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INTERNATIONAL ILLEGALITY AS A BASIS FOR REFUSAL TO PARTICIPATE IN HOSTILITIES–A TENTATIVE PROPOSAL AND A PRELIMINARY ANALYSIS OF AMERICAN LAW

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INTRODUCTION

"In the years preceding the Second World War the policies of the Western powers were animated . . . by the desire to avoid war at any price." [1] Thus, upon the termination of hostilities in the First World War, the various nations of the world, under the leadership of President Wilson, set out to establish an international organization which would be charged with the responsibility of preserving the peace. The League of Nations, the organization which resulted, was founded upon the recognition of "international law as the actual rule of conduct among governments." [2] The members were obligated "to respect and preserve as against external aggression the territorial integrity and existing independence of all members of the League," [3] and a procedure was established pursuant to which the League was to ensure that any change in the status quo was effected by peaceful means.[4]

Those who desired international peace did not rest with the establishment of the League however.

On August 27, 1928, as the result of a campaign to "outlaw" war,[5] fifteen nations (soon to be joined by virtually all remaining nations) signed the Kellogg-Briand Pact[6] pursuant to which the parties agreed "to renounce war as an instrument of national policy in their relations with one another." [7] The fundamental policy embodied in the Kellogg-Briand Pact was articulated by the tribunal in the "High Command Trial":

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1. MORGENTHAU, POLITICS AMONG NATIONS 241 (3rd ed. 1963).
2. LEAGUE OF NATIONS COVENANT preamble.
3. LEAGUE OF NATIONS COVENANT art. 10.
4. *See generally* MORGENTHAU, *supra* note 1, at 298-301.
5. *See* BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 649-50 (7th ed. 1964).
6. 46 Stat. 2343.
7. *Id.* at 2345-6.

> [T]he nations that entered into the Kellogg-Briand Pact considered it imperative that existing international relationships should not be changed by force. In the preamble they state that they are "persuaded that the time has come when . . . all changes in their relationships with one another should be sought only by pacific means." This is a declaration that from that time forward each of the signatory nations should be deemed to possess and to have the right to exercise all the privileges and powers of a sovereign nation within the limitations of International Law, free from all interferences by force on the part of any nation. As a corollary to this, the changing or attempting to change the international relationships by force of arms is an act of aggression and if aggression results in war, the war is an aggressive war.[8]

Despite these efforts, war again engulfed the nations of the world. At the conclusion of the Second World War, another effort was made to establish an international organization charged with the responsibility for saving "succeeding generations from the scourge of war." [9] Each member of the new organization, the United Nations, pledged to "settle . . . [its] international disputes by peaceful means" [10] and to "refrain in . . . [its] international relations from the threat or use of force against the territorial integrity or political independence of any state." [11] Again a procedure was established pursuant to which the members, acting through the organization, would prevent international disputes from endangering the maintenance of international peace and security.[12]

Although only future historians will be in a position to render a final judgment, it does appear that the United Nations has not been as effective as the founders had hoped. The reasons for this failure may be complex but at least the major factors can be noted:

> The constitutional scheme of the United Nations was built upon three political assumptions. First, the great powers, acting in unison, would deal with any threat to peace and security, regardless of its source. Second, their combined wisdom and strength would be sufficient to meet all such threats without resort to war. Third, no

8. High Command Trial, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 70 (1949).
9. U. N. CHARTER preamble.
10. U. N. CHARTER art. 2, para. 3.
11. U. N. CHARTER art. 2, para. 4.
12. *See generally* U. N. CHARTER arts. 33-51.

> such threat would emanate from one of the great powers themselves. These assumptions have not withstood the test of experience. The great powers have not been able to act in unison when their divergent interests were at stake, which is another way of saying that they have been able to act in unison only in rare and exceptional circumstances. And the main threat to the peace and security of the world emanates from the great powers themselves. Thus the constitutional scheme of the Charter has been defied by the political reality of the postwar world.[13]

Although in practical terms the efforts noted above may, in some sense, be considered failures, they cannot be said to have been wholly without effect. At least one commentator has noted that "the knowledge is common today that after long centuries of development culminating in the . . . formulations of the League of Nations, the Pact of Paris, the United Nations Charter and the Nuremberg Charter, Verdict, and Principles, the general community of states has achieved a distinction between permissible and nonpermissible coercion, with that coercion prohibited which creates in a target state reasonable expectation that it will be forced to use the military instrument in defense of its independence and territorial integrity." [14]

However, as long as the competence of international tribunals depends upon the consent of the states involved in the dispute and as long as the United Nations remains unable to act in certain circumstances to maintain peace, "the special prerogative claimed by states to interpret their own cause," [15] long regarded "as a conspicuous Achilles heel in international law," [16] will, to a great extent, nullify the fact that international law prohibits certain forms of coercion; any state which decides to engage in hostilities will no doubt contend that its action is consistent with the norms of international law.

Although such an "auto-interpretation" [17] of the norms of international law has been held to be ultimately subject to investigation and adjudication by an international tribunal,[18] international judicial review

13. MORGENTHAU, *supra* note 1 at 484-5.

14. McDOUGAL, *The Impact of International Law Upon National Law: A Party Oriented Perspective*, in STUDIES IN WORLD PUBLIC ORDER 157, 183 (1960).

15. *Id.* at 188.

16. *Id.*

17. *Id.*

18. For example, the Nuremberg Tribunal stated:

> [I]t was further argued that Germany alone could decide, in accordance

of a decision to engage in hostilities has been, up to the present, essentially ad hoc. Thus, even assuming that discoverable norms of international law regarding the permissible utilization of coercion do exist in fact, if these norms are ever to become more than devices which can be utilized to rationalize implementation of policy decisions made with little or no regard to the norms or simply tools for ad hoc condemnation and punishment, a more effective means of applying the norms in a manner which will limit policy choices in the first instance must be located.

The absence of an effective centralized international judicial institution as a means for the application of international prescription has seriously impaired the role of international law as a limitation upon the range of policy choices available to national actors. One method of remedying this defect has been to "internalize" the norms of international law by means of a specific constitutional provision.[19] For example, the French constitution provides that "treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party," [20] and the Basic Law of the Federal Republic of Germany provides that "the general rules of public international law form part of the Federal law [;] they take precedence over the laws and directly create rights for the inhabitants of the Federal territory." [21] In all of these countries, at least some norms of international law exert the same moral force upon national policy-makers as does the national constitution. But more importantly, in those countries in which the judiciary possesses the power of review of legislative and executive acts, the constitutional provisions have the effect of utilizing domestic courts as institutions for the application of international prescriptions, *i.e.*, the actions of national decision-makers may

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> with the reservations made by many of the Signatory Powers, at the time of the conclusion of the Kellogg-Briand Pact, whether a preventative action was a necessity, and in making her decision, her judgment was conclusive. But whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.

Id. at 189-90.

19. *Id.* at 213-4.

20. Article 55 of the French Constitution of 1958 is reprinted in STEIN and HAY, LAW AND INSTITUTIONS OF THE ATLANTIC AREA 29 (1967).

21. Article 25 of the Basic Law of the Federal Republic of Germany is reprinted in *id.* at 72.

be nullified by the judiciary when held to be in conflict with the norms of international law.

It is submitted that in those countries which do not possess constitutional provisions similar to those possessed by France and the Federal Republic of Germany but which do permit judicial nullification of legislative and political acts, independent domestic judicial review, including the application of the norms of international law, may serve as a means of effectuating the international prescription prohibiting the resort to certain forms of coercion. Given the existence of an international norm prohibiting the resort to military force in some circumstances, one method of increasing effective application of this norm would be to permit individual citizens to resist participation, via judicial proceedings in a domestic court, in the nation's armed forces upon the basis that the forces were to be employed in hostilities prohibited by international law. If the domestic courts retained sufficient independence from the influence of other governmental institutions and did, in fact, hold that the hostilities were prohibited by international law, presumably the ability of the nation's policy-makers to engage in the hostilities would be seriously limited (provided, of course, that a number of citizens sufficient to successfully engage in the hostilities did not do so voluntarily, *i.e.*, despite the fact that they possessed a right to refuse participation).

