The Constitution and Nuclear Defense

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It is becoming common knowledge1 that the combined nuclear arsenals of the United States and the Soviet Union contain more than 50,000 warheads, having a destructive power more than one million times greater than the atomic bomb that destroyed Hiroshima. In terms of blast equivalences, these weapons represent four tons of TNT for every living person on earth. One United States Polaris submarine can destroy 128 Soviet sites, and carries more firepower than all the weapons used in World War II. The new Trident submarines are still more powerful. These new weapon systems and the underlying strategic planning leave old notions of deterrence behind. These weapons are building toward a capacity to fight as well as to deter nuclear war, and some civilian and military analysts are even asserting that a nuclear war can be fought and "won". The United States and NATO have long expressed their policy to use nuclear weapons first — especially "tactical" nuclear weapons — if necessary, to stop a Soviet invasion of Europe.2

The United States is improving and developing more and more precise missiles and anti-submarine systems, thereby affording the

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1. The next several pages draw heavily on the literature of the Lawyers Alliance for Nuclear Arms Control, Inc., 11 Beacon Street, Suite 719, Boston, Mass., 02108, but any one of dozens of contemporary sources would have done as well. This group seeks to end lawyer apathy in the area. This is especially critical since lawyers learn and practice the skills of conflict resolution which are the very skills that must be applied to the nuclear arms race if we are to avoid nuclear war. Lawyers separate fact from fancy, distinguish the relevant from the irrelevant, and negotiate lasting agreements building upon common or compatible interests in efforts to obtain peaceful solutions to problems of conflict. Nowhere are these skills more in need today than in nuclear arms limitation, reduction and elimination.
United States a theoretical first-strike attack capability. It will be a “counterforce” capability having the power to destroy all or most of the Soviet Union’s nuclear arsenal. This “counterforce” capability is claimed to be defensive only, but since the weapons can deliver a first-strike, it can be seen as offensive as well. Military analysts expect the Soviet Union to have this same first-strike capability sometime before the end of this decade.³

The possibility of intentional full-scale nuclear war hangs by a hair trigger. Such a war would last only a matter of hours. If launched from the Atlantic Ocean, missiles from the new Trident submarine could hit Moscow in just ten minutes. Moreover, Pershing II missiles are currently scheduled for deployment in West Germany. They could hit targets in the Soviet Union in a mere four minutes. The Soviets have similar capabilities. Thus, it is obvious that the White House or the Kremlin will have only a few minutes in which to evaluate a report of an incoming missile attack and decide whether to launch a nuclear strike in response. It is quite possible that technological advances will force this decision to be delegated to computers and their “specialists”. Indeed, if a non-first-strike nuclear power is confronted by another nuclear power possessing a first-strike counterforce capability, it can be considered “rational for the non-first strike power to adopt a “launch on attack” or “launch on report” policy. It is widely feared the Soviets may adopt such a policy if the United States maintains its present philosophy. The destiny of mankind would then have been turned over to machines.

The probability of accidental nuclear war is genuine and increasing. The warning system of the United States Air Command has reported hundreds of false alarms about incoming missiles, and has otherwise malfunctioned. No American actually knows the reliability of the Soviet Union’s command and control systems. Yet, ironically, for all the billions they have spent on defense, the American people must rely every day on the Soviet systems to prevent our destruction. So far, the Soviet systems have been sufficiently reliable to protect Americans from a wave of nuclear weapons launched because of an accident or malfunction. But how long will security last? Currently, six countries

³. See supra note 1.
admit they have atomic arms. By the end of this century, an additional two dozen countries are expected to have nuclear weapons, thereby increasing dramatically the probability of accidental, or intentional, nuclear war.

Indeed, the existence of a "counterforce" first-strike nuclear capability that could destroy most of an opponent's nuclear weapons while they remain on the ground, makes nuclear war appear "rational" under certain circumstances. Suppose for example that Iran, with Soviet backing, masses its military forces to invade Saudi Arabia and the Arab Emirates, thereby eliminating most of Europe's and Japan's oil supply, as well as much of our own. Irreparably crippled, the United States, invoking the Carter Doctrine, declares its vital security interest threatened and prepares to intervene. It can do so effectively only by using American troops. The Soviet Union threatens the United States, saying it will not tolerate U.S. troops fighting in Iran or Saudi Arabia, which are just below its southern border. It then masses its troops on the Iranian border. Perceiving this development as further threatening its vital interests, the United States responds by placing its nuclear forces on a "red" ready alert. The Soviet Union responds by placing its nuclear forces on ready alert. Negotiations between the Soviet Union and the United States deteriorate and finally break down. Iran's troops begin to cross the border and invade Saudi Arabia.

