Nova Law Review

Volume 7, *Issue* 1 1982 *Article* 5

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Abstract

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KEYWORDS: intentions, deployment, nuclear

THE FRAIL CONSTITUTION OF GOOD INTENTIONS

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If I understand the architecture of Professor Miller's argument correctly, his lofty conclusion rests on two pillars, either of which he regards as adequate to support it; these pillars in turn arise from a single foundational premise. The conclusion, of course, is that the manufacture, deployment, or use of nuclear weapons is unconstitutional. The premise is that nuclear war is "[b]y definition" unlimited.[1] The first pillar is constructed from clauses of the Constitution reinforced with good intentions. The second is of similar construction, but is also girded by a novel interpretation of international law.

His essay is admittedly only a "preliminary inquiry"[2] into the constitutionality of nuclear weapons, but the architectural design must be examined to see if it affords any reasonable hope of supporting his conclusion.

Pillar I: The Well Intended Constitution

It is the leitmotif of Professor Miller's argument that the Constitution is not to be interpreted simply according to the terms of its text, but informed by the Constitution's intentions.[3] These intentions, we learn, are not simply those of the people who wrote the text, but also, and primarily, those present and future generations who live under its authority.[4] The ultimate end—stated vaguely enough to spark little opposition—emerges as "human survival under conditions that allow human dignity to be maximized."[5] But the proper and good intention

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1. Miller, *Nuclear Weapons and Constitutional Law,* 7 NOVA L.J. 21, 30 (1982).
2. *Id.* at 23.
3. *Id.* at 27.
4. *Id.*
5. *Id.* at 26.

accompanying this end is to be found among the "clergy, physicians, scientists, and businessmen [who] have grasped and [seek] to show others the meaning of nuclear war."[6] Lawyers are thus invited to share their intentions and, so inspired, to read the text of the Constitution.

Three aspects of the Constitution contribute to the first pillar of support—the Preamble, the nondelegation doctrine, and the Due Process clause. Apparently Professor Miller believes each is independently capable of supporting his conclusion, for he does not indicate how they fit together except that they are each to be read with the Constitution's "intention" in mind.

The most curious of these is the nondelegation doctrine. Professor Miller suggests that it is unconstitutional for Congress "tacitly or expressly"[7] to delegate the authority to the President to declare nuclear war. One must wonder from what use of the nondelegation doctrine Professor Miller expects to draw support. The oldest and most straightforward use of the nondelegation doctrine is, as the term implies, to require that certain decisions can be made by Congress alone, that it cannot delegate these to any other body.[8] But this argument can provide no support for Professor Miller's conclusion that nuclear weapons are unconstitutional because it implies that Congress does have the constitutional authority to manufacture, deploy, and use nuclear weapons.

Perhaps Professor Miller has in mind a more recent use of the nondelegation doctrine, one which hinges on individual rights rather than congressional duty.[9] It implies that an individual has a right to the careful reflection of Congress before his or her liberty is abridged. Conceivably that liberty could be expanded to the liberty to be free from nuclear threat. This use of the nondelegation doctrine could, like the first use, imply that Congress does have the authority to wage nuclear war. But the doctrine so used, unlike the first use, usually harbors a serious reservation about the power that Congress has exercised. While

6. *Id.* at 22.

7. *Id.* at 29.

8. *See, e.g.,* Field v. Clark, 143 U.S. 649 (1892) and The Brig Aurora v. United States, 11 U.S. (7 Cranch) 383 (1813). On the nondelegation doctrine generally, see S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER (1975).

9. *See, e.g.,* Kent v. Dulles, 357 U.S. 116 (1958).

an actual constitutional limit to that power must be established independently of the nondelegation doctrine, the nondelegation doctrine is at least supposed to elevate the sensitivity, or "raise the consciousness," of Congress to constitutional limitations.[10] Again, however, the nondelegation doctrine offers no support, in itself, for Professor Miller's conclusion.

