Nuclear Weapons and Constitutional Law

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Abstract

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KEYWORDS: nuclear, weapons, law
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Introduction

The time has come for lawyers to confront the question of whether nuclear weapons—their manufacture, deployment, and use—can be justified under either constitutional or international law. Since the explosions of primitive atomic bombs at Hiroshima and Nagasaki in 1945 it has been assumed, without much thought, that there is nothing unlawful about those weapons. This paper is a preliminary statement that suggests the contrary. It is predicated on two observations of Alfred North Whitehead: “The doctrines which best repay critical examinations are those which for the longest period have remained unquestioned;” and “almost all really new ideas have a certain aspect of foolishness when they are first presented.” What follows is a brief outline in which I contend that it is not really foolish for law and lawyers to contribute to the growing debate about nuclear war.

People throughout the world live today under the threat of a nuclear arms “race” that is madly out of control. That peril has at last—almost forty years after the bombs dropped on Hiroshima and Nagasaki—percolated into the thinking of growing numbers of men and women who have swelled into a spontaneous popular movement against the ultimate danger. Their motivations, as perceived by Ambassador George Kennan, include:

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1. Whitehead, as quoted in Miller, A Note on the Criticism of Supreme Court Decisions, 10 J. PUB. L. 139 (1961).

a growing appreciation by many people of the true horrors of a nuclear war; a determination not to see their children deprived of life, or their civilization destroyed, by a holocaust of this nature; and finally . . . , a very real exasperation with their governments for the rigidity and traditionalism that cause those governments to ignore the fundamental distinction between conventional weapons and weapons of mass destruction and prevents them from finding, or even seriously seeking, ways of escape from the fearful trap into which the cultivation of nuclear weapons is leading us.3

Members of the clergy, physicians, scientists, and businessmen have grasped and sought to show to others the meaning of nuclear war. With rare exceptions, lawyers until very recent times have been mute. They have assumed, if they thought about it, that nuclear weapons are just another means of killing—a bit more powerful but not essentially different from the long bow, the machine gun, the tank, and the airplane. That assumption is simply not accurate.

Some lawyers, mainly those in international law, have begun to challenge the assumption of legality of nuclear weaponry. The Lawyers Committee on Nuclear Policy has recently been formed, with headquarters in New York City. The Committee's position is that nuclear weapons are incompatible "with the core precepts of international law."4 The Committee believes that "nuclear warfare would lead to results incompatible with fundamental rules of international law, elementary morality, and contrary to any rational conception of national interest and world order. . . . The very nature of nuclear warfare is destructive of all the values which law obligates us to preserve."5


4. Weston, Clergy, Doctors, Business-and now the Lawyers, Des Moines Register, March 27, 1982, at A9, col. 1. Professor Weston of the University of Iowa quotes Chicago banker Ervin Salk to the effect that the nuclear arms race "is tearing the guts out of our economy just like Vietnam did."

5. LAWYERS COMMITTEE ON NUCLEAR POLICY, STATEMENT ON THE ILLEGALITY OF NUCLEAR WEAPONS 7 (undated). The Committee's purpose is to initiate a dialogue
No one has yet asked the constitutional question: Does the manufacture, deployment, and possible—even probable—use of nuclear weapons contravene the Constitution? This paper is a preliminary inquiry into that question. It is an outline, presenting possible constitutional arguments, rather than a full-dress exposition. In the well-known but little heeded words of Albert Einstein, "the unleashed power of the atom has changed everything save our modes of thinking, and we thus drift toward unparalleled catastrophe." So we do: I contend in this brief paper that the time has come—indeed, it is long past—to change "our modes of thinking" about the constitutionality of nuclear weapons.

My conclusion may be simply stated: An argument based on the goal-seeking nature of constitutionalism, together with at least four other constitutional arguments, invalidate the presumption of constitutionality. These arguments will be discussed in detail later. This is not to say that the Supreme Court would sustain these arguments, were a case to be brought. Rather, it is to say that as a part of the dialogue that is beginning about the legality of nuclear weapons the dimension of constitutional law cannot be ignored—it is not enough to argue that those weapons are incompatible with international law—as surely they are.

