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JURISPRUDENCE: VIETNAM AND CIVIL DISOBEDIENCE

GIDON GOTTLIEB

The two great crises of American life in 1967, Vietnam and the race riots, have revived ancient disputes between the citizen and the state. Opposition to United States actions in the war and to racial domination by the white majority has led, in many cases, to acts of civil disobedience and resistance. These in turn have prompted a debate on the limits of civil disobedience and on the duty to obey the law.

Objections to civil disobedience have rested on three fundamental assumptions: that there is a legal duty to obey the law and that the boundary between legitimate and illegitimate orders, practices, and enactments can be clearly drawn; that the duty to obey the law requires obedience to the lawfully constituted authorities; and that in democracies the avenues for peaceful change provide an alternative to unlawful modes of protest and civil disobedience.

The trouble is that insofar as the Vietnam war is concerned none of these assumptions is warranted. Complex questions are when Government actions are of questionable legality and when doubts about their legality cannot be dispelled by adjudication; these difficulties are compounded when none of the three departments of the Government abides by governing principles of law.

In this essay, I propose to survey some constitutional and jurisprudential aspects of the troubling issues that have been raised about the legality and the constitutional propriety of resistance to the Government’s war policy.

I

Vietnam: The Claims for Disobedience and Resistance.—Expert professional opinion has charged the President with unlawful action in Vietnam. It has accused him of violating the Constitution, the law of nations, and the treaties which are the supreme law of the land. The executive

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branch has thus itself been accused of disobedience, of disregarding the principles of the rule of law.

The Vietnam war has led an important body of citizens into direct conflict with the Government. Attempts to alter American policy in Vietnam were confined at one time largely to the exercise of first amendment rights of speech, assembly, and petition. A number of attempts, however, have recently been made to have the courts pass on the legality of the war itself. This they have thus far declined to do. Opponents of the war claim to have exhausted the avenues for peaceful change provided in the Constitution. They claim that the magnitude of the wrong which forms the basis of their complaint is truly enormous, requiring an urgent and effective remedy. These opponents do not seek to impose their political will on an unwilling majority. Their claims are not political; their demands are not those of a political minority. They advance primarily legal and moral claims involving the judicial competence of the Administration, though admittedly the motives for their opposition are not legal or constitutional. On the other hand, however, the Government's case against draft card burners, deserters, and other opponents is based on the principle of the rule of law. It is in response to attempts to enforce the law that opponents of the war are led to challenge the legitimacy of the state's own actions. They claim, in reply to charges that they are violating the law, that they are merely resisting the lawless behavior of the state itself.

Thus, while it is perfectly true that the opposition to the war is not primarily motivated by constitutional considerations, criticism of that opposition is dominated by a concern for law and order. This sequence is important. It situates the legal issues in the web of justifications, claims, and counterclaims. Ultimately, however, opposition to the war on moral grounds requires that, even should there be no doubts about the constitutionality of the State action, the demands of morality prevail. The conflict between the demands of law and morality arises only when the legitimacy of government action is itself beyond doubt. The strategy of arguments involves, therefore, a sequence of claims and responses which can be summarized as follows:

1. Opponents of the war, guided by moral or pragmatic considerations, urge civil disobedience and resistance involving violation of the draft laws and other laws.

3. On the principle of proportionality, see Williams v. Wallace, 240 F. Supp. 100, 106 (M.D. Ala. 1965), "[T]he extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against."

4. See the Coffin case.

5. See the Coffin case.
2. The Administration, guided by legal and political considerations of its own, seeks to punish alleged violations of the law.

3. Opponents respond that under the Constitution the authority of the President is limited by domestic and international law and that in his conduct of the war he is usurping powers not granted to him. They justify their violations as an attempt to resist illegitimate authority after having failed to do so by persuasion and by adjudication.

4. Critics of the opposition respond that there has been no court determination that the conduct of the war is unlawful in any way and that in the absence of such determination the claims of the opposition are unfounded. There is, moreover, a presumption that the acts of a legitimate government are lawful.

5. Opponents respond that in light of the courts' refusal to hear their arguments about the legality of the war, under the "political question" doctrine, they are fully entitled to determine for themselves in good faith the issue of legality; in such circumstances, they claim, the presumption of legality can be rebutted.

6. Critics of the opposition argue that the law is what the courts say it is and that judicial rejection of the opponents' claim, even in the form of a refusal to hear their case, amounts to a legitimation of government action.

