In Brief Rejoinder

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Abstract

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The editors of the *Nova Law Journal* have invited me to comment upon the responses that were received to my preliminary foray into the applicability of constitutional norms to nuclear weapons. I am happy to do so. At the outset, I should like to express my deep appreciation to those who took time from their busy schedules to write responses, as well as the editors of this *Journal* for making the symposium possible. It is, I believe, the first attempt by a legal periodical to tackle from a constitutional standpoint what by all odds is the overriding moral and political (and thus constitutional) question of the day.

Lawyers of whatever specialty have until quite recent times ignored the problems attendant to the manufacture, storage, deployment and possible—even probable—use of weapons that threaten the very fabric of civilization as we know it. Now, however, two groups of lawyers have been formed—one with Boston headquarters and the other centered in New York City; members of the American Bar Association, as well as other bar associations, are beginning to focus upon the growing peril. That is all to the good: lawyers, as Professor Levinson suggests, can play an important role in the developing dialogue. They exemplify in modern version what Samuel Johnson said long ago: "Depend upon it, Sir, when any man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." For the first time since Hiroshima and Nagasaki were all but obliterated in August, 1945, the minds of lawyers—some but far from all of them—are beginning to concentrate upon what Jonathan Schell has called "the fate of the earth."

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1. Although mention will be made of several responses, this rejoinder is general in nature. It seeks to extend the argument, rather than to comment upon each of the responses in detail.


The need, as Professor Dunne adumbrates, is for a "mutational change" in our modes of thinking about constitutions and constitutionalism. If, as Paul Freund once observed, the Supreme Court is a theme that forces lawyers to become philosophers, the very existence of nuclear weapons forces everyone, including lawyers, to think deeply about the nature of American constitutionalism. Professor Ball tells us that when Congress was delegated the "power to declare war," it did not include "the power to declare Armageddon." Indeed, it does not. Nor does the President have such a power, now that he, because of longstanding Congressional ineptitude and pusillanimity, has become the person who can precipitate a nuclear holocaust. True enough, the President has the ability to engage in nuclear war, either by responding to external attack or by use of a first strike, but if constitutionalism means anything it must be taken to mean that such an ability cannot be equated with constitutional propriety. As Professor Jenkins reminds us, the central concept of raison d'état becomes irrelevant and inapplicable with nuclear weaponry, simply because the survival of the nation—the fundamental purpose of that silent constitutional principle—cannot be guaranteed.

When the deep-thinkers of the national security establishment speak about nuclear war, they mention sooner or later what would be an "acceptable" number of Americans killed in such a war. The figure usually runs into tens of millions. Of course, the nuclear planners are making provision for the safety of key figures in government. A command center has been hollowed out of a hillside in Virginia, furnished with equipment and supplies and suitably protected. For ordinary Americans a "civil defense" program is envisaged (some $4.3 billion is allocated to it in the current budget). Cities will be evacuated, but no one quite seems to know how, say, the residents of New York or any other major city will survive. An official in the Pentagon has suggested that everyone should get a shovel, dig a hole, cover it with a couple of doors and throw three feet of dirt on top of it—after which a person or a family presumably will huddle in the hole until danger ceases.

absurdity of such a view requires no comment: It bespeaks a mind so dulled by computerized war games and thinking about the unthinkable that the person wallows in a swamp of consummate nonsense. Let no one fail to see the point: there is no escape for most Americans should nuclear war break out.

That does not mean, of course, that those who sit in positions of political power do not today and did not in the past toy with the use of nuclear weapons. To take the latter first, recently revealed documents tell us how very close the United States was to using atomic bombs in Indo-China as long ago as 1954—at the time when the French were being defeated at Dienbienphu.8 That they were not used, either by American forces or by the French (who had obtained them from the United States), came from a decision taken not on humanitarian grounds but because of a fear of a worldwide public uproar. As for today, in August, 1982, Secretary of Defense Caspar Weinberger was busily engaged in trying to stifle—through representations to the media—the fact that the Reagan administration was prepared to fight a “protracted nuclear war.”9 Small wonder, therefore, that the “doomsday clock” on the cover of the Bulletin of the Atomic Scientists has moved from seven to four minutes to midnight.

