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## THE JUSTICIABILITY OF CHALLENGES TO THE USE OF MILITARY FORCES ABROAD\*

JOHN NORTON MOORE \*\*

To his colleagues from abroad, the American lawyer seems to have an extraordinary preoccupation with the judicial process. Whether because of the major role of the Supreme Court in the American system, the strength of the common law tradition, or the dominance of the Langdell-Ames case method of instruction in American law schools, it is second nature for the American lawyer to turn to the courts for solution of major issues. It is not surprising, then, that the controversy surrounding the Vietnam War has given rise to a multitude of cases in American courts. These cases have arisen in a variety of contexts, including prosecution for refusal to be inducted,<sup>1</sup> prosecution for destroying Selective Service records or other acts of civil disobedience against the War,<sup>2</sup> suits by servicemen to prevent their being sent to Vietnam,<sup>3</sup> and taxpayer suits seeking injunctions

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1. See, e.g., *Mitchell v. United States*, 386 U.S. 972 (1967); *Kemp v. United States*, 415 F.2d 1185 (5th Cir. 1969); *United States v. Owens*, 415 F.2d 1303 (6th Cir. 1969); *United States v. Sisson*, 294 F. Supp. 511, 515, 520 (D. Mass. 1969), *prob. juris. noted*, 38 U.S.L.W. 3113 (U.S. Oct. 13, 1969); *United States v. Gillette*, 420 F.2d 293 (2d Cir. 1970).
2. See, e.g., *United States v. Rehfield*, 416 F.2d 273 (9th Cir. 1969); *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969). *United States v. Berrigan*, 283 F. Supp. 336 (D. Md. 1968), 417 F.2d 1002 (4th Cir. 1969), *appeal dismissed*, 38 U.S.L.W. (U.S. Feb. 24, 1970).
3. See, e.g., *Mora v. McNamara*, 389 U.S. 934 (1967). Massachusetts recently passed an Act requiring the State Attorney General to bring suit to prevent servicemen from Massachusetts from being required:

[t]o serve outside the territorial limits of the United States in the conduct of armed hostilities not an emergency and not otherwise authorized in the powers granted to the President of the United States in Article 2, Section 2, of the Constitution of the United States designating the President as the Commander-in-Chief, unless such hostilities were initially authorized or subsequently ratified by a congressional declaration of war according to the constitutionally established procedures in Article 1, Section 8, of the Constitution of the United States.

The Act, which was accompanied by much publicity, is intended to force Supreme Court consideration of the justiciability of the constitutional issues in the use of United States troops in the Vietnam War. Though it may achieve its objective of requiring the Court to fully consider the justiciability issue, the implication in the Act that the only congressional authorization of the use of armed forces abroad which is constitutionally permissible is a formal declaration of war, may make the Act unconstitutional. [1970] Mass. Acts Ch. 174.

to end American involvement.<sup>4</sup> Though the diversity of the contexts in which these cases arise assures a large number of legal issues, four major claims seem to run through most of these cases. They are, claims that American involvement has not been constitutionally authorized, that American participation is in violation of international law, that the method of conducting hostilities violates international law, and that participation in the War will entail personal responsibility under the Nuremberg principles.<sup>5</sup> To date, these claims have been treated as nonjusticiable "political questions" by every domestic court which has considered them. And the Supreme Court, by refusing to grant certiorari to review them, has acquiesced in this judgment, albeit without reasons.<sup>6</sup>

During the past few years several articles have been written taking the courts to task for refusing to meet these issues on the merits.<sup>7</sup>

4. See, e.g., *Velvel v. Johnson*, 287 F. Supp. 846 (D. Kan. 1968).

5. A fifth claim is that one who is conscientiously opposed to participation in a particular war may not constitutionally be conscripted for combat service in that war. In *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), *prob. juris. noted*, 38 U.S.L.W. 311 (U.S. Oct. 13, 1969), Judge Wyzanski held that the free exercise of religious clause of the First Amendment and the due process clause of the Fifth Amendment constitutionally barred the conscription for combat service in Vietnam of one who was conscientiously opposed to the War. In doing so, Judge Wyzanski drew a distinction between declared and undeclared wars and foreign wars and wars in defense of the homeland.

[T]his Court . . . assumes that a conscientious objector, religious or otherwise, may be conscripted for some kinds of service in peace or in war. This court further assumes that in time of declared war or in defense of the homeland against invasion, all persons may be conscripted even for combat service.

*Id.* at 908. Anticipating an appeal to the Supreme Court, Judge Wyzanski also based the decision on the conclusion that the distinction in the 1967 Selective Service Act between religious conscientious objectors and those objecting on other grounds violates the free exercise and establishment clauses of the First Amendment. Judge Wyzanski's holding has enormous significance for the constitutional law concerning conscientious objection, but seems to be confined in its impact to the operation of the selective service laws. The case is currently pending before the Supreme Court. For the Solicitor General's Memorandum to the Supreme Court in the *Sisson* case, see 8 INT'L LEG. MAT. 1248 (1969).

The jury nullification issue, argued by William Kunstler during the course of the panel on "The Use of Domestic Courts to Challenge Employment of Military Force Abroad," might be listed as a sixth claim. It arises, however, only in cases presented to a jury and is largely a dispute about the breadth of the judges charged to the jury. Among other problems, the Kunstler position raises serious questions about location of prescriptive competence in a democratic system and uniformity in the administration of justice. So far he has not persuasively answered either question. See Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969).

6. See *Mora v. McNamara*, 389 U.S. 934 (1967) (in brief opinions Justices Stewart and Douglas dissented from the denial of certiorari); *Mitchell v. United States*, 386 U.S. 972 (1967) (in a brief opinion Mr. Justice Douglas dissented from the denial of certiorari).

7. See Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEXAS L. REV. 1033 (1968); Velvel, *The*

Professor Warren Schwartz articulately presents this point of view when he says:

In the Vietnam case the personal stakes could not be higher. The litigants are being directed to place their lives in jeopardy and perhaps even take the lives of others in a conflict they assert to be illegal and immoral.<sup>8</sup>

If the judiciary, the organ of government most fundamentally committed to the vindication of constitutional principle, decides it cannot play its accustomed role in the Vietnam controversy, our basic institutional alternative to lawlessness is lost.<sup>9</sup>

While agreeing with Professor Schwartz and others who urge that the judiciary should fairly meet the challenge, I believe that they greatly oversimplify the difficulties in judicial decision on the merits of these major claims. First, they have focused largely on the constitutional rather than the International law claims and as a result have failed to adequately consider the full range of problems inherent in judicial decision of the Vietnam issues. Second, even on the constitutional issue, they have not adequately taken into account the reasons for judicial abstention stemming from the separation of powers and the nature of the judicial process. This is not to suggest that the opposite extreme, that there is no role for the judiciary in considering challenges to the use of military forces abroad, is correct, but only that the issues are a great deal more difficult than has yet been admitted by the proponents of either position. Similarly, to suggest that fundamental policies may sometimes favor abstention is not to suggest that courts should stand mute about their reasons for decision.