At the outset, I readily concede the jurisprudential problem of whether legal norms (rights) can exist absent a means of enforcement. That, however, should not stay the inquiry into the relevance of constitutional prescriptions to the nuclear threat. As long ago as 1803, in the famous case of Marbury v. Madison that established the Supreme Court's power of judicial review, Chief Justice John Marshall acknowledged that Mr. Marbury was entitled to his commission as a justice of the peace but went on to assert that there could be no judicial enforcement of that right. Congress, Marshall held, had constitutionally erred in trying to enlarge upon the original jurisdiction of the Supreme Court. Furthermore, until recent decades, a number of now-recognized

regarding the legitimacy of nuclear weapons under international law. (The present essay seeks to expand that focus to encompass constitutional law.) The Committee's address is 777 United Nations Plaza (5th Floor), New York, N.Y. 10017. (In the interests of disclosure, I am a member of the Consultative Council of the Committee.)

7. 5 U.S. (1 Cranch) 137 (1803).
constitutional rights such as the right to privacy, one person/one vote, and racial desegregation were not given judicial cognizance. The history of American constitutional law is one of an expanding number of rights brought into being, in one way or another, by the Supreme Court or other constitutional decisionmakers. In philosophic terms, law—including constitutional law—has always been instrumental. Rather than being a fixed body of pre-existing immutable principles, it is goal-seeking, purposive—a type of human activity that exists for identifiable ends. In addition, constitutional law has been and is relative to circumstances. Necessity is the mother of constitutional law which is constantly in a state of "becoming."  

More than 40,000 nuclear weapons now exist, and more are being produced each week. Russia has enough to wipe out every American city of 1500 or more people. The United States has an even larger stockpile. And nuclear capacity is proliferating. France, Great Britain, India, China, for certain, and Israel, South Africa and perhaps Brazil also have significant nuclear weaponry. Enough "overkill" already exists in amounts sufficient to vaporize every living human being on earth today. And yet political officers in the world's capitals continue a mad "race" for supremacy.

This essay is emphatically not a plea for unilateral disarmament. We live in a Hobbesian world, a condition not at all likely to change. The essence of my argument is that those who wield both formal authority and effective control in the American constitutional order have a duty to take action designed to eliminate the nuclear threat throughout the world. The duty, I maintain, is of constitutional dimension. The ultimate goal has been stated recently by Billy Graham as the elimination of every weapon of mass destruction in the world.

The Philosophical Basis of Constitutionalism

The text of the ensuing discussion comes from Justice Felix Frankfurter and the French legal philosopher, Leon Duguit. Said Frankfurter in 1949: "It is of the very nature of a free society to advance in its

8. For discussion, see A. Miller, Democratic Dictatorship: The Emergent Constitution of Control (1981); A. Miller, Toward Increased Judicial Activism: The Political Role of the Supreme Court (1982).
standards of what is deemed reasonable and right." Said Duguit in 1919: "Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First, the holders of power cannot do certain things; second, there are certain things they must do."  

This, then, is an exercise in American constitutionalism. As a concept, constitutionalism has usually had, at least in the United States, a normative connotation, as witness the following definitions. "Constitutionalism," Friedrich Hayek maintains, means that all power rests on the understanding that it will be exercised in accordance with commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right.  

To Daniel Bell it is "the common respect for the framework of law, and acceptance of outcomes under due process." Walter F. Murphy maintains that "[t]he fundamental value that constitutionalism protects is human dignity." And to Charles McIlwain "constitutionalism has one essential quality: it is a legal limitation on government." In sum, constitutionalism in America is more than a process—more than procedure alone—but has a substantive, normative, content looking toward the responsibility, as McIlwain put it, of government to the governed. James Madison said it well in The Federalist No. 51: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."  

