ON THE ALTERNATIVE APPROACH TO THE JUDICIAL REVIEW OF EMERGENCY POWER CASES

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It may be true that after the court has spoken on the cases[1] relative to the exercise of the emergency powers by the executive, the issues have been laid to rest. However, the nagging question persists why in cases[2] subsequent to the *Aquino, Jr. v. Enrile*[3], attempts were made to revive the issue of the constitutionality of the President's exercise of emergency powers.

This essay is an attempt to explore the possibility of utilizing the contextual approach[4] in the review of emergency cases in lieu of the traditional approaches employed by the courts, both in the Philippines and United States jurisdictions. The variables[5] which make the fabric of this approach have been unconsciously employed by the court in previous cases.[6] However, it is believed that a more conscious use of this particular scheme would effect more pragmatic judicial decisions and "provide some guiding lights for the attainment of democratic ideals."[7] Through this method, the court can best play its role as an active participant in an age of positive government. In assisting the furtherance of ideals, it must act at least in part as a national conscience by articulating in broad principles the goals of society.[8]

This framework of analysis endeavours to embody all the essential features[9] of the social process. This will ensure not only that in-

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[1]Lansang v. Garcia, G.R. No. L-33964, December 11, 1971, 42 SCRA 448 (1971); Aquino, Jr. v. Enrile and 8 companion cases, G.R. No. L-35546, September 17, 1974, 59 SCRA 183 (1974); Aquino, Jr. v. Commission on Elections, G.R. No. L-40004, January 31, 1975, 62 SCRA 275 (1975).

[2]Aquino, Jr. v. Commission on Elections, *supra*, note 1; Aquino, Jr. v. Military Commission No. 2, G.R. No. L-3764, May 9, 1975, 63 SCRA 546 (1975).

[3]*Supra*, note 1.

[4]Feliciano in his essay, *On the Function of Judicial Review and the Doctrine of Political Questions*, 39 PHIL. L. J. 444 (1964), made a suggestion about the possibility of using the contextual approach in judicial review as early as 1964.

[5]The various variables include: the characteristics of the participants, the objectives sought to be realized, the method by which the participants interact and affect each other, the condition of their interaction, the effect achieved.

[6]Barcelon v. Baker, 5 Phil. 87 (1905); Montenegro v. Castañeda, 91 Phil. 882 (1952).

[7]Millers, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. J. 661, 693, (1960).

[8]*Id.*, at 689.

[9]This refers to note 5.

quiry will be made in proper context, but also that the resulting decision will be reflective of all the essential elements of the social process. This specification is in turn useful not only in channelling inquiry, but also in serving as a constant reminder of what must be done. At the same time, the precise categorization of each of these phases and the clear cut differentiation established between them, are serviceable to the court for sorting out cases.[10] This approach is opposed to a mechanical view of the judicial and social processes. It seeks to provide purposive direction to the flow of social values.

JUDICIAL REVIEW, DEMOCRACY AND NATIONAL EMERGENCY

In order to understand fully how this approach may be utilized in achieving the cherished goals better than the traditional approaches, knowledge of the competing goals in the democratic order during times of national emergency is necessary. An inquiry into how the traditional approaches dealt with these competing values is also in order for the purposes of this paper.

"Emergency" as defined "connotes the existence of conditions suddenly intensifying the degree of existing danger to life and well-being beyond that which is accepted as normal."[11] An emergency requires extraordinary and prompt corrective measures. They include: securing of public safety,[12] the defense of the nation,[13] the maintenance of public order and efficient prosecution of any war in which the government may be engaged,[14] maintaining supplies and services essential to public welfare.[15] The concept of national emergency which calls for the exercise of emergency powers is a paradox in a constitutional democracy. It is during this period that the capacity of constitutionalism to endure is put to test.

In order to avert the danger of state destruction arising from the state of emergency, the government is equipped by the Constitution with extraordinary powers which are vested either in the executive or legislative departments of government or concurrently in these two branches. The exercise of such powers, however, is often attended with serious controversy, especially where doubts are entertained as to the legality of the

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[10]Laureta, *Linguistic Analysis and Law, Science and Policy: A Comparison of Method*, 39 PHIL. L. J. 696 (1964). See also Feliciano. *supra*, note 4; McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943); see also note 7.

[11]J. SMITH & COTTER, POWER OF THE PRESIDENT DURING CRISES 4 (1960).

[12]Aquino, Jr. v. Enrile, *supra*, note 1.

[13]Prize Cases, 2 Black 635, 17 L. Ed. 459 (1863).

[14]Ex Parte Endo, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1944); Korematsu v. U.S., 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

[15]Araneta v. Dinglasan, 84 Phil. 368 (1949); Gonzales v. Hechanova, G.R. No. L-21897, October 22, 1963, 9 SCRA 230 (1963).

measures taken. These disputes invariably reach the courts which, before passing upon the issues raised in the principal action, must first resolve whether or not it must exercise judicial review.

CONSTITUTION AS SUPREME LAW: THE BASIS OF JUDICIAL REVIEW

Justice Fernando in his essay[16] made an observation, disturbing but not without validity, that if the court would refuse to review cases involving liberty during times of stress, it may imperil the concept of constitutionalism and its underlying principle of personal freedom. The idea of Justice Fernando squarely fits into the view that every constitutional system envisions its endurance and permanence. It is because the Constitution seeks to provide for the basic framework of government. Under all conditions and circumstances, such idea of constitutionalism is sought to regulate the society. Not only that it is meant to operate during periods of peace and tranquility but during times of disorder as in wartime and other public emergencies.[17] The duty of the court to uphold the constitution is never meant to be a sort of fair weather arrangement.[18] This theory augurs the court's activist predilection.[19]

The foregoing idea springs from the conception that emergency powers have their roots in the constitution itself and therefore, not unlimited. To paraphrase Justice Frankfurter, emergency powers are as much a part of the constitution as the Bill of Rights.[20] The court is thus called upon as guardian of the constitution to apply its provisions in the determination of actual cases brought before it.[21] This is true even in cases which are considered to be political questions. In such cases, judicial review is deemed to be a product of constitutional interpretation.[22]

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[16]Fernando, *The Role of the Supreme Court as Protector of Civil Liberties in Times of Emergency*, 27 PHIL. L. J. 12 (1952).

[17]Home Bldg. & Loan Association v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934).

[18]Chastleston Corp. v. Sinclair, 264 U.S. 547, 548, 44 S.Ct. 405, 68 L.Ed. 841 (1924).

[19]See Jardeleza, *On Justice Fernando's Method in Constitutional Cases*, 47 PHIL. L. J. 696, 701 (1972).

[20]Korematsu v. U.S., *supra*, note 14. This idea corresponds to Machiavelli's. "Now in a well ordered republic, it should never be necessary to resort to extra-constitutional measure; for although they may for the time be beneficial, yet the precedent is pernicious, for if the practice is once established of disregarding the laws for good objects, they will in a little while be disregarded under the pretext for evil purposes. Thus no republic will ever be perfect if she has not be law provided for everything, having a remedy for every emergency and fixed rules for applying it." THE DISCOURSES, Book I, Chapter XXXIV.

[21]*Supra*, note 16.

[22]Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HAV. L. REV. 1-6 (1959).