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*War in Viet Nam: Unconstitutional, Justiciable and Jurisdictionally Attackable*, 16 KANSAS L. REV. 449 (1968). See also Henkin, *Viet-Nam in the Courts of the United States: "Political Questions"*, 63 AM. J. INT'L L. 284 (1969); Forman, *The Nuremberg Trials and Conscientious Objection to War: Justiciability under United States Municipal Law*, 1969 PROC. AM. SOC'Y INT'L L. 157. The proceedings of the complete panel on "The Nuremberg Trials and Objection to Military Service in Viet-Nam," are also useful. See *id.* at 140-181.

8. Schwartz & McCormack, *supra* note 7, at 1045.

9. *Id.* at 1036. Professor Schwartz may overstate the case when he implies that challenges to the use of the armed forces abroad are the "accustomed role" of the judiciary. There is an abundance of sweeping judicial language, which probably overstates the case in the other direction, suggesting no role at all for the judiciary in this area. For example, Mr. Justice Jackson, writing for the Court in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), said:

Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region....

*Id.* at 789.

In a democratic society there are strong reasons for judicial candor in decision making.<sup>10</sup> And like all other judicial decisions, decisions to abstain from consideration of a claim on the merits should be supported by adequate reasons rather than simply invocation of the "political question" formula or denial of certiorari. Such reasons, if rooted in important policies, are every bit as principled as decision on the merits. Thus, to pose the issue of abstention as one of "unspoken ad hoc adjustments" versus principled decision making, as Professor Schwartz has done, is to miss the point.<sup>11</sup> Judge Wyzanski saw the point when in holding that a defendant in a prosecution for refusal to be inducted could not challenge the legality of the Vietnam War he wrote:

It is not an act of abdication when a court says that political questions of this sort are not within its jurisdiction. It is a recognition that the tools with which a court can work, the data which it can fairly appraise, the conclusions which it can reach as a basis for entering judgments, have limits.<sup>12</sup>

There may also be room for Professor Bickel's judgment that the newness of some issues or the difficulty of foreseeing the limits of principle may justify some "expedient muddling through."<sup>13</sup> In fact, the decisions uniformly denying justiciability of challenges to the Vietnam War on what is at best sparse reasoning may be examples of this. Ultimately, however, if abstention is to be justifiable, it must be rooted in policies which command allegiance and which in their generality transcend any particular case. The real question must be what is the strength of any such policies in contexts such as Vietnam?

### *The Functions of Justiciability*

Justiciability in its broadest sense refers to a range of policies for judicial abstention on the merits of a particular claim. These policies are inarticulately embodied in the doctrines of standing, ripeness, adversariness and political question. Though interrelated, they can most usefully be considered as abstention because of inadequate assurance of full adversary presentation of the issues, and abstention

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10. While the author does not embrace all of the arguments of Professor Herbert Wechsler in his famous "neutral principle" article, Wechsler made an important point worth emphasizing when he stressed the need for candid judicial articulation of reasons for decision. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 20-22 (1959).

11. Schwartz & McCormack, *supra*, note 7, at 1053.

12. *United States v. Sisson*, 294 F. Supp. 511, 515 (D. Mass. 1968), *prob. juris. noted*, 38 U.S.L.W. 3113 (U.S. Oct. 13, 1969).

13. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 534 (1966).

because of more fundamental and less easily removed considerations stemming from the separation of powers and the nature of the judicial process.<sup>14</sup>

Because of the great effect a major war has on all of us and the variety of contexts in which challenges to a war can be presented, it is safe to say that these lesser reasons for abstention, embodied in the doctrines of standing, ripeness and adversariness, will not be present in some if not in most cases seeking to challenge the use of armed forces abroad. In the middle of the heated Vietnam debate arguments for abstention based on the danger of inadequate adversary presentation seem strangely out of place. And if the challenge is presented in a prosecution for refusal to be sent to Vietnam such arguments seem positively grotesque. As such, these lesser reasons for abstention should not bar consideration of the merits in cases in which the litigants have a personal stake in the outcome.<sup>15</sup>

The more fundamental policies for abstention stemming from the separation of powers and the nature of the judicial process, however, cut across the range of contexts in which challenges to the War are made and raise persistent questions about the wisdom of judicial review of such challenges. These more fundamental policies for abstention are usually invoked by reference to the "political question" doctrine. The "political question" doctrine, however, subsumes two different but interrelated reasons for abstention.<sup>16</sup> The first is simply that the decision of a particular question has been constitutionally entrusted to another branch for decision. Or perhaps a better way to state the same thing is that the court has reviewed the contested action and found that it is within the constitutional competence of the deciding branch, whether Congress, the Executive or both. If the reasons for the judgment that the issue is constitutionally entrusted to another branch are persuasive, presumably such "abstention" would be noncontroversial. For such a decision is a decision on the merits as much as any constitutional judgment delimiting the separation of powers. The second reason for abstention is somewhat different. It is that even though the contested action may in fact violate constitutional principles, there are prudential reasons why the courts

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14. See generally authorities cited note 13 *supra*.

15. This is not to suggest that these lesser reasons for abstention might not serve useful purposes in some contexts. For example, it may be that criminal prosecution for destruction of a draft card or for refusal to be inducted is not the proper place to consider challenges to the use of military forces abroad. Whether they are or not, however, relevance rather than the danger of inadequate adversary presentation would seem the real issue. Thus, the illegality of a particular war would not necessarily taint the entire Selective Service process (or the process of collection of federal revenues), and the illegality of an object of protest would not necessarily be a valid defense to prosecution for draft card burning. See *United States v. Eberhardt*, 417 F.2d 1009, 1012 (4th Cir. 1969). But see Sax, *Civil Disobedience. The Law is Never Blind*, SATURDAY REVIEW, Sept. 28, 1968, at 22.

