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THE CONSTITUTIONALITY OF THE VIETNAM VENTURE, AND A REGISTRANT'S RIGHT TO COUNSEL WITHIN THE SELECTIVE SERVICE SYSTEM

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INTRODUCTION

The legality of our Vietnam (Southeast Asian) adventure, which technically is not a war within the meaning of article I, section 8, clause 11 of the Constitution, or even of article II, section 2, clause 1, is somewhat tied in with other problems such as the power of the federal government to conscript, and a registrant's right to counsel at any time within the Selective Service System. The answers to the questions raised by these interrelated problems are of transcendent importance to the entire country and particularly to registrants. Their resolution may have international repercussions as well.

Questions about the constitutionality of the American presence in force in Vietnam, combined with the ability and power of the government to conscript in these times and under present circumstances, have created increasing pressures within our society and have spawned or increased numerous other problems, such as dissension and violence in our educational systems, inflation, and the plight of minorities. In a somewhat large degree this Vietnam cancer has contributed to the moral and political disillusionment of today's youth. Whether the Gordian knot physically tying this country to those shores can be judicially severed is a question that awaits examination in the opening portion of this article.

The right of a registrant to counsel is of great practical importance to millions of young men and might well be treated as the fulcrum for the constitutional and conscription questions. A

1. This may illustrate a new kind of domino theory, with increasing American intervention elsewhere plus escalation. On March 11, 1970, Senator Fulbright introduced a resolution as the "sense of the Senate", challenging the President's authority to commit American troops or aircraft to combat in Laos, and requiring "affirmative action" by Congress before such a commitment occurred. See also notes 88 and 105 infra.

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registrant may, in theory, have a lawyer represent him whenever a local board or other internal body permits it. In other words, the presence of counsel is perhaps a matter of ad hoc grace; or there may be national regulations or procedures allowing special or general representation; or a statute or executive order may so grant it; or, lastly, there may be a constitutional right to counsel, again either generally or particularly. None of the first three alternatives ordinarily exists; it is the constitutional basis which is here explored.

To date, there has been a combined legislative, executive, administrative, and judicial policy which apparently has negated any right to counsel within the System itself. If the Congress is unwilling or too lethargic to act, as well it may act through its statutory power, then the President, who is expostulating on the inequities of the System, can easily amend the Regulations to accomplish this result by a stroke of his pen. A constitutional right, nevertheless, cannot be rejected, nor may a course of administrative or even judicial conduct, however long or accepted, replace it. The right today can still be judicially enforced by reversal of prior decisions, or by modifying or distinguishing them.

To comprehend the general existence of this right within the System entails a discussion of two items. First, the power of the federal government to conscript will be examined. This will involve: (1) An extended analysis of the background and source of the power to conscript. (2) The national and historic climate of opinion concerning its necessity but cast against the individual’s right to freedom. (3) The exceptional situation which here permits one’s liberty to be taken without minimum procedural safeguards. (4) The particular and limited application and effectuation of these powers, rights, and needs in the

2. Selective Service Regulations, 32 C.F.R. § 1624.1(b) 1957, "That no registrant may be represented before the local board by anyone acting as attorney or legal counsel." What of appeal or any other boards? And what of the final appeal to the President? This Regulation uses the demonstrative "the" and the modifying "local", i.e., both specifying and therefore particularizing. See also note 137 infra.

3. There are several cases denying that this right exists; United States v. Tantash, 409 F.2d 227 (9th Cir. 1969); Nickerson v. United States, 391 F.2d 760 (10th Cir. 1968), cert. denied, 392 U.S. 907 (1968); United States v. Stafford, 389 F.2d 215 (2d Cir. 1968). See also United States v. Capson, 347 F.2d 959 (10th Cir. 1965), cert. denied, 382 U.S. 911 (1965), as well as United States v. Sturgis, 342 F.2d 328 (3d Cir. 1965), cert. denied, 382 U.S. 879 (1965). However, in United States v. Weller, 90 S. Ct. 1118 (1970), the Court granted a conscientious objector review as to the constitutionality of the regulation (see note 2 supra) forbidding representation.
current situation. Second, the actual rights of the registrant will be examined against the backdrop of the conscription power. This will be accomplished by means of parallels to be drawn from administrative law, techniques, and proceedings which are here to be applied within the administrative system, and likewise taking into account exceptions. Additionally, as a third item, the question will be raised whether such a “basic” or “essential” constitutional right to counsel, assuming it exists, should or does piggy-back with it other constitutional rights, and if it does, which or all of these rights are so piggy-backed.

I. CONSTITUTIONALITY OF U. S. PRESENCE IN VIETNAM

A discussion of the constitutionality of our presence in Vietnam, and of the constitutional Congressional power to conscript, so as to understand the existence and enforcement of the constitutional right to counsel within the System, requires at least some degree of exploration of the unadulterated exercise of such power. Conceding the constitutionality of and the conscripting power’s existence generally does not concede the validity of the conscripting power’s exercise and continuation with respect to Southeast Asia. Here we must develop the overall climate of political and constitutional liberties, against which the particular necessity of national requirements are to be cast. It is in the light of “this mood and with this perspective that the issue before [us] must be approached.’’

A. Background and Source of Power to Conscript

Congress, of course, is the source of the conscription laws, but it must go to the Constitution’s article I, section 8, clause 11 for its power to declare war, and to clause 12 for its power “To raise and support Armies” (and to clause 13 “To provide and

4. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring in the Steel Seizure Case). See also note 62 infra.

5. The present verb was substituted for “make” in the Constitutional Convention of 1787 so as to enable the Chief Executive (only) to repel sudden attacks. 2 RECORDS OF THE FEDERAL CONVENTION 318 (M. Farrand ed. 1937), hereinafter cited as “RECORDS.” See also F. Wormuth, THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION 3-4 (1968), a Center Occasional Paper, hereinafter cited as Wormuth, VIETNAM; this writer leans heavily on Wormuth for various aspects. See also note 16 infra, and M. Furse, THE WAY WE GO TO WAR (1969), who argues in the same vein but discloses numerous instances of Presidential “wars,” where troops have been sent abroad by Presidential action.

In the Articles of Confederation there was a provision in art. IX, para. 6, that “The United States in Congress assembled shall never engage in a war . . . unless nine states assent to the same . . . .” Thus a declaration of war seems technically to have been required even though another nation physically
maintain a Navy”). The quoted operative constitutional term is “raise” (and “provide”), as it is in the achievement of this power that conscription may become necessary.

attacked the Confederation—that is, if “make” and “engage” have any parallel meaning. Within the historic context, they should.

Under the Constitution’s term and background, however, such a declaration is apparently not required when another nation attacks us. The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863). Such an attack occurred at Pearl Harbor. But what of the situation when Germany then declared war—was a declaration required, or were we automatically at war so that the President could exercise all, even delegated, war powers? Hamilton disagreed with Jefferson on this point, feeling that “when a foreign nation declares war then any declaration on the part of Congress is nugatory; it is at least unnecessary.” 7 Works 746f. (1851) See also 2 Stat. 129-30 (1802), apparently in agreement, and the majority opinion in The Prize Cases, 67 U.S. (2 Black) 635 (1863).

6. U.S. Const. art. I, § 8, clause 13 bears upon aspects subsequent to the raising and providing of these forces, while clauses 15-16 deal with the state militias, and these are to be distinguished from the army powers. Arver v. United States, 245 U.S. 366, 382 (1918) (opinion by Chief Justice White for a unanimous Court).

7. The constitutional power of Congress to conscript was upheld in Arver v. United States, 245 U.S. 366, 382 (1918). See note 33 infra, and Cox v. Wood, 247 U.S. 3 (1918). But that was a war-time measure and during war; in time of peace an “urgent necessity” may seem to likewise uphold this power. Falbo v. United States, 320 U.S. 549 (1944) (per Black, with Murphy dissenting). See the language in note 42 infra, even though in this case the Selective Service & Training Act of 1940 was being applied to a final order to report on September 2, 1942, when we were at war, and the only point was the procedural one of being able to offer a defense (of exemption as a minister) in a criminal prosecution for a willful failure to report for induction (and not in habeas corpus proceedings after induction), which contention the Court rejected. However, when the war was over the Court, but now on the ground of lack of board jurisdiction, permitted this defense in a prosecution as occurred in the Falbo situation. Estep v. United States, 327 U.S. 114 (1946). Thus, in time of peace where no great emergency or urgent necessity exists “to mobilize national manpower with the speed which that necessity and understanding required,” so that no “dire consequences might flow” Falbo, at 551-52, different answers may be given than what in wartime may be required (the Estep case). And different questions may also arise. Is a claimed exemption (total or partial) because of conscientious scruples a constitutional right, as in United States v. Sisson, 297 F. Supp. 902 (D.C. Mass. 1969), cert. granted, 396 U.S. 812, where Judge Wyzanski held the 1967 Act as here applied violated the first and fifth amendments. See also Welsh v. United States, 404 F.2d 1078 (9th Cir. 1968), cert. granted, 396 U.S. 816, to be argued with Sisson; cf., United States v. Noyd, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1959) (affirming the court-martial conviction of Air Force Captain Noyd for refusing to instruct student pilots even though Noyd’s “humanism” opposed the Vietnam War only as unjust). On procedures, as in Falbo and Estep, see note 133 infra.

It should be further noted that in his Sisson opinion Judge Wyzanski felt a person conscientiously objecting not to war in general but to a particular type of war “might reflect a more discriminating study of the problem, a more sensitive conscience, and a deeper spiritual understanding.” Sisson at 908. This distinction between the general and the partial objector therefore raised a constitutional question as it amounted to a discrimination of certain religious beliefs over others. Along the same lines was the acquittal of Leslie C. Bowen, who refused induction. The federal district judge overturned a long-standing Selective Service practice under § 6-J of the Act which had the effect of refusing conscientious-objector status to Roman Catholics because that religion did not disapprove of all wars, and held that Bowen could conscientiously oppose a particular (the Vietnam) war. United States v. Bowen (D.C. Calif. 1969), as reported in N.Y. Times, Dec. 25, 1969, at 10, col. 1.
The historical background of these terms discloses that in early America "the right [of the Colonies] to enforce military service was unquestioned" and that at least nine of the states "expressly sanctioned" conscription by their laws. During the Revolutionary War the Continental Congress had requisitioned forces through the states, unfortunately without too much success, and under the Articles of Confederation the Congress enjoyed little of the war powers. While Art. IX, par. 5, of the Articles contained a provision giving the Congress power "to make [binding] requisitions from each state for its quota" of land forces, the next clause required "the legislature of each state . . . [to] raise the men." Article VII opened by referring to the "land forces [which] are raised by any state for the common defense," and in the same sentence it was again mentioned that it was the state legislatures "by whom such forces shall be raised . . . ." In effect, therefore, the naval forces had been placed in the national hands because collective, not individual, action only could be had, and also because the landlocked states might otherwise not contribute sufficiently but the former procedure of state-requisition remained with respect to the land forces. The actual methods of raising such naval or land forces were left to the national and state governments to formulate their own procedures.

8. Selective Draft Law Cases, 245 U.S. 366, 379-80 (1918), supra note 6, at 379 and 380 respectively, with the Pennsylvania Constitution of 1776 being quoted and n.3 giving references to the laws of other eight states (all prior to 1789 except for two, in 1780 and 1784). See, e.g., SSLR PRACTICE MANUAL § 2 at 1003-04, for other background material.

9. Congress had also authorized enlistments for one year, later ineffectually increased to three (with a bounty) at Washington's remonstrance. Previous Colonial "wars" had found volunteers, not conscripts, fighting, but there border and Indian battles occurred.

10. Selective Draft Law Cases, 245 U.S. 366, at 380-81 (1918), referring to the "earnest requests by Washington to Congress that a demand be made upon the States to resort to drafts to fill their quotas . . . ."

11. Art. IX opened by giving Congress "the sole and exclusive right and power of determining on peace and war"; art. VI, para. 5, referred to "a declaration of war by the United States in Congress assembled . . . ." But in the other articles and paragraphs a distinction was made between peace and war which enabled the states, during peace, to dominate in practically all aspects, while during war they still were able to control the appointment of all land officers save the generals (Congress, in art. IX, para. 5, was given power "to build and equip a navy") and to determine how to raise forces amongst other things. Arts. VI-IX.

12. Art. IX, para. 5, in several additional places kept pairing the states and raising of men, so that the words "raise" and "raised" were used six times in that one paragraph.

13. Art. VI, para. 4, denied to the states, in time of peace, the power to keep any vessels of war "except such number only, as shall be deemed necessary by the" Congress.
In the Constitutional Convention of 1787 the Randolph or Virginia Plan opened by resolving that the Articles should be corrected to better accomplish their ends relating to the "common defense," but provided no war powers as such except that "the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation . . . ." The Randolph Plan thus did not change anything, and the later Patterson or New Jersey Plan was silent in this respect. It was not until the Committee of Detail reported out its proposals that the legislative powers specifically included one "to raise armies . . . ." Subsequent discussion unanimously added "and support" to the infinitive, and then immediately occurred the following:

Mr. Gerry took notice that there was [no] check here against standing armies in time of peace. The existing Congress is so constructed that it cannot of itself maintain an army. This would not be the case under the new system. The people were jealous on this head, and great opposition to the plan would spring from such an omission. He suspected that preparations of force were now making against it. (He seemed to allude the activity of the Governor of New York at this crisis in disciplining the militia of that State.) He thought an army dangerous in time of peace and could never consent to a power to keep up an indefinite number. He proposed that there shall not be kept up in time of peace more than ______ thousand troops. His idea was that the blank should be filled up with two or three thousand. 17

Although Gerry's objections proved unavailing in the Convention, they represented the deep sentiments of the people generally, and Madison felt compelled in The Federalist to

14. Proposed May 29, 1787, 1 Records 20-21, respectively in the first and sixth resolutions.
16. Reported August 6, 1787, 2 Records 182 at 330, followed by "To build and equip fleets," which was also unanimously changed to its present constitutional language. The Committee also proposed (conditionally) to eliminate the powers of the states to keep troops, warships, and other items. 2 Records 182, at 187. On the power "To make war," see Wormuth, Vietnam, supra note 5. See also collection of articles in The Vietnam War and International War (Falk ed., 1968), and his publication The Six Legal Dimensions of the Vietnam War (1968 pamphlet).
17. 2 Records at 329. The motion then made by Elbridge Gerry (Mass.) and Luther Martin (Md.) to limit the number of the peacetime army was nevertheless unanimously defeated. See Martin's "Genuine Information" as to the proceedings of the Convention, delivered to the Maryland legislature. 3 Records at 207.
defend at length this grant of peacetime power.18 Gerry's language is indicative of the fact that throughout the history of colonial and then united America the words "liberty" and "freedom", whether of conscience or politics or otherwise, were part of the national heritage. Thus, when James Monroe, as Secretary of War under Madison, had a conscription bill introduced in order to wage war more effectively in 1812, the successful opposition "substantially rested upon the incompatibility of compulsory military service with free government...."19 "English and American tradition has long opposed military conscription. Back of this opposition there is a mental attitude which has been bluntly characterized...as a manifestation of the Anglo-Saxon's sense of the sanctity of the individual, [and] his repugnance to outside coercion..."20

So, too, did the people generally demand procedural regularities, and the recognition of these several procedural and substantive ideas was the price of ratification of the Constitution.21 Furthermore, while records of the Convention debates, The Federalist, and the ratifying Convention debates are barren of any reference to the particular right to counsel question here explored, as are the statutes and War Department regulations for the first seventy-five years of national life,22 still the warp and woof of the country's fabric is indelibly imprinted with the need for constitutional minimums in procedures in order to

18. No. 41, at 261 (Mod. Lib. Ed.), asking "But was it necessary to give an INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE, as well as in war?" He felt the answer "to be so obvious and conclusive as scarcely to justify such a discussion" and yet indulged in a lengthy one. Inter alia he remarked, based on the geographical and technological conditions then prevailing, that Great Britain was "impregnable" and so could not "cheat the public into an extensive peace establishment," and that unless the Union was now created so that England's example could be followed, the separate states "will present liberty everywhere crushed between standing armies and perpetual taxes." Id. at 263.

19. Selective Draft Law Cases, 245 U.S. 366, at 385 (1918), although White pointed out that Congress nevertheless had this power, despite such opposition, and that "peace came before the bill was enacted." The Mexican War volunteers sufficed.


22. Act of Aug. 7, 1789, Ch. VII, 1 Stat. at L. 49, established a Department of War. See also history and references at 384-88 of Selective Service Draft Law Cases 245 U.S. 366 (1918).
provide a proper notice and fair hearing before one's life, liberty, or property can be taken.\textsuperscript{23}

This need, enhanced in recent decades,\textsuperscript{24} has assumed somewhat large proportions if only to provide the people, in this complex society where the decision-making processes may ignore them,\textsuperscript{25} with a minimum opportunity to be properly heard on various matters. But until the Civil War no individual could seek a hearing on a question of or in the process of conscription. The reason that this was true is simple—where men voluntarily enlist they do not attempt to prevent oath-takings. Until 1863\textsuperscript{26} voluntary enlistment was used by the federal and state governments, although the French \textit{levée en masse} of 1798 suggested the

\textsuperscript{23} See, e.g., Forkosch, \textit{American Democracy and Procedural Due Process}, 24 Bklyn. L. Rev. 173 (1958), and citations and references to areas such as political organizations, religious bodies, educational institutions, fraternities and clubs, etc. In United States v. David Zimmerman, (S.D.N.Y. 1969), a motion to dismiss a draft-evasion indictment argued that the founding fathers did not grant the conscripting power to Congress during peacetime except to suppress insurrection, to repel invasion, and to execute the laws; as of this writing the decision is pending.

