date.”

And it is even more difficult to argue that the nuclear weapons possessors are pursuing negotiations – in good faith or otherwise – when there are no negotiations at all under way. The United States and Russia have not engaged in nuclear arms control dialog since the New START Treaty was signed in 2010, other than agreeing in 2021 to extend it for another five years. China, the United Kingdom, and France have never participated in nuclear arms reduction talks.



The most recent broadly multilateral effort in this field was the Treaty on the Prohibition of Nuclear Weapons (TPNW), signed in 2017 and entered into force in 2021. The TPNW would promptly and pervasively abolish nuclear weapons. It now has 68 parties, but none of the countries that possesses nuclear weapons, and none of their closest allies, is among them. All nine of those powers boycotted the TPNW negotiations and all have steadfastly rejected participation in the treaty.



It is against these seemingly inhospitable global political currents that my proposal for a Nuclear Kellogg-Briand Pact must swim. But before I detail my own recommendations, let me briefly identify an important, sustaining, source of hope and inspiration. Beginning in 2007, a group of four prominent U.S. senior statesmen -- George Shultz, Henry Kissinger, Bill Perry, and Sam Nunn -- authored an influential series of op/ed columns in the Wall Street Journal, advocating pursuit of a world free of nuclear weapons. These four -- two Secretaries of State under Republican Presidents Ronald Reagan and Richard Nixon, a Secretary of Defense under Democratic President Bill Clinton, and a Democratic Chair of the Senate Armed Services Committee -- concluded that the traditional practice of deterrence was "becoming increasingly hazardous and decreasingly effective," so the United States must adopt nuclear abolition as a direct, not a hopelessly long-term, objective. They proposed a series of specific arms control measures or actions to pursue promptly, in alignment with that overarching goal, saying, "Without the bold vision, the actions will not be perceived as fair or urgent. Without the actions, the vision will not be perceived as realistic or possible."

This advocacy from the Four Horsemen immediately drew the spotlight, and attracted legions of celebrity endorsers, including President Barak Obama and the U.N. Security Council. It is, of course, still fair to oppose their analysis and arguments, as many people do. But I submit that it is no longer possible to dismiss the concept of "Getting to Zero" as being merely idealistic or utopian. When these four well-seasoned cold warriors stand for nuclear abolition, no one can call that vision simply naïve or unrealistic. The idea must be taken seriously by serious people. It's not just rainbows and unicorns and singing kumbaya with Pete Seeger.



With that background, my proposed Nuclear Kellogg-Briand Pact would be a legally-binding treaty, open to all countries in the world to join, which would start by declaring that nuclear war is illegal and that the parties will not resort to it, advocate it, threaten it, or prepare to initiate it. There is a famous statement by Presidents Ronald Reagan and Mikhail Gorbachev at their 1985 summit meeting in Geneva that “A nuclear war cannot be won and must never be fought.” The five permanent members of the United Nations Security Council collectively reaffirmed that judgment in an emphatic joint statement in January 2022. I would like to make that commitment multilateral, legally binding, and permanent.

Like Kellogg-Briand, my treaty would be essentially a reciprocal “no first use” pledge, with the carve-out that if there were a violation by an aggressor who used a nuclear weapon first in combat, then the other parties would be released from their corresponding restraint, and could resort to all legal tools, possibly including exercising their own nuclear arms, if necessary in self-defense.

(Again, I have to admit that in the interest of time, I am skipping over a lot of complicated, important material here, because in many or most or almost all instances, the use of a nuclear weapon in war would still be illegal, wholly apart from my proposed treaty, as violative of key law of armed conflict provisions regarding Distinction and Proportionality. The International Court of Justice concluded as much in its famous-and-frustrating 1996 Advisory Opinion on the use of nuclear weapons. But parsing all that would be the subject of whole other Borah Symposium.)

I would also extend my nuclear treaty beyond the bare bones of what Kellogg-Briand addressed, in four distinct ways. First, I would graft onto my document effective measures of arms control and disarmament – conspicuously absent from the 1928 pact – designed to reduce parties’ capacities, as well as their inclinations, to resort to nuclear war. The United States and Russia, who still hold the lions’ share of the global nuclear armadas, should re-engage promptly in a program of additional phased deep reductions, and China, now the third leading nuclear power, should accept tight constraints, too. The world’s countdown toward zero nuclear weapons will take a while to achieve, but it should be resumed immediately and vigorously.

