

# The Duty to Disobey a Nuclear Launch Order

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*On November 19, Air Force Gen. John Hyten, commander of the US Strategic Command, declared he would refuse to follow an illegal presidential order to launch a nuclear attack. "If you execute an unlawful order, you will go to jail," the general explained at the Halifax International Security Forum in Nova Scotia. "You could go to jail for the rest of your life."*

Gen. Hyten is correct. For those in the military, there is a legal duty to obey a lawful order, but also a legal duty to disobey an unlawful order. An order to use nuclear weapons — except possibly in an extreme circumstance of self-defense when the survival of the nation is at stake — would be an unlawful order.

There is cause for concern that Donald Trump may order a nuclear strike on North Korea. Trump has indicated his willingness to use nuclear weapons. In early 2016, he asked a senior foreign policy adviser about nuclear weapons three times during a briefing and then queried,

"If we have them why can't we use them?"

During a GOP presidential debate, Trump declared,

"With nuclear, the power, the devastation is very important to me."

As the heated rhetoric with North Korean president Kim Jong-un escalated, Trump tweeted that Secretary of State Rex Tillerson was "wasting his time" by pursuing diplomacy with North Korea. Trump threatened to "totally destroy" North Korea. During his visit to South Korea earlier this month, Trump distinguished his administration from prior ones, who refrained from using nuclear weapons against North Korea.

"This is a very different administration than the United States has had in the past," he said. "Do not underestimate us. And do not try us."

In April, "multiple senior intelligence officials" told NBC News that the administration was "prepared to launch a preemptive strike" if they thought North Korea was about to conduct a nuclear test. Preemptive strikes violate the United Nations Charter, which forbids the use of military force except in self-defense or with permission from the UN Security Council.

## A Duty to Obey Lawful and Disobey Unlawful Orders

The Uniform Code of Military Justice (UCMJ) requires that all military personnel obey lawful orders. Article 92 of the UCMJ provides,

“A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States....”

Additionally, both the Nuremberg Principles and the Army Field Manual create a duty to disobey unlawful orders.

Article II of the Constitution states,

“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”

However, Article I specifies that only Congress has the power to declare war. Taken together, the articles convey that the president commands the armed forces once Congress authorizes war.

The president can only use military force in self-defense or to forestall an imminent attack. There must exist “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation,” under the well-established Caroline Case. A president has no lawful authority to order a first-strike nuclear attack.



John E. Hyten (Source: [Wikimedia Commons](#))

In its advisory opinion, “Legality of the Threat or Use of Nuclear Weapons,” the International Court of Justice (ICJ) determined in 1996 that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.”

The ICJ continued,

“However ... the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”

That means that while the use of nuclear weapons might be lawful when used in self-defense if the survival of the nation were at stake, a first-strike use would not be.

Article 509 of Field Manual 27-10, codifying a Nuremberg Principle, specifies that “following superior orders” is not a defense to the commission of war crimes, unless the accused “did not know and could not reasonably have been expected to know that the act ordered was unlawful.”

“Every violation of the law of war is a war crime,” Section 499 of the Army Field Manual states. The law of war is largely contained in the Geneva Conventions.

Gen. Hyten, who said he had been trained in the law of war for many years, cited its four guiding principles: distinction, proportionality, necessity and unnecessary suffering.

The first is distinction.

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives,” Article 48 of the Geneva Conventions, Additional Protocol 1, says.

Article 85 describes making the civilian population or individual civilians the object of attack as a grave breach, which is considered a war crime. Nuclear weapons do not distinguish between civilians and combatants.

Another guiding principle is proportionality.

“Loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained,” according to the US Army Field Manual FM27-10: Law of Land Warfare.

The damage a US nuclear weapon would inflict — the deaths of hundreds of thousands of people — would vastly exceed the military object of destroying North Korea’s nuclear weapons.

Military necessity is also a well-established law of war. It allows “those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy,” according to the Lieber Code. It is never necessary to use a nuclear weapon, except in certain hypothetical cases of self-defense if the survival of the US were at stake.

Finally, there is the principle of unnecessary suffering.

“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering,” according to Article 35.2 of the Additional Protocol I to the Geneva Conventions.

A nuclear attack on North Korea would kill and maim untold numbers of people.

If the president ordered a nuclear strike, Gen. Hyten said he would offer legal and strategic advice, but he would not violate the laws of war simply on the president’s say-so.

Who’s in the Nuclear Chain of Command?

Last month, Senate Foreign Relations Committee Chairman Bob Corker (R-Tennessee) worried that Trump may be leading the United States “on the path to World War III.” On

November 14, Corker convened the first congressional hearing on the president's power to use nuclear weapons since 1976.

Sen. Chris Murphy (D-Connecticut) said,

"We are concerned that the president of the United States is so unstable, is so volatile, has a decision-making process that is so quixotic that he might order a nuclear weapons strike that is wildly out of step with US national security interests."

Ret. Gen. Robert Kehler, former commander of the US Strategic Command, testified at the hearing that the military can refuse to follow what it views as an illegal order, including an order to launch a nuclear strike. To be lawful, an order must come from a source with legal authority and must be legal under the law of armed conflict, Gen. Kehler added.

Duke University Professor Peter Feaver testified that the president does not simply press a button to launch nuclear weapons. He can only give an order to others, who would then cause "missiles to fly."

However, although he cannot "press a button," the president has considerable power to manipulate circumstances in ways that would allow him to launch those missiles. Brian McKeon, senior policy adviser in the Pentagon in the Obama administration, testified that if a commander balked at carrying out a launch order, the president could tell the secretary of defense to order the reluctant commander to launch the missiles.

"And then, if the commander still resisted," McKeon added, "you either get a new secretary of defense or get a new commander."

One way or another, McKeon said, the president would get his way.

Moreover, Bruce Blair, former nuclear missile launch officer and co-founder of the anti-nuclear group Global Zero, told the Associated Press that a president can send a nuclear attack order directly to the Pentagon war room. From there, Blair said, that order "would go to the men and women who would turn the launch keys."

William Perry, secretary of defense in the Clinton administration, concurs. Perry told Politico that defense secretary James Mattis could not necessarily stop a nuclear launch order.

"The order can go directly from the president to the Strategic Air Command," Perry said. "So, in a five- or six- or seven-minute kind of decision, the secretary of defense probably never hears about it until it's too late."

Ranking Senate Foreign Relations Committee Member Ben Cardin (D-Maryland) advocated congressional reassertion of authority. He said they should not trust the generals or a set of protocols to act as a check on the president, or rely on individuals hired by the president to resist an illegal order.

"Donald Trump can launch nuclear war as easily as his Twitter account," Cardin cautioned.

## Reaffirm Congress's Constitutional War Powers

On October 27, Rep. John Conyers (D-Michigan) introduced H.R. 4140, the No Unconstitutional Strike Against North Korea Act. The bipartisan bill, which currently has more than 60 co-sponsors, would prohibit the use of any federal funds to launch a military strike against North Korea or to introduce the US Armed Forces into hostilities with North Korea before Congress either declares war on, or enacts an authorization for the use of military force in, North Korea.

Contact your Congress member and insist that he or she sign on to H.R. 4140 as a co-sponsor.

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