And one must further wonder how this use of the nondelegation doctrine could function towards "consciousness raising." Following a nuclear exchange should the Supreme Court declare the war to have been unconstitutional? If Professor Miller is serious about his fundamental premise that nuclear war is by definition unlimited, then there would be no Congress left to have its consciousness raised. But perhaps the remedy lies in equity rather than in law. Should an injunction be issued to halt the President from contemplating a nuclear exchange until Congress explicitly assumes its constitutional obligation to set forth the conditions, if any, in which it thinks nuclear war proper? Until Congress makes up its mind, nuclear war would be limited, assuming improbably that the President heeds the injunction, but hardly in a way that Professor Miller or most any United States citizen can think desirable.[11]

There is a third use of the nondelegation doctrine that might be thought to question the constitutionality of nuclear weapons, which would run as follows: only the President can act quickly enough to use nuclear weapons; only Congress can decide in each instance whether that use is justified. Aside from its wholly disingenuous use of the nondelegation doctrine, this argument requires propositions of fact and value that Professor Miller does not even assert, much less establish. Thus, under any of the three possible uses of the nondelegation doctrine, it lends no support to his conclusion and must be regarded as mere facade.

Infused with good intentions, the Preamble and the Due Process clause are also pressed into impossible duties. "Nuclear weapons and the delicate balance of terror jeopardize,"[12] he tells us, each of the

10. It is used, as Professor Alexander Bickel has noted, "in the candid service of avoiding a serious constitutional doubt." A. BICKEL, THE LEAST DANGEROUS BRANCH 165 (1962) (quoting United States v. Rumely, 345 U.S. 41, 47 (1953)).

11. Miller, *supra* note 1.

12. *Id.* at 27.

goals of the Preamble, especially in the sense that there might be no "posterity" remaining to enjoy them. Similarly, "[n]uclear weapons so endanger the lives, liberties, and properties of all Americans that they should be considered to be a deprivation contrary to Due Process."[13] No doubt nuclear weapons do in some way jeopardize our goals and do endanger our lives, liberties, and properties. But we have to ask, compared to what?

Compared to a world in which there are only conventional weapons? Clearly this is what Professor Miller hopes for, but our posterity and our lives, liberties, and properties would not necessarily be rendered more secure. One must discount the gravity of nuclear war by its improbability,[14] and one must remember that it was with conventional weapons that Rome lowered Carthage to dust.

But let's grant the preferability of a world without nuclear weapons. Can one discover a course of constitutionally mandated action? Professor Miller declares that guiding the course is a "duty to take action designed to eliminate the nuclear threat throughout the world."[15] One might wonder how Professor Miller can leap from the Constitution's rights and goals to world duties, but if the United States had sovereignty commensurate with that duty throughout the world, the duty would not be difficult to follow. The problem, of course, is that such authority is lacking. What then can the United States do? We can unilaterally disarm and achieve peace through submission. But Professor Miller implicitly agrees that while this might eliminate the nuclear threat, it would sacrifice the nation's goals. We could take the initiative in reducing our forces, but there is no guarantee that the Soviet Union would follow suit and thus the delicate balance of terror could be rendered an indelicate imbalance. We could negotiate in good faith, but again there is no guarantee that the Soviet Union would do likewise. Finally the United States could attempt to achieve nuclear superiority and either negotiate from strength or, with a clear superiority, force the Soviet Union into submission. Professor Miller might wish the courts to appoint a special master to oversee the SALT negotiations, but what

13. *Id.* at 36.

14. Apologies to then Chief Judge Learned Hand, United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).

15. Miller, *supra* note 1, at 24.

course of action that court appointee would mandate is far from clear.

In short, all that this pillar can support is a requirement to make a good faith effort to reduce the risk of nuclear war while not jeopardizing the nation's way of life. By no means is this a trivial obligation. But first, it does not differ in kind from the sort of duty we have assumed the Constitution to place on our public officials concerning conventional weapons, and second, the duty, involving in its essence questions of prudence and discretion, is wholly improper for judicial enforcement.