If either the United States or the Soviet Union concludes that: (1) negotiations have irretrievably broken down and are of no further avail and (2) war is surely coming, then, under these circumstances, voices on both sides will be raised declaring that a nuclear first-strike is fully "rational". It is better, it will be argued, for us to attack first and destroy as many Soviet missiles as possible, thereby suffering only 25 to 30 million dead Americans from a crippled Soviet nuclear response, than to lose fifty to eighty million or more Americans and most of our nuclear weapons, by waiting and absorbing a full power Soviet nuclear

4. United States, Soviet Union, United Kingdom, France, China, India and although she does not admit it, most people believe Israel has them as well.

5. The Carter Doctrine, 16 WEEKLY COMP. PRES. DOC. 197 (Jan. 23, 1980) which states: "Let our position be absolutely clear: An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such assault will be repelled by any means necessary, including military force."
first-strike attack.

Once war is perceived as inevitable in a world where the United States and the Soviet Union each possesses a first-strike capability, it will be declared “rational” to initiate nuclear war in a deteriorating crisis situation in order to destroy the other side’s missiles and limit casualties. If one accepts this analysis, is there any American who knows the Soviet mind well enough to predict the exact point at which, in a deteriorating crisis situation, the Soviets will perceive war as inevitable, or vice-versa? Assuming one side or the other perceives war as inevitable, on which side does prudence lie? Shall millions of preventable deaths be risked by not striking first, or shall it be a race between Americans and Soviets to press the button first? A bilateral first-strike situation is inherently unstable, especially during a deteriorating crisis. How should a democracy like the United States respond?

In foreign and military affairs, the general will of the population of a democracy is what the leaders determine it to be, and particularly for nuclear war prospects, what the President determines it to be. In a free society, no president normally would reach any momentous decision without consultation, without considering the widest scope of available opinions, without the best information he can obtain, and without patient and deep reflection on where the common interests of the people lie. But all of this takes time, much time, and time is precisely what is not available in the nuclear timetable. Neither the Congress, the people, nor any other authority, can make the decision for the President. The decision is essentially individual, and therefore autocratic. In the logic of nuclear war, the President, by circumstances of mutual, first-strike capability, is condemned to be a dictator. That is contrary to our democratic order, and a question arises, therefore, as to whether the Constitution applies to this situation.

The War Power

The Constitutional Convention was convened on May 25, 1787, and was concluded on September 17, less than four months later.6

6. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 649 (M. Farrand ed. 1911) [hereinafter cited as 2 RECORDS]. There is no complete or entirely reliable record of the Convention’s deliberations. The Convention’s delegates met in secret and resolved to communicate nothing to non-delegates. 1 RECORDS OF THE FEDERAL CON-
Fifty-five men attended in all, but the significant work was done by far fewer. For the first two months, the Convention devoted itself mainly to discussions, developing and perfecting resolutions. In late July, those resolutions on which agreement had been reached were turned over to the Committee on Detail, and on July 26, the Convention adjourned for ten days, until August 6, to permit that Committee of five to create a draft of the Constitution. 7

The Committee's draft constitution assigned Congress the power "to make war." 8 Later on August 17, Charles Pinkney opposed vesting the power to make war in Congress, saying "its proceedings were too slow." 9 He argued that the "Senate would be the best depository, being more acquainted with foreign affairs and most capable of proper resolution." 10 Pierce Butler countered, saying that if informed judgment and efficiency were the standards to be applied, then the Senate suffered the same disabilities as Congress; consequently, he was "for vesting the power in the President. . . ." 11 Thereafter, James Madison and Elbridge Gerry "moved to insert 'declare', striking out 'make' war; leaving to the Executive the power to repel sudden attacks." 12 Roger Sherman thought it stood very well. "The Executive [should] be able to repel and not commence war." 13 Elbridge Gerry said that he "never expected to hear in a republic a motion to empower th Executive alone to declare war." 14 Oliver Ellsworth observed that "there is a material

7. 1 RECORDS, supra note 6, at xxii. John Rutledge of South Carolina was Chairman, and James Wilson of Pennsylvania an important member.

8. 2 RECORDS, supra note 6, at 318: "Mr. Pinkney opposed vesting this power in the legislature. . . ."