Professor McDowell believes that the idea of a living Constitution “is ultimately at odds with the logic of the Constitution itself.”10 He of course has a full first amendment right to such a view. The fact that it runs contrary to the vast majority of constitutional scholars will not, and perhaps should not, deter him. How he can square his position with the development of constitutional law in the almost two centuries since 1789 remains completely mysterious. He misreads McCulloch v. Maryland,11 and seems to think that Chief Justice Marshall’s allusion to popular sovereignty in Marbury v. Madison12 is the ne plus ultra of

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12. 5 U.S. (1 Cranch) 137 (1803).
understanding about "the" Constitution. That just ain't so. The inescapable point, it seems to me, is that the meaning of the Constitution alters with the exigencies faced by succeeding generations of Americans—but the words remain the same. Each generation of Americans must undertake the task of writing its own constitution; that, at least, is the clear and unmistakable teaching of history. Professor McDowell does not like that; but he cannot gainsay it. The Constitution has always been relative to circumstances. To repeat Franz Neumann's point:

No society in recorded history has even been able to dispense with political power. This is as true of liberalism as of absolutism, as true of laissez-faire as of an interventionist state. No greater disservice has been rendered to political science than the statement that the liberal state was a "weak" state. \textit{It was precisely as strong as it needed to be in the circumstances.} It acquired substantial colonial empires, waged wars, held down internal disorders, and stabilized itself over long periods of time.\footnote{Neumann, \textit{The Democratic and the Authoritarian State} 8 (1957) (emphasis added).}

The relevant "circumstance" today is the imminence of nuclear holocaust. Those circumstances call, not for an expansion of governmental power but for the development of means by which government, in Madison's words, can be obliged "to control itself."\footnote{Federalist No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).} Professor Morris suggests that a constitutional judgment should be made that nuclear weapons "unreasonably jeopardize American well-being."\footnote{Morris, \textit{The Constitution and Nuclear Defense}, 7 Nova L.J. 151, 164 (1982).} That is the language of due process, and opens still another argument for the applicability of constitutional norms to the circumstances that confront us.

Professor Alfange asserts that the \textit{Duke Power} case is relevant to the nuclear weapon issue.\footnote{Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978).} I cannot agree with his conclusion; but

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\item \textbf{13.} McDowell, \textit{supra} note 10, at 147. For a preliminary inquiry into the meaning of what the Constitution is, see Miller, \textit{Toward a Definition of "The" Constitution, \textit{Daniel C. Dayton L. Rev.} \textit{1} (1983)}.
\item \textbf{14.} \textit{F. Neumann, The Democratic and the Authoritarian State} 8 (1957) (emphasis added).
\item \textbf{15.} \textit{The Federalist No. 51}, at 349 (J. Madison) (J. Cooke ed. 1961).
\item \textbf{18.} Alfange, \textit{Wisdom, Constitutionality, and Nuclear Weapons Policy}, 7 Nova
would like to draw upon that Supreme Court decision, and particularly the opinion of Judge McMillan in *Carolina Environmental Study Group v. United States Atomic Energy Commission* which was reversed by the Court. Environmentalists in North Carolina challenged the constitutionality of the Price-Anderson Act, setting monetary limits on the liability for damage resulting from a nuclear power plant. Judge McMillan ruled the statute unconstitutional, stating that "the destruction of the property or the lives of those affected by nuclear catastrophe without reasonable certainty that the victims will be justly compensated" violated the fifth amendment.

The Supreme Court reversed—unanimously. Where, then, does that leave us? I maintain that we are left exactly where the plaintiffs were on March 31, 1977 when Judge McMillan issued his opinion. The two situations are not analogous. Chief Justice Warren Burger, speaking for the Court, employed a limited standard of review in what he perceived to be an economic regulation. He found that the Act was neither arbitrary nor irrational; thus it "passe[d] constitutional muster." Burger also relied upon "an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the $560 million ceiling on liability is exceeded." Surely Burger's alleged "reasoning" is inapplicable to nuclear weapons. The point, as Professor Morris tells us, is that the danger created by nuclear weaponry is of such enormity that Americans are being deprived of their right to personal and psychic well-being.

Nuclear weapons, accordingly, constitute an "anticipatory taking" contrary to the fifth amendment and an "anticipatory" deprivation of life, liberty and property without due process of law. Due process, Justice Felix Frankfurter stated in 1950, "is that which comports with the

L.J. 75 (1982).