The concept of deterrence, after all, is fundamentally only a psychological construct: it attempts to alter an adversary's decision-making strategy by persuading the opponent not to undertake a particular action, out of fear of the adverse consequences we would inflict in return. That posture can be very valuable, and has been successful in helping to avoid a World War III, as both the United States and the Soviet Union were deterred from roaming too close to the precipice of nuclear war by the fear of a horrific return blow.

But as Shultz, Kissinger, et. al. highlight, deterrence is not enough. What is necessary, in addition, are measures of arms control, which operate on the real, physical level, not just the psychological level, and which directly reduce the adversary's tangible capabilities for engaging in nuclear hostilities. Arms control offers the only way (at least the only peaceful way) of diminishing the numbers of nuclear missiles and bombs pointed at us.

The international agenda for nuclear arms control is long and daunting. It includes restoration of discarded treaties, reinvigoration of violated instruments, and ratification of still-pending agreements such as the Comprehensive Test Ban Treaty. A great deal of heavy lifting remains to be done, and it must be what the 4 Horseman called a "joint enterprise," undertaken by all.

A second major step beyond the original concept of Kellogg-Briand would be to incorporate into the new nuclear treaty a series of "confidence-building measures." These are programs that (unlike disarmament steps) do not directly limit or reduce a state's weapons holdings, but endeavor to provide meaningful reassurance that war is not imminent, and that a neighbor (and potential adversary) is not preparing to launch a surprise attack. Among familiar confidence-building or transparency mechanisms are pre-announcement of, and invitation of foreign observers to, major military maneuvers and exercises, so nervous outsiders can be reassured that this is merely a training activity, not a prelude to an attack.

A related kind of measure would be promotion of additional mechanisms for crisis consultations and summit meetings. The original U.S.-U.S.S.R. hotline has been upgraded several times, but it has not been replicated among all pairs or clusters of nuclear-capable countries, and the mushrooming of Zoom and other conferencing tools during the Covid-19 era taught us much about effective, instantaneous, multilateral remote communications. If it worked reasonably well for my law school seminars, it should be perpetually available for world leaders in crises, too.

Likewise, we must never overlook the danger of accidents and unauthorized activities, especially in a deeply computer-enabled environment. According to an authoritative Atomic Archive, there have been at least 32 incidents, affectionately known as "Broken Arrows," involving the accidental firing, theft, or transport of a nuclear weapon – six devices have been lost and never recovered. We need better protections against such incidents and sharing of vital data about them.

In addition, my treaty would endeavor to find some way to preclude the nuclear powers from automating their decision-making processes in a crisis.

Nuclear command and control is no place for artificial intelligence – at least not for insinuating autonomous computer controls above human leadership.

Third, and at the highest level of abstraction and generality, my version of a nuclear Kellogg-Briand Pact would endeavor to reduce the overall salience of nuclear weapons as the “coin of the realm” in national and international security debates. To diminish the likelihood that these awesome tools of Armageddon will ever be detonated, we need to degrade them as the ever-ready “big stick,” and to recognize and declare that they are not “normal” weapons and cannot be wielded in ordinary circumstances.

In particular, I would augment my treaty by requiring parties to refrain from pursuing the use, or at least the first use, of nuclear weapons in meaningful operational ways, such as by prohibiting the development of military doctrine for a first use, prohibiting the testing and training of procedures for a first use, and prohibiting the development and deployment of specific types of weapons that are optimized for a first use.

In addition, I would demand that countries collectively cool their rhetoric about nuclear weapons, by refraining from threatening a first nuclear use, directly or indirectly. Leaders should not assert that “All options are on the table” during a crisis, or bluster about inflicting “fire and fury” or in other ways imply that they are contemplating breaking the longstanding nuclear taboo. Of course, we cannot control what journalists and private commentators may speculate about, but national and military leadership should responsibly refrain from knee jerk references to the ultimate rungs on the escalation ladder, as if their exploitation were imminent, plausible, and even inevitable.