7. Opponents respond that under the Constitution the courts do not have the exclusive right to determine what is constitutional and what is not, and that the courts have clearly chosen not to decide the issue.

In this succession of claims and counterclaims, hard questions are raised as to the role of the courts in our system of government. They are again invited to rule upon one of the great conflicts tearing American society apart and threatening the integrity of its institutions.

II

Civil Disobedience: Constitutional Values at Stake.—The call to resist illegitimate authority poses delicate legal problems. Significantly, international law and treaty obligations are now resorted to as a basis for challenging the legitimacy, rather than the morality, of government action. International law provides a juridical basis for objecting to state actions that may otherwise satisfy the demands of the domestic legal order. It provides a legal standard for assessing the behavior of states. It is not always clear when authority is legitimate, when laws are constitutional, and when actions are lawful. When uncertainty prevails, protesters take their chance. They may challenge a law, they may challenge the authority of a government official, and the final outcome of adjudication will often be uncertain.
The gravest legal and moral problems arise, however, where opposition and resistance is contemplated against laws that are plainly valid and government orders that are clearly legitimate on the grounds that a superior moral law or the dictates of conscience so require. In such circumstances, the constitutional values involved are weighty and fundamental. Resistance to laws of unquestionable legal validity compels the state to resort to coercion. Such resort necessarily weakens voluntary compliance and acceptance by the people of government authority. Government by consent—the rule of law—and the modes of peaceful change are then correspondingly weakened. Historical memories also turn to the danger of mobs initially animated by a burning passion for justice that are later swept by a desire for plunder and revenge. This threat was in Mr. Justice Black's mind when he said that:

Experience demonstrates that it is not a far step from what to many seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow. And the crowds that press in the streets for noble goals today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends.⁶

The rule of law need not be designed to secure only order and protect established interests. It is the only substitute for force and power yet devised in political societies. As the guarantor of liberty and peaceful change, it far transcends its traditional role as the defender of the status quo. Civil resistance unquestionably weakens the hold of the rule of law and its acceptance by the governed. In this weakening, the whole equilibrium of a force-free society is upset. The constitutional values at stake are not merely the demands of order as against the claims of conscience and justice. What is involved is government by consent of the governed and the pursuit of life, liberty, and happiness. Some have suggested that what is at stake is the survival of society itself. For, as Mr. Justice Whitaker has recently reasserted, disorderly society cannot survive.⁷ We must never forget, however, that even whole societies can be criminal, committed to horror, tyranny, and domination; that it is not always possible to put respect for the body politic above the claims of conscience and justice.

In the final analysis, the denial of fundamental human rights is itself subversive of the fundamental design of the rule of law. Pervasive injustice militates against government by consent. The denial of equal protection of the laws on the basis of race or income threatens the avenues of peaceful change. Injustice rots the pillars of popular acceptance of authority. Inas-

⁶ Cox v. Louisiana, 379 U.S. 559, 584 (1965) (dissenting opinion).
much as the rule of law is designed to substitute the assent of the governed for the force of the ruler, it is irrevocably wedded to the pursuit of social justice. The necessary connection between the rule of law and the pursuit of a just social order has long been obscured by dominant theories of legal positivism. Cataclysmic events both at home and abroad have now made this link manifest.

III

The War Power and Congress.—The Founding Fathers could not have foreseen that the foreign affairs and war powers would one day become the presidency’s most potent attribute. Their intent was to vest the power to commit the United States to war in the Congress. It was conferred upon Congress alone while the President was left with the authority to repel sudden attacks only. The growth of presidential power over foreign affairs was accompanied by a corresponding growth of treaty limitations on the international use of force and the conduct of warfare. Despite the supremacy clause in article VI of the Constitution, the full force of these treaties has never been brought to bear upon the presidency. The reluctance of the Supreme Court to become involved in foreign relations has in practice allowed the executive to interpret public rights under treaties politically, without fear of judicial pronouncement. More recently, however, the dominance of the presidency has become such that the checks of congressional participation in foreign relations are becoming increasingly inadequate. The relations between the President and Congress have been reviewed by the United States Senate Foreign Relations Committee. The Committee pointed out that:

Our country has come far toward the concentration in its national executive of unchecked power over foreign relations, particularly over the disposition and use of the armed forces. So far has this process advanced that, in the committee's view, it is no longer accurate to characterize our government, in matters of foreign relations, as one of separated powers checked and balanced against each other.

