# The Vietnam War and the American Judiciary: An Appraisal of the Rôle of Domestic Courts in the Field of Foreign Affairs

*Hans Martin Rothenbühler**)

## *I. Introduction*

American involvement in Vietnam, which began so inconspicuously more than a decade ago, has deeply marked both the stature of the U.S. abroad and American society at home. The impact of the war on the U.S. — though obviously incomparable to the devastation left behind in Vietnam — might, in the long run, be even more important. The process of entanglement in the Vietnam conflict and the conduct of the war by the American forces have raised many basic issues regarding the functioning of American political institutions. These problems were the subject of ardent political debates; at the same time, however, they have been taken up in often passionate legal controversies, both in the courts and in the legal literature. Legal arguments have, furthermore, been given a prominent place in the political discussions concerning Vietnam.

---

*) Lic. iur., M.C.L., Assistent für öffentliches Recht an der Universität Bern.

The essential parts of the present article were written as portions of a paper for the Comparative Constitutional Law Seminar of Professor Paul G. Kauper at the University of Michigan Law School in the spring of 1972. Apart from a few additions, only the jurisprudence and the literature up to that time have been taken into account. In any event it does not appear that there are any major new developments to be reported with respect to the matters here under consideration. This is easily explained by the fact that no more American draftees were stationed in Vietnam; moreover, the number of draft calls was reduced, and the draft itself will, before long, be abolished. With that, the main source for the cases discussed in the present article was exhausted.

Among the recent literature not taken into account in the present article the work by L. Henkin, Foreign Affairs and the Constitution (Mineola [N.Y.] 1972) should particularly be noted.

Foremost among the legal aspects of U.S. participation in the Vietnam war are, of course, the crucial issues of public international law raised by the American intervention[1]). But these are not the only legal queries pertaining to this conflict; probably quite as significant, though less well known outside of the U.S., are a number of fundamental constitutional questions. They concern, to mention here merely the most basic categories, the organization of the war power under the U.S. Constitution[2]), and the relationship between individual freedoms and military conscription. A third problem is intricately connected with both these issues: the scope of authority of the American judiciary in matters touching upon foreign affairs[3]).

To a foreign observer, one of the most striking features of American society during the last phase of U.S. involvement in Vietnam was, indeed, the extent to which domestic opponents of official U.S. policy in Southeast Asia put their hopes to end the war on the courts. Political action had proved to be of no avail or, at least, to be slow in bringing about change. On the other hand, Americans, more than any other nation, are used to the idea of having their controversies, even those with tremendous political implications, settled by the judiciary. It was thus a natural step to take the legal issues arising from the Vietnam war into the courts. There, however, the opponents of the American military engagement in Vietnam suffered perhaps their most bitter defeat. Apart from very few exceptions, the courts refused to take any stand with respect to the basic legal questions connected with U.S. participation in the war. The Supreme Court, in particular, studiously avoided getting involved in this matter at all.

To the European mind, and especially to continental-European lawyers, such a position is probably not surprising. On the basis of our legal education, we are inclined to assume without further reflection that the judiciary should not meddle with that kind of highly political business. The same is not necessarily true for the U.S. The Supreme Court, for example, has throughout its history resolved many disputes of great political importance.

---

[1]) This aspect is prevalent in the collection of articles edited by R. A. Falk, The Vietnam War and International Law, 3 vols. (Princeton 1968/69/72), hereafter cited as "The Vietnam War" I, II, III. There one also finds many further references to the literature dealing with the Vietnam issue from the point of view of international law.

[2]) See, for recent discussions of this problem, Van Alstyne, Congress, the President, and the Power to Declare War: A Requiem for Vietnam, 121 U. of Penn. L. Rev. 1 (1972), and Berger, War-Making by the President, *ibid.*, p. 29; cf. further the articles by Goldman, Quincy Wright, Reveley, Katzenbach, and Wooters, in: The Vietnam War III, pp. 489ss., and the references there.

[3]) The terms "foreign affairs", "foreign relations" and "foreign policy" will, for the purpose of the present article, be used synonymously and be understood to include the use of military power abroad.

The American courts enjoy, on the whole, a power of judicial review as broad as that of any other judiciary in the world; and they use it in a bold way unmatched anywhere else. One has only to recall, in this context, the recent Supreme Court decisions regarding capital punishment[4]) and abortion[5]).

Why, then, did the Supreme Court not pronounce itself on the legal aspects of American involvement in Vietnam? The response to this query would seem to be of considerable interest. Given the sweeping powers of the American judiciary, the reasons underlying such conspicuous restraint should, indeed, shed some light on the nature and the limitations of the institution of judicial review and its relationship to the domain of foreign affairs. An effort to understand this phenomenon would, thus, appear worthwhile, even if the answer can only be a preliminary one in view of the recent character of the events under examination.

In order to outline the issues, it will first be necessary to offer some general comments on the typical features of judicial review in the American constitutional system and its use in the field of foreign affairs prior to the Vietnam controversy. Thereafter, the cases which have arisen out of American involvement in Vietnam and the extensive legal literature devoted to the courts' handling of this matter will be analyzed. Finally, some conclusions will be drawn from the American experience relating to the Vietnam conflict for the general problem of judicial review in the field of foreign affairs.

## *II. Judicial Review in the Field of Foreign Affairs in the U.S.: A Survey of the Practice and Doctrine before Vietnam*

### A. Preliminaries

#### *1. Survey of the literature*

It is quite a reflection on American legal thinking and method that the author of the most searching and comprehensive inquiry ever made into the practice of American courts regarding the province of judicial review in the field of foreign affairs, Prof. Scharpf, is a foreign scholar[6]). The

---

[4]) *Furman* v. *Georgia, Jackson* v. *Georgia, Branch* v. *Texas*, 408 U.S. 238 (1972).

[5]) *Jane Roe et al.* v. *Henry Wade*, 41 U.S. L.W. 4213.

[6]) See F. W. Scharpf, Grenzen der richterlichen Verantwortung – Die *political-question*-Doktrin in der Rechtsprechung des amerikanischen Supreme Court (Karlsruhe 1965), pp. 13ss., 153ss. (hereafter quoted as Scharpf, »Grenzen«); Scharpf's analytical conclusions from the examination of the cases have also been presented in an article,

pragmatic approach of American lawyers and judges obviously does not create an urgent need for doctrinal systematization[7]). Practical-minded and topic-oriented, American legal literature is more interested in the debate of actual issues than in the development of abstract concepts. One may well say that the problem of the proper rôle of the American judiciary with respect to foreign relations has long been a dormant question of a rather theoretical nature. Occasional instances of court decisions raising this issue have sparked only scattered comment and discussion in American legal writing. Prof. L. L. Jaffe's "Judicial Aspects of Foreign Relations, In Particular of the Recognition of Foreign Powers"[8]) is probably the closest to a comprehensive presentation of the topic in American doctrine, but his approach, too, was selective[9]), and his work is, by now, somewhat dated[10]). The repercussions of the Cuban nationalizations in the U.S. courts changed this picture to a certain extent[11]); yet, the problems at stake there were still of a rather narrow nature. It is only the recent attempts to bring about court decisions

entitled: Judicial Review and the Political Question: A Functional Analysis, 75 Yale L. J. 517 (1966) (hereafter quoted as Scharpf, "Analysis"). This article has been referred to extensively in the most recent American literature. For critical assessments of Scharpf's conclusions see, *e. g.*, Tigar, Judicial Power, the "Political Question Doctrine", and Foreign Relations, 17 U.C.L.A. L. Rev. 1135 (1970) (reprinted in: The Vietnam War III, 654), pp. 1165s., and Bean, The Supreme Court and the Political Question: Affirmation or Abdication, 71 W. Virg. L. Rev. 97 (1969), pp. 104ss. The topic of the political question doctrine also figures prominently in two other recent publications in German dealing with the judiciary of the U.S.: H.-J. Schäfer, Inhalt und Grenzen der Richterlichen Gewalt nach der Verfassung der Vereinigten Staaten von Amerika (Berlin 1968), and W. Haller, Supreme Court und Politik in den USA – Fragen der Justiziabilität in der höchstrichterlichen Rechtsprechung (Bern 1972). Haller notes that there seems to be no equivalent to Scharpf's work in American legal literature; *op. cit.*, p. 180. See also, on the American literature concerning the political question doctrine, Scharpf, Grenzen, pp. 3s., and Analysis, p. 517 note *).

[7]) Cf. Haller, *op. cit.*, pp. 3ss.

[8]) Cambridge (Mass.) 1933.

[9]) See Jaffe, *op. cit.*, p. 4.

[10]) A more recent study dealing mainly with the foreign affairs aspect of the political question doctrine, Carrington, Political Questions: The Judicial Check on the Executive, 42 Virg. L. Rev. 175 (1956), is much shorter and thus even more selective. Cf. also Dickinson, The Law of Nations as National Law: "Political Questions", 104 U. of Penn. L. Rev. 451 (1956), and the chapter on foreign relations in the work by G. A. Schubert, The Presidency in the Courts (Minneapolis 1957), pp. 101ss.

[11]) See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), and R. A. Falk, The Role of Domestic Courts in the International Legal Order (Syracuse 1964); cf. Lillich, Domestic Institutions, in: C. E. Black/R. A. Falk (eds.), The Future of the International Legal Order vol. IV: The Structure of the International Environment (Princeton 1972), pp. 384ss. (originally published as "The Proper Role of Domestic Courts in the International Legal Order", 11 Virg. J. of Int. L. 9 [1970]), pp. 402ss. For a survey of the literature on this topic see also Hollweg, The Sabbatino Amendment: Congressional Modification of the American Act of State Doctrine, 29 ZaöRV 316 (1969), p. 318 note 8.

relating to the legal aspects of U.S. involvement in Vietnam which have provoked a broad and intensive doctrinal discussion of the general rôle of American courts in the field of foreign affairs[12]). In this context, the relationship between judiciary and foreign policy has, indeed, been widely debated and become the subject of a lively argument.

### *2. The constitutional basis and the characteristic features of judicial review in the U.S.*

Art. III Sect. 2(1) of the U.S. Constitution provides that

> "(t)he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ...".