9. Id.
10. Id.
11. Id.
12. Id.
13. Id. See also Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40-43 (1800) where Justice Samuel Chase wrote: "Congress is empowered to declare a general war or Congress may wage a limited war. . . ."
14. 2 RECORDS, supra note 6, at 318.
difference between the cases of making war and making peace," and that "it should be more easy to get out of a war, than into it." George Mason "was against giving the power of war to the Executive, because not [safely] to be trusted with it . . . he was for clogging rather than facilitating war; but for facilitating peace," thus, "he preferred 'declare' to 'make.'" Thereafter, the vote was called and "the motion to insert 'declare' in place of 'make' passed." This result is not surprising because the authors of our Constitution had all been reared with the axiom, endlessly repeated before and after the American Revolution, that standing armies and their commanders are always a menace to the liberties of a free people. The dangers posed by a standing army were repeatedly dealt with during the ratification debates, and it accounted for significant opposition to the proposed constitution.

There is no ambiguity or uncertainty about the general intent of the framers of the Constitution with respect to the war power. [It] was understood by the framers — and subsequent usage confirmed their understanding — that the President in his capacity as commander in chief of the armed forces would have the right, indeed the duty, to use the armed forces to repel sudden attacks on the United States, even in advance of Congressional authorization to do so . . . [and] . . . that he would direct and lead the armed forces and put them to any use specified by Congress but that this did not extend to the initiation of hostilities. . . .

15. Id. at 319 (emphasis original).
16. Id.
17. Id.
18. Id. (emphasis original).
19. Id. (emphasis original). By defining the issue in terms of the power to "declare" war, the framers may have confused later generations. The real issue was congressional authorization of hostilities, full or partial, against a foreign sovereign state. The framers meant to vest that power as well as the power ultimately to control general or limited war in the hands of Congress. The President was to be the commander-in-chief, subject to Congress' ultimate control.
20. National Commitments, S. REP. NO. 797, 90th Cong., 1st Sess. (1957), quoted in G. Gunther, Cases and Materials on Constitutional Law 417 (10th ed. 1980). In 1801, Chief Justice Marshall, writing for the Court, ruled that the "whole powers of war being, by the Constitution of the United States, vested in Congress . . . the Congress may authorize general hostilities . . . or partial hostili-
In a letter to Madison in 1789, Thomas Jefferson wrote: “We have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body. . . .”

One conclusion is clear: the so-called doctrine of a President attacking first and making war as anticipatory self-defense, allegedly justified by Article 51 of the United Nations’ Charter, has no historical standing in American Constitutional law.

The United States had a puny, regular military force of less than 840 men when George Washington assumed the Presidency under the new constitution, nevertheless, the framers sorely worried about war and the dangers posed by the military. They denied the President the power to initiate hostilities and embroil the nation in war. Presidents in the 19th Century interpreted their commander-in-chief powers differently, but on the whole, the basic constitutional framework was generally observed. Presidents did not initiate war. Summarizing the war power in the 19th Century, Robert William Russell wrote:

It is not a simple matter to arrive at conclusions concerning this period in which the constitutional interpretation was far from consistent, where Grant’s extreme view is sandwiched between the conservative views of Buchanan and Cleveland. But there was one opinion that enjoyed wide acceptance: the President could constitutionally employ American military force outside the nation as long as he did not use it to commit “acts of war.” While the term was never precisely defined, an “act of war” in this context usually meant the use of military force against a sovereign nation without that nation’s consent and without that nation’s having declared war upon or used force against The United States. To perform acts of war, the President needed the authorization of Congress . . . .

This dividing line between the proper spheres of legislative and executive authority was sufficiently flexible to permit the President to use military force in unimportant cases, while preserving the role of Congress in important decisions. The acts of war doctrine was probably a step beyond what the framers intended when they changed the Congressional power from “make” war to “declare”

Talbot v. Seaman, 5 U.S. (1 Cranch.) 1, 28 (1801).
21. See G. Gunther, supra note 20, at 418.
war, and was certainly a move in the direction of Presidential power compared to the cautious stance of Washington, Adams, Jefferson, and Madison. The central objective which the Constitution sought — Congressional authority to approve the initiation of major conflicts — was undamaged, but certain fraying of the edges had occurred. This slight deterioration was greatly accelerated during the following 50 years.28