22. *Id.* at 93.

deepest notions of what is fair and right and just."24 It means, in current context and to adopt Judge McMillan's classification, that Americans have a right to be free from both the immediate and the potential effects of nuclear weaponry.25

The immediate effects are bad enough. Storage of bombs and nuclear waste present as yet insoluble problems of safety. Furthermore, as Ruth Leger Sivard has concluded, increasingly vast sums are being spent to purchase what may be an illusory sense of security at the price of economic stagnation, repression, and poverty.26 I have elsewhere sought to draw attention to the emergence of a new "constitution of control";27 surely, nuclear weapons contribute to that development.

The potential effects are far worse. Drawing upon Judge McMillan's opinion, the following conclusions seem to be beyond argument.

First, there is a high probability of nuclear war, coming either by design or by accident.

Second, there is no escape from the impact of nuclear war.

Third, civil defense measures cannot possibly protect the residents of any city in the United States.

Fourth, the risks involved in nuclear weaponry are not the types that a responsible government places upon its citizens.

Fifth, there is no way that Americans can be compensated for losses of life, liberty, or property.

Sixth, nuclear war will be the "last epidemic." There is no way that the health services of the nation could take care of the casualties of such a war.

Given those effects, the conclusion of an anticipatory violation of the fifth amendment is unanswerable.

I do not, it is emphasized, wish to be placed in the position of one who uses constitutional argumentation as "desperate legal acrobat-

The ideas presented may be new, but I do not think they are foolish. If our modes of thinking about constitutions and constitutionalism are to be changed, the basic requirement, in the words of Alexander Pekelis, is to have

the will to discover the will to enlarge the tiny segment of the world we know, the will to learn and to do better, the firm and deepseated conviction that men may, again and again, in everyone’s lifetime, see “thin with distance, thin but dead ahead, the line of unimaginable coasts.”

There may well be an “arrogance of humanism”—the belief that humankind through the exercise of reason can control the future. Surely, however, we have to act as if what humans do can make a difference, as if they have the intelligence, the will, and the stamina to ward off extinction.

A final note: calling nuclear weapons a constitutional problem does not, of course, mean that they are ipso facto not a political problem. As Professors Alfange and McDowell note, those weapons should be dealt with by the political process. My belief is that the courts, and specifically the Supreme Court, are deeply immersed in politics and, indeed, would be quite meaningless unless seen as part of the political process. Judges are important political actors—now, in the past, and certainly in the future. Professor Judith Shklar has observed that the prevailing ideology of lawyers is “legalism”—the notion that law is something separate and apart from the remainder of society. But, as any sociologist of law knows, law and the state are closely intertwined. To call for a political solution to the nuclear threat does not foreclose action by courts. Quite the contrary. The Supreme Court sits as an authoritative faculty of political theory and of social ethics. It can, should the Justices so wish, set standards toward which all Americans can aspire.

31. See Alfange, supra note 18; McDowell, supra note 10.
33. It is worth special mention that the General Counsel of the Department of
On the other hand, as Professor Gerhard Casper has cogently observed, "constitutional rules are authoritative regardless of whether courts are able to interpret and enforce them." Congress and the President, Casper continues, "must be ready to reconsider fundamental constitutional policies and basic propositions of political theory." So they do. The Constitution is not a mere lawyers' document, not a plaything (or workthing) of lawyers only. It is the vehicle of the nation's life. And government officers, including the President, swear to "preserve, protect and defend the Constitution of the United States." If that means anything, and surely it is not mere brutum fulmen, it means cognizance of and adherence to a constitutional duty to insure the preservation of the nation and the values that they are embedded in the Constitution. In the age of thermonuclear bombs, that can only mean the total elimination of such weapons wherever they may be. In sum, no useful purpose is served by calling nuclear weaponry a "policy" question or a problem of "politics," for all branches of government deal with policy and politics.

Defense, William H. Taft, IV, acknowledges "the existence of the constitutional duty to reduce and, if possible, eliminate the threat that nuclear weapons pose to the individual freedom and rights of Americans set out in the Constitutions." Taft, Letter from the Government, 7 Nova L.J. 141, 143 (1982). One hopes that Mr. Taft's recognition of such a constitutional duty is communicated to the Secretary of Defense, the Joint Chiefs of Staff, and the President — and that they agree that such a duty rests upon their shoulders. I am, of course pleased to learn that my view on the existence of a constitutional duty has drawn the approbation of a high government officer — who, indeed, advances even more constitutional arguments than do I in support of such a position. Mr. Taft's letter merits wide circulation.

35. Id.
36. U.S. Const. art. II, § 1, cl. 7.