JUDICIAL POWER, THE "POLITICAL QUESTION DOCTRINE," AND FOREIGN RELATIONS

Michael E. Tigar*

The words "political question doctrine" are set off by inverted commas to denote my view that there is, properly speaking, no such thing. Rather, there is a cluster of disparate legal rules and principles any of which may, in a given case, dictate a result on the merits, lead to dismissal for want of article three[1] jurisdiction, prevent a party from airing an issue the favorable resolution of which might terminate the litigation in his favor, or authorize a federal court in its discretion and as a matter of prudence to decline jurisdiction to hear a case or decide an issue. A redefinition of the "political question doctrine" and isolation from it of other possible bases for refusal to decide constitutional issues are the burdens of the concluding sections of this article.

One conclusion of that analysis will be that the legality, in some accepted sense of the term, of American participation in an undeclared war in Indochina is susceptible of judicial resolution in a properly brought case. This conclusion is, I am sure, unsurprising: It has been reached by others.[2] I have been and remain unsatisfied, however, by the historical, logical and textual constitutional support thus far marshalled for such assertions. And I am disturbed by the way in which formulations of the "political question doctrine" by the Supreme Court[3] and by ardent and articulate adherents of the doctrine threaten to debase the currency of legal rules and norms as constraints upon American military action.

---

* B.A., 1962, J.D., 1966, University of California, Berkeley. Acting Professor of Law, University of California, Los Angeles. Much appreciation is due Robert W. Zweben, a third-year student at the National Law Center, George Washington University, without whose research assistance, ideas, and valuable suggestions this article would not have come to be.

1 U.S. CONST. art. III.

2 *See, e.g.*, Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEX. L. REV. 1033 (1968); Hughes, *Civil Disobedience and the Political Question Doctrine*, 43 N.Y.U.L. REV. 1 (1968). *Compare* United States v. Sisson, 294 F. Supp. 511, 515, 520 (D. Mass. 1968); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966) [hereinafter cited as Scharpf].

3 *See, e.g.*, Baker v. Carr, 369 U.S. 186, 209-237 (1962); Powell v. McCormack, 395 U.S. 486, 517-49 (1969), *discussed in Comments on* Powell v. McCormack, 17 U.C.L.A. L. REV. 1 (1969). *See also* Colegrove v. Green, 328 U.S. 549 (1946) (opinion of Frankfurter, J.).

This article begins with a discussion of the limitations—constitutional, statutory and decisional—upon the power and duty of federal courts to decide cases and controversies. I conclude that, contrary to a view often expressed in recent years, the federal courts do not have an ambulatory and discretionary power to refuse decision of cases over which they have jurisdiction. In the second section of the article, I focus particularly upon the "political question doctrine" in historical perspective, and argue that it was at its origin and through the first century of its development a collection of legal rules grounded in constitutional principle and not at all a device for leaving litigants without an authoritative decision of questions involving the separation of powers. In the concluding section, I urge that the federal courts—in light of proper limitations on their power and in particular the doctrine of "political questions" —have the power, and in an appropriate case, the duty, to decide the constitutional and federal law issues posed by American military involvement abroad, in Indochina today and in any future conflict.

I. A Critical Analysis of Theories of Judicial Power

Alexander Bickel has written what is unmistakably the most studied and eloquent analysis of the political question doctrine in the decisional law of the Supreme Court, and has done so in the context of an impressive reformulation of the grounds upon which the Supreme Court may refuse to decide constitutional issues and cases.[4] Professors Wechsler[5] and Gunther[6] have each joined the issue, and Professor Scharpf,[7] in an article in *Yale Law Journal*, has sought to resolve the debate by shifting its ground.[8]

---

[4] A. Bickel, The Least Dangerous Branch (1962) [hereinafter cited as Bickel], (especially Chapter 4, "The Passive Virtues").

[5] H. Wechsler, Principles, Politics and Fundamental Law 3-48 (1961) [hereinafter cited as Wechsler]; Wechsler, Book Review, 75 Yale L.J. 672 (1966).

[6] Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964) [hereinafter cited as Gunther].

[7] Scharpf, *supra* note 2.

[8] Bickel, in The Least Dangerous Branch, focused upon the Supreme Court to the virtual exclusion of the lower federal courts in setting out the constitutional theory of which his discussions of the political question doctrine is constitutive. *See* Bickel at 173. Indeed, Professor Wechsler has faulted this preoccupation, saying that "the conception of judicial review has never been regarded as a special doctrine governing the role of the Supreme Court, as distinguished from the lower courts in the judicial hierarchy; and the techniques for the avoidance of decision that Bickel so lucidly describes are addressed to the propriety of any judicial intervention, not merely to adjudication by the highest court." Wechsler, Book Review, 75 Yale L.J. 672, 675 (1966). I think Wechsler's criticism is unjustified. The Supreme Court is different from the lower federal courts, in ways which both indispensably support

The central thrust of Bickel's argument is that the Court ought in a number of situations—which Bickel describes suggestively but not exhaustively—refrain from deciding issues or cases brought to it. Among the devices available for "not doing"—to be employed when one agrees that a particular case should not be decided—is the "political question doctrine." There are, however, others, and Bickel refers to all these devices collectively as the "passive virtues."[9] These devices fall into two categories in Bickel's analysis: constitutional limits on the power of the Court and prudential limits self-imposed as rationales for declining to exercise jurisdiction which article three clearly gives. The constitutional limits inhere in the "cases" and "controversies" language of article three, with its requirements of adversity, constitutional standing,

---

and unavoidably cast doubt upon Bickel's hypothesis. We must, when considering limitations upon the "judicial power," prudential or constitutionally mandated, mark well that the Court sits not so much to safeguard the rights of litigants as to superintend the positive law of the American federal system. Certainly this is true for the years since the establishment of the discretion to deny certiorari, and thus avoid an adjudication on the merits, and is documented in the formal and informal law of granting or denial of the writ. SUP. CT. R. 38, 39, 41, 28 U.S.C. §§ 1254-56 (1964); BICKEL at 173; WECHSLER, *supra* note 5, at 15; H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1394-1422 (1953) [hereinafter cited as HART & WECHSLER]. Even in the years which preceded the grant of this discretion in 1925, the Court was apart not merely because at the apex; since the time of Marshall, its overtly and designedly political role in shaping American institutions has distinguished it from lower courts. The Court is, after all, the only judicial institution mentioned in the Constitution. Its early and repeated clashes with co-ordinate branches and with the states are a part of every history schoolbook. For lawyers, Charles Warren's treatment remains the best. C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1947) [hereinafter cited as WARREN]. *See also* A. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919). Much of the explanation of the Court's dominant position in shaping the philosophy of judicial power lies, no doubt, in the Justices' circuit trial court assignments, which persisted until 1869. 2 WARREN at 501. The *Burr* case, some of the rulings in which caused President Jefferson acute anguish, was tried on circuit by Marshall. Marshall ruled that the President was amenable to service of process. United States v. Burr, 25 Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807). *See* 8 J. WIGMORE, EVIDENCE § 2371, at 750-51 (McNaughton rev. ed. 1961). The *Habeas Corpus* Case, a direct (though in the end ineffectual) challenge to President Lincoln, was authored by Taney, sitting on circuit in Baltimore. See 2 WARREN at 368-74. Justice Story's opinions on circuit were often designed as innovative. *See, e.g.*, Greene v. Darling, 10 Fed. Cas. 1144 (No. 5165) (C.C.D. R.I. 1828); Comment, *Automatic Extinction of Cross-Demands:* Compensatio *from Rome to California*, 53 CALIF. L. REV. 224, 251-52 (1965). *See generally* 1 WARREN at 158-68.

Bickel does not, if I understand him, say that the lower courts should not use devices such as the political question doctrine to avoid adjudication on the merits. Rather, he focuses upon the Supreme Court because, since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), no constitutional pronouncement save the Court's is final and authoritative, and because the Court itself, rather than the "federal courts" generally, has stood at the center of controversies over the role of the judiciary in the federal system.

[9] BICKEL at 111.

and a dispute sufficiently ripe to be denominated a "case."[10] The prudential limits upon the exercise of power include species of standing[11] and ripeness,[12] as well as the discretionary power to deny

---

[10] *See* Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); Muskrat v. United States, 219 U.S. 346 (1911). The definition of the Court's proper role began in earnest with its refusal to give President Jefferson an advisory opinion on questions of foreign relations, see HART & WECHSLER, *supra* note 8, at 75-76, and with the Court's declination to administer a veterans' pension system, Hayburn's Case, 2 Dall. 409 (1792).

The "case and controversy" requirement is essentially a command that the federal courts limit themselves to deciding lawsuits in the adversary mold: there must be real, not feigned, adversity of interests; the parties must have a stake in the outcome of the controversy in which one stands to win or the other to lose something in consequence of the judgment; and the controversy must have reached a point in development that permits the parties to demonstrate how the legal rules for which each contends will work a harm upon the loser or confer a benefit upon the winner. It is easy to see that the "case and controversy" requirement carries with it a number of assumptions which more broadly underlie the "adversary system," with its supposition that the parties to a dispute will be motivated by self-interest to develop fully the factual and legal arguments behind their dispute. *See generally* C. WRIGHT, FEDERAL COURTS § 12 (1963).

[11] "Standing" is a term which gives lawyers, scholars and courts considerable difficulty. *See generally* Flast v. Cohen, 392 U.S. 83 (1968). Perhaps the confusion has been encouraged, if not engendered, by careless use of the term to refer to several quite distinct limitations upon the power and the willingness of federal courts to entertain claims of violation of federal rights. The varying and sometimes recondite uses of "standing" in the cases make analysis doubly difficult.

First, "standing" is sometimes used to refer to the procedural capacity of a litigant to sue or be sued. *See* A. EHRENZWEIG, CONFLICT OF LAWS §§ 11-24 (1959).

Second, "standing" is sometimes used to denote a limit upon the judicial power, and to refer generally to the requirement that litigants have a genuine and not a sham contrariety of interests, both qualitatively and quantitatively. Cases in which the requisite "qualitative" adversity was lacking include Muskrat v. United States, 219 U.S. 346 (1911), and FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). The question is double-edged in these cases: will the Court decline, on the basis of judicially-fashioned rules of restraint to take the case? (see *Muskrat*); and, on the other hand, may Congress bestow standing upon a class of litigants without falling afoul of the proscription on advisory opinions—stated affirmatively as the case or controversy requirement (see *Sanders Bros. Radio Station*). The "quantitative" dimension of standing was considered in Flast v. Cohen, 392 U.S. 83 (1968), in which the Court limited Frothingham v. Mellon, 262 U.S. 447 (1923). Frothingham had rejected a taxpayers' suit directed at a federal statute upon the ground that the interest of a taxpayer in the outcome of the litigation was but a comminute share of the interest of the community at large, and not sufficiently direct and immediate. *See also* Doremus v. Board of Educ., 342 U.S. 429 (1952).

A third use of the term "standing" has been in reference to questions essentially of ripeness. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), is such a case. There the FCC had adopted a rule stating that licenses for television broadcasting would not be granted if the applicant had a direct or indirect interest in more than five other stations. Storer, which had reached the limit under the rule, sued for a declaration that the rule was invalid. This Court concluded that Storer had "standing" to sue, resting its decision upon a perception of the statutory judicial review standard and a finding of present harm to Storer. 351 U.S. at 197-99. The Court recognized that "standing," in the sense it had used the term, carried along with it the notion of ripeness. Taking the question before the court out of "standing" language, one could cast it as, "Should Storer have gone through the license-application process before coming to court?" This requirement may also be termed

certiorari or summarily dispose of an appeal.[13] Bickel also includes among the passive virtues some principles of substantive law—the "void for vagueness" doctrine[14] and the law of delegation of au-

---

one of "finality." *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154-56 (1951) (Frankfurter, J. concurring).