\textsuperscript{24} See forkosch, \textit{constitutional law} Chaps. 18-20 (2d ed. 1969), hereinafter cited as Forkosch, \textit{constitutional}. This need is exemplified by the cases decided in the criminal, as well as the civil, areas since the 1950's.

\textsuperscript{25} The numerous governmental and private decisions being made in fields of ecology, and technology, as well as research, play with the lives of the people directly and indirectly affected, but without their voices being given an opportunity to be heard. For example, is the new Alaska oil find to be exploited by a pipeline or by tankers? Canada may have a voice in the latter aspect. But as to the former how may the Alaskan citizen, or any American citizen, be heard? The fact that the natural balance of the frontier may be altered, the esthetic and other benefits destroyed, argue for hearings, objections and open decisions openly reached. See generally Wheeler, \textit{Bringing Science Under Law}, The Center Magazine II 59 (1969).

\textsuperscript{26} The belief of the North in the shortness and relative unimportance of the war is found in Lincoln's (congressionally unsanctioned) proclamation of April 15, 1861, which called for 75,000 volunteers to serve for three months. Then on May 3d, he also called for 40 additional volunteer regiments, and 40,000 three-year regular enlistments, leaving the recruiting, etc. to the states. It was not until July 4th that Congress authorized the President to recruit 500,000 men for the duration. See also note 31 infra. Ad hoc regiments were also created by citizens who received colonels' commissions, or by companies who would organize and elect their own officers. The Confederacy at first utilized about the same voluntary recruitment system for its own forces, but adopted its "national" conscription a year before the North did. It was on March 3, 1863, that the first national conscription act was passed by the United States Congress. The law was poorly conceived and poorly executed. It still included the states in its calculations, if not in the enforcement. The first draft lottery in 1863 caused a riot in New York City, requiring federal troops to suppress it. There were three more drafts the following year. In numbers, the draft was a failure, it being effective only in stimulating volunteers who received bounties.
formula for a national and democratically selected army. When the first conscription law was enacted in the United States on March 8, 1863, those called were able to substitute others or to pay commutation money. This would explain the absence of constitutional or other attacks on the laws or their operations. When subsequent legislation was attacked the arguments were usually couched in such terms as these: thirteenth amendment violations, depriving the states of the right to "a well-regulated Militia" (second amendment), lack of congressional power to send draftees overseas, improper delegations, etc.

27. The late Senator Robert Taft rejected the view "that the compulsory draft is a democratic system. I deny that it has anything to do with democracy . . . . [I]t is far more typical of totalitarian nations than of democratic nations. The theory behind it leads directly to totalitarianism. It is absolutely opposed to the principles of individual liberty which have been considered a part of American democracy." Quoted in N.Y.U. Commentator, Nov. 12, 1969, at 2, col. 2.

28. However, was there not "federal" conscription practiced by the states under and pursuant to Lincoln's prior calls upon these sovereigns for troops? For the cases opposed to such power and its exercise, as well as other aspects, see RANDALL, CONSTITUTIONAL, supra note 20, at 232-56.

29. See 4:2:3 12 Stat. at L. 731, Chapt. LXXV, 37th Cong., and for background and other aspects see RANDALL, CONSTITUTIONAL, supra note 20, at 241-74. Sec. 1 of the 1863 Act declared all "able-bodied male citizens" and aliens who had filed their declarations of intention to become citizens, between 20 and 45, "to constitute the national forces, and [they] shall be liable to perform military service" except as thereafter provided, with the provisions as to enrollment and drafting not being relevant here. For the prior Executive calls and proclamations based upon the authority Lincoln allegedly derived from 1 Stat. at 4:2:3 L. 424 (1795), see W. DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION 16-18 (1931) (hereinafter called DUNNING, ESSAYS), and also Selective Draft Law Cases, 245 U.S. 365, at 386-87 (1918) for the subsequent four legislative draft calls. The constitutionality of these laws was not attacked federally, but in one state court they were upheld. In Kreddler v. Lane, 45 Pa. 238 (1863), Induction was enjoined but the case was overruled in 45 Pa. 295 (1864) (for background of the politics involved see RANDALL, CONSTITUTIONAL, supra note 20, at 11-12), and the identical constitutional provisions in the Confederacy, with analogous legislation, resulted in like decisions by the Southern courts (Selective Draft Law Cases, supra note 6, at 388, giving citations).

30. Both practices having been allowed under the old militia systems, although the latter (commutation) was dropped by 4:2:3 13 Stat. at L. 379 (1894).

31. For Lincoln's strong views upholding the laws see LINCOLN'S COMPLETE WORKS VII, 49-57 (Nicolay & Hay, eds., 1894). In his message to Congress of July 4th (see note 25 supra) requesting approval, Lincoln said: "Whether strictly legal or not [the draft calls] were ventured under what appeared to be popular demand and a public necessity, trusting then as now that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress." In 1931 DUNNING, ESSAYS, supra note 29, at 18, stated that "[t]his frank substitution of a 'popular demand' for a legal mandate, as a basis for executive action, is characteristic of the times."

32. See the Court's cavalier rejection of these in the Selective Draft Law Cases, 245 U.S. 366, at 389-90 (1918): Butler v. Perry, 240 U.S. 328, 333 (1916); and Jones v. Perkins, 245 U.S. 390 (1918). See also the background and references by Douglas in his Holmes dissent, infra note 44, at 939, 948.
B. Necessity for Conscription v. Individual's Right to Freedom

Perhaps the most basic and powerful general objection to conscription, from which other arguments may flow, was, and still remains, the objection based upon freedom and liberty: "We the People" have banded together for certain purposes; that where one of the ends of government is to attain and to "secure the blessings of liberty" (and happiness) of the individual, then the means therefore should not be perverted so as to jeopardize or cancel these blessings; that any government infringing upon these liberties or depriving the people of them breaches its duties and obligations so that such impermissible (unconstitutional) conduct may be opposed; or even if not objected to, or if the collectivity is compelled to "provide for the common defense" because of a grave situation which necessitates a limited exception, there must be a tailoring, if at all possible, to the exact needs so as not to excessively curtail such liberty. "[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.'"

33. These laws have, of course, been generally upheld. See note 7 supra; Annot., 129 A.L.R. 1171 (1940); Bernstein, Conscription and the Constitution, 53 A.B.A.J. 708 (1967); and citations in SSLR Practice Manual § 3 at 1005.

34. Legislation in the colonies (and at times found in their charters and grants) early adopted all, or parts of, those English "statutes ... as declare the rights and liberties of the subjects". South Carolina Statutes 1712, and Andrew Hamilton's argument at the 1735 trial of John Peter Zenger as well as Alexander Hamilton's (and others') in the 1804 appeal of Harry Croswell (see Forkosch, Freedom of the Press: Croswell's Case, 33 Ford. L. Rev. 415 [1965]), build upon and extended these rights and liberties, as did the numerous tracts and writings before and after the Revolution. An example is the Virginia Bill of Rights of 1776.

35. See, e.g., Forkosch, Does "Secure the Blessings of Liberty" in the Preamble Mandate Judicial Action? The Federal Republic of Germany, in Art. 3(3) of its Basic Law (i.e., Constitution) of 1949, states:

No one may be compelled against his conscience to render war service as an armed combatant. Details will be regulated by a Federal law. Of course our statutory conscientious objector privilege parallels this constitutional right, but a constitutional right here indicates a fundamental basis for its claim, with no impairment statutorily or administratively possible (assuming a vigilant Executive or judiciary).

36. For example, the fourteenth amendment prevents the states from depriving a person of "liberty", but what is encompassed by this term? See, FORKOSCH, CONSTITUTIONAL 408-11. The first amendment speaks of "freedom", not liberty (although "liberty" is found in the fifth amendment's due process clause), and the two terms are not necessarily treated alike. Id. at 408, n.41. A state infringing these liberties, and any penumbral aspects (Id. 435-36), may be opposed as may also the federal government.

The contract theory of government was most influential in the Eighteenth Century, regardless of its philosophical error or practical inapplicability. For example, in their Declaration of Independence the colonists argued that the King's keeping "among us, in times of peace, Standing Armies without the consent of our legislature" breached "the consent of the governed," and that "whenever any Form of Government becomes destructive of these ends," which were "liberty and the pursuit of happiness," then "it is the right of the people to alter or abolish it," so as "to effect their safety and happiness" through a new government. These arguments built upon the political philosophers Hobbes and Rousseau, with the latter's Social Contract being somewhat of a contemporary of the colonists' Declaration. But more to the instant point was Hobbe's Leviathan, in which he argued that security was the ultimate desideratum impelling all to enter into a social contract and to surrender power to one who would enforce peace, and that resistance and revolution were justified when, for example, the sovereign failed to protect them, or when he threatened to take their lives as in compelling service in the army, for such an existence was just as lacking in security as was the bellum omnium contra omnes in a state of nature (from which escape was sought through the contract).

The compelling exception which may be urged to overcome the claim of full and complete freedom and liberty, that is, freedom governmentally unimpaired via conscription, is self-preservation. Just as the individual has a right to life and its continuation and may therefore kill in self-defense, so must the nation also have such a collective right of self-defense, that is, be able to conscript without hindrance, but only, to use Sutherland's piercing phrase, "in the last extremity . . . ."38 Ghandi, of course, preached the contrary philosophy, although Christ may be utilized to illustrate that peace has exceptions, such as driving the money changers from the Temple. Particular and limited illegalities are sometimes exceptions inherent in our system of legalities,39 and it is a commonplace that every general principle or rule of law has exceptions. But there is a corollary to this, namely, that exceptions are limited in scope to the facts and

circumstances. They do not ordinarily expand to cover other
situations, and they are to be applied only when the same or
very substantially similar facts are presented. "It has become
axiomatic that '[p]recision of regulation must be the touchstone
in an area so closely touching our most precious freedoms.'"\footnote{40}
Therefore, conceding the exceptional power to conscript in a
real and unquestioned emergency of such grave and horrendous
consequences that no general or particular objection to its exer-
cise can be raised, \textit{i.e.}, an "actual declaration of war by Congress
in a clear-cut situation,"\footnote{41} can such exceptional power neverthe-

41. To "actual declaration of war by Congress" I have added "in a clear-
cut situation", and \textit{see also} the qualification in The Prize Cases, 67 U.S. 635,
at 668 (1863): "By the Constitution, Congress alone has the power to declare
a national or foreign war. It cannot declare war against a State or any num-
er of States, by virtue of any clause in the Constitution." Douglas, \textit{supra}, note 44,
makes no such other qualification, and in United States v. O'Brien,
391 U.S. 367, 377 (1968), Chief Justice Warren's majority language was,
"[t]he constitutional power of Congress to raise and support armies . . . is broad
and sweeping." Justice Douglas' dissent felt this "is undoubtedly true in times
when, by declaration of Congress, the Nation is in a state of war. The under-
lying and basic problem in this case, however, is whether conscription is
permissible in the absence of a declaration of war." \textit{Id.} at 399. Although the
actuality of war via foreign physical attack on the nation is not mentioned, it
is undoubtedly included in the views of the Court. The President has power
to repel the attack. (\textit{See notes 5 and 16 \textit{supra}}). \textit{Quaere}: Absent a congres-
sional conscription law, has the President any power to conscript generally
(remaining aside national guards, etc.)? While here not involved, it would
appear not, albeit Lincoln's actions, later congressionally approved, might
justify conscription by the President alone (\textit{\textit{supra} notes 26, 28, and 31}).

Nevertheless, does not the ability of Congress to declare war permit the
mere act itself to turn into a bootstrap operation as envisaged in the text
which follows? To illustrate, assume the conditions in the text's next sen-
tence, but with a declaration of war by Congress now occurring—for Justice
Douglas, and therefore for all the others, this would suffice. \textit{But see Justice
(\textit{infra} note 44) where there is a possible distinction between conscription "for
armed, combatant service overseas and those drafted for civilian work (the
Holmes situation)"). Why should this be so? Cannot a small band of wilful
and determined men (as President Wilson characterized his opponents) plunge
the nation into an armed camp, if not immediate conflict, and this, in turn,
create international problems easing us into war? \textit{See also} notes 46 and 47
\textit{infra}.

All hypothetical possibilities, of course, and not even probabilities, but in
this area do we not deal in these, despite Justice Holmes' caustic view that
"[i]t is the usual last resort of constitutional arguments to point out short-
comings of this sort." Buck \textit{v. Bell}, 274 U.S. 200, 208 (1927). Later I develop
the problem and the proposed solution further in discussing the question of
jurisdictional fact, \textit{infra} notes 67 \textit{et seq.}, although heretofore, for the purposes
there discussed, I have assumed that the constitutionality of the Selective
Service System and law "is settled, at least as of today." Therefore, "[w]hile
it is concluded that the 1965 addition [denouncing draft card burning] is a
constitutional exercising of Congressional power... the independent judiciary
should not be influenced by Congressional emotion or facts other than strictly
legal." Forkosch, \textit{Draft Card Burning—Effectuation and Constitutionality of
the 1965 Amendment}, 32 \textit{Bklyn. L. Rev.} 363, 326, 332 (1966) (hereinafter
cited as Forkosch, \textit{Draft Card Burning}). The law was upheld in United States
less be carried over into and utilized by the government in any and all other, but not analogous, situations? 42

The question is not rhetorical, for is this not the government's general contention? Let us assume a world in which absolutely no cloud marred the horizon of peace, no possible fear could be raised of a future change, and world order, law, justice, equality, etc. reigned. In such a world could the congressional power to conscript under a declaration of war be now constitutionally utilized? 43 If the answer be yes, 44 then can not the Congress become a collective dictator at will? By its simple-majority declaration of war may it not seize private property, regardless

42. In Falbo, 320 U.S. at 555-56 (1944), Murphy's dissent opened:

This case presents another aspect of the perplexing problem of reconciling basic principles of justice with military needs in wartime. Individual rights have been recognized by our jurisprudence only after long and costly struggles. They should not be struck down by anything less than the gravest necessity. We assent to their temporary suspension only to the extent that they constitute a clear and present danger to the effective prosecution of the war and only as a means of preserving those rights undiminished for ourselves and future generations. Before giving such an assent, therefore, we should be convinced of the existence of a reasonable necessity and be satisfied that the suspension is in accordance with the legislative intention.

Of course, even the latter's "intention" cannot give it power to declare war if no such "gravest necessity" exists at the time, and the language of Douglas, although expressed in a different context, is apropos: "If no United States court can inquire into the lawfulness of his detention, the military have acquired, contrary to our traditions . . . a new and alarming hold on us." Hirota v. MacArthur, 338 U.S. 197, 201 (1949).


Petitioner asks this Court to decide whether a draft of men into the Armed Forces in time of peace is constitutionally permissible. In the absence of a declaration of war, he argues, a draft is not authorized and is equivalent to involuntary servitude. The Court of Appeals held that Congress' [sic] power to conscript men into the Armed Forces was not so limited, and the Government, opposing certiorari, states that "[e]ven assuming that the present time is one of "peace", it has long been settled that the power to raise armies by conscription is not limited to periods of war or national emergency," citing [cases].

It is clear from our decisions that conscription is constitutionally permissible when there has been a declaration of war [although see note 41 supra]. But we have never decided whether there may be conscription in the absence of a declaration of war. Our cases suggest (but do not decide) that there may not be.

See also his last paragraph at 949, and also his dissent the same day in Hart v. United States, 391 U.S. 956, 958, 960 (1968), and the week before in United States v. O'Brien, 341 U.S. 367, 389-91 (1968). See also note 49 infra.
of whether or not just compensation is required;46 conscript and assign draftees to at least national projects (and businesses connected or interrelated thereto) on the ground that these are necessarily of aid to the "war" effort; curtail many of the economic, social, and other activities and needs of the people; and even limit, perhaps, nonessential liberties.246 And, separately or additionally, may not the President bootstrap himself into somewhat of a like situation when, "having, on his own responsibility, sent American troops abroad, [claims he] derives from that act 'affirmative power' to seize" private property, in other words, "he has invested himself with 'war powers.' "47

If the latter is denied this increased power48 then so must the former, and no "political question" intrudes or should intrude to prevent a judicial examination into and determination of these questions.49

45. On the necessity of just compensation, Black has gone so far as to desire that it be paid when a picketing injunction was upheld and thereby permitted union picketers to trespass (as against state laws), thereby resulting in a diminution of business, etc. See for one illustration of his views, Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), discussed in Forkosch, Picketing in Shopping Centers, 26 Wash. & Lee L. Rev. 250, 259 (1969).

46. On this last, see note 37 supra, rejecting curtailment of "essential liberties", so that an implication of permissible curtailment of nonessential liberties seems in order. On seizure of private homes see the third amendment, rejecting any quartering of soldiers in peace without the owner’s consent, and in times of war only as prescribed by law. See also note 41 supra. Analytically, Ex parte Milligan, 71 U.S. (4 Wall.) 2, 136 (1866) and Ex parte Merryman, 17 Fed. Cas. 144, (No. 9, 487) (C.C. Md. 1861), may be used. In the former, the Court, splitting 5 to 4 only on the question whether it was or "was not in the power of Congress to authorize" the Military Commission to sit, on the facts as the majority saw them, felt Congress had no such power, and neither did the President as Commander in Chief.

47. Jackson, J., concurring in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642-43 (1952), rejected these contentions because "no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President ... can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture."

