Nuclear Weapons: Unconstitutional or Just Unjust?

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Abstract

Before one can reasonably assess Professor Miller’s argument in "Nuclear Weapons and Constitutional Law," a fundamental distinction needs to be drawn. That distinction is between the Constitution and constitutional law. For Professor Miller, there is no Constitution beyond constitutional law; the Constitution is only what the judges say it is - no more, no less.

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Before one can reasonably assess Professor Miller's argument in "Nuclear Weapons and Constitutional Law," a fundamental distinction needs to be drawn. That distinction is between the Constitution and constitutional law. For Professor Miller, there is no Constitution beyond constitutional law; the Constitution is only what the judges say it is — no more, no less. And what the judges say it is depends only upon what Oliver Wendell Holmes in The Common Law called the "felt necessities of the times."¹ In Professor Miller's estimation the Constitution has no inherent political theory; its meaning depends only upon time and circumstance — and the judge's intuition.

Professor Miller's argument concerning the constitutionality of nuclear weapons can only be made once the Constitution is separated from constitutional law and discarded — or at least ignored. What must guide our constitutional thinking, Professor Miller insists, are not "old practices and old modes of thinking about constitutional propriety" but "new doctrine."² That new doctrine, apparently, is to be "discovered" in the higher law that Professor Miller is sure hovers above the Constitution itself. Professor Miller's quest is for the judicial formulation of a doctrine — the creation of a new right, actually — that postulates that "nuclear weapons are a clear and present danger both to survival and especially to achievement of human dignity."³ Thus, nuclear weapons, by the enormity of their potential destructiveness — the annihilation of human existence — violates the essence of natural justice. But to say that something violates natural justice is not the same thing as saying it violates the Constitution. As James Wilson saw fit to remind his fellow-delegates to the Federal Convention of 1787, "laws may be unjust, may be unwise, may be dangerous, may be destructive;

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3. Id. at 26.
and yet not be . . . unconstitutional." The same logic holds for nuclear weapons the procurement and accumulation of which is a matter of public law.

Rather than examine each strand of Professor Miller's legal reasoning, I prefer to consider the theoretical premises from which his arguments spring. For his theoretical premise—the idea of a living Constitution — is ultimately at odds with the logic of the Constitution itself.

The aim of those who framed the Constitution was to produce a document that they hoped would "last for ages." Their belief was that safe republican government depended upon a constitution that would be venerated by the people as "fundamental" and "paramount". To achieve such popular veneration — and to enjoy the necessary political stability that would flow therefrom — the framers recognized, first, that the constitution would have to be a written constitution and, second, that there would have to be a popular presumption of textual permanence of the document itself. That is, as James Madison understood it, its meaning was not to be "sought in the changeable meaning of the words composing it" but rather in "the sense in which the Constitution was accepted and ratified by the nation." Original intention and original meaning were held to be the primary means by which the written constitution could be kept a limited constitution. In this belief men as politically opposed as Thomas Jefferson and John Marshall could stand united. A written constitution, Jefferson said, was our "peculiar security"; to Marshall, it was the "greatest of all improvements on political institutions."

Professor Miller's argument, then, rests on a cracked foundation; for he makes a common error when he seizes John Marshall's *dictum*

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5. *Id.* at v. 1, 422.
in *McCulloch v. Maryland*\(^{10}\) (a statement Professor Miller holds to be "the most important ever uttered on the theory of constitutional interpretation")\(^{11}\) as his authority for a living constitution. Marshall's well-known remark that the Constitution was "intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs"\(^{12}\) is taken by Professor Miller to mean that 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."\(^{13}\) The crucial element of Professor Miller's argument derives from the mistaken notion that Marshall was referring to constitutional interpretation by the judiciary. He was not. The power of adaptation Marshall was pointing to was a legislative not a judicial power. The flexibility to meet the unforeseen exigencies of the future lay in the legislative power to draft whatever laws Congress should deem necessary and proper. Marshall was speaking to the necessary flexibility of statutory law, not fundamental law. Doubters need only look as far as his opinion in *Marbury v. Madison*:

> That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.\(^{14}\)

Professor Miller assumes that the changes brought about in the instruments of war "by the scientific-technological revolution"\(^{15}\) have resulted in a substantive transformation in the nature of war as it is understood under the Constitution. This does not necessarily follow.

Constitutionally, war is war. Constitutionally, Congress is obligated to do what it considers to be necessary and proper to give contemporary expression to its constitutional power to prepare for and wage war. (The constitutional power to declare war implies a constitutional power to prepare for war, following Marshall's logic in *McCulloch*.) If that means, in the deliberate judgment of Congress, procuring and stockpiling nuclear armaments, then such an activity is constitutionally permissible. It may be imprudent and dangerous but it is not unconstitutional. Further, constitutionally, the President as Commander-in-Chief, is empowered to direct whatever forces of war Congress places at his disposal.

Professor Miller's argument grows from a belief that the judiciary, in Owen Fiss's words, possesses "a special kind of substantive rationality"16 that enables it to declare constitutional values and to make the policy conform. Judges are not so much arbiters of concrete legal and constitutional disputes as they are seers and soothsayers pondering principles of abstract justice. Professor Miller apparently subscribes to the dominant jurisprudential view that constitutional values — that is, "broad and idealistic concepts of dignity, civilized standards, humanity, and decency"17 — are the stuff of constitutional law. The Constitution itself cannot be allowed to get in the way of doing good.

The constitutional and political dilemmas posed by this view are that the declaration of a constitutional or public value is a highly intuitive and personal judicial matter. A constitutional value depends more upon a creative judicial imagination than upon constitutional text or intention. This is hardly the foundation of limited constitutional government.

Conclusion

Professor Miller, like a growing number of Americans, is rightly concerned about the proliferation of nuclear weapons and, to borrow Jonathan Schell's phrase, the fate of the earth.18 But his solution misses the mark. Nuclear arms and the possibility of nuclear war are too im-

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portant to delegate to the judiciary. Like all the important and controversial public debates that generally characterize a popular form of government, they deserve to be addressed by political deliberation — not by judicial decree.