A. *Court as the Protector of Civil Liberties*

What are the basic constitutional values which impel the exercise of judicial review? The first major premise of the court's activist bias is the primacy of freedom in our system of government. At no other time is the probability of encroachment upon individual freedom as high as it is during times of stress. In a republican regime, individual liberty is so vital, so transcendental and so basic that it cannot be denied on mere general principle and abstract consideration of public policy.[23] Because of the importance of liberty in a republican state, the court, as the protector of the constitution, is duty-bound to act in every case where there is palpable transgression of the same. Justice Fernando unequivocally states:

> "The liberty enshrined in the constitution for the protection of which habeas corpus is the appropriate remedy, imposes that obligation. Its task is clear. It must be performed. That is a trust to which it cannot be recreant. Whenever the grievance complained of is deprivation of liberty, it is its responsibility to inquire into the matter and to render the decision under the circumstances."[24]

For the activist court, the responsibility is primarily the protection of civil liberties because such is the prerequisite of insuring justice under law in a free society.[25]

B. *Separation of Powers*

Where the principle of separation of powers is an issue in the emergency case brought before the court, the latter has been more than enthusiastic to perform such postulated duty. Attempt to arbitrarily exercise emergency powers, which may result in the concentration of powers in one organ, person, or body of persons, has been met with strong judicial disapproval as constitutionally reprehensible. Since emergency powers are conferred for the preservation of the democratic framework, they cannot be used to justify measures, the effect of which is the negation or the destruction of the republican system of government. In *Araneta v. Dinglasan*,[26] the court perceived the possible danger that emergency powers may inflict upon the principle of separation of powers.

> "Indeed no other factor than this inability could have motivated delegation of powers so vast as to amount to an abdication by the National Assembly of its authority. The enactment and continuation of a law so destructive of the foundation of democratic institution could not have

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[23]People v. Hernandez, 99 Phil. 515, 551-552 (1956).

[24]Justice Fernando's opinion, Diokno v. Enrile, G.R. No. L-35539, September 17, 1974, 59 SCRA 184, 286 (1974).

[25]See Ex Parte Milligan, 4 Wall. 2, 18 L.Ed. 281 (1866); Duncan v. Kahanamuko, 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688 (1946).

[26]*Supra*, note 15.

been conceived under any circumstances short of a complete disruption and dislocation of the normal processes of government..."[27]

In *Gonzalez v. Hechanova*,[28] the Government intimated the idea that in the exercise of emergency powers, the executive, upon the belief that compliance with certain statutes may not benefit the people, is at liberty to disregard them. The court answered: "that idea must be rejected — we still live in the rule of law."

The apprehension of the court about the executive's usurpation of judicial function likewise appears to be an important factor that influences the court's decision to consider the issue justiciable. Thus, in *Duncan v. Kahanamoku*,[29] the Governor of Hawaii declared martial law after Pearl Harbor, turning over to the commanding general of United States Army the government of the island. Subsequently, civilians were tried and convicted by military courts for civil offenses. The court declared the proclamation invalid on the theory that the Hawaiian Organic Law, which authorized the proclamation of martial law, was not intended to authorize the supplanting of civil courts by the military tribunals. The decision found support in the earlier case of *Ex Parte Milligan*.[30]

C. *Preservation of Civilian Supremacy*

The third factor that shapes the judicial activist attitude is its avowed duty to preserve civilian supremacy over the military. Willoughby,[31] believes that there is no such thing as a declaration of martial law whereby the military is substituted for civilian authority in times of emergency. While martial law is intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the country, it is not intended to authorize the supplanting of civilian authority with that of the military. It is on this premise that the *Milligan* and *Duncan* cases were decided.[32]

On the other hand, the Philippine Supreme Court assumed jurisdiction in the case of *Aquino, Jr. v. Military Commission No. 2*[33] but with a different result. The court in this case sustained the act of the executive relative to the creation and jurisdiction of military tribunals.

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[27]*Ibid.*, at 374.
[28]*Supra*, note 15.
[29]*Supra*, note 25.
[30]*Supra*, note 25.
[31]WILLOUGHBY, ON THE CONSTITUTION OF THE UNITED STATES (1951); see also BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 261 (1982).
[32]See note 25.
[33]*Supra*, note 2.

ACTIVISM OF THE PHILIPPINE COURT

(1) *Philippine Court: Activist on the Threshold Question*

What can be deduced from the above discussion is that the court, when confronted with the issue involving constitutional values, would assume jurisdiction over the case and it may either check the acts of the executive, or it may sustain them. In United States jurisdiction, it may be said that in a substantial number of cases, judicial activism has resulted in invalidation of the acts of the executive. Examples are found in the cases of *Milligan,*[34] *Ex Parte Merryman,*[35] *Duncan v. Kahanamoku,*[36] *Sterling v. Constantin.*[37] Judicial activism in its classical form is manifested by upholding constitutional rights of the individual, or by striking down acts which may put the principle of separation of powers at naught during times of emergency. Where the court upheld the validity of the measures taken by the executive as in the *Japanese Relocation Cases,*[38] it avoided passing upon the constitutionality of the acts.

In Philippine jurisdiction, the court's activism has been, more often than not, limited to the preliminary question — whether or not jurisdiction will be assumed. Once it assumes jurisdiction, the court has in most cases, especially those involving the exercise of emergency powers, sustained the acts of the executive. Thus, in the *Lansang v. Garcia,*[39] the court considered the issue justiciable and proceeded to inquire into the reasonableness of the acts of the President. The finding was that the latter did not act arbitrarily in suspending the writ of habeas corpus. In the latter case of *Aquino, Jr. v. Enrile,*[40] only five members of the court considered the act of declaring martial law as a political question, falling short of the required number of eight to overthrow the doctrine inunciated in the *Lansang* case where the court sustained the validity of the proclamation. The same may be said of the subsequent *Aquino* cases.[41]

It appears, therefore, that in the Philippine jurisdiction, the court is likely to manifest judicial activism by assuming jurisdiction in emergency power cases and then to legitimize the challenged acts. In other

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[34]*Supra,* note 25.
[35]17 F. Cas. 144. Case No. 9487.
[36]*Supra,* note 25.
[37]287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375 (1932). Of course, there are cases in which court validated the acts of the president. But the point is that the court is not hesitant.
[38]Korematsu v. U.S., *supra,* note 14; Hirabayashi v. U.S., 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943).
[39]*Supra,* note 1.
[40]*Supra,* note 1.
[41]See note 2.

words, judicial activism in the Philippines has largely been confined to the threshold question of justiceability, with the preponderating trend in favor of such categorization. Insofar as the substantial issues of conflicting social interests are concerned, however, the Phiilppine Supreme Court has tended to be more conservative than the United States Supreme Court, with a tendency to sustain challenged official acts[42] and marked hesitation to embark upon the creative construction of the basic individual rights and freedoms.

It may be conceded that in certain circumstances, personal freedom should be subordinated to the national security — a goal of the highest order during times of extreme emergency.[43] But it would be more judicious on the part of the court, if it addresses to the executive discretion the manner of preserving order and security, instead of legitimizing the acts, without the benefit of sufficient information as to the nature and extent of the emergency upon which the decision is based. By doing otherwise, the court lends its prestige to the act without the benefit of judicially acceptable evidence. What it usually does is to accept the findings of the president and upon these findings review is made.[44] It is for this reason that courts seldom can invalidate the acts of the president. If the court were of the belief that circumstances dictate that order and security should prevail over individual rights, it can still achieve its goals by leaving to the president the manner of preserving them. In so doing the court still actively participate in the shaping of social values. There is no abdication of judicial duty to mold social goals.

