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Clarifying the Issue of Nuclear Weapons Release Authority

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In the United States, the president – and only the president – has the authority to order the use of nuclear weapons. This exclusive authority is consistent with president’s Constitutional role as commander in chief of the armed forces and reflects the principle of civilian control of the military. It is also consistent with the intent of the nation’s Founders – expressed in the *Federalist Papers* – to ensure that the direction of war be executed by a sole commander. As Alexander Hamilton stated in *Federalist 74*, “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”¹

Recently, controversy has arisen over the role of the Chairman of the Joint Chiefs of Staff in nuclear weapons launch authority. This controversy was fueled by passages in a new book by Bob Woodward and Robert Costa, entitled, *Peril*, in which they recount statements purportedly made by the current Chairman of the Joint Chiefs of Staff General Mark Milley regarding his potential involvement in the decision process of launching nuclear weapons. As *The New York Times* reported:



INFORMATION SERIES

Issue No. 503 | September 22, 2021

General Milley convened a meeting in a war room at the Pentagon with the military's top commanders, telling them that he wanted to go over the longstanding procedures for launching a nuclear weapon. The general reminded the commanders that only the president could order such a strike and that General Milley needed to be directly involved.

'If you get calls,' General Milley said, 'no matter who they're from, there's a process here, there's a procedure. No matter what you're told, you do the procedure. You do the process. And I'm part of that procedure. You've got to make sure that the right people are on the net.'

The general added: 'The strict procedures are explicitly designed to avoid inadvertent mistakes or accident or nefarious, unintentional, illegal, immoral, unethical launching of the world's most dangerous weapons.'

Then, he went around the room and asked each officer to confirm that they understood what he was saying.²

In contrast to this reported explanation of the procedure, former Under Secretary of Defense for Policy Douglas Feith explained the role of the Chairman of the Joint Chiefs of Staff this way:

As a legal matter, the chain of command for military operations is straightforward: The President and the Secretary of Defense are the two civilians – the only two – who can issue an order to U.S. military forces. For operations (as opposed to training), the chain runs from the two of them directly to the four-star general or admiral at the top of each combatant command – for example, CENTCOM, Pacific Command, or Special Operations Command. These combatant commanders are responsible for planning and fighting wars – indeed, for planning and executing all military operations, including humanitarian relief and reconstruction....

The Chairman of the Joint Chiefs of Staff, the Vice Chairman, and the service chiefs (the top military officers of the army, navy, marine corps, and air force) are not in the chain of command for operations. The Chairman's job is giving military advice to the President, the Secretary of Defense, and the National Security Council – not commanding forces in battle. Rather than run military operations, the service chiefs are responsible for recruiting, training, and equipping.³

As explained, the Chairman of the Joint Chiefs of Staff has an advisory role and is responsible for providing the president and the Secretary of Defense with his best military advice. The Chairman exercises no operational control over the launch of nuclear weapons and is not in the operational chain of command.



INFORMATION SERIES

Issue No. 503 | September 22, 2021

Despite this, the book passages cited by *The New York Times* have led to confusion over the appropriate role of the Chairman in launch decisions regarding nuclear weapons. Is the Chairman “directly involved” in such decisions? And what does being “directly involved” actually mean?

The language in the statements attributed to General Milley has sparked confusion and may suggest to some that the Chairman’s role in nuclear launch decisions is more than advisory; to wit, that no launch decision can be taken without the Chairman’s involvement, or perhaps even his approval. Yet, this view is not supported by official documents and U.S. law.

For example, Department of Defense (DoD) Directive 5100.01, titled, “Functions of the Department of Defense and Its Major Components,” and updated in September 2020, identifies the Chairman of the Joint Chiefs of Staff as the “principal military advisor to the President, the National Security Council (NSC), the Homeland Security Council (HSC), and the Secretary of Defense.”⁴ In this capacity, DoDD 5100.01 states that the Chairman shall “[a]dvice and assist the President and the Secretary of Defense in performing their command function,” and shall “[a]dvice and assist the President and the Secretary of Defense in providing for the strategic direction of the Armed Forces, including the direction of operations conducted by the Commanders of the Combatant Commands, and provide military guidance for use by the DoD Components in the preparation of their respective detailed plans.”⁵

The advisory role of the Chairman is also codified in statute. Title 10, Section 163, of the U.S. Code states:

The Secretary of Defense may assign to the Chairman of the Joint Chiefs of Staff responsibility for overseeing the activities of the combatant commands. Such assignment by the Secretary to the Chairman *does not confer any command authority on the Chairman* and does not alter the responsibility of the commanders of the combatant commands prescribed in section 164(b)(2) of this title.⁶ [emphasis added]

Moreover, as the official website of the Joint Chiefs of Staff notes:

