Unchecked Political Question Doctrine: Judicial Ethics at the Dawn of a Second Nuclear Arms Race

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INTRODUCTION

This paper examines The Republic of the Marshall Islands v. The United States of America et al., the grounds for its dismissal, and recommendations for how it should be appealed and ultimately judged. The Marshall Islands sued alleging noncompliance with the Nuclear Non-Proliferation Treaty (NPT), seeking declaratory and injunctive relief. At issue are concepts

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of legality and ethics behind the “Political Question Doctrine” defense that the United States provides, in addition to whether or not the Marshall Islands has standing. In its arguments, the United States paints a picture of an area of completely outside the realm of judicial power: foreign affairs, and particularly, national defense. While the District Court for the Northern District of California largely accepted these two reasons in its dismissal, its application of the rules was improper. Although the appropriate binding precedent is largely stacked against any would-be challenger to the U.S. for treaty violations, there should be some theoretical route to success. For reasons set out below, the Marshall Islands arguably meets its burden under the stringent existing standards; even still, Political Question Doctrine ought to be reexamined and narrowed in scope by the Supreme Court. Once a United States treaty has been signed, ratified, and given the force of law, violations should be met with some form of relief, even if only declaratory. In the case of the Marshall Islands, that is the only redress absolutely necessary. With it, more relief might follow than any court could ordain.

Since the U.S. Constitution was written, the Supreme Court has lost its way in enforcing covenants with other nations and societies. As the rule now stands, treaties are joined with the Constitution as 1) “the supreme law of the land,” 2) domestic laws enacted since the treaty entered into force imbue the treaty with the force of law within the United States, and 3) judicial oversight is allowed in such contexts. Given that domestic laws and policies have validated the Nuclear Non-Proliferation Treaty since it entered into force with Presidential approval and

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5 U.S. Const. art. VI cl. 2.
“advice and consent of the Senate,” basic compliance with the United States’ obligations should be subject to judicial review.⁶

A BRIEF CONTEXTUAL BACKGROUND

Although the United States “arranged for [the Marshall Islands] designation as a strategic trust” after controlling them during World War II, the U.S. used them for nuclear testing between 1946 and 1958.⁷ “This abusive relationship officially lasted until 1986 when the United States and the Marshall Islands terminated the trust relationship by signing the Compact of Free Association.”⁸ The Marshall Islands therefore has vast experience in this realm and have a keener interest than most in preventing further nuclear testing or use in war. “[T]he Compact did not erase the consequences of radiation exposure, which continue to this day.”⁹ Their suit, now pending appeal in the 9th Circuit, does not seek relief for these ills, nor is an injunction against further testing sought. By suing countries in many different forums, the Republic of the Marshall Islands merely seeks to hold countries to the standard of accountability described in the widely-adopted Nuclear Non-Proliferation Treaty, subsequent Review Conference Action Plans, as well as U.S. Executive-branch statements and publications.

BASIC ARGUMENTS

The Republic of the Marshall Islands alleges in its complaint that the U.S. is non-compliant with its treaty obligations, namely Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).¹⁰ In addition, the Marshall Islands “requests an injunction against the

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⁶ U.S. Const. art. II § 2 cl. 2.
⁸ Id.
⁹ Id.
U.S. requiring it to comply with its obligations under Article VI of the NPT.”\textsuperscript{11} The treaty states: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”\textsuperscript{12}

The District for the Northern District of California’s opinion for its dismissal of this case largely draws on the U.S. Motion to Dismiss (Motion to Dismiss), and the U.S. Reply Memorandum in Support of that Motion (Supporting Memorandum). These two documents largely ignore the second obligation in Article VI of the NPT, covering “complete disarmament under strict and effective international control.”\textsuperscript{13,14} The parts of the Motion to Dismiss that presented significant problems for the Marshall Islands were: 1) injury in fact and redressability, 2) “Political Question Doctrine” jurisprudence (relied upon all the more in the last few decades), and 3) whether the treaty itself has self-executing provisions or if congress has implemented it through legislation.\textsuperscript{15,16} All of these issues weave closely together, and when taken as a whole present the strongest case for a valid challenge of the U.S. by the Marshall Islands.

**QUESTIONS OF LAW**

It is necessary to begin with the highest authority on the subject, before digressing into the various ways other authorities have distinguished themselves: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or

\textsuperscript{11} Id.
\textsuperscript{13} Id.
\textsuperscript{15} Id.
which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”\textsuperscript{17} These words, carefully chosen by the framers, show a distinct reverence for accountability and integrity as a nation, among other nations. It was particularly important in the time of their writing to convey that these United States, in their condition of infancy, would make good on their promises. In exchange, the framers earned their Constitution a legitimacy that would see this nation through centuries of stability.

As for authority to decide interpretation of those laws, “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;”\textsuperscript{18} These words from the Constitution suggest that treaties are effectively law, and that the judiciary has the final say on their interpretation and enforcement.\textsuperscript{19} Whether the judiciary should choose to defer to other authorities on the subject is therefore always a choice that they cannot be deprived of, short of an actual change to the Constitution.