(2) *Decision as a Result of other Social and Political Considerations*

The foregoing discussions indicate a disposition on the part of the Philippine Court to assume jurisdiction where issues of individual rights

[42]This, in fact, is the main objection of Bickel in the indiscriminate use of the power of judicial review. For him, the society's commitment to government under the rule of principle, and the necessity for an institution which can guard, define and develop the society's enduring values under the changing circumstances are the only justification for judicial review. (BICKEL, THE LEAST DANGEROUS BRANCH 23-28 (1962). When a political decision is invalidated or is upheld by the court, it must be firmly rooted in principles. However, there are times when the situations do not permit the promulgation of principle is still in its formative stage, or even if it has ripend, the social polity is not yet ready to accept it, especially when it is applied to a very sensitive problem. Bickel believes that a political society grows and survives in the tension between principle and expediency, so that there is always a possibility for a compromise between them, despite the court's firm commitment to the rule of principle. To enforce unconditionally the absolute principles the necessary — though unprincipled political act, the violation of the very reason for the court's existence would ensue. Thus, Bickel proposes an alternative, that is, to escape the validation or invalidation of the act by using the "unexhaustible" technique of avoidance.

[43]Korematsu v. U.S., *supra*, note 14; Hirabayashi v. U.S., *supra*, note 38.

[44]*Ibid.*

and separation of powers are raised in the pleadings. It often does so without express reference to other social and political factors that influence its decisions. Such simplification, to quote an American justice, "may be handy in political debates but may lack the precision necessary as a postulate to judicial reasoning."[45] While the importance of these concepts must be recognized in the process of rendering a decision, it should not exclude other equally important considerations. Constitutional values change from time to time, depending upon the needs of social polity in different periods.[46] Furthermore, decisions are in fact products of many variables which come into play in the judicial process.[47] By consciously recognizing and articulating the variables of the social order, decisions are placed on a broader perspective and the particular contexts in which they operated at a given time are better comprehended.

(3) *Judicial Review and the Accessibility Information*

Anent the standards used by the court in judicial review, some observations may be made. These standards of review presuppose the capacity of the judge to know the facts relative to the exercise of the review power. In many cases, the court admitted its inability to acquire information which is necessary in determining whether or not the executive acted arbitrarily.[48]

> "The president... has available intelligence services whose reports are not or ought not to be published to the world. It would be intolerable that courts, without relevant information, would review and perhaps nullify actions of the executive on information properly held secret."[49]

Frequently, the information on which judgment on the merits must be based are those that relate to political and military expediency and they provide authority to exercise emergency powers upon sudden events and circumstances vital to the existence of the state. The military findings do not rest on evidence but on information which may not be admitted in court.[50] Referring, to the standard of reasonableness, Justice Esguerra observed that it is just a "play of words". The determination of reasonableness necessarily warrants a consideration for the availability and choice of less drastic alternatives for the president to take. A necessary

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[45]Quoted in Fernando, *supra*, note 16.

[46]For extensive discussion, see Millers, *supra*, note 7; see also MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

[47]*Supra*, note 5. See also discussion in this paper of the application of various variables.

[48]Barcelon v. Baker, *supra*, note 6; Montenegro v. Castañeda, *supra*, note 6.

[49]Chicago v. Southern Airlines v. Waterman S.S. Co., 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948).

[50]*Supra*, note 49. See also the separate opinion of Justice Esguerra, Diokno v. Enrile, *supra*, note 25 at 516-517.

inference from this is that, in certain instances the court may be warranted in substituting its judgment for that of the political organs of government.

ACTIVISM AND ACTUAL COURT PRACTICE

Finally, the proponents of judicial activism do not sufficiently provide the answer to the issue posed that in actual court practice, many emergency cases are regarded as political questions,[51] where the court declines to pass upon the issue of the case but instead refers it to the political departments for the latter to determine the extent to which the exercise of such powers may go. In many of these cases, issues of personal freedom and the principle of separation of powers are involved, and if one were to follow the logic of the judicial activists, the court would have no other choice but to consider the questions justiciable.[52]

EMERGENCY POWERS: OPPOSING VIEWS

It has been posited that there is no other period more compelling for the court to exercise its judicial power than during times of emergency.[53] In *Ex Parte Milligan*,[54] the United States Supreme Cour had the occasion to assay the need of judicial review in teh context of national emergency. Accordingly, the court declared "that the constitution is law for rulers and people, equally in war and peace and covers with the shield of its protection all classes of men and at all times and under all circumstances."[55] This is in accord with the fundamental postulate of the democratic policy, namely, that the constitution is supreme and the Supreme Court as its protector is called upon to apply its provisions in the determination of actual cases and controversies brought before it.

At the other end of the spectrum, it is asserted that the exercise of emergency powers is unlimited or unrestrainable.[56] In *Korematsu v. U.S.*,[57] Justice Jackson pithily set forth such idea.

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[51]*Ibid.* Hathfield v. Graham, 73 W. Va. 759, 81 S.E. 533 (1914); Seymour v. Fisher, 280 D. Neb. (1922); McMaster v. Wolters, 268 F. 69 (S.D. TEX. 1920); Moyer v. Peabody, 212 U.S. 78, 29 S.Ct. 235, 53 L.Ed. 410 (1909).

[52]Lansang v. Garcia, *supra*, note 1; Sterling v. Constantin, *supra*, note 37.

[53]*Supra*, note 25.

[54]*Supra*, note 25.

[55]*Ibid.*, at 120-121.

[56]Justice Jackson's dissenting opinion, Korematsu v. U.S., *supra*, note 14.

[57]*Supra*, note 14. The theory of Jackson is antedated by Locke's. "In times of danger to the nation, positive law set down by the legislature might be inadequate or even fatal obstacle to the promptness of action necessary to avert catastrophy. In this situation the crown retains a prerogative ... power to act according to the discretion for the public good without the prescription of the law and sometimes even against it." Book II, OF CIVIL GOVERNMENT.

Likewise, Rousseau theorized along this line as Locke. Foreseeing the possible ill effects due to the inflexibility of the laws which may in certain cases results in the ruin of the state, he favored the appointment of the ruler who "shall silence

> "But I would not lead the people to rely on the court for a review that seems to me delusive. The military reasonableness of these orders can only be determined by the military superiors. If people ever let command of the war power fall into irresponsible hands, the courts wield no power to equal its restraints. The chief restraints upon those command physical forces of the country, in the future as in the past, must be their contemporaries and the moral judgments of history."

The idea of unrestrained exercise of emergency powers sprouts from the conception that the source of emergency powers are extra-constitutional. The study of various cases reveals that in certain instances, the court opted not to review a particular case because the issues involved were viewed as beyond constitutional limitations. Justice Jackson,[58] whose espousal of almost absolute judicial abnegation was as vigorous as Justice Black's partiality for judicial activism — theorized that emergency powers flow not from the text of the constitution but from extra-constitutional sources. Justice Sutherland in the case of *U.S. v. Curtiss-Wright Export Corp.*[59] thought along the same track. He suggested restraint upon the exercise of any pretended power to exercise judicial review. He opined:

> "It results that the investment of the federal government did not depend upon the affirmative grants of the constitution. The power to declare war... if they had never been mentioned in the constitution, would have been vested in the federal government as necessary concomitants of nationality "[60]

This intepretation if extended too far to apply to all cases pertaining to the exercise of emergency powers, is fraught with attendant risks. It encourages abuse of such powers, the consequence of which is the destruction of the very political system it ought to protect.