48. But see Wormuth, Vietnam, supra note 5 where, at p.2, the author begins: "Defying the critics of his Vietnamese adventure in a speech in Omaha on June 30, 1966, President Lyndon B. Johnson said: ‘The American people have chosen only one man to decide. ... nevertheless, the State Department has officially asserted that the President has the power to initiate war on his sole authority ... but as an act of supererogation he has obtained the permission of Congress in the Tonkin Gulf Resolution of August 10, 1964.” Professor Wormuth’s piercing analysis effectively destroys these contentions.

49. See note 44 supra, on other aspects, and on justiciability and political question see dissents in Mora v. McNamara, 389 U.S. 934 (1967). On the Congressional- Presidential distinction of power and effectuation (of the power), see United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), cert. denied, 386 U.S. 972 (1967) (and see also Douglas’ dissent). The political question doctrine has received quite a few blows in recent years, Forkosch, Constitutional 73-74, the latest being in Powell v. McCormick, 395 U.S.

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C. National Emergencies and the Power to Conscript

If the analysis to this point, and the preceding two divisions are valid or acceptable, then one might logically conclude that an examination is required of the factual "national emergency" within which the congressional power to conscript is,\(^5\) or is

486 (1969), in which Warren also pointed out that "[w]e need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment . . . ."

The losing efforts by Stewart and Douglas in the Mora and Mitchell cases, supra, to get the questions they propounded to the Court for a decision on the merits, have received some encouragement by the Massachusetts statute, enacted April 1, 1970, and signed by the Governor the following day, which provides that that state's servicemen can refuse, in the absence of a declaration of war by Congress, to participate in "armed hostilities" that are "not an emergency" and "not otherwise authorized in the powers granted to the President as Commander in Chief." The state's attorney general must defend the rights of those so refusing and he is directed to take "appropriate action" (e.g., an original suit) before the Supreme Court and, if necessary (because of a dismissal of such original action), go to a lower federal court (no other enforcement machinery is provided). Similar bills were filed in other states, New York, California and Rhode Island. Massachusetts, of course, has a history of such defiance. For example, there was its 1814 call for a convention to reject the military conscription bill then in Congress. As of this writing no action by the attorney general of Massachusetts has been taken, but one serviceman's individual suit challenging the President's authority to commit troops to Vietnam combat zones was dismissed because of lack of jurisdiction, and the first circuit one hour later denied his request for an injunction under the suit to prevent his transfer to Fort Dix, New Jersey. N.Y. Times, April 4, 1970, at 15, col. 2, referring to Pfc. John Griffin's action. Must the attorney general now take further "appropriate action" in this suit which would mean going higher from either court or both?

In one aspect such a Massachusetts statute may be castigated as another illustration of the discredited doctrine of interposition, but it is suggested that the doctrine seeks to prevent the federal government (which includes the judiciary) from enforcing its constitutional and proper power by interposing the state between the nation and the local citizen; now, however, the state is seeking to aid the federal government in disposing, at least judicially and on the merits, of questions and problems which are sapping the vitality and power of the nation. Furthermore, did Ellis Arnall "interpose" in Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) when the Supreme Court accepted an original bill against twenty railroads to enjoin them from rate fixing? The parens patriae doctrine was recognized as sufficient to sustain the state's action. But cf. Massachusetts v. Mell, 262 U.S. 447, 480 (1923), rejecting the state's standing to contend, in an original suit, that the federal Maternity Act was unconstitutional, and holding "no justiciable controversy either in its own behalf or as the representative of its citizens" was present by the state. (The Frothingham aspect of the case, i.e., the individual who sued and whose case was combined with the state's on the Court review, may have been overturned by Fast v. Cohen, 392 U.S. 83 [1968], but the state determination is seemingly still the law.)

However, the basic problem is still the very practical one of whether the Court, especially as reconstituted today, will be willing to do what the Warren Court refused to do—confront the President with an ultimatum and risk a Jackson-Lincoln-Roosevelt response.

50. "It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442 (1934). Justice Hughes was interpreting and applying the Contract Clause, art. I, § 10, to a state's mortgage moratorium law during the depression years. See also his judicial findings at 444-45.
continued,\textsuperscript{51} to be exercised. And, it follows that if this emergency is not a sufficiently grave and impelling one, unquestionably calling for the exercise of this awesome power to conscript and to consign, then the judicial branch\textsuperscript{52} has power so to declare and to either negate\textsuperscript{53} or modify the means being used. This is true despite the express power superficially granted generally and without specific limitation to Congress to "raise" forces.\textsuperscript{54}

Powers are not necessarily to be exercised merely because they exist or inhere in a body; if this were so, then unchecked and unlimited applications would, in effect, make for unchecked and unlimited powers.\textsuperscript{55} Nonuse, of course, does not cause a power to atrophy. However, the nonuse of a power, save in well-defined situations and under particular conditions, does make for such a continued limitation to analogous circumstances.\textsuperscript{56} The active and immediate threat of war which existed prior to Pearl Harbor and which was responsible for the conscription act of 1940, does not automatically\textsuperscript{57} justify the revival of this act under the cir-

\textsuperscript{51} See East N.Y. Savings Bank v. Hahn, 326 U.S. 230, 233-34 (1945), disclosing the legislature's factual inquiry prior to extensions of the mortgage moratorium law, and Frankfurter's acceptance of this "empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts." See also note 78 infra.

\textsuperscript{52} Neither of the other two branches will, as is obvious, and the local and appeal boards do not have this power or jurisdiction, Hart v. U.S., 391 U.S. 956, 960 (1968), leaving it therefore in the lap of the judiciary.

\textsuperscript{53} As it did in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), overturning the N.I.R.A. of 1933, albeit on commerce grounds and improper delegation.

\textsuperscript{54} But see notes 41 and 83, and references therein.

\textsuperscript{55} Does the upholding of the substantive power of conscription in turn permit its exercise by allocating the men drafted to service in private industry? In United States v. Copeland, 126 F. Supp. 734 (D. Conn. 1954), a selective service regulation providing for such an assignment of a conscientious objector against his will was denounced as there unauthorized, at least in peacetime, with the decision also being cited for holding that such a draftee may be assigned to work in hospitals, etc., under the control of states and their subdivisions, which are not considered as "private" as was the situation with Copeland who was assigned to work for Goodwill Industries, Inc. United States v. Hoepker, 223 F.2d 921 (7th Cir. 1955), cert. denied, 350 U.S. 841 (1955). But what of a draftee not otherwise claiming preferential treatment so that no quid pro quo argument might be advanced? Would not an Orwellian society emerge?

\textsuperscript{56} See Frankfurter's words in the Steel Seizure Case, 343 U.S. 529, at 610 (1952).

\textsuperscript{57} See note 51 supra, and also the Japanese Relocation Cases, Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944), both upholding detention (see notes 61 and 89 infra), but, as soon as the imminency of a Japanese attack on the mainland disappeared, that fact became decisive (though not expressly saved in Murphy's concurrence at 308) in Ex parte Endo, 323 U.S. 283 (1944).
cumstances existing in 1948 or its substitution in 1967. Where a congressional exercise of power ventures beyond its required borders, then even such a "delegation running riot" may, though under and allegedly pursuant to the war power, be squelched or tamed.

That the Supreme Court has exercised such a supervising power is shown by its 1952 Steel Seizure Case. If the Justices may call a President to constitutional account in these matters, why not the Congress? Development of such judicial power against one branch should, pari passu, permit the same position to be taken against the other branch. We, therefore, develop that precedential decision which involved the Chief Executive's declaration of a national emergency when a threatened strike allegedly would slow down, if not halt, steel production required for munitions and other purposes in the Korean "enterprise". Our participation in Korea, which was sanctioned by and involved the United Nations as well as other countries was, in this respect, more of a "war" than is Vietnam; yet the Supreme Court did not hesitate to protect the privately-owned mills now seized by virtue of a Presidential order. The case is a landmark decision in constitutional law, and yet not a single Justice termed the national effort in Korea a "war"; to the contrary, each of the seven opinion-writers was seemingly careful to disavow characterizing it as anything but that. And all of them, therefore, did delve deeply into the factual background of

60. See note 41 supra, and also note 89 infra.
61. Supra note 47.
62. Per Jackson, in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643 (1952). Although six Justices affirmed, all wrote separate opinions, Black's being the first because of seniority, with Frankfurter, Jackson and Burton joining his opinion while also writing their own; thus Black's majority opinion was for only four Justices, with three of them giving additional views.
63. Concerning the judicial terms used, Black only quoted the Government's contention as to the "theater of war" (343 U.S. at 587) justifying seizure, which he rejected. Frankfurter mentioned "the Korean conflict" (at 603), and later spoke in "a time when this country was not at war, in the only constitutional way in which it can be at war" (at 613) (although see note 41, supra). Douglas wrote of "the emergency" (at 629) and the "present emergency" (at 632). Jackson's term has been quoted, although he also referred to "emergency" (at 649, 650, 651, 652) and earlier had said, "Of course, a state of war may in fact exist without a formal declaration" (at 642), and "[assuming that we are in a war de facto" (at 643), as well as referring to the contention of "war powers", whatever they are" (at 644). Burton spoke of "a national emergency of the kind we face" (at 656) and "this emergency" (at 659, 660), and also felt that "[t]he present situation is not comparable to that of an imminent invasion of threatened attack" which he termed "such catastrophic situations", while additionally referring to the assumed "mobilized nation
this emergency situation, for absent war by congressional declaration or actual foreign attack on us, the President's power to seize required a more solid base than merely a finding by the Chief Executive that a national emergency existed sufficient to justify his conduct.

This approach and exercise of the judicial negative power in the Steel Seizure Case was not intimidated by any constitutional curtain shielding a Presidential subordinate, and was, therefore, in fact directed against the Chief Executive when he was acting in this capacity, even though nominally against his deligatee Sawyer, rather than the President as a delegatee of Congress. The judiciary in the Powell case has likewise tentatively acted directly against the Congress. This situation and problem is

waging war, or imminently threatened with, total war" (at 659). Clark referred to assumed "times of grave and imperative national emergency" and an assumed "gravity of the situation confronting the nation" (at 662). Vinson's dissent (concurred in by Reed and Minton) contained the following: "these are extraordinary times" and disclose "the threat of another and more terrifying global conflict"; "[f]or almost two full years, our armed forces have been fighting in Korea . . . [and] Hostilities have not abated". The dissent also quoted from the United Nation's reaffirmation "to continue its action in Korea . . . . Congressional support of the action in Korea has been manifested by provisions for increased military manpower and equipment and for economic stabilization" (at 668). The "attack in Korea" (at 670, 671) and all the other background items of international treaties, obligations, security programs, etc., prompted Congress to say that "the grim fact . . . [is] that the United States is now engaged in a struggle for survival" and that "it is imperative that we now take those necessary steps to make our strength equal to the peril of the hour, [which now] granted authority to draft men into the armed forces" (at 670-71); "assume[d] without deciding that the courts may go behind a President's finding of fact that an emergency exists" (at 678); "critical situation" (at 680); "the President proclaimed the existence of an unlimited national emergency" when the "aggression" occurred in Korea (at 700); "these times of peril" (at 704); "the gravity of the emergency" (at 708).

64. "To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action." Per Frankfurter, 343 U.S. 579, 596.

65. Vinson, in dissent (343 U.S. 579, 709), objected that "[t]here is no judicial finding [by the majority] that the executive action was unwarranted because there was in fact no basis for the President's finding of the existence of an emergency, . . . ." (See also note 93, infra). Vinson also cites Sterling v. Constantin, 287 U.S. 378, 399-401 (1932). Sterling involved the power of a state's chief executive to limit oil production through the promulgation of a decision that an emergency existed and justifying the use of the state militia for such purpose. Hughes denounced this and, inter alia, referred to the analogous federal powers, Id. at 400-01. Despite his objection Vinson, "[f]ocusing now on the situation confronting the President on the night of April 8, 1952," (343 U.S. 579, 701) when the postponed strike threatened to erupt, also went into the background and details concerning the seizure.

66. See note 49, infra. The Supreme Court also has so acted as to statutes, beginning with Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). See also note 74, infra.
therefore not the same as the judicial negation of a particular aspect of the general power attempted to be exercised by a delegatee as such. Here the delegatee seeks to assert a specific and valid exercise of an undoubted general power, as where the Interstate Commerce Commission may have the unquestioned general power to act, hold hearings, etc., but before its specific rate-making power may be particularly exercised in such a proceeding it must first expressly find existing rates to be improper, whereupon it may then exercise its additional power to fix reasonable rates.\textsuperscript{67} A delegatee may, therefore, be limited in its conduct not only by its delegator's basic statute or executive order but also by judicially-required conditions precedent. The condition precedent here is the express finding of a fact before the next step in the administrative process is permitted. This requirement has been applied against the President as delegatee or against his sub-delegatee.\textsuperscript{68}

Suppose one acts under a tentative or conditional delegation of authority which requires a finding of fact that some condition exists before any action may be instituted. This differs from the preceding illustration where there was no doubting that the general power initially to act was present. In this instance the general power to act at all is put into question. Again, suppose that a nominally-proper finding of fact is made but this finding is challenged on grounds that it is not supported by evidentiary facts within or without the delegatee's order. The question now is: Has the Supreme Court the judicial power to inquire into the supporting background of these findings and, if found to be insufficient, so declare and void the delegatee's act?\textsuperscript{69} In the Steel Seizure Case the opinions are rife with factual


\textsuperscript{68} The cases in the references in note\textsuperscript{67} supra, illustrate this, as also does Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). See discussions in Field v. Clark, 143 U.S. 649, 680-94 (1892), giving numerous such delegations upheld, as also does Hirabayashi v. United States, 320 U.S. 81 (1943).

\textsuperscript{69} Concerning one separate objection to such a delegation, that it involves the delegating and exercising of a legislative power by a body other than Congress, "[T]he obvious reason why the Supreme Court consistently sanctioned this practice is that the necessities of government demanded delegation... Whatever the doctrinal formulation—contingency, 'ascertainment of a fact,' 'power to fill up the details,' 'mere administrative function,' 'primary standard,' 'intelligible principle,' or otherwise—the fact of course is that the power to make law has been lodged in non-legislative hands." W. GELLOHN & C. BYSE, CASES ON ADMINISTRATIVE LAW 88 (4th ed. 1960).
analyses, but it must be repeated that there it was the constitutional ability of the President as such to act, and not as a delegatee of Congress, which was in issue and denounced;\textsuperscript{70} in the latter delegatee-exercise of power the opinions also go into this factual analysis to ascertain if a required finding is missing or lacking in sufficient content.

The wartime \textit{Hirabayashi} case illustrates how the Supreme Court, even during this genuine emergency and when a declaration of war existed, did go into these facts, regardless of its conclusion that the required "basic conclusion of fact" could be "rationally drawn" therefrom;\textsuperscript{71} the Hot Oil Case illustrates how the Supreme Court, even during the gravest economic emergency to befall the nation in peacetime, did void the President's order when the required finding was missing;\textsuperscript{72} and while no case directly in point has been found which illustrates how the Supreme Court has actually voided the President's order when a required finding was not supported by evidentiary facts, the \textit{Hirabayashi} approach can analogically and conceptually be used for its converse.\textsuperscript{73}

\textsuperscript{70} In overseas military matters the President's foreign affairs power may conceivably be sufficient, without more, to support his exercise of a delegation, as in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), but at least for the use of the armed forces this is here disputed and denied.

\textsuperscript{71} Hirabayashi v. United States, 320 U.S. 81, 103-04 (1943). \textit{See also} United States v. Grilm, 137 U.S. 147, 154-56 (1890), where "[a] minor question arises on these facts as to whether the petitioner was in fact enlisted." The Court held yes, but discussed at length the facts and details supporting this inference of fact and conclusion. The criminal prosecution-draft law cases developed the jurisdictional or basic fact concept which narrowed judicial review but permitted a consideration (somewhat) of the evidentiary facts. Estep v. United States, 329 U.S. 114, 122 (1946); United States v. Cook, 225 F.2d 71, 73 (3d Cir. 1955), with Douglas' dissent in a denial of a stay, Zigmond v. Selective Service Local Board No. 16, 391 U.S. 930, 932 n.3 (1968), citing \textit{Bstep}, where "we concluded judicial review was available to the extent of determining in a criminal action whether there was any basis in fact for the classification given . . . ."

\textsuperscript{72} Panama Refining Co. v. Ryan, 243 U.S. 388, 431 (1935). "The Executive Order contains no finding, no statement of the grounds of the President's action . . . in notable contrast with historic practice . . . . And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual."

\textsuperscript{73} \textit{See also} the situation in \textit{Ex Parte Endo}, 323 U.S. 283 (1944), although there the military commander was held unauthorized to hold a concededly loyal American of Japanese descent; if authorized, then perhaps the Murphy approach to the then-existing facts might be required (\textit{see note 92 infra}).

Cases are legion which are in the area of delegations to agencies, federal or state, which are required to have their findings so supported, for a variety of reasons, on which see cases and references in \textit{Forkosch, Administrative}, § 246c.
D. The Current Situation

This analysis of the exercise of judicial power against the President may be used against the Congress, one theory being that the Constitution is the great and the people, in turn, are the greatest delegators of powers to all three branches. Thus, Congress is a delegatee (trustee?) which must not act outside the boundaries set for it either expressly or by implication. 74 A clear-cut statutory violation of these boundaries results ultimately 75 in a judicial caning. 76 But where a statute is superficially valid, may the judiciary go behind the legislative facade and look at the facts? The Supreme Court has not hesitated to do this when the states are involved in criminal 77 and civil 78

74. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), rejecting the effort of Congress to increase the original jurisdiction of the Supreme Court as outside its powers, the Constitution itself fixing and limiting such jurisdiction which therefore cannot be touched save by amendment. A counter-argument may be urged, that just as the President is given vast powers beyond the shores, so should the Congress, i.e., are (being) fought overseas. However, there is no “war” under the Constitution, either by declaration or by an attack on us by Hanoi. There is a legal and technical peace today, and the question of a sufficiently grave emergency has been and is being examined here. Conscript is for internal or domestic assignment, not necessarily overseas; and even if for overseas, there is a current (somewhat major) withdrawal from our foreign commitments in progress, on which more later.