\textbf{ISSUES OF STANDING: INJURY IN FACT AND REDRESSABILITY}

One of the two reasons provided in the Order Granting the Motion to Dismiss is a perceived lack of Constitutional standing on the part of the Marshall Islands.\textsuperscript{20} The danger of nuclear weapons as “harm” is dismissed in particular, but the possibility of a contractual obligation based on the treaty is left open.\textsuperscript{21} Although the issue of standing itself might seem sufficient for a dismissal, the opinion ultimately instead relies instead on Political Question Doctrine.\textsuperscript{22} The requirements for standing are set out below.

\begin{footnotesize}
\begin{enumerate}
\item U.S. Const. art. VI cl. 2.
\item U.S. Const. art. III § 2 cl. 1.
\item U.S. Const. art. VI cl. 2.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
First, the plaintiff must have suffered an ‘injury in fact’ -- an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) ‘actual or imminent,’ not ‘conjectural’ or ‘hypothetical’ . . . Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court . . . Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

Assuming that the Marshall Islands has met the “legally protected interest” requirement by the nature of the Non-Proliferation Treaty being valid law (see: Congressional Implementation section), the other elements can be met as well. The “interest” named is increased security through U.S. treaty compliance. It was also given promissory, or at least rhetorical value in the 2010 NPT Review Conference Final Document. “[T]he Conference agrees on . . . concrete steps for the total elimination of nuclear weapons: . . . recognizes the legitimate interests of non-nuclear-weapon States in the constraining by the nuclear-weapon States of the development and qualitative improvement of nuclear weapons . . .”

These Review Conferences are given special weight in the current international nonproliferation regime. “The Nuclear Non-Proliferation Treaty (NPT) Nuclear-Weapon States (NWS), or P5, met in London, 4-5 February 2015, for the sixth P5 Conference to review progress towards fulfilling the commitments made at the 2010 NPT Review Conference . . .” Such is the contractual “legitimate interest” of the Marshall Islands as a party to the NPT. Its interest is also tied inexorably to its experience with nuclear testing in the past: should the NPT lapse, or

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25 *Id.*
27 *Id.*
the Comprehensive Nuclear Test Ban Treaty (CTBT) lose effect (which the United States has yet to ratify), fresh nuclear arms races would likely emerge, and with it new rounds of testing, as likely in the Pacific as anywhere else.\textsuperscript{30} For these reasons, the \textit{interest} is both “concrete and particularized,” and “actual . . . not ‘conjunctural’ or ‘hypothetical.’”\textsuperscript{31}

As noted above, the greatest danger to the Marshall Islands from nuclear weapons may not be from their use on the battlefield, but from yet further testing. The 2010 Review Conference Final Document had a specific section just for “South Asia and Other Regional Issues.”\textsuperscript{32} This section focused particularly on bringing India and Pakistan within the Treaty’s purview and on bringing North Korea’s nuclear testing to an end.\textsuperscript{33} Gregory Koblentz of the Council on Foreign Relations examines this topic in-depth.\textsuperscript{34} “Asia is witnessing a nuclear buildup . . . Unlike the remaining P5 countries, China is increasing and diversifying its nuclear arsenal . . . Pakistan and India have been involved in a nuclear and missile arms race since 1998 that shows no signs of abating.”\textsuperscript{35} Koblentz argues that the complex dynamics between these several countries and their weapons are particularly destabilizing.\textsuperscript{36}

\begin{quote}
[A]ctions taken by one state to defend against another state have the effect of making a third state feel insecure. The overlapping bilateral deterrence relationships among nuclear states creates the potential for changes in the capabilities or intentions of one state to have a cascading effect on the rest of the nuclear weapons states . . . Pakistan’s deployment of tactical nuclear weapons on short-range missiles and India’s development of a sea-based deterrent may lead both states to loosen their highly centralized command and control practices. Granting lower-ranking officers greater authority and capability to arm and launch nuclear weapons raises the risk of unauthorized actions during a crisis or
\end{quote}

\begin{footnotes}
\item[33]Id.
\item[35]Id.
\item[36]Id.
\end{footnotes}
inadvertent escalation during a conventional conflict by a local commander of a nuclear-armed unit who finds himself in a ‘use it or lose it’ situation . . . To the extent that India orients its nuclear posture toward China it will face a paradox that ‘what is credible toward China will likely not be minimum toward Pakistan; and what is minimum toward Pakistan cannot be credible toward China [internal citations omitted].’

As for the second element of causation required by Lujan (which directly feeds into the final element), one need only examine observations and recommendations from prescient policy experts. The climate of continued “hair-trigger alert” or “prompt-launch” within United States policy has partially created the current problem. "This policy of keeping missiles ready for immediate launch dramatically increases the likelihood of mistake or miscalculation . . . whether or not keeping missiles on high alert made sense during the Cold War, it does not today." The U.S. could have gone a different way after the Cold War, yet despite its treaty obligations chose policies that continued to presume the Soviet Union as an overwhelming threat. Acclaimed non-proliferation expert Jeffrey Lewis describes a time when the current Secretary of Defense was a “little known assistant secretary of defense” who, along with a few others, “felt that the United States and Russia needed to adjust their nuclear postures to place less emphasis on deterring a surprise attack and more on reducing the prospect for accidents, miscalculation, and unauthorized launches.” Those efforts were ultimately defeated, instead “opting to leave in place Ronald Reagan’s 1981 guidance calling for the ability to prevail in a protracted nuclear war against the Soviet Union.” The rest is largely history, and now “Carter’s views on

37 Id. at 31-41.
40 Id.
42 Id.
43 Id.
modernizing U.S. nuclear forces are no different from those of the bureaucrats and generals who allegedly bested him in 1994.”