JUDICIAL SELF-RESTRAINT

Different techniques have been resorted to in the observance of judicial self-restraint in cases involving emergency power.[61] The principal considerations for judicial forbearance are the working of the constitutional government which established the tripartite form of government,[62]

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all the laws ... and it is clear that people's first intention is the state shall not perish." HUTTON, SOCIAL CONTRACT 123-124.

J. S. Mills, one of the most ardent defenders of freedom and representative government, remarked, "I am far from condemning in case of extreme necessity, the assumption of absolute power in the form of temporary dictatorship." REPRESENTATIVE GOVERNMENT 274, 277-278 (1950).

[58]Jackson's separate opinion in Korematsu v. U.S., *supra*, note 14.

[59]299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936).

[60]*Ibid.*, at 315-318.

[61]BICKEL, THE LEAST DANGEROUS BRANCH 111-170 (1962).

[62]FERNANDO, THE POWER OF JUDICIAL REVIEW 71 (1968).

the inherent limitation of judicial method[63] and the awareness of the judiciary of its weaknesses in open confrontations with political branches.[64] Rossiter has aptly observed that courts have generally refused to speak about the powers of the president as commander-in-chief in any but the most guarded terms and have usually been realistic about the constitutional ability of the country to wage war led by its president.[65]

Self-restraint, of course, runs counter to the basic assumption of the classical theory of judicial activism that the exercise of judicial review is a necessary consequence of the court's postulated duty to decide all cases properly brought within its jurisdiction and decide the constitutional questions whenever the outcome of the case should depend upon such questions. Its votaries, on the contrary, think of judicial review not as mandatory duty but as a matter addressed to the sound discretion of the court.[66]

AVOIDANCE TECHNIQUES

By the use of various techniques of avoidance, the court, refrains from deciding squarely on the constitutional issue of the case. The classic illustration of this is the case of *Ex Parte Vallandigham*[67] In that case, the petitioner prayed for the issuance of the writ of *haveas corpus*, after having been convicted by the military commission. The purpose was to have the Supreme Court declare the acts of the President illegal. The Court instead of ruling on the constitutionality of the case chose to limit itself to jurisdictional technicalities by declaring that the review of the military commission was not within the powers granted by the constitution. The decision of the court was the result of extra legal forces working on the court — the case was decided during the American civil war. This decision conforms with Bickel's view that when a case is brought before the court, the latter is not confronted with an either or choice to declare unconstitutional or to uphold the acts being challenged. The court, he says, is at liberty to avail itself of its inexhaustible reserve of techniques to avoid ultimate constitutional judgments. He terms this outlook "prudential".[68]

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[63]Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924).

"Whatever may be the difficulties in definitively describing the differences between the judicial and the legislative department, it seems settled and clear that the court must have some rules to follow before it can operate. Where no rules exist, the court is powerless to act. From this it follows that the court cannot enter into the question of statecraft and policy."

[64]Finklestein, *Judicial Self-Limitation*, 37 HARV. L. R. 338 (1951).

[65]ROSSITER, THE SUPREME COURT AND COMMANDER-IN-CHIEF 2, 5 (1951).

[66]Mendelson, *Learned Hand, Patient Democrat*, 76 YALE L. J. 322 (1962).

[67]1 Wall. 243, 17 L.Ed. 589 (1864).

[68]Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. J. 40 (1961); BICKEL, *supra*, note 61 at 111-170.

Bickel's prudential technique is at variance with the policy science school's view of the court's more active role in the molding of social values. To McDougal, for example, what is more important is not whether the court should avoid decisions on the constitutional issue if such decision is "unprincipled" in the term of Bickel, but whether or not the decision would aid in the molding of the values of the society where such court functions at a particular time.[69]

However, if the case is properly brought before the court and it has no other alternative but to decide the constitutional issue raised, the court may either consider it valid;[70] or it may declare such an act unconstitutional;[71] or it may resort to the political question doctrine.[72]

POLITICAL QUESTION DOCTRINE

The political question doctrine has become a favorite refuge for the courts in cases involving constitutional issues. It is, however, problematic whether or not[73] such doctrine is a form of avoidance technique. So far, no comprehensive definition has yet been formulated about the political question doctrine.[74] An attempt is made here to determine whether or not this concept provides a concrete standard by which the court may be able to decide whether an issue is justiciable.

Finkelstein in his essays[75] attempts to explain the political question doctrine in terms of the court's apprehension about the ineffectiveness of its decisions.

> "There are certain cases which are completely without the sphere of judicial interference. They are called for historical reasons, 'political question'... It applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequence that a decision on the matter might entail. Sometimes it will result from the feeling that the court is incompetent to deal with the particular type of question unsolved. Sometimes it will be induced by the feeling that the matter is 'too high' for the courts. But always there will be the weighing of consideration in the scale of political wisdom."[76]

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[69]See Millers, *supra*, note 7; see McDougal, *supra*, note 19.
[70]*Supra*, note 1.
[71]*Supra*, note 25.
[72]*Supra*, note 49.
[73]Marcello, *The Political Question Doctrine*, 44 TUL. L. REV. 377 (1970).
[74]Scharpf, *Judicial Review and Political Questions: A Functional Analysis*, 75 YALE L. J. 520 (1966).
[75]*Supra*, note 64.
[76]*Ibid.*

Does this theory sufficiently aid the court in determining whether or not it would take jurisdiction over the issue? Does the "prickliness" of the issue necessarily make the issue non-justiciable?

In the cases[77] of *Luther v. Borden* and *Martin v. Mott*, the court seemed to be reluctant to speak about the constitutionality of the issue. It was because the court felt that its voice, even if heard, would not have an effect. An succinctly put by Finkelstein, "a question which involves a civil war can hardly be proper material for the wrangling of the lawyers."[78]

But there has been no consistent trend in the courts resort to political questions. Mere inability to enforce its decisions has not deterred the courts from rendering decision in other cases which were as explosive, if not more, as the *Luther* and *Martin* cases.

In *Ex Parte Merryman*,[79] the court through Chief Justice Taney challenged the president's power to suspend the writ of *habeas corpus* for wartime purposes. He ordered that Merryman, a Maryland secessionist being held in military prison, be brought to him on the writ, and when the commanding general refused to comply with the order, Taney ordered that the general himself be brought to the court in order to be fined and imprisoned for disobedience. He even went on to provoke conflict with the President.[80]

The same court did not consider the issue to be a political question in the equally sensitive case of *Youngstown Sheet & Tube Co. v. Sawyer*[81] and the *New Deal Cases*.[82] In the Philippine jurisdiction, the court did not seek refuge in the political question doctrine in *Gonzales v. Hechanova*.[83] In that case, the court declared illegal the exercise by the President of emergency powers under the commander-in-chief clause of the Constitution.

At times, the court instead of resorting to the political question doctrine in cases involving prickly issues availed itself of different avoidance techniques. It resorted to the jurisdictional technicalities in the case of *Ex Parte Vallandigham;*[84] it postponed the promulgation of the decision in *Ex Parte Endo*[85] and *Ex Parte Milligan*.[86]

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[77] How. 142-145 (1849); 12 Wheaton 19, 22 (1827).
[78] Finkelstein, *supra*, note 64 at 227, 243.
[79] *Supra*, note 35.
[80] ROSSITER, *supra*, note 65 at 22-23.
[81] 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1951).
[82] See MCCLOSKEY, *supra*, note 46.
[83] *Supra*, note 15.
[84] *Supra*, note 67.
[85] *Supra*, note 14.
[86] *Supra*, note 25.