75. In other words, only when a case or controversy is properly before it, which requires one or more persons to sue, etc. Thus, the probable unconstitutionality of the Alien & Sedition Acts of 1798, which expired by their own terms on March 3, 1801, could thus not be tested at that time even though three Supreme Court Justices, while sitting in the circuit courts, upheld their validity. See also Jackson’s dissent in Beauharnais v. Illinois, 343 U.S. 250, 287 (1952), and T. Emerson, D. Harris & N. Dorsey, Political & Civil Rights in the United States, 35-85 (3d ed. 1967).


77. Sibron v. New York, 392 U.S. 40, 59 (1968), a fourth amendment situation requiring a decision only “in the concrete factual context of the individual case.” See also, by analogy, Terminello v. Chicago, 337 U.S. 1, 8, 9 (1949), where “[f]or the first time in the course of the 130 years in which State prosecutions have come here for review, this Court is today reversing ... on a ground that was urged neither here nor below and that was explicitly disclaimed on behalf of the petitioner ...” (Frankfurter dissenting, Jackson and Burton joining). Douglas, for a majority of five, went into the record to exume the fact that no exception to the trial court’s (unconstitutional) instruction to the jury was taken, but nevertheless held such defect required overturning of the verdict of guilty. Vinson and Jackson (Frankfurter and Burton agreeing) also wrote dissenting opinions. Compare Douglas’ approach in this civil liberties case with a contrary view when property only was involved, especially where the protection of consumer interests against exploitation were considered, as in LPC v. Hope Natural Gas Co., 320 U.S. 591, 617 (1944).

78. In rent control, or jurisdictional (service of process) matters, as to the former, see, analogically, note 51 supra. See also Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948), a war-emergency holding. Compare Jackson’s concurring admonitions with Eisen v. Eastman (2d Cir. 1969), where Judge Friendly wrote, in upholding the statute, “The New York City Rent Control Law contains an impressive recital of the conditions deemed to call for its enactment ....” As to the latter (jurisdiction), the Supreme Court, in
matters. In administrative proceedings the Justices have gone so far as to create a "constitutional" or "jurisdictional" fact doctrine whereby they grant de novo reviews, during which the court examines evidentiary facts and makes its own findings of fact. So, too, has the federal judiciary, acting of its own volition, gone into the facts in federal criminal and civil matters, as well as in administrative proceedings. Thus, unless it is held that the Congressional power to declare war is unlimited, unconditioned, and uncontrolled, the judicial branch must somehow provide a factual rein to prevent this constitutionally delegated power from being abused. If the Supreme Court may examine the President's exercise of power via an executive order, then it should be able to do the same for a legislative exercise of power via a statute—whether this power is exercised to control the national economy in peace or in war,

revamping the civil law requirements for constitutional (non-personal) service of process, went deeply into the facts to show "presence" within a state sufficient to permit jurisdiction to attach. See International Shoe Co. v. Washington, 326 U.S. 310 (1945); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); and discussion in ForskoscH, CONSTITUTIOINAL 481-54 (1963), and CARmODY-FORSKOSCH NEW YORK PRACTICE, Chaps. VIII-X (8th ed. 1963, and 1968-1969 suppl.).

79. The most outstanding situation, where a constitutional infringement is claimed based upon the facts, is Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920), a rate-making case which has been severely criticized and somewhat limited procedurally but not substantially as to the exercise of such power, on which see ForskoscH, ADMINISTRATIVE §§ 342-3; DAVIS, ADMINISTRATIVE, supra note 67, IV, §§ 29.08.10; and L. JAFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 652-53 (1965), all giving other cases. See also note 82 infra.


81. The Supreme Court even went behind a prima facie valid judgment, where a state attempted to invoke the Court's original jurisdiction, to ascertain the true facts so as to disclose that it, the High Court, did not have jurisdiction. Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888). Although for states see Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935).

82. "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status." Brandeis, in Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

See also texts cited in note 79 supra. Even in FPC v. Hope Natural Gas Co., 320 U.S. 591, 60 (1944), a rate-making case, as in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920), the Court went into an extended discussion of the evidence although saying that the "end product" (at 601) or "end result" (at 603) controlled.

83. But see, notes 41, 44, 46, and 48 supra.
or to declare war. And is not the only way to do this to go into the facts?

What are the "facts" which apply here? They embrace both Presidential and Congressional ones, as well as findings of fact and evidentiary ones. President Johnson's initial belief that as the Chief Executive, he could, alone and without more, engage our armed forces in Vietnam, was misplaced and weak. It was sufficiently weak, as he himself recognized, to warrant a request of Congress for its cooperation.\textsuperscript{84} The Tonkin Gulf Resolution\textsuperscript{85} of August 10, 1964, resulted.\textsuperscript{86} As it is the only Congressional basis for authority to the President, not only to wage his Vietnam action but also to conscript through the congressional statutes in this area, this resolution requires a detailed and extensive analysis and evaluation.

The Tonkin Gulf Resolution contains three introductory "Whereas" clauses, followed by two relevant sections.\textsuperscript{87} Each clause and section must be examined. The first clause states,

\textsuperscript{84} Analogically, but not similarly, to the Lincoln situation, notes 26, 28, and 31 supra. See also the Roosevelt request of Congress for legislation in 1942 but threatening, if it were not given, to "accept the responsibility, and I will [nevertheless] act," although concluding that "When the war is won, the powers under which I act automatically revert to the people—to whom they belong." Quoted in FORKOSCH, CONSTITUTIONALISM 161. For another analysis see Malavet, The Vietnam War Under the Constitution: Legal Issues Involved in the United States Military Involvement in Vietnam, 31 U. of Pitts. L. Rev. 205 (1969).

\textsuperscript{85} The Resolution itself nowhere carries this designation, and Tonkin Gulf is not once referred to. The basis for this characterization is in the background of the first Whereas clause, next discussed, infra note 88, and text keyed thereto, which refers to the alleged attack by three North Vietnamese torpedo boats upon the American destroyer Maddox on August 2, 1964. The Administration's details are to be found in the statement by Adlai E. Stevenson, the U.S. Representative in the Security Council on August 5, 1964, Dept. of State Bull., Aug. 24, 1964, pp. 272-74.

\textsuperscript{86} H.J. Res. 1145, P.L. 88-408, 78 Stat. 384 (1964). The trenchant paper by WORMUTH, VIETNAM, supra note 5, effectively demolishes the contentions of the State Department that the President had such powers without the Resolution, and shows that even with the Resolution the alleged "war" in Vietnam was unconstitutionally entered into.

The deviousness with which the military and the executive branch have managed to commit the power and personnel of the United States abroad is displayed in hearings before a Senate subcommittee on American security commitments abroad, detailed somewhat by Tom Wicker in his N.Y. Times, Nov. 25, 1969, at 46, col. 3.

\textsuperscript{87} A third and final section is unimportant, merely stating the Resolution is to expire when the President so determines, or earlier by another concurrent resolution of Congress. To the contention that Congress has reserved to itself this power, and therefore the Court should not interfere, especially as a political act of high national importance is involved, the short answer is that it is not a question of congressional discretion when or how to act which is here examined but whether Congress ever had any power to enter into such an arrangement with the President, or to conscript, or to continue conscripting, or to prevent a registrant from utilizing counsel in the conscripting process.
as a finding of fact, that North Vietnamese “naval units ... have deliberately and repeatedly attacked United States naval vessels,” a fact brought into disrepute by the effective and well-publicized Senate hearings and investigations.88 As this overall analysis of the Resolution discloses, this so-called fact is the only finding in the entire document. Upon its truth, it is suggested, hinges the ability of the Congress and the President to act or to continue to act. This writer has attempted to disclose in the half dozen paragraphs preceding this one that facts are the basis for the exercise of various and different powers in various and different situations, and the cases disclose a judicial readiness to inquire into and for them, regardless of any upholding or denouncing of the power exercised.

For example, in Hirabayashi89 the Japanese attack on Pearl Harbor resulted in a series of Executive Orders beginning on

88. See, the memorandum of law prepared by the Lawyers Committee on American Policy Toward Vietnam in 1967 (reproduced Cong. Rec. of Sept. 23, 1965), and their reply, Vietnam and International War (1967) to the State Department’s second memorandum “The Legality of United States Participation in the Defense of Vietnam,” U.S. State Dept. Bull. Vol. 54, #1395 (1966). See also Pusey, WAX, supra note 5, who effectively disposes of this inflation of a trivial naval incident into a major crisis. See also the analysis by Wormuth, VIETNAM, supra note 5, at 43-44, THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk, ed., 1969) and brings together in two volumes discussions by writers such as Dean Rusk and U Thant, on the war’s legality.

The Johnson Administration cavalierly interpreted the Tonkin Gulf Resolution as “the functional equivalent of a declaration of war,” but the Senate Foreign Relations Committee has, in April of 1970, voted unanimously to repeal it. The Nixon Administration contends that “its actions in Southeast Asia are not based on the authority of the resolution” but repeal will, nevertheless, have a sobering effect on the President and also restore to the Congress its constitutional responsibilities. See editorial, N.Y. Times, April 15, 1970, at 42, col. 1, and also Senate’s vote, by 63 to 14, calling on the President to make no final agreement to return Okinawa to Japan without first obtaining its advice and consent (which resolution is questionably binding on the President constitutionally, although politically it is important). See also, note 1 supra and note 105 infra.

Reference may also be made to the National Commitments Resolution which passed the Senate by 70 to 16 in June, 1969, stating that “a national commitment by the United States results only from affirmative action taken by the legislative and executive branches of the United States Government by means of a treaty, statute, or concurrent resolution of both houses of Congress specifically providing for such commitment.” See also JAVITS, CONGRESS, infra note 105, at 233. On December 15, 1969, by a 78-11 vote, the Senate amended a defense appropriations bill so as to prohibit the commitment of ground combat troops in Laos, etc. Cf. however, the House’s vote by 333 to 55 on December 2, 1969, approving an Administration-supported resolution endorsing the President’s efforts to negotiate a “just peace” in Vietnam, which was felt to be sufficiently ambiguous so as to be interpreted as supporting the war (power) generally. For text, see N.Y. Times, Dec. 3, 1969, at 1, col. 1.

89. Hirabayashi v. United States, 320 U.S. 81 (1943). The majority opinion by Stone was followed by three concurring ones by Douglas, Murphy, and Rutledge.
February 19, 1942, authorizing the west coast military commander to impose curfews and to relocate all persons of Japanese ancestry. By legislation of March 21, 1942, Congress "ratified and confirmed" (308 U.S. at 85) the orders and military actions. "The actions taken must be appraised in the light of the conditions with which the President and Congress were confronted in the early months of 1942, many of which, since disclosed, were then peculiarly within the knowledge of the military authorities" (308 U.S. at 98-94). Included in these facts, which the Court related in detail, were not only the Pacific battles and situations but also the "threatened air raids and invasion [of the west coast] by the Japanese forces," and the "safeguarding [of] the military area . . . from the danger of sabotage and espionage" (308 U.S. at 95). The Court then went into a further statement of facts to show that sabotage and espionage from Americans of Japanese ancestry were not unthinkable,90 that there was a "reasonable ground for believing that the threat is real" (308 U.S. at 95), that "we cannot reject as unfounded the judgment of the military authorities and of Congress . . . for believing that in a critical hour such persons . . . constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it," for "[t]he extent of that danger could be definitely known only after the event and after it was too late to meet it."91

Even though the Court upheld all these acts and statutes it did go behind them to look at the true facts, and concluded that "[t]he threat of Japanese invasion of the west coast was not fanciful but real" (308 U.S. at 105, Douglas) and that in view "of the critical military situation which prevailed and the urgent necessity of taking prompt and effective action" (308 U.S. at 112) action "taken by the military commander . . . was taken in complete good faith and in the firm conviction that it was "absolutely required" (308 U.S. at 109, Murphy). Although, as Rutledge commented, "once it is found that an emergency has created the conditions requiring or justifying the" conduct and while he would not ordinarily proceed further, still "there may

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90. "These are only some of the many considerations which those charged with the responsibility for the national defense could take into account in determining the nature and extent of the danger of espionage and sabotage, in the event of invasion or an air raid attack." Id. at 99.
91. Id. Warren has suggested that these cases indicate the Court was in no position to challenge or reject the President's conclusion of military necessity during this wartime emergency. "The Bill of Rights and the Military," in The Great Rights 89, 101 (E. Cahn. ed., 1963).
... be bounds beyond which he cannot go and, if he oversteps them, ... the courts ... have power to protect the civilian citizen.92

This same judicial detailed examination of facts was also found in the peacetime Steel Seizure Case but there, because the emergency was on a different level and of a different nature, the desired exercise of Presidential power was rejected.93 But, assuming the existence of the facts when acted upon, can these facts be re-examined, with a new determination? In a peacetime mortgage situation this has occurred, as has been shown,94 and in his Endo concurrence Murphy felt that while “the military orders excluding her from California were invalid at the time they were issued, they are increasingly objectionable at this late date, when the threat of invasion of the Pacific Coast and the fears of sabotage and espionage have greatly diminished.”95 So, too, are the courts examining into and behind the facts in civil and criminal cases, as well as in administrative proceedings, and there is no hint of any judicial usurpation of power in this, or that it is not required of the Justices. Our concept of the rule of law is not a Platonic one; rather, it is the Aristotelian with a modern passion for facts, with law creeping out from their interstices,96 which governs our conduct within and without the courts. And if all this be so, and the only finding of fact in the Tonkin Gulf Resolution is the critical one of the alleged naval attack, then the power of Congress so to resolve in 1964 (or to delegate) is highly questionable. And even if Congress believed these facts to be correct at the time and so acted properly at that moment, later disclosures may invalidate the original fact and the original or continued exercise of power or, conversely, uphold the original exercise of power as in Hirabayashi. The Supreme Court has power now to inquire into the original and claimed true facts, decide as these now indicate, with power today to determine that the continuing jurisdiction cease.

92. Id. at 114. I have omitted negatives, for Rutledge phrased this as a question which “need not be faced” now. In Korematsu v. United States, 323 U.S. 214 (1944), Black's majority opinion likewise referred to “an area threatened by Japanese attack”. Id. at 214.

93. The dissenters felt that because “[t]here is no judicial finding” of fact that the President’s action “was unwarranted,” then the majority should not reverse. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643 (1952). Is not the implication that (1) if such a finding of fact were made (on a substantial basis) then reversal would be permissible, and (2) that the majority would be authorized (have power) to inquire into the evidence to ascertain whether or not such a finding could be made?

94. Supra note 51.

95. Ex Parte Endo, 323 U.S. 283, 308 (1944).

96. I have paraphrased H. MAIN, EARLY LAW AND CUSTOM 389 (1907).
The second clause of the Tonkin Gulf Resolution asserts "these attacks are part of a deliberate and systematic campaign of aggression" by Hanoi against its neighbors and allies. This may well be, but one might ask: has not the United States since receded from this diplomatic and policy position? Has it not discarded the domino theory, as well as the puppet one (Hanoi is fronting for China and/or Russia)? And is it not willing today to have the North Vietnamese take over the entire country, if, and provided that, free and democratic elections are held. 97 This, in effect, means that either the view expressed in the second clause is not a finding of fact but simply an opinion, or else that the facts have changed. 98

The third clause is only self-serving, hortatory, or innocuous, merely stating that we have no territorial ambitions in southeast Asia and desire "only that these peoples should be left in peace to work out their own destinies in their own way . . . ," a statement which is immaterial for our discussion. The three clauses, therefore, either were incorrect factually when promulgated or else have been rejected or altered by time and the tides of political opinion. 99 In any event, they certainly do not represent the findings of fact, or the evidentiary ones, which today would be made if a similar resolution were requested.

The first section of the Tonkin Gulf Resolution iterates congressional approval and support of the President's determination "to repel any armed attack against the forces of the United States to prevent further aggression." The former item can refer only to what allegedly occurred at Tonkin Gulf, this being "further aggression" in the latter item, and therefore, is questionable as being of any support to the first clause as a fact; the latter is not any fact in the past (although "further" implies the past) but merely for the future, later aggression, if any occurs.

The second, and here important, section contains two sentences, the first being merely a statement of our feeling that "peace and security in southeast Asia" are "vital to [our] national interest and to world peace . . . ." This probably might well

97. WORMUTH, VIETNAM, supra note 5 at 16, quotes Senator Fulbright's complaint that the policy "has been radically changed since the summer of 1964." THE ARROGANCE OF POWER 51 (1966). Since 1966 the policy has continued to be so changed until today there has been a large degree of reversal.
98. See note 88 supra. See also note 57 supra.
99. Even during the actual war period the Supreme Court felt that it had erred in policy, and therefore reversed its flag salute holding, Minersville School Dist v. Gobitis, 310 U.S. 586 (1940); rev'd. in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). See also note 57 supra.
have been incorporated in the third Whereas clause, but regardless, is a declaratory statement of a view held in 1864, and as above mentioned, refers to the discarded domino theory which the next sentence somewhat explicates. The next statement is "Consonant with the Constitution of the United States [and United Nations Charter and Southeast Asian Treaty obligations], the United States, is therefore, prepared as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." These quoted words in effect give the President a blank check ("all necessary steps, including the use of armed force") whenever he so feels ("determines") in order to aid Vietnam ("assist any member or protocol state ... requesting assistance").