Gregory Koblentz lays out a series of policy and diplomatic recommendations that aims to put U.S. nuclear posture back on track towards global stability. These recommendations bear a striking resemblance to what the Republic of the Marshall Islands seeks in its lawsuits against the nuclear-armed states.

Working with the other nuclear weapon states to strengthen strategic stability would serve U.S. national interests in a number of ways: Reduce the risk of nuclear weapons being used deliberately, by accident, or in an unauthorized manner . . . Reduce the risk that nuclear modernization programs and the development of nonnuclear strategic technologies, such as missile defenses, antisatellite technologies, precision conventional strike weapons, and cyberwarfare, will trigger arms races that could threaten strategic stability . . . Promote transparency among nuclear-armed states on their nuclear doctrine, posture, and modernization plans. Such transparency is necessary for a substantive dialogue to build mutual understanding and pave the way for future reductions . . . Demonstrate the U.S. commitment to fulfilling its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the Action Plan adopted by the 2010 NPT review conference.

There was at one time an Arms Control and Disarmament Agency, which was modified through The Arms Control and Disarmament Amendments Act of 1989. This legislation used verbiage very similar and peculiar to the Non-Proliferation Treaty: “as defined in this Act, the terms ‘arms control’ and ‘disarmament’ mean ‘the identification, verification, inspection, limitation, control, reduction, or elimination, of armed forces and armaments of all kinds under international agreement to establish an effective system of international control’” (emphasis added).

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44 Id.
46 Id., at 16.
Although disarmament should have been a priority during that time, the agency was
removed in the 1998 Enacted House Resolution 4328: “The United States Arms Control and
Disarmament Agency is abolished.” The duties were merged into the State Department. With
the recent demise and splitting up of the U.S.S.R. a few years prior, this change of policy would
almost lead one to believe that disarmament is only a priority when the goal is to convince rival
states to disarm. Given this logic, it is impossible to know when Article VI obligations of the
Non-Proliferation Treaty could ever be brought to bear; the nuclear powers would seem
costantly racing to weaponize, even when there is no one left in the race. Aside from many
sections of the Arms Control and Disarmament Act being repealed, the section stating: “creating
a new agency of peace to deal with” was stricken in favor of the phrase: “addressing” (emphasis
added). Despite these setbacks, the current State Department website for the Non-Proliferation
Treaty says unequivocally: “It [the NPT] comprises legally binding nonproliferation
commitments and is the basis for international cooperation to stem the spread of nuclear
weapons. The Treaty is underpinned by three ‘pillars’—nuclear nonproliferation, disarmament,
and the peaceful use of nuclear energy . . . .”

Like the State Department’s website, the 2010 Action Plan has great reverence for all
aspects of the treaty, including Article VI obligations. Action Three uses particularly strong
language such as: “unilateral” and “accelerate concrete progress.” While the Action Plan is not
binding, it could be read as the Executive’s current interpretation of the decades-old treaty,

49 Id.
52 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final
53 Id. at 26-27.
which is binding. This was evidenced when the original “Nuclear-Weapon States” recently gathered to “reaffirm” “commitments made at the 2010 NPT Review Conference” (below).  

The Conference resolves that: Action 1: All States parties commit to pursue policies that are fully compatible with the Treaty and the objective of achieving a world without nuclear weapons. Action 2: All States parties commit to apply the principles of irreversibility, verifiability and transparency in relation to the implementation of their treaty obligations . . . Action 3: . . . the nuclear-weapon States commit to undertake further efforts to reduce and ultimately eliminate all types of nuclear weapons, deployed and non-deployed, including through unilateral, bilateral, regional and multilateral measures . . . Action 5: The nuclear-weapon States commit to accelerate concrete progress on the steps leading to nuclear disarmament, contained in the Final Document of the 2000 Review Conference . . . To that end, they are called upon to promptly engage with a view to, inter alia: (a) Rapidly moving towards an overall reduction in the global stockpile of all types of nuclear weapons, as identified in action 3.  

While the type of relief sought by the Marshall Islands might be a bridge too far for the court (an “injunction requiring it [the U.S.] to comply [with the treaty] . . .”), there are other avenues for relief. In the related case Natural Resources Defense Council v. Pena, a need for such a remedy was acknowledged in the form of increased transparency. “Plaintiffs describe the National Ignition Facility . . . that would provide the DOE with enhanced experimental capabilities for . . . weapons physics . . . Plaintiffs question . . . and express the concern that its construction might increase the risk of worldwide nuclear proliferation.” The facility’s mission would seem to be continuing weaponization research on nuclear weapons. The verdict, while not exactly for the plaintiff (and yielded an array of issues on appeal and remand), did articulate a framework that can be emulated in the present case. “The Court is not entirely satisfied with

54 London P5 Conference, Joint Statement, (February 6, 2015).
58 Id.
59 Id.
the disclosure that surrounds these programs. The Court will request that the DOE perform a fuller disclosure of the environmental, health and safety risks associated with the plutonium pit fabrication program at LANL [Los Alamos National Laboratory] and NIF within a reasonable time after the issuance of this Memorandum Opinion.\textsuperscript{60}

A nexus becomes evident between \textit{Lujan}’s second element of causation and the third element of redressability when reviewing the 2010 NPT Review Conference Action Plan, cases like \textit{Pena}, and major policy pieces, such as Koblentz’s “Strategic Stability in the Second Nuclear Age.”\textsuperscript{61,62} A “favorable decision,” be it increased transparency or just declaratory relief will “likely” prompt the U.S. to open more venues for dialogue, reduce the alert status of its nuclear weapons, and otherwise use recommendations provided by prescient subject-matter experts as Jeffrey Lewis and Gregory Koblentz.\textsuperscript{63} It is precisely for this reason that the Marshall Islands is taking up many suits against the nuclear powers, so that they might act in concert to increase stability while upholding the NPT.\textsuperscript{64}