Others would define the political question doctrine as a function of separation of powers.[87] In other words, if the constitution assigns a particular function wholly and indivisibly to another branch, the judiciary cannot intervene in the exercise of such function. In *Barcelon v. Baker* and *Castañeda v. Montenegro*[88] cases where the issue involved was the President's power to suspend the writ of *habeas corpus*, the court considered it to be a political question.

If the political question doctrine is a function of separation of powers, it follows that each department has an exclusive field within which it can perform its role within certain discretionary limits. No other branch can claim a right to encroach upon these discretionary ilmits and assume to act on them. No presumption of an abuse of those discretionary powers by one branch will be considered by anotehr. In the words of the United States Supreme Court: "if the constitution commits to the executive the exercise of the war powers in all vicissitudes and conditions of warfare, it has necessarily given him the wide scope for the exercise of judgment and discretion in determining the nature and extent of threatened invasion and danger in the selection of the means for resisting it."[89]

In actual court practice, however, the fact that the constitution specifically confers executive power does not necessarily prevent the court from considering the issue justiciable. Otherwise, the court could not have assumed jurisdiction in *Lansang v. Garcia* or *Aquino, Jr. v. Enrile* cases. As Justice Fernando puts it:

> "Even when the Presidency or Congress possesses plenary power, its improvement, exercise or the abuse thereof, if shown, may give rise to a justiciable controversy. For the constitutional grant of authority is not usually unrestricted. There are limits to what may be done and how it is to be accomplished. Necessarily then, the courts in the proper exercise of judicial review could inquire into..."[90]

The fact therefore, that the emergency powers are textually demonstrable as vested in the president does not indicate with certainty that any issue relating to their exercise is necessarily a political question.

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[87]Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962); see also Weston, *Political Questions*, 38 HARV. L. REV. 296, 331-2 (1925). "... The non justiciability of a political question is primarily a function of the separation of powers. Much confusion result from the capacity of the political question label to obscure the need for case-by-case inquiry."

[88]*Supra*, note 6.

[89]Hirabayashi v. U.S., *supra*, note 38.

[90]FERNANDO, THE BILL OF RIGHTS IN THE REVISED CONSTITUTION 155 (1973).

SOME OBSERVATIONS ABOUT POLITICAL QUESTION DOCTRINE

One important generalization that can be made about the political question doctrine is that it does not provide for concrete guidelines for determining whether or not a particular issue is without the realm of judicial competence. It is merely a conclusion by the court, as observed by Dr. Feliciano, that the particular issue is committed to the political organs, the resolution of which is not within the court's jurisdiction. Surely, this is not an abdication of judicial power. The fact that the the court itself considers the issue political in nature, is an exercise of judicial prerogative.

On the other hand, the label political question obscures the need for a case to case inquiry. Such confusion results from the vacillation of the court regarding political question cases and cases decided on their merits, which cannot be readily explained in terms of constitutional delegations. Whether or not an issue is a political question is determined by the court only after weighing various considerations. The question of justiciability of an issue cannot derive from such simple premises as these traditional approaches would want it to appear.

From another perspective, it may be said that the indiscriminate use of the political question doctrine, regardless of the circumstances surrounding the court and the nation, is dangerous. It would encourage the political branches to abuse their powers. In a given case involving the application of the doctrine, there should be "careful consideration also of the social considerations which may militate against it."[91] Resort to political question doctrine must be made only if it aids in the accomplishment of the objectives of the society. As Justice Barredo[92] puts it.

> "But as the nomenclatures themselves imply, activism and self-restraint are both subjective attitude, not inherent imperative. The choice of alternative in any particular eventuality is naturally dictated by what in the Court's considered opinion is what the Constitution envisions should be done in order to accomplish the objectives of government and of nationhood."

CONTEXTUAL APPROACH IN REVIEW OF EMERGENCY POWERS

Of late, the tendency of jurisprudence is no longer centered on the unceasing controversy between judicial activism and judicial self-restraint but towards standards of judicial review. Such is the observation of Justice Fernando:

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[91]CAHN, SUPREME COURT AND SUPREME LAW 40 (1954).
[92]Justice Barredo's opinion in Diokno v. Enrile, *supra*, note 24 at 208.

> "There are signs that the contending forces in such questions for some an unequal contest, are not quiescent. The fervor that characterized the expression of their respective points of view appears to have been minimized. At least what was once fitly characterized as the booming guns of rhetoric coming from both directions, have been muted. Of late, scholarly disputations have been centered on the standards that should govern the exercise of power of judicial review."[93]

The shifting of jurisprudence towards the standards of judicial review finds its justification not only from the limitations of the traditional approaches but also from the realization by the court that in its exercise of judicial review, it is confronted by the issue of whether or not the decision made would promote realization or non-realization of stated societal values.[94]

As pointed out earlier, the tendency of the court, when confronted with a constitutional issue touching on personal liberty, is to immediately assume jurisdiction, without considering other factors or variables. On the other hand, proponents of judicial self-restraint, if the case is brought before the court anent the powers which are textually demonstrable to be conferred upon political depatrments, would unhesitatingly conclude the issue to be a political question. This mechanical approaches or oversimplification of the approaches are obviously not adequate responses to complex situations. It reduces in effect, the function of decision making into a mechanical appreciation of law as consisting wholly of a body of rules completely detached from the social process in which it functions and by which it is affected.[95] This attitude results from the view that decision making consists solely in the mechanical derivation of conclusions from predetermined premises.[96]

Where these traditional approaches end with mechanical application of a body of rules, the contextual approach starts by interpreting a body of rules *vis-a-vis* a particular context. The variables which make up the approach are the following: the objectives sought to be realized, the methods or instruments by which the participants interact and affect each, the condition of their interaction, and the effect or the outcome achieved.[97] The approach does not limit the judicial inquiry into the determination of the preferred constitutional rights, or with the question of the emergency powers being vested on the political organs. Rather, it would inquire whether such preferred rights are still valid *vis-a-vis* the context

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[93]Fernando, Javellana v. The Executive Secretary, G.R. No. L-36142, March 31, 1973, 50 SCRA 30, 321 (1973).

[94]Millers, *supra*, note 7 at 690.

[95]Laureta, *supra*, note 10.

[96]*Ibid.*

[97]Feliciano, *supra*, note 4.

where they come into play; or whether by deciding an issue, the goal of the society is served.

From the broader perspective, the court will decide whether it will assume jurisdiction or not, by using the variables of the approach. These variables have been employed by the court, to a "greater or lesser degree," "overtly" or "covertly", "consciously and unconsciously" before. However, it is proposed that these should be come recognized, "on and off the bench, as the hallmarks of the constitutional adjudicative process".[98] These variables are the products of various and laborious researches.[99] This conception of decision-making compels a comprehensive view of the legal order by stressing teh fact that it is not merely some simple and distinct element of the process but it is made up of the elements together. This realization in turn coupled with the detailed examination of the various elements or components of the process which it necessarily calls for, curbs oversimplification, and helps assure the realization of recognized social values.