The chain of command to these combatant commands runs from the President to the Secretary of Defense directly to the commander of the combatant command. The Chairman of the Joint Chiefs of Staff may transmit communications to the commanders of the combatant commands from the President and Secretary of Defense but *does not exercise military command over any combatant forces.*⁷ [emphasis added]

In his November 2017 testimony before the Senate Foreign Relations Committee, General C. Robert Kehler, former Commander of U.S. Strategic Command, stated that “US nuclear forces



INFORMATION SERIES

Issue No. 503 | September 22, 2021

operate under strict civilian control. Only the President of the United States can authorize the use of US nuclear weapons....”⁸ He emphasized that “the decision to employ nuclear weapons is a political decision requiring an explicit order from the President. The process includes ‘assessment, review, and consultation...(via) secure phone and video conferencing to enable the President to consult with his senior advisors, including the Secretary of Defense and other military commanders.”⁹

Accordingly, the role of the Chairman appears clear: he advises the president and Secretary of Defense on military matters, but does not exercise control over whether, when, or under what conditions the United States might actually launch nuclear weapons. That authority remains – as it always has been – the exclusive purview of the president of the United States as the nation’s chief executive and top civilian official in charge of the nation’s armed forces. The president may ask for the Chairman’s advice, and the Chairman may offer it, but the ultimate decision on nuclear weapons employment lies with the president.

Some have suggested that the president alone should not be entrusted with such a monumental decision regarding the use of nuclear weapons. As a recent editorial asserted, “At a minimum, a presidential order for a preemptive nuclear strike should be certified as authentic by the secretary of defense and reviewed by the attorney general to determine its legality. The vice president, as well as leaders of both parties in Congress, should be notified of the order.”¹⁰ Indeed, some in Congress have sought to involve the legislative branch in the decision-making process.¹¹ However, in the event a president is deemed unable to discharge the duties of the office, the 25th Amendment to the Constitution provides an appropriate solution by outlining the procedure for transferring power to the vice president. In this way, the Constitution both addresses the need for a single executive authority to act promptly in situations where the national interest demands it and provides a mechanism for removal should the president be unable to do so.

This is what the principle of civilian control of the military is all about. And it is a testament to the wisdom of the Founders and the enduring resilience of the governing charter they created.

¹ Alexander Hamilton, *Federalist Paper 74*, available at https://avalon.law.yale.edu/18th_century/fed74.asp.

² Michael S. Schmidt, “Fears That Trump Might Launch a Strike Prompted General to Reassure China, Book Says,” *The New York Times*, September 14, 2021, available at <https://www.nytimes.com/2021/09/14/us/politics/peril-woodward-book-trump.html>.

³ Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (New York, NY: HarperCollins Publishers, 2008), p. 108.



INFORMATION SERIES

Issue No. 503 | September 22, 2021

⁴ Department of Defense Directive 5001.01, “Functions of the Department of Defense and Its Major Components,” December 21, 2010, Incorporating Change 1, September 17, 2020, p. 17, available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/510001p.pdf>.

⁵ Ibid.

⁶ 10 U.S. Code, Section 163, “Role of Chairman of Joint Chiefs of Staff,” paragraph (b)(1), available at <https://www.law.cornell.edu/uscode/text/10/163>.

⁷ “Chairman of the Joint Chiefs of Staff (CJCS),” available at <https://www.jcs.mil/About/The-Joint-Staff/Chairman/>.

⁸ Statement of General C. Robert Kehler (USAF, Ret.) before the Senate Foreign Relations Committee, November 14, 2017, p. 3, available at https://www.foreign.senate.gov/imo/media/doc/111417_Kehler_Testimony.pdf.

⁹ Ibid., p. 4, citing Deputy Assistant Secretary of Defense for Nuclear Matters, *Nuclear Matters Handbook*, 2016, Washington, DC, 2016, p. 80.

¹⁰ Editorial Board, “Don’t Let Presidents Start Nuclear Wars on Their Own,” *Bloomberg*, September 20, 2021, available at <https://www.bloomberg.com/opinion/articles/2021-09-20/milley-trump-controversy-shows-need-for-nuclear-guardrails?srnd=opinion>.

¹¹ See, for example, the *Restricting First Use of Nuclear Weapons Act of 2021*, introduced by Senator Edward J. Markey (D-Mass.) and Congressman Ted W. Lieu (D-CA), which “prohibits the President of the United States from launching a nuclear first strike absent a declaration of war by Congress.” Press Release, “Sen. Markey and Rep. Lieu Introduce Reintroduction of Bill to Limit U.S. President’s Ability to Start a Nuclear War,” January 19, 2021, available at <https://www.markey.senate.gov/news/press-releases/01/19/2021/senator-markey-and-rep-lieu-announce-reintroduction-of-bill-to-limit-us-presidents-ability-to-start-a-nuclear-war>.

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