This proposal would appear to offer a possibility of effectively advancing the pursuit of peace and, if it were to prove ineffective in fact, it would not appear to adversely affect the current situation. If the domestic courts operated independently of other national decision-makers, the international community would gain the advantage of increasing effective application of international prescriptions. If, however, the domestic courts did not act independently and in effect acquiesced in the decision of the other domestic policy-makers despite the invalidity of the hostilities under international law, and/or the decisions of the national courts misapplied the prescriptions of international law, the decisions of the courts would have no effect upon the international validity of the hostilities and could not be utilized as a defense to an international prosecution of the policy-makers for the commission of crimes against peace.[22] At least, therefore, an initial investigation of the proposal would appear warranted.

The remainder of this paper is devoted to an analysis of American

22. *See* McDOUGAL, *supra* note 14 at 198-205.

law in light of the following questions: Does a procedure exist whereby an American citizen may resist induction into the armed forces of the United States upon the basis that the forces are to be employed in hostilities prohibited by international law? Does a procedure exist whereby a member of the armed forces may resist an order of his superior officer upon a similar basis? Assuming a procedure does exist, what principles of domestic law, if any, limit the jurisdiction of the domestic courts? Assuming the domestic courts possess jurisdiction, what principles of domestic law, if any, will cause the courts to decline to decide the issue upon the merits? Assuming the courts will undertake to render a decision upon the merits, what principles of domestic law, if any, will affect the probability of a decision favorable to the citizen?

PROCEDURE, JURISDICTION, AND JUDICIAL SELF-RESTRAINT

Present United States law[23] provides for an exemption from combatant service for those individuals who, by reason of religious training and belief are conscientiously opposed to war in any form[24] and does not permit an individual to resist induction into military service on the basis that he is being inducted in order to participate in an unlawful war. Even if an individual were permitted to resist induction upon the basis that the war in which he was being compelled to participate was illegal, the procedure pursuant to which he would seek judicial confirmation of his contention is inadequate.

Every American male citizen upon attaining the age of eighteen is required to register under the Military Selective Service Act of 1967.[25] Upon registration, the relevant local board classifies the registrant in one of the categories established by the Act and the relevant regulations and notifies the registrant of this classification. If the registrant objects to the classification, *i.e.*, if he feels he should have been classified in a

23. The Military Selective Service Act of 1967 (hereinafter referred to as 1967 Act) is composed of provisions contained in 50 U.S.C.A. APP. § 451 *et seq.* (1964) and the amendments to some of those provisions contained in Public Law 90-40 (90th Cong., 1st Sess.) reprinted in U.S. CODE CONG. & AD. NEWS 1342 (1967) (hereinafter referred to as 1967 Amendments).

The relevant regulations are contained in 32 C.F.R. § 1600 *et seq.* and in the amendments to some of those regulations contained in Exec. Order No. 11360, 32 FED. REG. 9787 (1967).

24. 1967 Amendments para. 7, U.S. CODE CONG. & AD. NEWS 1347 (1967).

25. 1967 Act, 50 U.S.C.A. APP. § 453 (1964). The Act also applies to aliens under specified circumstances. See 50 U.S.C.A. APP. § 454 (1964).

different category, he may request a personal appearance before his local board.[26] After this personal appearance, the local board considers the registrant's contentions and notifies the registrant of its determination by sending him another notice of classification.[27]

If the registrant continues to object to the local board's classification, he may appeal to the relevant appeal board.[28] The appeal board, before which the registrant is not permitted to appear,[29] will consider the registrant's file de novo. The registrant will be notified of the appeal board's decision when he receives a notice of classification from the local board.[30] If the decision of the appeal board was not unanimous and if the registrant disputes the decision of the appeal board, the registrant may appeal to the Presidential appeal board.[31] If the decision of the appeal board was unanimous and if the registrant disputes the decision of the appeal board, the registrant may attempt to obtain the intervention of the State Director of Selective Service or the Director of Selective Service, who may intervene by requesting the appeal board to reconsider its decision[32] or by forwarding the registrant's case to the Presidential appeal board[33] when intervention is deemed to be in the national interest or necessary to avoid injustice.

The participation of the judiciary in this process is extremely limited.[34] Unless the initial classification exerts a "chilling effect" upon

26. 32 C.F.R. § 1624.1(a) (1967). The registrant is not permitted to be represented by counsel and is not entitled as a matter of right to present witnesses in his behalf. 32 C.F.R. § 1624.1(b) (1967).

27. 32 C.F.R. § 1624.2(d) (1967).

28. 32 C.F.R. § 1626.2 (1967). The appeal is initiated when the registrant files a written notice of appeal with the local board. 32 C.F.R. § 1626.11 (1967). It is the duty of the local board to forward the registrant's appeal to the relevant appeal board. 32 C.F.R. § 1626.13 (1967).

29. The registrant may attach a written statement to his file before the file is forwarded to the appeal board. 32 C.F.R. § 1626.12. The appeal board may base its decision *only* upon the information contained in the registrant's record (including his written statement if any) and general information concerning economic, industrial, and social conditions. 32 C.F.R. § 1626.24 (1967), *as amended*, Exec. Order No. 11360 para. (6) (a), 32 FED. REG. 9787 (1967).

30. 32 C.F.R. § 1626.31 (1967).

31. 32 C.F.R. § 1627.3 (1967).

32. 32 C.F.R. § 1626.61 (1967).

33. 32 C.F.R. § 1627.1 (1967). In addition, either the State Director of Selective Service or the Director of Selective Service may appeal from any determination of a local board at any time. 32 C.F.R. § 1626.1 (1967).

34. The 1967 Act, 50 U.S.C.A. APP. § 460 (1964), provides that the decisions of the local boards are "final" except where an appeal is taken pursuant to the regulations established by the President and that the decisions of the appeal boards are "final"

the registrant's exercise of the right to freedom of speech and/or it is clear that an appeal would be futile[35] (or, perhaps, unless the order to report for induction was issued in violation of the relevant regulations[36]), the registrant cannot institute a suit to enjoin the local board from issuing an order to report for induction.[37] The only manner in which a registrant may obtain judicial review of his classification prior to induction into military service in the absence of these circumstances is to exhaust his administrative remedies (including submission to the physical examination given by the armed services to all prospective inductees) and then refuse to comply with an order to submit to induction.[38] When the registrant is then called upon to defend a crim-

unless modified or changed by the President. The provisions of the Administrative Procedure Act are not applicable to the functions of the selective service system. 1967 Act, 50 U.S.C.A. APP. § 463(b) (1964).

35. Wolff v. Selective Service Bd., 372 F.2d 817 (2d Cir. 1967).

36. In Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956), the court reversed an order of the district court denying an injunction to set aside an order of induction issued while an appeal from a classification was pending. Without discussing the cases which had held that review was available only by habeas corpus or as a defense in a criminal proceeding, Mr. Justice (then Judge) Stewart held that the order of induction was issued in violation of the regulations and that ". . . until his administrative appeal is disposed of . . . [the plaintiff] is entitled to have his induction enjoined." *Id.* at 378.

37. *E.g.*, Watkins v. Rupert, 224 F.2d 47 (2d Cir. 1955) (suit for permanent and interlocutory injunctive relief from order classifying registrant 1A and requiring him to report for induction).

In one case, involving extremely unusual facts, habeas corpus was successfully utilized as a remedy prior to induction. *Ex parte* Fabiani, 105 F.Supp. 139 (E. D. Pa. 1952).

38. In Falbo v. United States, 320 U.S. U.S. 549 (*see also*, Estep v. United States, 327 U.S. 114 (1946)), the Supreme Court held that a registrant could not defend a prosecution for failure to report for induction or for work of national importance upon the basis that he had been wrongfully classified prior to the time when he had exhausted all the procedures of the selective service process and had been finally accepted by the armed services. It has been held that a registrant had failed to exhaust the administrative process when, for example, he failed to appeal from the last classification given by his local board, Skinner v. United States, 215 F.2d 767 (9th Cir. 1954), *cert. denied*, 348 U.S. 981 (1955), and when he neglected to present to the appeal board his claim that the local board was guilty of misconduct in connection with his classification, Davis v. United States, 203 F.2d 853 (8th Cir. 1953), *cert. denied*, 345 U.S. 996 (1953).

The *Falbo* case was decided at a time when the regulations provided for medical examination after the issuance of the order to report for induction. The regulations currently provide for medical examination prior to the issuance of the order to report for induction. See 32 C.F.R. § 1628 (1967). Thus, it would appear that before the registrant attempts to defend a criminal prosecution for failure to report for induction or for work of national importance upon the basis that he was wrongfully classified,

inal action for knowingly disobeying an order of the local board,[39] he may allege as a defense that the order to report for induction was unlawful due to the fact that the local board's classification was arbitrary and illegal because of *procedural* irregularities and/or because there was no basis in fact for the board's classification of the registrant.[40]

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the registrant must submit to a physical examination which occurs prior to the issuance of an order to report for induction.