These variables may be dealt with in terms of the concepts of preferred constitutional values and their relative consequentiality in a particular context. As noted earlier, the alternative approach, unlike the traditional approaches, lays importance not so much on who the litigants are or what the issues are, but in the "realization or non-realization of stated values" in a particular situation. In any of these changing conditions, the courts should aid in the shaping of the relevant social values.[100]

During normal times, it is widely accepted that individual freedom occupies the highest position in the hierarchy of constitutional values. The problem, however, comes to the fore when individual freedom interferes with the exercise of powers during times of stress. The court would then be confronted with the difficult question of balancing the value of human freedom and the value of social order.

In some instances, the court declared the question or the issue raised as a political question.[101] Thus, the Philippine Supreme Court, construing the provision of the Bill of 1902 as authorizing the governor-general to suspend the privilege of the writ of *habeas corpus* in cases of rebellion, imminent or actual invasion, as public safety requires it, held that the governor-general's findings as to the necessity of suspension

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[98]Millers, *supra*, note 7 at 690.

[99]McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203, 204 (1943); McDougal, *Law as Process of Decision: Policy Oriented Approach to Legal Study*, 1 NAT. I. F. 53-72; McDougal & Feliciano, *Law and Minimum Public Order*.

[100]Millers, *supra*, note 7 at 690.

[101]*Supra*, notes 6 & 52.

of the writ was conclusive and final on the judicial department.[102] The ruling was affirmed in *Montenegro v. Castañeda,*[103] where the court stated that the authority to decide whether the exigency has arisen requiring the suspension belongs to the executive and that his decision is final and conclusive upon the court and upon all other persons. Since strict application of separation of powers were adhered to no allegation of abuse of powers by political departments court be entertained.

On the other hand, when the issue of personal freedom was raised, some courts determined the issue as if it never heard the political question doctrine. This is illustrated in the case of *Sterling v. Constantin,*[104] where the court opined:

> "We find... that not only was there never any actual riot, tumult, or insurrection which would create a state of war existing in the field, but that, if all of the conditions did come to pass, they would have resulted merely in breaches of peace to be suppressed by the militia or a civil force..."

In these two situation, we can see the difference between the proposed alternative approach and the traditional approaches. If one were inclined to judicial activism, he would consider the two cases as justiciable, regardless of the values as dictated by the situation. The same may be said of the disciples of judicial selfrestraint. The issues would necessarily be outside the province of the courts. The proposed approach would consider the issue in terms of the relevant constitutional values. If it believes that order and security are the needs of the time due to public disorder, then it would address the solution to the president. Certainly, this is not an abdication of judicial duty to help in the shaping of social values.

In a state of "total emergency", as during the civil war or a world war, it is not liberty alone of the individual that is involved but the collective peace and the safety of the entire nation. Here it seems there exists total emergency, obvious that the court should concede to the political organ the widest discretion in the exercise of emergency powers. The affirmance of the validity of the executive order to impose a blockade in the *Prize Cases*[105] illustrate this principle.

In cases decided during the United States Civil War,[106] the world war[107] or in extreme emergencies like ours at present,[108] the court laid

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[102]Barcelon v. Baker, *supra,* note 6; *In re* Boyle, 6 Idaho 609, 57 P. 706 (1898); *In re* Moyer, 35 Colorado 415. 85 P. 190 (1904); Ex Parte MacDonald, 49 Mont. 454, 143 P. 947 (1919).

[103]*Supra,* note 6.

[104]*Supra,* note 37.

[105]*Supra,* note 13.

[106]Ex Parte Vallandigham, *supra,* note 67. See also Ex Parte Merryman, *supra,* note 35.

[107]Hirabayashi v. U.S., *supra,* note 38; Korematsu v. U.S., *supra,* note 14.

[108]Aquino, Jr. v. Enrile, *supra,* note 1; Aquino, Jr. v. Military Commission No. 2, *supra,* note 2.

importance on the security and order of the nation over the individual rights by either upholding the acts of the executive or referring to them as political questions. Thus, the court upheld the unusual military action of imposing curfew regulations in the case of *Hirabayashi*. In *Korematsu*, the issue involved was not merely keeping the people off the streets at night as it was in *Hirabayashi*, but of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp solely because of his ancestry. As Justice Murphy put it: "The issue of exclusion goes over the brink of constitutional power and falls into the ugly abyss of racism."[109] Despite this, the court upheld the validity of the exercise of emergency powers. The reason, according to Justice Black was the consideration of national emergency.

> "The compulsory exclusion of large groups of citizens from their homes, except under circumstance of direct emergencies and peril, is inconsistent with our basic government institutions. But when under the conditions of modern warfare, where our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."[110]

In these cases, when the court sustained the acts of the president, it, in effect, signified its acceptance of the priority of national security over individual freedom. So, in terms of the priority of values, the court was right in its decision. However, it would have been better for the court to consider the issue as a political question due to informational difficulties. If was for this reason that Justice Jackson disagreed with the rest of the court.[111] By considering the issue as a political question, the court would still extend priority to order over individual freedom, although the manner of achieving it is addressed to the executive. In a manner, the court is saved from making decision not grounded on facts which are judicially cognizable.

Even the "open court" theory as formulated in the *Milligan* and *Duncan* cases does not rule out the possibility of assumption by the executive powers pertaining to the judicial department of the government when the latter fails to function because of the intensity of war.

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[109]ROSSITER, *supra*, note 65 at 50.

[110]*Ibid.*, at 49.

[111]See dissenting opinion of Justice Jackson in Korematsu v. U.S., *supra*, note 14.

"The limitation under which courts will labor in examination the necessity of a military order are illustrated by this case. How does the court know that these orders have a reasonable basis in necessity? No evidence whatever on the subject has been taken by this court or any other court. There is a sharp controversy as to the credibility of the De Witt report. So the court, having no choice but accept General's own unsworn, self serving, untested by any cross examination, *that what he did was reasonable, and thus it will always be when the courts try to look into the reasonableness of a military order.*" (Underscoring supplied).

In summary, the court must give the president wide latitude in the exercise of emergency powers conferred upon him by treating the issue of his exercise of such power as political. However, when the necessity calling for the exercise of such powers is non-existent, or when the president becomes unreasonable, or when the acts taken have no demonstrable relation to the emergency, the court should review the case as a protective measure for the preservation of constitutional values. Civil rights determination in the judicial process is a "resultant of an evaluation of powers relationship in the social process, and civil liberties receive protection when it is convenient for society to protect them."[112] In extreme cases, such as when there is total emergency, the court would indubitably subordinate individual freedom to that of collective peace. McDougal is apt on this point:

> "As it is observed, the outcomes and effects are important aspects of the power process, and a law of human dignity will insist upon the most flexible interpretation of... inherited doctrines for promoting the application of authority to particular events in ways that enhances the overriding values of a world public order of freedom, security and freedom as such values are at stake in differing types of particular events and contexts."

CONDITIONS OF THE INTERACTION

Generally, the court, when it finds itself unable to secure information necessary for the review of the issue, would regard the issue to be without the court's jurisdiction. This is usually true in cases involving foreign elements. The court in the *Chicago Airlines* case decided not to review, Justice Jackson forebearance:

> "The President, as commander-in-chief... has available intelligence services whose reports are not or ought not be published to the world. It would be intolerable that the courts, without relevant information, should review and perhaps mullify actions for the executive on information properly held secret."[113]

In the essentially domestic cases, however, the court should be less constrained by political question doctrine.