There is, however, a major limitation upon this delegation of Congressional power. For it is now the President, not Congress, who has the power to institute or make, if not declare, war. A second major objection is the lack of any standard

100. On "war by invitation," and its unconstitutionality, see WORMUTH, VIETNAM, supra note 5, at 21-28.

101. Id. at 44, who argues against such a power to delegate, quoting from Justice Marshall's opinion in Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825), that a "strictly and exclusively legislative" congressional power cannot be delegated "to the courts, or to any other tribunals ...." This general statement has, of course, been rejected by modern-day necessities of delegating such powers to administrative tribunals, merely softening the power by terming it a "quasi" one (Holmes, J.) dissenting in Springer v. Philipple Islands, 277 U.S. 189, 210 (1928). See FORKOSCH, ADMINISTRATIVE, 48. See also note 69 supra. The point made by Professor Wuth is nevertheless valid in certain peacetime situations, e.g., "The Congress is not permitted to abdicate or to transfer others the essential legislative functions with which it is thus vested," Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935), and especially in this alleged war (or emergency) situation does this prohibition hold, as:

(1) this is an express grant of power of an "essential legislative function" by art. I, § 8, cl. 11 to Congress, and therefore limited to that body. Hamilton espoused this view in opposition to Jefferson's dispatch of a squadron of frigates (for defensive purposes only) to the Mediterranean after the Bay of Tripoli had declared war on us in 1801 (which raises the question, can a mosquito so antagonize the elephant that, without more, the latter may now trample upon him, i.e., entire villages and the nation to overcome it?); Hamilton felt that "[i]t is the peculiar and exclusive province of Congress, when the nation is at peace to change that state into a state of war ...." (7 Works 746-47 [1851]). See also Daniel Webster's views in 1814, as quoted by Douglas, dissenting in Holmes v. United States, 391 U.S. 936, 939 n.3 (1968), and Webster's statement in 1847 concerning the Mexican War: "I hold the war-making power to be instrusted to Congress. The Constitution places it there. I believe that Congress was surprised into the recognition of war on the 3rd of May, 1846. I believe that if the question had been put to Congress before the advance march of our troops, not ten votes could have been obtained to pronounce that there was then an existing state of things which
whatever to guide the President-delegatee in using his uncontrolled discretion in so determining, or in what is meant by "necessary steps," or what the limits are in "the use of armed force." The word "determines" may conceivably be limited by the implied common law term "reasonable," i.e., as the President reasonably determines, but if so, this almost certainly permits judicial questioning of the facts upon which the reasonableness is based. The word "necessary" which superficially modifies "steps" is likewise a term analogous to "reasonable," and the language may even be inferentially held to be "all necessary and reasonable steps"; in either case, the court again has power to inquire into the necessity of a particular step, under the facts and circumstances then applying or continuing to apply. And even if the clause "including armed force" is added to the preceding, it is nevertheless embraced within "steps," not "necessary," for the variety of steps to assist a nation includes matériel, advice, etc., as well as men; which still leaves "necessary" open to the preceding objection so that now the judiciary again has power to inquire into the factual and situational necessity.

amounted to, or justified, war or to declare war against Mexico ... . It must be admitted to be the clear intent of the Constitution, that no foreign war should exist without the assent of Congress. This was meant as a restraint on the executive power." Id.

(2) Apparently the Supreme Court has agreed with Hamilton and Webster, e.g., Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800), Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801), Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804). Wornuth concludes that only "Congress may initiate action short of general war, that the initiation both of general war and of action short of general war belongs to Congress, and that it is for Congress to prescribe the dimensions of the war." Id. at 9.

102. See the Panama Refining case, supra note 68, where both Hughes, for the majority, and Cardozo, the lone dissenter, concurred in the necessity of a "standard reasonably clear whereby discretion must be governed," at 434. See also Douglas' dissent, in New York v. United States, 342 U.S. 882, 884 (1951), that "Absolute discretion, like corruption, marks the beginning of the end of liberty." See further Forkosch, Administrative, 103-15. In rate-making, of course, the courts go even beyond this requirement of standard and will also review de novo, e.g., id. at 750-51, giving the Ben Avon situation, supra note 79.

103. In American Power and Light Co., 329 U.S. 90, 91 (1946), the Court upheld a delegation of power to simplify corporate structures or break up companies in a holding company system when these "unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power ... ." This peacetime delegation and exercise of power, all subject to (continuing) judicial review, with a negative (as in the Federal Trade Commission's "unfair methods of competition") plus additional terms of limitation, is a far cry from what is here examined in isolation, with liberty, not property, involved. See Brandeis in the St. Joseph Stock Yards Case, infra note 117, at 77, stating that when a citizen claims his liberty is infringed he must be given a "judicial determination of the facts" via habeas corpus, if necessary. "But a multitude of decisions tells us that when dealing with property a much more liberal rule applies."
initially or today, for the use (or continued use) of armed force, i.e., men may not be “necessary” even though machines are.

This lack of standard in the Tonkin Gulf Resolution is confirmed by reference to Section 4(a) of the Military Selective Service Act of 1967 which contains this delegation: “The President is authorized, from time to time, whether or not a state of war exists, to select and induct . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces.” Assuming Congressional ability so to act in times of peace (which has been denied above), the delegation itself permits the selecting and inducting power to be exercised for the twin purpose of providing and maintaining the force’s strength. The power is the means whereby the purpose or end is to be accomplished, and neither of these, means or end, is qualified in any way. The clause “as may be required” vests discretion in the President, and here, too, there is no limitation upon his unbridled exercise, e.g., he may decide ten million inductees are required to maintain such strength. Again, as with the Resolution, whether or not “reasonably” is placed before “required,” the judiciary must determine either factual situation, else “delegation running riot” ensues. Similarly if the same term is used to qualify “number of persons”, or “provide”, or “maintain”, or “strength”, the same conclusion follows.

The unbridled and uncontrolled delegation in Section 4(a) can be justified only in terms of an actual war situation or grave and acute national emergency, and then only temporarily, but in 1967 there was neither, and as of this writing this continues to be the case. Even the statutes concerning active duty refer to a “time of war or of national emergency declared by Congress, or when otherwise authorized by law,” before permitting reserve units generally, without their consent, to be called to active duty, or similarly “In time of national emergency

105. See Roosevelt’s promise, supra note 84, and also notes 1 and 88. On October 14, 1969, Senators Javits and Pell introduced a resolution to terminate the Tonkin Gulf Resolution on December 13, 1970, which would not, however, repeal current Congressional authorization for continued aid, training, and equipment to Vietnam, Laos, and elsewhere. On December 8, 1969, Senator Mathias introduced a resolution to terminate not only the Tonkin one but also the Quemoy-Matsu-Formosa one of 1955, the Mideast one of 1957, and the Cuban one of 1962. See also Javits, The Congressional Presence in Foreign Relations, 48 FOREIGN AFFAIRS, 221 (1970), and cf. Shaplen, Our Involvement in Laos, id., at 478.
106. 10 U.S.C. § 672(a), permitting the order to be by “an authority designated by the Secretary concerned . . . .” And for a like statute for the standby reserve, see § 674(a).
declared by the President” for the ready reserve. In other words, these reserves are treated differently (unequally, to discriminate against the registrant-inductee?) in that active duty requires, as a condition precedent, war or a Congressional (Presidential) declaration of a national (not just an ordinary) emergency, whereas the registrant may eventually be inducted “whether or not a state of war exists,” without any national emergency being declared or existing in fact, and solely in the discretion of the Presidential-delegatee.

The limitations to the Tonkin blank check are both external and internal. Is there any finding of fact upon which the congressional (and then Presidential war power may constitutionally be exercised, e.g., has a foreign nation attacked us, or declared war on us? If not, then has Congress any power under Article I, section 8, clause 2 to declare war against a foreign body, if we do not desire to dignify North Vietnam as a nation? Or, if we accept the statement of opinion, not facts, in the first sentence of section 2, that our national interest requires peace and security in Vietnam, is this per se, or even in conjunction with the alleged attack, sufficient as a justification for the exercise of any such congressional (war) power? Even if the second sentence is to be upheld because of our treaty commitments, it opens with “Consonant with the Constitution,” and the Supreme Court has already indicated that a treaty cannot violate a constitutional requirement. Or, if this objection is not sufficient, then “all necessary steps, including the use of armed force,” may also be a limitation, for by specifying the latter as one such necessary step the Congress placed it in a category separate and different from others, e.g., advisors, weapons, money. In effect, and to avoid ambiguity and confusion, Congress here recognized that “all necessary steps” might ordinarily be judicially interpreted as not including “armed force” because of constitutional limitations, and therefore strove to indicate its desires.

This congressional action reinforces the view here expounded: that such an additional power delegated to the President must find constitutional support in the actuality or declaration of war—for while there is peace “no doctrine that the Court could promulgate would seem to me more sinister and alarming than

107. Id. at § 673(a), with the same general language as above.
108. See Forkosch, Treaties and Executive Agreements, 32 Chicago-Kent L. Rev. 201, 209-10 (1954), for citations and references, and also Wormuth, Vietnam, supra note 5, at 40.
that [the Congress] can vastly enlarge [its] mastery over the internal affairs of the country by [its] own [or with the President's] commitment of the Nation's armed forces to some foreign venture." This view discounts the power of Congress itself to "raise" armies in time of peace (apparently still the government's contention), and further indicates that a "foreign venture" is without the power of either branch or both unless some valid support is shown; in the President's case, Congressional, and in Congress's case, constitutional. Further, and arguendo, if the Tonkin Gulf Resolution's "armed forces" is nevertheless upheld, and the President thereby claims the power to send men to Vietnam which is also upheld, he possibly can so dispatch regular army men and volunteers, but this does not necessarily mean that conscripts may be so treated or raised. Cannot a draftee or inductee claim this Vietnam combat service is without the power of the two branches even while conceding the power to raise and require service of some other kind?

II. A Registrants Actual Rights v. the Conscription Power

This 1964 and continued exercise of congressional-executive power in conscripting men for the Vietnam "venture" was and/or is without the general power of either, whether under the Constitution or a delegation—at least this seems to be now indicated. Even if an emergency claim is added, the facts as they existed in 1964 disprove that theory, and do so even more clearly today. This, in effect, requires the war-time (or extreme

109. In the Hirabayashi case, supra note 57, at 912 Stone referred to such a coupling of powers so that both branches, acting together, were there upheld in imposing "the curfew restriction here complained of", and also delegating to a "designated military commander" power to determine "when, and where so to impose. Murphy also referred to this "working together" but added "in normal times," at 109. See also notes 57 and 113.

110. See note 47 supra, for the exact quotation (here slightly altered).

111. See note 44 supra.

112. The term "venture" as used by Jackson, supra note 47, there referred to the Korean situation, now comparable and analogous to the one in Vietnam, i.e., actual fightings. Therefore, the valid dispatching of troops to Germany for occupation purposes cannot be used for any counter-argument nor, if one points to Japan (with which a peace treaty was signed), for a like dispatch, for we have stationed troops at overseas bases for decades, e.g., Guantanamo, Pearl Harbor (prior to Hawaii's statehood). While this may be foreign "service," it is not a "venture" as above used and we limit this discussion to "venture." Cf. however, a statement illustrative of the feeling and views of the combatants, that "I don't know I agree that this war is different from any other war," was made by a military judge of a general court-martial in South Vietnam, New York Times, March 20, 1970, at 16, col. 4.

113. In Hirabayashi, supra note 57, there was an actual war, with a valid belief in an immediate and threatened Japanese invasion of the west coast, whereas here these facts are farthest from the situation, i.e., it is the United States which is sending combat troops to foreign shores.
emergency) measure of conscription now to be denounced, so that no question of a constitutional right to counsel within the Selective Service System need arise. *Arguendo*, the power to conscript may be sustained, whether generally (i.e., even during peace) or particularly (i.e., an acute and overriding emergency)—does this carry with it the further power to deny a registrant his sixth amendment right to counsel in and during the System’s proceedings? Or, aside from a sixth amendment right, through the fifth’s due process requirements?

There are two main objections to the denial of such a right today. First, in any administrative proceeding a respondent has a constitutional right to a full and fair hearing which includes counsel whenever a quasi-judicial power is being exercised and judicial review is circumscribed as to the merits, with exceptions being permitted in but a few situations. Secondly, even during such latter situations, one’s constitutional rights at least as to counsel cannot be denied except and unless the conditions are so grave that “national survival is at stake . . .”

A. Registrant’s Right to a Full and Fair Hearing

The law surrounding a registrant’s claim to counsel within the Selective Service System does not embrace a governmental

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114. There can be no denial that local boards act administratively, for the exhaustion doctrine is applied. DuVernay v. United States, 394 F.2d 979, 981 (5th Cir. 1968), *aff’d. equally divided court*, 394 U.S. 309, as is the minor prejudice doctrine. See cases in notes 133, 149, 191 infra.

115. For example, the hearing may, under emergency conditions or for like reasons, be postponed, as in Yakus v. United States, 321 U.S. 414 (1944), or Fahey v. Mallonee, 332 U.S. 245 (1947), and in summary destruction (bad food) cases this is commonplace. See, North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908). This question whether a registrant’s “hearing” can be postponed within the local board until after the initial classification, is not required to be answered, so long as a hearing, with the right to counsel, is given prior to the classification becoming final. *See Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-53 (1941). *See also* United States v. Illinois Central R.R., 291 U.S. 457 (1934); Nickey v. Mississippi, 292 U.S. 393 (1934). Nevertheless, a hearing may, in an emergency situation, be denied, where adequate judicial review is substituted. Pacific Live Stock Co. v. Lewis, 241 U.S. 440 (1916). The Court in Bowles v. Willingham, 321 U.S. 503 (1944) quoted Brandeis in Phillips v. Comm’r. 283 U.S. 589, 596 (1931) that “where only property rights are involved, mere postponement” is proper “if the opportunity given for the ultimate judicial determination of the liability is adequate”. *See also* note 167 infra. However, (1) personal constitutional rights are involved here; (2) there is no present emergency; (3) constitutional, not statutory, rights are involved; (4) a statute here expressly requires the hearing, just the contrary of that in *Bowles*, *Yakus*, and other analogous cases.

gratuity, pension, grant, gift, or like situation wherein "no vested right" is created. In such nonconstitutional fields there is ordinarily no constitutional right (by definition) to a full hearing or to counsel. Here, the initial question involves what field of law is actually present. There can be no disputing the fact that one's liberty, at the very least, is being "taken" when one is inducted involuntarily, so that at least a fifth amendment right to due process of law is present, that is notice and hearing at some point before the taking becomes final. But even if there is such a requirement, there is ordinarily no additional constitutional need to have the full hearing in the agency pro-

tribunal's view that a defendant's "right to be present at his own trial was so 'absolute' that, no matter how unruly or disruptive" he was he could never lose it so long as he insisted upon it. Instead, such a defendant "can lose his right to be present" but it can "be reclaimed as soon as" he is willing to behave (on question of whether Allen was competent, see concurrence by Douglas). Quaere: can one's right to counsel (of his own choosing or else court-appointed) be likewise so treated under these disruptive circumstances? And even if not, where the lawyer likewise so acts, can one's own chosen (and paid for) counsel be so removed and a defendant left bereft of advice save from one he does not desire?


118. A statute giving a "full" hearing is interpreted to mean a hearing of a quasi-judicial nature, in which the constitutional minimums of procedural due process require adequate notice and a fair hearing, e.g., the right to counsel in agency proceedings. Morgan v. United States, 298 U.S. 468 (1936).

119. See discussion in FORKOSCH, ADMINISTRATIVE 54-60, giving cases and references. Of course a statute may grant this right, but this is not considered here.

120. However, art. I, § 9, cl. 2 prevents "The privilege of the Writ of Habeas Corpus" from being suspended by the federal government, which also implies, especially in view of the exceptions attached, a right to be free from detention, etc.

121. "That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic and other proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden." S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 102 (1959).

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ceeding when it is performing solely legislative\textsuperscript{122} or executive\textsuperscript{123} functions,\textsuperscript{124} or the proceeding is non-adversary in nature.\textsuperscript{125}

The second question is therefore: what power is being exercised by a local board, or any internal reviewing board exercising these same powers, when a registrant appears before it, and what is the nature of the proceeding? This question cannot be answered generally. Each type of appearance requires a detailed examination to ascertain exactly what is actually being done by the board with and to the registrant at the particular moment involved. Each situation cannot be discussed, but an illustrative one, necessarily covering all registrants, may be examined, namely, classification. The particular statutes and regulations involved and applicable must first be set forth as a backdrop.