While it would appear that the issuance of an order to report for induction marks the end of the administrative process, *see* Gibson v. United States, 329 U.S. 338 (1946), as a practical matter, in the absence of a precise judicial determination of the matter, see Daniels v. United States, 372 F.2d 407, 413 (9th Cir. 1967), it would appear prudent for the registrant who wishes to challenge his classification (or the order to submit to induction) to report to the induction center but to refuse to take a step forward when requested to do so. In this manner, the registrant will be assured that he has exhausted the administrative process and, at the same time, will have avoided becoming subject to court-martial jurisdiction.

If the registrant fails to take the step forward when requested to do so, he is considered to have refused induction and may not be tried by court-martial. See 50 U.S.C.A. APP. § 462(a) (1964).

A registrant who fails to take the step forward, nevertheless may be considered to have submitted to "constructive" induction under certain circumstances. Gilliam v. Reeves, 263 F.Supp. 378 (W. D. La. 1966). *Compare* United States v. Hall, 36 U.S.L.W. 2018 (U.S.C.M.A. June 16, 1967).

The fact that the registrant must exhaust his administrative remedies plus the fact that an inductee may not necessarily be required to participate in hostilities would appear to indicate that a registrant who refused induction could not defend a criminal prosecution upon the basis that the hostilities were illegal (unless he could prove that it was certain or virtually certain that if inducted he would be required to participate in the hostilities).

39. The 1967 Act, 50 U.S.C.A. APP. § 462 (1964), provides that any person who knowingly fails or neglects or refuses to perform any duty required of him under or in the execution of the Act, upon conviction, shall be subject to a fine of not more than $10,000 or five years imprisonment or both. Trial may be by civil court, or, if the registrant has been inducted, by court-martial. *Id.*

The 1967 Amendments direct the Department of Justice to proceed with prosecutions under this section as expeditiously as possible (or advise the House of Representatives and the Senate in writing of the reasons for its failure to do so) and directs the courts to give precedence to the trial of cases arising under the Act (and indicates that appeals from the decision of any district court or court of appeals shall take precedence over all other cases pending before the court to which an appeal is taken). 1967 Amendments para. 10, U.S. CODE CONG. & AD. NEWS 1348 (1967).

40. In Estep v. United States, 327 U.S. 114 (1946), the Supreme Court held that a registrant who had exhausted the administrative procedures of the selective service system could defend a criminal prosecution for failure to comply with an order to submit to induction upon at least three bases: (1) that the Selective Service Act had been violated ("The authority of the local boards is circumscribed by . . . the Act. . . ." *Id.* at 120); (2) that the regulations had been violated ("The authority of the local boards is circumscribed by . . . the regulations. . . ." *Id.*); (3) that the board

Civilian status is an essential condition for this method of attack upon the board's classification. If the registrant has been inducted into the armed forces, the only method by which an individual may obtain a judicial determination of his contention that his induction into the armed forces was unlawful is by way of habeas corpus.[41] While the

had exceeded its jurisdiction because there was no basis in fact for the classification which the board gave to the registrant ("The question of jurisdiction is reached only if there is no basis in fact for the classification which it gave to the registrant." *Id.* at 122). As to the last basis, see Dickinson v. United States, 346 U.S. 389, 396 (1953), where the Court apparently held that there must be some affirmative evidence to support the local board's determination ("But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice. *Id.* at 397).

The 1967 Amendments para. 8(c), U.S. CODE CONG. & AD. NEWS 1347-8 (1967) provide:

> No judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the defendant has responded affirmatively or negatively to an order to report for induction, or for civilian work. . . . *Provided*, that such review shall go to the question of jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Although this section appears to limit judicial review to cases presenting a claim that there was no basis in fact for the registrant's classification, it would appear that an order which violated the Act or the regulations could not be enforced even if there was some basis in fact for the classification.

41. Habeas corpus is available to secure release from military service. Billings v. Truesdale, 321 U.S. 542 (1944).

Paragraph 8(c) of the 1967 Amendments, U.S. CODE CONG. & AD. NEWS 1347-8 (1967), provides that "no judicial review shall be made of the classification or processing of any registrant . . . expect as a defense to a criminal prosecution. . . ." Although this provision appears to deprive the courts of jurisdiction to review the basis of a classification by means of habeas corpus, it is doubtful whether the statute precludes any review by means of habeas corpus. U.S. CONST. art. I § 9 cl. 2 provides that the writ of habeas corpus may be suspended only "in Cases of Rebellion or Invasion . . ." and, at least in time of peace, it does not appear that Congress possesses the ability to deprive the federal courts of the power to issue the writ of habeas corpus. Eisentrager v. Forrestal, 174 F.2d 961, 963-4 (D.C. Cir. 1949), *rev'd on other grounds sub nom.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); McNally v. Hill, 293 U.S. 131, 135 (1934); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 295 (1904); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868).

Assuming that habeas corpus remains available, it may nevertheless be a less than adequate remedy. Mr. Justice Murphy in his concurring opinion in Estep v. United States, 327 U.S. 114, 129-30 (1946), stated:

> It should be noted in passing, however, that [habeas corpus after induction] may be quite illusory in many instances. It requires one first to enter the armed forces and drop every vestige of civil rights. Military orders become the law of life and violations are met with summary court-martial

federal judiciary will entertain a suit for habeas corpus, the scope of review is again apparently limited to procedural irregularities[42] and to whether there was any basis in fact for the inductee's classification by the local board.[43]

If a member of the armed forces does not contend that his induction was unlawful, he may attempt to attack an order directing him to participate in certain hostilities which he believes to be illegal by at least two methods.

Article 90 of the Uniform Code of Military Justice provides that:

> Any person subject to this chapter who—
>
> . . . .
>
> (2) willfully disobeys a *lawful* command of his superior commissioned officer; shall be punished . . . as a court martial may direct. . . .[44]

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procedure. No more drastic condition precedent to judicial review has ever been framed. Many persons with religious or conscientious scruples are unable to meet such a condition. But even if a person is inducted and a quest is made for a writ of habeas corpus, the outlook is often bleak. The proceeding must be brought in the jurisdiction in which the person is then detained by the military, which may be thousands of miles removed from his home, his friends, his counsel, his local board and the witnesses who can testify in his behalf. Should he overcome all these obstacles and possess enough money to proceed further, he still faces the possibility of being shifted by the military at a moment's notice into another jurisdiction, thus making the proceedings moot. There is little assurance, moreover, that the military will treat his efforts to obtain the writ with sympathetic understanding. These practical difficulties may thus destroy whatever efficacy the remedy might otherwise have and cast considerable doubt on the assumption that habeas corpus proceedings necessarily guarantee due process of law to inductees.

42. *See In re* Shapiro, 35 U.S.L.W. 2701 (D.N.J. May 22, 1967) (decided prior to the Military Selective Service Act of 1967). *See also* Eagles v. United States ex rel. Samuels, 329 U.S. 304 (1946).

43. In Eagles v. United States ex rel. Samuels, 329 U.S. 304 (1946), the Court appeared to hold that the *Estep* (327 U.S. 114 (1946)) scope of review would control in habeas corpus proceedings by registrants claiming to have been improperly inducted. "If it cannot be said that there were procedural irregularities of such a nature as to render the hearing unfair . . . or that there was no evidence to support the order . . . the inquiry is at an end." Eagles v. United States ex rel. Samuels, *supra* at 312. "Nor can we say that there was no evidence to support the final classification made by the board of appeal." *Id.* at 316. *See* Kanas v. Yancy, 36 U.S.L.W. 2321 (2d Cir., Dec. 3, 1967).

44. 10 U.S.C. § 890 (1946) (emphasis added).

A similar provision deals with violation of or failure to obey any lawful general order or regulation.[45]

A member of the armed forces may thus attack the legality of an order by a refusal to obey followed by a defense of illegality in a court-martial resulting from the refusal.

