

Reference Sheet on Nuclear Command and Control

An Overview of the Nuclear Command and Control System

At present, the President makes the sole decision whether to use nuclear weapons. While some maintain that this is a product of the President's constitutional commander-in-chief authority, it also reflects various statutory authorities. For example, federal law (codified at 42 U.S.C. § 2121(b)) authorizes the President to direct civilian agencies to deliver nuclear material or weapons to the Defense Department's custody "for such use as [the President] deems necessary in the interest of national defense" and to authorize the Defense Department to "manufacture, produce or acquire" nuclear weapons "for military purposes[,]" subject to certain limitations. Past presidents have occasionally delegated this authority.

The U.S. nuclear command and control system links the President with those U.S. military elements responsible for deploying nuclear weapons. While details of the current system remain classified, it is believed to consist of the following:

- As a routine matter, the Defense Department develops and maintains an array of plans for using nuclear weapons in response to various threats and other strategic scenarios.
- When a foreign attack occurs or another scenario potentially warranting a nuclear response arises, the President will convene with the Secretary of Defense, the Joint Chiefs of Staff, and other relevant military commanders and policy advisors to develop a response.
- If the President determines the use of nuclear force is appropriate, then he or she would authorize such action using the "football"—a suitcase containing communication tools and a codebook which is always kept near the President by a U.S. servicemember.
- As part of those procedures, the President would identify himself or herself using unique codes stored on a "biscuit" that he or she keeps with him at all times and transmit a launch order to the Pentagon and U.S. Strategic Command (STRATCOM). The Secretary of Defense or other official would then generally verify that this order came from the President.
- STRATCOM would then execute the order by communicating it to multiple land- and water-based nuclear weapons teams, who conduct their own verification process and eventually launch.

Having originated during the Cold War, this process is designed to operate reliably and execute quickly in a manner of minutes, even in the event of an attack on the United States.

Background Legal Principles

Under *U.S. domestic law*, the use of nuclear weapons generally falls within the same constitutional framework as other war powers. The Constitution does not address the issue squarely, but gives relevant authorities to both Congress and the President:

- Article I of the Constitution gives Congress the authority to "declare War," "raise and support Armies," "provide and maintain a Navy[,]" and "make Rules for the Government and Regulation of the land and naval forces[,]" among other relevant authorities; however,
- Article II, however, makes the President the "Commander in Chief of the Army and Navy of the United States," vests him or her with "the executive Power[,]" and has been interpreted as providing the executive branch with substantial authority over foreign affairs.

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Most legal experts believe these provisions give Congress authority over how the military is structured, maintained, and equipped, while giving the President authority over tactical and custodial decisions. The line between these two spheres of authority, however, is not always clear.

The executive branch currently claims that the President may use military force without congressional authorization, “at least insofar as Congress has not restricted it,” where two conditions are met: (1) the President can “reasonably determine” that it “serves important national interests[;]” and (2) it is of a limited “nature, scope and duration” that does not “constitute a war for constitutional purposes” subject to Congress’s authority to “declare War”.

At times, the executive branch has also claimed that the president has the authority to act in a manner not subject to these or other congressionally imposed limitations, including cases of national self-defense.

International law also sets legal limits on when the United States may resort to the use of military force. Several pose special challenges in the context of nuclear weapons.

The principles of *jus ad bellum* reflected in the U.N. Charter prohibit states from resorting to the use of military force against other states, except where authorized by the U.N. Security Council or pursuant to the “inherent right of individual or collective self-defence[.]” The latter is generally interpreted as permitting military action in response to armed attacks and imminent threats thereof, though when this condition is triggered is often contested. Military responses must also be a necessary response to such attacks or threats, and proportional to the potential harm they could inflict.

Jus in bello principles, meanwhile, limit how force may be used within an ongoing armed conflict. They include: *military necessity*, which says uses force must be in pursuit of legitimate military objectives; *distinction*, which requires that militaries distinguish valid military targets from invalid targets, such as non-combatants and civilians; and *proportionality*, meaning the harm inflicted must be proportional to whatever legitimate military advantage is being secured.

The Duty to Obey Military Orders

Federal law (codified in Title 10 of the U.S. Code) establishes the default operational chain of command for the military, which runs from the President to the Secretary of Defense to various combatant commands. However, it also authorizes the President to create alternative chains of command.

Individuals in the default chain of command below the Secretary of Defense are generally military servicemembers subject to the Uniform Code of Military Justice (UCMJ). Several UCMJ provisions obligate servicemembers to obey lawful orders, including:

- Article 90 of the UCMJ subjects servicemembers who disobey “a lawful command of [their] superior commissioned officer” to punishment as assigned by a court-martial, including up to death if committed in time of war;
- Article 92 of the UCMJ subjects any servicemember who “violates or fails to obey any lawful general order or regulation[.]” knowingly fails to obey “any other lawful order . . . which it is his duty to obey[.]” or “is derelict in the performance of his duties” to court-martial.

These obligations, however, are limited to lawful orders. The Defense Department’s Manual for Courts Martial clarifies that orders generally “may be inferred to be lawful” except where they are “patently illegal[.]” Obeying an order generally insulates a servicemember from any legal consequences for their actions before a court-martial, but this does not apply where he or she knew, or “a person of ordinary sense and understanding would have known[.]” that the order was unlawful.