This grant of judicial power has been interpreted by the judiciary not only as a right, but as a duty of judicial review of the actions of the other departments of government. Such a construction is at the very core of Mr. C. J. Marshall's justification of judicial review of legislative enactments in *Marbury* v. *Madison*[13]) when he states:

> "It is emphatically the province and the duty of the judicial department to say what the law is"[14]).

The text of art. III of the Constitution in no way suggests a limitation of this general grant of judicial power as far as foreign affairs are concerned. On the contrary, one must conclude from the mention of cases involving Ambassadors, Consuls and other public Ministers in Art. III Sect. 2(2) of the Constitution that at least some instances of cases touching upon foreign relations were clearly envisaged as falling within the cognizance of the federal courts. The special nature of such controversies was the obvious reason for bringing them within the reach of original jurisdiction of the Supreme Court[15]). Since the American courts seem thus to have an obligation to adjudicate all cases properly brought before them, and since there

[12]) See pp. 331ss. below. Two other more recent Supreme Court decisions bearing heavily on the political question doctrine in its purely domestic aspects have likewise contributed to the renewed interest in this concept; these are *Baker* v. *Carr*, 369 U.S. 186 (1962), and *Powell* v. *McCormack*, 395 U.S. 486 (1969).

[13]) 1 Cranch 137 (1803).

[14]) *Ibid.* 177. An even more outspoken statement of the duty of judicial review by C. J. Marshall is to be found in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821) at 404, quoted by Scharpf, Grenzen, p. 9.

[15]) Such an interpretation was also given to this clause by C. J. Marshall in *Marbury* v. *Madison*, 1 Cranch 137 (1803) at 175. See, however, Marshall's dictum in the same case where he exempts the conduct of foreign affairs by the President and his subordinates from judicial review; *ibid.* 165s. (quoted by Tigar, *op. cit.* [above note 6], pp. 1167s.).

is no express exception made for special treatment of matters touching upon foreign affairs, the question inevitably arises as to what would give the judiciary the power to deal with such issues in a distinct way[16]).

The power of judicial review thus provided in the U.S. Constitution does embrace both executive and legislative conduct[17]). Therefore, there would appear to be no constitutional basis which could justify differences in the scope of review depending upon whether it is the President and his subordinates or Congress who are acting in the domain of foreign affairs. As has been noted above, the relationship between these two departments of government in the field of foreign relations has become, in the context of U.S. intervention in Vietnam, the subject of the most ardent disputes[18]). Though it will not be possible here to enter into the discussion of these questions, it is nevertheless important to keep in mind that Congress, too, has its responsibilities with respect to American foreign policy. The analysis of the controversy regarding the proper line to follow for the American judiciary in cases pertaining to the Vietnam war will, indeed, show that the issue of judicial review and foreign affairs is not purely one between the courts and the executive, and that it cannot fully be understood without taking into account the rôle of Congress in the field of American foreign relations.

In practice, however, the problem of judicial review in matters touching upon American foreign policy usually arises in the context of executive action. This does not only reflect the present preponderance of this branch in the day-to-day decisions to be made in the domain of foreign affairs. There is a more basic reason: Only a relatively small part of the foreign relations of any country can be regulated in a general manner by substantive legal norms at the national level[19]). Domestic legal rules relating to the conduct of foreign affairs are, therefore, mostly functional, *i. e.*, instituting organs and assigning powers[20]).

---

[16]) Scharpf, Grenzen, pp. 9ss., sees here the basic doctrinal problem *(dogmatisches Grundproblem)* of the theory of political questions; see also Scharpf, Analysis, pp. 517ss.

[17]) *Marbury* v. *Madison,* 1 Cranch 137 (1803).

[18]) See the literature referred to in note 2 above.

[19]) Cf. John Locke, The Second Treatise of Government (1690) ed. by J. W. Gough (Oxford 1946), p. 74: "And though this federative power [viz. the foreign relations power, described by Locke as "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth", *ibid.*] in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive laws than the executive; and so must necessarily be left to the prudence and wisdom of those whose hands it is in, to be managed for the public good". Similarly H. D. Treviranus, Außenpolitik im demokratischen Rechtsstaat (Tübingen 1966), pp. 7ss.

[20]) This is not to suggest that there are no substantive legal norms at all regulating the conduct of foreign affairs; but they are usually in the realm of international law.

This has important consequences for the jurisdictional basis of eventual court action in the field of foreign affairs. The American judiciary's power is limited to the decision of cases and controversies[21]). Together with the other jurisdictional requirements of standing or proper party in interest[22]), directness[23]), and ripeness[24]), this restriction has the effect of excluding *a priori* from the grasp of the courts many issues of foreign policy. Since matters of foreign affairs are less suitable for regulation by substantive norms of the Constitution or the laws of the U.S., they are less likely to become the issue of a case or controversy involving the substantive rights of private individuals. As concerns the organizational structure, *i.e.*, the distribution of powers in the domain of foreign relations provided for in the Constitution, the standing requirements which make an actual personal interest of the claimant a condition of litigation may often serve as a formidable barrier to any legal challenge to the exercise of their authority by either the executive or the legislative branch of government[25]). The same is true for treaty provisions and the rules of customary international law as far as they do not deal directly with the rights and duties of private individuals, but regulate the governmental relations between the U.S. and other nations. Such are, of course, the provisions of an essentially political nature, as a treaty promise of military assistance, or a rule of customary international law forbidding aggressive wars[26]).

A final feature of the U.S. system of judicial review to mention here is the important discretionary element in the exercise of the power of judicial review by the Supreme Court. First, the granting of a writ of certiorari is a matter of discretion[27]). Furthermore, in cases of original jurisdiction, leave

[21]) *Muskrat v. U.S.*, 219 U.S. 346 (1911); cf. Scharpf, Grenzen, pp. 354ss., and Haller, *op. cit.* (above note 6), pp. 140ss.

[22]) *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923); *Tilestone* v. *Ullman*, 318 U.S. 44 (1943); cf. Scharpf, Grenzen, pp. 358ss., Haller, *op. cit.*, pp. 147ss., and Tigar, *op. cit.* (above note 6), p. 1138 note 11.

[23]) *Toilet Goods Association* v. *Gardner*, 387 U.S. 158 (1967); see also Scharpf, Grenzen, pp. 361ss.

[24]) *International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222 (1954); see also Scharpf, Grenzen, pp. 364ss. The terminology with respect to these jurisdictional requirements is not uniform. In court practice as well as in the doctrine, directness and ripeness are often treated as aspects of standing; cf. also note 41 below.

[25]) Cf. pp. 327s. below.

[26]) Cf. Tigar, *op. cit.* (above note 6), p. 1171. As to the latter example, one would have to distinguish between the general public and individuals legally obliged to fight in an allegedly aggressive war; in such a context, the standing issue is of a somewhat different nature.

[27]) See Rule 19(1) of the Revised Rules of the Supreme Court of the U.S., 1970 (28 U.S.C. App.; 1970 ed.). The same discretion is exercised with respect to the grant of writs of habeas corpus.

to file a bill of complaint must be obtained prior to the actual proceedings[28]), and, again, the Supreme Court may deny such a motion without stating any reasons[29]). Both these procedural tools can, of course, be used as a means of avoiding judicial review in the field of foreign affairs.

### B. The practice of the Supreme Court

#### *1. General attitude*

The U.S. Supreme Court has, at different times, expressed widely diverging views regarding the proper scope of its authority in cases involving foreign affairs. In 1952, for example, Mr. J. Jackson declared for the Court:

> "Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" [30]).

This attitude reflects a long-standing doctrinal tradition which has assigned the conduct of foreign relations more or less exclusively to the executive and the legislature, prohibiting judicial scrutiny over their performance. Of the three branches of government, the courts have, indeed, always been regarded as the least able to deal with the vital and complex problems of foreign policy, and they often were the first to acknowledge their limited capacity[31]). In one of the most poignant doctrinal formulations of this opinion it has even been said:

> "The conduct of foreign relations is, of course, entirely removed from judicial control" [32]).

Yet, such absolute statements seem clearly inaccurate. There can, indeed, be no doubt that the American judiciary has, from its beginning, exercised an important influence on foreign affairs. Through the interpretation of international agreements or the adjudication of prize cases, to mention here but two areas, it has had considerable impact on the international relations of the U.S.; and, as Prof. Jaffe points out, the courts have not always

[28]) Rule 9(3), *ibid.*

[29]) Rule 9(5) *in fine, ibid.*; cf. note 83 below. For the difference between refusals of certiorari and summary dismissals of appeals, and the somewhat questionable use sometimes made by the Court of this latter possibility, see Gunther, The Subtle Vices of the "Passive Virtues" – A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1 (1964), pp. 10ss.

[30]) *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952) at 589.

[31]) Cf. Jaffe, *op. cit.* (above note 8), p. 38: "In no other field are the courts so quick to shy from an issue as when it touches upon the international order – or, more specifically, on the conduct of foreign affairs".

[32]) Dodd, Judicially Non-Enforcible Provisions of Constitutions, 80 U. of Penn. L. Rev. 54 (1931), p. 85.

followed the lead of the executive in these matters[33]). Therefore, it would be incorrect to conclude hastily that the judiciary can — so to speak by definition — have no power whatsoever in the field of foreign affairs, or that its influence is, at best, so minor as to be negligible. The U.S. Supreme Court has, in Mr. J. Brennan's classic statement of the doctrine of political questions in *Baker* v. *Carr*[34]) acknowledged that

> "... it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"[35]).

The question becomes thus one of demarcation, of drawing a line between issues involving foreign affairs which are justiciable, and those beyond the reach of judicial power. The problem of where this limit must be set, and for what reasons, is the issue which has been raised afresh by the Vietnam controversy.

### 2. *The Supreme Court's three basic options*

Three basic attitudes toward cases touching upon the conduct of American foreign relations are open to the Supreme Court. They will here be briefly outlined:

a) The Supreme Court, or any other American court for that matter, can, and indeed does in some such cases, render a decision on the merits. It might be founded either on the application of domestic law, especially on constitutional grounds, or on international law, since international treaties are part of the supreme law of the land by virtue of art. VI of the Constitution, and international customary law is also applied directly in the U.S. courts[36]). It is particularly the customary rules governing the law of international treaties which are of interest in this context[37]). The most important instances

---

[33]) See Jaffe, *op. cit.*, p. 233; cf. also *ibid.*, p. 39, where he states: "It is the proud boast of our courts that they administer the law of nations as part of the law of the land, and surely it cannot be denied that many of the rules of international law are being worked out and applied in the courts. This alone establishes the court as an organ of international relations".