A defense to a court-martial for the refusal to obey an order based upon the allegation that the order was unlawful is extremely difficult to sustain. The military courts generally follow the rule stated in *Winthrop's Military Law and Precedents:*

> [T]o justify an inferior in disobeying an order as illegal, the case must be an extreme one and the illegality not doubtful. The order must be clearly repugnant to some specific statute, to the law or usage of the military service, or to the general law of the land. The unlawfulness of the command must thus be a *fact* and in view of the general presumption of law in favor of the authority of military orders emanating from official superiors, the *onus* of establishing this fact will, in all cases—except where the order is palpably illegal upon its face—devolve upon the defense, and clear and convincing evidence will be required to rebut the presumption.[46]

More specifically, it would appear that where the allegation that the order is unlawful is directed toward the legality under international law of the hostilities in which the defendant is ordered to participate, the presumption that the order is lawful appears to be conclusive.[47]

If the defendant is convicted by a court-martial for failing to obey an order which he contends is unlawful, may the decision of the court-martial sustaining the legality of the order be appealed to the civil courts? The Uniform Code of Military Justice provides that the decisions of the Court of Military Review are "final and conclusive." [48] Pursuant to this statute, the civilian courts have held that upon petition for a writ of habeas corpus, the civilian courts will not review the decision of military tribunals on the merits:

> [I]n habeas corpus proceedings to obtain release from detention pursuant to a sentence of a court-martial, there can be no dis-

45. 10 U.S.C. § 892 (1964).

46. WINTHROP'S MILITARY LAW & PRECEDENTS 575 (2d ed). *See e.g.*, United States v. Buttrick, 18 C.M.R. 622 (1954); United States v. Trani, 3 C.M.R. (1952).

47. United States v. Johnson, 36 U.S.L.W. 2198 (U.S. C.M.A., September 26, 1967).

48. 10 U.S.C. § 876 (1964).

> charge if the military court (1) was duly constituted, (2) had jurisdiction over the person of the alleged offender, (3) had jurisdiction to try the offense, and (4) was authorized to pronounce under the law.[49]

Another method whereby a member of the armed forces may attack the legality of an order directing him to participate in what he contends is an unlawful war is presented by the possibility of a suit to enjoin his superior from issuing or enforcing the order. An individual who institutes such a suit is faced initially with the possible invocation of at least two doctrines which may prevent a decision upon the merits.

The first doctrine which may be invoked is a decision by the court that it lacks jurisdiction to entertain such a suit. In *Chisholm v. Georgia*,[50] Chief Justice Jay, by way of dictum, indicated that the judicial power did not extend to suits against the United States unless Congress by general or special enactment consented to the suit.[51] From this dictum has evolved the doctrine of the sovereign immunity of the United States and a suit instituted by a member of the armed forces against his superior may be dismissed as a suit against the Government without its consent.[52]

As the Supreme Court has confessed with respect to the decisions concerning suits against government agents acting in their official capacity where the United States has not consented to be sued, "it is fair to say that to reconcile completely all the decisions of the Court in this field . . . would be a Procrustean task." [53] Although this statement related to decisions prior to 1949, it is believed that it remains true to a certain extent and no attempt will be made to reach a definite answer to the question of whether this "doctrine" does in fact prevent a suit by a member of the armed forces against his superior.

Assuming that the court does hold that it possesses jurisdiction, the court may invoke the second doctrine, the doctrine of "political ques-

49. United States ex rel. Okenfus v. Schulz, 67 F.Supp. 529 (D.N.Y. 1946).

50. 2 U.S. (2 Dall.) 419 (1793).

51. *See generally* WRIGHT, FEDERAL COURTS 157-61 (1963).

52. *See, e.g.*, Mora v. McNamara — F.2d — (D.C. Cir. 1967), *cert. denied*, 88 S.Ct. 282 (1967); Luftig v. McNamara, 373 F.2d 664 (1st Cir. 1967).

53. Malone v. Bowdoin, 369 U.S. 643 (1962).

tions," to withhold a decision upon the merits.[54] This doctrine may prove to be the far more important of the two.

The doctrine of "political questions" is ". . . primarily a function of the separation of powers" [55] and has been defined as a doctrine which asserts that "courts may neither reconsider nor review the decision of a coordinate department of the Government made in the exercise of its constitutional authority." [56] In *Baker v. Carr*,[57] Mr. Justice Brennan indicated the factors which are taken into account in a decision that a particular issue presents a political question:

> . . . textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[58]

In the realm of foreign relations, the courts have applied the doctrine of political questions to, and have thus refused to review, the decision of the executive on such questions as whether or not a treaty has been terminated,[59] which nation possesses sovereignty over disputed territory,[60] and whether a particular foreign government is entitled to immunity from suit pursuant to the restrictive theory of sovereign immunity.[61]

Although the courts have not expressly held that judicial deference

54. *See, e.g.*, Mora v. McNamara, — F.2d — (D.C. Cir. 1967), *cert. denied*, 88 S.Ct. 282 (1967); Luftig v. McNamara, 373 F.2d 664 (1st Cir. 1967).

55. Baker v. Carr, 369 U.S. 187, 210 (1962).

56. Dickinson, *The Law of Nations as National Law: Political Questions*, 104 U.PA. L.REV. 451 (1956).

57. 369 U.S. 187 (1962).

58. *Id.* at 217.

59. Terlinden v. Ames, 184 U.S. 270 (1902).

60. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 307 (1829).

61. *See* Cohen, *Some Problems of Doing Business With State Trading Agencies*, 1965 U.ILL.L.FORUM 520, 529.

is constitutionally required in the field of foreign relations, the decision to refrain from review would appear to possess "constitutional underpinnings." [62] One "great structural principle of American Constitutional Law," according to Edward S. Corwin, "is supplied by the doctrine of the Separation of Powers." [63] The American conception of this doctrine has been summarized in several propositions:

> (1) There are three intrinsically distinct functions of government, the legislative, the executive, and the judicial; (2) these distinct functions ought to be exercised respectively by three separately manned departments of government; which, (3) should be constitutionally equal and mutually independent. . . . [64]

Conceptions of precisely which governmental functions are appropriately exercised by each of the three departments are, undoubtedly, vague. Nevertheless, the courts are apparently of the opinion that however much the three branches may share governmental power in some areas, each department is possessed of certain powers which it may exercise to the exclusion of the others. Thus, the decision in *Youngstown Sheet & Tube Co. v. Sawyer*[65] appears to rest, according to one commentator, upon "the proposition that since Congress could have ordered the seizure [of the steel industry in 1952], . . . the President, in making it on his own, usurped 'legislative power' and thereby

62. This term was utilized by the Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) in connection with its discussion of the "act of state doctrine." In the *Sabbatino* case, the Court held that the judiciary would refuse to review the validity of the act of a foreign government under international law. The refusal of the courts to review the validity of the act of a foreign government is termed the "act of state doctrine." (With reference to this doctrine, the Court stated that although the act of state doctrine is not required by the Constitution, the doctrine

> . . . does . . . have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competence of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. *Id.*

63. CORWIN, INTRODUCTION IN THE CONSTITUTION OF THE UNITED STATES OF AMERICA, SENATE DOC. No. 39, 88th Cong., 1st Sess. 9 (1964).

64. *Id.* at 9-10.

65. 343 U.S. 579 (1952).

violated the principle of the Separation of Powers." [66] The President's action was therefore deemed unconstitutional. Similarly, it would appear to follow that it would be unconstitutional for the courts to "usurp" the powers which are possessed exclusively by one or both of the other departments of government.

The extent of the constitutional authority possessed by the judiciary in the field of foreign relations is uncertain to say the least. If the "power" to conduct the external affairs of the nation is viewed as possessed exclusively by one or both of the "political" departments of the government, it would appear that it would be unconstitutional for the courts to "usurp" the power of these branches of government. Perhaps the least that may be noted is that it would be "inappropriate" for the judiciary to interfere with the policy determinations which are necessarily involved in the conduct of the nation's foreign affairs and which are ". . . of a kind clearly for nonjudicial discretion." [67]

Is the question of the legality of a decision to engage in hostilities a question which is "appropriate" for resolution by a judicial institution?

The factors which a President takes into account before seeking a declaration of war from the Congress are certainly of a varied nature. For example, he may consider the strength (in terms of resources and possible allies) possessed by the potential target state, the strength in the same terms of the United States, and the objectives which might be accomplished or defeated by war with the potential target state. After considering such factors as these, the President then makes a judgment as to whether war with the potential target state is the desirable course of action. A judgment of this nature is generally viewed as a political judgment, the correctness of which is viewed as reviewable by the electorate to which the President and the Congress are responsible.[68]

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66. CORWIN, *supra* note 63 at 11.