16. See Henkin, *supra* note 7, at 285-86; Schwartz & McCormack, *supra* note 7, at 1041.

should not examine the constitutional claim. A short framework for analysis is not the place to debate the merits of the classical theory of judicial review championed by Professor Wechsler and challenged by Professor Bickel and others. Since it bears on this second reason for abstention, however, an outline of the skirmish is a useful starting point. Professor Wechsler has argued that the courts are constitutionally compelled to decide concrete controversies on the merits unless "the Constitution has committed the determination of the issue to another agency of government than the courts."<sup>17</sup> Professor Bickel, on the other hand, argues that courts may constitutionally abstain from decision on the merits for a number of systemic reasons which he refers to as "the passive virtues."<sup>18</sup> The considerable difficulty in reconciling Supreme Court cases with Professor Wechsler's test, and the difficulty in accepting his method of arriving at it by logical derivation from the supremacy clause and the judiciary article suggest that the merits of the prudential reasons given for abstention are a better guide for decision.

The most fruitful starting point for evaluating justiciability claims would seem to be the functional approach suggested by Professor Scharpf.<sup>19</sup> Under his approach the first task is to identify the systemic reasons for judicial abstention. Applying this approach, as well as maintaining the separate focus on both types of "political question" decisions, considerations relevant to the decision to abstain on challenges to the use of military forces abroad include:

1. Has the decision been constitutionally entrusted to the discretion of another branch of government?
2. Are there prudential or systemic considerations which suggest that it would be unwise for the judiciary to decide the issue on the merits?
  - a. Will judicial consideration interfere with political resolution by another branch which has greater control of the problem and greater flexibility in solution?
  - b. Are there "judicially discoverable and manageable standards for resolving" the issue?
  - c. Does the court have sufficient access to information and is it suited for the problems of fact appraisal presented?
  - d. Would judicial consideration interfere with a need for uniformity and consistency in foreign relations?
  - e. Are there institutional checks in the system other than the courts which are capable of responding more sensitively to the challenge?

These considerations are suggested by analysis of the full range of

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17. Wechsler, *supra* note 10, at 9.

18. See A. Bickel, *supra* note 13; Bickel, *Foreword: The Passive Virtues, Supreme Court, 1960 Term*, 75 HARV. L. REV. 40 (1961).

19. See Scharpf, *supra* note 13, at 566-97.

"political question" cases, most recently the 1962 reapportionment case, *Baker v. Carr*,<sup>20</sup> as well as by the analysis of Professor Scharpf and some speculations of my own.

Though these two major questions subsumed under the "political question" doctrine provide a useful focus for analysis, in fact they seem inextricably related and the criteria for abstention on the second issue may well influence characterization on the first. Similarly, the answers to both questions are frequently interrelated with the merits of the claims presented. For example, if the answer to the constitutional claim is that military forces may not constitutionally be used abroad without a declaration of war, there would be no problem of judicially manageable standards. On the other hand, if the real constitutional issues are the extent of independent presidential authority to use force abroad and the limits of congressional delegation of authority to the President, there may well be a serious standards problem. To take another example, under existing precedents it is certainly clearer that the Congress and the President acting together may constitutionally disregard a valid treaty than that the President acting alone may do so. Characterization on the first issue, then, might possibly turn on the extent to which the contested action is congressional-executive action rather than simply executive action. Professor Schwartz refers to this feedback as "the dynamic relationship between construction and application of a governing standard."<sup>21</sup> This dynamic interrelation between the merits of the issue presented and the strength of the reasons for abstention suggests that answers in one context ought not be writ large as absolutes. It further suggests that analysis of the abstention question should be preceded by some awareness of the problems inherent in analysis on the merits.

If the reasons given above include most of the policies for judicial abstention, then the application of these policies to specific challenges to the use of armed forces abroad should suggest the wisdom of judicial abstention on each challenge. The four major challenges which seem to recur in a variety of contexts are: claims that the use of military forces abroad has not been constitutionally authorized, claims that the use of military forces in a particular war violates international law,

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20. 369 U.S. 186, 217 (1962). See generally Scharpf, *supra* note 13.

21. Schwartz & McCormack, *supra* note 7, at 1043-44. Judge Wyzanski also noted this interrelation in his opinion in *United States v. Sisson*:

The court has a procedural, as well as a substantive, problem. It must decide whether the question sought to be raised is in that category of political questions which are not within a court's jurisdiction and, if the issue falls within the court's jurisdiction, whether, as a matter of substance the defendant is right in his contention that the order is repugnant to the Constitution. Again, while those two aspects are technically separate, they are so close as often to overlap.

*United States v. Sisson*, 294 F. Supp. 511, 513 (D. Mass. 1968), *prob. juris. noted*, 38 U.S.L.W. 3113 (U.S. Oct. 13, 1969).



claims that the method of conducting hostilities violates international law, and claims that individual participation in a particular war would entail personal responsibility under the Nuremberg principles.<sup>22</sup> The next sections will examine the considerations for abstention with respect to each of these major claims. On each it will be useful to first briefly examine the nature of the controversy on the merits.

*Claims that the use of military forces abroad has not been constitutionally authorized.*

The controversy concerning the war power has raged at least since the clashes of Jefferson and Hamilton over the power of the President in the 1801 naval war against the Bashaw of Tripoli.<sup>23</sup> The three principal issues in the debate are: First, what independent authority does the President have to order the use of military forces abroad? Second, if congressional authorization is necessary, what form must it take? And third, may Congress delegate authority to use the armed forces abroad to the President, and if so, how broad a delegation is permissible?<sup>24</sup> The starting point of the debate is the Constitution, which gives Congress the power to declare war and which makes the President the Commander-in-Chief. A second major input is the nearly 200 years of constitutional experience in which successive Presidents and Congresses have interpreted these provisions. It is particularly relevant in this regard that during the present century there has been a strong tradition of substantial independent Executive authority to employ the armed forces abroad, highlighted by President Truman's use of a quarter of a million American troops in Korea. The extent to which this practice may have departed from the original constitutional scheme is hotly debated.

Applying the functional criteria previously set out, the first question is has the decision been constitutionally entrusted to the discretion of another branch of government? Professor Velvel answers this by making a distinction between the decision to use forces abroad which

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22. See the discussion of other possible claims at note 5 *supra*.

23. For discussion on the merits of the war power controversy see Henkin, *Constitutional Issues in Foreign Policy*, 23 J. INT'L AFFAIRS 210, 214-18 (1969); Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619; Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 NAVAL WAR COLLEGE REV. 28 (1969); Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?* 55, VA. L. REV. 1243 (1969); *supra* note 7; F. Wormuth, *The Vietnam War: The President v. The Constitution* (An Occasional Paper of the Center for the Study of Democratic Institutions, 1968); Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1969).