[34]) 369 U.S. 186 (1962).

[35]) *Ibid.* 211; this is apparently also acknowledged by J. Frankfurter in his dissenting opinion: see *ibid.* 281, note 11. It should be noted that the passage quoted was the merest dictum, the case at hand in *Baker* v. *Carr* having not the slightest relation to the domain of foreign affairs.

[36]) *The Paquete Habana*, 175 U.S. 677 (1900); see also Q. Wright, The Control of American Foreign Relations (New York 1922), pp. 171s., and Jaffe, *op. cit.* (above note 8), pp. 39ss. Not all of their examples are, however, any longer correct, since the doctrine of political questions has, in the meantime, expanded to embrace today, *e. g.*, also the problems of sovereign immunity; see for this development Scharpf, Grenzen, pp. 109ss.

[37]) *E. g.*, the rules concerning the effect of war upon treaties; see for these and further examples from the law of treaties Scharpf, Grenzen, pp. 20ss.; cf. Jaffe, *op. cit.*, p. 76.

of decisions on the merits based on constitutional grounds relate likewise to the law of treaties[38]).

b) A second possibility is for the Supreme Court, or, again, any other American court, to decide a case pertaining to foreign affairs on jurisdictional considerations. Although it would be thinkable that the usual jurisdictional requirements enumerated above[39]) be applied more strictly where foreign affairs are at stake, and thus turned into a tool for limiting judicial review in this field, this does not seem to be the usual practice of American courts[40]). They have rather based their restraint in matters involving foreign policy on the further jurisdictional requirement of justiciability, *i. e.*, the doctrine of political questions[41]). The origins of this concept in American court practice are somewhat disputed[42]). Prof. Scharpf has carefully screened and classified all the instances where the Supreme Court has relied on the political question doctrine in the field of foreign relations[43]). He also points to the various limitations and inconsistencies in the application of this theory. Among them, the repeated changes in the jurisprudence of the Supreme Court with respect to the problem as to whether courts could decide on the continuing existence of a state of war as a constitutional condition for the exercise of the war power are especially illustrative[44]).

In this context, one has, however, to take into account the pragmatic nature of American jurisprudence: The approach of the courts is a topical one. They are not so much interested in logical and systematic consistency

---

[38]) See particularly *Reid* v. *Covert*, 354 U.S. 1 (1957), where the Supreme Court refused, for the first time in its history, the application of an international agreement because of its incompatibility with the Constitution; for further examples see Scharpf, Grenzen, pp. 45ss.

[39]) See p. 318 above.

[40]) See, however, the rather exceptional cases of war criminals, especially *Hirota* v. *Mac Arthur*, 335 U.S. 876 (1948), and *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), where the Supreme Court was of the opinion that it lacked subject-matter or territorial jurisdiction respectively, and was, therefore, not competent; for Scharpf's account of these cases see Grenzen, pp. 179ss.

[41]) Cf. *Baker* v. *Carr*, 369 U.S. 186 (1962) at 208ss. Actually the label of "justiciability" has been used to designate various jurisdictional requirements, especially standing, and even the case and controversy requirement: see, *e. g.*, J. Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951) at 150ss., and J. Brennan's dissenting opinion in *Barlow* v. *Collins*, 397 U.S. 159 (1970) at 171 note 3.

[42]) On the historical development of the political question doctrine see Haller, *op. cit.* (above note 6), pp. 181ss.

[43]) See Scharpf, Grenzen, pp. 20ss.; Scharpf has likewise dealt with the political question doctrine in the realm of internal affairs (*ibid.*, pp. 233 ss.), but these aspects are not of interest here.

[44]) *Ibid.*, pp. 162ss.

and the building of theories, but in the disposition of a particular case, "justice hic et nunc" [45]). It is, thus, not surprising that the Justices, aiming at a certain practical result, did not make its legal justification their main concern. Therefore, a just appraisal must, as Prof. Scharpf does throughout his work, consider also the actual circumstances of the various cases, as well as the appropriateness of the decision, and the availability of feasible alternative solutions. Where the political question doctrine is at stake, we thus often find not only a subject-matter of a more or less political nature to decide, but moreover a problem of judicial policy.

c) The last of the three basic options is one to which only the Supreme Court can have recourse. It consists of applying its discretionary power to prevent cases from being argued before it by refusing a writ of certiorari or of habeas corpus, or leave to file a bill of complaint [46]). There seems to be, up to now, no systematic study of the relationship between the Supreme Court's use of this possibility to avoid judicial review altogether, and the subject-matter of the cases at stake in such instances. Given the great number of rejections of applications for writs of certiorari, it is even highly improbable that such an examination will ever be made on a comprehensive basis [47]). It is thus generally the outstanding examples of such refusals which have attracted the interest of the legal literature. This is also true where the avoidance of jurisdiction concerned cases involving foreign affairs. One notable instance was the numerous applications for writs of habeas corpus filed by war criminals after World War II; in most of these cases, the Supreme Court denied the application without stating any reasons [48]).

## C. The doctrinal aspects of judicial restraint or abstention in the field of foreign affairs

### *1. The origin of the problem*

Prof. Quincy Wright has clearly pointed out in 1922 already that the difficulties which led the courts to hedge their power of judicial review in

[45]) Cf. Haller, *op. cit.*, pp. 3ss., 140; Scharpf, Grenzen, pp. 404s. Thus, it only confirms the attitude of the courts when American authors have sometimes emphasized that it is not possible to furnish a comprehensive logical rationale for all cases where the political question doctrine has been applied; see, *e. g.*, the Notes in 62 Harv. L. Rev. 659 (1949), p. 663 note 28, and in 24 Notre Dame Lawyer 231 (1949), p. 236; cf. also, in this context, pp. 314s. above.

[46]) See pp. 318s. above.

[47]) See, however, the limited attempt in this direction mentioned by Scharpf, Grenzen, p. 353 note 158.

[48]) See for an account of these cases Fairman, Some New Problems of the Constitution Following the Flag, 1 Stanford L. Rev. 587 (1949).

the domain of foreign affairs by developing the political question doctrine have their origin in the notion that U.S. courts apply international law[49]). Prof. Scharpf's analysis of the practice confirms this view. He shows that, for the number as well as for the importance of the cases, the political question doctrine has essentially been invoked with respect to foreign relations matters if the outcome of a dispute turned on a question of international law[50]), but — apart from immigration and deportation controversies — scarcely ever in instances where constitutional issues were at stake[51]).

The reason for this occasional reluctance to apply international law is evident: the recourse to international law means in fact that a court draws the standards it enforces in such instances from somewhere beyond the Constitution, the basic instrument which has endowed the judiciary with its power of review, and set up the courts as one of three co-equal branches of government. As long as the application of international law does not run contrary to the foreign policy of the executive and Congress, this reliance on supra-constitutional norms does not appear to engender particular problems. Where, however, the question at stake is whether these other departments of government have violated the law of nations, the courts would, indeed, sit in judgement on the actions of the President or Congress as a kind of "quasi-international" tribunal[52]). Given the uncertain and, in many respects, still precarious character of important parts of international law, neither the executive nor the legislature are yet likely to accept and willingly comply with a decision finding them in breach of international law[53]). Absolute insistence by the judiciary upon the rules of international law wherever its canons are pertinent might thus result in serious political difficulties.

### 2. *The reasons for judicial restraint, especially the doctrine of political questions*[54])

The classic explanation of judicial restraint in the field of foreign affairs has been based on the view that the Constitution has entrusted these matters

---

[49]) Wright, *op. cit.* (above note 36), pp. 172s.; this is also Dickinson's starting point, see *op. cit.* (above note 10), pp. 451ss.

[50]) See Scharpf, Grenzen, pp. 66, 73, 104s., 141, 150s., 162, 175ss., and 208.

[51]) Scharpf, Grenzen, pp. 411s., and Analysis, pp. 542, 583ss.

[52]) See for subtle allusions to this basic difficulty the first judgement by C. J. Wyzanski in the Sisson case, *U.S.* v. *Sisson* (D.C. Mass., 1968), 294 F. Supp. 515 at 517; he seems, however, more concerned with the prospect that such a judicial pronouncement might encounter allegations of national bias at the international level.

[53]) *E. g.*, a decision holding a congressional declaration of war to be contrary to international law!

[54]) See for a more extensive survey on the various doctrinal explanations of the political question theory Scharpf, Grenzen, pp. 389ss.

exclusively to the other branches of government, thus making the political question doctrine a product of constitutional interpretation[55]). A second doctrinal group, sometimes designated as "opportunistic"[56]) or "prudential"[57]) theory of the doctrine of political questions, sees behind the avoidance of controversial problems involving foreign relations the apprehension of the courts that interference might endanger their position[58]). Yet another doctrinal trend explains the political question phenomenon by saying that this concept is applied in cases where there is a lack of legal principles with regard to the issue before the court[59]), or where the available legal rules are not the only factor to take into account in making the decision[60]).

Prof. Scharpf considers all these explanations as unsatisfactory[61]). Based on a topical analysis of the cases, he develops his own interpretation of the political question doctrine, a "functional" theory as he calls it. He stresses the following elements in the instances where the courts have actually invoked the doctrine in the context of foreign affairs[62]): difficulties of access to information, the need for uniformity of decision[63]), and deference

---

[55]) Weston, Political Questions, 38 Harv. L. Rev. 296 (1925), pp. 318ss., 331ss. See also Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959), pp. 2ss. Cf. Scharpf, Grenzen, pp. 389ss., and Analysis, pp. 538ss.

[56]) Scharpf, Grenzen, pp. 393ss., and Analysis, pp. 549ss.

[57]) Tigar, *op. cit.* (above note 6), p. 1140.

[58]) This view has most recently been developed very eloquently by A. M. Bickel, The Least Dangerous Branch – The Supreme Court at the Bar of Politics (New York/Indianapolis 1962), p. 184: "Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgement; (c) the anxiety, not so much that the judicial judgement will be ignored, as that perhaps it should but will not be; (d) finally ('in a mature democracy'), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from". See also Finkelstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338 (1924), pp. 344ss., 347ss., 361ss.; see further Finkelstein, Further Notes on Judicial Self-Limitation, 39 Harv. L. Rev. 221 (1925). Bickel's basic assumption that the courts have considerable discretion as to whether to decide an issue has been sharply criticized as being incompatible with the fabric of a legal system founded upon principle and the rule of law; see, *e. g.*, Gunther, *op. cit.* (above note 29).