A fourth "standing" issue is that of "legal wrong," a term which appeared in section 10 of the old Administrative Procedure Act and which now appears in the judicial review provisions of recodified Title 5, 5 U.S.C. § 702 (Supp. IV 1969). *See* United States v. Storer Broadcasting Co., 351 U.S. 192, 198-99 (1956); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939). The "standing" issue in "legal wrong" cases really goes to the merits of the claim being asserted, for "standing" is denied or upheld based upon whether the harm complained of is legally cognizable.

Fifth: Closely related to the fourth meaning but distinct from it, is the issue of "standing" raised when *B* seeks to complain of a violation of rights which are said to "belong" to *A*. Mr. Justice Frankfurter termed this the problem of "directness." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 153-54 (1951). This fifth notion of standing has been an issue in search and seizure cases, most recently Alderman v. United States, 394 U.S. 165 (1969). In these cases, the Court has held that in a case, United States v. *A*, *A* cannot complain of the admission into evidence of items unlawfully seized from *B*.

All of the foregoing five definitions of "standing" may operate to limit judicial review of illegal searches and seizures, though obviously in different ways. For example, if the Court should decide that a criminal defendant may challenge the admission into evidence against him of *any and all* material seized in violation of the fourth amendment, it might limit the rule to post-indictment motions under FED. R. CIV. P. 41(e), and retain the traditional concept of standing for pre-indictment Rule 41(e) motions. The ground for such a distinction might rest upon principles of "standing" in the sense of "ripeness": a potential defendant, not yet indicted, might be held to be not close enough to being harmed by illegality which did not violate "his" right of privacy. The Court might not, that is, wish to decide the fourth amendment question until it had to. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 155 (1951) (Frankfurter, J. concurring).

Another application of the fifth definition of "standing" is Barrows v. Jackson, 346 U.S. 249 (1953). *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925); NAACP v. Button, 371 U.S. 415 (1963). Other "vicarious assertion" cases are collected and analyzed in Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962), and in the opinions of Justice Frankfurter in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149 (1951). *See also* the opinion of Mr. Justice Jackson which, while it does not extensively discuss legal theory, characteristically takes a workman-like and practical approach to the issues. 341 U.S. at 186-87. *Compare* the opinion of Mr. Justice Black, 341 U.S. at 142, *with* the opinion of Mr. Justice Douglas, 341 U.S. at 174.

[12] There are some lawsuits ripe enough to be cases and controversies, but as to which the Court may nonetheless decline jurisdiction, in order that the parties may have a chance to use nonjudicial means to settle the controversy or in order that the way in which the legal rules in issue will affect the litigants will become clearer. *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136 (1967); note 11 *supra*.

[13] The power summarily to dispose of an appeal is not the power to avoid an adjudication on the merits, at least technically. *Compare* WECHSLER, *supra* note 5, at 4-15, 47 and Gunther, *supra* note 6, at 10-13 *with* BICKEL at 71, 126, 174.

[14] *See* Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). The doctrine is not a device for avoiding constitutional adjudication, of course, for it rests upon the proposition that statutes, to satisfy due process requirements, must provide an ascertainable standard for the conduct of those to whom they are addressed. Many modern applications of the doctrine are in the free speech field, where precision of regulation is necessary to ensure that statutes do not

thority.[15] These last are means of avoiding decision of constitutional issues, not of avoiding decision altogether.

The "political question doctrine," Bickel argues, is rooted both in the Constitution and in considerations of prudence. For its constitutional basis, Bickel accepts Professor Wechsler's formulation:

> I submit that in cases of the kind that I have mentioned, as in others that I do not pause to state, the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally. That, I submit, is *toto caelo* different from a broad discretion to abstain or intervene.[16]

But, Bickel argues, there is also a discretionary power, rooted in considerations not of constitutional command but of prudence, to refuse to decide "political questions" when they meet the following test:

> 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 judgment; (c) the anxiety, not so much that the judicial judgment 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.[17]

---

tred upon protected rights. *See* NAACP v. Button, 371 U.S. 415 (1963); Aptheker v. Secretary of State, 378 U.S. 500, 516 (1964).

Bickel's justification for including the doctrine among the reasons for "not doing" is therefore difficult to understand. It has been applied in cases posing deep conflicts between branches and in federal-state cases of some moment. *See* United States v. Robel, 389 U.S. 258 (1967); Cox v. Louisiana, 379 U.S. 536 (1965); Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, 54 CALIF. L. REV. 132 (1966).

[15] "Delegation" cases are today among the most controversial on the docket. I do not, of course, refer to the old-style cases in which the Court flayed the Congress and Executive for abdication of responsibility and held delegations of power void for being standardless and overbroad. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 41-72 (1965). Since Kent v. Dulles, 357 U.S. 116 (1958), in which the Court held the Secretary of State had no authority to deny passports based on the political affiliations, and Greene v. McElroy, 360 U.S. 474 (1959), in which the Court held that the Department of Defense lacked authority to deny security clearances without a hearing, the Court has asked "has the administrator been given the power he claims?" as a means of avoiding decision of serious constitutional questions. *See, e.g.*, Gutknecht v. United States, 396 U.S. 295 (1970); Schneider v. Smith, 390 U.S. 17 (1968); United States v. Robel, 389 U.S. 258, 269-82 (1967) (Brennan, J. concurring).

[16] WECHSLER, *supra* note 5, at 13-14.

[17] BICKEL at 184.

In order to evaluate Bickel's view of the political question doctrine, one must see it in the context of his lengthy discussion of the "passive virtues." Analysis of Bickel's theory also provides a framework within which to view competing views of the Court's constitutional jurisdiction.

It should be clear that in pursuit of his main theme—the value of devices for not deciding—Bickel has aggregated the most disparate sorts of legal rules and principles, and, as I shall argue, in a way which poses dangers to values which he, in common with many, regards as worthy of protection. I do not speak here of the difficulty in regarding summary dispositions of appeals as a means of not deciding; Professor Gunther has considered this question in detail.[18] Nor do I intend to comment in detail upon the confusion which may spring from including vagueness and delegation rationales as among the passive virtues.[19] Two propositions lie at the heart of Bickel's theory: first, that the Court as an institution is incapable of deciding certain kinds of issues and occupies a position in the constitutional system which counsels it to avoid decision of other issues; second, that the Court may permissibly take refuge in a series of justifications for not deciding which he enumerates and defends. As to the first point, I believe him to have idealized the concept of the frame of government to a level of abstraction leading to conclusions unsupported in the history of the Court and our lawlife. On the second, I think he has propounded a theory of judicial non-review which, if taken by the Court as the basis of its work, will isolate it still further from the forces which make its decisions responsive to democratic values and even from the arguments made by counsel for litigants at its bar.

A. *The Court as a Counter-Majoritarian Institution*

The Court's role, for Bickel, is defined by its "counter-majoritarian" character, which he deduces from the Court's position in the constitutional scheme.[20] Justices are not popularly elected, they serve for life, are not expressly made responsible to anyone nor any principle save that of "good behavior,"[21] and were surely conceived of by the framers as inclined to check excesses generated by the popular will. The framers' intention is reflected in part in the constitutional basis for judicial review in the service of con-

---

[18] *See* note 6 *supra*.

[19] *See* notes 14 & 15 *supra*.

[20] BICKEL at 16-23.

[21] U.S. CONST. art. III, § 1. *See* Chandler v. Judicial Council of the Tenth Circuit, 382 U.S. 1003, 1004-06 (1966) (Black, J., dissenting).

stitutional principle.[22] But if we examine the Court in the performance of the judicial review function, we see that it is no more counter-majoritarian in the nature of things than the Congress and the President are majoritarian in the nature of things. The Court affirms and enforces many constitutional values which are not in the mold that permits it to be described as counter-majoritarian. Now, the "counter-majoritarian" aspect of its duty is no doubt important: free speech, free press, religious liberty, due process, among other values, have all at times been safeguarded by the Court against attack by institutions representing the majority of Americans then qualified to vote.[23] But it is also true that the Court, in tending constitutional principles, upholds values which make majoritarian institutions work, and which prevent them from being subverted and overthrown by the powerful forces which strive to harness state power to their interests. Surely majoritarian principles justify, if they were not the explicit rationale for, the white primary[24] and reapportionment[25] cases, and even a number of free speech cases, in which the free and open debate thought essential to the maintenance of democratic institutions has been safeguarded.[26] Majoritarian principles may even be advanced as plausible and intelligible justification for the representative-seating cases of *Bond v. Floyd*[27] and *Powell v. McCormack*.[28] Yet these cases are among those in which the Court has been criticized, and even by Professor Bickel,[29] for being too venturesome. Granted that in the reapportionment field the lack of judicially-manageable standards may be and has been advanced as a sufficient ground for judicial non-review, but Bickel at any rate has not chosen to take this ground save as subordinate to his main concern with the Court's institutional role.[30]

---

[22] *See* Wechsler, *supra* note 5, at 5-10, and the authorities he cites; HART & WECHSLER, *supra* note 8, at 312-40.

[23] This article is not concerned with whether the "majoritarian" institutions truly do, or ought to, reflect popular will. There is no claim that the country or its institutions are in any absolute sense responsive to the will of the people who are subject to them. *See* Tigar, Book Review, 78 YALE L.J. 892 (1969). A longer essay on this subject, "The Jurisprudence of Insurgency," will appear in the Fall of 1970 in a collection issued by Pantheon and edited by Professor Herman Schwartz.

[24] *E.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

[25] *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

[26] *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

[27] 385 U.S. 116 (1966). *Bond* held that the Georgia legislature violated Bond's first amendment rights by refusing him a seat because of his beliefs and utterances.

[28] 395 U.S. 486 (1969). To underscore the point, *Powell* was brought into court by Powell himself and thirteen of his constituents, suing as class representatives under FED. R. CIV. P. 23.

[29] BICKEL at 189-97.

[30] *Id.*

Indeed, one may suggest that the principal difference between most of the judicial activism of the early 1930's and most of the activism of the Warren Court is in the latter Court's assertion of its widest powers of review in precisely those areas in which the democratic process needed the Court's protection in order to survive or come into existence. It is not therefore, permissible to label the court a "counter-majoritarian" institution if by this term is meant that the Court must inevitably uphold, or has usually upheld, antidemocratic principles.

Now it may be objected that I have missed the meaning of "counter-majoritarian," and that it has reference for Bickel not to the values in whose service a particular Court may be, but to the process of decision itself by a group of men who are not accountable in the same sense that legislators and Presidents are accountable. That is, the Court's power has only the Constitution to justify it, while legislators and the President can point to a popular mandate which gives them a legitimacy apart from the constitutional sanction given their powers. Of course, such an assertion would not be strictly accurate, for the nomination and confirmation process, as well as myriad subtle forces of which Professor Bickel is supremely aware, exert pressures from institutions which are, in the constitutional scheme of things, majoritarian.[81] But if Bickel's argument rests upon the premise that the Court is institutionally counter-majoritarian in the constitutional system, there is, in addition, both a formal and a logical objection to it. First, whatever the appellation is intended to denote, it has an undesirable connotative content for Bickel, and his argument is unclear as to whether political philosophy or the framers' intent—or maybe both—counsel the Court to restrain itself. And this is the formal objection: the connotation of "counter-majoritarian" as "in fact" undemocratic is clearly invoked to persuade us of Bickel's view, while the term denotes only the Court's institutional position in the constitutional system and is defended by reasoned argument only to this extent.

The logical objection is this: if the term "counter-majoritarian" refers only in a specific descriptive sense to the Court's institutional role in the separation of powers scheme, then the term has no normative content whatever. It simply tells us a fact about the

---

[81] Whether or not Mr. Dooley was right in saying that the Supreme Court reads the election returns, pressure upon the Court from majoritarian institutions has taken and may take the form of proposals (successful and unsuccessful) that Congress limit the Court's jurisdiction, proposals such as FDR's "court-packing" plan, and refusals by responsible executive officials to enforce the Court's commands. *See* Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965); 1 WARREN, *supra* note 8, at 729-79; Kaplan, *Comment*, 64 COLUM. L. REV. 223 (1964).

