Law and the Indochina War: A Retrospective View*

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> We are mad, not only individually, but nationally. We check manslaughter and isolated murders; but what of war and the much vaunted crime of slaughtering whole peoples?
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> Seneca: *Ad Lucilim* XCV.

> How small, of all that human hearts endure,
> That part which laws or Kings can cause or cure.
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> Oliver Goldsmith: *The Traveller*

I. Introduction

This century, from the Hague Conferences through the Vietnam War, has seen a profound change in attitudes toward the role of law as a constraint upon foreign policy. The Hague Conferences [1] represented at once an attempt, however feeble, by men of mixed motives to emplace fledgling prophylactic legal institutions upon the tendencies of the nation-states to resolve disputes by war, and at the same time to limit war's destructiveness if prevention failed. World War I destroyed not only most of this superstructure, but also massive portions of the more fundamental institutions of the dynastic state system of the time. When European balance of power politics failed to maintain peace and preserve social order, the ad hoc systems of the Hague Conventions were replaced by the League of Nations, which provided a weak form of collective security and a standing conference system of dispute resolution.

The controversy in this country over our participation in the League of Nations was not merely a debate between advocates of the geopolitics of power and proponents of a stronger role for legal institutions in international relations. Both proponents and opponents of the League recognized the need for development of dispute resolution institutions to displace balance of power politics in the maintenance of peace. Woodrow Wilson favored the League for precisely the same reason that Philander

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[1] *See* Firmage, *Fact-Finding in the Resolution of International Disputes — From the Hague Peace Conference to the United Nations,* 1971 Utah L. Rev. 421 (an analysis of the evolution of fact-finding, peace-keeping, and dispute resolution techniques through the media of the Hague Conference, the League of Nations, the Bryan treaties, and the United Nations).

Knox, Senator Borah, and J. Reuben Clark, Jr.,[2] opposed it; all were reacting against European balance of power politics. Wilson viewed the League system as the way to conduct foreign policy on a foundation of collective security, if not parliamentary politics. Knox, Clark, and others saw the League — inextricably tied to the Versailles settlement as the price Wilson paid for the world body — simply as an institutional means by which France and Britain might maintain a dominant position over Germany. In their view, the League amounted to European power politics in institutional disguise. Clark, far from opposing the concept of a standing conference system as a means of dispute resolution, proposed such a plan of his own.[3] The arbitration treaties of William Jennings Bryan, our participation in the Permanent Court of International Justice supported by Harding, the Kellogg-Briand Pact (defended by proponents and opponents of the League), the reliance upon arbitration as a means of dispute resolution by Elihu Root, Charles Evans Hughes, and J. Reuben Clark, Jr., and the disarmament conferences (sustained by leading proponents and opponents of the League) represent some degree of support for a legal or institutional approach to foreign policy — an approach excoriated by Acheson,[4] Kennan, and others after World War II.

Kennan's book, consisting of lectures delivered at the University of Chicago in 1951, became one of the most popular and influential writings on foreign policy. His criticism of excessive legalism in foreign policy was based upon his examination of American foreign policy from the Civil War to World War II:

> . . . I see the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems. . . .
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> It is the belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints. This belief undoubtedly represents in part an attempt to transpose the Anglo-Saxon concept of individual law into the international field

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[2] *See* Firmage & Blakesley, *J. Reuben Clark, Jr.: Law and International Order*, in J. REUBEN CLARK, JR. — DIPLOMAT AND STATESMAN 43, 54 *et seq.* (R. Hillam ed. 1973).

[3] *See id.* at 61–62 & n.46, *citing* Clark, *System of Pacific Settlement of International Disputes: A Program*, UNITY (Oct. 4, 1923). Clark proposed that there be created a world judiciary and world deliberative body, with quasi-legislative functions, which he called a "World Congress." *Id.* at 61.

[4] Mr. George Kennan complains, I think justly, of the disservice which lawyer secretaries of state did to American foreign policy during the years when they directed most of our effort to the negotiation of nearly a hundred treaties of arbitration, only two of which were ever invoked. He is, of course, quite right that all this misguided effort sprang from a complete failure to see the enormous threat to world stability which the Germans were so soon to carry into action. Even after the First World War, the realities of power were still obscured to us by our peculiar American belief that salvation lies in institutional mechanisms.

D. ACHESON, MORNING AND NOON 147 (1965). *See also* Acheson, *The Arrogance of International Lawyers*, 2 INT'L LAWYER 591 (1968); McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

> and to make it applicable to governments as it is applicable . . . to individuals.[5]

Elaborating upon these early observations, Kennan in his memoirs described our foreign policy between 1865 and 1939 as "utopian in its expectations, legalistic in its concept of methodology, moralistic in the demands it seemed to place on others, and self-righteous in the degree of high-mindedness and rectitude it imputed to ourselves." [6] He also criticized our

> inordinate preoccupation with arbitration treaties, the efforts towards world disarmament, the attempt to outlaw war by the simple verbiage of the Kellogg Pact, and illusions about the possibilities of achieving a peaceful world through international organization and multilateral diplomacy, as illustrated in the hopes addressed to the League of Nations and the United Nations.[7]

Kennan's penetrating criticism of our legalistic, institutional approach to foreign policy during the century preceding World War II was far more than a simple commentary on the limitations of one trained in the law to serve as Secretary of State. Rather, Kennan indicated an entire approach to foreign policy,[8] an approach shared not only by lawyers, but also by political scientists and historians, presidents and their advisors, and proponents and opponents of the League. To Kennan, this approach ignored the inevitable role of power in politics.

> The conception of law in international life should certainly receive every support and encouragement that our country can give it. But it cannot yet replace power as the vital force for a large part of the world. And the realities of power will soon seep into any legalistic structure which we erect to govern international life. They will permeate it. They will become the content of it; and the structure will

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[5] G. KENNAN, AMERICAN DIPLOMACY 1900–1950, at 95–96 (1951).

[6] G. KENNAN, MEMOIRS: 1950–1963, at 71 (1972).

[7] *Id.*

[8] Kennan recorded in 1944 his reaction to the press reports of the Dumbarton Oaks discussions:

> Underlying the whole conception of an organization for international security is the simple reasoning that if only the status quo could be rigidly preserved, there could be no further wars in Europe, and the European problem, as far as our country is concerned, would be solved. This reasoning, which mistakes the symptoms for the disease, is not new. It underlay the Holy Alliance, the League of Nations, and numerous other political structures set up by nations which were, for the moment, satisfied with the international setup and did not wish to see it changed. These structures have always served the purpose for which they were designed just so long as the interests of the great powers gave substance and reality to their existence. The moment this situation changed, the moment it became in the interests of one or the other of the great powers to alter the status quo, none of these treaty structures ever stood in the way of such alteration.
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> International political life is something organic, not something mechanical. Its essence is change; and the only systems for the regulation of international life which can be effective over long periods of time are ones sufficiently subtle, sufficiently pliable, to adjust themselves to constant change in the interests and power of the various countries involved.