The 19th Century presidents used the military forces in “hot pursuit” of bands of pirates or bandits or to protect American lives and property under treaties conferring rights and obligations on the United States. But early 20th Century presidents — Theodore Roosevelt, Taft, and Wilson — expanded the scope of presidential power by using military force against small sovereign states, and Congress did not resist.29 Later, in 1941, “President Roosevelt, on his own authority, committed American forces to the defense of Greenland and Iceland and authorized American naval vessels to escort convoys to Iceland”;29 thus, “by the time Germany and Italy declared war on the United States, in the wake of the Japanese attack on Pearl Harbor, the United States had already been committed by its president, acting on his own authority, to an undeclared naval war in the Atlantic.”30

The trend begun by Theodore Roosevelt, Taft, and Wilson, and accelerated by Franklin Roosevelt, increasingly continued under Presidents Truman, Eisenhower, Kennedy, Johnson, and Nixon, “bringing the country to the point at which the real power to commit the country to war is now in the hands of the president.”31 thus, the power to conduct foreign affairs,32 the campaign for government secrecy, and the

24. Id.
25. Id.
26. Id.
27. Id. See also United States v. Curtis-Wright Corp., 299 U.S. 304 (1936) where the Court seemingly affirmed an inherent superior presidential power over foreign affairs, not derived from constitutional or statutory sources. Compare Bestor, infra note 28.
28. For an enlightening analysis of this power, and the meaning of the King’s
commander-in-chief powers were combined and used in ways that eventually produced the current "Imperial Presidency".\(^\text{29}\)

The imperial presidency was essentially the creation of foreign policy. A combination of doctrines and emotions — belief in permanent and universal crisis, fear of communism, faith in the duty and the right of the United States to intervene swiftly in every part of the world — had brought about the unprecedented centralization of decisions over war and peace in the presidency. With this there came an unprecedented exclusion of the rest of the executive branch, of Congress, of the press and of public opinion in general from these decisions. Prolonged war in Vietnam strengthened the tendencies toward both centralization and exclusion. So the imperial presidency grew at the expense of the constitutional order. Like the cowbird, it hatched its own eggs and pushed the others out of the nest. And, as it overwhelmed the traditional separation of powers in foreign affairs, it began to aspire toward an equivalent centralization of power in the domestic polity.\(^\text{30}\)

However, the war powers as spelled out in the Constitution and its balances between Congress and the President are not obsolete. All that is required is for Congress actively and continually to reassert its constitutional authority over the use of American military force. Ultimately, congressional action will be founded upon enlightened, press influenced public opinion. This opinion obviously will affect the presidency since that office is also highly susceptible to public influence.

A first step was taken by Congress when it passed the War Powers Resolution in 1973, stating its purpose was

\begin{quote}
to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such
\end{quote}

\(^{29}\) For discussion, see A. Schlesinger Jr., The Imperial Presidency (1973).

\(^{30}\) Id. at 207.
This legislation, however, does not fully restore the intent of the framers. The framers did not rely on the collective judgment of Congress and President to initiate hostilities, but solely on Congressional declaration to introduce military forces into hostilities, except in limited cases of presidential repulsion of a sudden attack on the United States. Nevertheless, the statute is useful, so long as it is seen as a first step to be followed by others. It confirms the constitutional position that the doctrine of presidially created war as anticipatory self-defense has no constitutional standing, and it helps to restore part of the constitutional balance. The rest of the balance can be restored if the American people have the will and have the vision to do so. Alexander Hamilton was prophetic in seeing the consequences of a people living in a garrison state. He implied the need for continuous vigilance by the people. In a striking passage, Hamilton observed "safety from external danger is the most powerful director of national conduct, . . . [and] . . . [e]ven the ardent love of liberty will, after a time, give way to its dictates." Hamilton prophetically concluded that the "violent destruction of life and property incident to war—the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security, to institutions, which have a tendency to destroy their civil and political rights."

31. The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.


33. Id.
Presidential Power and Nuclear War

It seems relatively straightforward to conclude that the President has no constitutional power to initiate a nuclear war by authorizing a preemptive nuclear first-strike. That clearly would be a functional "declaration" of war in its most emphatic and destructive form, and only Congress has that power under our Constitution. Moreover, as the United Nations repeatedly has declared, the threat or use of nuclear weapons is a "crime against mankind and civilization."