The Military Selective Service Act of 1967 provides in section 3 that every male citizen of, and other male person in, the United States, between the ages of 18 and 26, must register pursuant to Presidential proclamation and by rules and regulations to be prescribed.\textsuperscript{126} Section 5[a] provides that the selection for training and service is to be made from among these registrants pursuant to rules and regulations with certain provisos attaching. Section 6 says that exemptions and deferments are provided for, and in section 10[a][1] there is “established in the executive branch of the Government an agency to be known

\begin{itemize}
  \item \textsuperscript{122} For example, solely rate-making as such for the future, although by statute a combined quasi-legislative and quasi-judicial combination is generally exercised, e.g., Arizona Grocery Co. v. Atchison, Topeka & S.F. Ry., 294 U.S. 370 (1932).
  \item \textsuperscript{123} For example, a deportation “proceeding is, throughout, executive in its nature,” Brandeis, in Ng Fung Ho v. White, supra note 82, at 284.
  \item \textsuperscript{124} Assuming, of course, no statute requires it, as in note 122 supra. See also notes 118-19.
  \item \textsuperscript{125} See United States v. Abilene &Southern R.R., 265 U.S. 274 (1924), and note 117 supra.
  \item \textsuperscript{126} Under \textsection 10(b)(1) the President is authorized to prescribe rules and regulations, and under \textsection 10(c)1 to delegate or permit subdelegation of “any authority vested in him under this title . . . ” The delegation of the power to prescribe and promulgate rules and regulations to the director is valid, Savoretti v. Small, 244 F.2d 292 (5th Cir. 1957). See also the Selective Service Regulations Part 1611, concerning the details, exemptions, etc. These statutes and their regulations may have induced former Selective Service Director Hershey to feel that “a registrant is not an ordinary citizen,” N.Y. Times, Oct. 31, 1969 at 4, col. 1, but fortunately, he was not supported in this by the judiciary, (e.g., in Tousley v. United States, 90 S. Ct. 838 (1970), the five-year statute of limitations (18 U.S.C. \textsection 3282) was held applicable as of the date of his failure to register at 18, and did not, as the government contended, apply to each day thereafter that he continued so to fail to do).
  \item On the arguments against the randomness of the new “random selection sequence” draft lottery instituted under an Executive Order of Nov. 26, 1969, see N.Y. Times, Jan. 4, 1970 at 66, col. 3.
\end{itemize}
as the Selective Service System, and a Director...." The President is authorized

to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection... of persons... Such local boards... shall, under rules and regulations prescribed by the President, have the power... to hear and determine... all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe.... No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution... [and] such review shall go to the question of jurisdiction herein reserved to local boards... only when there is no basis in fact for the classification assigned to such registrant... (§ 10[b][3]).

The Selective Service Regulations contain details on all of the preceding and include the following: the local board chairman is to "take necessary action to prepare for registration"

127. The Selective Service Regulations give details as to the composition of such boards and, here of interest, do not permit a member to act where the registrant involved is a first cousin or closer, either by blood, marriage, or adoption, or where the registrant is an employee or employer, etc., Part 1604.55.

128. See generally 32 C.F.R. XVI. See note 126 supra, on delegation by the President. These promulgated rules and regulations are a registrant's right to be accorded to him. Knox v. United States, 200 F.2d 398 (9th Cir. 1952); Forkosch, Draft Card Burning, supra note 41, at 308 n.22, and 322 n.73, and note 160 infra, as well as Ginger, Minimum Due Process Standards in Selective Service Cases, 19 Hastings L.J. 1313 (1968). An excellent descriptive article of the system's functioning applied to registrants, and suggesting that because of the penalties inflicted if forms are not properly and fully completed, etc., "a critical stage [as] in the criminal proceedings" has been reached, and that the warnings (see Forkosch, CONSTITUTIONAL LAW § 430 [2d ed. 1969]) required in criminal matters should be required and given here (at 1341). See also Comment, Fairness and Due Process Under the Selective Service System, 114 U. Pa. L. Rev. 1014, 1029-34 (1966) re the right to advisors or counsel, and advocating the presence of counsel at local board hearings even though speaking (arguing) would be discretionary with the board.
and is to "supervise" it when and as required (Pt. 1612.21); each registrant is assigned a selective service number (Pt. 1621.2), and a file or "Cover Sheet (SSS Form 101)" is opened for him (Pt. 1621.8); a questionnaire (Form 100) is then mailed (Pt. 1621.9) which the registrant must complete and return within ten days (Pt. 1621.10). This questionnaire is an eight-page document, five of which have thirteen subdivisions which require the registrant to give detailed information as follows; identification, military record; marital status and dependents; registrant's family; occupation; agricultural occupation, minister or student preparing for the ministry, conscientious objector, education; statement of alien, physical condition; court record, sole surviving son. Assuming no problem arises as to the procedures and completion of the questionnaire, classification later occurs. "Classification is the key to selection" and it is "the local board's responsibility to decide . . . " (Pt. 1622.1[b][c]). A majority of those present at a local board (Pt. 1604.56) or a panel (Pt. 1604.52a[d]) meeting "shall decide any question or classification." A local board member is to "ad-

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129. The procedures at Pt. 1613.11 et seq. include authority to the registrar to obtain the "information necessary" and "sufficient information" for the registration, and he is to "note . . . which [of the registrant's answers] he believes to be incorrect or false" or else to indicate otherwise with a "None" (1613.14[a]). To what extent this power in the registrar is properly delegated, and, second whether it can be properly exercised, and third, whether this does not bring him into the selection process directly, or indirectly, are questions not explored. On this last aspect, however, questions of propriety, at least, enter.

130. For further details see Forkosch, Draft Card Burning, supra note 41, at 303-05 and also SSLR PRACTICE MANUAL § 1010, at 1034, and 2076 et seq.

131. There is an additional 14th subdivision, with blank lines, headed "Statement of Registrant" which permits amplification of the preceding. In addition, any and all other and additional information may be supplied via affidavits, etc.

132. There are other provisions concerning the obtaining and using of all other information, but nothing is to be considered, even oral information, unless summarized in writing and placed in the registrant's file. "Under no circumstances shall the local board rely upon information received by a member personally unless" then put on paper and filed. Pt. 1623.1(b).

133. Ordinarily "no panel . . . shall determine any question or classification" save the one to which the registrant is initially assigned. Pt. 1604.52a(e). In such classifying of a registrant "[t]here shall be no discrimination for or against him because of" race, creed, color, memberships or activities in labor, political, religious, etc. organizations, and "[e]ach such registrant shall receive equal justice." Pt. 1622.1(d).

It may be noted that any re-classifications (or other forms of reprisals) because of political activity run afoul of not only general principles of justice and American constitutional law, but also of the System's own regulations, which is condemned when any other agency so acts, Breen v. Selective Service Local Board No. 16, 90 S. Ct. 661 (1970), where a student exemption, not deferment, was involved, and Kolen v. Selective Service Board, 90 S. Ct. 811 (1970). This case granted certiorari in five other cases, and remanded all for reconsideration in the light of Breen; see further Gutknecht v. United States,
minister the following oath to every person testifying before it: 134 Minutes are to be kept of each meeting (Pt. 1604.56), and a government appeal agent "shall be appointed by the President" for each local board. His duties include, but are not limited to, attendance at "such local board meetings as the local board may request," and rendering "such assistance to the local board as it may request by advising the members and interpreting for them laws, regulations, and other directives." 135

In theory this provision for board counsel is supposed to be balanced by another provision, that "advisors to registrants may 136 be appointed by the Director . . . to advise and assist registrants in the preparation of questionnaires . . .

90 S. Ct. 505 (1970); Oesterreich v. Selective Service Local Board No. 11, 393 U.S. 233, 237-38 (1968); Service v. Dilles, 354 U.S. 363, 380 et seq. (1957); Estep v. United States, supra note 7, at 121 et seq.; FORKOSCH, ADMINISTRATIVE, 340-43; Forkosh, Draft Card Burning, supra note 41, at 327. See also Breen and Oesterreich, supra, and Clark v. Gabriel, 393 U.S. 256 (1968), permitting pre-induction suits to restrain induction where a "clear departure by the board from its statutory mandate," i.e., the exemption, was involved, but the court denied such process where improper considerations were alleged to motivate the board's decision on reclassification. For further cases and their implications, see Sloan v. Local Bd. No. 1, 414 F.2d 125 (10th Cir. 1969). See also Stiles v. United States, (1st Cir. 1967), cert. granted, 391 U.S. 903, writ dismissed after argument as improvidently granted, 393 U.S. 219.

The regulations and requirements also seek to protect the registrant from bias or prejudice by a member for or against him. On the necessity that an examiner be free of bias see FORKOSCH, ADMINISTRATIVE, at 321-28. However, see Gibson v. Reynolds, 172 F.2d 95 (8th Cir. 1949), cert. denied, 337 U.S. 925 (1949), where it was held that a member of a board who had misclassified a registrant could not be sued even though "possessed of animosity or even malice toward one whom the officer may erroneously feel is seeking an immunity to which he is not entitled." For example, in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), Vinson in effect permitted a tort action against an administrative official where the allegations in effect alleged deliberate and willful conduct which caused damage. But in Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949, (1950) Learned Hand refused to permit such a personal suit for damages against a United States Attorney-General, and also several agency directors, because of policy grounds, and quoted an earlier opinion that a federal attorney, "if not a judicial officer, is at least a quasi-judicial officer" and is therefore "immune" absolutely.

134. Pt. 1604.57 (the oath being that generally found in courts): "You swear (or affirm) that the evidence you give in the matter now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God." It may be additionally noted that this oath uses the term "evidence."

135. Pt. 1604.71(a) and (d) (2a) (4), with subdivision (5) being: "To be equally diligent in protecting the interests of the Government and the rights of the registrants in all matters." On the problem of divided loyalties, conflict in work and "representing", see SSLR PRACTICE MANUAL § 45, at 1025. But see especially the type of cross-examination, etc. indulged in by the agent in United States v. DeLime, 121 F. Supp. 750 (D.C.N.J. 1954), aff'd 223 F.2d 96 (3d Cir. 1955). A board is disqualified to classify a registrant who is a government appeal agent, or advisor to registrants, etc. Pt. 1604.55(b).

136. Contrast this permissive "may" with the mandatory "shall" for appeal agents. On these advisors, see SSLR PRACTICE MANUAL § 46, at 1025-26, and on its absence, when so proved in a criminal case, see note 193 infra.
and to advise registrants on other matters relating to their
liabilities under the selective service law" (Pt. 1604.41). How-
ever, Part 1624.1(b) specifically commands "[t]hat no registrant
may be represented before the local board by anyone acting as
attorney or legal counsel."\(^{137}\)

The initial classification proceeding and procedures as such
are not given. They may be inferred from the preceding, and
other rules and regulations: namely, after the registrant's file
is complete the local board (or assigned panel) meets, evaluates
the material, discusses, and votes, whereupon a classification
ensues. For example, I-A is given where the registrant "has
failed to establish to the satisfaction of the local board . . . that
he is eligible for classification in another class."\(^{138}\) All this is,
in theory, with nobody else present.\(^ {139}\) As with judges, these
deliberations and determinations should not be influenced by
anything but the facts, under the policies of the Act and the
Regulations, and without pressures outside or inside their
chambers. However, the Regulations, as already noted, permit
the local board to require a government appeal agent to be
present at their "meetings." Since this general term includes
all assemblages of the board members for whatever purpose they
meet, the regulation is not limited grammatically to meetings
at which a classified registrant thereafter appears. Nevertheless,
it is only after such a classification occurs, and notice thereof
is mailed to him, that a registrant has thirty days after the mailing
of such classification to request an opportunity to appear in
person before the designated member(s) of the local board.
Although "in its discretion, [the board] may permit any person

\(^{137}\) Does this specific reference solely to "the local board," whereas else-
where the specifics include "appeal board" and "President," mean that a law-
ner may represent a registrant before these latter? See also note 2. Apparently
the question has never been raised or decided. Furthermore, whereas the
board's appeal agent aids, advises, and interprets on the laws and regulations,
the advisor is to aid registrants in the physical preparatory form work, and on
their "liabilities." What of the registrant's rights? And what of interpreta-
tions, etc. of the laws and regulations, and their applicability or inapplicability
to the particular registrant?

\(^{138}\) Pt. 1622.10. Does this place an undue burden on the registrant, and
therefore violate any constitutional right, and also create a presumption with-
out facts if these be not present (see, e.g., FOKOSCH, CONSTITUTIONAL LAW
\S\ 422 and 424)? Apparently not, although quare: by analogy to the pro-
posed Bail Reform Act presently in Congress, which seeks to use preventive
detention by, in effect, having an accused "show" he is not guilty, is not this
undue burden placed on the registrant unconstitutional?

\(^{139}\) Although, as just noted in the preceding paragraph, the local board
may "request" the appeal agent to attend its meetings. A registrar (see note
129 supra) or other volunteer or paid employee theoretically should not be
present. Is there any Star Chamber tinge flavoring these proceedings?
to appear before it with or on behalf of a registrant” (Pt. 1624.1), as happens when the registrant is in a hospital, or outside the country (see also Pt. 1655.11); in no event, however, may a lawyer appear as such. At this “appearance” (the Regulations nowhere refer to it as a “hearing” or by an analogous term)

[The registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant’s file. The . . . local board . . . may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.]

The classification scheme emerging from these statutes and regulations contains phrases and terms bearing upon the question, what power is being exercised by the local board in classifying a registrant, and what is the nature of this (or these) proceedings. Section 10(b)(3) of the Act, quoted above, states the local boards shall “hear and determine” this, and other, questions, and makes their “decisions . . . final” save where on “judicial review . . . there is [found to be] no basis in fact for the classification . . . .” It would be difficult to find another statute more explicit and clear in what it purports to have the local board do, what power it should exercise, and what the nature of this particular proceeding is to be. No matter how this lan-

140. Pt. 1642.2(b). After this appearance the local board “shall consider the new information which it receives and, if [it] determines that such new information justifies a change” then a reopening and reclassifying occurs. Pt. 1624.2(c). The term “consider” appears in many instances on reopening, reclassifying, etc. Pt. 1625.2, .3(a) and (b), 4, 11.

141. The 1940 statute’s § 5(g), reenacted in 1948 as § 6 (j), contained a provision that a local board’s rejection of a claim of conscientious objection, when appealed, was first to be referred by the appeal board to the Department of Justice “for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, . . . [and] shall,” after such hearing, if the objections are found to be sustained, recommend one of two items to the appeal board; if, “after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend” to the appeal board accordingly. “The appeal board shall, in making its decision, give
guage is examined, “hear and determine” has ordinarily and usually implied but one thing, where no qualifying language is considered to, but shall not be bound to follow, the recommendation . . . .” The 1967 amendments, in § 1(7), re-cast § 6(j) so as to eliminate items, including the above, and it is now found in 50 U.S.C. § 456(j).

In United States v. Nugent, 346 U.S. 1 (1953), five members (Jackson not participating) felt § 6(j) did not permit or require F.B.I. reports to the Department of Justice (which “regularly used” it to investigate) to be made available to the conscientious objector at such hearing so that he could “refute—item by item, if necessary—the matters discussed in the investigator’s report [although see note 163 infra, concerning the right to a fair summary]. In sum, respondents assimilate the ‘hearing’ in § 6(j) to a trial . . . .” (at 7). Frankfurter (Black and Douglas joined) and Douglas (Black joined) filed dissenting opinions. The first felt [about the three judges below (Swan, Learned Hand, and Frank)], that “so strong a court and one so strong in literary endowment . . . should rely . . . on the opinion of a District Judge impressively attests the persuasiveness of that opinion” (at 10). That opinion referred to “other provisions in the Act” which showed that the F.B.I. investigative report was to “be made a part of the record for consideration by all directly concerned with the classification” and, since the registrant had already put everything in his file in the local board, “there would be no point to notify him to appear in the departmental hearing just to put in more evidence” (at 11), evidence which he did not have or, having, could use to seek re-classification at the local level and then appeal. “Thus, by elimination, the only useful purpose of notice at that stage was to give the registrant opportunity to meet the contents of the report” (at 11). Frankfurter later said that “[t]he enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies” (at 13).

Douglas’s one-paragraph dissent stressed this misguided “use of statements by informers who need not confront the person,” and felt that these “faceless people” should not be allowed to “escape the test and torture of cross-examination” as otherwise “the person investigated or accused stands helpless” (at 13-14).

It is suggested that: Nugent’s statutory language is not what the present Act’s § 10(b)(3) covers and the fact-situations are therefore not the same, despite the powerful arguments by the dissenters (only Black and Douglas remain on the bench as of this writing). The majority did not and could not factually hold against the characterization of the hearing as quasi-judicial or against the right to counsel, as this was obiter. The majority merely held that F.B.I. reports need not be so disclosed, and under other circumstances this, too, has been upheld (next paragraph). Jackson’s nonparticipation (he was a former Solicitor General and then Attorney General before ascending to the High Court) did not mean he would have agreed with Vinson’s majority opinion—the contrary would be more probable (see next paragraph). Today’s bench would be interested in the current actualities affecting the nation, which has been discussed above, and the rights of a registrant in the light of these, not past decisions based on different and inapplicable situations and principles.