G. KENNAN, MEMOIRS: 1925–1950, at 218 (1967).

> remain only the form. International security will depend on *them*: on the realities of power — not on the structure in which they are clothed. We are being almost criminally negligent of the interests of our people if we allow our plans for an international organization to be an excuse for failing to occupy ourselves seriously and minutely with the sheer power relationships of the European peoples.[9]

The League's ultimate failure[10] to meet the challenge of the aggressor states in the 1930's, although in part due to its inherent institutional weakness, was more basically due to the failure of traditional balance of power diplomacy. The seeds of World War II were clearly sown at Versailles; the blame for the inability of the League to prevent the harvest must also be borne by those European states that refused to support the League at critical points and by the United States, which refused to participate. Basic power remained within the states, and they continued to make fundamental decisions that were translated by traditional means into action within the international sphere. In other words, the debacle of World War II represents not only a failure of legal institutions, but also the more basic failure of traditional balance of power diplomacy.

The United Nations and the League are alike in that both have had impressive success in preventing certain types of violence and in restoring and maintaining at least a short lived peace between belligerents, while both have had very little success in resolving the underlying causes of such violence.[11] Senator Fulbright, however, argues that the United Nations has not failed, because it has never been tried.[12] Certainly we retreated with undue and perhaps tragic haste from initial attempts to use this institution in the place of traditional alliance diplomacy.[13] Nevertheless,

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[9] *Id.* at 218–19.

[10] Critics of the League of Nations often overlook its substantial achievements in maintaining the peace for over a decade after World War I, during which time the European map was redrawn. On at least one occasion, the League performed a crucial role in preventing a Balkan conflagration that could well have resulted in a European or world-wide war. *See* Firmage, *supra* note 1.

> The dispute of Albania against Yugoslavia and Greece in 1921 might well have resulted in substantial territorial losses, if not the disappearance of Albania, but for the actions of the Council of the League and its commission of inquiry which helped to establish the Albanian government and to settle that state's frontiers. Again, the Demir-Kapu frontier dispute between Greece and Bulgaria in 1925 might well have resulted in another Balkan war but for the forceful demands of Aristide Briand, President of the Council of the League. Greece, prepared to invade Bulgarian territory, pulled back after reception of Briand's telegram demanding that neither side resort to war. A commission of inquiry sponsored by the Council was later instrumental in settling the dispute. The eventual failure of the League has made it all too possible to forget its impressive successes in dealing with disputes of lesser magnitude than Manchuria or Spain, but still quite sufficient to have resulted in war in the absence of effective regimes of settlement.

Firmage, Book Review, 1972 AM. POL. SCI. REV. 1088.

[11] For analysis of fact-finding and peace-keeping efforts by the United Nations see Firmage, *supra* note 1, at 432 *et seq.*

[12] Address by William Fulbright before the Pacem in Terris III Conference, Oct. 8, 1973, in 119 CONG. REC. 18,830 (daily ed. Oct. 9, 1973).

[13] It is interesting to note that the current revisionist writing on the origins of the Cold War, coming in part from the New Left, was preceded by twenty years not only by the Old Left, epitomized by Henry Wallace, but also by the Old Right. J. Reuben

it is begging the question to assert that the United Nations — and the entire institutional approach to foreign policy that it represents — has not failed because it has never been used. Such an assertion must be followed by an inquiry into the reasons why the powerful nations have not used the United Nations as the primary vehicle for accomplishing their goals.

Beginning with the Cold War and the creation of NATO, and continuing in some degree until late 1972, when the United States ended its participation in the Vietnam War, the world has been gripped by an ideological struggle, the ferocity of which has not been matched since the Wars of Religion. This struggle has frozen international politics into a bipolar structure that has prevented the application of either traditional balance of power diplomacy or its more sophisticated alternative, legal institutionalism. The watershed years in international relations, beginning in the late sixties and extending to the present, have brought the opportunity for another beginning. As in 1815, 1918, and 1945, we now must reexamine the international community and the means by which its roots may be deepened. This Article will focus on the contributions that law — both municipal and international — can realistically make toward attaining the goal of a world community governed more by law and less by force.

II. LEGAL OBLIGATION AND COMMUNITY

In evaluating the role of law in foreign affairs, a critical examination of Kennan's indictment of excessive legalism may be appropriate. Kennan perceived a relationship between a community and its institutions that determines the effectiveness of legal obligation. He therefore distrusted attempts by institutionalists to transplant the legal structure of a hierarchically ordered municipal system based upon a mature and somewhat homogeneous community into the highly decentralized and heterogeneous international community.

Kennan's criticism, however, ignored the mutual cause and effect relationship between a community and its institutions. That is, although a

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Clark, Jr., a conservative Republican who served as Solicitor of the Department of State under Hoover and who adamantly opposed our participation in both the League and the United Nations, also opposed the creation of NATO and the polarization of the world into opposing armed camps which it represented:

> "It would hardly do to form an open alliance against Russia; and both Britain and ourselves should be wary of an alliance with her. So the device is conceived as a 'union' of states, which, however, would tie the nations together more securely than an alliance and be a greater threat to Russia.
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> "But such an alliance would lead, and such a 'union' will lead, sooner or later, to a counter-alliance by the other nations that would challenge the power of such a 'union,' so meaning either constant war for supremacy or a war of absolute conquest by the one or the other and a consequent enslavement of the conquered. Peace without liberty spells a stalemate in civilization and spiritual development. 'Union now' has far more ill than good in it. Nor must America ever become a party to an attempted military domination of the world."

Quoted in Firmage & Blakesley, *supra* note 2, at 56.

certain critical mass of "community-ness" must exist before a legal structure will naturally emerge and be accepted as obligatory, legal institution may profoundly change and deepen community ties through its accommodation of successful experiences. The lesson then is not that we draft a utopian world constitution and invite the world to ratify and accede, but rather that we perceive embryonic legal institutions within the international system as possible contributors to the development of an emerging international community.

Ascertaining the relationship between power, morality, law, and community begins with an analysis of the nature of legal obligation. Proponents of Natural Law maintain that legal obligation can be objectively derived from the principles of justice; in contrast, Positivists focus on the role of the sovereign state, rather than the principles of justice, in formulating legal obligation. Our recent preoccupation with institutional systems and disregard of moral principles as constraints on sovereign authority reflect a theoretical dependence upon the tenets of Positivism. Although Natural Law is theoretically deficient because it fails properly to consider the role of power in developing legal obligation, Positivism is equally deficient because it is excessively preoccupied with the same. Accordingly, a return to Naturalist considerations, tempered by Positivist realism, may contribute substantially to the effectiveness of law in accomplishing international peace.

John Rawls recently stated in a neo-Naturalist thesis [14] that legal obligation first arises from a disposition to support efforts to improve social interaction through fair laws and fair institutional procedures.[15] Thus, although institutions might reinforce legal obligations and even create legal duties pursuant to fair procedures, the content of the law would forever remain the primary source of obligation. According to Naturalist theory, one may be obligated conscientiously to object to or civilly disobey laws dictated by the formal institutions, where such laws violate the primary principles of justice or are enacted in violation of fair procedures.[16] Thus, the Naturalist conception of law as voluntarily obligatory lends itself well to the international sphere, since institutional systems are often incapable of enforcing legal rules without voluntary compliance.

Positivists, in contrast, reject any objective constraints, such as principles of fairness, upon the sovereign's authority to make law. Although the sovereign may consent to being obligated — both internally by constitutional constraints and externally by treaties and voluntary participation in international institutions — such obligation, being self-imposed, need not be based on any principles of justice or fairness. Thus, Positivists contend that adherence to law in the international sphere is discretionary with the sovereign. Their reliance in foreign affairs on power politics,

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[14] J. RAWLS, A THEORY OF JUSTICE (1971).

