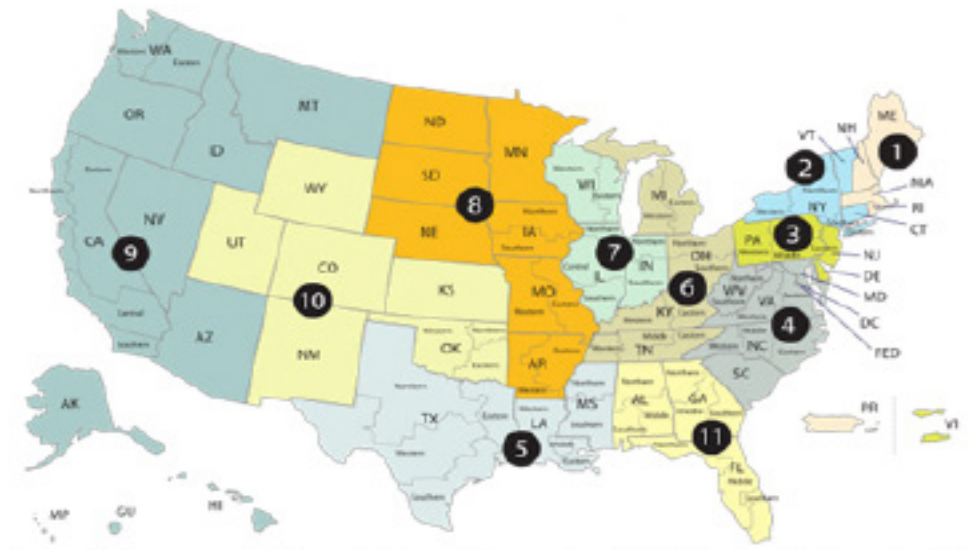
U.S. courts: federal law superior to international law

Most of the trial court orders forbidding "necessity" defenses rely on the Chicago-based 7th Circuit's 1985 decision in U.S. v. Allen, which asserts (in error some would say), "Although their purpose may have been to uphold international law, their action disobeyed the wholly independent federal law protecting government property." Although federal law may be independent, it is not superior to or controlling of U.S. treaties which constitute "the supreme law of the land" under Article 6 of the U.S. Constitution. The 7th Circuit's error or subterfuge is obvious and egregious in view of five Supreme Court cases in which U.S. treaty law was declared "supreme" and controlling of all the rest. (10)



Map of the geographic boundaries of the various U.S. Courts of Appeal and U.S. District Courts.

Prof. Lippman explained, "By denying protesters the use of the necessity defense, courts merely are … abdicating their constitutional duty to permit criminal defendants to introduce a defense." Nowadays, most federal juries are prohibited from learning objective facts from expert witnesses about nuclear weapons — either about their uncontrollable, indiscriminate, and long-term radiological effects, or about what superior/controlling law says regarding individual responsibility for the planning and preparation of mass destruction. Federal juries only hear what the prosecutors' military or weapons-building witnesses (so-called "experts") say in testimony about the bomb. (Occasionally, federal defendants are allowed to testify about the facts, but their testimony is always dismissed as inexpert, and coming from alleged conspirators, saboteurs or terrorists.) The government witnesses' biased, self-interested testimonies and "exhibits" — from the perpetrators of the crime being protested — become the only set of "facts" presented by authorities or experts the jury is allowed to consider.

Because of court orders granting motions in limine, federal juries never hear any expert testimony (facts) that contests, much less rebuts or refutes the government's claims that nuclear weapons are defensive and legal. The reason for excluding these facts is obvious. Ordinary citizens, let alone legal scholars and weapons designers, or any trial defense team can easily disprove the nearly axiomatic presumption that nuclear weapons are lawful. Judges at every level of the judiciary all know how easy it is to show that the effects of H-bombs are ghastlier and more heinous than all other banned weapons (poison, cluster munitions, land mines, and gas) combined.