\textbf{“POLITICAL QUESTION DOCTRINE”}

The defense most readily accepted by the district court was “Political Question Doctrine.”\textsuperscript{65} The U.S. questioned the court’s ability to determine what “the ‘good faith’ standard” was and confidently asserted: “Plaintiff has no answer for the serious intrusion into the Executive Branch’s foreign policy sphere that an exercise of judicial review would require.”\textsuperscript{66}

\textsuperscript{60} \textit{Id.}
\textsuperscript{64} The Nuclear Zero Lawsuits, http://www.wagingpeace.org/nuclearzero/
\textsuperscript{65} Motion to Dismiss, at 9, The Republic of the Marshall Islands v. The United States of America et al, No. 4:14-cv-01885-JSW (N.D. Cal. Sep. 12, 2014).
What more of a serious answer could be required for judicial review than that of a small, irradiated state, speaking on behalf of all members of the international community who would like to know why their lives could still be taken at a moment’s notice by the products of an obsolete arms race between powerful states? Although the basic reasoning behind Political Question Doctrine may be sound, it should not have been accepted to the extent it was here. It may, perhaps, be extreme for a court to order increased negotiation or transparency without the means to enforce it. Likewise it could also be extreme for a court to invalidate the U.S.’s membership in one of the most important international regimes of all time, simply based on noncompliance. It should be perfectly acceptable, however, for a court to simply allow a valid complaint to be taken on its merits, allowing for the possibility of declaratory relief. It is precisely because issues of foreign policy can be so sensitive that the Executive would be pushed to settle before trial, thereby providing the Marshall Islands with relief it seeks, even if the only consequence of not doing so might be the process of discovery or declaratory judgment based on noncompliance.

The U.S. defense equated the Executive’s power of negotiation with treaty “resolution.” 67 “The Resolution of A Treaty Dispute Regarding Good Faith Negotiations Among Sovereigns is Constitutionally Committed to The Executive Branch” was somehow extracted from “[t]he [Executive’s] power to negotiate with foreign nations.” 68 As noted above, the ultimate resolution (though of course not negotiation itself) always lies with the judiciary. The precedent that was accepted by the court originated from “The Head Money Cases,” (Edye v. Robertson) regarding what should occur when treaty enforcement breaks down among nations. 69 70 “If these fail

67 Id. at 11
68 Id.
69 Id. at 12.
70 Edye v. Robertson, 112 U.S. 580, 598 (1884).
[government ‘interest’ and ‘honor’], its infraction becomes the subject of international negotiations and reclamations . . . which may in the end be enforced by actual war . . . with all this the judicial courts have nothing to do and can give no redress.”

It is obvious that the court in *Edye* not only wished to renege on its constitutionally apportioned duty and prerogatives, but that it sought to prevent any future court from being able to use them. Rather than accept the vital responsibility that the framers intended, the court showed that it prefers instead Thucydides’ famous words that “the strong do what they can and the weak suffer what they must.” By invoking this language, the defendants essentially stated they would prefer to bring the odds of nuclear war upon themselves in the folly of Executive will-to-power than yield any such determination of national integrity to the courts. This is the argument that the district court accepted. Pushing Political Question Doctrine this far, however, is ethically and morally repugnant, and should not be allowed when treaty noncompliance causes real harm. This is not to say that judges should engage in judgments of statecraft and strategy, but only carry out their duty according to the law. In this case, the precedent invoked should be overturned or distinguished to allow some form of justice. Declaratory relief will not result in a coup against constitutionally apportioned Executive power, but rather hold it within the bounds thereof, if only rhetorically.

**THE IMPLICIT MORALITY ARGUMENT**

It is clear by its filings that the U.S. sees any “intrusion into the Executive Branch’s foreign policy sphere” as one that should be judged, erring on the side of the government.

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72 Id.
73 Thucydides, History of the Peloponnesian War 269 (Dover Publications 2004).
regardless of right or wrong; a kind of home-team argument.\textsuperscript{74} That is certainly the way the relevant precedent seems to have gone since “The Head Money Cases.”\textsuperscript{75} This kind of thinking may have made sense in a pre-nuclear era, but is inappropriate in extreme cases like this one.

The country and now the world is in need of a credible neutral observer. The judiciary must take up its mantle as referee, and declare right or wrong as it is empowered to do under the Constitution. If there is any moral, ethical, or home-team argument to be made on a side that should be erred on, it is truth, not ignorance. Executive motivations for noncompliance are complex, and may be motivated by any number of things including Congress, the Defense industry, will-to-power within the Defense Department, etc. Sometimes a rallying cry is needed for compliance. Such is the only way that the Comprehensive Test Ban Treaty will ever be ratified, and such is the way meaningful disarmament within the NPT will be achieved.

Evidence of appropriate ethical principles are provided by Thomas Merton, who wrote some of the most prophetic words of his time in the 1950’s and 60’s. “In the minds of the world leaders a continued stalemate is accepted, in practice, as ‘peace,’ and the power struggle continues under the constant menace of accidental global war.”\textsuperscript{76} These words remind the modern reader that not too long ago, there was a real fear of accidental nuclear annihilation. Simply because the rhetoric of the Cold War is now lacking (despite disturbing signs of a resurgence recently), the danger of such an accident is not itself reduced.