[59]) See Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485 (1924), pp. 486ss., and especially 511s.; cf. Scharpf, Grenzen, pp. 396ss., and Analysis, pp. 555ss.

[60]) See Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265 (1961), p. 1303; see also the quotation from Bickel in note 58 above. Cf. Scharpf, Grenzen, pp. 398ss., and Analysis, pp. 558ss.

[61]) See Scharpf, Grenzen, p. 404, and Analysis, p. 556.

[62]) See Scharpf, Grenzen, pp. 404ss., and Analysis, pp. 556ss.

[63]) This element is also emphasized by C. G. Post, The Supreme Court and Political Questions (Baltimore 1936), pp. 119, 126; see further Carrington, *op. cit.* (above note 10), p. 175.

to the wider responsibilities of the political departments, *i. e.*, avoidance of embarrassment to the national government. The essence of the functional theory is thus summarized:

> "The emphasis of the political question is on the 'foreign relations law', and within this field on questions of international and domestic law which immediately concern the political or military interactions of the United States with foreign states. In this field, the Court is confronted with a wider context in which domestic courts may not be sure of their grasp of all relevant data and in which they cannot even potentially determine the conduct of all important participants in the process of interaction. Deference to those departments of the government which have a specific responsibility for the actions and reactions of the United States in the external arena would appear to be no more than the realistic acknowledgement of the functional limitations of the judicial process" [64]).

This result seems somewhat disappointing if one takes into account the enormous amount of research which preceded it. However, such apparent simplicity may be inevitable. The doctrine of political questions is not based on complex theoretical considerations [65]), but is a practical tool of a practical-minded judiciary. The functional approach appears to furnish an adequate rationalization for most instances where the courts have in the past applied the doctrine. But whether this concept is also a useful means of deciding if the judiciary should exercise restraint in a newly arising case is, indeed, another question which will be examined in the context of the analysis concerning the courts' action with respect to the Vietnam controversy.

Finally, it is interesting to note that most of the elements relied upon by the different doctrinal explanations of the political question theory can be found peacefully side by side in the Court's authoritative statement of the doctrine by Mr. J. Brennan in *Baker* v. *Carr* [66]):

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional

---

[64]) Scharpf, Analysis, p. 596. For criticism of Scharpf's conclusions in American legal literature see the references in note 6 above.

[65]) Cf. Scharpf, Analysis, p. 597: "I [do not] think that [the] recognition [of functional limitations upon the Court's responsibility] will provide the basis for any sweeping theories of judicial self-limitation. In my understanding of the political question, the doctrine cannot be regarded as a test for the validity of the competing theories of judicial review to which I have referred at the beginning of this article".

[66]) 369 U.S. 186 (1962).

commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question" [67]).

*3. Political question doctrine vs. avoidance, restraint vs. abstention: the difference*

As Prof. Scharpf points out[68]), there is a considerable difference in the effect of these two forms of judicial self-limitation. The purely procedural refusal of certiorari, or the disposition of a case on jurisdictional grounds such as lack of standing, leave open the possibility of a later decision on the merits, perhaps with a better qualified party as applicant. On the other hand, the invocation of the political question doctrine undoubtedly has a certain legitimizing effect; such a decision sets a precedent for judicial deference to the other branches of government, granting them discretionary power the exercise of which is beyond judicial scrutiny. The binding effect of such a precedent is, however, not to be overestimated, since there is no absolute barrier against a later overruling judgement deciding the issue on the merits. Neither can the legitimizing effect be the same as in the case of a decision on the merits. In the formulation of a judgement, the courts might even, willingly or subconsciously, cast doubt upon the legal justification of the other departments' positions, without formally disposing of the question[69]).

## *III. Vietnam and the Courts*

### A. The cases

#### *1. Classification*

The controversies in which American courts have been called upon to rule on the legality of U.S. participation in the Vietnam war can be classified into three broad categories[70]):

---

[67]) *Ibid.* 212.

[68]) See Scharpf, Grenzen, pp. 386ss., and Analysis, pp. 536ss.; see also Haller, *op. cit.* (above note 6), pp. 186ss.

[69]) See for such an example Scharpf, Grenzen, pp. 65s. (referring to *Pearcy* v. *Stranahan*, 205 U.S. 257 (1907)).

[70]) For a more detailled classification of the cases see Loeb, The Courts and Vietnam, 18 Am. U. L. Rev. 376 (1969), p. 377 note 5; cf. also D'Amato/Gould/Woods, War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister, 57 Cal. L. Rev. 1055 (1969) (reprinted in: The Vietnam War III, 407), p. 1105 note 302.

a) A first group consists of the instances where servicemen have brought suits to enjoin the Secretary of Defense from ordering them to Vietnam because of the alleged illegal character of the war[71]). This includes the cases of servicemen seeking relief on this ground through habeas corpus proceedings[72]), and of draftees invoking this argument as a defense in criminal proceedings brought against them for refusal of induction[73]). One would also have to classify in this category the cases where conscientious objectors refused to perform the civilian duties required in lieu of military service, claiming that Congress did not have the power to raise armies through a compulsory draft in peacetime, *i. e.*, without formal declaration of war[74]).

b) A slightly different situation was present in the case of the Massachusetts anti-war bill of 1970, where the Commonwealth of Massachusetts, based on the above arguments, sought to obtain an injunction against all further orders to Vietnam of inhabitants of Massachusetts[75]).

c) A third group of cases deals with the question whether the alleged illegality of the Vietnam war justified exemptions from military service for conscientious objectors who did not fulfill the statutory standard of being "opposed to ... war in any form"[76]), but invoked religious reasons[77]) to refuse service in the Vietnam war only[78]).

### *2. The action of the courts*

As has been noted above, the usual jurisdictional preconditions of litigation may often work as an insuperable hurdle to legal challenges of executive or legislative action in the field of foreign affairs[79]). This circumstance has again been demonstrated by the cases arising out of the Vietnam controversy. There have been many instances of suits related to the Vietnam war

---

[71]) *Luftig* v. *McNamara*, 387 U.S. 945 (1967) den. of cert., *Mora* v. *McNamara*, 389 U.S. 934 (1967) den. of cert., *Orlando* v. *Laird*, 404 U.S. 869 (1971) den. of cert.

[72]) *McArthur* v. *Clifford*, 393 U.S. 1002 (1968) den. of cert.

[73]) *Mitchell* v. *U.S.*, 386 U.S. 972 (1967) den. of cert.

[74]) *Holmes* v. *U.S.*, 391 U.S. 936 (1968) den. of cert.; *Hart* v. *U.S.*, 391 U.S. 956 (1968) den. of cert.

[75]) *Massachusetts* v. *Laird*, 400 U.S. 886 (1970).

[76]) Selective Service Act, 62 Stat. L. 604 (1948), sec. 6(j) at 612, as amended in 50 U.S.C. sec. 456 (j) (1970 ed.).

[77]) It should be noted that the statutory standard of "religious training and belief" *(ibid.)* as the basis of conscientious objection has been very liberally construed by the Supreme Court; see *U.S.* v. *Seeger*, *U.S.* v. *Jakobson*, *Peter* v. *U.S.* 380 U.S.163 (1965).

[78]) *Gillette* v. *U.S./Negre* v. *Larsen*, 401 U.S. 437 (1971); cf. *U.S.* v. *Sisson*, 399 U.S. 267 (1970) in note 81 below. See on the issue of selective conscientious objection O'Brien. The Nuremberg Principles, in: The Vietnam War III, 193.

[79]) See p. 318 above.

which were dismissed for lack of standing in its various aspects, including the prerequisites of directness and especially of ripeness[80]). Where the applicants were not thrown out of court because of the absence of these threshold requirements, the judiciary has likewise followed a nearly uniform pattern of judicial restraint or abstention. With very few exceptions[81]), its line has been an unequivocal refusal to pronounce itself on the legality of U.S. participation in the Vietnam conflict.

This is particularly true for the Supreme Court. Among the three categories of cases mentioned above, the last is the only one where the Court reached a decision on the merits. It considered the issue mainly as one of statutory construction, holding that the respective provisions of the Selective Service Act did not violate any constitutional rights by not permitting

---

[80]) See for a list of such cases the Note, Constitutional Law – Power to Declare War – Secretary of Defense may not be enjoined from ordering servicemen to Vietnam on allegation that present American combat activities there are not constitutionally authorized, 5 Georgia L. Rev. 181 (1970), p. 186 note 17. In *Massachusetts* v. *Laird*, 400 U.S. 886 (1970) at 887ss., J. Douglas, dissenting, has insistently maintained that the standing requirement was satisfied. The same view has been taken, at least with respect to some types of cases raising the issue of the legality of U.S. participation in the Vietnam war, by Schwartz/McCormack, The Justiciability of Legal Objections to the American Military Effort in Vietnam, 46 Tex. L. Rev. 1033 (1968) (reprinted in: The Vietnam War III, 699), pp. 1037ss., and, with an even broader scope, by Velvel, The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable, 16 Kansas L. Rev. 449 (1968) (reprinted in: The Vietnam War II, 651), pp. 485ss. For the contrary opinion see Forman, The Nuremberg Trials and Conscientious Objection to War: Justiciability under United States Municipal Law, [63] Proceedings ASIL 157 (1969) (reprinted in: The Vietnam War III, 399), pp. 162ss. Cf. also, in this context, the comment of Farer, *ibid.*, p. 177, D'Amato/Gould/Woods, *op. cit.* (above note 70), pp. 458s., and Lillich, *op. cit.* (above note 11), pp. 412ss.