Court, not analytically different from the fact that there are to be, under article one, two Senators from each State. We cannot deduce from this assertion anything about what the Court *should* do, or what the framers intended that it do. Any argument which attempts to lead from the assertion that the court is "counter-majoritarian" to the assertion that it should decide or refrain from deciding in particular ways must necessarily go beyond consideration of the institutional arrangement of the branches of government to make a normative judgment.

To put the matter differently, any admonitions that Professor Bickel, or Professor Wechsler, or I, may address to the Supreme Court are precatory, in the sense that the Court can decide any case that reaches it and read out a decision which announces any rule of law upon which the Justices decide. Our test for determining which admonitions are wisest, or truest, will customarily be whether they follow logically upon precedent as decided by the Court, whether they have a demonstrable constitutional footing in the text of the document as read in the informing light of history, or whether they follow from premises about democratic government which we state and gain assent to before taking the step of setting out our admonitions.

In sum, I wonder at the utility of the term "counter-majoritarian" as a touchstone for analysis of the Court's proper role. The term has the quality of vagueness and elusiveness which will not yield when one seeks to isolate from it identifiable elements of justification for Professor Bickel's argument. It is rooted in neither history, nor precedent, nor in the article three limitations on the judicial power. Insisted upon as a rationale for non-decision, the spectre of counter-majoritarianism may permit forces outside the Court to turn institutions majoritarian by design into institutions majoritarian in name only. If we are truly seekers after the democratic values conjured by the connotations of majoritarian, we do not need the passive virtues in quite all the splendor and with quite all the breadth in which Professor Bickel offers them. Rather, our precatory admonition to the Court must be an immensely more subtle one resting upon a concern that the power of review which is plainly there be limited in ways which attend the overriding interests of democratic control of institutional decisions and protection of individual liberty against majority or minority incursion. Some of the justifications for not deciding issues or cases will be, in the nature of legal principles, based upon considerations of practical wisdom, some upon textually-demonstrable constitutional rule, and others upon a concern for democratic values.

B. *Can One Be Virtuous Though Passive?*

But what of the virtues themselves, taken one at a time? Are they not reasonable? Certainly as principled bases of non-decision many of them are unexceptionable. What has worried many of Bickel's critics is the assertedly unprincipled way in which Bickel urges that virtue be practiced.

Bickel lists, as I have said, the justifications for not deciding cases or issues. Then there appears this paragraph:

> It follows that there are limits to the occasions on which these doctrines and devices may be used, limits that inhere in their intellectual content and intrinsic significance. Indeed, with the possible exception of what I have called ripeness of the issue, which is merely a catch-all label for a certain order of considerations relating to the merits, none of these techniques totally lacks content of its own, and none is thus always available at will. Even the device of certiorari has some intrinsic meaning and will not be readily usable on all occasions. This is doubly true of the other concepts I have dealt in. Yet one or another of them will generally be available, and there will often be room for choice among two or three, and room certainly for an election whether or not to resort to any. We have had steadily in view the process of election—the elements that enter into a decision to avoid a constitutional issue.[32]

This paragraph has been taken, and not without justification, as a clarion call for abandonment of principled bases of decision.[33] Analyzed by one anxious to find fault, Bickel seems to say that when a majority of the Court feels that it must not or cannot or should not decide a constitutional case, it will in most cases find some one of the passive virtues ready to hand. The practice of the most appropriate or most justifiable passive virtue will then solve the feeling of unease about deciding the hard case. The apparent willingness to permit the passive virtues to become *post hoc* justifications for refusal to decide has aroused Bickel's critics, both because principled decisions are generally to be preferred and because Bickel's implicit defense of cynicism contradicts his insistence elsewhere upon principle.[34]

To the extent that one shares Professor Wechsler's view of the Court's power to refrain from deciding federal constitutional questions, there is a further ground for criticism.[35] Wechsler's position is essentially this: the Constitution has made a choice of the

---

[32] BICKEL at 170.
[33] Gunther, *supra* note 6, at 10.
[34] *Id.* at 12-13.
[35] *See* note 5 *supra*.

limits on the Court's power not to decide. It has determined which hard questions the Court may legitimately duck, and has even provided indisputably and clearly for judicial review in the *Marbury v. Madison* sense. The checks upon this power, including those derived from congressional limitations of the Court's jurisdiction, mark also the limits within which the duty of judicial review must be performed.

Moreover, Bickel, it is shown above, premises much of his argument upon the assertedly "counter-majoritarian" character of the Court. One of the ways in which the Court is counter-majoritarian lies in its insulation from contemporaneous social goals and values hammered out in the democratic process. But a willingness —indeed eagerness—to decide cases upon grounds not stated militates against whatever responsibility may be built into the system by which the Court's members are appointed and live and work. The Court's decisions, or non-decisions, to the extent that they rest upon grounds not articulated, are insulated from public criticism and debate. This debate has an impact upon the Court to an uncertain, though undeniably important, extent.

Further, and particularly in constitutional cases, the Court's willingness to regard abstention from decision as a principle in itself without a clearly-articulated set of reasons for not deciding insulates it from arguments made at its bar by advocates for the persons and interests whose legal rights are in issue. That is, if the Court looks first to ill-defined considerations of appropriateness in deciding whether to decide, and then seizes upon the justification for not deciding which lies most readily at hand, it will become impossible for counsel to argue out in a rational way the reasons why not deciding is or is not appropriate. Arguments about the passive virtues, in certiorari petitions, jurisdictional statements, briefs and oral argument, will become sophistic in the sense that gave Sophists a bad name in Athens:[36] disputation will mask the subject of discussion rather than advance consideration of it.

It is important for the Court to be responsive to advocates at its bar, for with the increasing importance of institutional litigants —the Solicitor General,[37] the American Civil Liberties Union, the NAACP Legal Defense and Education Fund,[38] and so on—in the Court's constitutional caseload, advocates are more than ever rep-

---

[36] B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 73-81 (1945).

[37] Werdegar, *The Solicitor General and Administrative Due Process: A Quarter Century of Advocacy*, 36 GEO. WASH. L. REV. 481 (1968).

[38] *See* the Court's acknowledgement of these groups in NAACP v. Button, 371 U.S. 415, 431 (1963). *See* Ginger, *Litigation as a Form of Political Action*, 9 WAYNE STATE L. REV. 453 (1963).

resentative of the public interests served or harmed by differing decisions on constitutional issues, and therefore objectively counter the forces which tend to isolate the Court from democratic values and goals. It will do nothing save nurture legal fictions[39] if decisional rationales, or rationales for avoiding constitutional decision, are transmuted into mere devices to be employed in the service of other values.

The Bickel cosmology of virtue also erodes, because it pays little attention to, the independent and quite important justifications for a number of the "passive virtues," other than the justification for all of them in the large that they promote passivity. The devices which Bickel collects under the name passive virtues have less in common than they have to distinguish themselves from one another, and it may certainly be argued that he does not carry the burden of persuading the reader that they should be regarded as relatively interchangeable.

A final point: Bickel overlooks the differing impact of a decision not to decide upon litigants in different postures: civil plaintiffs, civil defendants, criminal defendants, and habeas corpus petitioners, and by this means obscures the distinction between a decision on the merits and a procedural dismissal. This distinction has, as is argued below, at least as important a consequence as the "declaration of non-unconstitutionality" which Bickel argues persuasively accompanies the rejection of a constitutional claim on the merits.[40]

C. *Another View of the Judicial Power*

It is certainly true that constitutional crisis may be avoided through refusal by the Court to decide constitutional issues. But there are times past in which such a refusal would have carried disastrous consequences, or at least would have undermined the Court's ability to play the role which even Professor Bickel would agree that it must.[41] My reluctance to find a virtue in passivity is illustrated by my reaction to his suggestions that the Court should have ducked the constitutional issues in *Dred Scott* and taken so long in deciding the *Steel Seizure Case* that the parties could work

---

[39] Legal fictions have their uses, of course, in an open, common law system. They are often new legal rules travelling incognito. H. MAINE, ANCIENT LAW (1st ed. 1861).

[40] BICKEL at 130-31.

[41] Given some uncertainty over President Eisenhower's will to enforce judicial commands about integration, see Kaplan, *supra* note 31, at 223, the decision in Cooper v. Aaron, 385 U.S. 1 (1958), is surely such a case. So, too, were Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1801). *See generally* 1 WARREN, *supra* note 8.

out a settlement. In both of those cases the appropriateness of the Court's action seems not open to doubt.

Dred Scott[42] arose when forces on either side were gathering for a showdown on the slavery issue. Politicians were choosing positions, orators were exhorting, John Brown was fighting in Kansas, and the conflict between the industrial and agrarian economies was taking the path which was to end in Civil War.[43] In the midst of the struggle, there was the view that the matter might somehow be smoothed over by a Supreme Court decision on slavery.[44] But in retrospect, one can, I think, see that the clash was all but inevitable, and that some basic dislocation of the constitutional structure established in 1789 was necessary to deal with the question of slavery and reallocate national commitments to establish the primacy of free labor. The Court's candid declaration in *Dred Scott* was a signal that if slavery was to be dealt with, it would have to be through the political departments of government, through the amending process, or failing that, in some more violent way. In *Dred Scott* the Court in effect declined an invitation to rewrite the constitutional compact by sanctioning the piecemeal destruction of Southern interests, and refused at the same time to take the unprincipled course of raising hopes that it would do so at some time in the future when the case became riper, or when some other condition was fulfilled that made the passive virtues less virtuous.

In the *Steel Seizure Case*,[45] the Court's intervention stands as proof that in some instances the Court can be sensitive to the problem of governmental illegality so swift to take its toll that only immediate and authoritative judicial action will do any good. Action which comes later is of no use: damages are not adequate (or not available against the sovereign), and an injunction to the responsible official not to do similar conduct in the future is unavailable if the plaintiff cannot show an immediate threat that the challenged conduct will be repeated. A refusal to decide in such a case, or a delay which obviates the need to decide, suggests to the alleged

---

[42] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[43] *See* W. WILLIAMS, THE CONTOURS OF AMERICAN HISTORY 284-300 (1961); B. DUNHAM, HEROES AND HERETICS 443-50 (1964); A TREASURY OF GREAT REPORTING 139-43 (L. Snyder ed. 1962).

[44] 2 WARREN, *supra* note 8, at 294-300, recounting Justice Grier's assurance to President Buchanan, which led the latter to predict in his inaugural address that the question of slavery was about to be "finally settled" by the Supreme Court, a reference to *Dred Scott*.

[45] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In these cases, President Truman had ordered the steel mills seized and run by federal troops, invoking a generalized "war power." The Court upheld the mill owners.

offender that the challenged exercise of power is worth the risk again since there is no practical restraint upon it.[46]

Granted that the power-wielder may disregard the Court's admonition in such a case as the *Steel Seizure Case*, but violation of an express judicial command may either provide an occasion for the political process to function by causing public censure of the official, or demonstrate that the political process is ineffective to redeem the constitutional promise of justice and must therefore be changed in fundamental ways.

Dred Scott and the *Steel Seizure Case* are merely examples which raise broad-gauge considerations about constitutional adjudication. What may we say are the relevant criteria in assessing, in general, the Court's obligation to decide a constitutional case?

To begin, I put aside any question about the propriety of constitutional judicial review. There is no need to redo that argument.[47] We come then to a number of identifiable limits on the power, or the duty, or both, to decide. First, there are a group of constitutional and statutory limitations framed with specific reference to the federal courts. The jurisdiction of federal courts is limited by article three to cases and controversies.[48] Thus, the Court must refuse to decide a constitutional issue or other federal question when the claimant lacks a stake in the outcome of the litigation, or the claim lacks maturity to the extent that a judicial opinion would not affect real as opposed to hypothetical and speculative interests. Too, the Court may determine that it has not been given the power to decide the issue—that the power resides elsewhere to formulate the judgment the claimant seeks.[49] There are, in addition, a host of other jurisdictional requirements, some finding express textual support in the constitution[50] and others enacted under the congressional authority over the "inferior federal courts" and over the appellate jurisdiction.[51] The plaintiff in any action bears some

---

[46] Bickel elsewhere shows his sensitivity to this problem in quoting Justice Jackson's warning of the result of validating the power asserted in the Japanese relocation cases. BICKEL at 131, *quoting* Korematsu v. United States, 323 U.S. 214, 242, 245-46 (1944) (dissenting opinion). *See generally* J. TEN BROEK, E. BARNHART & F. MATSON, PREJUDICE, WAR, AND THE CONSTITUTION (1954).