8. Where public rights are involved in a treaty, the courts accept the interpretation of the political departments. "So far as treaties are regarded as international compacts the national rights and obligations accruing thereunder are determined by the political departments of the government." I. Willoughby, Constitutional Law of the United States 578 (2d ed. 1929). C. Post, The Supreme Court and Political Questions 81 (1936).


It cited with approval the language of the Supreme Court in Myers v. United States:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.11

The Committee concluded as follows:

Claims to unlimited executive authority over the use of armed force are made on grounds of both legitimacy and necessity. The committee finds both sets of contentions unsound.

The argument for legitimacy is based on a misreading of both the Constitution and the experience of American history. A careful study of the Constitution and of the intent of the Framers as set forth in the extensive documentation which they bequeathed to us leaves not the slightest doubt that, except for repelling sudden attacks on the United States, the founders of our country intended decisions to initiate either general or limited hostilities against foreign countries to be made by the Congress, not by the executive.12

It is indeed salutary to recall that our major wars were the outcome of presidential policies in the making of which Congress played a distinctly secondary role.13

The adjustment of the relationship between the legislative and the executive branches in the making of war and peace decisions, as recommended by the Senate Committee, requires the fencing in of presidential powers by political action. These powers have already been formally checked by treaties, restricting the freedom of the United States to wage war and regulating the conduct of hostilities—treaties such as the Kellogg Briand Pact, the United Nations Charter, and the 1949 Geneva Conventions. The powers of the presidency are not left intact by these treaties. In a well-known opinion, Mr. Justice Miller discussed the President's duty to take care that the laws be faithfully executed:

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself,

our international relations, and all the protection implied by the nature of the government under the Constitution?\textsuperscript{14}

As Corwin reminds us, Attorney General William Wirt had argued that the "laws" to which the "faithfully executed" clause referred comprised not only the Constitution, statutes, and treaties, but also "those general laws of nations which govern the intercourse between the United States and foreign nations."\textsuperscript{15} The United States, having become a member of this society of nations, was obliged to respect the rights of other nations under that code of laws and the President, as the chief executive officer of the laws, and as the agent charged with the superintendence of the nation's foreign intercourse, was bound to rectify injury and preserve peace. When Theodore Roosevelt "took Panama," Senator Morgan, (a precursor of Senators Morse and Fulbright), said in the Senate:

The President has paused in his usurpation of the war power, but not until he had gone to so great a length that he believed Congress would be compelled to follow the flag to save appearances and adopt a war that he was actually waging against Colombia under guise of treaty obligations to protect the transit across the Isthmus of Panama. . . . To obtain ratification of his excessive adventure he comes to the Senate and appeals to its special treaty-making power to join him in giving sanction to the war he had begun and is conducting with a display of war power at sea that is far greater than was mustered in the war with Spain, all under the pretext of protecting the isthmian transit. He asks the Senate to usurp the power of Congress to declare war, instead of making his appeal to Congress.\textsuperscript{16}

The Senate, rather than the courts, was the effective arena for charging that the President's conduct in Panama had violated the treaty obligations of the United States. The courts' noninvolvement was complete. The passivity of the courts, however, in relation to the President was ended in \textit{Youngstown Sheet & Tool Co. v. Sawyer}\textsuperscript{17} in which the Court reviewed the President's authority to seize the nation's steel mills, distinguishing \textit{Mississippi v. Johnson},\textsuperscript{18} in which it had confessed its inability to enjoin the President from exceeding his constitutional powers. Mr. Justice Brennan, speaking for the Court in \textit{Baker v. Carr},\textsuperscript{19} indicated that the question whether the courts would refuse to adjudicate is itself a constitutional question:

\begin{itemize}
  \item \textsuperscript{14} In re Neagle, 135 U.S. 1, 64 (1890).
  \item \textsuperscript{15} 1 Op. Att'y Gen. 566, 570 (1822).
  \item \textsuperscript{16} Cited in Corwin, supra note 13, at 475-76.
  \item \textsuperscript{17} 343 U.S. 593 (1952).
  \item \textsuperscript{18} 71 U.S. (4 Wall) 475 (1857).
  \item \textsuperscript{19} 369 U.S. 186 (1962).
\end{itemize}
Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.\textsuperscript{20}

The dissent of Justices Douglas and Stewart in the per curiam decision to deny certiorari in \textit{Mora v. McNamara}\textsuperscript{21} has now raised the remote possibility that the courts may be willing at some future time to review the legitimacy of government actions in the light of governing treaty obligations.