[15] *Id.* at 11–17.

[16] *Id.* at 371–82.

rather than objective legal norms, grows out of this contention. Legal realists in this country, including the McDouglas school of thought, urge that legal institutions should be manipulatively used to promote national interests in international affairs. So interpreted, law is mere superstructure controlled by the power forces of the state. Thus, where states are ideologically opposed, law can provide at best a temporary truce, but it cannot establish ultimate peace.

Although adherence to either the Naturalist or the Positivist theory of obligation can assist in achieving international order, reliance on either theory in isolation may ultimately be reactionary. For example, the Positivists' excessive reliance on institutions partially justified a reversion to power politics when the institutions seemingly failed. Had the Positivists better understood the limited role that formal structure plays in the development of legal obligation, then the partial success of the institutions could have been appreciated and their ultimate inadequacy anticipated.

Thus, our earlier mistake was optimistically to assume that a complex superstructure sitting uncomfortably atop an embryonic community could resolve fundamental intracommunity conflicts. But Kennan's blanket indictment of the institutional approach to foreign policy, based on the weaknesses inherent in the early development of international institutions, also missed the mark. The problem was not that legal institutions were wholly ineffective, but only that they were not totally adequate. Further, nascent existence and use of legal institutions, even at first limited to peripheral international problems, would have been helpful in developing a community of greater depth, which might in turn have supported yet stronger institutions.

An institutional approach to foreign policy must begin with a proper assessment of the level of community that exists within the international system and the corresponding capacity of community members voluntarily to accept as obligatory rules emanating from community institutions. Stated differently, experience suggests that legal institutions absent the requisite foundation of community cannot yield world peace.

Yet there is nothing inherent in man's nature, nor in his cultural or national divisions, that precludes the development of a communal base sufficient to support a legitimate normative order. It is suggested that there exist as innate propensities within man a sense of fairness and a sense of community, which in combination provide a base sufficient to support a universal normative structure. Further, if law is to be obligatory, it is suggested that *any* legal system must accommodate this normative structure, at least to a minimal extent; thus, this normative structure would perform a critical role in maintaining both internal and external peace among sovereign states. This theory is impliedly supported by recent research in language learning by Noam Chomsky, by studies of moral development by psychologists Lawrence Kohlberg and June Tapp, and by research in comparative law by Rudolph Schlesinger.

Chomsky's research in language learning suggests that there exists in man an unconscious knowledge of innate principles of universal grammar. This innate mental structure allows successful experience to confirm a prior disposition "that there is a primitive, neurologically given analytic system which may degenerate if not stimulated at an appropriate critical period, but which otherwise provides a specific interpretation of experience . . . ." [17]

Thus, contrary to radical empiricism, which rejects the theory of innate forms of knowledge, Chomsky theorizes a system of belief not entirely dependent on environmental circumstances, but instead erected upon innate principles of mind: "A system of knowledge and belief results from the interplay of innate mechanisms, genetically determined maturational processes, and interaction with the social and physical environment." [18] Extrapolated to a theory of law, Chomsky's theory suggests that legal rules are possibly constructed on the basis of distinct innate schemata, or a universal normative structure, much like the universal structure of language.[19] Indeed, both the uniformity of legal principles and the regularity with which people accept rules of social interaction as obligatory are inconsistent with the empiricist's view that obligation arises from experience. Thus, abstract normative principles may be inherent in human nature and may impose limits on what the mind will accept as legally obligatory.

The notion that there may be innate principles of mind that determine a universal normative structure should be no surprise to students of comparative law. The concept of Jus Gentium — principles of law common to all nations by virtue of their being intrinsically consonant with right reason — existed historically under Roman law and survives today in article 38(1)(c) of the statute of the International Court of Justice. "These 'general principles of law' are not . . . peculiar to any legal system but are inherent in, and common to, them all. They constitute the common foundation of every system of law." [20]

Rudolph Schlesinger, in the Cornell Project,[21] recently attempted to define the "common core" of legal principles. Although the scope of

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[17] N. CHOMSKY, PROBLEMS OF KNOWLEDGE AND FREEDOM: THE RUSSELL LECTURES 13 (1971).

[18] *Id.* at 21.

[19] Although Chomsky's investigation is presently limited to language, he suggests an investigation of other systems of belief as a natural further step: "I see no reason why other domains of human intelligence might not be amenable to such investigation. Perhaps, in this way, we can characterize the structure of various systems of human knowledge and belief, various systems of performance and interaction." *Id.* at 47.

[20] Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations — A Study,* 10 U.C.L.A.L. REV. 1041 (1963), *quoting* Cheng, *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice,* in 38 GROTIUS SOCIETY: TRANSACTIONS FOR THE YEAR 1952, at 125, 129 (1953).

[21] Financed by a grant from the Ford Foundation, the purpose of the Project as initially formulated was to determine "whether there are, in fact, any basic 'core' legal principles of private law generally recognized by civilized nations." Davis, *Comparative Law Contributions to the International Legal Order: Common Core Research,* 37 GEO. WASH. L. REV. 615, 616 (1969).

research was limited to contract law, the noticeable uniformity of contract principles discovered by the research supports the theory of a universal normative structure. Although legal realists have criticized the theory of common core research, their criticism has focused on the alleged pointlessness of discovering common core principles, not upon the fact of their existence.[22]

Further support for a universal normative structure theory is found in recent research by psychologists Kohlberg and Tapp. Their national, cross-national, and cross-cultural studies of the effects of moral and legal attitudes on behavior suggest that moral and legal development toward order and justice follows a universal sequence of distinct stages.[23] Kohlberg's research indicates that "[t]he development of moral thought follows a universal sequence of distinct stages." [24] Similarly, Tapp's research relates legal concepts to Kohlberg's moral levels.

Kohlberg's studies identify three general levels of moral judgment and two intermediate stages within each level. At level I, the "Preconventional Level," man interprets moral labels in terms of physical consequences. At the "Physical Power" stage of level I, superior power or prestige determines morality in terms of physical consequences. At the "Instrumental Relativism" stage of level I, moral acts are hedonistically characterized in terms of satisfying one's own needs; equitable considerations are present, but they are interpreted pragmatically. At level II, the "Conventional Level," morality is characterized by active support of the status quo. At the "Interpersonal Concordance" stage of level II, conformity to majority behavior determines morality. At the "Law and Order" stage of level II, one's moral duty is to obey fixed rules to maintain the given social order. Level III, the "Post Conventional" level, is marked by the appearance of autonomous moral principles. At the "Social Contract" stage of level III, morality is determined in terms of individual rights agreed upon by the society in the form of a hypothetical constitution. In this stage, procedural rules for reaching consensus opinions are critical, and possibility of social change is determined by social utility. The "Universal Ethic" stage of level III is characterized by universal, consistent,

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[22] Even if comprehensive impressions of commonly accepted positive legal principles, attitudes and consistencies of decision making were somehow reduced to a manageable common denominator of core premises arguably constituting an extranational common law of mankind, the fabric of this law is so easily rent or so clearly vulnerable to unretributable alteration, change or even obliteration by those exercising raw political power within the territories of national enclaves that such a comprehensive project would be manifestly pointless.
Id. at 626.