[47] *See* note 5 *supra*.

[48] *See* notes 10-12 *supra*.

[49] *See* text accompanying notes 95-99 *infra*.

[50] *E.g.*, the diversity jurisdiction, U.S. CONST. art. III, § 2. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

[51] *See* WECHSLER, *supra* note 5, at 14. The extent of Congress's power to limit the jurisdiction of the federal courts is discussed in HART & WECHSLER, *supra* note 8, at 312-40.

burden to show that factually and legally the prerequisites to jurisdiction are satisfied, and the court must at least go far enough to decide whether it has jurisdiction.[52]

The second source of limitation upon the Court's power lies in the law of remedies and the substantive law which the Court superintends.[53] To take one example, there are some instances in which equity denies an injunction because the matter is simply too complicated for the chancellor to administer.[54] As another instance, the Supreme Court has decided that in a criminal case styled *United States v. A*, *A* cannot complain of the admission into evidence against him of evidence obtained in an unlawful search of *B*, because the harm to *A* is not sufficiently direct or immediate for the remedial law to take notice of.[55] In each of these cases there is nothing in the constitution which forbids a federal court to act. The court could make a new or different rule about the injunctive power, and since it clearly has jurisdiction of the criminal case and *A* is clearly harmed by the governmental conduct in question, there is no constitutional inhibition upon the Court saying that he has "standing."[56]

A third limitation upon the Court's power is the canon of interpretation which counsels against deciding a constitutional issue when the claimant can get all the relief he wants on a nonconstitutional theory. Stated more broadly, the Court seeks the narrowest possible ground on which to decide.[57]

The fourth and final limitation upon the exercise of judicial power is the most controversial.[58] This limitation is the discretionary refusal to decide a case or issue of which the court has jurisdiction and which falls within the substantive and procedural mold of cases in which the law customarily or in the run of cases provides a remedy.[59] Refusal, for want of ripeness or for failure

---

52 C. WRIGHT, FEDERAL COURTS § 16 (1963).

53 The sources of law which the Court administers are various: the Constitution; laws and treaties of the United States; customary international law, The Paquete Habana, 175 U.S. 677 (1900), Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); the admiralty law, Hess v. United States, 361 U.S. 314 (1960); and state law in diversity cases, Erie R.R. v. Tompkins, 304 U.S. 64 (1938). As to *Erie*, see text accompanying note 144 *infra*.

54 27 AM. JUR. 2d *Equity* § 106 (1966).

55 *See* note 11 *supra*.

56 *Id.*

57 *See, e.g.*, Kent v. Dulles, 357 U.S. 116 (1958).

58 The limitation is upon the "exercise" of power, not upon the power itself.

59 One might include here such doctrines as that the Court will not consider the invalidity of a statute at the insistence of one who has availed himself of its benefits. Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring), and the roundly criticized principle that the Court will not entertain a constitutional challenge

to exhaust administrative remedies, to hear a case, falls into this classification. This final class of discretionary grounds for non-decision is the one whose defensibility traditionalists regard as questionable at best, though for Professor Bickel it is essential to the maintenance of the Court's proper relationship with coordinate branches of government. I suggest, however, that such discretionary devices for decision-avoidance as (nonconstitutional) ripeness,[60] primary jurisdiction,[61] and some applications of the doctrine of exhaustion of administrative remedies,[62] are entirely defensible as a matter of both prudence and constitutional principle. Disagreement with this view rests, I think, upon an uncritical equation of the power to decide with the duty to decide.

It is one thing, after all, to say that every claimant asserting a federal right has, subject to the constitutionally-exercised power of the Congress over the jurisdiction of article three courts, the right to a federal judicial forum in which to litigate his claim on merits. It is quite another thing to say that whenever a litigant in such a posture presents a claim in a judicial forum that the court must then and there decide it. There is no principled objection that I can see to the Court, for reasons entirely aside from the restrictions on timing of litigation inherent in the general law of remedies, declaring that considerations of federalism or comity, or regard for a coordinate branch of government require that it not now decide the constitutional issue tendered by the claimant. So long as the effect of such a decision is only to require the claimant to exhaust other remedies, or to await a greater danger of harm to his federally-protected right, so long as it is clear that these doctrines are court-made means to serve principled purposes, and so long as it is understood that they may be discarded when other principles require it,[63] there is no retreat from the general principle

---

to a statute at the behest of one whose violation of the statute was covertly fraudulent. Dennis v. United States, 384 U.S. 855, 864-67 (1966).

[60] *See* note 12 *supra*.

[61] *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 121-51 (1965).

[62] *See generally* McKart v. United States, 395 U.S. 185 (1969). "Ripeness" denotes the degree of factual and legal development of the principles at stake in the action. "Exhaustion of administrative remedies" denotes a requirement that the litigant aggrieved by governmental action present his claim to some administrative body for determination; if he fails to do so, he may be denied a judicial remedy altogether since the administration avenue that he "ought" to have pursued may be closed. *McKart* contains a discussion of this principle. "Primary jurisdiction" denotes a decision about allocation of initial competences to decide.

[63] When constitutional liberties are at stake, the courts have been quick to cast aside ripeness, exhaustion and primary jurisdiction barriers to decision. *See, e.g.*, Wolff, v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967); Dombrowski v. Pfister, 380 U.S. 479 (1965). Even the presence of a clearcut statutory interpretation issue may lead the Court to say that, for example, the "exhaustion" requirement should be dispensed with. McKart v. United States, 395 U.S. 185 (1969).

that a federal forum must be generally available for the decision of any federal claim.[64] Retreat from that principle, to iterate, must be sounded by the Congress under its article three powers, or by the Court upon a finding that article three does not reach the claimant's case. The refusal to decide based upon ripeness, or exhaustion, or primary jurisdiction is the deferral of decision, not the abdication of authority to decide. Deferral of decision may, of course, result in never having to decide, for the other forum may resolve the problem or the threatened harm never come to pass.

It should be noted as well that deferral of decision is not possible with respect to cases in all procedural postures. It is difficult to justify in a habeas corpus case, in which the petitioner asserts that he is detained in violation of the Constitution, laws and treaties of the United States, and the custodian must come forward and state the grounds for the detention. For a court to assert, in such a case, that while it has authority, under the Constitution and the statutory grant of habeas jurisdiction, to decide, it will in its discretion refuse to do so, leaving the petitioner in custody, appears justifiable upon no ground of constitutional principle or generally applicable precedent.[65] Similarly, when the claim of federal right is raised in defense of a criminal prosecution in which the impact of refusal is that the claimant is convicted, refusing to decide cannot be justified by resort to any generally applicable principle.[66] More of this in the concluding section.

II. WHAT IS—AND IS NOT—A POLITICAL QUESTION

I have sought thus far to outline a general view of the limitations upon the power and duty of federal courts to decide cases and controversies involving claims of federal right. This discussion provides an introduction to and framework within which to view the following discussion of the "political question" doctrine. The view taken here of the power and duty to decide is, I submit, borne out by a critical analysis of the political question cases decided prior to *Colegrove v. Green*,[67] the reapportionment case undercut by *Baker v. Carr*.[68] The principal defect in political question discus-

---

[64] *See generally* HART & WECHSLER, *supra* note 8, at 312-40. *Compare Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) *with Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1868). *See also* Oestereich v. Selective Serv. Local Bd. No. 11, 393 U.S. 233, 239 (1968) (Harlan, J., concurring).

[65] *See generally* R. SOKOL, FEDERAL HABEAS CORPUS 1-27, 308-40, 346-47 (1969). *See Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869).

[66] *See* notes 172-75 *infra* and accompanying text.

[67] 328 U.S. 549 (1946).

[68] 369 U.S. 186 (1962).

sions in *Colegrove* and after, I shall argue, rests upon an insufficient attention to the detailed principled justifications for judicial refusals to decide issues and cases.

Indeed, the current discussions of the political question doctrine are characterized by either a level of generalization which approaches the meaningless, or a simple enumeration of the "political question cases" without an attempt to analyze their various rationales. The Wechsler formulation of the political question doctrine, quoted in section I of this article, terms a political question one which the Constitution requires to be decided by an organ of government other than the judiciary. This view does not intelligibly account for all the cases, though it comes closest of any current definition to having a foundation in constitutional principle. Bickel defines the political question doctrine, in the passage quoted in section I, in terms of the Court's sense of unease at straying into the decision of difficult and delicate questions involving the separation of powers and requiring "political" expertise or sensitivity to make an intelligent decision. Bickel's view is perhaps a direct descendant of Justice Frankfurter's dictum in *Colegrove v. Green* that "[c]ourts ought not to enter this political thicket."[69]

Another important contemporary statement is that of Justice Brennan in *Baker v. Carr*, a statement the more significant because it concluded with the holding that reapportionment of state legislatures is not a political question:

> 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 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

---

[69] Colegrove v. Green, 328 U.S. 549, 556 (1946). To the extent that Frankfurter's *Colegrove* opinion held that the political question doctrine was one of federalism rather than of separation of the powers of the three constitutional limbs of government, his view was rejected in Baker v. Carr, 369 U.S. at 210. This rejection was proper, as the discussion below will show. Turning to Frankfurter's discussion of the political question cases in *Colegrove*, his short summary of a few leading cases, 328 U.S. at 556, describes the political question as foreclosing judicial inquiry into decisions committed finally to other branches. There is no hint that this determination is to rest on other than careful analysis of the constitutional provisions invoked as a barrier to decision. *See* text accompanying notes 78-114 *infra*.

> for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[70]

Justice Brennan also attacked the question from a different direction by enumerating the fields in which the doctrine had been applied: foreign relations,[71] status of Indian tribes,[72] dates of duration of hostilities,[73] validity of certain legislative acts,[74] and republican form of government cases.[75]

The Brennan formulation may at first sight seem the most reasonable, for it at least seeks to classify the cases in which non-decision is appropriate, and to enumerate in detail the elements of a decision not to decide. However, comfort drawn from the *Baker v. Carr* formulation is short-lived when one sees that presence of any element justifying non-decision, or the determination that a case is in a field in which non-decision is appropriate, is a necessary but not a sufficient condition precedent to refusing decision. The lengthy list of elements and "fields" of non-decision ultimately advances analysis no more than Bickel's or Justice Frankfurter's shorter, more suggestive definitions. One is still left with an ill-defined, discretionarily-applied "barrier" to decision.[76]

All of these definitions, it seems to me, rest upon a mistaken legal and historical premise. I say this not because of the simple fact that courts, having the power to decide whether they have the power to decide, are the arbiters of the limits upon this doctrine.[77] Rather, attention to the doctrine's history reveals that it is—in the full-blown terms in which Justices Brennan and Frankfurter and Professor Bickel set it out—a recent invention based upon a misreading or distortion of the early "political question" cases. Surely this failure to take account of its early definition and meaning is important in assessing whether the doctrine has any basis in article three, and surely the acute and repeatedly challenged sense of the proper spheres of the branches of government expressed by Marshall, Story, Taney and their contemporaries should have some

---

[70] 369 U.S. at 217.

[71] *Id.* at 211-13.

[72] *Id.* at 215-17.

[73] *Id.* at 213-14.

[74] *Id.* at 214-15.

[75] *Id.* at 218-26.

[76] *Id.* at 214: "the political question barrier falls away."