\textbf{IV}

\textit{The Supreme Court and the Vietnam War.}—The attempts to challenge the legality of the United States action in Vietnam have failed so far even to evince a consideration of plaintiffs' claims on their merits. The Supreme Court has had the opportunity to hear the issue. In \textit{Mitchell v. United States},\textsuperscript{22} the Court denied certiorari over the dissent of Mr. Justice Douglas. In that case, petitioner did not report for induction as ordered, was indicted, and sentenced to 5 years imprisonment. The issue of the legality of the war was raised as a defense in the criminal prosecution. His case raised a number of questions:

1. Whether the Treaty of London is a treaty within the meaning of article VI, cl. 2?
2. Whether the question as to the waging of an aggressive "war" is in the context of this criminal prosecution a justiciable question?
3. Whether the Vietnam episode is a "war" in the sense of the Treaty?
4. Whether petitioner has standing to raise the question?
5. Whether, if he has, the Treaty may be tendered as a defense in this criminal case or in amelioration of the punishment.\textsuperscript{23}

Mr. Justice Douglas was of the opinion that certiorari should have been granted. He referred to "a considerable body of opinion that our actions in Vietnam constitute the waging of an aggressive "war,"" and indicated that the question raised was a recurring one in Selective Service cases. In \textit{Mora}, the three accused had already been inducted and convicted of willful dis-
obedience of an order in violation of article 90 of the Uniform Code of Military Justice. In one instance, the order directed the individual concerned to board a sedan which would take him to an air force base for further transportation to Vietnam. On other occasions, the individuals had been ordered to board an aircraft for transportation to Vietnam. The main contention of the three soldiers was that each of the orders was unlawful because American participation in the Vietnam conflict is illegal. The United States Court of Military Appeals held that under domestic law the presence of American troops in Vietnam is unassailable, and that the legality of such presence under international law is not a justiciable issue. The Supreme Court proceedings arose out of a suit brought by petitioners to prevent the Secretary of Defense and the Secretary of the Army from carrying out orders for their transportation to Vietnam; petitioners requested a declaratory judgment that United States military activity in Vietnam is "illegal." The suit did not involve an appeal from the conviction for disobedience. The suit was dismissed by the District Court and the Court of Appeals affirmed. The Supreme Court denied certiorari, over the dissent of Justices Stewart and Douglas. Mr. Justice Stewart indicated that the following questions were raised by that case, which had not been raised in the Mitchell case:

I. Is the present United States military activity in Vietnam a "war" within the meaning of Article I, Section 8, Clause 11, of the Constitution?

II. If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?

III. Of what relevance to Question II are the present treaty obligations of the United States?

IV. Of what relevance to Question II is the Joint Congressional ("Tonkin Gulf") Resolution of August 10, 1964?
   (a) Do present United States military operations fall within the terms of the Joint Resolution?
   (b) If the Joint Resolution purports to give the Chief Executive authority to commit United States forces to armed conflict limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?

These are large and deeply troubling questions. Whether the Court would ultimately reach them depends, of course, upon the resolution of serious preliminary issues of justiciability. We cannot make these problems go

away simply by refusing to hear the case of three obscure Army privates. I intimate not even a tentative answer upon any of these matters, but I think the Court should squarely face them by granting certiorari and setting this case for oral argument.  

In a more elaborate dissent, Mr. Justice Douglas outlined the governing provisions of domestic and international law and repeated his view that the petitioners should be told whether "their case is beyond judicial cognizance. If it is not, we should then reach the merits of their claims, on which I intimate no views whatsoever."  

Both in *Mitchell* and in *Mora*, the Supreme Court denied certiorari. In both cases, the dissents turned on the question whether the Supreme Court ought to hear plaintiffs' arguments on the serious preliminary issues of justiciability. In these cases, the Supreme Court refused even to hear arguments on the justiciability of plaintiffs' contentions, let alone on the merits of their claims.