Separately, in Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), aff’d 4-4, 341 U.S. 918 (to reverse were Black, Frankfurter, Douglas, and Jackson, according to Frank, The United States Supreme Court: 1950-51, 19 U. Chi. L. Rev. 165, 197 (1952), an Executive Order provided for dismissal of a governmental employee if “on all the evidence reasonable grounds exist for the belief that the person involved is disloyal . . . .” The lower majority felt that no constitutional field in this executive domain was involved, as the government was not required to retain employees in whom it lacked confidence, and, further, its construction of the Order’s language was that it did not mandate a judicial-type hearing with confrontation, etc. The dissenter felt that in this way the constitutional patt, with Miss Bailey’s impugned loyalty was felt to a finding of treason, loss of reputation, and future jobs, and that this punitive dismissal necessitated “all the safeguards of a judicial trial before it [the
explicitly used, namely, an adjudicative, judicial-type, trial proceeding, whether in the courts or administrative agencies.\textsuperscript{142}

"'Hearing' is a term of art in administrative proceedings."\textsuperscript{143} While its single use\textsuperscript{144} in a statute does not automatically necessitate a judicial-type or trial hearing, a question of its meaning and interpretation is first required to be answered within the context of the conditions and situation surrounding its enactment. However, in this legislation, the term is not unadorned. "Determine" is coupled with "hearing" by a conjunctive and it, too, is a term of art, namely, to perform a judicial act.\textsuperscript{146} And when the combined "hear and determine" is used the phrase can have but one meaning in this context, and that is a judicial-type or trial hearing.\textsuperscript{147} Thus, regardless of any constitutional requirement, this statutory admonition informs a local board that it must follow this procedure before it can render "decisions". This term also means something legal and judicial.\textsuperscript{148} Therefore, by statute alone, and without the necessity of requesting judicial aid on a constitutional basis, there should be no question of the right to a trial hearing (or, at least, counsel) within the System in classification proceedings. Of course there is qualifying language elsewhere, as quoted above, such as that in Part 16.24.1(b) of the Regulations which rejects the use of an attorney, but first, the statute itself contains no such limitations, and second,

\textsuperscript{142} See Londoner v. Denver, 210 U.S. 373 (1908), where the statute required objections to proposed assessments to "be heard and determined by the city council before" an ordinance could be enacted, and the court (2 dissent) felt that now "due process of law" applied (at 385-6). Although Holmes, one of the dissenters, a few years later commented that this was only because a "relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing." Bi-Metallic Inv. Co. v. Colorado, 239 U.S. 441, 446 (1915). See also note 170 infra, and Grant v. Michaels, 94 Mont. 452, 456, 23 P.2d 266, 270 (1933), and 39 C.J.S. Hear 875 n.15, 876 n.22(5), (1944) and (Supp. 1968).


\textsuperscript{144} If qualified by "full," see note 118 supra, for the meaning usually ascribed to it.

\textsuperscript{145} See Förkösche, Administrative 284-86.

\textsuperscript{146} See Gooch Milling & Elev. Co. v. Commissioner, 133 F.2d 131, 137 (8th Cir. 1943); Tracy v. MacIntyre, 29 Cal. App. 2d 145, 84 P.2d 526, 528 (1938); Smith v. Board of Educ., 174 Ga. 735, 164 S.E. 41, 43 (1932).

\textsuperscript{147} See 26A C.J.S. Determine 888.

if the preceding analysis is correct, then this section of the Regulations is *ultra vires* (and, *pari passu*, any "appearance" limitation is likewise bad).

The nature of the proceeding is peculiarly judicial, as is apparent from the local board's procedure in arriving at the classification, the possible adversary procedure involved, and the scope of review which is sharply limited. The procedure has the board examining the facts beginning with the registrant's date of birth, checking and evaluating all information, determining the true facts, casting one against the other, finding what seems to be the best answer to any conflicting evidence, and then making their findings of fact and determination.\(^{149}\) This present determination which is based on findings of prior facts, "constitutes the exercise of a judicial function. That function can be exercised only after notice and an opportunity to be heard."\(^{150}\) Likewise, does the possibility of an adversary proceeding so disclose the nature of the local board's procedures\(^{151}\) and more to the point, is the circumscribed judicial review permitted? The statutory command is that the review is only on the question of a

\(^{149}\) In Dickinson v. United States, 203 F.2d 336, 345 (9th Cir. 1953), *rev'd* on other grounds, 346 U.S. 389 (1953), the court said "[w]e cannot subscribe to any proposition that a draft board must give complete credence to all of the claims of such a registrant. The board had the same right to evaluate the testimony of a witness before it as has a trial court."

\(^{150}\) Gilchrist v. Bierring, 234 Iowa 899, 14 N.W.2d 724, 732 (1944), a license renewal case, and *see* FORKOSCH, ADMINISTRATIVE § 57.

\(^{151}\) See what Brandeis referred to in United States v. Abilene & Southern R.R., note 125 *supra*, at 288-89. That was a proceeding before the I.C.C. on a division of joint rates. Obviously one carrier would get less if the other (assuming two) got more. From this point of view the Commission was acting in the role of a court adjudicating between two adversaries, so that even though the proceeding was technically an investigation instituted by the Commission" it still was subjected to the requirement that its finding be made on evidence presented to and before it. "Every proceeding is adversary, in substance, if it may result in an order in favor of one carrier as against another."

Here, of course, one registrant is not opposed by another registrant to see which is to receive a classification not desired, but in a larger picture there is a degree of substance to this interpretation. But the concept of the silent governmental interest, with the local board and the appeal agent now advocating it, and both opposed to the individual before them, clearly discloses one aspect of the adversary nature of the proceeding. Another such adversary aspect is disclosed where the local board acts punitively, in defiance of the statutes, and in its "basically lawless" conduct reclassifies because of a registrant's delinquency. In the district court it was held this "does not constitute penal action," Oestereich v. Selective Service Local Bd. No. 11, 280 F. Supp. 78, 81 (D.C. Wyo. 1968), and *aff'd* in 390 F.2d 100 (10th Cir. 1968), but the Supreme Court reversed, note 133 *supra*. At the very least, and disregarding all else, the individual should have his own counsel present to analyze, argue, and present on his behalf, and otherwise factually and legally support his position. As later urged, no great harm to or delay in the board's processes occurs because of this.

\(^{152}\) *See* the *Estep* case, note 7 *supra* at 122, and FORKOSCH, ADMINISTRATIVE § 760.
“basis in fact for the classification,” and this means an exceedingly restricted scope of review for the courts.\textsuperscript{153} However, in practice, the Supreme Court has utilized the normal and usual substantial evidence rule in its review, although mouthing adherence to the basis in fact standard.\textsuperscript{154} The lower courts have also mentioned different terms while likewise utilizing the broader approach.\textsuperscript{156}

What and how does this “basis in fact” review differ from the statutorily required substantial evidence rule? Since this review is statutorily provided it is to be approached from the necessity, and not the actuality, of the situation. In the 1951 \textit{Universal Camera}\textsuperscript{156} case Frankfurter traced the evolution of the standard for, or scope of review of, quasi-judicial agency determinations and showed that because of an ambiguity “by imperceptible steps” the “belief justifiably arose” that any evidence, even “when viewed in isolation, substantiated the Board’s findings.” This was decided to be error, in that the standard required the “substantial evidence” to be based on the whole record (\textit{i.e.}, any disagreement as to the findings of fact between the trial examiner and the agency is to be included). This degree of proof must be found to exist by the reviewing court before the decision could become final. “The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”\textsuperscript{157} The “basis in fact” is on the other hand analogous to the “any evidence even ‘when viewed in isolation’” approach that was rejected in \textit{Universal Camera}. If a judicial-type proceeding involves and requires a judicial-type hearing then ordinarily the scope of review is the broader substantial evidence rule. Only where an exception is permitted is a narrower scope to be upheld, and it is suggested that, absent a national and grave emergency of significant proportions and

\begin{itemize}
    \item 156. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), on which see \textit{Forkosch, Administrative Law} § 257, and also \textit{Has the “Whole Record” Formula Superseded the “Substantial Evidence” Rule}, 3 \textit{Lab. L.J.} 455, 519 (1952).
\end{itemize}
immediate applicability, it is unconstitutional to substitute the very narrow basis in fact scope of review for the broader substantial evidence one. Further, today the courts should review the alleged emergency situation and reverse the Estep decision on this point and denounce any statutory restriction in this respect.

This conclusion is further bolstered by what Brandeis urged in a deportation, e.g., (overseas [combat] assignment?) proceeding: that the order there "deprives [one] of liberty . . . . It may result also in loss of both property and life; or of all that makes life worth living." The court, therefore, granted a de novo review, even though a judicial-type immigration hearing had been conducted. And in 1920 the High Court granted a like broad de novo review when property (in a rate-making proceeding, where the contention was that a deprivation of a reasonable return would thereby result in a confiscation of property) was allegedly taken without substantive power. This decision has not been reversed despite strong opposition by great judges, and has had the effect of dignifying property above human rights where no emergency was claimed or existed.

The Regulations, given in some brief detail above, together with the classification scheme which emerged, additionally support the overall conclusion just reached that a judicial-type hearing is contemplated, involved, and occurs before such classification. When authorized, and properly drafted and promulgated, these regulations ordinarily have the force of law and bind persons as well as the agency itself, so that a violation of its procedures which prejudices the individual will invalidate the board's actions or determinations. Ordinarily the "key" to classification is the questionnaire, which contains numerous

158. Ng Fung Ho v. White, note 123 supra, at 284.
159. Ohio Valley Water Co. v. Ben Avon Borough, note 79 supra with Brandeis (Holmes and Clarke) dissenting, followed in the St. Joseph Stock Yards case note 117 supra, with Brandeis, Stone, and Cardozo dissenting, although raising procedural requirements before granting a de novo review, and limiting the review to the record facts so that any claimed new evidence would require a remand to the agency for consideration. See New York v. United States, note 102 supra, at 334.
160. See Service v. Dulles, note 133 supra, at 372, citing United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). See also note 128 supra. See further N.Y. Times, Sept. 16, 1969, at 32, col. 2, that local boards are being attacked for violating Pt. 1604.52(c) in that their members are not truly local in composition; and Walsh v. Local Board, 305 F. Supp. 1274 (S.D.N.Y. 1969), holding "blatantly lawless" the board's refusal to grant student deferment in that situation.
161. See Wills v. United States, 384 F.2d 943 (9th Cir. 1967), and on the burden see United States v. Freeman, 388 F.2d 246 (7th Cir. 1967).
details to be supplied\textsuperscript{162} by the registrant. However, the local board has a variety of powers to investigate \textit{\textit{e.g.}}, the subpoena power), request, and otherwise obtain whatever additional material it requires, including amplification by or through the registrant himself.\textsuperscript{163}

Thereafter at least a quorum of the local board must meet and act as a board, in conformity with the regulations, \textit{\textit{otherwise it acts at least ultra vires}},\textsuperscript{164} and a classification is made \textit{\textit{in camera}}. This action necessarily includes a sifting and evaluation of the evidentiary facts\textsuperscript{165} so that upon the resulting basic facts the local board will find the individual to be within a certain group and thereupon classify him as such. This will be the extent of their determination, though not necessarily final.\textsuperscript{166}

This procedure, analogous to what occurs in a court trial or administrative quasi-judicial type hearing, is required by language in the regulations: that the board \textit{(or panel) "decide" or "determine" the classification; that any testimony must be sworn to (and the prescribed oath is identical to that administered in courts); that the appeal agent must "interpret" the

\textsuperscript{162} What is the effect of deliberately false answers, so that a registrant obtains an incorrect classification and deferment? \textit{\textit{See United States v. Battaglia, 410 F.2d 279 (7th Cir. 1969), upholding conviction, \textit{\textit{cert. denied}}, 90 S. Ct. 73 (1970). If compulsory self-incrimination is claimed, regardless of the falsity of the answers, \textit{\textit{see United States v. Knox, 90 S. Ct. 363 (1969)}, a wagering registration tax case, rejecting this contention. May Knox now analogously be used to reject the registrant's contention because even though he could have validly refused to complete the form, the information was nevertheless voluntarily given by him. \textit{\textit{See also Bryson v. United States, 90 S. Ct. 355 (1969), decided simultaneously with Knox, and also Berkovitch, CONSTITUTIONAL LAW, 288 n.18, as well as Minor v. United States, 90 S. Ct. 284 (1969). See also note 128 supra.}}}}

\textsuperscript{163} If the board members go outside the written information in the file then not only are the regulations breached but a basic violation of fairness occurs, for the individual cannot know that "evidence" he must combat, \textit{\textit{e.g.}}, United States v. Simmons, 348 U.S. 397 (1955), requiring a summary of the F.B.I. report under former \S 6(j) of the Act \textit{\textit{see note 141 supra}}. However, Pt. 1623.1 (b) requires the classification "be determined solely on the basis of the\textit{\textit{written information in the file (see also note 132 supra) so that an ultra vires act, at the least, occurs.}}}}

\textsuperscript{164} One court has dignified such a violation as being of procedural due process, United States v. Walsh, 279 F. Supp. 115, 121 (D.C. Mass. 1968), but this is not so; the reason is that the resulting classification is not yet "permanent" \textit{\textit{see note 165 infra}} and the individual may seek a hearing, as next described. If no quorum is present the classification is void, and telephone calls are not enough \textit{\textit{(Walsh, supra)}}.

\textsuperscript{165} \textit{\textit{E.g., the supervising registrar may "note ... which [answers] he believes to be incorrect or false" when the individual registers originally, note 129 supra and while not applicable here, is this not what the board members do, and also in evaluating?}}}}

\textsuperscript{166} "No classification is permanent," Pt. 1625.1(a), but for purposes of appeal the one given here, if no hearing is sought, is permanent till changed; similarly with all classifications.
laws, etc., for the members who are to be unbiased and uninfluenced by aught except the record facts. If the initially-classified registrant requests an "appearance" before the board within thirty days after the mailing of the classification, he may "discuss", i.e., give additional testimony and his interpretation of the facts, and present arguments and "point out" overlooked facts and his correct classification. During this discussion the government appeal agent may assist the board in protecting the government's interests, whereupon the board "considers" all the evidence and "determines" whether or not a re-classification is to occur. This initial or preliminary determination together with the subsequently required one, is a judicial-type proceeding, and the resultant classification involves the taking of a constitutionally-protected right.

The constitutional field here involved, plus the exercise of a quasi-judicial power where a statute and/or regulation mandates a hearing ("appearance"), must and ordinarily does require minimum procedures conforming to due process at least, before the second, or final, classification or determination of the board. The full panoply of these constitutional minimums are demanded in the regulatory agencies and other agencies pertaining to property; at the very least, in theory, they should be applied where liberty and life are at stake. But a full-scale judicial-type hearing in the classification process must yield somewhat to the realities of the conscripting reason and purpose. The extreme of a deliberative full hearing cannot therefore be utilized just as its coin-face extreme, no adequate safeguards, must yield. In Part III the suggestion of a gray mean is made.

B. National Emergency Needed to Take Away Right to Counsel

In the opening paragraph of this subdivision II we ventured that two main objections could be made to the System's denial of the right to counsel in its classification procedures. The first of which has been answered, namely, the registrant's right to a full and fair hearing prior to the classification. The second objection was that even where exceptions are permitted these constitutional rights (at least to counsel) cannot be taken except and unless the conditions are so grave that national survival is at stake. Some of these exceptions indicate the type of emergency which justify the temporary postponement of the judicial-type hearing in the agency.\footnote{167 See note 115 supra.}
For example, a statute and regulations permit the agency to appoint a conservator for a federal savings and loan association on grounds that its affairs were being conducted in an unfit and unsafe manner injurious to and jeopardizing the interests of its members, creditors, and the public. Such a conservator was appointed and took possession of an association, which sought the return of its property alleging a violation of due process as no notice or hearing had been given it beforehand, even though the regulations provided for an agency hearing afterwards; a three-judge district court agreed. The Supreme Court reversed, even though "[t]his is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation . . . [requires] this summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint . . . ."168

So, too, in an unfit-food summary destruction situation, where the Court queried, "[W]hat is the emergency which would render a hearing unnecessary" before the agency so acted? "Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it . . . . If a party cannot get his hearing in advance of the seizure and destruction he has the right to have it afterward . . . in an action brought for the destruction of his property . . . ."169 A concern for the interests and welfare of the public was the keystone here, and it necessarily must also be that a like concern for the immediate safety of the nation is at the basis for any like postponement of the right to a hearing before classification. There are two aspects of this argument which create doubt as to the analogy—first, is there really a postponement, and second, how is the immediate safety of the nation being aided by the alleged postponement?

In the bank and food cases there were, respectively, a full and complete agency and court trial afterwards. This is true in every constitutional field, e.g., in a tax assessment where more than a relatively few persons are concerned who are not exceptionally affected on individual grounds.170 The theory is that due process does not demand a trial hearing at the initial

170. Bi-Metallic Investment v. Colorado, supra note 142, referring to Londoner v. Denver. After the assessment the individual may object according to the proper procedures and receive a full hearing in the agency or in a court.
stage or at any particular "point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." So long as an agency judicial-type hearing, or a trial in a court, is held prior to the determination becoming irrevocably final, then procedural due process in a constitutional field is served. But here the postponement of any hearing from the initial (Star Chamber, if no later hearing occurs?) classification until after the "appearance" does not, in this situation, result in a judicial-type hearing, nor does it occur in an appeal board or before the President. The basic reason for postponing the quasi-judicial determination to a period after the agency's decision or order stems from the emergency and needs of the situation. Quaere: assuming the factual existence of a sufficiently grave national emergency in the 1940's, does this permit that conclusion of a legal emergency to continue ad infinitum? Or, with peace treaties (regardless of the German situation) and the termination of the war, does the legal conclusion and then-emergency give way to later and present conditions? In the light of current events, e.g., that for January 1970 the draft call is reduced from the 35,000-man quota originally assigned in November 1969 to only 12,500 men; that training companies have been reduced from 560 to 460 as of December 1, 1969, thereby eliminating thirty advanced training companies; and that three basic training centers out of a total of sixteen are to be closed by the spring of 1970, can it seriously be urged that a sufficiently grave emergency today exists so as to justify any reduction in one's constitutional rights to a trial hearing at some place, agency or court, before arms are placed in one's hands? Or that the scope of review should be kept as narrow as discussed above? And even if the government

171. Opp Cotton Mills v. Administrator, note 115 supra and the other cases cited with it.
173. N.Y. Times, Nov. 23, 1969, at 1, col. 6, giving Defense Secretary Laird's announcement, and stating the Administration proposed to reduce the armed forces by 220,000 men. On November 25th the President announced the scrapping of germ weapons. And on November 26th the President signed into law a bill permitting a Selective Service lottery but said he would not be satisfied until a "completely volunteer" army, navy, and air force resulted, and this "is our ultimate goal."