[81]) Probably the most outstanding such exception is *U.S.* v. *Sisson* (D.C. Mass., 1969), 297 F. Supp. 902, where the court, in an opinion delivered by C. J. Wyzanski, recognized the possibility of selective conscientious objection. This was partly based on the distinction between declared and undeclared wars, though the court, at the same time, had to acknowledge a limitation on its jurisdiction because of the political question doctrine, preventing it from ruling squarely on the legality of U.S. action in Vietnam (see *loc. cit.* at 906ss.). A divided Supreme Court dismissed the appeal against this decision on other, rather complex jurisdictional grounds, holding that the relevant statute did not permit a direct appeal to the Supreme Court in this case: *U.S.* v. *Sisson*, 399 U.S. 267 (1970), C. J. Burger and JJ. Douglas and White dissenting. For a comment on the ruling by C. J. Wyzanski see von Simson, Wehrdienstverweigerung in USA und Vietnamkrieg, U.S. District Court, District of Mass., U.S. v. Sisson, 1. April 1969, 30 ZaöRV 99 (1970).

In two more recent decisions, the courts have gone beyond judicial restraint to the merits of the issue, stating that the use of military force by the President in Vietnam was implicitly approved by Congress, and thus constitutional: see *Orlando* v. *Laird* (D.C. E.D.N.Y., 1970), 317 F. Supp. 1013; *Berk* v. *Laird* (D.C. E.D.N.Y., 1970), 317 F. Supp. 715, both affirmed *sub nomine Orlando* v. *Laird* (C.A. 2nd, 1971), 443 F. 2d 1039, cert. den. 404 U.S. 869 (1971), JJ. Douglas and Brennan dissenting.

selective conscientious objection against a particular war only[82]). In this context, neither the opinion of the Court, nor Mr. J. Douglas' dissent, dealt specifically with the constitutional or international law aspects of the Vietnam war.

In all the other cases the Supreme Court avoided deciding the issues at stake by refusing grants of certiorari, or leave to file a bill of complaint[83]), with vigorous dissents by Mr. J. Douglas, joined twice by Mr. J. Stewart[84]), and once by Messrs. JJ. Harlan[85]) and Brennan[86]). Thus the Supreme Court let stand judgements of the Courts of Appeals which held that the congressional power to raise armies was not dependent on the use made by the President, or Congress, of these armed forces[87]), that the problem of the legality of U.S. action in Vietnam was a political question not subject to judicial review[88]), that the power of Congress to raise armies was not limited by the absence of a military emergency[89]), or that the use of military force in Vietnam was implicitly sanctioned by Congress by the passing of appropriations and other forms of legislation expressing approval, and thus constitutional[90]). In other instances, the Courts of Appeals had rejected the arguments raised against the use of compulsory military service in peacetime in *per curiam* decisions without any further legal justification[91]).

According to the practice of the Supreme Court, the concurrence of at least four Justices is required to grant a writ of certiorari. It is thus interesting to note that, altogether, four Justices have in cases raising the question of the legality of the Vietnam war expressed their inclination to grant

---

[82]) See the cases referred to in note 78 above.

[83]) In *Massachusetts* v. *Laird*, 400 U.S. 886 (1970), since this was a case of original jurisdiction.

[84]) In *Mora* v. *McNamara*, 389 U.S. 934 (1967), and *Massachusetts* v. *Laird*, 400 U.S. 886 (1970); see also J. Stewart's "Memorandum" in *Holmes* v. *U.S.*, 391 U.S. 936 (1968).

[85]) In *Massachusetts* v. *Laird*, 400 U.S. 886 (1970).

[86]) In *Orlando* v. *Laird*, 404 U.S. 869 (1971).

[87]) *U.S.* v. *Mitchell* (C.A. 2nd, 1966), 369 F. 2d 323.

[88]) *Luftig* v. *McNamara* (C.A. D.C., 1967), 373 F. 2d 664 (mentioning as additional ground for dismissal that the case was an unconsented suit against the U.S.); *Mora* v. *McNamara* (C.A. D.C., 1967), 387 F. 2d 862, referring to Luftig.

[89]) *U.S.* v. *Holmes* (C.A. 7th, 1968), 387 F. 2d 781.

[90]) *Orlando* v. *Laird* (C.A. 2nd, 1971), 443 F. 2d 1039.

[91]) *U.S.* v. *Hart* (C.A. 3rd, 1967), 382 F. 2d 1020. A somewhat special group of cases are the ones where not the duties of draftees, but the obligations resulting from enlistment contracts were in issue: see *McArthur* v. *Clifford* (C.A. 4th, 1968), 402 F. 2d 58, referring to *Morse* v. *Boswell* (C.A. 4th, 1968), 401 F. 2d 544; cf. *Morse* v. *Boswell*, 393 U.S. 802/1052 (1968) den. of preliminary stay and cert., J. Douglas dissenting. For further lower court decisions in this context see also D'Amato, Massachusetts in the Federal Courts: The Constitutionality of the Vietnam War, 4 U. Mich. J. of L. Reform 11 (1970), p. 12 note 4.

certiorari, or leave to file a bill of complaint; however, they never joined in a single case. This is all the more intriguing as the guide-lines for granting a writ of certiorari set forth by the Supreme Court itself appear to be quite satisfied[92]).

### *3. Mr. J. Douglas' dissents*

In these dissenting opinions, the following points are of interest for the topic here under consideration: First, it is important to note that the issue Mr. J. Douglas wanted to decide by granting certiorari was, at least in the early cases, partly one of international law and its application by national courts. This element is particularly emphasized in *Mitchell* v. *U.S.*[93]) where Mr. J. Douglas put the problem in terms of the binding force of the Treaty of London, by which the allies had set up the war crime tribunals after World War II, and of the individual responsibility of soldiers under international law. In later dissents, Mr. J. Douglas likewise stressed that the Supreme Court had to decide the constitutional question whether conscription was legal without formal congressional declaration of war[94]).

In *Massachusetts* v. *Laird*[95]), Mr. J. Douglas[96]) emphatically stressed that Massachusetts had standing to bring the suit, and that the issue raised was justiciable. This latter result was based on a point by point examination of the test laid down in *Baker v. Carr*[97]) in this context, Mr. J. Douglas emphasized that there were judicial standards available to dispose of the case, and that to reach a decision unfavourable to the position of another branch of government could not in itself be considered as an embarrassment, if such a decision was required by the applicable constitutional standards[98]). To justify this result, Mr. J. Douglas stressed repeatedly that the appropriateness of the executive's decision to intervene in Vietnam was not in issue[99]). He thus left aside the aspect of the legality of the Vietnam war with respect to U.S. obligations under certain international treaties, or international law

---

[92]) See Rule 19(1) of the Revised Rules of the Supreme Court, *loc. cit.* in note 27 above, which mentions, among other criteria, conflicting decisions of the Courts of Appeals, or important federal questions not yet settled by the Supreme Court, as reasons for granting certiorari; these guide-lines are, however, in the Court's own language, "neither controlling nor fully measuring the court's discretion" *(ibid.)*.

[93]) 386 U.S. 972 (1967); see also the dissents of both JJ. Stewart and Douglas in *Mora* v. *McNamara*, 389 U.S. 934 (1967).

[94]) *Holmes* v. *U.S.*, 391 U.S. 936 (1968); cf. *Hart* v. *U.S.*, 391 U.S. 956 (1968).

[95]) 400 U.S. 886 (1970).

[96]) JJ. Harlan and Stewart, although dissenting too, did not join in J. Douglas' dissent.

[97]) 369 U.S. 186 (1962), see pp. 325s. above.

[98]) 400 U.S. 886 (1970) at 892s.

[99]) *Ibid.* 893, 896.

in general, making the problem an exclusively constitutional one[100]). Although this might have been due to the limitation to constitutional arguments in the motion filed by Massachusetts, it is interesting to note that Mr. J. Douglas preferred to stay strictly on the safer constitutional ground rather than to expand his argument by including the objections raised under international law against U.S. military involvement in Vietnam. Indeed, he had never asserted in his prior dissents that these questions would also present a justiciable issue.

### B. Vietnam and the political question doctrine: the scholars' controversy

#### *1. The dangers of abstention*

It is not surprising that the treatment by the courts of an issue as crucial and widely debated as the Vietnam war has found passionate criticism as well as firm justification in the legal literature. However, if there was one point on which many writers – critics and defenders of the courts' basic attitude of restraint, and friends and foes of the executive's war policy – agreed, it was the regret that the Supreme Court steadfastly avoided dealing with this problem without giving a reasoned justification for this course of action. Indeed, there were numerous voices calling for a principled decision, either on the merits or on the underlying reasons for the Court's abstention[101]). Some authors even went so far as to prophesy that the uncertainty created by the continuous refusal of the Supreme Court to pronounce itself in any way whatsoever on such a fundamental issue might ultimately endanger the position of the Court in the American constitutional system, and the rule of law[102]).

---

[100]) See also *ibid.* 900: "The question of an unconstitutional war is neither academic nor 'political'".

[101]) See Hughes, Civil Disobedience and the Political Question Doctrine, 43 N.Y.U. L. Rev. 1 (1968), pp. 9ss., 14s., 18; Schwartz/McCormack, *op. cit.* (above note 80), pp. 1042 (speaking of "adroit silent avoidance"), pp. 1049, 1052; Loeb, *op. cit.* (above note 70), p. 396; Moore, The Justiciability of Challenges to the Use of Military Forces Abroad, 10 Virg. J. of Int. L. 85 (1969) (reprinted in: The Vietnam War III, 631), pp. 88, 106s.; Tigar, *op. cit.* (above note 6), p. 1146; Note, 5 Georgia L. Rev. 181 (1970). The opposite view that the Supreme Court was justified in avoiding this difficult issue altogether has been defended by Katz, When a Nation is at War – The Supreme Court in a Post-Utopian Era, 23 Rutgers L. Rev. 1 (1968), p. 10 ("Strategies of evasion are, perhaps, the most appropriate way for the Court to deal with such issues ..."); cf. also Henkin, The Supreme Court 1967 Term – Foreword: On Drawing Lines, 82 Harv. L. Rev. 63 (1968), pp. 88ss., and Viet-Nam in the Courts of the United States: "Political Questions", 63 A.J.I.L. 284 (1969) (reprinted in: The Vietnam War III, 625).