67. Baker v. Carr, 343 U.S. 579 (1952).

68. *See, e.g.*, Pauling v. McNamara, 331 F.2d 796, 799 (D.C. Cir.), *cert. denied*, 377 U.S. 933 (1964), wherein the court noted that with respect to certain types of decisions:

> . . . [there] is no reason why we as judges should regard ourselves as some kind of Guardian Elders ordained to review the political judgments of the elected representatives of the people. In framing policies relating to the great issues of national defense and security the people are and must be, in a sense at the mercy of their elected representatives. . . . [T]he basic and important corollary is that the people may remove their elected representatives as they cannot dismiss United States Judges.

See also Pauling v. McElroy, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960).

Judicial review of the judgment of the President to the effect that war is the proper course of action would be undesirable for at least two reasons. First, the federal judiciary is not responsible to the electorate and, it is believed, a decision as grave as the decision to go to war should not be made by individuals who are not politically responsible. Second, the nature of the judicial process as we now view it is such that many factors which the President takes into account before making his judgment would not or could not be taken into account in the judicial process of decision-making.

However, it is submitted that there are certain questions presented by a decision to engage in hostilities which could be appropriately determined by the judiciary. One function of judicial review in the American system of government is the function of "legitimatizing" the exercise of authority. Governmental officials are entrusted with certain powers upon assuming office. When a government official acts in a particular matter, judicial review of his action ensures that the official has been endowed, in fact, with the power to take the particular action. In addition, assuming that the official does in fact possess the requisite power, judicial review serves to ensure the exercise of the power in the prescribed manner (thereby, if the determination is in the official's favor, "clothing" the act with authority).

While the judiciary should not and perhaps could not review the *wisdom* of the President's judgment to engage in hostilities, the courts could determine, it is submitted, whether the President possessed the power to order the armed forces to engage in hostilities (and, if so, perhaps to a limited extent, whether he exercised this power in the proper manner).[69] Thus, the courts could determine: Whether the President possessed the legal capacity to command American forces to engage in hostilities without a congressional declaration of war; if not, whether the President had requested a declaration from Congress; and if so, whether Congress had issued such a declaration. A determination of this type of question does not involve a review of the wisdom of the President's decision to engage in hostilities.

Several examples may clarify the suggested distinction. In *Youngstown Sheet & Tube Co. v. Sawyer*,[70] President Truman, to avert a

69. *See* United States v. Schmidt Pritchard & Co., 47 C.C.P.A. 152, *cert. denied*, 364 U.S. 919 (1960), which invalidated action taken by the President because he did not strictly adhere to the procedures established by Congress in the legislation delegating the power to act to the President.

70. 343 U.S. 579 (1952).

nationwide strike of steel workers which he believed would jeopardize the national defense, issued an Executive Order[71] directing the Secretary of Commerce to seize and operate most of the steel mills of the country. The Court affirmed the grant of a preliminary injunction restraining the Secretary apparently on the basis that neither the President's executive powers under Article II of the Constitution nor the President's powers as Commander-in-Chief permitted the President to order the seizure. The Court did not question, at least explicitly, the President's determination that a strike of the steel workers would jeopardize the national defense. Moreover, the Court did not appear to question the President's determination that a seizure of the mills was the best manner in which to avert a strike. Rather, the Court was concerned solely with the power of the President to order the seizure and apparently assumed that the seizure was a desirable measure to safeguard the national defense.

Similarly, in *Ex parte Milligan*,[72] the Court invalidated President Lincoln's order following his suspension of the writ of habeas corpus, providing for the trial by military commission of persons held in custody as "spies" and "abettors of the enemy." [73] The Court again did not apparently question the wisdom of the President's course of action but considered only the power of the President to issue the order.

Brown v. United States[74] provides a final example. The property of certain British citizens had been loaded aboard a ship for transportation to England prior to the war of 1812. When war was declared, the ship was not permitted to sail for its final destination. The cargo was ultimately unloaded and stored on land for at least twelve months when it was sold. A United States Attorney filed a libel against the cargo as the property of enemy aliens. Chief Justice Marshall, speaking for the Court, held that in absence of statute, the Executive did not possess the power to seize the property of enemy aliens when the property was located on land within the continental United States. Again, the Court did not concern itself with the question of whether

71. Exec. Order No. 10340, 17 Fed. Reg. 3139-43.

72. 71 U.S. (4 Wall.) 2 (1866). *See also* Duncan v. Kahanamoku, 327 U.S. 304 (1946).

73. Chief Justice Chase and three other Justices, although they agreed with the Court in ordering the release of Milligan, were of the opinion that Congress, in time of war, could authorize the substitution of military tribunals for civil tribunals for the trial of certain offenses. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139-40 (1866) (opinion of Chase, C.J.).

74. 12 U.S. (8 Cranch) 110 (1814).

the seizure of alien property in these circumstances was a desirable method of prosecuting the war. The Court was concerned solely with the presence or absence of Executive power.

It is submitted that, despite frequent citation, the leading cases in this area do not support the proposition that the judiciary is precluded from determining whether the President possesses the power to order the armed forces to engage in hostilities.

In *United States v. Curtiss-Wright Corp.*,[75] the Court was concerned with the validity of a Joint Resolution of Congress which rendered the sale of arms to certain warring countries unlawful "if the President . . . [found] that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict . . . may contribute to the re-establishment of peace . . . and if . . . he makes proclamation to that effect . . . ." [76] More specifically, the question before the Court was whether the standards contained in the Resolution were so vague that the Resolution was unconstitutional as an unlawful delegation of legislative power. The Court intimated that if the Resolution had purported to deal solely with domestic affairs, the Resolution would have been unconstitutional.[77] However, the Court stated:

> . . . we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . , Congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[78]

Upon this basis, the Court sustained the validity of the Resolution.

Thus, the very issue before the Court in the *Curtiss-Wright* case was whether the President possessed the power to act. As the Court sustained the Resolution of Congress delegating power to the President, the Court held the President did in fact possess the requisite power. It is important to note that the Court was not faced with the question

75. 299 U.S. 304 (1936).
76. 48 Stat. 811 (1934).
77. 299 U.S. at 315.
78. *Id.* at 319-20.

presented, for example, in *Youngstown Sheet & Tube Co. v. Sawyer*,[79] and did not decide whether the President possessed the power to take the action he did in the absence of a valid Congressional Resolution.

In *Martin v. Mott*,[80] Congress had authorized the President to call upon the militia "whenever the United States shall be invaded or be in imminent danger of invasion . . . . " The plaintiff, a member of the New York militia, failed to report for duty when the Governor of New York, acting pursuant to the President's request, called out the New York militia. The plaintiff was court-martialed, convicted and fined. The plaintiff then sought to recover the amount paid as a fine. In the course of its opinion, the Court stated that it would not review the determination of the President that the United States had been or was about to be invaded and that, therefore, it was necessary to call upon the state militia.[81] By refusing to review the President's estimate of the circumstances and his decision that the circumstances were such that he was authorized to act pursuant to the statute, it may be stated, in a narrow sense, that the Court refused to review the question of whether the President possessed the power to act; for, if the circumstances were not those specified in the relevant statute, the President was not authorized to act.[82] However, in a broad sense, the question of whether the President possessed the power to act was not in issue. The Congress had enacted a statute authorizing the President to call upon the militia. The Court was not required to and did not determine whether the President would have possessed the power to act in the absence of an authorizing statute. In fact, the Constitution specifically empowers the Congress to "call forth the militia" to repel invasions.[83] Had Congress not enacted legislation delegating this power to the President, it is probable that an attempt by the President to call upon the militia would have been void.

In *Chicago & Southern Air Lines, Inc. v. Waterman*,[84] the Court declined to review an order of the Civil Aeronautics Board (CAB) denying a certificate of convenience and necessity to Waterman for a route involving overseas air transportation. The Civil Aeronautics

79. 343 U.S. 579 (1952).

80. 25 U.S. (12 Wheat.) 19 (1827).

81. *Id.* at 28-32.

82. That is, the Court refused to review the determination that certain "jurisdictional facts" were present. *See* Crowell v. Benson, 285 U.S. 22 (1932).

83. U.S. CONST. art. I, § 8, cl. 15.

84. 333 U.S. 103 (1948).