[77] The "power" to decide, to which this article is addressed, might better be termed the "legal capacity" to decide, to distinguish this use of the term "power" from use of the term to signify "might." The Romans had a word for each concept of "power": *potentia* means "might," and *potestas* refers to "legal capacity" or "jurisdiction."

weight in assessing the prudential considerations said to support the maintenance and even expansion of the doctrine. That is, if it can be demonstrated that the political question doctrine has not historically had the role and meaning assigned to it by some justices and some scholars, then one will be left to argue whether there are any prudential or textual constitutional reasons for refusing to decide.

Turning to the early political question cases, we see that they fall into several groups, none involving discretionary refusals to decide, and only one involving a "barrier" to decision in the *Baker v. Carr* sense.

A. *Cases Assessing Generally-Addressed Commands by Co-ordinate Branches*

In *Williams v. Suffolk Ins. Co.*,[78] the plaintiff sued for loss of ship and cargo upon a marine insurance policy issued by the defendant. The defendant claimed that the master of the insured vessel had been negligent, in that he had persisted in taking seals off the Falkland Islands after a demand by the government of Buenos Aires, which claimed jurisdiction over the Falklands, that he refrain from doing so. The President of the United States had repeatedly asserted that the islands were open to vessels of all nations, including the United States, for hunting seals. The Court determined that it would not interfere with the executive's determination. The precise question framed by the circuit court and certified for determination was:

> Whether . . . it is competent for the Circuit Court in this cause, to inquire into and ascertain by other evidence [than that used by the executive in making its determination], the title of said government of Buenos Ayres to the sovereignty of said Falkland Islands; and if such evidence satisfies the Court, to decide against the doctrines and claims set up and supported by the American government . . . .[79]

The Court held that the decision as to which nation or government has sovereignty over an island or country is for the executive branch to make, given its power respecting foreign relations. "The action of the political branches of the government, in a matter that belongs to them, is conclusive."[80]

Ten years earlier, in *Foster v. Neilson*,[81] the plaintiff had sued on an 1804 Spanish land grant. The defendant disputed the title, claim-

---

[78] 38 U.S. (13 Pet.) 415 (1839).
[79] *Id.* at 417.
[80] *Id.* at 420.
[81] 27 U.S. (2 Pet.) 253 (1829).

ing that the territory in question had not been in the Spanish government's domain at the time of the grant. The Court held for the defendant, noting that the United States, through both the executive and legislative branches, had taken the position that all titles purportedly based upon grants like the plaintiff's were at least presumptively void. A commission had been established by the Congress to try out the question in individual cases. The Court upheld the executive and congressional determination.

The principle established in these cases, and others decided in the same period, was carried forward into this century in *Oetjen v. Central Leather Co.*[82] There the dispute was over the ownership of hides confiscated in Mexico by Pancho Villa, acting under a commission from the revolutionary government of General Carranza. The Court upheld the title of the party claiming through the Carranza government, upon the basis that that government had been recognized by the United States. Recognition of a foreign government by the executive branch, the Court held, binds the judicial branch. The legitimacy of the Carranza government having been established, the Court proceeded to uphold the taking of the hides (although it might have cut the inquiry short on this score merely by invoking the act of state doctrine).[83]

These cases, typical of many which speak of political questions in the context of foreign relations, invoke no barrier to decision of the lawsuit before the Court. The Court's decision is no more nor less than an assertion that the Constitution commits to the executive branch the power to recognize foreign governments, and to make a determination of the territorial limits of the sovereignty of the United States and other nations. The statement "this is a political question and the Court will not upset the Executive's determination" is no different analytically from the statement "this is a question arising under the commerce clause and the congressional enactment before us was within the power of Congress to pass." The Court, that is, decides that the President has acted within his powers in making a declaration, based upon the ascertainment of "legislative facts,"[84] and amounting to a "law or rule," in the sense of a "command" which "obliges generally to acts or

---

[82] 246 U.S. 297 (1918).

[83] *Id.* at 303-04. The Court in *Oetjen* spoke expressly of the "act of state" doctrine. *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The "act of state" doctrine, a principle of federal law derived through analysis of the customary international law which the Court applies under the authority of The Paquete Habana, 175 U.S. 677 (1900), is a principle of recognition of transnational judgments or decrees.

[84] *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.02, 7.06 (1958).

forbearances of a class." The Court's decision in each of these cases determined that the law or rule in question was within the legal power of the person making it to make, then formulated an individually-addressed command based upon it. This individually-addressed command, which one might term "occasional or particular" in the sense that it "obliges to a specific act or forbearance, or to acts of forbearance which it determines specifically or individually,"[85] was embodied in the Court's judgment.

As another instance of the same principle, consider the *Chinese Exclusion Case*,[86] in which the Congress had passed a statute which arguably abrogated a treaty with the Emperor of China. The Court said that "[t]he question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts,"[87] and its holding amounts to the assertion that the Congress has the constitutional power to abrogate treaties by the process of enacting subsequent legislation.

B. *Cases Involving an Application of the Parol Evidence Rule*

Another species of case is represented by *In re Baiz*,[88] in which the Court held that the petitioner was not entitled to diplomatic immunity from process. The Court said at the conclusion of its opinion:

> Regarding the matter in hand as, in its general nature, one of delicacy and importance, we have not thought it desirable to discuss the suggestions of counsel in relation to the remedy, but have preferred to examine into and pass upon the merits.
>
> We ought to add that while we have not cared to dispose of this case upon the mere absence of technical evidence, we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof.[89]

Baiz deals with the diplomatic immunity provisions of law now codified at 22 U.S.C. §§ 252-53. These provisions have been often

---

85 The language is that of J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 18-26 (Hart ed. 1954). Austin is here drawing a distinction between "individually-addressed" commands, which are issued (under the American constitutional system) to individuals or readily-identifiable groups by the judiciary or the executive branch, and generally applicable legal rules or principles which are a part of the legislative function. The orthodox distinction between "adjudication" and "rulemaking" in administrative procedure suggests the difference.

86 Chae Chan Ping v. United States, 130 U.S. 581 (1889).

87 *Id.* at 602.

88 135 U.S. 403 (1890).

89 *Id.* at 431-32.

construed, and it is usual to accept State Department certifications concerning the status of a person claiming immunity.[90] To the extent that these certifications are relied upon in the manner approved in *Baiz*, the Court is doing no more than fashioning and applying a rule of evidence. The Court holds only that the certificate of the State Department cannot generally be impeached with parol evidence. This holding rests in part upon "deference" to the executive branch, but also upon considerations of policy identical to those underlying similar parol evidence rules. For example, the verdict of a jury as rendered and recorded in open court is well-nigh conclusive and may not be impeached by parol except in unusual and limited circumstances.[91] The promotion of certainty and the honoring of reliances brought into being by the State Department's practice and, as well, independently justifiable, supports the *Baiz* rule.

In the same vein is *Field v. Clark*,[92] in which the Court refused to go behind the signatures of the Speaker of the House of Representatives and the President of the Senate on a bill, and to consider a claim that the bill as passed by the Congress differed from that enrolled and signed by the President and Speaker. The Court stated that it would reflect a lack of respect for a coequal department if it were not to "accept, as having passed Congress, all bills authenticated" in this manner.[93]

Field v. Clark and *In re Baiz*, though commonly called "political question" cases, do not, therefore, involve a refusal to decide. Moreover, the Court has recognized that deference and not surrender is involved in fashioning rules of evidence when political considerations are at stake. Most clearly in the law of privilege it has said "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[94]

---

[90] The precedents are collected and discussed in Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965). *See also* United States *ex rel.* Casanova v. Fitzpatrick, 214 F. Supp. 425 (S.D.N.Y. 1963). The "evidentiary" character of the certificate is illustrated by Banco de Espana v. Federal Reserve Bank, 28 F. Supp. 958, 972 (S.D.N.Y. 1939), *aff'd*, 114 F.2d 438 (2d Cir. 1940), holding that if the diplomat chooses not to invoke his immunity, for example to testify in a case, he may do so. The question whether the waiver was improper is between him and his government. The immunity, of course, belongs to the government in question, and may be waived by it. *Id.*

[91] 8 J. WIGMORE, EVIDENCE § 2348 (McNaughton rev. ed. 1961).

[92] 143 U.S. 649 (1892).

[93] *Id.* at 672.

[94] United States v. Reynolds, 345 U.S. 1 (1953). *See* 8 J. WIGMORE, EVIDENCE § 2379(g), at 808-10 (McNaughton rev. ed. 1961), noting that in England the decision as to whether the privilege for official information exists is for a political minister, while in this country the decision is the court's. Wigmore approves the

C. *Cases Involving the Constitutional Commitment to Other Agencies of Power to Issue Individually-Addressed Commands*

Another class of what might be termed "political question" cases are those involving a constitutionally-based commitment of the power to issue "occasional or particular" commands to another branch of government than the judiciary. The trial of impeachments by the Senate may be an example,[95] and in *Powell v. McCormack*[96] the respondents earnestly contended that determinations as to the seating of representatives were of such a nature. The issue has arisen in other contexts, however. The Congress is given the power to provide for the governance of the land and naval forces, which may involve giving courts martial and other agencies the power to issue binding commands directed to individuals. The flourishing growth of administrative tribunals vested with such power is similarly an exercise of congressional power which may, it has been argued, permit the Congress to foreclose the judiciary from interfering with agencies thus created. As to military tribunals, the claim of constitutional withdrawal from courts of the power to decide has been faced and resolved in favor of review on habeas corpus, and lately through the injunctive power.[97] And the Court has carefully limited the sphere within which courts martial, rather than article three courts, may issue commands at all.[98] Administrative agencies, even those whose determinations are made "final" by statute, find the Court superintending them with a hint that the Constitution compels judicial review.[99] The operation of "separation of powers" logic in such cases measures the deference given to the determinations of military and administrative bodies, and

---

American rule: "A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. . . . Both principle and policy demand that the determination of the privilege shall be for the court." *See also* Cambell v. Eastland, 307 F.2d 478 (5th Cir. 1962); Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Hawaii 1947). Governmental claims of privilege are routinely overruled when the personal liberty of a litigant is in issue. *See* Alderman v. United States, 394 U.S. 165 (1969); Dennis v. United States, 384 U.S. 855 (1966); Roviaro v. United States, 353 U.S. 53 (1957); United States v. Coplon, 185 F.2d 629 (2d Cir. 1950); Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Hawaii 1947).

[95] U.S. CONST. art. I, § 3, cl. 6-7. Since the judgment in such a case would not extend to a restraint upon personal liberty, habeas corpus might not be available.

[96] 395 U.S. 486 (1969), *discussed in Comments on* Powell v. McCormack 17 U.C.L.A. L. REV. 1 (1969).

[97] *See* United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922); Comment, *Investigative Procedures in the Military: A Search for Absolutes*, 53 CALIF. L. REV. 878 (1965).

[98] O'Callahan v. Parker, 395 U.S. 258 (1969).

[99] Estep v. United States, 327 U.S. 114, 119-20 (1946). HART & WECHSLER, *supra* note 8, at 340, interpret *Estep* as saying that "jurisdiction always is jurisdiction only to decide constitutionally."

does not signify a general and discretionary invocation of a barrier to decision. Looking more broadly at the cases in which a constitutional basis is sought for the assertion that the final power to issue individually-addressed commands resides elsewhere than the judiciary, the determination of the constitutional issue thus tendered is made by the Court on a basis applicable not to a class of issues or problems, but on the basis of the legally-demonstrable competence of the non-judicial body. These cases may involve some of the same kinds of separation of powers considerations as do cases such as *Oetjen* or cases such as *Baiz*, but they involve the making of an entirely different sort of determination.