[23] Kohlberg & Tapp, *Developing Senses of Law and Legal Justice*, 27 J. SOC. ISSUES at 89 (1971). The theoretical bases for Kohlberg's model are represented by John Dewey's genetic, experiential, and purposive reasoning (1910, 1916, and 1930), Jean Piaget's structural approach to moral development and cognitive thought (1928, 1929, and 1932), and Immanuel Kant's ethical analysis (1849). *Id.* at 67.

[24] *Id.* at 67.

and comprehensive moral decisions. Individual ethical principles prevail.[25]

Tapp's levels of legal development, which correspond to Kohlberg's levels of moral development, progress from prohibitive laws supported by threat of punishment, to prescriptive or neutral regulatory laws supported by vested interests, to rationally, beneficial laws supported by principled obedience.[26]

The implications of the Tapp and Kohlberg studies are that a universal normative structure exists and that movement toward full realization of that structure contributes to peace and justice within the community. Movement between stages, however, follows an incremental pattern requiring stimulation and assimilation, and the absence of either element tends to retard or even arrest community development to higher levels. To facilitate growth, therefore, the stimulator must encourage "[e]xperience-based activity involving conflict resolution, problem solving and participation in decision making," all of which promote voluntary compliance through perfecting a sense of responsibility, obligation, and justice. Tapp and Kohlberg observe:

> The match problem for affecting change in legal development is one of presenting stimuli sufficiently incongruous to stimulate conflict in the individual's cognitive schema, and sufficiently congruous to be assimilated with some accommodative effort.[27]

The relevance to the international sphere of data relating to the normative development of the individual obviously raises complex questions; nevertheless, several hypotheses will be suggested. The first hypothesis is that the individuals who ultimately are affected and bound by decisions, including the decision-makers themselves, must be willing to live with the results; this is not to say that the individuals who participate in the decision-making process can develop a corporate legal conscience through corporate experiences in conflict resolution. Rather, the degree to which the individuals have developed their legal consciousness bears directly on what decisions they will accept as obligatory. The second hypothesis is that the level of legal consciousness which the individual decision-makers have accommodated will necessarily limit the alternatives for decision available to them. Furthermore, the bounds of the alternatives certainly must be circumscribed by the limits that the participants are willing to accept. It follows that institutional structures and individual legal consciousness can reinforce each other in the accomplishment of peace.

The interplay between institutional structures and individual legal consciousness can contribute to international peace and justice in at least four areas. First, the degree to which a government conforms to its own legal constraints, constitutional or otherwise, bears directly on international

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[25] *Id.* at 73–77.

[26] *Id.* at 84.

[27] *Id.* at 87.

peace. Second, the degree to which the government's decisional processes conform to international legal constraints also affects international order. Third, the extent to which a government promotes and sustains international institutions contributes to international order. Fourth, the level of legal consciousness attained by the world public actually constrains governments that would otherwise act contrary to international order.

A government's strict compliance with its own laws contributes to international order in several ways: (1) A government that has incorporated international law into its own civil or common law is obligated to international order by its own legal structure, apart from international constraints. (2) A state must habitually obey its domestic legal constraints before it can successfully accommodate international legal principles. A government, for example, that disregards its own legal procedures will likely act similarly in its relations with other states. Accordingly, strict compliance with domestic constitutional procedures benefits not only domestic order, but also international order, and vice versa. A comparison of our government's conduct in the Watergate affair and its unconstitutional acts in Indochina supports this proposition.[28]

This concept should not be viewed solely through the glasses of Western liberal thought. It is not asserted that progressive democratic societies will be peaceful and totalitarian states will be war-like; rather, it is asserted that states, regardless of their ideology, that adhere to internal legal constraints and abide their own rules of municipal order are less likely to violate international norms; conversely, violation of international norms may similarly predispose a government to violate municipal law.

The extent to which a government's formal decision-making machinery operates under international legal constraints necessarily affects international order. For example, efforts in establishing treaties and regulating conflicts between international actors substantially aid in preserving international order, notwithstanding the rationalist power politics theory to the contrary. Abram Chayes recognizes this view in an analysis of the working of arms control agreements.[29] Chayes asserts that the bureaucratic inertia of perpetuating and maintaining "organizational health . . . in terms of bodies assigned and dollars appropriated" [30] can be channelled in a normative direction by the processes of treaty negotiation and ratification.[31]

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[28] Our participation in the Vietnam War was initiated and later maintained in violation of both constitutional and international law. In turn, later violations of municipal and constitutional law, known generically as Watergate, were in part caused by factors stemming from our involvement in Vietnam.

[29] Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905 (1972).

[30] *Id.* at 916, *quoting* G. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 82 (1971).

[31] [T]his very process of negotiation and ratification tends to generate powerful pressures for compliance, if and when the treaty is adopted. At least three interrelated phenomena contribute to these pressures: (1) by the time the treaty is adopted, a broad consensus within governmental and political circles

International institutions may substantially contribute to international order both by successfully resolving conflicts and by stimulating international community growth. Although Kennan's criticism of excessive institutionalism possesses penetrating insight, the growth of supernational entities has rendered his criticism increasingly less valid and more reactionary. Institutional structure, however, cannot replace a lack of consensus on critical issues. Obligations arising out of supra-national institutions will be binding only insofar as they comport with the level of legal development achieved by the participating states.

Finally, the growing consciousness of the universality of human experience contributes to the development of law and peace:

> There is a new realism emerging out of the need to adapt the state system to the multiple challenges of war, population pressure, global pollution, resource depletion, and human alienation. It is this new political consciousness that insists upon regarding America's involvement in the Indochina War as illegal and immoral *from the beginning* . . . .[32]

Our involvement in the Vietnam War offers an excellent vehicle for a detailed analysis of the significance to international peace and justice of governmental adherence to constitutional and international laws.

A. Vietnam and Constitutionalism

This country, along with other states, can influence the growth of legal consciousness by force of example; a particularly potent example would be a return to the basic precepts of our own charter, thereby fostering an understanding of constitutionalism. Those exercising sovereign prerogatives are considered to be circumscribed by *leges imperii* — the laws of government. These laws normally antedate the exercise of sovereign power and determine the identity and the limits of persons that exercise such power. Contrary to those who perceive from the Vietnam experience a failure of our constitutional structure and the accompanying need for a convention to produce a new constitutional document,[33] it would seem at once more sound and more attainable to return to the basic prescriptions of the Constitution. Detailed analyses of the constitutional implications of our Vietnam involvement have been accomplished [34] and will not be re-

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> will be arrayed in support of the decision; (2) meanwhile, principal centers of potential continuing opposition will have been neutralized or assuaged, though often by means of concessions that significantly modify the substance of the policy; and (3) many officials, leaders of the administration or regime and opponents as well, will have been personally and publicly committed to the treaty, creating a kind of political imperative for the success of the policy.

Id. at 920.

[32] Falk, *Nuremberg: Past, Present, and Future,* 80 YALE L.J. 1501, 1510–11 (1971) (footnote omitted).

[33] R. TUGWELL, A MODEL CONSTITUTION FOR A UNITED REPUBLICS OF AMERICA (1970).