“Merton was troubled by the fact that so much of the fear surrounding the potential destruction was allowed to center upon the danger that some madman might come to power or

\textsuperscript{75} Edye v. Robertson, 112 U.S. 580, 598 (1884).
\textsuperscript{76} Thomas Merton, The Nonviolent Alternative XXI (Farrar, Straus, & Giroux 1980).
have access to the bomb.”

This “madness,” as discussed by Merton, can be seen represented today as the world powers struggle to bend the power of the Non-Proliferation Treaty to prevent states like Iran and North Korea, or other non-state entities from obtaining nuclear weapons, even while the U.S. decreases its budget for non-proliferation. And yet the key to his nuclear weapons analysis is a concept of “the bureaucratization of homicide” as revealed to him by reports of Adolf Eichmann’s level of sanity during his defense while on trial in Jerusalem.

“The bureaucracy of Nazi Germany—with its compartmentalization of tasks, separation of planning from execution, hierarchical structure, compensation for conformity, and technicized or euphemistic language – insulated people such as Eichmann from responsibility.”

In thinking about Eichmann, Merton found it difficult and disturbing to imagine ‘this calm, ‘well-balanced,’ unperturbed official conscientiously going about his desk work, his administrative job, which happened to be the supervision of mass murder. He was thoughtful, orderly, unimaginative. He had a profound respect for system, for law and order. He was obedient, loyal, a faithful officer of a great state. He served his government very well. He was not much bothered by guilt . . . Eichmann was devoted to duty, and proud of his job.’

An analogy is therefore drawn between simple office work and the modern world we find ourselves in. A concept is introduced wherein hard and proud workers can simultaneously be guilty for the destruction of millions of people, or perhaps even worse.

Eichmann’s sanity suggested to Merton that, in the modern world, ‘it is precisely the sane ones who are most dangerous,’ and Merton suggested that the sane ones of the 1960’s were conscientiously going about the desk work of preparing a nuclear holocaust. ‘It is the sane ones, the well-adapted ones,’ Merton observed, ‘who can without qualms and without nausea aim the missiles and press the buttons that will initiate the great festival of destruction that they, the sane ones, have prepared’ . . . People worried about madmen firing nuclear weapons, but Merton knew that

77 Supra.
80 Id. at 89.
81 Id. at 77, 89.
‘the sane ones will have perfectly good reasons, well-adjusted reasons, for firing the shot. They will be obeying orders that have come down the chain of command. And because of their sanity, they will have no qualms at all. When the missiles take off, then, it will be no mistake.’\textsuperscript{82}

In its arguments, the United States effectively argued that it has been doing the best it can, and therefore is doing the right thing, the moral thing. It might yet argue that since ratification, it has in fact undertaken “good faith measures” to cease its personal arms race with Russia through treaty endeavors, and to a lesser extent other recognized nuclear-armed states.\textsuperscript{83} Insofar as the other Article VI obligation of negotiating toward a “treaty on general and complete disarmament under strict and effective international control,” however, scant evidence can be brought that any of the pre-1967 nuclear states have complied.\textsuperscript{84}

One new movement, however, is attempting to change that. In December, 2014, countries gathered “at Vienna’s Hofburg Palace to discuss the next steps of the movement to reduce or eliminate nuclear weapons on humanitarian grounds.”\textsuperscript{85} The United States did not attend the first two conferences, which had “128 and 146 countries, respectively,” but they did attend this year’s conference.\textsuperscript{86} Before arriving, a U.S. State Department press release read: “this conference is not the appropriate venue for disarmament negotiations or pre-negotiation discussions and the United States will not engage in efforts of that kind in Vienna.”\textsuperscript{87,88} Although

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\textsuperscript{84} Id.
\textsuperscript{86} Id.
\textsuperscript{87} An International Partnership for Nuclear Disarmament Verification (Dec. 4, 2014), http://www.state.gov/t/avc/rls/234680.htm
\textsuperscript{88} United States Will Attend the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Media Note (Nov. 7, 2014), http://www.state.gov/r/pa/prs/ps/2014/11/233868.htm?goMobile=0
\end{flushleft}
the delegation was there to announce a new verification initiative, it was viewed simply as a face-saving measure by some.\^89 Richard Lennane responded to the announcement artfully.\^90

I have nothing to say to the nuclear-armed states here, except briefly to express my admiration for the delegate of the United States, who with one insensitive, ill-timed, inappropriate and diplomatically inept intervention yesterday managed to dispel the considerable goodwill the US had garnered by its decision to participate in this conference . . . No, my message today is for those states which do not have nuclear weapons; for those states which, whatever the security threats they face, have forsworn nuclear weapons by joining the Nuclear Non-proliferation Treaty; for those states which, despite having no nuclear weapons, unjustly bear the risks and will wear the terrible consequences of their use. And my message to you begins with these words from Isaiah: How long, O Lord? Until the cities are wasted without inhabitant, and the houses without people, and the land lies utterly desolate? . . . How long will you listen politely to nuclear-armed states that claim to support the Comprehensive Test-ban Treaty as a crucial step towards disarmament, but haven’t ratified it after 18 years?