24. These issues are posed and discussed in Moore, *supra* note 23, at 30-35. A fourth and perhaps potentially more explosive set of issues is the extent to which Congress may limit or withdraw authority from the President to use the armed forces abroad. See *Fulbright Panel Votes to Repeal Tonkin Measure*, N.Y. Times, April 11, 1970, at 1, col. 5 (City ed.)

he characterizes as a "political question" and the decision as to which branch has the power to decide to commit forces abroad which he says is justiciable.

[t]he question is not *whether* the nation is to fight a large war, but which branch of government has the *power to decide* if it is to fight such a war. The author would be the first to agree that *whether* this country is to fight is a political question; but which branch has the *power to decide whether to fight is a judicial question*.<sup>25</sup>

The difficulty with this seemingly attractive position is that the issue of who has the power to decide is not as unitary as Professor Velvel's characterization suggests. If the issue is the independent authority of the President to use force abroad and there has been no congressional participation in that decision, then a strong case can be made that the delineation of Executive authority is as much a judicial function as delineating the authority of Congress by declaring acts of Congress unconstitutional. That practice has been good law since *Marbury v. Madison*.<sup>26</sup> Moreover, the Court's negation of President Truman's asserted power to seize the steel mills in aid of the Korean war effort supports the Court's authority to be the final arbiter on questions of the constitutional authority of the President.<sup>27</sup> If the issue is the form of congressional authorization or the extent of the congressional power to delegate the war power to the President, however, it is not as clear that the Court should assert independent authority. Though such decisions are just as much decisions concerning the constitutional power of Congress, past precedent in the foreign affairs area suggests that the Court has left the form of authorization and the extent of delegation of the war power to the discretion of Congress. Thus, in the case of *Talbot v. Seeman*,<sup>28</sup> also authored by Chief Justice John Marshall, the Court did not feel that a formal declaration of war was required for congressional authorization of hostilities. More recently, the *Curtis-Wright*<sup>29</sup> case established a tradition of broad congressional power to delegate authority to the President in foreign affairs. In fact, even in domestic law where the power of the Executive is not as

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25. Velvel, *supra* note 7, at 480. Professor Velvel must mean that the decision whether *Congress* or the *President* has the power to decide whether to fight is a judicial question. For if the Court decided that it had the power to decide whether to fight, the decision as to whether this country is to fight could hardly be termed a political question as he posits.

26. 5 U.S. (1 Cranch) 137 (1803).

27. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

28. *The Amelia* 5 U.S. (1 Cranch) 1 (1801).

29. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). One commentator interprets the *Curtiss-Wright* decision as withdrawing "virtually all constitutional limitation upon the scope of congressional delegation of power to the President to act in the area of international relations." Jones, *The President, Congress and Foreign Relations*, 29 CALIF. L. REV. 565, 575 (1941).

great, anti-delegation authority is largely defunct. If the constitutional requirement is congressional authorization of the commitment, it is a substantial extension to say that the process by which Congress chooses to provide that authorization and the degree of control which they exercise over it are matters for the courts. In the Vietnam context, however unsatisfactory the Tonkin Gulf Resolution is as a general practice,<sup>30</sup> it does establish congressional involvement and remove the constitutional issue from the category of simply ascertaining the limits of independent Executive authority. Decision on the merits in the Vietnam context, then, is inevitably tied up with the form of authorization and breadth of delegation issues both of which may have been constitutionally entrusted to Congress for decision.

The second question is are there prudential or systemic considerations which suggest that it would be unwise for the judiciary to decide the issue on the merits? Though not necessarily conclusive, at least three of the prudential criteria seem relevant to abstention on the constitutional claim. First, to challenge the constitutionality of the use of troops abroad while those troops are engaged in a major conflict may impair the ability of the President to negotiate a settlement or to otherwise disengage without total defeat. Even a declaratory judgment that a war is unconstitutional might strengthen the position of the opponent or cause him to hold out for greater concessions in negotiation, particularly in a war in which domestic public opinion may be an important factor. And if judicial decision sanctions refusal to be inducted for service in the war or has some other more concrete impact, this interference with the settlement process might be dramatic. Certainly it has the potential to be much more serious than Presidential inability to take over the steel mills during the Korean War. Since the courts do not have the kind of effective control of the total situation necessary for settlement of the war, they should be particularly sensitive to the impact which their decisions might have on the settlement efforts of other branches which do. Professor Schwartz has suggested as factors mitigating this risk that the government might win on the merits, that constitutional objection might be cured by subsequent congressional action, and that the courts could frame relief to minimize the impact.<sup>31</sup> Though these factors do mitigate the risks they do not take into account the psychological impact of declaring an on-going war unconstitutional or

30. Though in its historical context the Tonkin Gulf Resolution should be construed as a valid exercise of the congressional power to authorize the use of armed forces abroad, it is a sorry discharge of congressional responsibility. Moreover, the circumstances of its passage and the ambiguity of the congressional debates served to isolate the President and to increase the political cost of the War.

For discussion of the Tonkin Gulf Resolution and excerpts from the congressional debates see Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Vietnam*, 112 CONG. REC. 14943, 14,960-67, 14,983-89 (daily ed. July 14, 1966). See also Velvel, *supra* note 7, at 473-77.

31. See Schwartz & McCormack, *supra* note 7, at 1049-52.

of forcing a direct confrontation between Congress and the President during the course of a war.

Second, the constitutional issues raise major problems as to "judicially discoverable and manageable standards." If, of course, the Court was willing to say that absent a prior formal declaration of war the commitment of troops to combat abroad is unconstitutional, then the standards problem would not seem major. But the argument that a formal declaration of war is constitutionally required is the most extreme constitutional claim put forward.

The real issues seem to be the extent of independent Executive authority and the power of Congress to delegate its authority to the President. Either with or without congressional authorization, then, there is a serious standards problem. What is the test for independent Executive authority or an invalid delegation? Short of a no independent authority position, which seems unrealistic and policy defeating, there is no test as neat as the "one man one vote" of the reapportionment decisions. The dividing line which I have tentatively suggested for marking off Executive authority, "congressional authorization in all cases where regular combat units are committed to sustained hostilities,"<sup>32</sup> is still much less certain than this "one man one vote" standard. And what is a serious problem in the absence of congressional authorization is nearly insoluble in a Vietnam-type case where there is congressional involvement and the issue is the limits of the congressional power to exercise or delegate its authority. What standards comparable to "one man one vote" are discoverable on that issue? Must a time limitation be used, or an area limitation or a size of forces or weapons limitation? All of these factors and more may be critical for conflict management. This difficulty suggests the wisdom of entrusting the delegation issue to Congress.