Act provided that orders of the CAB involving applications for air routes of this type were to be submitted to the President, and that the orders were subject to the President's approval, disapproval, or modification. The Court stated that a court could review the order of the CAB either prior to or subsequent to the submission of the order to the President. If a court were to review the order prior to submission to the President, the court's determination would either be binding upon the President or the President would be free to disregard the court's determination entirely. If the court's determination were binding upon the President, the review by the court would be inappropriate as the review would occur before the order had acquired finality (the order was not final until approved by the President) and thus before the order imposed an obligation, denied a right, or established some legal relationship.[85] If the court's determination could be entirely disregarded by the President, review by a court would be inappropriate in that the court's determination would merely serve as an advisory opinion.[86]

If the review were to occur subsequent to the President's determination, the Court held that it could not in any event review the action of the President in approving, disapproving, or modifying the order of the Board for to do so would be to review

> . . . decisions as to foreign policy . . . [which were] political and not judicial. Such decisions are wholly confided by the Constitution to the political departments of the government, Executive and Legislative. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[87]

It would appear fairly clear that the Court could have reviewed certain portions of the order of the Board prior to the President's action.[88] However, it would also appear that the Court did not wish to limit, in any manner, the flexibility possessed by the President. Congress

85. *Id.* at 112-13.
86. *Id.* at 113.
87. *Id.* at 111.
88. *Id.* at 114 (Douglas, J., dissenting).

empowered the President to act upon his estimate of the manner in which the order of the Board would affect the nation's foreign affairs. The Court was apparently of the view that *any* limitation upon the President's freedom to act would not accord with the very purpose for which Congress empowered the President to act and, therefore, declined to review the Board's order.

However, it should be noted that again, there was no question but that the President possessed the power to modify, approve, or disapprove the order of the Board. This power had been delegated to the President by Congress. The Court was not presented with the question and did not decide whether the President would have possessed the power to act with respect to the order of the Board in absence of Congressional authorization.

Finally, in *Johnson v. Eisentrager*,[89] the issue before the Court was whether the federal courts possessed jurisdiction to issue a writ of habeas corpus in a case involving nonresident aliens captured, tried and convicted by an American military tribunal for violations of the laws of war prior to their capture. As the aliens had never been within the territorial jurisdiction of an American court, the Court held that it did not possess jurisdiction. The remainder of the opinion, as noted by Mr. Justice Black in his dissenting opinion, in which the Court states that there was no doubt but that the President possessed the power to send American forces to China (where the aliens were captured) was composed of dicta.[90]

Internal Application of International Law

Assuming that it would be appropriate for the judiciary to determine the existence of the power to order the armed forces to engage in hostilities, where, in fact, does that power reside and what limitations are imposed upon the exercise of that power by the norms of international law?

The President is designated Commander-in-Chief by the Constitution.[91] Pursuant to the powers of the Commander-in-Chief, various Presidents of the United States have ordered the armed forces to engage in hostilities on occasion without formal congressional action.[92] In

89. 339 U.S. 763 (1950).
90. *Id.* at 791, 792 (Black, J., dissenting).
91. U.S. Const. art. II, § 2, cl. 2.
92. See Corwin, *supra* note 63 at 541-2.

most instances, the military operations appear to have been defensive in character although there have been some occasions when the military forces were utilized in offensive operations, more often than not, of a limited character.

The constitution also empowers the Congress to declare war.[93] The question of when the President may take certain action without a congressional declaration of war is not easily answered. But it does appear that *the least* that was intended by the Framers is that a congressional declaration was required in *some circumstances.* In *The Prize Cases,*[94] the Court sustained the validity of President Lincoln's implementation of the blockade of the South at a time when Congress was not in session. In the course of its opinion, the Court stated, "this greatest of civil wars was not gradually developed . . . it sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war.* 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." [95] *Perhaps* the least that could be said is that when immediate action is required and/or opportunity for congressional action is limited,[96] the President may act pursuant to his powers as Commander-in-Chief without a declaration of war. However, when the necessity for action arises gradually, giving time for deliberation, and/or where the President's action is to take the form of a massive deployment of force, it would appear that a declaration of war would be required.

Assuming that in some, if not all, circumstances, the President is free to act without the necessity of resorting to Congress for a declaration

93. U.S. CONST. art. I, cl. 11.

94. 67 U.S. (2 Black) 635 (1863).

95. *Id.* at 668-9.

96. *See* The Protector, 79 U.S. (12 Wall.) 700 (1872). In this case, it became necessary to determine the exact dates upon which the Civil War began and ended (in order to determine whether the statute of limitations had run). The Chief Justice, speaking for a unanimous Court stated:

> [I]t is necessary . . . to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, *obliged to act during the recess of Congress* must be taken. The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second. *Id.* at 702 (emphasis supplied).

of war, is the President's power in these circumstances limited by a norm of *customary* international law?

An indication of an answer to this question is to be found in *Brown v. United States*.[97] In that case, a libel was filed by a United States Attorney against property alleged to belong to enemy aliens. No statute specifically authorized the seizure of the property of enemy aliens located on land[98] within the continental United States. The United States contended that the congressional declaration of war empowered the executive, in executing the laws of war, to seize, and the courts to condemn, all property which, according to international law, was subject to condemnation.

The Court, in an opinion by Chief Justice Marshall, rejected the position of the United States:

> . . . [the] argument [of the United States] must assume for its basis the position, that . . . [customary international law] constitutes a rule which acts directly upon the thing itself, by its own force, and not through the sovereign power. This position is not allowed . . . . [The rule of customary international law] is a guide which the sovereign follows or abandons at his will; the rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him, without obloquy, yet it may be disregarded.[99]

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97. 12 U.S. (8 Cranch) 110 (1814).

98. The fact that the property was located on land was utilized to show that the attorney for the United States was not acting under the authority of letters of marque and reprisal. *Id.* at 127.

99. *Id.* Mr. Justice Story dissented, *id.* at 128, upon the basis that the power of the Executive to conduct the war included the power to libel property of the type involved in the case. He referred to the law of nations not as a grant of power to the Executive but as limitation upon the Executive's exercise of the power, *i.e.*, the Executive could libel only that property which, according to the law of nations, could be confiscated. If the Executive wished to confiscate property which was not liable to confiscation according to the law of nations, the Executive could not do so without express congressional authorization. For example, see his dissenting opinion *id.* at 152-53:

> My argument proceeds upon the ground, that when the legislative authority, to whom the right to declare war is confided, has declared war in its most unlimited manner, the executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare established among civilized nations.

The *Brown* case thus appears to hold that at least in some areas, customary international law does not empower the President to take action unless the action is authorized in the manner prescribed by the Constitution. Although the analogy is far from complete, it would appear that in at least some areas *customary* international law which has not been given effect as domestic law would not prevent the President from taking action which the Constitution permitted.[100]

Whether or not the conclusion reached in the preceding paragraph is correct, it remains to consider whether the powers of the President may be limited or "enlarged" by a treaty to which the United States is a party.

Article II, section 2 of the Constitution of the United States empowers the President to make treaties "by and with the Advice and Consent of the Senate . . . providing two-thirds of the Senators present concur." Treaties concluded in this manner become the supreme law of the land.[101] If, in this manner, the United States becomes a part to a treaty which prohibits the employment of armed forces in certain circumstances, does the treaty, as "the supreme law" of the land, limit the power of the President to order the employment of American armed forces in hostilities prohibited by the treaty?

For purposes of domestic law, treaties have been classified into two types: "self-executing" and "non-self-executing." [102] If a treaty is sus-

100. From the national point of view, this position would appear to be the most desirable position for the courts to adopt. In the absence of an international "legislature" to provide for radical changes in customary international law when changed circumstances require, it would seem undesirable, from a national point of view, to prevent the President from taking certain action in certain circumstances due to the fact that a norm of customary international law, developed in other circumstances and now, perhaps, in a slow process of evolution, prohibited the action. Thus, assumming that the norms of customary international law were definite enough to be applied by a court of the United States, it seems probable that a court would not hold that the President was prohibited from taking action which the Constitution permitted as long as the norms of customary international law can be changed only by a process of lengthy and slow evolution.

101. U.S. CONST. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

102. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829):

> . . . [A Treaty] is . . . to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision [that is, when it is "self-executing"]. But when

ceptible of direct application by the courts, *i.e.*, if the treaty is self-executing, the norm contained in the treaty will become effective as internal law upon its adoption by the prescribed procedures. However, if the norm contained in the treaty is not susceptible of direct application by the courts, *i.e.*, if the treaty is not self-executing, the norm contained in the treaty will not become effective as internal law *unless*[103] and until Congress enacts legislation which implements the treaty norm.