[102]) Schwartz/McCormack, *op. cit.*, pp. 1036, 1053; Tigar, *op. cit.*, pp. 1147, 1178; see also Hughes, *op. cit.*, pp. 14s., 17s., who sees in this uncertainty a possible

It is yet too early to resolve whether such sinister consequences could indeed follow from the Supreme Court's handling of this matter, or whether this was merely an exaggerated argument in a somewhat emotional and heated discussion[103]). It must be observed, nevertheless, that at least some of these criticisms appear to be self-defeating in so far as the traditional rôle of the courts in maintaining the rule of law was understated, and emphasis put on moral disapproval rather than on legal reasoning[104]). This does not seem to be a very promising way to make the call for judicial intervention heard and followed by the courts.

*2. The distinction between constitutional and international law issues*

Prof. Scharpf has concluded that the doctrine of political questions has its prime application in the field of foreign affairs in controversies where the decision turns on an issue of international law; in disputes of a purely constitutional scope, he considers the doctrine to be of questionable value, especially if important individual rights granted by the Constitution are at stake[105]). This view finds some support in Mr. J. Douglas' dissenting opinion in *Massachusetts* v. *Laird*[106]). However, not all writers recognized this to be a valid distinction[107]), and some seem simply to have ignored it[108]).

---

source of civil disobedience. The Court's refusal to take any stand with respect to the legality of the Vietnam war, and civil disobedience are also linked by Gottlieb, Vietnam and Civil Disobedience, [1967] Annual Survey of American Law 699 (1967) (reprinted in: The Vietnam War II, 597). Cf. further Malawer, The Vietnam War under the Constitution: Legal Issues Involved in the United States Military Involvement in Vietnam, 31 U. of Pittsburgh L. Rev. 205 (1969) who speaks of a "vacuum of judicial review" (p. 238).

[103]) It is significant for the confusion sometimes permeating this debate that there were authors who seem to have assumed that the Supreme Court had actually applied the political question doctrine in the cases here under consideration; thus, the important difference between this doctrine and the avoidance of an issue by the Supreme Court (see p. 326 above) has not always been observed: see Hughes, *op. cit.* (above note 101), pp. 1 (Introduction), 15, 18s.

[104]) See Loeb, *op. cit.* (above note 70), p. 395: "The pattern of the courts' response to the conflict in Vietnam is in historical retrospect consistent. The Supreme Court has usually been less zealous of liberty when its judicial sword of protection has been needed most". Loeb goes on to say that the courts' position "... can be thus understood historically and politically; but must be rejected morally" *(ibid.)*.

[105]) Cf. p. 323 above. [106]) See pp. 330s. above.

[107]) See Schwartz/McCormack, *op. cit.* (above note 80), p. 1043: "The claim ... that the use of unilateral force violates our treaty obligations, raise[s] questions of the type that have been consistently regarded as justiciable"; cf., however, *ibid.*, p. 1050, where they acknowledge that the constitutional issue, *i. e.*, the absence of a congressional declaration of war, was the most clearly justiciable one. In the recent literature the distinction between problems of international law and constitutional issues has been emphasized, especially, by Moore, *op. cit.* (above note 101), pp. 87, 98ss.

[108]) See Faulkner, The War in Vietnam: Is it Constitutional?, 56 Georgetown L. J. 1132 (1968), pp. 1134ss., whose view seems to imply that the courts could even review a

Yet, even among the most outspoken critics of the Supreme Court's performance on this question many acknowledged this difference, saying that the justiciable issue was not whether the U.S. should have taken military action in Vietnam, but which branch of government should have decided whether to take such action[109]). Focusing then on this constitutional aspect of the problem, they either found that the test laid down in *Baker* v. *Carr*[110]) was met by the constitutional questions raised by the U.S. military involvement in Vietnam[111]), or else rejected altogether the doctrine of political questions in the constitutional context[112]). Among the authors stressing that the Court had no discretion whatsoever to refuse or avoid a decision on the merits of a constitutional claim, once the jurisdictional requirements were present[113]), Prof. Tigar has probably developed the most pointed formulation:

> "It seems important ... to combat the notion that non-rules should somehow be synthesized, developed and elaborated by a series of non-decisions leading to a non-law of justification for ignoring the principles of order crystallized out

---

congressional declaration of war. Even the otherwise very lucid article by Tigar does not appear fully clear on this point: see Tigar, *op. cit.* (above note 6), p. 1174. Falk avoids this issue by making compliance with international law a matter of adherence to constitutional tenets; see note 117 below; in this context, cf. also his plea for a more active rôle of the domestic judiciary in the enforcement of international legal standards: see note 151 below.

[109]) See, *e. g.*, Velvel, *op. cit.* (above note 80), pp. 479s.; cf. also Malakoff, The Political Question and the Vietnam Conflict, 31 U. of Pittsburgh L. Rev. 504 (1970); see further Schwartz/McCormack, *op. cit.* (above note 80), pp. 1042s., who recognize that apart from this paramount constitutional issue there might have been other subordinate questions which the judiciary was correct to abstain from deciding.

[110]) See pp. 325s. above.

[111]) Velvel, *op. cit.*, pp. 481ss.; Malakoff, *op. cit.*, pp. 505ss. Lillich, *op. cit.* (above note 11), pp. 416s., only notes that the courts did not, as they should, apply the "Baker-test" before keeping out of the Vietnam controversy as a political question. For a severe critique of the "Baker-test" see Tigar, *op. cit.* (above note 6), pp. 1154 (where he puts forward the interesting idea that the criteria laid down in Baker are necessary, but not sufficient conditions for the application of the political question doctrine), and pp. 1163s.

[112]) Tigar, *op. cit.*, p. 1178; D'Amato, 4 U. Mich. J. of L. Reform 11 (1970), pp. 16s., stating that the distribution of powers between the President and Congress can never be a political question, and referring to *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Likewise, Loeb, *op. cit.* (above note 70), p. 390: "The 'political question' sanctuary is untenable because it is a meaningless and deceptive formula. It is untenable because it is basically a responsibility avoiding device". Cf. also Falk, Six Legal Dimensions of the United States Involvement in the Vietnam War (Princeton 1968) (hereafter cited as "Legal Dimensions" from the reprint in: The Vietnam War II, 216), p. 250.

[113]) See Tigar, *op. cit.*, pp. 1172ss. (referring to the famous Dred Scott case *Scott* v. *Sanford*, 19 How. 393 (1857)) as an instance where the Court could not avoid a decision on the merits despite the highly political question at stake), p. 1177; cf. also Hughes, *op. cit.* (above note 101), pp. 9ss.

in 1787 and embodied in the Constitution. It seems worthwhile to say that the notion that non-law can be elaborated in this way is of fairly recent origin and not supported by previous authority" [114]).

The distinction between the constitutional issue of the proper domestic organ to decide on the use of armed forces abroad, and the international law questions involved in the Vietnam conflict, was not always neatly observed by the proponents of judicial restraint either [115]). There was even an attempt made in this camp to reduce the political question doctrine to a theory of purely constitutional relevance. Prof. Henkin has suggested that the doctrine is neither necessary nor useful where problems of international law were in issue, since, as a matter of constitutional law, the Constitution prevailed over conflicting norms of international law [116]). This seems to oversimplify the case, as it does not take into account the different quality of the rules regarding the conduct of foreign relations in these two legal systems. As we have seen above, domestic, and that is primarily constitutional, norms are mostly organizational allocations of powers, whereas there is a considerable body of substantive standards of international law regulating the behaviour of States in the international realm. The constitutional assignment of a particular task, *e. g.* the war power, to a specific national organ does not necessarily include the mandate to use this power in a way contrary to international law. Thus, the dilemma facing a court claiming generally to apply international law if recourse to these rules could provoke a dispute with other branches of government is not inevitably a conflict between incompatible legal standards [117]).

### *3. The reasons for judicial restraint or abstention*

The justifications presented by the authors approving of the line which the courts have followed with regard to the Vietnam issue seem mostly of

[114]) Tigar, *op. cit.*, p. 1178.

[115]) See, *e. g.*, Katz, *op. cit.* (above note 101), p. 12.

[116]) Henkin, 63 A.J.I.L. 285ss. (1969); similarly Forman, *op. cit.*, (above note 80), p. 162.

[117]) Falk has even argued that the U.S. Government is bound to act in accordance with the law of the land which includes international law; he has thus maintained that a violation of international law by the executive department would be unconstitutional; see Falk, International Law and the United States Role in the Viet Nam War, 75 Yale L. J. 1122 (1966) (reprinted in: The Vietnam War I, 362), pp. 1154s., International Law and the United States Role in Viet Nam: A Response to Professor Moore, 76 Yale L. J. 1095 (1967) (reprinted in: The Vietnam War I, 445), pp. 1150s., and, particularly, Legal Dimensions, p. 248. This view has been sharply criticized by Moore, International Law and the United States Role in Viet Nam: A Reply, 76 Yale L. J. 1051 (1967) (reprinted in: The Vietnam War I, 401), pp. 1091ss. Falk himself has admitted that "... there is no established legal doctrine ..." which would support this theory; see 76 Yale L. J. 1150.

a prudentialist nature[118]). Apart from the lack of expertise and information of the courts in this matter[119]), and the absence of legal standards for a neat separation of congressional and presidential war powers[120]), these writers stressed that judicial intervention could have hampered the war effort[121]), or the political solution of the Vietnam conflict[122]). Some of them even predicted a constitutional crisis in case of judicial interference anticipating that the President would simply have disregarded the courts' verdict, leaving them in the awkward position of not being able to enforce their decision[123]).

Among the advocates of judicial intervention, some summarily dismissed these fears as unjustified[124]), thereby showing an optimism which is not necessarily born out by past experience[125]). Others, although aware of the potential dangers of judicial action, thought that they were outweighed by the possible damage of continuing restraint and abstention on the part of the judiciary; they pictured this attitude as an expression of judicial abdication, and of abnegation of the courts' most basic right of delineating the respective powers of the other branches of government under the Constitution[126]).

### *4. Vietnam, the judiciary and Congress*

This brings us to probably the most interesting aspect of the controversy, the rôle and the responsibility of Congress in the context of the Vietnam issue. Indeed, the most potent argument of the proponents of judicial

---

[118]) The only clear exception in this respect which has come to the attention of this author is Forman who heavily emphasizes the constitutional argument; see Forman, *op. cit.* (above note 80), p. 162, and his comment *ibid.*, p. 175. Cf. also Henkin, *loc. cit.* in note 116 above.

[119]) See Katz, *op. cit.* (above note 101), p. 11.

[120]) Moore, *op. cit.* (above note 101), p. 95.