Third, since these constitutional claims are intended to resolve a dispute about the relative role of Congress and the Executive and not to apply some constitutional prohibition limiting total governmental power to act, such as the Bill of Rights, if there are institutional checks other than judicial determination which each branch exercises on the other it is certainly relevant to the abstention decision. Although it would not be totally satisfactory in view of the demands to "support our boys" once a major commitment of troops abroad has been made, Congress could refuse to appropriate funds or to conscript the necessary troops, could censure the President as the House did President Polk for his Mexican War activities,<sup>34</sup> or could even institute impeachment proceedings against the President. And short of these checks, Congress can hold public hearings and mobilize public opinion in a manner which can have a major impact on Executive

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32. See Moore, *supra* note 23, at 32. See also the more complete discussion of alternatives for drawing this line in Note, *Congress, The President, and the Power to Commit Forces to Combat*, *supra* note 23, at 1744-1803.

33. Reveley, *supra* note 23, at 1275.

discretion.<sup>34</sup> This existence of other institutional checks on the relationship between the political branches suggests that the judiciary should go slow in intervening in the processes of political adjustment between them. The felt necessities of the time and the interplay of the political branches may be a more reliable guide than overly neat apriori constitutional hypothesis.

Delay in decision until after the war would substantially ameliorate the first policy for abstention, that adverse decision might interfere with broader settlement. It would not, however, significantly negate the force of the second or third prudential policies for abstention.

Taken together, the answers to these first and second questions concerning abstention suggest that in a situation in which the armed forces abroad are committed pursuant to joint executive-congressional action, the courts should defer to the political interaction between Congress and the President rather than engage in a line drawing exercise for which there are no adequate constitutional guidelines. In a situation, however, in which the dominant issue is the extent of the independent Executive power to commit troops abroad, although there still may be significant costs from judicial action, it is not as clear that the courts should always abstain from decision. Vindication of the constitutional principle that major use of force ought to be acquiesced in by Congress may support some role for the Court in delineating Executive authority if it remains sensitive to the costs and difficulties of judicial involvement.

*Claims that the use of the armed forces in a particular war violates international law.*

Despite occasional sweeping judicial statements to the contrary, it is clear that not every decision affecting foreign relations requires abstention. One need not subscribe to the simplicities of either the monist or dualist theories of the relation between national and international law to recognize that "international law is part of our law."<sup>35</sup> Validly ratified treaties are, pursuant to the supremacy clause, part of the law of the land and in appropriate cases domestic courts may also apply customary international law. Moreover, for a nation vitally interested in strengthening international law, and in a system where there are too few viable international tribunals, it might be particularly useful to set an example by expanding the role of domestic courts in the creation and application of meaningful international standards. Professor Schwartz makes this point well:

If the international legal system is to prevail over national conceptions with respect to the use of force, perhaps a person

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34. The nationally televised hearings of the Senate Foreign Relations Committee on the Vietnam War are an example.

35. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

should not be compelled to serve in support of a military effort contravening international standards.<sup>36</sup>

Despite strong tugs in this direction, there are persistent questions as to the suitability of domestic courts for such a role, at least in the absence of specific congressional authorization.

Applying the functional criteria for evaluation of abstention, the first question is has the decision been constitutionally entrusted to the discretion of another branch of government? Whatever the ought of this question, there is substantial authority for the proposition that decisions concerning foreign relations taken by the Congress or the president within their constitutional authority are valid whether or not in violation of international law. That is, within their constitutional sphere of action the political branches have the authority to violate international law if they so choose. In the *Chinese Exclusion Case*<sup>37</sup> a unanimous Supreme Court held that Congress may constitutionally override a valid treaty by later inconsistent enactments even though the nonapplication of the treaty would be a violation of international law. And of particular relevance to the waging aggressive war claim, Mr. Justice Field said in dictum:

When once it is established that Congress possesses the power to pass an act, our province ends with its construction, and its application to cases as they are presented for determination. Congress has the power under the Constitution to declare war, and in two instances where the power has been exercised—in the war of 1812 against Great Britain, and in 1846 against Mexico—the propriety and wisdom and justice of its action were vehemently assailed by some of the ablest and best men in the country, but no one

36. Schwartz & McCormick, *supra* note 7, at 1040. Professor Wallace McClure has also been a strong supporter of the position that one ought not be compelled to serve in a war if that war is illegal under international law.

37. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). Just a year earlier, in *Whitney v. Robertson*, 124 U.S. 190 (1888), Mr. Justice Field said, in writing for a unanimous court:

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.

*Id.* at 194.

Arguably the subsequent executive-congressional exercise of the war power presents an even stronger case than other kinds of subsequent legislation.

See also Dickinson, *The Law of Nations as National Law: "Political Questions"*, 104 U. PA. L. REV. 451, 487-90 (1956). For an illustration from Great Britain, see *Mortensen v. Peters*, 14 Scots L.T.R. 227 (1906).

doubted the legality of the proceeding, and any imputation by this or any other court of the United States upon the motives of the members of Congress who in either case voted for the declaration, would have been justly the cause of animadversion.<sup>38</sup>

The principle of the *Chinese Exclusion Case* has been widely criticized, and it is true that it evolved in an earlier era when bilateral rather than multilateral treaties were the usual fare.<sup>39</sup> But any other decision would still raise substantial questions as to the source of the Court's constitutional authority to strike down joint actions of the political branches on the basis of international law. Moreover, although in some areas affecting foreign relations there may be a stronger constitutional case for the primacy of treaties or the courts may have primary competence, it is particularly questionable with respect to executive-congressional decisions to commit armed forces abroad.

The case of *Reid v. Covert*,<sup>40</sup> which established the preeminence of the Constitution over treaty obligations, also supports the authority of the political branches, when they are acting pursuant to their constitutional authority, to take domestically valid action even though in violation of international law. The Constitution makes the President the Commander-in-Chief and gives to Congress the power to declare war. In light of *Reid*, it is open to question whether these powers may be domestically limited by prior treaty obligations. Judge Northrop summarized these points in *United States v. Berrigan*<sup>41</sup> when he said:

Whether the actions by the executive and the legislative branches in utilizing our armed forces are in accord with international law is a question which necessarily must be left to the elected representatives of the people and not to the judiciary. This is so even if the government's actions are contrary to valid treaties to which the government is a signatory. . . . The categorization of this defense as a "political question" is not an abdication of responsibility by the judiciary. Rather, it is a recognition that the responsibility is assumed by that level of government which under the Constitution and international law is authorized to commit the nation.<sup>42</sup>

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38. *Chae Chan Ping v. United States*, *supra* note 37, at 603.