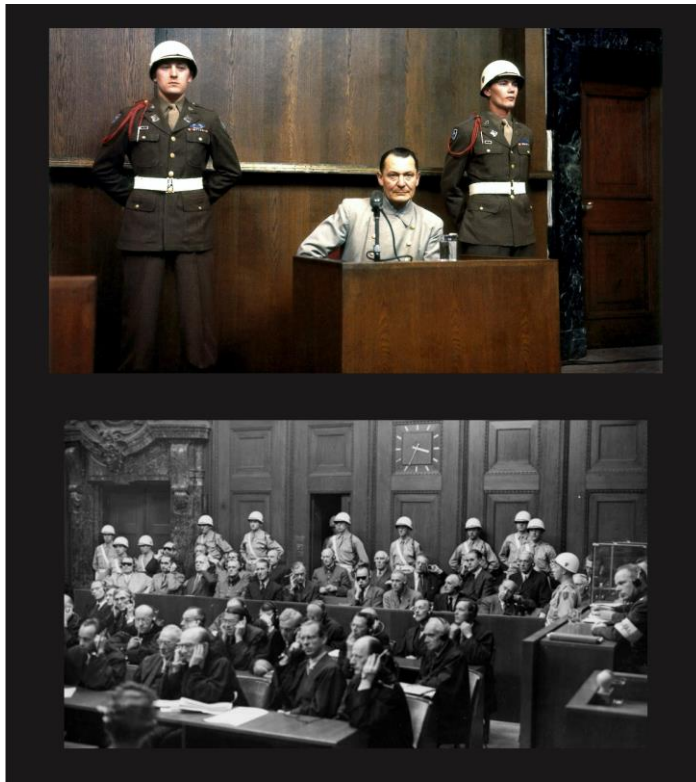
A mostly-forgotten 1973 U.S.-U.S.S.R. Agreement on the Prevention of Nuclear War could be revived and multilateralized here, incorporating a series of modest but useful declarations and procedural safeguards about the shared objective “to remove the danger of nuclear war” and to “exclude the outbreak” of such hostilities.

I have a raft of additional provisions that I would try to cram into a Nuclear Kellogg-Briand Pact, but the hour is growing late, so let me simply tick off a few of them quickly.

For example, nuclear weapons need no longer be kept on a proverbial “hair trigger.” Missiles could be mutually de-alerted and de-targeted, providing a modicum of additional time for deliberation, data gathering, and communication. Much as the Versailles Treaty attempted to institute a “cooling off period,” to prevent states’ reflexive mobilizations of their forces from triggering an unwanted avalanche into war, instituting some firebreaks in the nuclear chain of command can help avoid catastrophe today.



Finally, the treaty should invoke the principles of modern international criminal law, providing for global prosecution of those who order, and those who deliver, nuclear weapons first in combat. In principle, the International Criminal Court could provide a suitable venue for investigating and prosecuting individuals for nuclear acts that would be defined as war crimes, crimes against humanity, and aggression. But the complex attitudes toward the ICC of some of the leading states, including the United States, may make other *ad hoc* tribunals more appropriate. In my view, both the leadership figures who decide to violate the no first use commitment, and those down the chain of command who implement such a manifestly illegal order, should face justice.



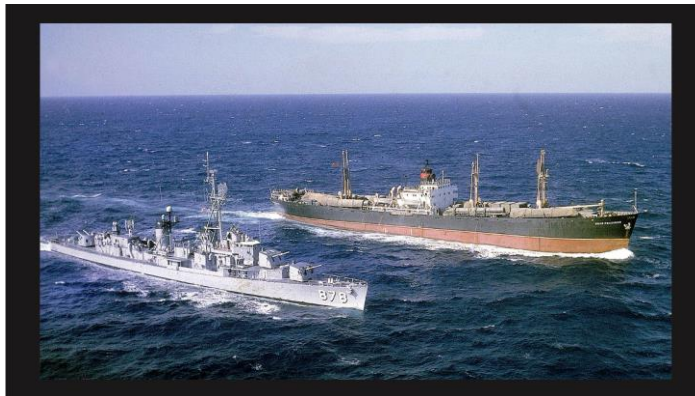
It may be instructive to recall here that, whatever shortcomings of the Kellogg-Briand Pact were revealed by the horror of World War II, the treaty did at least provide the legal and moral underpinnings for the post war Nuremburg and Tokyo prosecutions for aggression, by establishing the then-novel international law concept of a “crime against the peace.”