[34] Berger, *War-Making by the President,* 121 U. PA. L. REV. 29 (1972); Fulbright, *Congress, The President and the War Power,* 25 ARK. L. REV. 71 (1971); Goldwater,

peated here; rather, only conclusions of law will be advanced. As will be seen, obedience to these most basic constitutional principles would at once restrain our own predilections toward the unlawful use of force, and would serve as an example to be followed by other states.

First, it is apparent that the war powers, although divided between the executive and the legislative branches, were deposited dominantly within the latter branch.[35] The deliberative branch was purposely given preponderant power as a check upon the impulsive use of military force. The logic of James Madison is as compelling now as it was during the battle over the ratification of the Constitution:

> Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought to be commenced, continued or concluded.* They are barred from the latter function by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.[36]

Madison further noted the axiom that "the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence." [37]

Thomas Jefferson also indicated his pleasure in the decision to endow the Congress rather than the President with the war power; he wrote to Madison: "We have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay." [38]

The President's Constitutional Primacy in Foreign Relations and National Defense, 13 VA. J. INT'L. L. 463 (1973); Lofgren, *War-Making Under the Constitution: The Original Understanding,* 81 YALE L.J. 672 (1972); Rostow, *Great Cases Make Bad Law: The War Powers Act,* 50 TEX. L. REV. 833 (1972); Van Alstyne, *Congress, The President, and the Power to Declare War: A Requiem for Vietnam,* 121 U. PA. L. REV. 1 (1972); Wormuth, *The Nixon Theory of the War Power: A Critique,* 60 CALIF. L. REV. 623 (1972).

[35] Lofgren, *supra* note 34, at 688. Lofgren has carefully analysed the Convention, state ratification debates, trends in theory, and English influence. He concludes that the men of the day probably conceived of the President's war-making role in exceptionally narrow terms.

James Wilson, perhaps the leading legal theoretician of the Convention, said:

> The power of declaring war, and the other powers naturally connected with it, are vested in Congress. To provide and maintain a navy — to make rules for its government — to grant letters of marque and reprisal — to make rules concerning captures — to raise and support armies — to establish rules for their regulation — to provide for organizing . . . the militia, and for calling them forth in the service of the Union — all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress.

1 J. WILSON, WORKS 433 (R. McCloskey ed. 1967).

[36] Berger, *supra* note 34, at 39, *quoting* J. MADISON, *Letters of Helvidius,* in WRITINGS 148 (G. Hunt ed. 1906).

[37] *Id.* at 38, *quoting* 6 J. MADISON, *Letters of Helvidius,* in WRITINGS 138, 174 (G. Hunt ed. 1906).

[38] Fulbright, *supra* note 34, at 74, *quoting* 15 THE PAPERS OF THOMAS JEFFERSON 397 (J. Boyd ed. 1955).

Congress's powers to "provide for the common defence," [39] to "raise and support armies," [40] "to provide and maintain a navy," [41] "to regulate commerce with foreign nations," [42] "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations," [43] to "grant letters of marque and reprisal," [44] to "make rules concerning captures on land and water," [45] "to make rules for the government and regulation of land and naval forces," [46] "to provide for calling forth the militia to execute the laws of the union," [47] to "suppress insurrections and repel invasions," [48] "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States," [49] "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," [50] and, most importantly, "to declare war," [51] clearly leave the Executive only ministerial war power prerogatives, and these he may exercise only within parameters determined largely by Congress.

Congress's textual grant of power to "declare war" provides, with only one qualification, the exclusive power to initiate war,[52] whether declared or undeclared.[53] The sole qualification upon Congress's exclusive power

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James Wilson, recognized as a proponent of a "strong Executive," referred to the "declare war" provision in ratification debates in Pennsylvania:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man . . . to involve us in such distress; for the important power of declaring war is vested in the legislature at large . . . from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (1937).

[39] U.S. CONST. art. I, § 8, cl. 1.

[40] *Id.* cl. 12.

[41] *Id.* cl. 13.

[42] *Id.* cl. 3.

[43] *Id.* cl. 10.

[44] *Id.* cl. 11.

[45] *Id.*

[46] *Id.* cl. 14.

[47] *Id.* cl. 15.

[48] *Id.*

[49] *Id.* cl. 16.

[50] *Id.* cl. 18.

[51] *Id.* cl. 11.

[52] See Wilson's statement in 2 J. ELLIOT, *supra* note 38. Secretary of State Daniel Webster said (in 1851):

> . . . I have to say that the war-making power in this Government rests entirely with Congress; and that the President can authorize belligerent operations only in the cases expressly provided for by the Constitution and the laws. By these no power is given to the Executive to oppose an attack by one independent nation on the possessions of another. . . . [I]f this interference be an act of hostile force, it is not within the constitutional power of the President . . . .

Quoted in Van Alstyne, *Congress, The President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 11 (1972), *quoting* 7 DIGEST OF INTERNATIONAL LAW 163–64 (J. Moore ed. 1906).

[53] The Congress possesses all war-making powers of the United States. Those powers not specifically falling within the "declare war" provision most assuredly were residual in the "grant letters of marque and reprisal" clause. U.S. CONST. art. I, § 8, cl. 11.

to initiate war is the presidential prerogative to use military force to repel sudden attack upon the United States [54] and, after the War Powers Amendment, upon its forces.[55] James Madison and Elbridge Gerry made joint motion to change Congress's power from *make* war (the original wording of the clause as proposed by the Committee on Detail) to *declare* war, for the purpose as recorded by the notes of the convention kept by Madison, of "leaving to the Executive the power to repel sudden attacks." [56] Congress's war powers also extend to the circumstances of war's termination.[57]

As Commander-in-Chief, the President has substantial though not unlimited power to direct a war once it has been initiated by Congress. Hamilton, the powerful advocate of presidential prerogatives, outlined the limits of the President's power as Commander-in-Chief in *The Federalist Papers*:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends

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See Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 696 (1972).

Thomas Jefferson, as Secretary of State, analyzed the "undeclared war" element of reprisal:

> [A] reprisal on a nation is a very serious thing. . . . [W]hen reprisal follows, it is considered an act of war, and never failed to produce it in the case of a nation able to make war; besides, if the case were important and ripe for that step, *Congress must be called upon to take it;* the right of reprisal being expressly lodged with them by the Constitution, *and not with the Executive.*

Quoted in 7 INTERNATIONAL LAW DIGEST § 1095, at 123 (J. Moore ed. 1906) (emphasis added).

Pierce Butler, a Convention delegate from South Carolina, stated:

> It is improbable that a single member of the Convention have signed his name to the Constitution if he had supposed that the instrument might be construed as authorizing the President to initiate a war, either general or partial, without the express authorization of Congress.

Quoted in Fulbright, *Congress, the President and the War Power*, 25 ARK. L. REV. 71, 74 (1971). Early cases decided by the Supreme Court also left little doubt about the power of Congress over both "declared" and "undeclared" wars. The word "war" was not confined to mean only general ("declared") war. The Supreme Court furthermore found that the President must abide by the limitations set by Congress. Little v. Barreme, 6 U.S. (2 Cranch.) 170 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch.) 1 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 36 (1800).

[54] The records of the constitutional convention leave little doubt that it was the intent of the Framers to provide an exception to the congressional war powers enabling the President to repel sudden attacks upon the United States. "Mr. MADISON and Mr. GERRY moved to insert *'declare,'* striking out *'make'* war; leaving to the Executive the power to repel sudden attacks." Van Alstyne, *supra* note 34, at 6, *quoting* 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, at 318–19 (M. Farrand ed. 1911).