39. See the remarks of Professor Louis B. Sohn, 1969 *Proc. AM. Soc'y INT'L L.* 180.

40. 354 U.S. 1 (1957). *Reid v. Covert* decided a very different issue involving the Bill of Rights jury trial guarantees. The argument which can be made on the basis of the *Reid* case, however, is that if the Constitution entrusts the war power to Congress and the President, that power cannot be constitutionally limited by agreement with a foreign nation.

41. 283 F. Supp. 336 (D. Md. 1968).

42. *Id.* at 342.

While it is clear from these decisions that Congress and the President acting together have constitutional authority to act even in violation of international law, the issue is not nearly so clear if the President, acting alone, violates a valid treaty approved by the Senate. The answer in that case lies somewhere in the poorly charted limits of Executive and Congressional authority in foreign relations issues. In any event, the focus must be on the constitutional authority of the President or Congress to take the action as well as on whether the action is in violation of international law. It is to be hoped (and urged) that Congress and the President will be sensitive to the importance of adherence to international law, but under the Constitution it is questionable whether the Court has authority to police the international law violations of the political branches when they are acting within their sphere of constitutional authority.

The second question is are there prudential or systemic considerations which suggest that it would be unwise for the judiciary to decide the international law issues on the merits? While they should not be taken as absolutes, at least four of the prudential criteria seem relevant to abstention on the international law claim.

First, there is a serious problem in ascertaining manageable standards for decision. Although the General Assembly has appointed a succession of Special Committees on the Question of Defining Aggression, the latest of which is still working on the question, there is still no agreed definition of aggression with which to implement the standards of the United Nations Charter or the Kellogg-Briand Pact.<sup>43</sup> Moreover, as is evidenced by the Vietnam War, since World War II the principal public order issue has become the control of intervention in internal conflict. The UN Charter is only poorly responsive to the problem of intervention and in the absence of a more adequate Charter framework there has been wide disagreement about the applicable nonintervention norms of customary international law.<sup>44</sup> As a result, if the issue is one of major use of force—and particularly intervention in internal conflict, as it is in the Vietnam War,<sup>45</sup> there is a severe standards problem. This problem is compounded on international law issues, because unlike the case with respect to domestic law a United States court cannot promulgate an international standard which will be definitive for any other nation. At most, the domestic formulation will simply be an input into the

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43. See generally Report of the Special Committee on the Question of Defining Aggression, 24 U.N. GAOR, Supp. 20, U.N. Doc. A/7620 (1969); M. McDougal & F. Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER 143-160 (1961).

44. For an account of the Charter inadequacies in dealing with intervention and a review of the competing nonintervention norms see Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205 (1969).

45. For discussion on the merits of the legal issues in the Vietnam War see I & II THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1968-69). Both volumes are sponsored by the "Civil War" Panel of the American Society of International Law.



much broader determination of international law by reference to state practice. The limited power of United States courts to clarify doubtful areas in international law means that domestic court jurisdiction could result in the United States following a restrictive view of international law without other nations feeling reciprocally bound. To some extent this problem is present with all applications by domestic courts of customary international law, and it can easily be overstated as a reason for abstention. Nevertheless, as the issues approach the most sensitive areas of national discretion, a lack of adequate international standards becomes a relevant consideration in deciding whether to exercise competence.

Second, and closely related to the first, judicial formulation of standards for decision in the most sensitive areas of national action may interfere with the ability of the political branches to formulate standards or to obtain international agreement on them. The decision on the desirability and content of a definition of aggression or whether the United States will follow the traditional or newer nonintervention norms are among the most sensitive issues of foreign relations. This problem of interference with the authority of the political branches and of uniformity and consistency in foreign relations is closely tied to the constitutional submission of foreign relations decisions to the political branches. If the political branches have by their actions taken a position in foreign relations, it is not clear that the courts have authority to override that action.

Thirdly, judicial determination by a domestic court during the course of conflict to the effect that a particular war violates international law may interfere with settlement by the political branches which are in the best position to terminate the conflict. Few major international conflicts are so one-sided that conformance with international law requires sacrifice of all of the objectives of either of the participants. Yet judicial declaration that a particular conflict is in violation of international law may contribute to the loss of even justifiable defensive objectives. Thus, if relief takes the form of a declaratory judgment it may have adverse psychological consequences on the government's negotiating position. And if it involves more effective sanctions, such as prohibition of induction, it might have a much more serious impact. Moreover, unlike the constitutional claims, the ameliorative devices which depend on subsequent congressional action would be unavailable. Another point relative to the settlement issue is that normally a domestic court has both parties to a dispute before it and may fashion relief fair to both. In adjudicating the legality of a war, however, the adversary is not subject to the jurisdiction of the court.

Fourth, a decision that a particular use of force is a violation of international law may require fact assessments which present particularly difficult problems for domestic courts. The assessment of the lawfulness of the Vietnam War, for example, involves fact

determinations about the extent of military involvement of North Vietnam and the interrelation of Hanoi and the Viet Cong which a domestic court may be poorly equipped to handle.<sup>46</sup> Under some theories it might also involve questions of the statehood of North and South Vietnam or the validity of recognition of the Saigon government, which even in the nonwar context have been issues on which the courts have deferred to the Executive.<sup>47</sup> Moreover, adequate presentation of the government position might require disclosure of sensitive information compiled by the national intelligence agencies which would be prejudicial to future intelligence operations or settlement efforts.

Delay in decision until termination of hostilities would ameliorate the danger of interference with the settlement process, but the other three prudential considerations for abstention would still be largely operative.

The strength of these prudential considerations for abstention can be oversold and will certainly vary with the context. A court might feel in a particularly extreme context that the price of ignoring these prudential considerations is sufficiently offset by other considerations, particularly the importance of vindication of international law. The major issue which would still remain, however, would be the court's constitutional authority to declare the otherwise valid actions of the political branches invalid because in violation of international law. Existing precedents suggest that at least with respect to executive-congressional action such decisions have been constitutionally entrusted to Congress and the President.