This is my personal experience as well. In a simple Minnesota case of trespass against depleted uranium (DU) munitions manufacturer Alliant Techsystems in 2004, four civilian non-lawyers, myself included, proved to a jury that our refusal to leave the company's premises was an act of justifiable crime-prevention, not criminal trespass. The jury found us not guilty. It is so easy to show that radiological DU weapons are unlawful that we established our successful defense of necessity even without the help of attorneys. Historically, court authorities react to such verdicts. Professor Colbert noted, "The motion in limine to exclude an entire defense first appeared just after juries had acquitted civil rights protestors, anti-war demonstrators, and black liberation activists … in the late 1960s and early 1970s." (11)

A legal vacuum into which federal courts allow no air

Binding international treaties in general, (12) and U.S. Air Force, Navy and Army Field Manuals in particular, all hint at the illegality of nuclear weapons by forbidding mass attacks on civilians and any use of poison. In view of the toxic, indiscriminate, long-term, and uncontrollable effects of nuclear weapons, military and international treaty law can be interpreted as having already prohibited them. Nuclear weapons are like other contraband, in a class along with land mines, cluster bombs, biological weapons, and poison gas. Yet federal courts cannot tolerate any airing of these facts — which might prove the bomb is unlawful — and the "supreme" law can't be allowed within a jury's earshot. To protect the bomb from legal scrutiny, federal judges and appellate courts have created a legal vacuum, where the introduction of even the tiniest bit of fresh, treaty air would smash their bubble.

So frightened of this puff of air are federal courts that even former U.S. Attorney General Ramsey Clark, an expert on treaty law who helped negotiate and chauffeur the U.S. adoption of the Nuclear Non-Proliferation Treaty, was kept away from a Tennessee jury in the infamous notorious Y-12 nuclear weapons factory protest case of 2012. (The 6th U.S. Circuit Court of Appeals in Cincinnati ultimately nullified the three convictions and sentences in this case — May 15, 2015 — but not because the trial judge excluded evidence friendly to the defendants in error. The convictions were vacated due to gross over-charging by the government which used the Patriot Act's draconian anti-terrorism language against three nonviolent, gray-haired political protesters: Sr. Megan Rice, 81, Michael Walli, 63, and Greg Boertji-Obed, 57.)

The court system appears nearly petrified that a jury might hear an expert explanation of the bomb's unlawful status. In one extraordinary case, after a federal judge in Arizona agreed to hear a necessity defense by nuclear weapons protesters, the 9th U.S. Circuit Court of Appeals in San Francisco rushed in before trial to prevent it. In pre-trial motions in the case, U.S. v. the Hon. Richard M. Bilby, (11) Arizona's U.S. Attorney filed a complaint against Federal District Judge Richard Mansfield Bilby, warning that the defense of necessity would "divert the focus of the trial," (13) … "transforming routine criminal prosecutions … to broad-ranging and time-consuming inquiries concerning the wisdom of nuclear … policies." (14) The U.S. Attorney even warned that, "If left uncorrected, the … order will … possibly result in the defendants' acquittal" (15) — a prospect so unthinkable that the 9th Circuit acted quickly to snuff it out.

Prof. Lippman noted, "The judiciary, in ruling on necessity, must concede that the harm created by nonviolent protesters is minor when compared to the potential consequences of a nuclear…war." But the judiciary habitually echoes appeals court precedents and U.S. Attorney's speeches. One DA ominously warned that if the necessity defense were allowed in nuclear weapons cases, "the harm to the government … would be substantial." (16)

As Lippman reported, dozens of lower courts have allowed juries to hear necessity defenses by war resisters, after which juries have returned not guilty verdicts. "In my rather extensive experience, in civil resistance cases in which defendants have been permitted to rely upon the necessity defense, a significant percentage have been acquitted by a jury of their peers," Lippman wrote. (17) In U.S. v. Ashton, a judge ruled in 1853 that the crew of a faulty ship was justified by necessity to demand that the captain return to port. They were not bound to continue on a voyage that presented a risk to their lives. Lippman found in the Ashton case a perfect analogy to our dilemma of being involuntarily conscripted into the "ships' company" of what could be called our nuclear weapons flotilla. "[T]he crew," the judge said, "have a right to resist, and to refuse obedience."

"It is time," Lippman says, "to tear down the Berlin Wall that prevents civil resisters from pleading the necessity defense in an attempt to justify their formally criminal conduct — and to open the judicial politburo to the voices of change."