[121]) *Ibid.*, pp. 94s.

[122]) Katz, *op. cit.*, p. 11.

[123]) See Locke/MacIver/Wolff, The Supreme Court as Arbitrator in the Conflict Between Presidential and Congressional War-Making Powers, 50 Boston U. L. Rev., Special Issue, 78 (1970), pp. 93, 115s. (referring to the Dred Scott case – see note 113 above – as an instance of unfortunate judicial intervention in a major political issue with disastrous consequences); see also Katz, *op. cit.*, p. 11.

[124]) See Velvel, *op. cit.* (above note 80), pp. 500ss., cf. Loeb, *op. cit.* (above note 70), pp. 395s.

[125]) See for past frustrations of judicial action by the executive, *e. g.*, *Ex parte Merryman* (C.C. Md., 1861), 17 Fed. Cas. 144, referred to by Scharpf, Grenzen, pp. 195s.; cf. also the *Cherokee* cases described *ibid.*, pp. 78ss.

[126]) See Malakoff, *op. cit.* (above note 109), p. 513; cf. Velvel, *op. cit.* (above note 80), p. 480, and the references in note 102 above; see also Spong, Can Balance be Restored in the Constitutional War Powers of the President and Congress?, 6 U. of Richmond L. Rev. 1 (1971), pp. 12ss.

restraint, or even abstention, was the circumstance that Congress, though obviously not overly happy with the Vietnam war, had never really opposed the President in this matter. On the contrary, the course of the majority of Congress can in many ways be interpreted as a tacit – or even explicit – approval of the President's policy. It is thus not surprising that the courts going to the merits of the Vietnam issue concluded that Congress had sanctioned the use of military force in Vietnam[127]). And it appears difficult to rebut the argument that there was in fact no conflict of powers present in this issue and, hence, no need for judicial determination of the relative authority of the executive and Congress in the domain of the war power[128]). As long as Congress does not disagree with the President's undertakings as Commander-in Chief, there is no compelling reason for the judiciary to tell Congress that it alone has the ultimate constitutional right to decide about war and peace. To take up such a moot and abstract question would not only have been contrary to traditional principles of American constitutional adjudication[129]); given the serious risk that a decision of this kind would have further aggravated the political controversy, such action would, indeed, have been irresponsible.

The counterargument of the supporters of judicial intervention against this justification of judicial inactivity was the assertion that the political process had ceased to function properly, and that Congress was thus no longer able or willing to oppose the presidential war policy[130]). At the basis of this reasoning is the proposition that the courts should have forced a Congress reluctant to take a clear stand to face its responsibility, *i. e.*, either to declare war, or to order an end to the hostilities[131]). At this point, the

[127]) See pp. 328s. above, particularly the cases referred to in notes 81 *(in fine)* and 90 above.

[128]) Moore, *op. cit.* (above note 101), pp. 95s.; Ratner, The Coordinated War-making Power – Legislative, Executive and Judicial Roles, 44 So. Cal. L. Rev. 461 (1971), pp. 482s., 486. Locke/MacIver/Wolff simply begged this fundamental issue by basing their analysis on the hypothetical assumption that Congress actually had taken legislative measures to counteract the President's policy in Vietnam (see *op. cit.* [above note 123], pp. 79ss.); they concluded that this would have led to a justiciable issue (*ibid.*, p. 94), that the Court should, however, have abstained even then from passing on the problem, lest it jeopardize its authority (*ibid.*, p. 116).

[129]) See *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923) at 484s., where the Court held that it had no jurisdiction, if the issues at stake were "... not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government".

[130]) Schwartz/McCormack, *op. cit.* (above note 80), pp. 1046s.; Loeb, *op. cit.* (above note 70), p. 391 (saying that "... the political processes have ... become clogged"); see also the Commentary by Schwartz, 10 Virg. J. of Int. L. 114 (1969), p. 116.

[131]) See Schwarz/McCormack, *op. cit.*, p. 1050; Loeb, *op. cit.*, p. 396; cf. Velvel, *op. cit.* (above note 80), p. 499. See, against this proposition, Ratner's terse

issue is not any more between the judiciary and the executive, but between the judiciary and Congress; and the question arises on whose behalf the courts should have intervened, since the power of waging war is obviously not theirs. Is there a constitutional right for individuals not to serve in any but congressionally declared wars? Is a jail sentence for refusal of induction into the armed forces a deprivation of liberty without due process of law if the unconstitutionality of a war not declared by Congress cannot be raised as a defense? The argument could be made, and was indeed made[132]), but the prospects that the Supreme Court will squarely face this issue are not too likely. It is improbable that the Justices would in the near future hold that Congress is answerable to them with respect to the forms to observe in the exercise of its war power. However, the development which has already taken place indicates that here lies the essential issue of the constitutional controversy which has focused on the Vietnam war. It is possible that the courts will try to advance further along these more subtle lines of due process and individual protection. As one astute observer of the court scene has suggested:

> "Few lawyers believe that the present frustrations will produce a peacenik's *Baker* v. *Carr*. There is not likely to be a Supreme Court ruling that the great questions of war and peace are justiciable in the federal courts, to be settled ultimately by the Supreme Court. Rather, the courts, the legislatures and the men of law will probably try to accelerate a process that is already under way — a nibbling away at the edges of the President's almost solitary power to wage war. So far the focus has been on placing due-process limitations on the Selective Service System by bolstering dissenters' rights to protest, and by attempting legislatively to tie peace strings to the public purse" [133]).

---

formula: "Congress can act to restrain the President. Whether it should do so is not a judicial issue" (*op. cit.* [above note 128], p. 483). Among the opponents of official U.S. policy in Vietnam, Falk has warned against the insistence upon a formal congressional declaration of war, because such a declaration could have enlarged the conflict and made the American position more rigid, both externally and at the domestic level; see Falk, Legal Dimensions, pp. 245s.

[132]) See Velvel, The Constitution and the War: Some Major Issues, 49 J. of Urban L. 231 (1971), pp. 285ss.; D'Amato/Gould/Woods, *op. cit.* (above note 70), pp. 1108s., particularly note 319. Cf. also the interesting, but somewhat unusual argument regarding the relationship between the draft and the state militias by D'Amato, 4 U. Mich. J. of. L. Reform 11 (1970), pp. 14ss.

[133]) Graham, Introduction — Toward a Jurisprudence of Peace?, 50 Boston U. L. Rev., Special Issue 1 (1970), p. 2. This conclusion finds support in the fact that even opponents of a decision by the courts on the constitutionality of U.S. participation in the Vietnam war have proposed a more active judicial rôle in the enforcement of the laws of warfare (see Moore, *op. cit.* [above note 101], pp. 101ss., 107), or in the protection of the first amendment rights of war protesters (see Katz, *op. cit.* [above note 101], pp. 12ss.).

### *5. Conclusion: the relevance of the doctrine*

One of the remarkable points in the legal discussion resulting from the American involvement in Vietnam is the modest rôle usually conceded to the doctrine of political questions. Its "status and nature" were, as one author put it, rather disputed[134]). As to the doctrinal foundations of the solutions proposed with respect to the problem of the courts' attitude in this matter, the proponents of judicial abstention or restraint appear to lean toward a prudentialist approach of avoiding a politically too controversial problem, rather than the classic theory making judicial non-intervention in questions touching upon foreign affairs a matter of constitutional construction[135]). Although the elements of the functional theory were present, too, in the arguments of the defenders of judicial self-limitation, these aspects do not seem to have been the decisive factors. The critics of the Supreme Court's avoidance of the issue, on the other hand, emphasized in their majority that the doctrine of political questions could not be invoked at all to the extent that basic constitutional problems, and not questions of international law, were at stake. Although they thus arrived at the same conclusion as Prof. Scharpf with his functional concept[136]), they seem closer to a strictly constitutional view in the sense of an absolute judicial obligation to pass upon any constitutional issue if the jurisdictional requirements are met.

It is not surprising that Prof. Scharpf's theory thus emerges somewhat frayed, and appears to have been of little utility in the search for an answer to the question whether the courts should have used their power of judicial review with respect to the Vietnam issue. The functional approach is based on a topical analysis of the cases; the result is an explanation of past instances where the political question doctrine has actually been applied. But just because the functional theory is not intended to express a comprehensive view with regard to the basis and limitations of the institution of judicial review[137]), it does not seem particularly helpful as guide-line for the determination whether the judiciary should intervene, or exercise restraint, in a newly arising controversy.

As far as the first element of the functional concept of the political question doctrine is concerned, it has been rightly observed that difficulties of access to information are no insuperable obstacle to judicial action[138]). By

[134]) Hughes, *op. cit.* (above note 101), p. 7; for doubts that the theory of political questions merits the status of a settled "doctrine" see also Tigar, *op. cit.* (above note 6), pp. 1163s., 1166, 1178; cf. further note 139 below.

[135]) See, however, note 118 above.

[136]) See p. 323 above.

[137]) Cf. note 65 above.

[138]) See Tigar, *op. cit.* (above note 6), pp. 1165s.

imposing burdens of proof and applying the rules of evidence, courts are usually able to force the parties before them to disclose whatever the judges think to be essential for the case at hand, lest a party be willing to foresake its claim. The real problem thus is whether a court is disposed to make use of this power. The two further components of the functional theory are the need for uniformity of decision within a nation, and avoidance of embarrassment to the other branches of government neither do these standards in themselves furnish cogent answers either as to whether judicial intervention is desirable or permissible in a particular case involving foreign affairs. Modern government often speaks with many voices, even in matters of foreign policy. Courts have also again and again rendered decisions embarrassing or annoying the other branches of government, if the judges thought that more respectable values than governmental comfort were to be honored.

The criteria developed by the functional theory can thus only be part of the viewpoints to take into consideration, factors to be weighed against the importance of the rights of the other parties to an actual dispute. In such a process of balancing, the basic understanding of the institution of judicial review — prudentialist emphasis on the passive virtues, or activist insistence on the constitutional mandate to preserve the rule of law — will play a decisive role[139]).