[55] S. 440, 93d Cong., 1st Sess. § 3 (1973), provides:

> To repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack.

See 50 U.S.C.A. §§ 1541–48 (Supp. 1974).

[56] Van Alstyne, *supra* note 34, at 6, *quoting* 2 RECORDS OF THE FEDERAL CONVENTION OF 1789 (M. Farrand ed. 1911).

[57] Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948).

> to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, — all which, by the Constitution under consideration, would appertain to the legislature.[58]

The President, possessing no power to initiate or wage executive war other than the power to repel sudden attacks, has been further limited by Congress in his exercise of the powers of Commander-in-Chief.[59] Congress has statutorily circumscribed presidential prerogatives to use troops for particular purposes and in certain areas of the world.[60] He may not raise armies without congressional authorization,[61] nor may he violate the Laws of War as determined by Congress.[62] Congress's power to issue letters of marque and reprisal, coupled with the original understanding of congressional power to declare war, should mean that Congress has complete power over the commencement of war, whether declared or undeclared ("imperfect").[63] The vast majority of Executive wars cited [64] as precedents for the legality of the Executive origin of the Vietnam War based upon Commander-in-Chief powers of the President are distinguishable on their face as minor events, often involving the landing of troops to protect American civilians abroad.[65] The only valid precedent for the constitutional prerogative of the President to initiate war, though clearly distin-

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[58] THE FEDERALIST No. 69, at 448 (Modern Library ed. 1937) (A. Hamilton).

[59] *See* Wormuth, *supra* note 34, at 652 *et seq.*

[60] *Id.* at 639–40. Congressional acts have regulated or forbidden the use of troops to accomplish the return of fugitive slaves and have forbidden the use of troops at polling places and as posse comitatus, or marines on shore. Other acts have provided for selective service and training limitations, and termination of activities in Indochina.

[61] *Id.* at 642. For example, Abraham Lincoln's use of volunteers at the beginning of the Civil War was dependent upon subsequent congressional legislation. United States v. Hosmer, 76 U.S. (9 Wall.) 432 (1870).

[62] Wormuth, *supra* note 34, at 645.

[63] Lofgren, *supra* note 34, at 699–700. Lofgren concludes:

> Since the old Congress held blanket power to "determine" on war, and since undeclared war was hardly unknown in fact and theory in the late eighteenth century, it therefore seems a reasonable conclusion that the new Congress' power "to declare War" was not understood in a narrow technical sense but rather as meaning the power to commence war, whether declared or not. To the extent that the power was more narrowly interpreted, however, the new Congress' control over letters of marque and reprisal must have suggested to contemporaries that it would still control "imperfect" — that is, undeclared — war.

Id.

[64] 117 CONG. REC. 11,913–24 (1971) (remarks of Senator Goldwater); Goldwater, *The President's Constitutional Primacy in Foreign Relations and National Defense,* 13 VA. J. INT'L L. 463 (1973); Rostow, *Great Cases Make Bad Law: The War Powers Act,* 50 TEX L. REV. 833 (1972).

[65] Of the 137 cases of Executive action claimed by the State Department, forty-eight had clear congressional authorization, one was in self-defense, six were mere demonstrations, some others were trespass or spontaneous, unsanctioned acts by lower commanders, and several were clearly unconstitutional acts by the President. Wormuth, *supra* note 34, at 660 *et. seq.* "Even were these incidents to be regarded as equivalent to executive waging of war, the last precedent would stand no better than the first; illegality is not legitimized by repetition." Berger, *War-Making by the President,* 121 U. PA. L. REV. 29, 60 (1972).

guishable in terms of international law,[66] is the Korean War. In that regard, it must simply be affirmed that violation by a President of a clear and exclusive textual grant of authority to Congress must not be taken to legitimate similar subsequent violations.[67]

The Tonkin Gulf Resolution, though not a congressional authorization for war,[68] may reasonably be interpreted as an attempt by Congress to delegate its war powers to the President[69] and directly to authorize his acts in the nature of reprisals.[70] Even though the Supreme Court has not stricken a delegation of congressional powers to the Executive since the 1930's,[71] the specificity of the textual grant of the war power to Congress, together with its profound impact upon the entire conception of separation of powers, suggests that delegation of such powers should not be tolerated. In any event, whatever authority the President derived from the Tonkin Gulf Resolution was terminated with its repeal in 1971. At least after that time, the United States fought an unconstitutional war in Southeast Asia.

It seems clear that the war powers cannot be delegated by treaty, specifically by the provisions of the Southeast Asian Treaty,[72] without participa-

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[66] Within the context of international law, two highly significant factors distinguish our participation in the Korean War from our role in Vietnam. First, the United Nations by Security Council resolution had determined the existence of an armed attack by the forces of North Korea upon South Korea. The resolution called upon all member states to provide military forces under a unified United Nations command to repel the attack. 5 U.N. SCOR, 476th meeting 5, U.N. Doc S/1588 (1950). Second, the massive, completely unambiguous nature of the armed attack verified by United Nations fact-finding at the time of the assault, contrasts sharply with the indirect aggression that characterized the early years of the Vietnam War. *See* Firmage, *Fact-Finding in the Resolution of International Disputes — From the Hague Peace Conference to the United Nations,* 1971 UTAH L. REV. 421, 445–46.

[67] Many writers who are critical of the several lists of "Executive wars" because of the insignificance of the examples set forth find little problem in accepting the Korean conflict and the Vietnam action as examples of "Executive wars." The Senate Foreign Relations Committee has issued a statement that "only since 1950 have Presidents regarded themselves as having authority to commit the armed forces to full scale and sustained warfare." S. REP. No. 707, 90th Cong., 1st Sess. 24 (1967).

President Johnson, in much the same way as President Truman handled the Security Council resolution, did not place primary legal reliance upon the Tonkin Gulf Resolution. Instead, he repeatedly asserted a constitutional, presidential power to conduct war in Southeast-Asia.

[68] Wormuth finds four differences between the Tonkin Gulf Resolution and initiation of war by Congress: (1) The Resolution did not initiate hostilities, but only authorized the President to do so; (2) The Resolution did not define our legal status, *i.e.,* general or limited war; (3) The Resolution defined no adversary state; and (4) No treaty of peace requiring Senate concurrence was demanded; accordingly, the President could freely conclude a peace as well as authorize a war. Wormuth concludes that since the Tonkin Gulf Resolution performed none of the functions of a declared war, it could not operate as a declaration of war. It was an outright presentation of the war power to the President and, as such, was an unconstitutional delegation of congressional power. Wormuth, *supra* note 34, at 691–92. *See also* Van Alstyne, *supra* note 34, at 20.

[69] Wormuth, *supra* note 34, at 692.

[70] See Tonkin Gulf Resolution, H.R.J. Res. 1145, 88th Cong., 2d Sess., 78 Stat. 384 (1964), wherein the President is authorized to repel an attack against United States forces and to "prevent further aggression."

[71] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 292 U.S. 388 (1935).