**CONGRESSIONAL IMPLEMENTATION**

The final major defense that the U.S. presented for the Marshall Islands in this case is the fact that the Non-Proliferation Treaty likely does not include any “self-executing” provisions, in the way that the courts have accepted them in the past, all the way back to United States v. Percheman.\^91\^92 The modern rule is best summed up in the somewhat recent Supreme Court opinion of Medellin v. Texas (2008): “while treaties may comprise international commitments, they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on those terms.”\^93 There are two major problems with the line of reasoning that the U.S. takes in using this defense: 1)

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89 Richard Lennane, Wildfire Statement at HINW14 Vienna, (December 12, 2014), https://www.youtube.com/watch?v=qrTk567QRxM.
90 Richard Lennane, Wildfire Statement at HINW14 Vienna, (December 12, 2014), https://www.youtube.com/watch?v=qrTk567QRxM.
91 United States v. Percheman, 32 U.S. 51, 82 (1833).
Congress has enacted implementing statutes about the Non-Proliferation Treaty. 2) It should not be entirely constitutional for the courts continue along the Medellin path ad infinitum—to leave it up to the Executive and Congress as to which signed and ratified treaties they do or do not want to comply with. The entire point of the framers writing: “He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur,” would seem to be: treaties that are ratified by the Senate are law. 94

Assuming, though, that the self-executing jurisprudence is valid in the way that the U.S. defense argues it, the fact remains that the Non-Proliferation Treaty has been implemented through many public laws and regulations. On the subject of the Nuclear Nonproliferation Act of 1978, Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission explains: “[w]ith the implementation of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), a new and somewhat more ambiguous phase of atomic history began.” 95 The National Nuclear Security Administration, named as one of the defendants in this case, stated dryly in a Record of Decision (2008): “The United States has made significant progress toward achieving the nuclear disarmament goals set forth in the NPT, and is compliance with its Article VI Obligations.” 96 There is of course also the Arms Control and Disarmament Amendments Act of 1989 which, as previously noted, effectively codified language from the NPT. 97

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94 U.S. Const. art. II cl. 2.
POLITICAL REALITIES

It is clear that current executive and congressional priorities favor re-armament. Despite a lack of funding, the push for nuclear modernization continues. “[T]he congressional investigators have described the modernization push as poorly managed and financially unaccountable.”

Although the non-proliferation elements of the Non-Proliferation Treaty is the portion that is most agreeable to the U.S. (rather than disarmament negotiations), preventing the spread of nuclear weapons now takes a back seat to modernization. “The nonproliferation coordinator on the National Security Council, Liz Sherwood-Randall, and the Office of Management and Budget director, Sylvia Burwell, sided with the Pentagon and directed the NNSA to increase the nuclear weapons account” (and so reduced non-proliferation funding).

These actions, coupled with the lack of U.S. participation in serious disarmament negotiations, belie a true lack of accountability to the Non-Proliferation Treaty in its entirety. Although the reasoning behind the Political Question Doctrine would suggest the Executive and Legislative branches know best how to handle foreign affairs, it is often more complicated than that. “Congress can fight hard for projects that represent big-ticket items in important districts.”

As “[a] recent federal study put the collective price tag [for modernization], over the next three decades, at up to a trillion dollars,” that can present quite a conflict of interest for congressmen. “‘A lot of it is hard to explain,’ said Sam Nunn, the former senator whose

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100 Id.
102 Id.
writings on nuclear disarmament deeply influenced Mr. Obama. ‘The president’s vision was a significant change in direction. But the process has preserved the status quo.’”

EXECUTIVE-BRANCH INTERESTS

At the outset of his presidency in 2009, President Obama gave the famous speech in Prague, in the Czech Republic, on the subject of pursuing “a world without nuclear weapons.”

“First, the United States will take concrete steps toward a world without nuclear weapons. To put an end to Cold War thinking, we will reduce the role of nuclear weapons in our national security strategy and urge others to do the same.”

Despite these earnest words, carrying them out has proved difficult. Even dismantling weapons that were already slated to be taken apart has become problematic, as Robert Alvarez points out in “The Nuclear Weapons Dismantlement Problem.” He notes that while President Obama has taken around “500 warheads from active service . . . President Bush unilaterally retired 5,253 weapons, or 42 percent of the U.S. arsenal, during his presidency” Alvarez did not speculate on whether this disparity is due to political gridlock on nuclear issues or funding, or rather reflects political attitudes more in line with rearmament. His paper notes that although “the United States reports great progress in physically dismantling its nuclear weapons . . . [t]he US Government Accountability Office (GAO) . . . presents a very different picture. The US Government’s statements about nuclear weapons dismantlement ‘may be misleading.’”

103 Id.
105 Id.
107 Id.
108 Id.
Insofar as working towards the Nuclear Non-Proliferation Treaty Review Conference of 2015, Undersecretary of State for Arms Control and Nonproliferation Rose Gottemoeller admonished those in attendance at the U.N. First Committee to “join with the United States to advance realistic and achievable objectives.” She also reiterated a policy of unwillingness to participate in negotiations toward disarmament unless Russia is a ready and willing partner: “The United States has made clear our readiness to discuss further nuclear reductions with the Russian Federation, but progress requires a willing partner and good environment.”

On its face, this writing would appear to describe the United States as trying to negotiate towards vague disarmament goals, arguably in compliance with Article VI of the NPT. Embedded within them, however, is one of the clearest descriptions of current US policy. Rather than employing a “lead by example” strategy of negotiating with all ready and willing partners, or unilaterally reducing excessive arms, the US seems to demand that Russia (and Russia alone) agree to negotiations. The rationale given being that “90% of the global nuclear stockpile” belongs to the former Cold War rivals. Despite arguing that “[n]ow is the time to move forward, not back to postures reminiscent of the Cold War,” the Secretary reaffirmed a tone of first, Russia.