V

The Political Question Doctrine.—The political question doctrine ferries in its shallow wake webs of connected rationales. This doctrine is of primordial importance in any analysis of the concept of state lawlessness—and of the consistency of state action with the Constitution. Professor Bickel in his influential book, *The Least Dangerous Branch*, wrote that the doctrine of political question is the culmination of a progression of devices for withholding the ultimate constitutional judgment of the Supreme Court.  

The Supreme Court, in his view, has a considerable area of choice in deciding whether, when, and how much to adjudicate. This choice, however, is not regulated by principle—it is not that of principled adjudication. The essential fact in his view is that the Court wields a three-fold power:

It may strike down legislation as inconsistent with principle. It may validate or, in Charles L. Black's better word, "legitimate" legislation as consistent with principle. Or it may do neither. It may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency. . . .

When the Court, however, stays its hand, and makes clear that it is 

26. 389 U.S. at 934-35.
27. Id. at 939.
staying its hand and not legitimating, then the political processes are
given relatively free play. Such a decision needs relatively little justifica-
tion in terms of consistency with democratic theory. It needs more to be
justified as compatible with the court's role as defender of the faith,
proclaimer and protector of the goals.29

Set against this view is the theory that the Court must legitimate whatever
it is not justified in striking down and that the "practical" result of not
striking down action or legislation is the same as if there had been a de-
cision to legitimate. The corollary of this theory is that the courts are the
only possible tribunal to make a determination of constitutionality; if the
courts declare, when a particular action is challenged, that they have no
jurisdiction to decide the question, this is a declaration that no power exists
to make a finding of unconstitutionality. The "judicial monopoly" theory
thus reserves to the Supreme Court the exclusive right to pass on the con-
sistency of state action and legislation with the Constitution: since only
the courts can "invalidate" state action, whatever they fail to invalidate is
thereby made legitimate.30

Another theory regarding the doctrine has been advanced by Professor
Wechsler:

[A]ll the doctrine can defensibly imply is that the courts are called upon
to judge whether the Constitution has committed to another agency of
government the autonomous determination of the issue raised, a finding
that itself requires an interpretation.

I submit that in cases of the kind that I have mentioned, [political
question cases] as in others that I do not pause to state, the only proper
judgment that may lead to an abstention from decision is that the Con-
stitution has committed the determination of the issue to another agency
of government than the Courts. Difficult as it may be to make that judg-
ment wisely, whatever factors may be rightly weighed in situations where
the answer is not clear, what is involved is in itself an act of constitu-
tional interpretation, to be made and judged by standards that should
govern the interpretive process generally. That, I submit, is toto caelo
different from a broad discretion to abstain or intervene.

The Supreme Court does have a discretion, to be sure, to grant or
to deny review of judgments of the lower courts in situations in which
the jurisdictional statute permits certiorari but does not provide for an
appeal. I need not say that this is an entirely different matter.31

30. D. Morgan, Congress and the Constitution (1956); G. Hughes, The Political
In *Baker v. Carr*, the Supreme Court carefully considered the various aspects of the political question doctrine. Mr. Justice Brennan’s opinion for the Court, despite some comments to the contrary, did not wholly equate the political question doctrine with the separation of powers problem. It identified six distinct considerations involved in the doctrine:

Prominent on the surface of any case held to involve a political question is found a 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 non-judicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of 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.

Indeed, although the political question doctrine is “primarily” a function of the separation of powers, the other itemized factors are also considered by the Court:

The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.

In a noteworthy dissent, Mr. Justice Frankfurter urged the consideration of factors other than those involved in the separation of powers doctrine:

It may well impair the Court’s position as the ultimate organ of “the supreme Law of the Land” in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court’s authority—possessed of neither the purse nor the

32. 369 U.S. 186 (1962).
33. Id. at 217.
34. Id. at 226 (footnote omitted).
sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.\textsuperscript{35}