[72] *See* Firmage, *International Law and the Response of the United States to "Internal War,"* in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 89, 116–17 (R. Falk ed. 1969). Article four, paragraph one, of the Southeast Asia Collective defense Treaty (SEATO) states:

tion by the House of Representatives in the treaty-making process.[73] SEATO requires that its member states act only "in accordance with [their] constitutional process." [74] The President must not be allowed the ultimate bootstrap of initiating an international agreement (SEATO), claiming the constitutional mandate to see "that the laws be faithfully executed," [75] and then waging a war — otherwise proscribed by the Constitution — upon the argument that it is required by the international agreement. Neither presidential power to initiate war nor congressional authority to delegate its war powers can be accomplished by international agreement contrary to constitutional restraints. In *Reid v. Covert,* the Supreme Court stated that

> no agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution.
>
> . . . It would be manifestly contrary to the objectives of those who created the Constitution [and] alien to our entire constitutional history and tradition . . . to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.[76]

Covert mercifully lays to rest the question whether the power to make international agreements somehow releases the federal government from constitutional constraints, a question raised in part by a broad reading of *Missouri v. Holland* [77] and in part by Mr. Justice Sutherland's tortured history of the origin of national power to conduct foreign policy.[78]

> Each party recognizes that aggression by means of armed attack in the treaty area against any of the parties or against any state or territory which the parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger (1955) *in accordance with its constitutional processes.*

6 U.S.T. 81, T.I.A.S. No. 3170, *reprinted in* 60 AM. J. INT'L L. 647 (1966) (emphasis added).

> [T]he treaty commitment, rather than empowering the President to undertake the use of military force, sets an international contractual obligation — obliging Congress to make the declaration of war if it intends to fulfill the treaty commitment.

Van Alstyne, *supra* note 34, at 14.

[73] The Constitution vests the war powers in both Houses of Congress, and not in the President and the Senate, as with the treaty power. The alternative — granting to the President the power to initiate war with Senate concurrence — was specifically considered and rejected at the Convention. *See* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292, 300 (M. Farrand ed. 1911).

[74] SEATO Treaty, art. 4, ¶ 4, 6 U.S.T. 81, T.I.A.S. No. 3170, *reprinted in* 60 AM. J. INT'L L. 647 (1966).

[75] U.S. CONST. art. II, § 3.

[76] Reid v. Covert, 354 U.S. 1, 16–17 (1957).

[77] 252 U.S. 416 (1920).

[78] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). According to Mr. Justice Sutherland, power to conduct foreign policy was somehow transferred directly from the Crown to the federal government and does not inhere to the federal government through grant from the Constitutional Convention. Justice Sutherland wrote for the Court: "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the

The constitutional mandate that the "executive power shall be vested" [79] in the President is not a grant of inherent power, much less an executive authorization to do all things "necessary and proper" to accomplish delegated prerogatives. Rather, it is simply the power ministerially to execute laws enacted by Congress. The President's constitutional mandate to execute the laws in no way authorizes the President to perform the legislative task of creating the laws to be executed. When considered in the context of the war power, the President's executive power does not in any way increase his enumerated power as "Commander-in-Chief." This is the meaning of the *Steel Seizure* and *New York Times* cases.[80] An acknowledgment of inherent presidential power would constitute a giant stride toward eliminating the distinction between republican government and imperial presidency.

Finally, it is quite proper that foreign affairs remain dominantly the domain of the political branches of government. Foreign affairs has constituted the "hard core" of the political question doctrine from the beginning. Even so, the courts have often spoken on vital issues of foreign policy.[81] As the communal roots of a society deepen and the community matures, it would seem reasonable that decisions could increasingly be made more in accordance with rules of law and somewhat less by political accommodation. Accordingly, one might expect to see a gradual but steady constriction of the scope of the political question doctrine. But where the Constitution accomplishes a clear textual grant of power to one political branch, it would seem entirely proper for the Court to reject the political question argument and reach the merits of a controversy. Under *Baker v. Carr*,[82] a "textually demonstrable constitutional commitment of the issue to a coordinate political department" qualifies as a political question. However, the branch to which such power has been granted must stay within its constitutional mandate; whether a branch exceeds such mandate is justiciable, according to *Powell v. McCormack*.[83] Whether we should be at war at a given time, with whom, and for what reason are political questions rightly reserved to the political branches. But the issue

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United States of America." *Id.* at 316; *see* Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973); Wormuth, *supra* note 34, at 694.

[79] U.S. CONST. art. II, § 1, cl. 1.

[80] *See* New York Times Co. v. United States, 403 U.S. 713 (1971); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[81] In keeping with the intentions of the framers, the Court has held that the President may repel a sudden attack, whether by invasion or by insurrection, that Congress may institute either general or limited war, and that the President in waging war may not exceed his statutory authority. The rank, status, duties, and discipline of members of the armed forces are fixed by Congress. The recruitment of the armed forces, the draft, the confiscation of enemy property, the appropriation of factories, the suspension of the writ of habeas corpus — all these and other topics have been adjudicated and held to belong to Congress.

Wormuth, *supra* note 34, at 678–79 (footnotes omitted).

[82] 369 U.S. 186 (1962).

[83] 396 U.S. 486, 514 (1969). *See also* Bond v. Floyd, 385 U.S. 116 (1966).

whether war was initiated in accordance with the Constitution's clear textual mandate to Congress is justiciable and should be decided by the Court.[84]

The concept of separated powers, properly checked and balanced, has too long been allowed to atrophy because of a tilt toward the Executive branch. This trend, too frequently advanced by Executive action during times of war, must be reversed, and a condition of equilibrium reestablished. Perhaps the causally related shocks of Vietnam and Watergate will generate currents of opinion sufficiently strong and enduring to facilitate institutional reform capable of returning us to old moorings.[85]

In addition to the constitutional constraints upon Executive action, extra-constitutional constraints must be preserved and in some cases revitalized. Although these concepts cannot be developed here, such constraints upon arbitrary presidential action include a strong political party structure to which the President would in some degree be accountable; a White House staff with seniors committed to republican government and the rule of law and juniors sufficiently beyond identity crises to avoid seduction; a Cabinet composed of members of sufficient independent political or professional base to allow private if not public dissent from presidential policies; and a presidential schedule that would allow leading politicians of both parties access to the presidential ear. Finally, a free press, though not formally a part of the system of checks

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[84] In 1821, Chief Justice Marshall, in Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821), stated:

> It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Id. at 404.

The abstention and political question doctrines are exceptions to Marshall's dictum, and perhaps rightly so. But the goal recognized in the statement remains valid, particularly as it relates to the question of a clear textual grant of power to one branch of government that is usurped by another without the necessity of a struggle.

See also Massachusetts v. Laird, 400 U.S. 886 (1970) (Harlan & Stewart, J.J., dissenting); Hart v. United States, 391 U.S. 956 (1968) (Douglas, J., dissenting); Holmes v. United States, 391 U.S. 936 (1968) (Douglas, J., dissenting); Mora v. McNamara, 389 U.S. 934 (1967) (Stewart & Douglas, J.J., dissenting); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971) (court found a justiciable question and reached the merits of the case concerning United States military activity in Vietnam).

[85] George Washington said:

> The necessity of reciprocal checks of political power . . . has been evinced. . . . To preserve them must be as necessary as to institute them. If in the opinion of the people, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

35 G. WASHINGTON, WRITINGS 228–29 (Fitzpatrick ed. 1940).

and balances, provides the life fluid — from a position shielded by the first amendment — without which the entire constitutional structure would be impotent. A conditional privilege for newsmen's sources of information is essential.