As "officers of the courts" lawyers have a quasi-governmental sta-

tus. As such, they should no longer remain on the sidelines, taking no action to seek and, one hopes, to find what Kennan calls "ways of escape."\(^{16}\) The full force of law, feeble though it may be, should be brought to bear upon the growing peril. Law, to be sure, has shortcomings as a principle of social order. It cannot do everything; there are limits to its effectiveness in changing either the attitudes or behavior of people. But that does not mean that the effort should not be made. Chief Justice Earl Warren once remarked that "law floats in a sea of ethics."\(^{17}\) So it does: law can be a powerful educational force that will create the climate so necessary to move away from the abyss.

A persuasive case can be made for the proposition that nuclear weapons should be considered to be unlawful under both international law and constitutional law. Since law is instrumental, and a reflection of the circumstances in which it exists, the nuclear peril presents it with a challenge and an opportunity. In the United States, the ultimate purpose of law is human survival under conditions that allow human dignity to be maximized. In familiar legal terms, nuclear weapons are a clear and present danger both to survival and especially to achievement of human dignity. Senator J. W. Fulbright, then chairman of the Senate Foreign Relations Committee, stated the point in 1967 in these well-chosen words: The President, he said,

> by acquiring the authority to commit the country to war, now exercises something approaching absolute power over the life or death of every American—to say nothing of millions of other people all over the world. . . . No human being or group [is] wise and competent enough to be entrusted with such vast power. Plenary powers in the hand of any man or group threatens all other men with tyranny or disaster.\(^{18}\)

So it does—whether such a power resides in the Kremlin or the White House. The well-known statement of military scientist Karl von Clause-
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witz, that "war is diplomacy carried on by other means,"\textsuperscript{19} may well have been accurate when made early in the nineteenth century; but it no longer is. Unleashing the atom invalidated it.

Nuclear war cannot by any criterion be "deemed reasonable and right"—to use Justice Frankfurter's words. Not for the United States. Not for the Soviet Union. Nor for any nation. International law merges with constitutional law to proscribe use of such weapons. Once that is seen, \textit{a fortiori} their manufacture and deployment are also outlawed.

Constitutional Challenges to Nuclear Weapons: The Goals of the Preamble

The purposive—goal-seeking—dimension of constitutionalism suggests this argument: the preamble to the Constitution states the ends of government—"to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Nuclear weapons and the delicate balance of terror jeopardize each of those goals; and nuclear war would eradicate them. Surely the framers could not have contemplated such a consequence either for themselves or their posterity.

We are that posterity. The time has come to think seriously about giving substantive content to the preamble. Strictly speaking, to be sure, the preamble is not part of the Constitution. It precedes it. The preamble has never been held to sustain a specific claim of governmental power or of private right. As Justice Joseph Story said in his \textit{Commentaries}, "Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them."\textsuperscript{20} In other words, the preamble sets the tone for the meanings to be given to the specific provisions of the Document of 1787.

Those meanings, first, should be derived from a correct appreciation of present conditions and with the avowed goal of meeting current problems. To quote Chief Justice Marshall's well-known words in \textit{Mc-
Culloch v. Maryland, "The subject is the execution of those great powers on which the welfare of a nation essentially depends. . . . This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various 'crises' of human affairs." \(^{21}\) The import of that statement, the most important ever uttered on the theory of constitutional interpretation, is clear: The Constitution may validly be considered to be a tacit delegation of power by the framers to enable succeeding generations of Americans to write their own fundamental law—to meet, that is, the exigencies of their—not the framers'—times.

The Constitution was drafted for the benefit of "ourselves and our posterity." Since nuclear weapons threaten the goals of the preamble, the meaning is that there will be no posterity left to pick up the pieces after the bombs have exploded. Not only will the constitutional order have vanished, but quite possibly civilization itself. No one can validly argue that threatening the very existence of "posterity" can be constitutional. Posterity has its claims under the Constitution. That is particularly true because the rapid rate of social change, brought about by the scientific-technological revolution, means that most people alive today will be their own posterity. (Those who ask, "what has posterity done for me?", should constantly keep in mind that they are their own posterity.)