A non-self-executing treaty, by definition, is a treaty which is not susceptible of immediate domestic application without further action. Presumably, therefore, a non-self-executing treaty which purported to limit the power of the nation to engage in certain forms of coercion would require further implementation before it could be applied by the courts as a limitation upon the nation's ability to engage in the forms of coercion which the treaty was designed to prohibit.

The effect of a self-executing treaty is dependent upon the answer to the question of whether the President is required to seek a declaration of war under some circumstances or whether he need not seek congressional action in any circumstances.

Assuming That the President Must Request a Declaration of War in Some Circumstances.

If the President is required to seek a declaration of war in some

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> the terms of the stipulation import a contract—when either of the parties engages to perform a particular act [that is, when it is not "self-executing"], the treaty addresses itself to the political and not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court.

See also Head Money Cases, 112 U.S. 580, 598 (1884). *See generally* McDOUGAL, *supra* note 14 at 215-22.

103. The intention of the Framers as to whether Congress would be required to implement a non-self-executing treaty is not clear. Certain provisions of the Jay Treaty required appropriations to fulfill the obligations imposed by the provisions. There apparently was no question but that Congress was the only body competent to make the appropriations despite the existence of a treaty. *See* U.S. CONST. art. I, § 9. Certain members of the House of Representatives, notably Alexander Hamilton, contended that, as the treaty was the "supreme law of the land," Congress was bound to implement the treaty by making the appropriations. Madison, in opposition, introduced a number of resolutions which provided, in essence, that Congress could deliberate the matter and decide whether or not to make the appropriations. The House adopted Madison's resolutions *and* made the appropriations. *See* CORWIN, *supra* note 63 at 468-9.

However, it would appear that Madison's view has prevailed. *Id.* at 470.

circumstances, the existence of a self-executing treaty (or federal legislation) limiting the President's power in those identical circumstances would be immaterial. The President would be required to seek a declaration of war in either case (because the Constitution required it or in order to supersede the self-executing treaty or to repeal the prior legislation).

With respect to those circumstances in which, according to the Constitution, the President may act pursuant to his own authority without seeking a declaration of war, further difficulties are encountered.

(1) If, as the courts have traditionally held, a self-executing treaty is no different than ordinary federal legislation, then a self-executing treaty could not *limit* the authority possessed by the President by virtue of his office without a violation of the principle of the Separation of Powers. Therefore, the President would be required to seek a declaration of war only in those circumstances in which the Constitution required congressional action. A treaty (or federal legislation) could not require congressional action in those circumstances in which the Constitution permitted the President to act upon his own authority.

In these circumstances, it would be a contradiction in terms to speak of a "self-executing" treaty which *limited* the circumstances under which the President was authorized by the constitution to act upon his own authority.

Would it be possible to conceive of a self-executing treaty (or federal legislation) which "increased" the President's powers? Assuming that the President could not take action under some circumstances without congressional authorization, presumably, it would be possible for Congress, by legislation, to authorize the President to take action in this sphere in advance those of specific circumstances.[104] Could this ad-

104. In United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936), the Court upheld the Joint Resolution of Congress which made it unlawful to sell arms to certain countries "if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace . . . , and if . . . , he makes proclamation to that effect. . . ." The Court indicated that the standards contained in the statute were so vague that if the statute had purported to deal solely with domestic affairs, the statute would have been unconstitutional as an unlawful delegation of legislative power. However, as the statute concerned external affairs, the Court stated that:

> Congressional legislation . . . within the international field must often accord to the President a degree of discretion and freedom from statutory

vance authorization take the form of a self-executing treaty? In order to so hold, it would be necessary to hold that the President and two-thirds of the Senators present on a particular day could authorize the President in advance of particular circumstances to take action which he could be authorized to take, in absence of a treaty, only with the consent of the majority of both houses of Congress.[105] If a court were to so hold, it would not be possible to speak of a self-executing treaty which limited the President's authority but it would be possible to speak of a self-executing treaty which "expanded" the President's authority. If a court would not so hold, it would not be possible to speak of a self-executing treaty in this area.

(2) It would be possible to view the President's powers under the Constitution as composed of three different types: (a) powers which he could exercise without congressional authorization; and, (b) powers which could not be exercised without congressional authorization

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> restriction which would not be admissible were domestic affairs alone involved.

Id. at 126.

105. Of course, it is not possible to predict with any degree of certainty the manner in which a court would decide this question. However, it is possible to note that in some areas, it has never been assumed that the treaty-making power could be utilized to negate the constitutional grant of power to another house of congress. Thus, the Constitution provides that "no money shall be drawn from the Treasury, but in Consequent of Appropriations made by law. . . ." U.S. CONST. art. I, § 9. The proposition that a treaty which required the appropriation of funds could not dispense with the necessity for a congressional appropriation was apparently never questioned by the men who had framed the Constitution. *See* CORWIN, *supra* note 63 at 469. It would appear, therefore, that a treaty which requires an appropriation of funds cannot be self-executing.

The power to declare war is specifically vested by the Constitution in the Congress and not in the President and the Senate acting severally or jointly. *Query*, can a treaty which provides for taking action in circumstances which would ordinarily require congressional action ever be said to be self-executing, or, if self-executing, could such a treaty be constitutional? *See* Reid v. Covert, 354 U.S. 1, 17 (1957):

> The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

See also Geoffroy v. Riggs, 133 U.S. 258, 267 (1890), where the Court stated:

> [T]he treaty power as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. *It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government. . . .*

(Emphasis supplied).

(which may or may not take the form of a self-executing treaty or federal legislation); and (c) powers which were "defeasible", *i.e.*, which he could exercise on his own authority unless Congress moved to limit these powers by means of a self-executing treaty[106] (or by federal legislation).

If the President were viewed as possessing these three types of powers, it would be possible to speak of a self-executing treaty (or federal legislation) which limited the President's authority. It would or would not be possible to speak of a self-executing treaty which "expanded" the President's authority depending upon whether or not a court would hold that, in those areas in which a congressional authorization was required before the President could act, Congress could authorize the President to act in advance and that the advance authorization could take the form of a self-executing treaty.

Assuming That the President Need Not Request a Declaration of War Under Any or Most Circumstances.

If it is true that the President need not, under any or most[107] circumstances, seek a declaration of war, then:

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106. This type of power is conceived as similar to the power possessed by the states to legislate in certain areas unless and until the Congress enacts legislation which purports to encompass the identical subject matter. *See, e.g.*, Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851):

> . . . the mere grant of . . . [certain powers] to Congress . . . [does] not imply a prohibition on the States to exercise the same power[s]; that it is not the mere existence of such . . . [powers], but . . . [the] exercise [of the same powers] by Congress, which may be incompatible with the exercise of the same power[s] by the States, and that the States may legislate in the absence of congressional regulations.

See also the opinion of Hamilton writing under the pseudonym "Pacificus" in THE FEDERALIST, No. 1 at 76, 82-3 (J. C. Hamilton ed. 1851) (Hamilton):

> . . . the executive [possesses the right] in certain cases to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision. The decision of the executive power in the Constitution, creates a *concurrent* authority in the cases to which it relates.

107. *See Hearings on S. Res. No. 151*, 90th Cong., 1st Sess. 80-1 (1967) wherein Undersecretary of State Katzenbach stated that to use the phrase "to declare war" would be to use "an outmoded phaseology." Mr. Katzenbach did not believe that the Tonkin Gulf Resolution, 78 Stat. 384 (1964), was "constitutionally necessary" to

(1) It is not possible to speak of a self-executing treaty in this area. The President would require no authorization, advance or otherwise, under any circumstances, to exercise authority in these areas. Moreover, no treaty (or federal legislation) could limit the President's power without violating the principle of the Separation of Powers. Under this view, for purposes of the authority to employ the nation's armed forces in hostilities, the President would be limited by neither the Constitution[108] nor a self-executing treaty (or federal legislation). The only effect of a treaty under this view would be to impose an international obligation upon the country.

(2) It would be possible to modify the position somewhat so as to view the President as possessing at least two types of power: (a) powers which he could exercise on his own authority and which could not be limited by Congress without a violation of the principle of the Separation of Powers; and, (b) defeasible powers which he could exercise on his own authority unless Congress moved to limit his authority by means of a self-executing treaty or otherwise.

In this situation, it would be possible to speak of a self-executing treaty (or federal legislation) which limited the President's authority but it would not be possible to speak of a self-executing treaty (or federal legislation) which "expanded" the President's authority.

