

THE CONSTITUTION PROJECT  
  
*Safeguarding Liberty, Justice & the Rule of Law*

August 11, 2017

The Honorable James Mattis  
Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301

Dear Secretary Mattis:

We expect you noticed the press coverage last month of remarks by Admiral Scott Swift, commander of the Pacific Fleet, at a press conference following joint exercises with the Australian navy. As widely reported, and in answer to an unexpected question, the Admiral said he would carry out a nuclear strike against China, if so ordered by President Trump. He referenced the principle of civilian control of the military by way of explaining his answer. Admiral Swift's recognition of his oath to protect and defend the Constitution is as reassuring as his quick salute to an order for nuclear war is troubling.

We are concerned that such a senior commander would not have simply deflected such a question, rather than answer as he did. We trust you share some of the following reasons for concern and will communicate to commands with nuclear strike capability to be alert to questionable orders.

The principle of civilian control is, of course, unassailable. It speaks, however, to the nation's commitment that our military may not take action on its own initiative, except in defense when attacked. That is, the principle is about limiting the role of the military, not enhancing the authority of civilian leaders; it is not meant as a blanket validation of all orders that may come from a Commander-in-Chief. Certainly there would be no grounds for a military commander to carry out a presidential order for a nuclear strike against, say, Canada, England, or other allies.

Beyond that basic framework, there are other important constraints on initiating offensive military action.

First is the limitation on military action in Article I, section 8, of the U. S. Constitution. That provision assigns to the Congress the sole responsibility and authority for taking the nation to war. While Presidents have often ignored that provision, and Congress has frequently defaulted in its responsibility, the constitutional requirement remains. It ought to signal to military commanders to be alert that the powers the President has under Article II of the Constitution are limited.

Second, domestic U. S. law, including the provisions of the Uniform Code of Military Justice (UCMJ) and jurisprudence developed under the UCMJ, recognizes the obligation of members of the military to refuse to obey unlawful orders. Thus, a commander may legitimately question the lawfulness of an order from a superior. Admittedly, in a circumstance of imminent attack, exercise of discretion to disobey is a fraught proposition. However, the hypothetical posed to Admiral Swift about an order to begin a nuclear war would, absent an attack, at least be subject to question.

Finally, the international law of war imposes additional limits on any claim to presidential authority to start a nuclear war. The Department of Defense expressly acknowledges legal limits in this regard in its *Law of War Manual*.<sup>1</sup> The Foreword to that *Manual* states (p. ii):

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<sup>1</sup> See <http://archive.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf>.

The law of war is part of who we are. George Washington, as Commander in Chief of the Continental Army, agreed with his British adversary that the Revolutionary War would be “carried on agreeable to the rules which humanity formed” and “to prevent or punish every breach of the rules of war within the sphere of our respective commands.”

And regarding nuclear war, the *Manual* states (section 6.18, p. 393):

The law of war governs the use of nuclear weapons, just as it governs the use of conventional weapons. For example, nuclear weapons must be directed against military objectives. In addition, attacks using nuclear weapons must not be conducted when the expected incidental harm to civilians is excessive compared to the military advantage expected to be gained.  
[Footnotes omitted.]

We concede that gainsaying a presidential order for nuclear attack would pose a terrible problem for any operational commander. Addressing such an existential question is one reason our military has the finest schools and training for its flag officers.

You have our great respect and gratitude for the extraordinary challenges and responsibilities you shoulder for the nation. We hope you will consider the views we offer above and remind senior commanders of their responsibility in dealing with any orders to go to war that lack legal authority. This is an especially timely caution in view of the conditions on the Korean peninsula.

Thank you for your consideration.

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