*Claims that the method of conducting hostilities violates international law.*

Another international law claim, in addition to the claim that the use of the armed forces in a particular war violates international law, is that a particular method of conducting hostilities violates international law, that is, that the use of particular tactics or weapons systems or the treatment of civilians or prisoners of war violates international law. Since the United States is a party to most of the Hague and Geneva Conventions regulating the conduct of hostilities, many of these claims can be expected to have a specific treaty base. Though the awkwardness of demonstrating a "personal stake in the outcome" may make standing a more serious obstacle to claims in this category, one can imagine a number of contexts in which standing probably ought not bar consideration of the issues. For example, if a serviceman sought an injunction against widespread violations of the laws of war in a unit to which he had been assigned, or if a prisoner of

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46. See generally Moore, *Law and Politics in the Vietnamese War: A Response to Professor Friedmann*, 61 AM. J. INT'L L. 1039 (1967).

47. See generally Moore, *The Role of the State Department in Judicial Proceedings*, 31 FORDHAM L. REV. 277 (1962), and authorities collected at 277 n. 8.

war sought protection under applicable treaties, both claimants would seem to have a very real personal stake in the outcome. Assuming the standing hurdle can be overcome, a case can be made for judicial activism in policing violations of the laws of war.

The first question concerning abstention, whether a decision has been constitutionally entrusted to another branch of government, would only be relevant in those contexts in which the Executive is alleged to have ordered a violation of a customary or treaty law obligation. In the absence of such an order, a treaty at least, represents an executive-congressional decision and if intended to be self-executing should be applied by the court. Many, if not most, of the violations of the laws of war probably fall into this category of unauthorized deviation from command directives and as such do not present a significant problem in judicially contradicting a constitutionally authorized decision-maker. The recent tragic events at Songmy are an example. Even when this first question is relevant, though, or when a clear command directive contradicts a prior treaty obligation, it is still not at all clear that a court should defer to the later Executive decision. Although the Constitution makes the President the Commander-in-Chief, it does not provide satisfactory guidance for the resolution of a clash between the Commander-in-Chief power and the treaty power. It is at least a reasonable resolution of such a clash that the treaty power would prevail and that departure from treaty or executive-congressional agreement standards would require Senate or Congressional participation. The uncertainties whether a particular treaty is meant to be self-executing and whether the power of the President as Commander-in-Chief can be limited by treaty may in particular cases somewhat qualify these tentative conclusions.

The second question, whether there are prudential or systemic considerations suggesting that it would be unwise for the judiciary to decide the issue on the merits, similarly turns up only weak reasons for abstention. In most contexts judicial policing of the laws of war would not have the severe impact on the conduct of the war which might accompany judicial consideration of participation claims. Even if the method of conducting hostilities were altered, the war effort could still proceed. In fact, there is good reason to believe that violations of the laws of war are usually counter-productive and that judicial intervention would more often than not better promote national goals. Certainly in view of the large number of applicable treaties to which the United States is a party, in most cases there would be no standards problem in policing violations of the laws of war. Similarly, though fact appraisal may be somewhat more difficult than in the usual domestic case, there do not seem to be any overwhelming obstacles either from the difficulty of fact appraisal or the need for uniformity and consistency in foreign relations. It might be urged, of course, that there are other institutions better suited to the role of policing violations of the laws of war, particularly self-policing by the military.

The argument proves too much, however, since the availability of other institutions is never by itself a wholly persuasive reason for abstention. Moreover, despite good faith efforts at self-policing, like all institutions the military has built in limitations which may hinder its own self-policing operations. For example, self-policing in the Vietnam War, though it seems to have been sincerely pursued, got off to a slow start and has certainly been inadequately implemented. In these circumstances a judicial boost to lagging policing efforts might have served both the national and the litigants' interests.

The wide variety of situations in which claims concerning the conduct of hostilities may arise precludes meaningful generalization in advance. Analysis of the functions served by judicial abstention, however, suggests that there are few fundamental obstacles to a more aggressive judicial role in policing violations of the laws of war.

*Claims that individual participation in a particular war would entail personal responsibility under the Nuremberg principles.*

One way in which the international law issues are sought to be presented in a variety of contexts challenging the use of armed forces abroad is by invocation of the Nuremberg principles. If the Nuremberg principles are invoked simply as one source of the international law obligations not to engage in aggressive war or not to violate the laws of war, such allegations raise the same justiciability problems as claims that the use of the armed forces in a particular war violates international law or claims that the method of conducting hostilities violates international law. If, however, the purpose in invoking the Nuremberg norms is to avoid personal liability, then different considerations are introduced. The 1945 Charter of the Nuremberg Tribunal, since codified by the International Law Commission, ascribes individual responsibility under international law for:

(a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances. . . .

(b) *War crimes*: namely, violations of the laws or customs of war. . . .

(c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war. . . .<sup>48</sup>

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48. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, Aug. 8, 1945, 82 U.N.T.S. 279. See generally G. MUELLER & E. WISE, *INTERNATIONAL CRIMINAL LAW* 227-290 (1965).

For more detailed analysis of the justiciability of this third claim concerning allegations that participation in a particular war would be contrary to the Nuremberg principles see Forman, *supra* note 7.

At least acts in the category of "war crimes" are also substantially covered by the Uniform Code of Military Justice.<sup>49</sup> To the extent that an action would entail personal responsibility under the Nuremberg principles, the Uniform Code of Military Justice, or any other valid national or international standard, certainly the criminality of the action should be a valid defense to state compulsion to engage in it. The sense of justice boggles at the thought that a man may be legally compelled to perform an act entailing criminal liability.

The category of actions for which one may be held criminally accountable under the Nuremberg principles is much narrower, however, than is popularly supposed. Though the Nuremberg principles are not absolutely clear, the most widely shared interpretation of them is that no soldier is liable simply because he participates in an aggressive war.<sup>50</sup> To include participation as such would have hardly served the humanitarian objectives of Nuremberg, as hundreds of thousands of soldiers would have been subject to criminal liability when their only crime was to misperceive which side was the aggressor. Instead, for liability under the Nuremberg norms there must be personal participation in high level planning or in the commission of a war crime or crime against humanity such as the killing or torturing of prisoners of war. Benjamin Forman, the Assistant General Counsel for International Affairs of the Department of Defense, recently summarized this general Nuremberg law in a paper delivered at the 1969 annual meeting of the American Society of International Law:

No Nuremberg norm makes it criminal to be a soldier or, as such, to carry on belligerent activities injurious to others in accordance with the laws and customs of war, even though the war be an aggressive war. The crime against peace can be committed only by those in a position to shape or influence the policy that initiates or continues it. . . .