This goal raises other questions, e.g., does today's impersonal war so change and brutalize our conscripted fighting men that a form of dehumanization may occur permitting the Songmy (Mylai Hamlet No. 4) massacre of March 16, 1968, to occur, to be explained, to be excused, and thus to become a tactic? If so, does a volunteer corps become inured to this and permitted so to do because it is only one small segment of our nation, which therefore does not affect the national psychology, interests, morals, and values? Or are we affected and infected nevertheless?
continues to urge retention of factually outmoded fictions or presumptions of emergency conditions by raising bogeymen, still, in the end, how can it justify the denial of counsel in the classification "appearance"?

On this last aspect there is one contention which has not yet been suggested, namely, the consequences attendant upon any judicial reversal of the legislative-administrative-judicial cooperation of the past. Now the government may urge that if the registrant becomes constitutionally entitled to a judicial-type trial hearing in the classification process, or if the judicial scope of review is broadened beyond that granted by the statute, the political and other consequences for America's position vis-à-vis the world, and the ultimate effects upon our national interests, are grave, incalculable, and so portentous that the Supreme Court must shrink from assuming this responsibility. First, what are the consequences in terms of fact, not theory or horrendous possibilities? Has any study been made illustrating factually the number of registrants who have requested their "appearance" rights? And what this number is compared to the total number classified, or within the classifications initially made, i.e., on percentage or absolute bases? Or do we know how many so requesting have then demanded a full hearing? Or, aside from such demand, how, many have demanded only their right to counsel? Second, do we know exactly what would happen to the overall draft proceedings if all of the preceding could be estimated and their impact separately or in conjunction evaluated? Third, what of the right to counsel without the other rights, and its impact within the system when considered alone—would the presence of counsel so materially hamper and affect the local board's processes that grave harm would result? Where are the facts, if any, to support this claim?174

These questions are not rhetorical. They are posed to show that today we are proceeding on a basis of theory and speculation, and playing blindman's buff175 with the hearing rights, counsel rights, and other rights of the citizens of this nation. Regardless, the judiciary can certainly take judicial notice of the lack of any continuing or present national emergency, of the imponderables

174. See Frankfurter's comment in note 51 supra. Congress may, through one of its committees, easily obtain these statistics; even the President, to whom has been delegated control of the System, can call for these facts; and, finally, the Director has them within his reach.

175. Clark's term in Simmons, note 163 supra, at 495, stating, "The Congress, in providing for a hearing [under § 6(j)] did not intend for it to be conducted on the level of a game of blindman's buff."
and values within our national background and upon which the nation was conceived (Part I supra), and proceed accordingly. In this regard the very least that is indicated by the facts and the background here developed is that counsel at "appearances" is a constitutional and statutory right; that no great harm will result if it now is required judicially, and that human rights are thereby considered at least on a par with property.

Finally, and even if any harm to the national interest does result, the great individual values involved require, at the least, that the Court look at the picture through spectacles which balance out its myopia. These weight the received image with the physical impairment so that decent vision results. Here the balancing formula, though sometimes rejected, is more often used: "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of competing private and public interests at stake in the particular circumstances shown."176 On balance, and under the present-day facts, do not the advantages to our citizens and the great national interests to be furthered by giving at least this degree of counsel due process to registrants outweigh any inconvenience to local boards resulting therefrom? If it be urged that there is insufficient manpower, a simple remedy is available—increase the size of the boards, enable more panels to sit, and thereby distribute any increased work among these members.177 Or, if it be felt that without the constitutional right to counsel being effectuated within the System the entire classification process must fall, the Supreme Court has already

176. Harlan, in Barenblatt v. United States, 360 U.S. 109, 126 (1959), although Black then stated "I do not agree" to such a "congressional or judicial balancing process" in this area of First Amendment freedoms, at 141, with Warren and Douglas agreeing with Black. See also Warren's views in United States v. Robel, note 37 supra, at 268 n.20. Cf. however, Black's earlier (balancing) language and views in Martin v. City of Struthers, 319 U.S. 141, 143-44 (1943). For other language supporting the balancing approach see Frankfurter's concurring remarks (Harlan) in Sweezy v. New Hampshire, 354 U.S. 257, 266-67 (1957), and see FORKOSCH, CONSTITUTIONAL LAW 421-23, discussing the balancing formula and giving additional cases and quotations. On the use of such a conception political situations, see article by Smith, GERM WAR: WHAT NIXON GAVE UP, N.Y. Times, Nov. 26, 1969, at 16, col. 6, stating the President "gave up a few horrible and probably unusable weapons in the American arsenal to gain possible advantages of security for the nation and prestige for himself."

177. As they are uncompensated volunteer workers, there is no added financial burden, while the little additional space or other requirements are slight inconveniences when compared with the gains to be derived. Arguendo, the induction occurs sans the right to counsel, can not every inductee now obtain a writ of habeas corpus, and with a lawyer, seek redress in the courts? Which entails the greater burden, permitting counsel before or after induction?
said that it would strain the words of a statute "in the candid service of avoiding a serious constitutional doubt."\(^{178}\)

C. The Need for Counsel

Assuming that at the very least the right to counsel should be recognized, one may ask why this is so important. Or, put differently, why should this take precedence over the other rights found, e.g., in the Bill of Rights?\(^{179}\) The second question need not be answered, although in Part III a solution is proposed. The first question is answered in several respects by the Regulations and by the decisions of the Supreme Court. The former recognize that the System's labyrinthine procedures hold pitfalls, and so permit an "advisor" to be appointed "to advise and assist registrants in the preparation of questionnaires . . . and to advise registrants on other matters relating to their liabilities under the selective service law."\(^{180}\) A lawyer can thus perform a variety and multitude of services before, during, and after the registration, and before, during, and after the classification.\(^{181}\) He is trained to read and hopefully to make sense out of statutes and regulations and to understand administrative language and questionnaires.\(^{182}\) The lawyer can raise objections, unknown to or unseen by the layman-registrant: board action contrary to the Regulations,\(^{183}\) a delegation by the local board to its clerk to act as its agent in an "appearance" situation,\(^{184}\) any classification action by less than a majority of a quorum present in person,\(^{185}\) a failure to reclassify after the registrant's appearance before the board,\(^{186}\) the use by the board of information concerning registrant and his family not in the file,\(^{187}\) the board's refusal to consider new information,\(^{188}\) a decision by the local board of delinquency (punishment) because of pro-

\(^{178}\) United States v. Rumely, 345 U.S. 41, 47 (1953), per Frankfurter.

\(^{179}\) On the pros and cons of a preferred Bill of Rights (external and internal) position, see FORKOSCHE, CONSTITUTIONAL LAW 428-31.

\(^{180}\) See text following note 136 supra.

\(^{181}\) See the suggestions in SSLR PRACTICE MANUAL § 1006 at 1031 which, though few, indicate somewhat the lawyer's job.

\(^{182}\) See Storey v. United States, 370 F.2d 255 (9th Cir. 1966).

\(^{183}\) United States v. Peebles, 220 F.2d 114 (7th Cir. 1955); Niznik v. United States 173 F.2d 328 (6th Cir. 1949), cert. denied, 337 U.S. 925. See also Knox v. United States 200 F.2d 398 (9th Cir. 1952).


\(^{185}\) Application of Shapiro, 392 F.2d 397 (3d Cir. 1968).


\(^{187}\) United States v. Bender, 206 F.2d 247 (3d Cir. 1953).

\(^{188}\) United States v. Zieber, 161 F.2d 90 (3d Cir. 1947).
testing the Vietnam involvement, and the board's handling of prima facie conscientious objector claims differently.

There are some cases which state that even though an advisor is not appointed, or is not available, or their names and addresses are not listed, no legal injury results unless there is an affirmative showing by the registrant of resulting prejudice. A more refined view has, however, at least been expressed by the First Circuit. Does the former approach apply to the lack of counsel, that is, must a registrant ordinarily first show prejudice before this right attaches, or should attach? While it has been held that a classification proceeding is not a criminal one, as ordinarily it does not impose punishment, still liberty, and possibly life, are affected, as well as property, e.g., the economic consequences such as loss of a business run by the registrant, or of a job and advancement, or of schooling and betterment in and for the future. The words

189. Wolff v. Selective Service Board No. 16, 372 F.2d 817 (2d Cir. 1967), and see next paragraph's quare.

190. Miller v. United States, 388 F.2d 973 (9th Cir. 1967).

191. What is prejudice? And when is it sufficiently minor or egregious to be ignored or condemned? See Simmons v. United States, note 163 supra, at 404, where the Court said that "the notice . . . does not, in our view, convey clearly to the layman the idea that he must make a request for the resume prior to the hearing or forever waive his rights in this respect." In Frank v. United States, 236 F.2d (9th Cir. 1956) the board's refusal to reopen a classification was upheld where the registrant's letter asked for a "personal appearance" and not a reopening of the claim of conscientious objector. Cf. however, Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956), holding that oral notice to the chairman of a change in status is to be treated as a request for reopening (per the present Mr. Justice Stewart).

192. See United States v. Jones, 384 F. 2d 781 (7th Cir. 1967); United States v. Capson, 347 F.2d 959 (10th Cir. 1965), cert. denied, 382 U.S. 911 (1965); Date v. United States, 243 F.2d 99 (5th Cir. 1957) Clark v. United States, 236 F.2d 13 (9th Cir. 1956), cert. denied, 352 U.S. 882 (1956).

193. Steele v. United States, 240 F.2d 142, 146 (1st Cir. 1956), a 2-1 decision, where the objector was convicted of failing to report. The court felt there was no constitutional requirement "that a registrant be provided with free advice and assistance" although, by regulation (which had the force of a statute), it might be accorded. A failure to supply an advisor therefore was not a constitutional violation. Ordinarily the registrant would have to couple this board failure with prejudice to him, but now, in a criminal case, where a defendant shows this lack of advisor, then the prosecution has the burden of proving "that the denial of the procedural safeguard has not prejudiced the defendant" (at 146).

194. If a criminal case were involved, then Steele would conflict with the others, note 192 supra, where two had certiorari denied, although now, in place of an advisor, we discuss lack of counsel.

195. See United States v. Cralle, 415 F.2d 1065 (9th Cir. 1969); United States v. Brooks, 298 F. Supp. 254 (W.D. La. 1969), "Proceedings before draft boards are not stages in a criminal prosecution, thereby entitling a registrant to all of the procedural safeguards guaranteed by the Constitution. See also Storey, note 182 supra, and note 191, but cf. note 133, where the abuse of this classification power is denounced, and note 151 supra.
adopted by six Justices in Gideon are sufficient to dispel such a requirement of prejudice, and show that without more, the lack of a lawyer injures a registrant:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. 196

III. WHAT RIGHTS ACCOMPANY THE RIGHT TO COUNSEL?

If a constitutional right to a hearing in the classification process is sustained or, at the least, the right to counsel, does

196 Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963), quoting Sutherland in Powell v. Alabama, 287 U.S. 45, 68-9 (1932). Douglas concurred but opened, "While I join in the opinion of the Court, a brief historical resume on one point (note 199 infra) seems pertinent" (at 345). See also, A. Lewis, Gideon's Trumpet 223-38 (1964), who shows the aftermath's (i.e., the new trial's) victory for Gideon disclosed the extreme value of the attorney's presence and services. On the right to counsel, etc., in children's court hearings see In re Gault, 387 U.S. 1 (1967), and in disbarment, In re Buffalo, 390 U.S. 544 (1968). In Vaccarino v. United States, 305 F. Supp. 732, 735-36 (S.D.N.Y. 1969), release was granted to an inductee illegally denied a reclassification hearing, the court pointing to the "mind-numbing maze of statutes, regulations and memoranda" of the System, and saying: "In view of that policy [of denying counsel, and the informality of the proceedings] and the labyrinth of statutes and regulations, which are inscrutable not only to laymen but also to most lawyers, the board cannot hold registrants to a precise use of technical terminology." It may be noted that the sixth amendment right to counsel in criminal cases has been continually expanded. Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964), Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Wade, 388 U.S. 218 (1967); Orozco v. Texas, 394 U.S. 324 (1969); and applied elsewhere, as in income tax statements, Mathis v. United States, 391 U.S. 1 (1968), to give but these few illustrations. More importantly, this right to counsel furnishes the jurisprudential basis for use in fourth and fifth Amendment situations, which (see Forkosch, Constitutional § 425), is applied retroactively even though in the other amendment's areas retroactively may not be so applied. Linkletter v. Walker, 381 U.S. 618 (1965), and see Forkosch, supra, § 427.
this latter require that any other rights can piggy-back their way into the "appearance"? And if so, what are these other rights? Regardless, what consequences would now flow if the appearance (trial hearing) is so broadened? It is suggested that no answer can or should be given to these questions at this moment. The empiric and "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require,"197 should control. For the classification appearance, just as with due process of law, "is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."198 Thus the use of a meat-axe instead of a scalpel is unjustified, where a procedural innovation comes into play without prior experience under it. Permitting the full range and panoply of constitutional rights, the entire Bill of Rights to enter the classification proceeding, would probably overload the System, cause a breakdown, and create more problems than the one it seeks now to solve. This is a horrendous probability, not possibility, and its logical extensions need not be further explored.

Separately, is the entire range of procedural rights under due process of law to be invoked within the System, e.g., in the classification proceeding? It has been suggested that the rationale of the System cannot permit this, but that a gray mean be utilized between this extreme and that of the present. This suggested compromise permits all present methods and procedures to be utilized but requires the registrant to be accorded the right of confrontation whenever and wherever possible, with his counsel then being able to cross-examine (within the usual limits imposed in judicial or quasi-judicial trials). This right would remove the stigma of Star Chamber from the local boards, and permit a degree of confidence in the process to be restored. But such a procedure requires a broadening of the judicial review "basis in fact," and while not necessarily to the extreme of "substantial evidence on the whole record" presently applying to the regulatory agencies, perhaps to an "arbitrary or capricious" in-between. This might well be left to the courts which, as has been noted, mouth "basis" while somewhat applying "substan-

tial". As for the method of judicial review, the courts have already made an inroad and modified the strictness of the habeas corpus-after induction procedure and, again, may likewise have the opportunity left to them to go further into this.

These conclusions do not require that only the right to counsel be recognized, because in this area, after an experimental opening period, other questions may arise. For example, is Gideon to apply, so that while any registrant financially able to do so should have the right to retain counsel of his own choosing, an indigent one should be provided with a lawyer without charge? Or is this too much financially and procedurally for the System to bear? First, although the Regulations today reject the use of counsel by a registrant before the local board, another provision authorizes volunteer "advisors" to assist registrants for all other purposes, and they may easily be increased and now permitted so to appear, as well as being lawyers. Second, there are numerous groups and organizations which provide counsel in criminal and civil matters, so that an extension of their services to encompass a classification proceeding could be simply effectuated. Third, all this assumes a large number of registrants would seek counsel, and also seek counsel without charge, and this is not known statistically. Regardless, the right to counsel would be watered down if not provided for the poor.

Is there any other penumbral or peripheral procedural aspect which piggy-backs into the classification proceeding with the right to counsel? The Miranda warnings ordinarily have no applicability in the usual administrative proceeding, especially within the Selective Service System, and throughout the

199. To illustrate the thought involved, in Gideon, note 196 supra, Harlan's concurrence felt that by holding this sixth amendment fundamental right to be one embraced by the fourteenth amendment, the Court did not "automatically carry over an entire body of federal law and apply it in full sweep to the states," at 352. To which Douglas, also concurring, replied that the former's view, shared by the late Justice Jackson, was that a Bill of Rights guarantee applied to the states was now "a lesser version of the same guarantee as applied to the Federal Government. . . . But that view has not prevailed and [such absorbed] rights . . . are not watered-down versions. . . ." at 347.

Regardless of the cost aspect, numerous O.E.O. and other legal service programs have been attacked because the government is paying lawyers to counsel litigants who now sue the government. In the present aspect, however, this argument is inapplicable and senseless.

200. See SSLR Practice Manual § 1005 at 1030-31 for discussion and references to constitutionality of group legal services to the registrant.


registration-classification procedure the individual's rights to sufficient time and aid in properly preparing his file is indicated (aid is, as has been shown illusory, and the advisor a facade). The right to be heard personally (and now through counsel) in one's behalf is in the Regulations, the power of subpoena is held by the board and may be exercised, no classification is permanent and so reopenings on new evidence occur with new classifications and new appearances, and there is a right to appeal within the System, conceivably up to the President.

It appears to this writer, at this moment, and under the eclectic method suggested, that a fair procedure can be had as above suggested where counsel becomes a right, so that more than the preceding need not be urged. In time, and with experience, a re-evaluation may occur and new procedures drafted. No fundamental, basic, essential, or other constitutional or constitutionally protected rights need therefore be urged at the present moment. But without the right at least to counsel, the classification proceeding today, under present circumstances, is a snare and a delusion, a farce committed upon an unsuspecting public, and a violation of one's most important of constitutional rights in this situation.

203. There are no cases on this point, that is, a rejection of a registrant's request for a subpoena (*duces tecom*) so as to have testimony adduced which he claims will aid in resolving his classification, when judicial review later occurs.

204. See as occurred in dropping the Department of Justice hearing, note supra.

205. "I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial... Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute." Rutledge (Murphy), dissenting in *In re Yamashita*, 327 U.S. 1, 81 (1946).