I do not suggest, of course, that in and of itself the preamble can be invoked to persuade anyone that nuclear weapons are unconstitutional per se. However, the preamble does provide an initial entry point into a more detailed and more specific analysis. The implication here is that, as William Seward once said, "there is a higher law than the Constitution"; or as Chief Justice Marshall wrote in *Fletcher v. Peck,* \(^{22}\) Georgia's attempt to revoke a fraudulent land grant disregarded "certain great principles of natural justice." \(^{23}\) Therefore, Georgia was restrained "either by general principles which are common to our free

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22. 10 U.S. (6 Cranch) 87 (1810).
23. Id. at 133.
institutions, or by the particular provisions of the Constitution.” Marshall’s colleague, Justice William Johnson, went even further, asserting that “a general principle, on the reason and nature of things; a principle which will impose laws even on the deity” invalidated the attempted rescission. In sum, can a principle of natural justice—a concept that has greater currency in Great Britain—be employed to determine the validity of nuclear weapons? The answer can only be “yes.” In the language of the famous “Martens Clause” of the fourth Hague Convention of 1907, when no treaty provision specifically forbids a new tactic or weapon, combatants and non-combatants remain nonetheless protected by legal principles derived “from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

Without going further into the complex question of natural justice, what particular provisions of the Constitution are conceivably relevant to the nuclear weapons situation? I suggest the following, each of which would require creativity or innovation by a constitutional decision-maker. The points are listed as questions requiring exploration, not as established doctrines. Taken together, however, they point in only one direction: the illegality of nuclear weapons.

The Congressional War Power

First: Can Congress delegate, tacitly or expressly, its war-making power? That there has been a tacit delegation to the President admits of no doubt (as Senator Fulbright said). It is even possible to perceive an express delegation in the War Powers Resolution of 1973, enacted into law over President Richard Nixon’s veto, which ironically was intended to place limits over presidential power.

Presidents beginning with George Washington have unilaterally employed violence. All of those instances, however, save perhaps for

24. Id. at 139.
25. Id. at 143 (Johnson, J., concurring).
27. See Fried, supra note 18.
President Abraham Lincoln during the Civil War, were for limited goals. They were taken in accordance with the Principle of the Economy of Means: just enough violence to meet the situation adequately. That Principle is simply not applicable in the age of nuclear warfare. By definition, use of nuclear weapons cannot be limited. Once employed, sooner or later the conflict will escalate into all-out war. The meaning for present purposes is that it is one thing for a President to use limited violence, but that it is quite another thing for the Chief Executive to have absolute power of life and death in the nuclear age. Insofar as there is a constitutional doctrine about delegation of legislative powers, certainly it does not extend to the power to threaten civilization itself.

During the Civil War, the Supreme Court in the Prize Cases sustained Lincoln's actions to meet the emergency: "The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name, and no name given to it by him or them could change the fact." (What the Court did not say was that Lincoln made absolutely no attempt to call Congress into session to consider a response to Fort Sumter's hostilities; in fact, he waited almost three months—from April until July—before formally telling Congress what was going on.) The most that can be said for the decision in the Prize Cases is that the Supreme Court came close to being an arm of the Executive. That decision, furthermore, at best stands for the proposition that a President can respond to emergency situations. By no means does it mean that the President can commence a war. First-strike use of nuclear weapons should, as former high officials Robert McNamara, McGeorge Bundy, Gerard Smith and George Kennan recently argued in Foreign Affairs, be dropped as a policy option.

The so-called doctrine of anticipatory self-defense, taken pursuant to Article 51 of the United Nations Charter, was cited by American lawyers during the Cuban missile crisis of 1962 (wrongly, in my judgment). That episode is proof positive about the enormity of Congress

30. Id. at 699.
31. McNamara, Bundy, Smith & Kennan, Nuclear Weapons and the Atlantic Alliance, 60 FOREIGN AFF. 753 (Spring 1982).
allowing one man to have the power to eliminate human life. Clearly, the framers did not want the wealth and blood of the nation to be committed by one person (as The Federalist No. 69 evidences)—even in a day before the invention of such conventional weapons as the machine gun and the tank! During the 1787 Convention, Elbridge Gerry remarked that he “never expected to hear in a republic a motion to empower the President alone to declare war.”32

We deal, however, with one of the greatest silences of the Constitution; the principle of constitutional reason of State (raison d'état), defined as “the doctrine that whatever is required to insure the survival of the State must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men.”33 Political officers of American government have never hesitated to employ that principle—to invoke a constitutional silence—both in external and wholly domestic matter, when they believed that conditions warranted. Franz Neumann put it well:

No society in recorded history has ever 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. 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.34

Neumann surely was correct on the historical record. Said another way, the Constitution has never been a barrier to what those who wield effective control over governmental actions wanted to do.