As I see it, it would be better if all countries, especially the nine who are currently endowed with nuclear weapons, would accept a nuclear Kellogg-Briand treaty containing these postulates, but I would press forward on the road toward nuclear sanity even if some states remained retrograde for a time. According to one study, there were at least 25 occasions during the Cold War when senior U.S. leaders contemplated a first use of a nuclear weapon. If the United States, with its enormous advantages in conventional weapons, economic power, intelligence assets, and diplomatic heft, has so frequently pondered crossing the nuclear Rubicon, what are the chances that other countries, less blessed with alternative methods for imposing their will, would be unilaterally self-restrained?

My underlying premise in all this is that nuclear weapons pose the only immediate existential threat to our country, our society, and our world. Terrorism is not nearly on that scale. Biological warfare and pandemics might be. Climate change is of a comparable magnitude, in a different way and time scale. Conventional wars are terrible, but not sufficient to pose a truly existential threat to the United States – only nuclear weapons can do that. My proposition for you therefore is that if nuclear weapons are properly seen as the #1 security threat confronting the country and all humanity, then abating it ought to be the #1 priority for the United States and everyone else.

When someone asks me whether it is “realistic” to contemplate the global elimination of nuclear weapons, my response is that it is not “realistic” to contemplate anything else. How long can humanity continue to count on good luck and unsteady brinkmanship to prevent a nuclear war? If we don’t end nuclear weapons, they will end us. Our current situation is a bit like the fate of a guy who falls off the top of a 100-story building – as he plummets past the 50<sup>th</sup> floor, he’s heard to remark, “Well, so far, so good.”

These are assuredly tough times for arms control. The global political climate, poisoned by Russia’s war in Ukraine and more generally by the spread of authoritarianism around the planet, is inhospitable for enlightened appreciation of long-run shared interests. Russia wrongly suspended participation in the New START Treaty, and there is no successor in place or even in the works for that agreement, so when it expires in early 2026, the world will be utterly bereft of legal restraints on the largest nuclear arsenals for the first time since 1972.





But historically, sometimes, arms control has done best when the objective conditions seem worst. Sometimes, only shortly after acute crises, cooler heads prevail and recognize the dangers and their shared responsibility for walking the world back from the precipice. Just to cite one example: the Limited Test Ban Treaty, the first major modern arms control treaty, prohibiting nuclear testing in the atmosphere, under water, and in outer space, was concluded in a 10-day flurry of negotiations between the United States, the Soviet Union, and the United Kingdom in July 1963. This was just nine months after the October 1962 Cuban Missile Crisis, still regarded as the closest that the United States and U.S.S.R. came to nuclear war, and less than two years after the erection of the Berlin Wall, representing the clear cleavage between East and West.

So sometimes, the politics of arms control can pivot quickly. My hope is that we are approaching such a legitimacy watershed, and that the idea of a Nuclear Kellogg-Briand Pact could assist in eradicating the absurdity of our current mutual assured destruction.

#### V. CONCLUSION



What would Senator William Borah say about my concept for a Nuclear Kellogg-Briand Pact? Well, frankly, he would probably hate it – let's face it, he opposed most new ideas.

So I would prefer to leave contemporary judgments up to you. It can be a bit jarring to realize that the time gap between the 1928 Kellogg-Briand Pact (which can seem like quite ancient history) and the 1972 SALT I Treaty (which is still part of the cannon of modern arms control) is smaller than the time gap between SALT I and today. So here's hoping that what's old can become new again, in a different form.

I'll close with an evocative quotation from an anguished, prescient letter that Senator Borah sent to a friend on February 6, 1923, "I feel that we are drifting, drifting, while the most serious conditions the world has ever experienced are calling for bold and determined action...I have thought that the moulding and



directing of public opinion might be helpful...I do not really understand how we can be idle or inactive. We are verging in my opinion upon another World War, and even if it does not result in war, it will result in such utter economic chaos as would have a more destructive effect upon civilization and upon peoples than war itself."

I hope, this time, we can do better than that.

Thank you for your kind attention. I look forward to any questions, comments, and debates you might have.