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Notes

(1) Beginning with the most recent: the Tenth Circuit, U.S. v. Platte, 401 F.3d 1176 (2005); Seventh Circuit, U.S. v. Urfer, Sprong, 287 F.3d 663 (2002), and U.S. v. Haynes, 143 F.3d 1089 (1998); First Circuit, U.S. v. Maxwell, 254 F.3d 21 (2001); Ninth Circuit, U.S. v. Komisaruk, 885 F.2d 490 (1989) [as well as U.S. v. Cottier, 759 F.2d 760 (9th Cir. 1985), and U.S. v. Aguilar, 756 F.2d 1418 (9th Cir. 1985), and U.S. v. May, 622 F.2d 1000 (9th Cir. 1980)]; Eighth Circuit, U.S. v. Kabat, 797 F.2d 580 (1986); Eleventh Circuit, U.S. v. Montgomery, 772 F.2d 733 (1985); and the Second Circuit, U.S. v. Allen, 760 F.2d 447 (1985).

(2) Black's Law Dictionary defines "motion in limine" as "[a] written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements." Black's Law Dictionary 914 (rev. 5th ed. 1979).

(3) Douglas L. Colbert, "The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial," Stanford Law Review, Vol. 39, No. 6 (Jul., 1987), pp. 1271-1327 (page count 57). DOI: 10.2307/1228848; [https://www.jstor.org/stable/1228848]

(4) U.S. v. Montgomery, 772 F.2d 733 (11th Cir. 1985), where the majority instructed the parties to in part, "See U.S. v. Lowe, 654 F.2d 562, 566-67 (9th Cir. 1981); U.S. v. May, 622 F.2d 1000, 1009 (9th Cir. 1980); U.S. v. Shiel, 611 F.2d 526, 528 (4th Cir. 1979)."

(5) U.S. v. Allen, (2nd Cir. 1985)

(6) U.S. v. Urfer and Sprong (7th Cir. 2002).

(7) The in limine tactic of excluding testimony helpful to defendants in political cases was used in prosecuting Tim DeChristopher who mucked up an unlawful timber auction. At trial, the judge prevented the jury from finding out the auction was illegal. See the documentary, "Bidder 70."

(8) The prosecutorial tactic of excluding testimony helpful to defendants in political cases was also used in the federal prosecution of climate activist Tim DeChristopher, who outbid competitors for drilling rights at an unlawful BLM auction. Never intending to pay, he was prosecuted in federal court and at trial the judge's grant of a motion in limine prevented the jury from learning that the BLM auction was illegal. See the documentary "Bidder 70" (Mountainfilm 2012), as well as PeacefulUprising.org and ClimateDisobedienceCenter.org.

(9) Matthew Lippman, "Towards a Recognition of the Necessity Defense for Political Protesters," Washington and Lee Law Review, Vol. 48 No. 1, Winter 1991, pp. 235-251; [https://scholarlycommons.law.wlu.edu/wlulr/vol48/iss1/11/]

(10) See The Paquette Habana, 175 U.S. 677 (1900)

(11) Douglas L. Colbert, "The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial," Stanford Law Review, Vol. 39, No. 6 (Jul., 1987), pp. 1271-1327 (page count 57). DOI: 10.2307/1228848; [https://www.jstor.org/stable/1228848]

(12) The Hague Conventions explicitly ban the use of poison or poisoned weapons; the Geneva Gas Protocol prohibits not only gas weapons but "all analogous liquids, materials or devices"; the 1977 Protocol Additional to the Geneva Conventions outlaws weapons that do long-term damage to the environment; the Geneva Conventions forbid indiscriminate attacks, attacks on civilian objects and reprisals—reprisal being one word that precisely describes so-called nuclear "deterrence" with its ready willingness to reprise one nuclear weapons attack with another.

(13), (14), (15) "Petition for a Writ of Mandamus.," U.S. v. the Hon. Richard M. Bilby, Dist. Judge for the Dist. of Arizona, No. 86, Jan. 23, 1986.

(16), (17) Prof. Matthew Lippman, "Towards a Recognition of the Necessity Defense for Political Protesters," Washington and Lee Law Review, Vol. 48, No. 1, Jan. 1, 1991, pp. 234-251.