But does the President, after receiving a radar or other report of an incoming wave of nuclear missiles, have constitutional power to authorize a responsive nuclear missile strike? The War Powers Resolution of 1973 permits the President "to introduce United States Armed Forces into hostilities" in the event of "a national emergency created by attack upon the United States . . . or its armed forces." This provision clearly contemplates the use of military manpower and it may be so limited, but arguably it may also include hardware, such as nuclear missiles. Thus, the statutory situation is somewhat murky. Yet clearly, a nuclear attack on the Soviet Union based on radar alone, or some other report, does not come within the statute because the reports may, like others in the past, be in error. At that moment only a report exists and neither the United States nor its armed forces have actually been "attacked". The doctrine of anticipatory self-defense by a President is ruled out. Likewise, the situation would not fall within the provision of the President's Constitutional power to repel sudden attacks because the "attack" had not yet occurred. On the other hand, if the reports were true and if the President waited until after the "attack" on the United States actually occurred, he may be left with very few, if any, missiles with which to respond. Of course, in such a situation, a question exists concerning the good to be achieved by authorizing a responding nuclear attack with the remaining missiles, which would only produce another nuclear attack on the United States with the Soviet Union's remaining missiles.

35. See supra, note 31.
36. Id.
It may be true that neither the Constitution nor the War Powers Resolution was designed to apply to the conditions of nuclear war. Nuclear war is fundamentally different from warfare by tank, machine gun, and airplane. It is a crime against humanity. But, under the Constitution as it currently exists, it appears reasonably correct to conclude (1) that the President has no constitutional power to order a pre-emptive, nuclear first-strike and thereby initiate nuclear war; (2) that the President has no constitutional power to order a nuclear attack solely in response to reports of an incoming wave of missiles, and (3) that the President has no emergency power to “repel” a nuclear attack already fully completed. If the President has any power, it would only be to repel a nuclear attack on the United States that is in process by authorizing a responding nuclear attack after the United States actually has been attacked. Of course, by then, there may be very little left with which to respond or little reason to do so. It is difficult to see how an American nuclear attack on the Soviet Union authorized during or following a nuclear attack on the United States by the Soviet Union can be characterized as “repelling” the initial attack. Nothing is “repelled”, and the concept loses its meaning in a nuclear context. Moreover, the whole concept of presidential power “to repel a sudden attack” on the United States presupposes (1) that the purpose of such presidential power is to gain time sufficient for Congress to convene and act, and (2) that things called “Congress”, “the United States”, and “the American people” will continue to exist after the President exercises his power to repel sudden attack. If neither of these two presuppositions exist, as neither would if we absorbed a full, nuclear strike from the Soviet Union, then the whole rationale for the concept of presidential power “to repel sudden attack” disappears. Rather clearly, it seems, the existence of a first-strike posture in the possible use of nuclear weapons is unconstitutional and should be dropped as a policy option.37

A president may act contrary to the constitutional requirements in each of the above three situations, arguing emergency presidential prerogative,38 a doctrine dangerous to a free society. The founding fathers

37. For a recent discussion of this point solely as a matter of policy, see Bundy, Nuclear Weapons and the Atlantic Alliance, 60 FOREIGN AFFAIRS 753 (Spring 1982).
38. Machiavelli argued that all republics in times of crisis need a dictatorship
did not completely deny power to use military force to the President. They permitted him to repel a sudden attack, and this recognizes, in part, an emergency power in the President, but the prerogative is not unqualified. Nevertheless, some presidents have gone well beyond their carefully circumscribed power. It appears that Lincoln acted on a theory of wide presidential prerogative during the Civil War, as did Roosevelt during World War II, and Kennedy during the Cuban Missile Crisis.

So long as presidents believe they will be successful in their actions, they will continue to claim emergency prerogative. But, what would count as “success” in any of the above three situations involving nuclear war? Our safety may turn on the quirks of mind of a particular president and on how he judges “success” and how he sees himself in the annals of history. The pathway to real “success” is set forth in Professor Arthur Miller’s article.

Professor Miller’s stimulating and welcome analysis, seeking to change our modes of thinking about nuclear war, goes well beyond my argument set forth above. He holds that the manufacture, deployment, and use of nuclear weapons are unconstitutional. By focusing solely on

and that it was better to provide for one by law than to have power usurped. “[R]epublics which, when in imminent danger,” Machiavelli said, “have recourse neither to a dictatorship, nor to some form of authority analogous to it, will be ruined when grave misfortune befalls them.” 1 N. MACHIAVELLI, THE DISCOURSE ch. 34, 291 (Routledge ed. 1950). Two and a half centuries later, Rousseau argued that the “ability to foresee that some things cannot be foreseen is a very necessary quality;” that the “sacrosanct nature of the laws never should be interfered with save when the safety of the state is in question,” and at that point “the People’s first concern must be to see that the State shall not perish.” 4 J. ROUSSEAU, SOCIAL CONTRACT ch. 6, 415-16 (Oxford ed. 1947). Even John Stuart Mill stated he was “far from condemning, in cases of extreme exigency, the assumption of absolute power in the form of a temporary dictatorship.” J. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, THE PHILOSOPHY OF JOHN STUART MILL 408 (M. Cohen ed. 1961).