Circumstances have changed so radically since 1787, and even since the first primitive atom bombs were exploded in 1945, that old practices and old modes of thinking about constitutional propriety must be re-examined. New doctrine must be discovered: The government

32. 2 M. FARRAND: THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (1911).
33. C. FRIEDRICH, CONSTITUTIONAL REASON OF STATE 4-5 (1957).
must be obliged, as Madison said, to control itself. The Bill of Rights was a conscious attempt to resolve the dilemma that raison d'état presented to policy-makers. The first ten amendments were inserted for the people's security, to counterbalance extravagant claims of State security. The men who wrote the Bill of Rights were not naive. They knew history and they knew the dark side of man. They opted to make "reasons of freedom and of personal security" explicit, leaving "reason of state" unexpressed. Nuclear warfare means that both personal and national security are threatened; neither can long exist while nuclear weapons proliferate. To permit the President alone to have the power to trigger thermonuclear war is contrary both to the letter and the spirit of the Constitution. The failure of Congress to retrieve its war-making authority can no longer be tolerated. In fact, the power to commit the nation to nuclear war is not only presidential; it has actually been delegated to subordinate officers—and on a number of occasions to the vagaries of a computer interpreting radar messages. That is an intolerable situation.

The Congressional Power to Punish Offenses

Second: Can Congress neglect to exercise a delegated power? We have already mentioned the war-making power. Under article I, section 8, clause 10 of the Constitution, Congress has power to punish offenses against "the law of nations." In his famous Commentaries on American Law, Chancellor Kent wrote in 1826:

"When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among civilized nations of Europe, as their public law. . . . The faithful observance of this law is essential to national character. . . ." 36

If, then, it can be shown that international law makes nuclear weaponry illegal, a duty is imposed upon the United States (and other nations) to adhere to that principle.

36. J. Kent, Commentaries on American Law 1 (1826).
The argument would go like this: Congress having been delegated the power to define and punish offenses against international law, has a duty to carry out that power. In *United States v. Arjona*, the Supreme Court said that international law places a duty on every government to prevent a wrong being done within its borders to another nation with which it is at peace, or to the people thereof. That of course is scant legal authority, as lawyers understand authority, to sustain an argument that Congress has a duty to determine the state of international legal norms concerning nuclear warfare and act in pursuance thereof. But the *Arjona* decision does provide a point of entry into a systematic inquiry into the problem. Richard Falk and colleagues have concluded in their monograph *Nuclear Weapons and International Law* that "any threat or contemplated use of nuclear weapons is contrary to the dictates of international law and constitutes a crime of state." If that be so, then the duty that American government has, in all of its branches, becomes clear: to take action to help prevent that "crime of state." As the United Nations has repeatedly said, the threat or use of nuclear weapons is a "crime against mankind and civilization."

The Constitution and International Law

*Third:* Is international law a part of the corpus of "laws" that the President must faithfully execute (pursuant to Article II of the Constitution)? No one has ever fully explicated the meaning of the word "laws". Usually it is thought of as Congressional statutes. Arguably, however, it has a wider compass. For example, in recent years the Supreme Court has maintained, successfully, that its decisions are the law

37. 120 U.S. 479 (1887). The *Arjona* principle was employed by the Supreme Court to hold that Congress may set up a military commission "as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war." In re Yamashita, 327 U.S. 1, 7 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942). Compare A. Reel, *The Case of General Yamashita* (1949) with T. Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970).