At this juncture, it is important to distinguish the two principal issues concerning the review of emergency cases. One issue involves the question whether or not the executive determination of martial law or the suspension of the writ of *habeas corpus* is justiciable; the other one concerns the justiciability of the acts of the executive subsequent to

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[112]Millers, *supra*, note 7 at 688.
[113]Chicago & Southern Airlines v. Waterman, S.S. Co., *supra*, note 50.

that determination. Central to these issues is the accessibility of facts to the court, which oftentimes, determines the reviewability of the issue.

Regarding the first issue, the courts seem inclined to consider the issue a political question.[114] In most of the cases of this nature, the court seem to accept the finding of the executive as final and conclusive upon the courts. The most plausible explanation of the court's claim is the well-reasoned doctrine in constitutional law that whenever the law gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, such law makes him the sole and exclusive judge of the existence of those facts.[115] Such rule was affirmed in the case of *Moyer v. Peabody*.[116] Even in the case of *Sterling v. Constin*, the court did not dispute the theory of the conclusiveness of the executive findings,[117] although the subsequent act of the executive relative to the goal of restoring order was held open to inquiry by the court. The rationale behind this is the perceived necessity for the executive's ability to exercise proper control in instances of sudden emergencies which imperil the national security. Such situation, therefore, calls for a permitted range of honest judgment for flexible measures to suppress violence and restore order.[118]

The case of *Barcelon v. Baker*, relying heavily on the *Moyer* case, explained the difficulty of the court to secure information necessary in reviewing the case. As a consequence, the court held the issue a political question. The court stated:

> "...in many instances, the evidence upon which the President might decide that there is imminent danger of invasion might be of the nature constituting strict technical proof, or disclosure of evidence might reveal important secrets of the states which the public interest and even safety might imperiously demand to be kept in concealment."
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> "... the executive branch of the government, through its numerous branches of the civil and military, ramifies every portion of the archipelago, and so enable thereby to obtain information from every quarter and corner of the state. Can the judicial department of the government, which has a very limited machinery for the purpose of investigating general conditions, be any more sure of ascertaining the true conditions throughout the archipelago, or in any part or district, than the other branches of the government? We think not."[119]

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[114]See notes 6 & 51. But see also Ex Parte Milligan.
[115]Martin v. Mott, 12 Wheaton 19, 22 (1827).
[116]Moyer v. Peabody, *supra*, note 51.
[117]*Supra*, note 37.
[118]*Ibid.*
[119]*Supra*, note 6.

On the other hand, the issue concerning the reviewability of the acts of the president subsequent to the declaration of martial law or the suspension of the writ has brought forth conflicting decisions. It seems that the primary consideration in the determination of the cases would still be, as in the first, the accessibility of information to judicial inquiry. One cluster of cases[120] supports the rule that the acts of the executive subsequent to such determination are also beyond the ambit of judicial scrutiny. In the *Moyer* case, the court held that the executive discretion in exercising the emergency powers, both with respect to the declaration and the choosing of the means in meeting the emergency, are none-justiciable. The court seemed of the view that the choice of what particular measures to take should not be interfered with as long as the choice was made in good faith.[121] In the same manner, Justice Jackson very strongly urgued that the court should consider the acts of the military in the case of *Korematsu* as a political question due to the difficulty on the part of the court to secure facts.[122]

However, in cases where it is evident that the necessity had never existed or is no longer present, the court would assume competence in reviewing the case and secure facts either from the brief of the petitioner or by judicial notice. This is exactly what the court did in the case of *Chastleton Corp. v. Sinclair*, where it held that it had the authority to "inquire whether the exigency still existed upon which the continued operation of law depends."[123]

From the point of view of sheer logic, there appears to be no justification for the variance in the decision rendered. This is, however, sufficiently explained by the variance in the circumstances under which the decisions were made. In the *Milligan* and *Duncan* cases, the emergency was already over, the emergency warranty executive actions never existed as in the caes of *Sterling v. Constantin.* Under such conditions, information may be secured by the court without necessarily exposing to danger the national security. The cases abovementioned were decided when the war was over.

During wartime, however, decisions would be based on facts supplied by the military as in the *Japanese Relocation cases.* For the court to require strict admission of evidence as in normal time, would result in exposing to danger the escurity of the nation. The decision of the court upholding curfew regulations imposed by executive act in *Korematsu* was subjected to severe criticism because it upheld an act of the military

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[120]See 54 NEB. L. REV. 144, 145 (1975).
[121]Moyer v. Peabody, *supra*, note 51.
[122]See note 110.
[123]Chastleston Corp. v. Sinclair, *supra*, note 18.

without a factual record on which the justification for the act was analyzed. Justice Jackson, in his dissenting opinion in *Korematsu,* declared that "the military reasonableness of these orders can only be determined by the military superiors".[124] In cases like this one, what the court should have done was to consider the issue a political question, instead of reviewing them without facts on which its decision was to be based, unless it would be willing to accept the military findings. It is inconceivable how the court could invalidate an act, when such judgment is based solely on military findings.

THE METHOD BY WHICH THE PARTICIPANTS INTERACT AND AFFECT EACH OTHER

This variable concerns with the analysis of whether in some cases, the court is more willing to assume jurisdiction than in other cases, depending upon the method of interaction among the participants. The analysis of cases shows that the court is more inclined to consider the issue involving the usurpation by the executive of function belonging to the other branches of the government. The reason why the court is stricter in these cases may be that the executive overreaching creates a danger, a kind of general usurpation far greater than the danger posed by the isolated interferences with the individual rights.[125]

In cases concerning the trial of the civilian by the military tribunal, a function which is judicial in character, the court is more than willing to review the case.

> "Every trial involves the exercise of judicial power, and from what sources did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them, because the constitution expressly vests in one Supreme Court and such inferior court as the Congress may from time to time ordain and establish, and it is not pretended that the commission was the court established by Congress."[126]

The trial of civilians by the military commission was questioned in *Duncan v. Kahanamoku.*[127] The majority of the court speaking through Justice Black, based its decision on ground that the Hawaiian Organic Act, which authorized the establishment of martial law, was not intended to authorize the supplanting of courts by military tribunals. Even in *Ex Parte Vallandigham,* the court was not quite enthusiastic about abdicating the exercise of judicial review, but due to the conditions so

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[124]See note 110.

[125]See 85 HARV. L. REV. 1290 (1972).

[126]Ex Parte Milligan, *supra,* note 25. See also Ex Parte Merryman, *supra,* note 35.

[127]*Supra,* note 25.

infused with tension as a result of civil war, it limited itself to jurisdictional technicalities instead of considering it a political question.

The same may be said of the cases involving legislative powers relating to emergency. In the celebrated *Steel Seizure case*,[128] the United States Supreme Court found that a President acted in excess of his constitutional powers. The President, in this case, ordered the Secretary of Commerce after efforts to settle a labor dispute in the steel industry had failed, to seize the steel mills and operate them in order to avert a nationwide strike. Justice Black, in disposing of the case said:

> "Even though the theater of war be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power to keep labor disputes from stopping the production. This is the job for the Nation's lawmakers, not for its military authorities."[129]

In a Philippine case,[130] the court ruled against the executive secretary and restrained the importation of rice and corn. To justify the importation, the powers conferred on the president as commander-in-chief were invoked. The Supreme Court held that the importation violated the statute and that could not be justified by falling back on the president's war power or power to declare martial law.

The recent cases of *Aquino v. Commission of Election* and *Aquino v. Military Commission No. 2* confirmed this view, that is, the justiciability of the issue. It is interesting to note that some of the justices[131] retreated from their political question doctrine stand in *Aquino, Jr. v. Enrile*. The latter case does not involve the usurpation of functions belonging to the branches of the government. In fact, the question involved in that case was the exercise of a function which the constitution specifically conferred on the executive. This only further proves the thesis above stated.