Pillar II: The Constitution Girded with International Law

Perhaps the most creative aspect of Professor Miller's argument is found in the construction of this second pillar where he attempts to argue that the Constitution imports a duty, to be judicially enforced, to obey international law, which he asserts is "surely"[16] incompatible with nuclear weapons. The argument begins with the proposition that "Congress having been delegated the power to define and punish offenses against international law, has a duty to carry out that power."[17] The thought continues that the President also might as well be assigned a duty "faithfully to execute" international law.[18] And then why not have the Supreme Court "grasp the nettle and point out to the Executive and the Congress that officials in those branches are charged with [this] constitutional duty"?[19]

Putting aside the question of whether what is called international law, lacking both an authoritative interpreter and a means of enforcement, can be considered law—putting aside the fact that it is only in the recent writings of a few academic commentators that nuclear weapons are regarded as contrary to international law[20]—putting aside all of

16. *Id.*at 23.
17. *Id.* at 33.
18. *Id.*
19. *Id.* at 35.
20. Professor Miller is apparently depending on the work of R. FALK, L. MEYROWITZ, & J. SANDERSON, NUCLEAR WEAPONS AND INTERNATIONAL LAW (Occasional Paper No. 10, World Order Studies Program, Center of International Studies, Princeton University (1981)). Other than this work, it is hard to discover much that can be used to support Professor Miller's claim that nuclear weapons are unconstitutional. There is the 1961 United Nations General Assembly Resolution 1653, 16 U.N. GAOR Supp. (No. 17) at 4, U.N. Doc. A/5100 (1961) asserting the use of nuclear

this—the argument that international law has a place in the Constitution superior to ordinary legislation and presidential action is wholly without foundation in the text of the Constitution, precedent, or the Framers' intent. The text of the Constitution does grant Congress the *authority* "to define and punish Piracies and Offenses against the Law of Nations;"[21] but this authority implies a *duty* to enforce international law about as much as the authority of Congress to borrow money[22] mandates a duty of deficit spending.

Recognizing the discretionary authority of Congress to define and punish offenses against the law of nations and recognizing that this requires the principle *leges posteriores priores contraries abrogant* (later laws abrogate prior laws that are contrary to them), the Court has consistently held that Congress has the authority, to which courts will give effect, to violate international law—even treaties—the most fundamental datum of international law. What international law provides, wrote Chief Justice John Marshall, "is a guide the sovereign follows or abandons at his will. The rule is addressed to the judgment of the sovereign: and although it cannot be disregarded by him without obloquy, yet it may be disregarded."[23] The fact that Congress violates international law is, as Professor Louis Henkin has succinctly made the point, "constitutionally irrelevant."[24]

Nor has Professor Miller produced one shred of evidence that the Framers wished to subordinate national sovereignty to the dictates of international law. The wisdom of the contrary position—that occasionally it is necessary to subordinate international law to national sovereignty—is reinforced when we see that some, such as Professor Miller, are willing to see as a dictate of international law the freshest idealisms

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weapons to be illegal (55 states voting in favor of the resolution, 20 states against, and 26 states abstaining). But as Professor Michael Akehurst points out in A MODERN INTRODUCTION TO INTERNATIONAL LAW 252 (1978 3d ed), "A General Assembly resolution of this type is, at most, merely evidence of customary law; but the voting figures for this resolution show the absence of a generally accepted custom." The United States voted *no* while the U.S.S.R. voted *yes,* possibly because of the latter's nuclear inferiority at the time. *Id.*

21. U.S. CONST. art. I, § 8.
22. *Id.*
23. Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814).
24. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 410 n.11 (1972).

of a few academic commentators regardless of the consequences for national security.

To say that his interpretation is without foundation in conventional construction of the Constitution may leave Professor Miller undaunted, for again he understands the Constitution in terms of its "intentions" and he understands these intentions to be those of the well intended "clergy, physicians, scientists, and businessmen"[25] rather than the more modest ones of the Framers. If this beneficent sentiment proved insufficient to bestir the Due Process clause and the Preamble to join the march against the bomb, perhaps it is sufficiently engaging to disarm the world through international law. But again, even if we grant momentarily that Congressional authority to define and punish offenses against the law of nations could be puffed into a duty, which the courts could enforce, we confront the problems of limited power. Court injunctions could only extend to the United States government, and thus we would simply have to return to the prudential alternatives discussed above, running from submission to dominance.