40. See Murphy, Request of the Senate for an Opinion as to the Powers of the President In Emergency or State of War, 39 Op. Att'y Gen. 343-48 (1939); 10 F. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES 1941, at 195 (1950).
the limited presidential power to repel attack, my argument is narrower but parallels his, seeking to demonstrate only that the presidential core of our nuclear first-strike capability strategy is unconstitutional. Professor Miller broadly attacks the nuclear establishment as a whole, arguing boldly that constitutional law is instrumental and that it places a duty on government officers NOT to take any action that, on balance, unreasonably jeopardizes the well-being of the populace or “posterity.” He argues that constitutional law imposes a duty of negative content. Although this part of the argument is neither set forth comprehensively nor definitively, I find Professor Miller’s preliminary statement persuasive.

Two additional arguments and a general conclusion present some surmountable difficulties. First, Professor Miller argues that international law partially defines the duties the Constitution places on governmental officers because it is incorporated into our constitutional law.41 Second, he argues that international law, as stated by Richard Falk and his colleagues, declares that any threat or contemplated use of nuclear weapons constitutes a crime of state.42 The duty of government officials, he argues, then becomes clear: “to take action to help prevent that ‘crime of state.’”43 Accepting the validity of the above two arguments for discussion purposes, the requirement that government officials “take action” does not follow from the prior general duty of negative content that officials take no action that unreasonably jeopardizes the well-being of the American people. Another step is needed, a constitutional judgment from the Supreme Court that the current manufacture, deployment, and contemplated use of nuclear weapons unreasonably jeopardizes American well-being. Once that reasonable judgment is made, then Professor Miller’s arguments take hold and Congress comes under a duty to act to undo the jeopardy to the American people. In doing so, it prevents a “crime of state.” Such judgment from the Supreme Court of the United States is, however, most unlikely. That prospect, though, should not deter vigorous discussion of this vital subject.

Should international law be part of constitutional law? Professor

42. Id. at 33.
43. Id.
Miller argues it should. Surely, the part of international law that conflicts with the Constitution cannot be. My argument above indicates, however, that part of international law outlawing a nuclear first-strike position does not conflict with American constitutional law. Thus, that portion of international law could be incorporated into American constitutional law. Professor Miller's preliminary, creative, result-oriented affirmative argument is intriguing indeed. Anyone who takes law and humankind seriously must agree with his goal to eliminate nuclear weapons. Yet, I suspect American officials will not accept Professor Miller's argument without also knowing it has been agreed to by the Soviets. Nevertheless, by opening debate, Professor Miller puts us in his debt.

Professor Miller is quite right when he states that we must invent the legal means, whether his or others, by which the world can peacefully settle the issues that previously have been settled by war. Until the necessary legal means are created and institutionalized, any reduction in the steadily increasing probability of nuclear catastrophe is unlikely in the absence of effective negotiations on the control, reduction and elimination of arms. The limited progress that has been made to control nuclear arms has come as a result of direct negotiations between the nuclear powers, and, in this country, has been accompanied by enlightened citizen demands. In the United States, citizen enlightenment in the area of arms control is crucial, but, happily, as John Jay saw long ago, citizen interest in this area endures. "Among the many objects to which a wise and free people find it necessary to direct their attention," Jay declared, "that of providing for their safety seems to be first"; and that means their "security for the preservation of peace and tranquility, as well as against dangers from foreign arms and influence, as from dangers of the like kind arising from domestic causes."\textsuperscript{44} Thus, the legal profession becomes deeply implicated because it consists of professionals whose skills are necessary to save mankind from nuclear war. Lawyers have skills to separate fact from fancy; they can understand nuclear strategies, and they can explain to the public the dangers and constitutional status of our current nuclear posture. Lawyers also are negotiators and indispensible advisors to policy makers. They nego-

\textsuperscript{44} THE FEDERALIST No. 3, at 14 (J. Jay) (J. Cooke ed. 1961) (emphasis original).
tiate lasting agreements founded on the existence of common or compatible interests, including common and compatible interests of the Soviet Union and the United States. It is these lawyerly skills, employed in the service of Professor Miller's vision, that are sorely needed today by the American people for their posterity. May they be forthcoming.