This position is emphasized with regards to a specific weapons treaty: “A critical part of this regime is the Intermediate-Range Nuclear Forces Treaty (INF). The United States is deeply concerned about Russia’s violation of its obligations under this landmark treaty.” Can this

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10 Id.
111 Id.
112 Id.
113 Id.
114 Id.
115 Id.
fixation on a hope for meaningful progress with an increasingly belligerent Russia constitute compliance with Article VI? Is that a very convincing argument when, after the US won the (first) Cold War, “The United States Arms Control and Disarmament Agency [was] abolished?”

Pragmatists make the argument that in the interest of national security, excessive nuclear weapons serve only to the detriment of other United States needs, rather than some added percentage of theoretical deterrence. Joe Cirincione makes that case in writing “How Big a Nuclear Arsenal do We Really Need?" “President Obama wants to use his last two years to further his agenda, here’s something he could do that would both advance the cause of global security and save the country money: suspend plans to develop a new arsenal of American nuclear weapons.” Given how expensive the modernization process will be, there is a substantial argument to be made that the national security situation is such that the U.S. cannot afford brand-new nuclear weapons delivery systems in addition to weapons systems that can fight the wars we are currently fighting. “While his promised policies to reduce the role and numbers of nuclear weapons lagged, the Pentagon and Congress raced ahead with plans to buy a whole new generation of nuclear-armed submarines, bombers and missiles.”

On the other side, deterrence is given as the key rationale for the maintenance of thousands of nuclear weapons. The United States Air Force Center for Unconventional Weapons Studies, produced a 244 page book entitled Strategic Deterrence in the 21st Century. While a

118 Id.
119 Id.
disclaimer disregarding this book as representative of official policy is expected, it does not negate the fact that it is an in-depth study of current policymakers.\textsuperscript{121} It describes twelve Air War College students (typically experienced Air Force officers), “engaging in critical thinking about the nature of strategic deterrence and the role of nuclear weapons under strategic deterrence” who compiled “their professional study papers” to create the book.\textsuperscript{122} “The class took two field trips: one to Washington, DC, to engage with Office of the Secretary of Defense policy makers, Joint Staff and Air Staff offices, the State Department, and the Central Intelligence Agency; and one to Lawrence Livermore National Laboratory . . .”\textsuperscript{123}

Although some text from this book will be presented below, one need look no further than the table of contents to see what it is those twelve students took away from their visits with agency officials. Eight of the twelve chapters consist of titles clearly favorable to modernization and rearmament, a few of which are: “ICBMs: Cold War Relics or Products for Peace . . . The Case for a New Nuclear Weapons Arsenal . . . Nuclear Modernization and the Non-Proliferation Treaty: Compliance or Compromise . . . Is there Future Utility in Nuclear Weapons? Nuclear Weapons Save Lives.”\textsuperscript{124}

The main thrust of the arguments laid out seems to be an answer to the following question: “Does the United States Need Nuclear Weapons?”\textsuperscript{125} A theory is given in response to nuclear disarmament proponents in the summary near the bottom of page two, essentially assuming that a “new nuclear arms race” will occur if “drastic reductions” are adhered to.\textsuperscript{126} The

\textsuperscript{121} Supra, at ii.
\textsuperscript{122} Supra, at v.
\textsuperscript{123} Supra, at v.
\textsuperscript{124} Supra, at iii.
\textsuperscript{125} Supra, at 2.
\textsuperscript{126} Supra.
chapter entitled “Nuclear Modernization and the Non-Proliferation Treaty: Compliance or Compromise” provides a sharper glimpse into the current thought on deterrence within the defense establishment.\textsuperscript{127} It attempts to present a win-win-win situation of numerical warhead reduction, modernization of what is left, and supposed treaty compliance. While it concedes that “[p]eer P5 [permanent five nuclear-armed members of the U.N. Security Council] . . . NWS [Nuclear Weapons States] are likely to mirror-image what the United States is doing as the global nuclear leader,” the chapter then provides reasons why reducing weapons unilaterally would still somehow be poor policy.\textsuperscript{128} “Multilateral alliances and bilateral agreements could be jeopardized if America’s declining nuclear force structure were perceived as less than credible.”\textsuperscript{129} No definition is given for what kind of arsenal would be “less than credible.”\textsuperscript{130} The point is also conceded that “[w]hile a declining nuclear inventory may signal good faith towards arms reduction, modernization efforts can be perceived as a silent arms race among [Nuclear Weapons States] and possibly provoke proliferation.”\textsuperscript{131} However, the chapter contends, because “[h]istory has shown that America continues to deter other countries from attack with its current nuclear arsenal,” modernization should proceed, regardless of the provocations that might result.\textsuperscript{132}

The chapter focuses on analyzing whether the concept of modernization can coexist with the Non-Proliferation Treaty, yet misses entirely the a primary point of Article VI: “relating to cessation of the nuclear arms race at an early date.”\textsuperscript{133} Instead of supporting those ends, it