### *IV. Summary and Outlook: The Prospects for Future Development of the Rôle of the Courts in the Field of Foreign Affairs*

We have seen that judicial restraint or abstention in cases involving foreign affairs are most disputed, if constitutional questions are in issue. The most articulate critics of the Supreme Court's performance with respect to the Vietnam problem have focused on this aspect. Two categories of constitutional queries were present in this controversy. The first group relates to the constitutional rights of individuals subject to the draft, whereas the second regards the allocation of the war power between the executive and legislative departments of government.

As to the distribution of powers issue, there has in fact never been a true conflict between the President and Congress concerning the country's basic

---

[139]) Cf. also Jaffe, Judicial Aspects (above note 8), pp. 233ss., and Dickinson, *op. cit.* (above note 10), pp. 492s., who both stress that it is difficult, if not dangerous, to think of the political question theory as a strict legal doctrine, and point to the importance of the judicial process and judicial attitudes for the solution of the conflicts of interest underlying each political question case. See further Haller, *op. cit.* (above note 6), p. 366, who also alludes to these limitations of Scharpf's theory.

commitment to the war. Despite the vigorous opposition of a significant number of Senators and Congressmen, the legislative branch has never taken definitive action to terminate American involvement in Vietnam. Yet, it cannot be excluded that such a confrontation could develop in the context of some future assignment of American armed forces abroad. It is also likely that such a clash would affect important private interests, thus making litigation possible. The Supreme Court's decision in such a case is difficult to foresee, since much may depend on the precise features of the controversy and the political conditions prevailing at that time. But it seems safe to predict that the Court could not simply avoid and ignore the problem, if the case brought before it meets the usual jurisdictional requirements.

Hence, the fundamental constitutional question raised by the Vietnam war is, whether the Supreme Court could and should have intervened to clarify the legal situation concerning the constitutional rights of draftees and military personnel. One may well start with the proposition that the Court would have done so if these constitutional claims would either have been obviously justified, or else clearly frivolous and futile. In both cases, an unequivocal decision on the merits could well have been thinkable. But there are in fact many legal issues open with respect to the relationship between individual freedoms and military conscription. A time of deep and serious political controversy surrounding these matters was not an auspicious moment for their adjudication. Instead of resolving the dispute, such a ruling might have aggravated it. For some authors, nothing short of a judicial determination that the war was unconstitutional could possibly have restored the rule of law[140]). In the opposite camp, the feelings — though perhaps not the legal arguments — against any judicial interference with the war effort were equally strong.

Thus, any decision whatever by the Supreme Court would probably have stirred further controversy[141]). This means, in other words, that the Vietnam issue was too political even to be declared a political question by the Court. Moreover, it has been suggested that the past "activist" Court was not very eager to admit, in this form, its "impotence"[142]). Others have speculated that the Court was aware of the criticism which it had already provoked by its so-called judicial activism, and therefore wary of provoking any more hostile sentiments against the judiciary[143]). All these elements may certainly

---

[140]) See, *e. g.*, Velvel, *op. cit.* (above note 132), pp. 285ss., 293, and Faulkner *op. cit.* (above note 108), p. 1143.

[141]) In this sense Henkin, 82 Harv. L. Rev. 63 (1968), p. 90.

[142]) *Ibid.*, p. 91.

[143]) Cf. Loeb, *op. cit.* (above note 70), pp. 392s.

have contributed to the Supreme Court's avoidance of the problem. Yet there is a further consideration, again related to the responsibilities of Congress in this matter. As it had already been said before the beginning of the Vietnam debate, judicial authority to vindicate the rights of private individuals against the military powers of the executive is exposed to particular strains in time of war; the judiciary thus needs assistance and support, if it is to accomplish its task:

> "Armed with congressional limitations on the military, the courts can assist in the protection of private rights, but the courts are too fragile a bulwark standing alone" [144]).

What was at the base of the Supreme Court's attitude regarding the Vietnam controversy, seems to be closer to the prudentialist theory than to any other doctrinal explanation of judicial restraint or abstention in cases involving foreign affairs. This is not to suggest that the factors stressed by those other theories are completely irrelevant. The Court's inclination to be prudent may well substantially depend on whether there are, in a specific case, clear textual commitments of power in the Constitution, or practical obstacles of the nature emphasized in the functional theory. Nevertheless, this conclusion is not likely to satisfy adherents to strict logic and principle and, indeed, it cannot do so. However, it seems that absolute insistence on rationality with respect to the basis and functioning of the institution of judicial review might be more fallacious than to acknowledge that there are still some limits to overcome for legal logic. Although it is the lawyer's, and especially the judge's, task to expand the domain of reason and principle, and to eliminate arbitrary power, it is probably also true that they can do so only cautiously where they touch upon sensitive issues of great political importance. The political processes are, unfortunately, yet considerably dominated by irrational forces, and the judiciary could jeopardize its position and past achievements by simply refusing to take this circumstance into account. This does not necessarily mean abdication, but postponement of action until there are more favourable conditions for the vindication of principles. Past practice of American courts shows that they have often been willing to intervene in such touchy matters, once the critical political obstacles had disappeared [145]). Whether the judiciary will do so in the context

---

[144]) Carrington, *op. cit.* (above note 10), p. 197. Falk puts eventual court action against the war power in an even wider framework, making the success of such a challenge dependent upon the concurrence of "... many other social, moral, and political forces opposing the course of involvement in a war"; Falk, Legal Dimensions, p. 255.

[145]) See, *e. g.*, the cases vindicating constitutional rights against the military after the termination of hostilities by Scharpf, Grenzen, p. 209 (text to notes 323 and 324).

of the Vietnam war remains to be seen[146]). Given the many proceedings still pending against draft resisters and deserters, and the possibility of legal actions by persons already sentenced for those and similar crimes, there should be ample occasion for such endeavours on the part of the courts.

If the American judiciary appears to have the power of enforcing constitutional provisions even where the conduct of foreign affairs is in issue, and to be usually willing to perform this function in appropriate cases and under normal conditions, the situation is somewhat more complicated when questions of international law are involved. The origins of the problem have been pointed out above[147]). Since the cleavage between national legal systems and the international legal order is not likely to vanish soon, the political question doctrine will presumably continue to operate for some time as a safety-valve in cases where national policies and international norms clash. But it should be kept in mind that such a mechanism ultimately raises the problem of the true rôle of international law in the municipal legal order. The conclusion has been drawn from the Vietnam controversy, and it seems indeed inevitable, that the status of international law in the domestic legal system of the U.S. is not as unquestionably assured as the prevalent "law of the land" formula would suggest[148]).

As to the possible future developments in this matter, there appear to be no inherent and cogent reasons for limiting the judiciary's contribution to the regulation of foreign affairs definitely and forever. No other national organ could be more qualified to apply the norms of international law in the domestic context. The practical difficulties of judicial review in this field stressed by the functional doctrine of political questions, the dangers and pitfalls of judicial intervention emphasized by the prudentialists, and the constitutional formulas relied upon by the classic theory, are not insurmountable obstacles to an expansion of the courts' rôle. Rather, they represent various facets of today's legal and practical impediments to the full application of the judiciary's resources in the field of foreign affairs. Judicial power has, for centuries, been slowly growing in the internal, domestic domain, marking a long process of substituting reason and principle for absolute discretionary power of the executive and/or the legislature. The present controversies about the judiciary's task in the context of foreign

---

[146]) Such a development seems to be hoped for, *e. g.*, by Van Alstyne, *op. cit.* (above note 2), p. 3.

[147]) See pp. 322s. above.

[148]) See Lillich, *op. cit.* (above note 11), pp. 419ss., 423s.; cf. also O'Brien, *op. cit.* (above note 78), pp. 237s. Lillich has even said, in a somewhat wider context, that "... international law, although doctrinally incorporated into the law of the United States, actually is accorded second-class status"; Lillich, *op. cit.*, p. 423.

relations are but an expression of similar aspirations for the reign of legal principle in the international realm, a proposition which is still rather novel.

Indeed, the observance and enforcement of the rules of international law are yet at a relatively low level, in comparison to the more developed national legal systems. Unfortunately, this is particularly true with respect to the most fundamental and important norms, as the prohibition of aggressive wars. Therefore, the national courts cannot make use of their full potential in the vindication of international standards against the other branches of government. Before compliance with these rules is assured at the international level, such judicial action might seriously jeopardize a country's interests in a violent and anarchic world. However, if the enforcement of the basic principles of international law should ever, as we all must hope, make significant progress, the domestic judiciary will not only be able but should indeed expand its rôle in the field of foreign affairs. Judicial intervention might, then, save the nation the embarrassment of international enforcement action[149]), and the fact that a nation has more than one voice to speak in the international realm could prove to be an advantage.

The relative weakness of domestic courts in the field of foreign affairs appears thus ultimately to be the reflection of the short-comings of today's international legal order. These deficiencies, in turn, are related to the unfortunate fact that the conduct of foreign relations is the last bastion of large-scale executive discretion and "pure" politics[150]). In the gradual limitation and removal of this playground for would-be "Principi" and "Iron Chancellors", the national judiciaries could make an important contribution by subjecting the conduct of foreign policy to legal principles, domestic or international ones[151]). But the courts will not be in a position to do so without corresponding enhancement of the rule of law at the international level.

---

[149]) Similarly Q. Wright, The Power of the Executive to Use Military Forces Abroad, 10 Virg. J. of Int. L. 43 (1969), p. 57; cf. Falk, Legal Dimensions, p. 249: "In the setting of the Vietnam War ... action by legislative and judicial organs to inconvenience the executive might have worked out to national advantage"; cf. *ibid.*, pp. 254s.

[150]) Cf. Treviranus, *op. cit.* (above note 19), pp. 7ss.

[151]) The case for a more active rôle of domestic courts as instruments of world legal order has particularly been pleaded by Falk. Because of the "horizontal" character of the international legal system, he sees in the national judiciaries a prime means for bringing international law to bear upon executive action in the domain of foreign policy. See Falk, *op. cit.* (above note 11), pp. xis., 10ss., 174s., and 177; Legal Dimensions, pp. 244s., 249s., and 254; and Falk's comments in [62] Proceedings ASIL 77, 80 (1968). In the same sense also Lillich, *op. cit.* (above note 11), pp. 418 and 421; he further notes that Falk's prior advice of judicial restraint in the context of the act of State doctrine as applied to foreign expropriations has now cut against Falk's arguments in favor of judicial intervention in the Vietnam controversy; see Lillich, *op. cit.*, p. 418 note 239.