D. *The "Republican Form of Government" Cases: A Hybrid*

The "republican form of government" cases are difficult to explain, particularly in light of Justice Frankfurter's analysis of the guaranty clause in the reapportionment cases.[100] The text should be the starting point for analysis:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.[101]

One ought, in analyzing the clause, to begin by inquiring what structures and practices of government are uniquely safeguarded by it.[102] Many attributes of the "republican form of government" are safeguarded by provisions of the Bill of Rights applicable to the states, among them the free speech and free press guarantee. The thirteenth, fourteenth and fifteenth amendments, and the Reconstruction legislation in aid of them, contain, as both the *Colegrove* majority and the *Baker v. Carr* majority would have agreed,[103] provisions which are designed to foster and extend republican institutions. When we consider the guaranty clause in isolation from other guarantees of rights bound up with republican institutions, therefore, we address a rather narrow class of cases.[104]

---

[100] Colegrove v. Green, 328 U.S. 549 (1946) (opinion of Frankfurter, J.); Baker v. Carr, 369 U.S. 186, 266 (1962). Frankfurter begins with the broad proposition that guaranty clause cases are nonjusticiable, and argues as well that cases involving "political" as distinct from "personal" rights are not justiciable. The former assertion is discussed in the text below. The latter assertion rests simply upon a judgment as to whether one who claims his vote has been "debased" has been harmed in a way which the law of remedies can notice.

[101] U.S. CONST. art. IV, § 4.

[102] *See* Baker v. Carr, 369 U.S. 186, 241-50 (1962) (Douglas, J., concurring).

[103] Frankfurter impliedly conceded in *Colegrove* that the "white primary" cases were rightly decided. 328 U.S. at 552.

[104] In addition to Justice Douglas's concurring opinion in *Baker*, cited in note 102 *supra*, *see, e.g.*, Bond v. Floyd, 385 U.S. 116 (1966).

Luther v. Borden[105] was a trespass case, the plaintiff claiming under the rebel government of Rhode Island, and the defendant claiming under the "established" or "charter" government. The plaintiff asserted that the charter government was not "republican" and that the rebels had de facto control of the subject property at the time the cause of action arose. The Court held the question not subject to judicial resolution, and upheld a dismissal of the plaintiff's suit. The Court's opinion rests upon its finding that Congress has the power to decide which government of a state to recognize, and that the "political" department had sole authority to determine whether the guaranty clause was appropriate to be invoked. There is some textual support for the latter assertion in the language of the clause, and the decisions are explicable as holding that the Constitution commits the decision—the issuance or nonissuance of an occasional or particular command—to another branch, at least insofar as the command is thought of as issued to a state or government as an entity. Of course, the command or decision, though so addressed, will almost surely have collateral consequences upon individuals in the state, and as to them will be a generally-addressed command.

True, the Court in *Baker v. Carr* sought to include "lack of criteria by which a court could determine which form of government was republican"[106] among the grounds of decision in *Luther*. There is no textual support in the *Luther* opinion for such an assertion, and "lack of criteria" is, in any event, only another way of saying that the interpretation of the guaranty clause would present a question of first impression.

Georgia v. Stanton,[107] an attempt to invoke the judicial power against reconstruction, failed also, the Court holding that the legislation in question amounted to a judgment that Georgia did not have a republican form of government and required intervention of federal authority to establish one.

None of the cases goes so far as to say that every question arising out of an executive or congressional assertion of power under the guaranty clause is beyond judicial review. If in the course of its action the Executive should imprison some recalcitrant state official, his right to sue in habeas corpus is not drawn into question by any interpretation of the guaranty clause.[108] And the "republi-

---

105 48 U.S. (7 How.) 1 (1849).

106 369 U.S. at 222. *Compare id.* at n.48.

107 73 U.S. (6 Wall.) 50 (1867).

108 Although the Court yielded to the Congress in *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868), and held that it had validly been deprived of appellate jurisdiction in a habeas corpus case, in *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1868) it did not. Indeed, the Court's earlier decision in *Ex parte* Milligan, 71 U.S. (4 Wall.)

can form of government" cases do not, as Justice Douglas has pointed out, foreclose even quite sweeping judicial review of the exercise of executive power when such exercise is claimed to threaten other rights guaranteed by the Federal Constitution, laws and treaties.[109]

There have not been enough "political question" cases under the guaranty clause to permit a conclusion broader than this: the clause uniquely governs a narrow class of cases and the decisions construing the clause hold it to establish both that the political department may issue certain sorts of individually-addressed and certain forms of generally-addressed commands. There is no judicial power to compel the issuance of the generally-addressed command, just as there is no such power to compel the issuance of any other sort of generally-addressed command.[110] And there is no reason to doubt that a decision to invoke the clause is reviewable, although one must concede that the matter is far from settled.

E. *Immunity of the President's Person*

Mississippi v. Johnson,[111] often termed a "political question" case,[112] held that President Andrew Johnson could not be sued. Though the case also involved a "guaranty clause issue," the President's immunity may perhaps be termed a "political question." To make this concession does not admit a generalized judicial power to abstain from deciding certain sorts of issues.

First, the President is not immune from *all* process of any sort, or at least there is quite respectable authority for saying so.[113]

---

2 (1866) affirms as well the Court's power in habeas corpus. *See* HART & WECHSLER *supra* note 8, at 292 n.1.

109 *See* Justice Douglas's concurring opinion in *Baker*, 369 U.S. at 241-50; note 108 *supra*.

110 That is, there is no power to compel the Congress to pass a law respecting interstate commerce, although it has power to do so. Had the Congress never legislated in this field, it is difficult to imagine a Court ordering it either to get busy and think about the problem or to pass some particular law at the behest of a particular plaintiff. While it is true that this notion of judicial power rests ultimately upon a hard-to-justify distinction between "misfeasance" and "nonfeasance," there is a sense in which our entire legal system rests upon such a notion. The notion that plaintiffs have the burden of proof, and the extensive case law defining and protecting the "status quo ante" the litigation, are expressive of this concept. *See* Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959).

111 71 U.S. (4 Wall.) 475 (1866). It is surely not remarkable that a great deal of the political question law was made during and immediately after the Civil War, by a Court constituted as a pro-North institution.

112 *See, e.g.*, Justice Frankfurter's *Colegrove* opinion, 328 U.S. at 556.

113 *See* United States v. Burr, 25 F. Cas. 30, 34-35. (C.C.D. Va. 1807). Chief Justice Marshall demolished the claim of the President to a plenary immunity from process. Marshall indicated that the President may be liable to produce documents under subpoena, and to have his deposition taken, although his personal appearance at a trial might be excused due to the burdens of office.

Second, and more important, as to almost any question on which one might wish to sue the President there will generally be some subordinate official who can be reached.[114]

F. *The "Modern" View of the Political Question Doctrine*

In sum, the "political question doctrine" does not seem to be a doctrine at all, but a group of quite different legal rules and principles, each resting in part upon deference to the political branches of government. Such an assertion, however, while setting forth a characteristic of the political question cases, does not uniquely describe them. The idea of deference to coordinate branches is evident in a number of other contexts as well, such as in assessing the constitutionality of statutes. The general assertion that a political question is one which courts should not decide because they do not wish to enter the "political thicket" is, therefore, meaningless. Its invention, in the perhaps worthy service of integrating a disparate collection of precedent, has served in subsequent cases to becloud the issue which the Court must confront when deciding not to decide. It is no doubt healthy that the doctrine, in the broad form stated by Mr. Justice Frankfurter in *Colegrove v. Green*, has not found a majority willing to press it to the limits suggested by Frankfurter's definition. However, the notion has persisted, despite the results in *Baker v. Carr* and *Powell v. McCormack*, perhaps in part because of the vague and general "test" for political questions set out in those cases, that there is a means for the Court to avoid deciding any case or issue upon the basis of a broad, highly general, and almost entirely discretionary principle of nondecision. This view is of course subject to the same criticisms which may be made of Professor Bickel's apothesis of the passive virtues.

With the above discussion as background, one can see in particular why the Brennan formulation in *Baker v. Carr* represents an unsatisfactory effort to rationalize a collection of disparate precedent. Consider the various elements of the Brennan "test." The first of the stated grounds, "textually demonstrable constitutional commitment,"[115] is in accord with a group of the precedents, although the phrase uncritically lumps together commitments of power

---

[114] *E.g.*, the Attorney General when it is sought to reach some practice of his department, as in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); or the Secretary of State, as in Aptheker v. Secretary of State, 378 U.S. 500 (1964). In a related context, Justice Frankfurter remarked that to approve a legal theory under which no officer of government could be reached with process in a given case would be to approve a "fox-hunting theory of justice that ought to make Bentham's skeleton rattle." United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 473 (1951) (concurring opinion).

[115] 369 U.S. at 217.

to make individually-addressed and generally-addressed commands. The second, "lack of judicially discoverable and manageable standards,"[116] is not the mark of a political question, but appears to restate the principle of ripeness and the equity principle that the chancellor cannot intervene where the dispute will not permit the entry of a judicially-manageable mandatory decree. The "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"[117] rationale is meaningless except as a restatement of the doctrine of "exhaustion of administrative remedies" or ripeness, for it assumes the existence of a nonjudicial body with the power to decide initially and appears to require that that body's decision be obtained in the first instance. The only application of this rationale not analyzable in ripeness or exhaustion terms would be one in which there was no way for the litigant against whom the political question doctrine was invoked to obtain the required preliminary determination. In cases in which "political question" means that some coordinate branch has the power to issue generally-addressed commands, that department usually cannot be compelled to issue such a command. To take another illustration, the State Department, when its view as to recognition of a foreign government or some other question of policy is important, has at times been less than clear about its position.[118] There is no means to compel the Department to come up with a clearer answer, and the courts have solved this question by either trying to guess at the Department's position, or by going on to decide the matter independently, sometimes in clear recognition that waiting for the Department would be futile and a possible departure from the judicial obligation to decide.[119]

Such an instance of the "preliminary decision" rationale elides with the next *Baker* justification for the political question doctrine, "the impossibility of the court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."[120] Unless this rationalization is designed to express in another way the principle that some commands, general and particular, are left to the coordinate branches of government to be

---

116 *Id.*

117 *Id.*

118 *See* HART & WECHSLER, *supra* note 8, at 196-97, discussing some far-fetched judicial attempts to divine the State Department's intentions. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 420 (1964), & particularly note 19 and the accompanying text, discusses judicial deference to Executive Department determinations in the field of extranational recognition of judgments. *See also* the discussion in Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965).

119 HART & WECHSLER, *supra* note 8, at 196-97.

120 369 U.S. at 217.

framed in final form, it has no support in the cases and provides no definable guide to decision. What conceivably can "lack of respect" mean, as a principle of decision, to a Court which decided *Marbury* or the *Steel Seizure Case*? The criterion "unusual need for adherence to a political decision already made,"[121] to the extent it reflects the cases, speaks to the question of commitment of a decision to another branch.

The final *Baker* test, "the potentiality of embarrassment from multifarious pronouncements by various departments on one question,"[122] has not been used in the older cases as an independent basis for invoking the political question doctrine, but as a spur to finding that the question in issue had been committed to another branch for decision in one of the senses described above. There have, indeed, been cases involving the most delicate questions of foreign relations in which executive action by officers acting within the scope of their duties has been condemned by the Court,[123] and the condemnation made the basis of an occasional or particular command that the damage done by the officers be redressed.[124]

It is appropriate, too, at this point, to note another stated justification for invoking the political question doctrine, first set out in an article by Professor Scharpf[125] and adopted by a distinguished district judge.[126] Scharpf states that "difficulties of access to information"[127] may provide a justification for not deciding. While it is true that "political question" cases, particularly those involving the guaranty clause and foreign relations, involve issues as to which fact-gathering is difficult, this does not at all justify invocation of a barrier to decision. A less drastic remedy will suffice. The difficulties which the adversary system has in reconstructing past events tend, as a review of the cases shows, to be resolved by familiar rules of evidence which fall generally into three categories: allocation of the burden of going forward,[128] allocation of the risk of nonpersuasion,[129] and parol evidence rules.[130] These rules may rest

---

121 *Id.*

122 *Id.*

123 *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); The Paquete Habana, 175 U.S. 677 (1900).