38. See supra note 26, at 60.

of the land—thus presenting the question of whether the President has a constitutional duty to faithfully execute them. That question is not only unanswered in constitutional theory; it is little discussed in the scholarly literature. If, however, the Supreme Court is correct in its perception of the thrust of its decisions, then the word “laws” must include more than Congressional enactments. If that is so for the Supreme Court, it requires no large mental jump to say the same for norms of “the law of nations.”

Imposing duties upon the President is such a new concept that very few judicial decisions are apposite. Since Mississippi v. Johnson, it was thought that the writ of courts did not run against the Chief Executive. That, however, changed in 1974 when President Nixon was required to relinquish the infamous White House tapes. Lawsuits against the President have become, if not routine, then certainly not rare. (Even so, litigants tend to hale subordinate executive officers into court, rather than the Chief Executive—as, for example, in the Iranian Hostage Case.

A concept of constitutional duty is slowly being developed in American constitutional law. Since Cooper v. Aaron, the Justices have maintained that their decisions are “the law of the land.” The Justices have more than an umpire’s function, as Justice William Brennan noted:

Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of government. While individual cases turn upon controversies between parties, or involve particular prosecutions, court rulings impose official and practical

41. 71 U.S. (4 Wall.) 475 (1866).
consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights.

The interpretation and application of constitutional and statutory law, while not legislation, is lawmaking, albeit of a kind that is subject to special constraints and informed by unique considerations. Guided and confined by the Constitution and pertinent statutes, judges are obliged to be discerning, to exercise judgment, and to prescribe rules. Indeed, at times judges wield considerable authority to formulate legal policy in designated areas.

My suggestion is that Supreme Court Justices should grasp the nettle and point out to the Executive and the Congress that officials in those branches are charged with a constitutional duty to take action to eliminate threats to the lives, liberties, and properties of the citizenry. Those threats emanate from nuclear weaponry.

The Affirmative Duties of the Federal Government

Fourth: That suggestion of a pervasive governmental duty runs not only to the express provision that the President must faithfully execute the laws but to Congress as well to define and deal with the law of nations and also to the Supreme Court—to make international legal norms judicially cognizable. Of even more importance, a due process question is presented: Does due process of law have a third dimension—in addition to its procedural and substantive aspects—that places affirmative duties upon the federal government?

The answer can only be “yes.” Some Supreme Court decisions point in that direction. In West Coast Hotel Co. v. Parrish, for example, Chief Justice Charles Evans Hughes wrote for the Court that “the liberty safeguarded... (by the Constitution) is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people.” That statement seems to fit the nuclear weapons situation exactly. And in

47. 300 U.S. 379 (1937).
48. Id. at 391 (emphasis added).
Green v. County School Board of Kent, a the court held that local school boards were “charged with the affirmative duty” to integrate public schools. Professor Thomas Emerson has argued that the first amendment has an affirmative dimension. The point is that American constitutional law should include not only what governments can and cannot do but also, as Duguit said, what they must do if constitutionalism is to survive; and there is precedent for that conclusion.

The argument, in sum, is that the Constitution imposes duties and obligations upon government to control itself—and thus to protect the citizenry. Those obligations run to the American people—the “We, the people . . .” of the preamble. They can be inferred from the Constitution itself, from certain statutes, and from some Supreme Court decisions. The emergent duty that should be recognized is for government officers not to take actions that jeopardize the well-being of the populace, or the well-being of “posterity,” or indeed, the well-being of peoples of other nations. Nuclear weapons so endanger the lives, liberties, and property of all Americans that they should be considered to be a deprivation contrary to due process.

Conclusion

It would be naive to expect the Supreme Court to intervene in matters such as are discussed above. In general, judges are timorous officers of government. They look upon requests to go beyond the familiar and the expected as “frightful occasions.” Judges, however, are not the only guardians of the Constitution. Their reluctance should not foreclose a growing dialogue about the constitutionality of nuclear weapons. Constitutional lawyers and political scientists can no longer remain aloof from the ultimate terror. Political means must be invented by which “the world can peacefully settle the issues that throughout

50. Id. at 437.
52. See supra note 10.
That is the challenge that nuclear weapons presents to the constitutional lawyer. No more important task exists.