Lawyers Can, But Law May Be Unable to Contribute to Nuclear Weapons Debate

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Abstract

Professor Miller concludes that “law and lawyers have something useful to contribute to the growing debate about nuclear war.” I agree that lawyers can make a useful contribution. Whether the law can make a contribution is quite another matter, on which I have serious doubts.

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In order to evaluate the contribution that the law can make, let us assume that Miller has convincingly demonstrated that the United States Constitution prohibits the manufacture, deployment and use of nuclear weapons. Let us also assume that, in order to resolve any lingering doubts, the people of the United States have added a new amendment to the Constitution, worded as follows:

1. It is the policy of the United States that the public or private production, ownership, deployment, use or threatened use of nuclear weapons, whether inside or outside the United States, violates basic human rights in the United States and throughout the world.
2. The Congress, the President and all other officers of the United States shall take all actions that are feasible to implement this amendment.

What could be the effect of this constitutional message upon the conduct of national and international affairs?

Clearly this constitutional amendment would not oblige the United States to disarm unilaterally while other countries continue to stockpile and deploy nuclear weapons. Even if the amendment, when read in isolation, could be interpreted as a mandate for unilateral disarmament, it would have to be read in context of the government's basic responsibility to preserve and defend the nation. It is inconceivable that the United States Supreme Court would order the President and Congress

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to engage in unilateral disarmament. Even if the Court rendered such an order, it is inconceivable that the President or Congress would obey it.

What would happen if the United States entered into multilateral agreements with other countries, whereby all undertook to eliminate nuclear weapons — would the Supreme Court then order the President and Congress to carry out the obligation of the United States to disarm, and would the President or Congress obey any such court order? Again, the answer must be negative. The Supreme Court is in no position to monitor compliance, by other countries, with a multilateral agreement to disarm, nor can the Court react effectively to any violation that may occur. The most that the Court could accomplish would be to settle disputes as to whether an action taken or proposed by the President or Congress was within the jurisdiction of that branch of government. But even here, the highly sensitive nature of the subject matter might discourage the Court from stepping in.

It seems, then, that the hypothetical constitutional amendment discussed above would not establish any enforceable law. It could, however, be seriously misunderstood by foreign governments, who might interpret it as a signal that the United States was committed to disarmament whether or not other countries reciprocated. The security of the United States would then be seriously endangered.

The hypothetical constitutional amendment would, of course, be a powerful statement of public opinion, and the proceedings leading to its ratification would provide a massive public forum for the debate on nuclear weapons. But public opinion can be expressed very effectively in many other ways, including the election of public officials, the conduct of polls, or the use of "1-900" telephone surveys at a cost of 50 cents per "vote." If the American people insist on an end to nuclear weapons, they are quite capable of making their wishes known without the need for an amendment to the Constitution or for a reinterpretation of the existing constitutional language.

The preceding comments reflect my serious doubt that the adoption of a constitutional amendment, or the reinterpretation of the existing constitution, could legally bind the United States government to engage in nuclear disarmament. The constitutional arguments could be ingredients of a public forum, but they would not be essential ingredients, and the debate could proceed on questions of national and international policy as effectively without as with the inclusion of the consti-
tutional arguments. Indeed, the elimination of constitutional arguments might speed up the debate, by preventing lengthy discussion or litigation about the jurisdiction of the courts, the standing of any potential plaintiffs, or other technicalities.

This means that lawyers would not be able to contribute, to the public debate, any specialized knowledge of legal rules or technicalities pertaining to the subject matter. This does not mean, however, that lawyers should drop out of the public debate. To the contrary, as public citizens, lawyers have a special responsibility to address matters of public concern, even when the matters cannot be resolved by resort to legal rules or technicalities. Lawyers are equipped to understand the framework of institutions, to engage in rational and persuasive discourse, to sift and compare ideas, to offer and demand the presentation of facts, to marshal the arguments from various perspectives, and to seek accommodation of conflicting tendencies. Holding these skills in trust for society, lawyers have the opportunity and obligation to use them, not only when a legal rule or technicality is at issue, but more broadly, whenever a matter of general social concern is ripe for debate.

In the latter situation, the lawyer does not authoritatively lay down the law. Rather, as an articulate citizen, the lawyer participates equally with other citizens in wrestling with a common problem.

The threat of nuclear weapons is horrendous. The burden on public officials is staggering. The need for public debate is urgent. No higher challenge or opportunity has faced lawyers as citizens.