124 The Paquete Habana is an example.

125 Scharpf, *supra* note 2.

126 United States v. Sisson, 294 F. Supp. 511, 515, 520 (D. Mass. 1968)

127 Scharpf, *supra* note 2, at 567.

128 See the discussion in Alderman v. United States, 394 U.S. 165 (1969), of the defendant's burden of going forward and the government's burden of proof in a case involving unlawful electronic surveillance.

129 In the field of conflicts of law involving a foreign law the American courts have persisted in applying the absurd rule that the foreign law must be pleaded and proved by the party relying upon it. *See* A. EHRENZWEIG, CONFLICT OF LAWS

in part as we have seen in the discussion of, for example, *In re Baiz*, upon considerations of deference to a "political branch" of government. They may also rest, as does the presumption of regularity[131]—the presumption that an official duty was lawfully performed—upon related reasons of extrinsic policy.[132] They also rest upon an assessment of the probabilities inherent in the situations to which they address themselves: the assumption that an official record is accurate, or that the officer who attests that a certain thing is so is acting within the scope of his authority.[133] But the application of these rules has always been tempered with the understanding that to the extent they are shortcuts to finding the truth in a majority of cases, they may be discarded when they are shown to impede that process.[134] To the extent that these rules reflect considerations of deference to political branches or reflect judgments about other matters of extrinsic policy, they give way in the face of countervailing considerations of individual legal right.

G. *Concluding General Observations*

The foregoing analysis seeks to demonstrate that neither a reading of the "political question" cases themselves, nor an earnest attempt to understand restatements of "political question" law, permits one to say that there is a coherent, single principle which permits or requires non-decision of an identifiable class of cases. We do see that "political question" cases rest in some measure upon

---

§ 127 (1962). Otherwise, the court may assume the foreign law to be the same as the domestic law. While this rule may be ridiculous, the notion that the difficulties of finding out what is the state of affairs in a foreign country (Scharpf's reason for applying the political question doctrine to foreign relations cases) should be resolved by allocating the burden of proof is not. *See* Walton v. Arabian-American Oil Co., 233 F.2d 541 (2d Cir. 1956), *cert. denied*, 352 U.S. 872 (1956).

130 *See* notes 88-94 *supra* and accompanying text.

131 The "presumption of regularity" crops up in many contexts to help the government show that official duty was lawfully performed. Selective service cases are filled with discussions of the presumption: *e.g.*, Greer v. United States, 378 F.2d 931, 933 (5th Cir. 1967). For a more general discussion, see my treatment of the problem in SEL. SERV. L. REP., Practice Manual ¶ 2404, at 1148 n.7.

132 *See* Wigmore's discussion of the parol evidence rule relating to the verdict of a jury, 8 J. WIGMORE, EVIDENCE § 2348 (McNaughton rev. ed. 1961), and the more general discussion of the parol evidence rule in 9 J. WIGMORE, EVIDENCE §§ 2400-78 (3d ed. 1940).

133 For an application of this assumption, see Fed. R. Civ. P. 44. For a more general discussion of the principle that an official record, taken as a whole, is proof that the things there recorded, and only those, took place, see 5 J. WIGMORE, EVIDENCE § 1633, at 519 (3d ed. 1940).

134 United States v. Procter & Gamble Co., 174 F. Supp. 233, 237 (D.N.J. 1959): "[T]his presumption or [*sic*] regularity . . . is effective, like other presumptions of fact, only in the absence of evidence to the contrary."

deference to coordinate branches, but we see that other sorts of cases do also. We do not see in the law of political questions an authority to refuse to decide any given issue always, at all times, and by whomever raised. This assertion does not, of course, answer the problem entirely. That there is no general principle of non-decision which meets all the cases to which the wit of judges and ordinary men would seek to apply it does not tend inevitably to the conclusion that there are no cases, or no class of cases, in which non-decision is appropriate. The field of foreign relations is one in which the foregoing analysis may fruitfully be tested, not because such a test will finally determine the worth of the analysis, but because it is a political question arena of some importance.

III. American Military Involvement as a Political Question

None of the authority commonly cited by those who oppose a judicial consideration of American military involvement abroad suggests that there is *no* judicial power respecting foreign relations, or that the view of the United States government upon questions of international law is for the President finally to decide. Rather, the foreign relations-international law cases demonstrate that the judiciary will determine the sphere within which the Executive and the Congress, or the two of them jointly, have authority within the constitutional system, and will defer to competent exercises of that authority to issue both general and particular commands.

To be sure, there are judicial expressions of hesitancy about the power to decide foreign relations issues. Often quoted is a dictum in *Marbury v. Madison:*

> If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.
>
> In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.
>
> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
>
> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual

> rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.[135]

A close reading of this statement reveals that it does not purport to exclude all questions of foreign relations from judicial cognizance, but only certain functions of the Secretary of State. The evidentiary privilege for official information—the "executive privilege"[136]—reflects this concern, as do the parol evidence rule cases such as *In re Baiz*, and the deference paid to State Department declarations in other foreign relations contexts. It has been held, along this line, that a spy cannot sue for his wages on a contract to commit espionage;[137] not because the Court will refuse to decide such cases, but because a part of every such contract is an understanding that litigation upon it is at best a breach of good faith. By bringing his suit alleging the contract exists, the plaintiff pleads himself out of court. The President's power respecting foreign relations has also been invoked in cases upholding his power to make an occasional or particular command, even one with great economic consequences, as in the *Curtiss-Wright Export Case*.[138]

These isolated and celebrated cases give a distorted view of the role of the federal courts, particularly the Supreme Court, in fashioning and applying principles of international law in the sphere of American foreign relations. A closer analysis of the cases is required.

To begin, there is an arena in which the judiciary claims complete sway. When neither the Executive nor the Congress has acted, and when the Court finds no commitment of the power to decide in the first instance to either of these branches, it will apply rules of written and customary international law to the settlement of disputes between private persons.[139] These rules may be derived from treaties.[140] They may also be derived from customary interna-

---

135 5 U.S. (1 Cranch) 137, 165-66 (1803).

136 The "executive privilege," "narrowly confined to cases involving the national security," Cambell v. Eastland, 307 F.2d 478 (5th Cir. 1962), is extensively discussed in 8 J. WIGMORE, EVIDENCE §§ 2367-79 (McNaughton rev. ed. 1961).

137 Totten v. United States, 92 U.S. 105 (1875).

138 United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), contains a sweeping statement of the President's power in the field of foreign relations which is not borne out by the cases and not necessary to the decision in that case.

139 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

140 U.S. CONST. art. III, § 2.

tional law.[141] The admiralty jurisdiction involves federal courts in the latter sort of lawmaking.[142] But even without express article three warrant, the Court has concluded that the federal judiciary is empowered to find and apply rules of customary international law in the same way that a common law court finds and applies municipal rules of decision.[143] While considerations of federalism have since *Erie R. R. v. Tompkins*[144] kept the federal courts away from such lawmaking with respect to municipal legal rules, its authority in the international sphere is undoubted. Indeed, the case which *Erie* overruled, *Swift v. Tyson*,[145] rested upon a theoretical foundation which brought that case within the ambit of federal courts' common law power upon the basis of considerations not unlike those whch motivate it in the international law field. *Swift* was a commercial law case, and Justice Story's opinion reflects the view that commercial law was, as it had been since the *praetor peregrinus* of Roman times and until a late date in English legal history, a species of *jus gentium* pertaining to the class of merchants without regard to nationality.[146]

Rules of international law may be applied by the Supreme Court with respect to certain transnational disputes in the formulation of rules concerning recognition of extranational judgments and decrees,[147] and in the formulation of choice of law rules in transnational controversies.[148]

The Court has also not retired from the field when the Executive or Congress claims that the formulation of a general or occasional command with respect to foreign relations is within its competence. It has reached and decided the merits, in the face of a "war power" claim, in the *Japanese Relocation Cases*,[149] and in

---

141 The Paquete Habana, 175 U.S. 677 (1900).

142 *See generally* Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661 (1963).

143 The Paquete Habana, 175 U.S. 677 (1900).

144 304 U.S. 64 (1938).

145 41 U.S. (16 Pet.) 1 (1842).

146 *See id.* at 19, for Justice Story's discussion of the international character of the commercial law. It was the reluctance of the common law courts to apply law merchant principles that led to the early expansion of the equity jurisdiction in England and the establishment of commercial courts to serve the class of merchants and traders. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 604-35 (2d ed. 1936). As to the Roman Law, *see* Comment, *Automatic Extinction of Cross-Demands:* Compensatio *from Rome to California*, 53 CALIF. L. REV. 224, 228 (1965).

147 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

148 *See* A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW § 9 (1967).

149 Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

the *Steel Seizure Case*,[150] to give two examples. The deference displayed in these cases is just that—deference, not surrender, a deference that is rooted in the notion of separate and equal branches of government and that precedes a decision on the merits as to whether the Constitution gives the Executive the power he claimed to have. Decisions that consider the dangers of the nation speaking with two voices in foreign affairs do not use the language of abdication but of decision that the scheme of separation of powers validates the claim that the Executive has the power to decide which he claims to have.[151]

Consider now the case of American involvement in Indochina. First, it is claimed by opponents of the war that the President has exceeded his constitutional authority in sending vast numbers of American troops to another country to fight without a congressional authorization for him to do so.[152] Interestingly, it is also claimed that the process of conscripting those troops is unlawful,[153] but no one has suggested that the courts do not have the power to decide this issue, or ought not, in the exercise of some presumed discretion, decide it; this though the impact of an adverse decision on the merits of the exercise by the President of his powers would be incalculable.

It is also claimed by opponents of the American involvement in Indochina that our participation involves violation of treaties to which the United States is a party, which define certain acts, whether committed by nations or by individuals, as crimes against international law.[154] Some of these treaties have been interpreted to consider in mitigation, but not in exoneration, that an individual was under orders to do the conduct denounced as criminal.[155]

Third, it is claimed that American participation in Indochina may involve this country in violation of rules of customary international law regulating the conduct of warfare.[156]

One may quickly see that litigation of these issues might pre-

---

150 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), *discussed in* HART & WECHSLER, *supra* note 8, at 1200-12.

151 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); The Paquete Habana, 175 U.S. 677 (1900).

152 *See* SEL. SERV. L. REP., Practice Manual ¶ 2329, at 1140 and authorities there cited.

153 *See* Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493 (1969).

154 *See generally* SEL. SERV. L. REP., Practice Manual ¶¶ 2326-33 at 1138-42. *See also* Mora v. McNamara, 389 U.S. 934 (1967); Mitchell v. United States, 386 U.S. 972 (1967) (Douglas, J., dissenting from denial of certiorari).

155 *Id.*

156 *Id.*

sent the following questions: whether government officials or those acting in concert with them are violating international law; whether the United States Government is violating such law; and whether the executive branch has trespassed upon some constitutional obligation which it owes to the people generally. These issues raise in turn procedural difficulties which might stand in the way of a court deciding the merits, as well as the question whether one of the particular political question principles may be invoked as a barrier to judicial decision.

Consider, first, the case of a civil plaintiff seeking a declaratory judgment and injunction against executive officers, and alleging each of the three general grounds mentioned above. While a suit against the President might be barred by doctrines peculiar to the Presidential office, suits against subordinate officers of government would not face the same difficulty. The first issues to be confronted would be those of constitutional standing, ripeness in the constitutional sense and the requisite adversity—the article three requirements. These are not issues peculiar to so-called "political" questions. A court might well decide that the plaintiff lacked standing with respect to his international law claims, both because such claims are arguably properly raised only by nations which are offended by unlawful behavior of other nations,[157] and because to the extent that individuals are affected, those individuals are Indochinese and not Americans. With respect to other international law claims, arising under the "individual responsibility" treaties, the court might well question the plaintiff's standing to sue in the sense that it did not appear that he is being asked to violate international law. The ripeness issue might be raised in the sense that the case lacked sufficient development of the factual and legal basis of the alleged harm to be a "case and controversy."