How does this differ from the traditional approach? From the viewpoint of the proponents of judicial self-restraint, the fact that the

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[128]Youngstown Sheet & Tube Co. v. Sawyer, *supra*, note 81.

[129]*Ibid.*, at 587.

[130]*Supra*, note 1.

[131]The following justices considered the issue in Aquino, Jr. v. Enrile, *supra*, note 1 at 66, Justices Makasiar, Antonio, Esguerra, Fernandez and Aquino a political question. In the subsequent cases, all of them deemed the issue justiciable.

In the case of Aquino, Jr. v. Comelec, the petition was filed questioning the power of the president to issue decrees. All the members of the court, except Justices Teehankee and Fernando, agreed that the President has the power to issue decrees.

In the case of Aquino, Jr. v. Military Commission, the petitioner put in issue the jurisdiction of a military commission to try him. The Supreme Court, speaking through Justice Antonio was quite explicit as the the competence of a military commission to proceed against the petitioner.

issue involved is the usurpation of functions as long as the exercise of functions is in pursuance of the goal of the executive in restoring peace or winning the war, the issue is still within the realm of political question doctrine. The proposed alternative does not limit the court to the idea that judicial inquiry has no place in cases involving the exercise of emergency powers by the political organs, in pursuance to the goals of restoring peace and order. Rather, this approach serves as a reminder that in some instances, especially those affecting the doctrine of separation of power, the court had shown more willingness to review, even more enthusiastic than it had shown in cases involving personal freedom during times of emergency.

THE OUTCOME OR THE EFFECT OF THE DECISION

In the history of judicial determination of constitutional cases, judges have habitually analyzed and thought in terms of the consequences, though their decisions might be couched in terms of "adherence to the law". But to some degree, they have been engaging in "operational thinking". In the main, it is suggested in this paper that "operational thinking" should become the "outward rule, rather than the hidden reality".[132]

The court is usually influenced by its beliefs of the possible outcome of the decision, in determining whether or not it would take jurisdiction. The court's apprehension of the profound and portentuous consequences that flow from the acceptance or rejection of the jurisdiction affects its decision whether or not the issue is justiciable.[133] Whatever course of action the court may take, it leaves an indelible mark on its institutional prestige.

What can be gleaned from the cases[134] is that the court, if it decides to vindicate the constitution, usually makes decisions when the war is over or when the emergency justifying the exercise of the power has ceased. This is so because when there exists total emergency, even if the court speaks, it will never be heard.

In cases decided during the period of emergency, where there is no room for postponement, the court usually defines the issues so narrowly that a sweeping generalization on the executive prerogative is avoided. Unmanageable conflict with the President is thus averted. This is what

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[132]Millers, *supra*, note 7 at 690.

[133]Finklestein, *supra*, note 64.

[134]Ex Parte Endo, *supra*, note 14. She petitioned for habeas corpus in July 1942. She was finally successful in December 1944. Ex Parte Milligan, *supra*, note 25. The petition was filed in 1863, the decision was made in 1866. Duncan v. Kahanamuko, *supra*, note 25; see also BICKEL, *supra*, note 68.

the court did in the case of *Hirabayashi v. U.S.*[135] In this case, the court chose to rigidly define the issue by fixing its attention only on question of curfew regulation.

The case of *Ex Parte Merryman* is a classic example of a case where the court decided against the legality of the act of the President when the atmosphere was charged with great tension due to the civil war. Consequently, the court provoked conflict with the president. On this situation, MacCloskey commented that the "war is never a favorable environment for judicial power".[136] For war is characterized by emotion and quick, drastic action, and courts are not well equipped to cope with either. Commenting on the fate of judicial review during the civil war, he continued: "civil war was also demonstrating that the experiment of an independent and influential national judiciary had failed".

The fear of the portentuous consequences made Justice Esquerra to consider the issue in *Aquino, Jr. v. Enrile,* a political question. Haunted by the spectre that beset the Taney court he posed this question, "suppose the court says they are not sufficient (referring to the fact-finding role of the court) to justify martial law and the President says they are because the evidence on which he acted shows existence of invasion, what will happen? The outcome is too unpleasant to contemplate."[137]

The fear of the court of the consequences that may flow from judicial interventionism is not unfounded, for history is replete with such tension-filled situations. This is especially true when the court decides to invalidate the questioned act. On the other hand, if the court, as a result of such inquiry made during the existence of emergency, favors the validity of the act, it would be upholding such act without the factual bases. The result is as deleterious to the court as when it invalidates the same act without adequate evidence.

The analysis of cases would show that the court went against the government in only a few celebrated decisions concerning the violation of inviolable constitutional rights.[138] The fear of the court that its decision might be disregarded in these cases is not as great as when it decides the case during the existence of grave emergencies. However, it is also the fear of the court that its refusal to review might lead to the constitutional havoc that propels it into the making of inquiry[139] The

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[135]*Supra,* note 38.
[136]McCLOSKEY, *supra,* note 46.
[137]*Ibid.*
[138]Ex Parte Milligan, Sterling v. Constantin, Ex Parte Merryman, Duncan v. Kahanamuko.
[139]Youngstown Sheet & Tube Co. v. Sawyer, *supra,* note 81; Gonzales v. Hechanova, *supra,* note 15.

very fact that it has sometimes disregarded doubts about its capacity to arrive at realistic and responsible decisions seems to show that the court finds the determination of such issues so central to its functions. This is especially true when the emergency is over or when in fact, it has not existed at all. It is then very willing to risk confrontations with political organs a critical decision to make during times of actual emergency.

The court's decisions seem also to have been influenced by the existence of other emergencies like economic dislocation. During the advent of grave economic depression in the *United States cases*,[140] were brought before the court, questioning the validity of the measures taken by the president in response to the emergency, aptly described by Justice Brandeis as "more serious than war". The court declared the measures as violative of the constitution. As a consequence, the President and the nation were provoked, causing much tension to the entire country. That the court meddled in highly volatile economic affairs was obviously an error. The telling unpopularity of the court led it to drastically change its position on the issue and only after the court "packing plan" was broached by the president after his resounding electoral victory.

These cases clearly demonstrate that if the court should lose its sense of political, social and economic reality in making its decisions, there can be no justification for doctrinaire persistence or avoidance.

The inability of the court to perceive the grave consequences flowing from the insistence of judicial review may lead the court to virtual ineffectiveness. In the same manner, its refusal to decide the case may cause the very destruction of the constitution which it ought to protect. Hence, it is suggested that judicial decisions should be gauged by their results and not either by their logical consistency with a set of doctrinal principles or by an impossible reference to neutrality of principles. The effects of a decision should be weighed and the consequences assessed in terms of their social adequacies. McDougal postulates:

> "The essence of a reasoned decision by the authority of the secular values of a public order of human dignity is a disciplined appraisal of alternative choices of immediate consequences in terms of preferred long-term effects, and not in either the timid foreswearing of concern for immediate consequences or in the quixotic search for criteria of decision that transcend the world of man and values in metaphysical fantasy. The reference of legal principles must be either to their internal legal arrangement or to the external consequences of their application. It remains mysterious what for a decision a neutral system could offer."[141]

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[140]See the New Deal Cases.
[141]Quoted from Millers, *supra*, note 7.