Pursuing Professor Miller's apparent assumption that good intentions make up for what, under conventional interpretations of the Constitution, would be usurpation of authority, there may be, however, a way in which the Supreme Court could grasp the nettle and eliminate threats to the lives, liberties, and properties of the citizenry. It could make itself the authoritative interpreter of international law. It could secretly authorize a Super Manhattan project which would culminate in the construction of a nuclear weapon awesome and accurate enough to cow into submission all nuclear powers. Then the Court would be able to give clout to the special masters it appoints to strategic negotiations and to back the injunctions it would issue around the world in the name of enforcing international law.

Other than with this reinforcement, I can see no way that the superstructure of Miller's argument can withstand even minimal scrutiny.

The Foundation

My inquiry thus far has focused on the superstructure of Professor Miller's argument, though I have indirectly touched on the adequacy of

25. Miller, *supra* note 1, at 22.

its foundation. It is time to examine more closely his contention that nuclear war is "by definition" "unlimited."[26] If we fully grant this premise then the superstructure becomes ironically superfluous. For if nuclear war is "definitionally" unlimitable, it must be obviously unlimitable. If it is obviously unlimitable, no one with a modicum of intelligence and concern for self-interest would consider risking it, for one's missiles would in effect be directed towards oneself and all that one wishes to preserve. If such a person would not even contemplate the use of nuclear weapons, we are rendered about as secure against nuclear weapons as we could ever expect to be through any judicially enforced pronouncements.

But only as an exercise in abstract logic should we grant Professor Miller his premise. As a military analyst has recently argued, it is utterly ridiculous to believe that generals and politicians "would become so absorbed in the conflict-as-a-game that they would reply tit for tat, move by move, instead of stopping the war as soon as it had become nuclear, before it could destroy their own cities and their own families."[27] One would have to believe that mankind both in the battlefield and in civilian authority had become robots. And if we thus reasonably deny Professor Miller his premise, the structure of the argument collapses.

This is not to say that in several respects, I do not share Professor Miller's wistful yearning for a world free of nuclear weapons. There was at least dignity in the defense of Carthage in a way there can never be in a defense against nuclear destruction. But to allow this yearning for dignity to inform one's interpretation of the Constitution and judicial power, is to lay bare the frailty of good intentions.

Can Lawyers Contribute to the Debate?

Although Professor Miller urges the Supreme Court to "grasp the nettle"[28] on the question of the constitutionality of nuclear weapons, he realizes that it is "naive"[29] to expect the Justices presently to do so. His

26. *Id.* at 30.

27. Luttwak, *How to Think About Nuclear War,* 74 COMMENTARY 21, 26 (Aug. 1982).

28. Miller, *supra* note 1, at 35.

29. *Id.* at 36.

apparent hope is to foster a "dialogue about the constitutionality of nuclear weapons,"[30] which in a fashion akin to the reapportionment cases will move the Court closer to his wished for declaration. He asks then rhetorically: "Is it really foolish to contend that law and lawyers have something useful to contribute to the growing debate about nuclear war?"[31]

Lawyers should be able to contribute to this debate. They should be able to remind us of the relevance of constitutional principles to changing circumstances. But to do so in the case of nuclear strategy, they must not only be aware of constitutional principles and of the relevance of those principles to the larger ends and limits of law and politics; they must also be knowledgeable as to the nature of those changing circumstances, which in this case means knowledge of diplomacy and strategy in the nuclear age. These are demanding criteria, but occasionally lawyers do meet them and make valuable contributions.[32]

On that concluding point I find myself in partial accord with Professor Miller. It is not entirely foolish to contend that lawyers have something useful to contribute to the growing debate about nuclear war. But it is foolish to believe that many who meet the above criteria will agree with Professor Miller.

30. *Id.* at 36.
31. *Id.* at 21.
32. *Cf.* S. TALBOTT, ENDGAME 20-21 (1979).