As to war crimes and crimes against humanity, liability is similarly individual. The individual must himself commit the substantive offense or conspire to do so.<sup>51</sup>

Perhaps the greatest barrier to invocation of the Nuremberg principles as a defense against personal accountability, then, is that

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49. See Forman, *supra* note 7, at 161, D'Amato, Gould, & Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 CALIF. L. REV. 1055 (1969).

50. Claims that clearly identified belligerents are "war criminals" simply because combatants in a military apparatus engaged in aggressive war have not been accepted by the world community, including the International Military Tribunal at Nuremberg, and are clearly in contravention to accepted "standards of human rights for contexts of violence." See M. McDOUGAL & F. FELICIANO, *supra* note 40 at 528, 531-34, 541-42, 530-61.

51. Forman, *supra* note 7, at 163.

there may be no accountability. Certainly the typical soldier will not be participating in high level planning necessary for liability under the crimes against peace count. Unless a claimant alleges that he will be personally participating in violation of the laws of war or of crimes against humanity, then, invocation of the Nuremberg principles for the purpose of avoiding individual liability seems to be beside the point. And if his allegation is that he will be personally participating in war crimes or crimes against humanity constituting war crimes, it is implicit in Articles 90-92 of the Uniform Code of Military Justice<sup>52</sup> that the illegality of the order to participate in such actions is a valid defense to an action for noncompliance. In fact, the refusal of a soldier to participate in such acts which he should reasonably know are unlawful is not only permitted but required by domestic law.<sup>53</sup> Here too, then, depending on the timing and the specifics of the allegations, the invocation of the Nuremberg principles may be largely beside the point. Thus, it is clear that a soldier would have a valid defense to a charge that he refused to carry out an order to kill prisoners of war or unarmed civilians in his custody (but he would not need Nuremberg to prevail). In fact, as a large segment of the American public seems to have unfortunately ignored in the much publicized "Green Beret" and "Songmy" cases, the carrying out of such an order which the soldier should reasonably know is unlawful is a violation of both international and domestic law. As a result of this duty, it seems doubtful whether general allegations of the possibility of participating in war crimes could be raised as a defense to an order to report for induction.

It would seem that the existing defenses in domestic law and the areas of individual accountability under the Nuremberg principles are reasonably congruent, at least for the typical soldier. In contexts presenting severe pressure to participate in war crimes, however, this congruence may provide insufficient protection for the claimant. Thus, if a soldier is assigned to a force or unit which he alleges engages repeatedly in a practice which violates the laws of war, it seems reasonable to adjudicate this claim on the merits either in an action to block an assignment or obtain a transfer or in an action to obtain injunctive relief against the continuation of the illegal practices. The kinds of severe pressures an individual soldier would be subjected to in such a unit and the risk which he runs in disobeying an order at his peril should his judgment about its illegality be wrong strongly suggest that judicial intervention is proper in such a context. The examination of evidence in the *Levy* trial concerning allegations of widespread violations of the laws of war by the "Green Berets" supports this conclusion. It is also supported by the weakness of

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52. 10 U.S.C. §§ 890-92 (1964). The illegality of an order is explicitly said to be a defense in the discussion of Articles 90-92 in *MANUAL FOR COURTS-MARTIAL* (1969), Exec. Order No. 11, 476,34, Fed. Reg. 10826-30 (1969). See also *ARMY FIELD MANUAL FM 27-10, THE LAW OF LAND WARFARE* 182-83 (1956); Forman, *supra* note 7, at 164.

53. See *United States v. Kinder*, 14 C.M.R. 742 (1954).

reasons for abstention when the claim is violation of the laws of war. To prevail, of course, a claimant must still prove his case.

Lack of accountability rather than any more fundamental "political question" would seem to be the principal bar to broad invocation of the Nuremberg principles on a theory of avoidance of personal liability. Moreover, in the absence of personal accountability or severe pressures to participate in illegal conduct, it is doubtful whether an individual litigant has the necessary "personal stake in the outcome of the controversy" to satisfy the standing test which the Supreme Court recently enunciated in *Flast v. Cohen*,<sup>54</sup> at least if the purpose of invoking the Nuremberg norms is to avoid personal accountability. And if the purpose of invoking the Nuremberg norms is to challenge the legality of the war itself, that is to avoid participation in an allegedly illegal war even though participation would not lead to personal accountability, then the more fundamental justiciability policies rather than standing would seem to be the principal bar. In most cases, of course, the two reasons for invoking the Nuremberg norms come mixed together. But whether the difficulty is thought of as relevance, standing, or justiciability, in all but a fairly narrow class of cases involving personal responsibility or a risk of severe pressure to conform to an unlawful practice constituting a war crime, the Nuremberg challenges to the use of military forces abroad will probably be unsuccessful.

### Conclusion

The tradition of judicial review runs deep in the American system. It is not every issue, however, which is constitutionally entrusted to the judiciary or which is suitable for judicial action. To date no court has held a challenge to the commitment of military forces abroad justiciable.<sup>55</sup> The invocation in these cases of the "political question" formula without explanation of its justification or the denial of certiorari without reasons, however, is an unsatisfactory judicial response. Particularly when faced with challenges presented by

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54. 392 U.S. 83, 99-101 (1968). Quoting *Baker v. Carr*, the Court sharply distinguished between standing and justiciability:

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." . . . In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question.

*Id.* at 99-100.

55. But see the discussion of *United States v. Sisson*, *supra* note 5.

sincere individuals, some of whom are involuntarily serving in a war to which they object, courts have a duty to fully articulate reasons for their decision. Full articulation calls for identification of the functions served by "justiciability" and their application to the major claims challenging the use of the armed forces abroad. Such a functional analysis of the reasons for judicial abstention is likely to please neither the activists nor the strict constructionists. There are important systemic policies suggesting that for the most part the resolution of claims that a particular use of force abroad has not been constitutionally authorized or is in violation of international law should be left to the interplay of political forces. Nevertheless, the newness and range of the challenges to the use of military forces abroad suggest a lack of wisdom in dogmatic assertion that there is no role for judicial action on such challenges, particularly on challenges to initial commitments instituted solely on the authority of the President. Moreover, there may be considerable room for a more active judicial role in policing violations of the laws of war.<sup>56</sup> Whatever the ultimate resolution of these issues, their importance and complexity calls for full articulation of the reasons for decision.

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56. See D'Amato, Gould & Woods, *supra* note 48.