

UNITED STATES NUCLEAR DEFENSE POLICY: THE CONSTITUTIONAL FRAMEWORK

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The distribution of constitutional authority in foreign and military affairs has been a subject of controversy between Congress and the president from America's national beginnings. The sparse, terse, general constitutional dispositions left undecided the respective authority of the two branches in determining basic aspects of military policy even in the days of primitive weapons and simpler military deployments and strategies. For nuclear defense policy, the constitutional terminology seems wholly inappropriate, and the distribution of authority between the president and Congress--insofar as it is clear--may seem archaic. Yet our Constitution remains unamended in relevant respects, and two hundred years of constitutional practice have not modified the original allocations in crucial respects relevant to our subject.

Today, some aspects of nuclear defense policy clearly are determined by the original allocations. Contemporary institutions and established practices are the product of those original allocations, modified by history in some respects and to some extent but not superseded. And in the controversies of today, both the president and Congress refer--and are compelled to refer--to the constitutional provisions.

Considering the presidency today, one must appreciate that the executive branch consists of many thousand officials and millions under their authority. For purposes of the Constitution, however, they are all "the president," acting in his name and by his authority. In general, there are no clear or agreed limitations as to what the president can delegate within the executive branch, although there may be quasi-constitutional objections to presidential delegation of some kinds of authority to persons not confirmed by the Senate in accordance with Article II, clause 2 of the Constitution.

Constitutional authority to make nuclear defense policy today is determined largely by the allocations of two hundred years ago. What is explicit on the face of the Constitution has governed our way of doing things in foreign and military matters from the beginning. For our purposes, it is relevant that

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