Without resorting to more detailed analysis of the Court’s decisions involving the doctrine of political question, it is possible to conclude that in its \textit{Baker v. Carr} formulation the doctrine features, at the very least, an amalgam of prudential and legal considerations dominated by the separation of powers theory. This amalgam contains express reference to the respect due coordinate branches of the government, to the possibility of an unusual need for unquestioning adherence to a political decision already made, and to the risk of embarrassing the Government abroad as well as to the risk of grave disturbances at home. These references suggest that the Court might well be guided by considerations other than principle, despite Professor Wechsler’s appeal. Politics, foreign relations, and prudential calculations are all expressly recognized as proper considerations for determinations whether to adjudicate a case or not. The Court’s decision in \textit{Baker v. Carr} appears to bear out Professor Bickel’s theory about the Court’s triad of functions. Under Professor Bickel’s theory, under Professor Wechsler’s plea, as well as under the Court’s decision in \textit{Baker v. Carr}, it can be stated that the constitutional validity of state action remains undetermined whenever the Court invokes or fails to review lower-court decisions in reliance upon the political question doctrine. In other words, the Court’s dismissal of a case impeaching the validity of state action, when it relies on the political question doctrine, does not amount to a legitimation of the challenged action. (This, of course, must be distinguished from denial of certiorari by the Supreme Court.) The constitutionality or validity of state action then remains to be determined otherwise than by judicial proceedings. Despite the presumption in favor of the legality of government acts, one cannot, under the American legal system, claim that government orders must always be presumed to be valid unless and until invalidated by the courts.

Thus, when a citizen in good faith believes in the illegality of the Government’s conduct, public expressions of such belief cannot be the basis of an indictment or crime. In the Supreme Court’s decision in \textit{Keegan v. United States}, Mr. Justice Roberts said: “One with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the law shall not be obeyed; that its command shall be resisted until a court shall have held it valid.”\textsuperscript{36}

\textsuperscript{35} Id. at 267 (emphasis added).

\textsuperscript{36} 325 U.S. 478, 493-94 (1945).
Legal experts, judges, and lawyers from 75 countries, meeting under the auspices of the International Commission of Jurists agreed that the existence of effective safeguards against the possible abuse of power by the executive is an all important aspect of the rule of law. Judicial control over the acts of the executive should insure, in the opinion of these experts, that "The executive acts within the powers conferred upon it by the constitution and such powers as are not unconstitutional"; and also:

(b) Whenever the rights, interests or status of any person are infringed or threatened by executive action, such person shall have an inviolable right of access to the Courts and unless the Court be satisfied that such action was legal, free from bias and not unreasonable, be entitled to appropriate protection;

(c) Where executive action is taken under a discretionary power, the Courts shall be entitled to examine the basis on which the discretion has been exercised and if it has been exercised in a proper and reasonable way and in accordance with the principles of natural justice;

(d) The powers validly granted to the executive are not used for a collateral or improper purpose.

To assert that government actions are necessarily valid unless and until disallowed by the courts runs counter to this concept of the rule of law. It contradicts, moreover, the premises of the Declaration of Independence and of the Universal Declaration of Human Rights.

VI

Resistance to Illegitimate Authority.—American constitutional law is revolutionary in origin. This historical fact is not without significance for theories of civil disobedience. The *ius resistendi*, that is, the right of the ruled to resist the ruler, if need be by use of violence in case of the unlawful usurpation of power, played a decisive role in the formation of modern constitutional law. Some early American bills of rights recognized it. Article 3 of the Virginia Bill of Rights of 1776 provided that:

When any government shall be found inadequate or contrary to these purposes, a majority of the community have an indubitable, unalienable, and indefeasible right to reform, alter or and abolish it, in such manner as shall be judged most conducive to the public weal.

In the Maryland Bill of Rights of 1776, it was provided that: “The doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.”

The French Declaration of the Rights of Man of 1789 provided that: “The end of all political association is the conservation of the natural and inalienable rights of man. These rights are liberty, security, property and resistance to tyranny.”

In the French Declaration, therefore, the right to resist tyranny was elevated to one of the four natural and fundamental rights of man. These historical documents reflect the political doctrines of the time which inspired the Founders of the American Constitution and the drafters of the Declaration of Independence.

Emphasis on the right to resistance was characteristic of eighteenth century constitutional theory. In the nineteenth century, however, the duty of obedience to the state was again emphasized. Under the much criticized Austinian model, obedience was due to commands of the sovereign who was defined, in empirical terms, as a determinate (group of) human superior(s) not in the habit of obedience to a like superior, but in receipt of habitual obedience from the bulk of a given society. The Austinian sovereign, a political superior who can compel others to obey, is incapable of legal limitation. In the still influential Austinian model, obedience to the law is equated with obedience to the commands of the sovereign—obedience to law and obedience to constituted authorities are then one and the same.