(3) It would be possible to modify the position so as to hold that all powers possessed by the President to employ the armed forces in hostilities were "defeasible," *i.e.*, could be exercised by the President on his own authority unless Congress moved to limit the exercise of the powers by self-executing treaty or otherwise.

The fact that so many variables are involved makes a prediction as

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authorize the engagement of American forces in Vietnam. It is possible that Mr. Katzenbach was of the opinion that the SEATO Treaty, (1955) U.S.T. 81, T.I.A.S. No. 3170, was sufficient, under the Constitution, to authorize the President's actions. If, however, he was of the opinion that the President's action would have been authorized in absence of treaty and in absence of a declaration of war or congressional resolution, it is difficult, in view of the massive American committment in Vietnam, to conceive of any circumstances in which according to Mr. Katzenbach, any type of congressional action would be required.

108. Of course, in a broad sense, the President would be limited by the Constitution. The Congress could refuse to raise an army, U.S. CONST. art. I, § 8, cl. 11, or to appropriate funds for the maintenance of the armed forces, *id.* In addition, if the President persisted despite the lack of appropriations for maintenance of the armed forces, he could be impeached by the House, U.S. CONST. art. I, § 2, para. 5, tried by the Senate, U.S. CONST. art. I § 3, para. 6, and, upon conviction, removed from office, U.S. CONST. art. I, § 3, para. 7.

to which position a court would adopt extremely difficult. However, it may be noted that a national court would attempt to take account of, in addition to considerations of the "national interest", such factors as the intention of the Framers, the traditional notion of the status of self-executing treaties, the principle of the Separation of Powers, and the American conception of limited government.

From the point of view of an American citizen, perhaps the most desirable position, in view of the factors noted in the preceding paragraph, would be a position which held that the President's power to command the armed forces to engage in hostilities could be exercised by the President upon his own authority unless Congress moved to limit his authority by means of a self-executing treaty or by legislation. This position possesses, from the national point of view, a number of advantages. First, this position is extremely flexible. As the President and not the Congress negotiates treaties, the only treaties which would limit the President's powers would be those treaties which he submitted to the Senate for its advice and consent. In addition, these treaties could be superseded by subsequent inconsistent legislation enacted by majority vote of each house. Moreover, although the President's power could be limited under this position without the President's participation (via federal legislation), Congress could always eliminate the limitation by subsequent inconsistent legislation. Second, this position would not, in all probability, involve the courts to a great extent. In the absence of a limiting statute or treaty, the courts could rather easily dispose of a suit attacking the President's exercise of authority. Third, although this position would eliminate the concept of a self-executing treaty (or of federal legislation) which "expanded" the President's authority in this area, in light of the position's advantages as little violence as seems possible is done to the factors noted in the preceding paragraph.

The most desirable position from the standpoint of limitation upon the power of the President to employ the armed forces in hostilities would be a position which held that the President could act upon his own authority only in a very limited number of circumstances. In all other situations, he would be required to seek congressional action (which could not be taken in advance). At least this position would force a critical examination by Congress of the decision to engage in hostilities. However, this result may be viewed from the national point of view as a severe limitation upon flexibility which would be too great

to tolerate. In addition, the courts might be constantly presented with the need to define those circumstances under which the President could take action upon his own authority without congressional authorization. The possible increased involvement of the courts with the attendant delay and uncertainty generated by the necessity of a case-by-case delimitation of the President's authority might, from the national point of view, be considered intolerable.

Perhaps the most that could be expected by an individual interested in subjecting national decision to engage in hostilities to maximum judicial review would be the adoption of a position to the effect that: (1) while the President cannot act in certain circumstances without congressional authorization, he may be authorized in advance (by self-executing treaty or federal legislation) to take action in these circumstances; and, (2) the powers which the President may exercise on his own authority include, in addition to the powers he possesses by virtue of his office, certain powers which he may exercise upon his own authority unless the Congress moves to limit the exercise of these powers by means of a self-executing treaty or otherwise. From the international point of view the only advantages that this position possesses over the position most desirable from the national point of view is the increased involvement of the national courts and, possibly, the Congress. An exercise of apparent presidential authority could be subjected to attack as an action which the President is authorized to take only with the participation of Congress and for which the President had not received advance congressional authorization or, where the President possessed a defeasible power, which had been prohibited by federal legislation or self-executing treaty. However, in view of the fact that the remaining positions involve either increased involvement of the courts, a possible disadvantage from the national point of view, or greater damage to the factors noted previously, the adoption of this position is perhaps the most that the international community can expect.

Assuming that a treaty may, under some circumstances, limit the power of the President to employ the forces of the United States in certain forms of coercion, does the Congress retain the power to terminate the treaty, and if so, how may this power be exercised?

Legislation which implements a non-self-executing treaty possesses the same status as other federal legislation and may be repealed, therefore, by subsequent inconsistent legislation (or subsequent inconsistent

self-executing treaty).[109] Presumably, a congressional declaration of war may be considered inconsistent with prior legislation implementing a non-self-executing treaty prohibiting the resort to the use of force in specified circumstances.

A norm contained in a self-executing treaty possesses no "higher" status than that possessed by other federal legislation. Thus, the norm may be repealed by subsequent inconsistent legislation (or a subsequent inconsistent self-executing treaty or subsequent inconsistent federal legislation implementing a non-self-executing treaty).[110] Presumably, a congressional declaration of war could be viewed as inconsistent with a self-executing treaty prohibiting the resort to the use of force in certain circumstances and for certain purposes.

Similarly, the Constitution provides that the laws of the United States made in pursuance of the Constitution become the supreme law of the land.[111] It would appear, therefore, that even if a norm of customary international law could limit the President's power to employ the armed forces of the United States in certain forms of coercion, a court would be bound by the Constitution to apply inconsistent federal legislation.

Thus, it would appear that assuming it was possible to limit the President's authority to employ the armed forces of the United States in certain forms of coercion by self-executing treaty, legislation implementing a non-self-executing treaty, or norm of customary international law, it would appear that this limitation could be removed by subsequent inconsistent federal legislation.

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109. This conclusion would appear to follow from the fact that Congress is apparently not required to implement a non-self-executing treaty, *supra* note 103.

110. *E.g.*, Whitney v. Robertson, 124 U.S. 190, 194 (1888):

> By the Constitution a Treaty is placed on the same footing, and made of like obligation, with an Act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the Treaty on the subject is self-executing. If the country with which the Treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress.

See also Taylor v. Morton, 23 Fed. Cas. 784 (No. 13, 799) (C. C. D. Mass. 1855).

111. U.S. CONST. art. VI, para. 2.

Conclusion

Peaceful relations between nations, at all times and in all circumstances, is one of mankind's greatest dreams. The League of Nations, the Kellogg-Briand Pact, and the United Nations are representative of efforts which have pushed the world further along the spectrum from anarchy to the desired goal. However, it appears likely that as long as future efforts are directed solely to international prescriptions designed to directly affect only nations and not individuals, further progress will be slow and, perhaps, minimal.

The international community has apparently developed a norm which prohibits the utilization of military force by nations in some circumstances. However, the nations of the world have been unable or unwilling to reach agreement upon the establishment of a truly effective centralized institution to apply this norm. This paper has explored one small aspect of a possible remedy for this defect.

If individual citizens could attack, in domestic judicial institutions, the decision of government officials to engage in hostilities upon the basis that the hostilities are prohibited by international norms, it is possible that the range of policy-decisions available to national officials would be effectively narrowed. Of course, this suggestion is not an ideal solution. Domestic judges are citizens who may be affected by the mood of the country and who may be moved by conceptions of patriotism or of the "national interest." In addition, citizens may become convinced that the nation should engage in hostilities despite the fact that the hostilities violate international law and may participate in the nation's effort regardless of the existence of legal right to decline to do so. Nevertheless, it does appear that an immediate rejection of the proposal would be unwarranted.

Further investigation may ultimately prove that the proposal is unworkable. This paper has presented a preliminary analysis of the current legal problems encountered by an American citizen who attempts to resist compulsory participation in hostilities upon the basis that the hostilities are prohibited by international law. This analysis indicates that the citizen faces virtually insurmountable obstacles in such areas as procedure, jurisdiction, judicial self-restaint and constitutional law. American courts under current legal doctrine appear, therefore, to possess only limited utility as institutions for the application of international prescriptions in this area. Additional study and reflection may suggest a different conclusion. Hopefully, those who pursue peace will not permit the discussion to rest here.