B. International Law and Vietnam

The existence of nuclear weapons has made massive warfare between nuclear-weapon states highly unlikely and has also precipitated increasingly strong customary legal constraints upon such forms of warfare. Similarly, the trauma of the Vietnam War, by force of its ghastly impact upon all participants, may affect certain international rules of behavior. The norms most likely to be affected are those governing the conditions under which nations go to war and the means by which war is fought.

Within the traditional norm [86] governing third party participation in civil strife, third parties could aid the incumbent government at least initially, they could not aid the insurgent faction at least until a status of belligerency was attained, and they were required to be neutral after such status was attained; this norm has been seriously undercut. A fundamental justification for a rule favoring the incumbent has been the accuracy of perceiving the valued roles performed by the incumbent in society. Thus, a legal presumption favoring the incumbent was defensible because its very existence strongly suggested its legitimacy. The term "legitimacy" is not used here in the legalistic sense of the acquisition of power by formally orthodox or proper means; rather, it is used, as the political scientist or sociologist would use it, to connote a sufficient affinity between the people and the institutions of government, based upon the preexistence of a cultural harmony between them, that allegiance naturally results without coercion.[87] Because of this affinity between the people and their government, the government could perform essential functions such as the maintenance of order, the collection of taxes, and the performance of other basic tasks. In those parts of the so-called Third World that have experienced colonial rule, the emergence of governing elites possessing the characteristics of political legitimacy has not occurred immediately, nor has it always taken the direction preferred by the former colonial ruler. Often, several factions have contended for dominance, or former colonial rulers have attempted to impose their choice for native leadership upon the society.

The result has been a blurred distinction between incumbent and insurgent. Most incumbents have lacked many if not all of the traditional characteristics of incumbency. In such a situation the underpinnings of the

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[86] *See* Firmage, *Summary and Interpretation,* in THE INTERNATIONAL LAW OF CIVIL WAR 405 (R. Falk ed. 1970).

[87] *See* Firmage, *The War of National Liberation and the Third World,* in LAW AND CIVIL WAR IN THE MODERN WORLD (Moore ed. 1974). Lipset has defined legitimacy as the capacity of a political system to advance and maintain the belief that existing political institutions were the most appropriate for the community. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy* 53 AM. POL. SCI. REV. 69 (1959).

traditional rule, with its presumption of incumbent legitimacy, have been largely destroyed. The traditional rule cannot survive in those areas with a colonial past, at least until traditional elites emerge possessing sufficient legitimacy to govern.

It follows that a new norm governing third party involvement will develop; that rule will either allow unrestricted military aid to both incumbent and insurgent without distinction, or it will proscribe military assistance to any faction in a state experiencing civil strife, or it will allow some forms of aid under restrictions falling somewhere between the two pole positions. The first possibility would permit unrestrained intervention and is best described as the absence of a norm rather than the creation of a new one. The second possibility, proscribing any form of third party military aid, would probably be at once the most desirable and the least likely of accomplishment. Modified versions of this norm, sufficiently realistic to be acceptable to most powerful states, have been suggested and analyzed by Farer and Moore.[88] Our experience in Vietnam clearly demonstrates the illegality, the immorality, and the hopelessness of intervention in support of an incumbent regime that lacks sufficient legitimacy to govern without outside assistance.

World-wide offense at American participation in the Vietnam War stemmed not only from the perceived illegitimacy of our intervention, but also from the strategy and the weaponry employed. A clear absence of proportionality existed from the beginning; it was made apparent to the world because of television, and it was made more damning upon release of the Pentagon Papers, which revealed no serious debate on the moral and legal questions involved in waging modern war against a native society. A strategy necessitating free-fire zones, forced depopulation of major areas, carpet bombing, bombing of major urban areas, and use of the most sophisticated weaponry with massive firepower obliterates any distinction between combatant and non-combatant. The moral and legal consequences resulting from the needless deaths of hundreds of thousands of people should be enough to deter other states from similar conduct. But if this is not enough, the spectacle of our political fabric being more seriously rent by our involvement in Vietnam (followed both chronologically and causally by Watergate) than by any other event since the Civil War should give pause to states considering similar policies of intervention into post-colonial wars of separation and revolution.

III. Conclusion

The end of American participation in the Vietnamese war, rapprochement with the Soviet Union, and normalization of relations with China effectively conclude the ideological binge that the world has enjoyed since

[88] Farer, *Harnessing Rogue Elephants: A Short Discourse on Intervention in Civil Strife*, in 2 The Vietnam War and International Law 1089 (R. Falk ed. 1969); Moore, *The Control of Foreign Intervention in International Conflict*, 9 Va. J. Int'l L. 205 (1969).

the political fossilization of the military conclusion of World War II. Traditional balance of power politics can now be indulged with more actors than two. This condition represents a giant step forward from that of the Cold War. In many respects, however, this places us back on square one — circa 1918 or perhaps 1945 — with the alternative of attempting in perpetuity a balance of power sufficient to ensure the peace or, in recognition of the inherent instability of such a system, attempting a deepened international community sufficient to support legitimate institutions for cooperation and dispute resolution. Law can contribute to the deepening of international community to the extent that it is acknowledged to be more than the superstructure of community and actually part of its warp and woof.

Reactionary foreign policy could result from two conditions. First, an attempt to return simply to the politics of classic balance of power, without recognizing the need for an increased role for institutions of law, would represent a tragic waste of this foreign policy watershed. Kissinger and Kennan can no more hope to control perpetually the multiple variables in such a system of inherent instability than could Metternich and Bismark. Second, premature or unjustified reliance upon legal institutions could result in a disillusioned reaction against them and could cause total reliance upon geopolitics and force.

To reiterate, international order can be furthered by introjecting legal constraints on decisional processes in four suggested areas. First, the degree to which a government adheres to its own legal constraints, constitutional or otherwise, bears directly on international peace. Second, the degree to which a government's decisional processes adhere to international legal constraints also affects international order. Third, the extent to which a government promotes and sustains international institutions contributes to international order. And fourth, the level of legal consciousness that the world public has realized acts as a real constraint on governments that would otherwise act in disruption of international order.

In earlier times, when men were perhaps closer to the truth than later generations may care to admit, sovereign discretion was considered to be limited by four levels of law: the laws of God; the laws of nature; *leges imperii,* or the laws of government — in our day, constitutional law; and finally, laws common to all nations, or international law. Today we accomplish the first by a well publicized prayer breakfast, deny the existence of the second, ravage the third by claiming our own past violations as precedent for continued violations, and use the fourth to rationalize a course of conduct determined largely by other motives. The first contribution of law to the accomplishment of peace might well consist of an attempt to control our own illegal predilections toward violence, recognizing that in recent years we have been among the major contributors to a violent world. An "Athenian stranger" observed hundreds of years ago that "the state in which the law is above the rulers, and the rulers are the inferiors of the law, has salvation, and every blessing which the gods

can confer." [89] If we were to achieve that happy condition, we would at once eliminate much violence now caused by our own illegal acts, and perhaps we would then be in the position to deserve and receive the emulation of others.

[89] PLATO, LAWS BK. III (J.M. Dent Trans. 1934).