\textsuperscript{127} Supra, at 181.
\textsuperscript{128} Supra, at 187.
\textsuperscript{129} Supra.
\textsuperscript{130} Supra.
\textsuperscript{131} Supra.
\textsuperscript{132} Supra, at 189.
effectively calls for the nuclear forces to out-perform their Cold War predecessors.134 The point is implied that new nuclear weapons capabilities are needed for new threats: “[t]he nuclear status quo is based on a legacy Cold War security strategy that lacks the flexibility and confidence to deter current and emerging security threats.”135 The argument basically calls for a new arms race, even though the “nuclear arms race” referred to in the NPT has still not ceased.136137 “A relevant twenty-first century nuclear enterprise will signal to our allies in extended deterrence and peers in strategic deterrence that America will remain an unrivaled global nuclear leader.”138 It would seem being the “unrivaled global nuclear leader” is therefore a significant goal within the Defense establishment, in spite of treaty obligations.139

**CONGRESSIONAL INTERESTS**

As is often the case, the Executive Branch will not always be able to get Congress to follow its procurement agenda, particularly with such expensive items vital to national security. “Where nuclear weapons are concerned, a Republican Congress and a Democratic president are likely to leave things right where they are: without a clear direction, without a strategy and without any budgetary logic.”140 In this vein of conflicting interests, one of the most in-depth studies is “The Trillion Dollar Nuclear Triad.”141 It served to get the ball rolling in policy circles in terms of discussing the true cost of continued nuclear weapons maintenance and

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135 Supra.
136 Supra.
139 Supra.
141 Jon B. Wolfsthal, Jeffrey Lewis, Marc Quint, The Trillion Dollar Nuclear Triad (James Martin Center for Nonproliferation Studies 2014).
modernization, and the problem of mixed procurement interests and oversight.\textsuperscript{142} “A variety of different actors, each with only partial responsibility for oversight of national priorities, are making decisions that will result in the piecemeal procurement of an entirely new nuclear triad, with far from certain results.”\textsuperscript{143}

BUREAUCRACY AND DEFENSE ESTABLISHMENT INTERESTS

Joan Johnson Freese describes nuclear weapons within the context of other bureaucratic “Special Children” of the Department of Defense:\textsuperscript{144} “once a weapon is deemed special . . . it gets its own bureaucracy, its own budget, and strategy becomes guided as much by bureaucratic principles and goals as national needs.”\textsuperscript{145} Lumping nuclear in with “cyber” and “space,” the article makes a compelling case that “[t]he primary goal of any bureaucracy is self-perpetuation . . . Bureaucracies have not served nuclear weapons or space well . . . There is little reason to think cyber will be any different.”\textsuperscript{146} In so doing, Joan helps to bring “nuclear” down to earth as a concrete, cognizable problem that can have real solutions.

The United States Air Force nuclear forces have had a rash of embarrassing incidents in the last decade, which Jeffrey Lewis deftly puts into the broader context of military needs:\textsuperscript{147} “the Department of Defense, and especially the Air Force, are losing competence in the nuclear enterprise because no one takes deterrence seriously anymore . . . Many of these weapons no longer have plausible military missions . . . The people handling them know that, and act

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\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Jeffrey Lewis, Death Wears Bunny Slippers. Why America’s Nuclear Missileers are Going Soft, (May 16, 2013), http://www.foreignpolicy.com/articles/2013/05/16/death_wears_bunny_slippers_nuclear
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This article touches on the spike of recent nuclear incidents in a way that no activist, politician, or scientist could. It simultaneously explains why (in very simple terms) they likely occurred, and what can simply be done about it. "The message that these incidents sends seems pretty clear to me: eliminate nuclear weapons that have no plausible military mission. We can’t fool the people assigned to them."149

INTERNATIONAL INTERESTS

A Chatham house report entitled “Too Close for Comfort, Cases of Near Nuclear Use and Options for Policy” examines thirteen “near-miss” nuclear situations “[C]ases of near nuclear use resulting from misunderstanding demonstrate the importance of the ‘human judgment factor’ . . . since the probability of inadvertent nuclear use is not zero and is higher than had been widely considered . . . the risk associated with nuclear weapons is high.”150 This report and others like it are key to dismantling common misconceptions of automatic nuclear security such as this assertion from Strategic Deterrence in the 21st Century: “[d]uring the Cold War, the stakes were too high for the United States or Soviet Union to even approach their [nuclear weapons] use.”151

CONCLUSION

In conclusion, The Republic of the Marshall Islands has here called on the preeminent world power to recognize its duty to a signed, ratified, and legally enforceable document—the Nuclear Non-Proliferation Treaty. The mere fact that the Executive does not agree with a lawful treaty, cannot in itself be a valid defense. Whether it is influenced or gridlocked between the

148 Id.
149 Id.
150 Patricia Lewis, Heather Williams, Benoît Pelopidas, Sasan Aghlani, Too Close for Comfort (Chatham House, the Royal Institute of International Affairs, 2014).
Defense Department and Congress should not provide an excuse, but rather an additional reason why the courts should exercise their judgment. To extend “Political Question Doctrine” to the extreme that the United States argues would rend the constitutional separation of powers, effectively deputizing the judiciary and destroying whatever enforcement mechanisms international partners still have.\textsuperscript{152}

Therefore, the judiciary has a solemn duty not only to American citizens, but also to those in the international community with whom the United States enters compacts and agreements with, as intended by the founders. If certain judicial relief must be granted (declaratory or otherwise) to ensure continued American surety, dignity, and prestige, it is essential that such relief be granted. For the Marshall Islands, it was not even contemplated.