This identification of the sovereign with legality has been challenged in twentieth century legal theory. Under the theories of Salmond, Kelsen, and Hart, the legal sovereign cannot be accounted for in empirical terms. Rather legal sovereignty is a juridically defined concept which has little meaning outside normative contexts. Obedience to law is one thing; it must not be confused with obedience to a determinate human superior or superiors.

These rival theories—obedience to the commands of a determinate person or persons and deference to rules identified as legal—are reflected in attitudes to civil disobedience and resistance. Government lawlessness is a difficult concept under the Austinian command theory. It is more accessible under the theories of Hart and Kelsen. Under the command theory, the crucial problem is to identify who the sovereign is and who the lawfully constituted authorities are. Once this is done, doubts about the legality of commands can be resolved with ease. Under the other theories mentioned, the crucial problem is to identify the juridical limits of state competence under the rules of the system. The command theory calls for an empirical

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39. Id., Introduction by H. Hart.
test of political supremacy, while the other theories call for a decision as to legal validity.

The difficulties caused by the courts failure to adjudicate key issues involving government actions are compounded when authoritative legal provisions are on the statute books and govern the very issues which the courts refuse to hear. This involves the ingredients that make up what Lon Fuller calls the “internal morality” of the law: congruence between official action and the rules as announced.

We arrive finally at the most complex of all the desiderata that make up the internal morality of the law—congruence between official action and the law. This congruence may be destroyed or impaired in a great variety of ways. . . . Even the question of “standing” to raise constitutional issues is relevant in this connection; haphazard and fluctuating principals concerning this matter can produce a broken and arbitrary pattern of correspondence between the constitution and its realization in practice.40

Repeated failure by the courts to apply the Constitution and supreme law of the land raises concern about the absence of discernible relations between the orders and commands of the President and the Constitution which he is sworn to execute. Thus the Constitution and treaties might just as well not have existed at all insofar as they were not reflected in presidential actions in the Vietnam war.

A total failure by the courts and the executive to apply governing constitutional and treaty law would result, according to Fuller, in something that is not properly called “law” at all:

Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile,—as futile, in fact, as casting a vote that will never be counted.41

His conclusion is that in situations in which the inner morality of law is impaired,

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41. Id. at 39.
his rights to engage in a general revolution. One thing is, however, clear. *A mere respect for constituted authority must not be confused with fidelity to law.*\(^{42}\)

In a similar vein, Hart suggests that unless a legal system is capable of protecting what he calls "the minimum content of natural law," there is then no point in having a legal system at all. Significantly, the right to rebel against illegitimate authority has been reaffirmed in the 1948 Universal Declaration of Human Rights, which confirms in the preamble that:

> Recognition of the inherent dignity and of the equal and of the inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world. ... Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the event of the world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed the highest aspiration of the common people. ... It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

The principles of the 1948 Declaration are now generally recognized to be obligatory for the member states of the United Nations, and to constitute a highly authoritative interpretation of the United Nations' Charter, which is itself incorporated in United States law.\(^{43}\)

In conclusion, theories of resistance to illegitimate authority can be founded on a number of alternative propositions:

1. On the right of the ruled to resist the ruler, if need be by means of violence, in case of any unlawful usurpation of power (under national or international law);
2. On the right of the ruled to resist the ruler when the laws of God or the dictates of morality so require;
3. On the right of the ruled to resist the ruler when fundamental human rights are not protected by the rule of law;
4. On the right of the ruled to resist the ruler when there is a general and drastic deterioration of legality or pervasive uncertainty about the legality of the ruler's own actions;
5. On the right of the ruled to resist the ruler in the absence of procedures for achieving peaceful change.

\(^{42}\) Id. at 41 (emphasis added).

\(^{43}\) Commission to Study the Organization of Peace, The United Nations and Human Rights, 18th Report 5 (1968): "While the Declaration is not directly binding on United Nations members, it strengthens the obligations under the Charter by making them more precise. ... Moreover, the Declaration can be considered as an authoritative interpretation of the Charter of the highest order."
The ripening of revolutionary conditions in the United States and in the world is accompanied by the refinement of juridical theories reaffirming the right of resistance to illegitimate authority. This marks a return to eighteenth century theories which molded the institutions of this nation.\textsuperscript{44}  

\textsuperscript{44} On the subject of this essay in general, see Allen, Civil Disobedience and the Legal Order (2 pts.), 36 \textit{U. Cinn. L. Rev.} 1, 175 (1967).