Again, the court might regard the case as inappropriate for decision upon some nonconstitutional ground, including nonconstitutional ripeness of the kind discussed above, or upon the basis that an injunction would tax the administrative powers of an equity court beyond their wonted limits. Were the plaintiff to overcome these hurdles, he would have the burden of going forward and the risk of non-persuasion and might find it difficult to meet a burden of establishing his case by the required quantum of evidence. There are justifications for insisting upon a heavy burden of proof. And since the executive decisions in question would in the typical injunction or declaratory judgment suit be challenged not as occasional or particular commands but as general decisions of policy,

[157] *See* L. ORFIELD & E. RE, INTERNATIONAL LAW 177-79 (2d ed. 1965).

the deference due judgments about "legislative fact," would be among the considerations called into play by the Executive in defending the case. But, "what if?" What if the Court should find it necessary to find, if it were to inquire about the merits, that the war was somehow "illegal?" It seems to me at that point that the Court cannot upon any principle finding root in the constitutional system of rules evade its obligation to decide.

Cries of dissent from this view may be based upon several grounds. Some viewers of the Court would question the wisdom of the Court arrogating to itself such power, upon general principles similar to those invoked by Professor Bickel. But in considering such complaints, one ought to consider as well the enormous power which the Constitution commits to the executive branch with respect to military and foreign affairs matters, and ask what if any checks the framers could have intended to provide. Patrick Henry expressed concern on this score in the debates on ratification:

> If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute! The army is in his hands, and if he be a man of address, it will be attached to him, and it will be the subject of long meditation with him to seize the first auspicious moment to accomplish his design; and, sir, will the American spirit solely relieve you when this happens? I would rather infinitely—and I am sure most of this Convention are of the same opinion—have a King, Lords, and Commons, than a government so replete with such insupportable evils. If we make a King, we may prescribe the rules by which he shall rule his people, and interpose such checks as shall prevent him from infringing them; but the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke. I cannot with patience think of this idea. If ever he violates the laws, one of two things will happen: he shall come at the head of his army, to carry everything before him; or he will give bail, or do what Mr. Chief Justice will order him.[158]

There are also those who argue that the Court should not "become involved" because its decision might be disregarded.[159] Would not the judgment of the Court against the war be a confession, they urge, of its own inability to change the course of events to which its decision is addressed? Such worries seem to me ill-conceived, although upon a premise that may evoke dissent from some. Earlier in this article I discussed *Dred Scott*, and concluded that the Court, in deciding that case, fulfilled its duty to chart the limits upon the power of the constitutional compact, and therefore

---

158 *Quoted in* 1 DOCUMENTS OF AMERICAN HISTORY 147 (H. Commager ed. 1944).
159 Bickel so argues.

of the existing system of positive law, to accommodate the growing demand for abolition. There were those, of course, Justice Grier and President Buchanan among them, who believed that *Dred Scott* would set at rest the controversy about slavery. But that to one side, I would contend that *Dred Scott* is a classic case of the Court upholding what the existence of a written constitution necessarily implies: that agencies of government must when pressed give a reason for behaving as they do, and that when the agency of government which is the last resort of the victim of some alleged governmental misconduct has spoken in such terms, the populace is given a choice between abiding by the authoritative decision thus made, or of altering the frame of government to accommodate its demands.

This argument assumes that the Constitution assigns spheres of competence to departments of government and to the electorate. It assumes that the only one of these agencies with the conceded power to act upon the basis of no identifiable principle is the electorate. The alternative amounts, it seems to me, to an insistence upon absolutism. By absolutism, I do not mean the assertion within a particular ambit of the power to make discretionary decisions: such power may be saved from a claim that it is unlimited if the power-wielder recognizes or is made to recognize that his discretion extends only to particular matters committed to him by legal rules which he can identify, or that his discretion as to particular matters may be checked if he passes certain bounds even within that ambit.[160]

The notion that the Constitution establishes these spheres of competence is basic to the notion of a written constitution, representing as it does the crystalizing out of legal rules and principles upon the basis of the social conditions of 1787. This notion is also reflected in the case law of "political questions," which as we have

---

160 Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1303 (1961), states that there are areas of public life which are rule-free, either because of a decision that the actor is better left without a rule to guide him, or that a rule is only one among a number of considerations. Surely what Professor Jaffe means is something like that set out in the sentence above: an area or discretion to make commands, subject to correction for abuse and subject to limitation to ensure the actor keeps within it. It seems to me that while Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948), holding that a Presidential international air route award is not subject to judicial review, is explicable as a case holding that the President is confided with power to make certain types of occasional or particular commands, it is not rightly decided. Better, it seems, to recognize that insofar as the President was exerting his power over foreign relations in his decision, his discretion is unreviewable. But if the foreign relations questions can be shown to be out of the case, then review seems proper.

seen is not unprincipled law but based upon a judicial determination of the powers of the departments of government.

The Court can evade the impact of this argument, it seems to me, only by deciding that the Executive is committed with the final authority to make decisions about war and peace which, at least as they take the form of general commands not addressed to a particular plaintiff—as in our declaratory judgment and injunction case—are not reviewable. This decision, which would follow one line of political question authority, would have some support, although meager, in principle, at least up to the point that the President, for example, said that he had the power to declare war and that Congress had no such power. The last case would be distinguishable as being too clear to permit argument that the President was not misreading the constitutional compact. But in all cases save this one, we would know the limits to which the rule of law will carry us in the conduct of war, and that is a judgment which the article three courts, if we assume away all the principled bases of non-decision discussed above, have the duty to make.

This duty arises from the words of article three itself, which speaks of "cases" and "controversies" within certain limits and raising certain kinds of issues. And if in a given case there be no statutory limit on the Court's jurisdiction, and if there be no demonstrable commitment of the decision to another branch, and if there be no more chance of postponing decision for another day upon some consideration of, say, ripeness, from whence derives the determination not to answer the legal question the plaintiff asks? I do not mean to foreclose the question whether the Constitution commits the decision in such a case to another branch, but only to suggest that the case law of the "political question" doctrine, and the concept of judicial review implicit in *Marbury,* requires that it be answered.

Let me suggest an argument that the decisions concerning the conduct of warfare are not the Executive's alone. The argument rests upon the acknowledged power of the Court to find and apply rules of international law and to probe into questions involving foreign relations when those questions involve considerations of private right. I also suggest that it will turn upon an assessment of the importance, in the constitutional scheme, of some check upon the executive's control of the military, and of the constitutional commitment to the Congress of the power to declare war. At this point, when deciding who should decide, rather than at the point of making up out of whole cloth discretionary principles of non-decision, must the weight of "separation of powers" argu-

ments be measured. It it true that the Framers believed we should speak with one voice on these questions, no matter whose voice that turned out to be? Or is it more likely that the constitutional document is the more honored by the view that the successive consideration by all the councils of the nation should be available?[161] And if the seriousness of these questions has not led the Court to postpone, avoid, or defer decision upon some ground generally applicable to constitutional cases, then, taking it as given by this preliminary "decision to decide" that some concern of private right is inevitably involved, in which a decision one way will adversely affect an interest the law recognizes in the general run of cases, there is evidence that the Court was intended to have the power to delimit the sphere of executive discretion by imposing limits not only as to the matters on which he might decide, but as to the content of the decisions he might make within these bounds.[162] One would, that is, require some more explicit evidence than the document offers of a constitutional commitment of the power to decide in any way whatever before holding that the Court may not inquire into the propriety of executive action. Not only is such evidence lacking, but the cases in which the Court has reached and decided questions of foreign relations, even those involving the "war power," point in the opposite direction. Just as there is no "political question" doctrine in the broad, unprincipled sense urged by some, so there is no "war power" in the sense of a generalized grant of authority to the executive branch. The text of the Constitution, with its detailed description of the powers of the Congress over foreign and military affairs,[163] the Federalist papers, with their discussion of the principles back of this enumeration,[164] and the case law[165] militate against the claim that there is a "war power."

Consider now, as an alternative, the case not of a civil plaintiff, but of a criminal defendant or habeas corpus litigant. What of a selective service registrant who seeks to challenge the legality of the war in which he is conscripted to fight, who refuses induction and thereby makes himself subject to criminal prosecution? And what, in the same breath, of the soldier who refuses an order to get on a ship bound for a war the legality of which he challenges,

---

161 *See* SEL. SERV. L. REP., Practice Manual ¶ 2329 at 1140.

162 *See generally* WECHSLER, *supra* note 5, at 4-15; HART & WECHSLER, *supra note* 8, at 312-40.

163 I refer here to the detailed breakdown in article one of the war-making and army-raising power given to Congress, and the relatively limited grant of authority to the Executive in article two.

164 THE FEDERALIST Nos. 24-29 (A. Hamilton).

165 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

or who is prosecuted for failure to obey an order to shoot a civilian, and who seeks habeas corpus review of his court martial conviction?

Perhaps in some of these cases non-constitutional ripeness poses an issue whether there is a threat of imminent harm to the claimant. One might question in the case of the registrant whether the prospect of harm at the point of induction is real enough that he can litigate it in his criminal prosecution, or must await litigation over a more direct and immediate order to participate in unlawful activity.[166] And as to the international law rights of the Vietnamese nation and people, one must consider the conventional objection that the claimant cannot assert rights which do not "belong" to him.

But assume away these problems for the moment, and leave aside the obstacles discussed above to resolving the issue in favor of the claimant—burden of proof and so on. To refuse to decide the issue upon the ground that it is a "political question" would require hurdling a number of obstacles to non-decision, designedly placed in the path of courts in deciding cases where liberty is at stake. Two principal questions arise.

To begin, it is true that precedent committing to other agencies the determination of issues which may arise in such cases may be said to stand in the way of decision. The World War II judicial review cases, *Lockerty v. Phillips*[167] and *Yakus v. United States*,[168] are examples. But in these, the Court properly declined jurisdiction because Congress had merely limited the federal forums available to test the legality of executive determinations and to challenge the constitutionality of congressional enactments, and there arose no issue of depriving the litigant of a federal judicial hearing of his constitutional claims. Congress has not created such alternative means, and has not imposed such restrictions upon the cases of which we speak here. And in cases challenging the legality of American military involvement in criminal courts, the reasons for not deciding are even less cogent than in the civil case. That is, the courts cannot, save upon the most convincing demonstration of constitutional imperative, both lend their weight to denial of liberty and at the same moment deny the litigant whose liberty is imperiled the opportunity to litigate all legal issues which stand between him and his freedom. "Jurisdiction," as Professors Hart

---

[166] *See* note 12 *supra* and accompanying text.
[167] 319 U.S. 182 (1943).
[168] 321 U.S. 414 (1944).

and Wechsler have said, "always is jurisdiction only to decide constitutionally."[169] And if that is so, there is no "discretion" to refuse to decide. That is, once it appears that a federal court has jurisdiction to decide a class of cases, the Constitution forbids foreclosing determination of the merits of such cases.[170]

Pushing in upon the decision about power to decide in a criminal case is the defendant's right to a judicial forum within which to litigate his federal claim.[171] Obtruding upon every habeas corpus case is the historic view that habeas corpus to test custody is the last refuge of liberty denied, and that the custodian must answer to a court as to what basis there is in law for the detention.[172] Does this assertion mean that the court must in a criminal or habeas corpus case, decide the legality of the international involvement which the defendant or petitioner has declined? Not necessarily. This question has arisen before, and it is surprising that courts have not moved easily from earlier analogous decisions into the discussion of review of American military activity. In *United States v. Coplon*,[173] *United States v. Andolschek*,[174] and *Alderman v. United States*,[175] the assertion was made that certain government documents should not be revealed to the defendant, though they were either essential in the preparation of the defense or contained proof of governmental wrongdoing which might, if explored in an adversary hearing, lead to suppression of certain evidence against the accused and perhaps dismissal of the charges. Rather than demand that the evidence be produced, the Court put the government to the option: disclose or dismiss. A similar option is put to the government in cases involving turnover of prior statements of government witnesses under the Jencks Act and, under the Federal Rules of Criminal Procedure, with respect to other failures to make discovery. If, therefore, the claim of presidential power, pressed earnestly in the cited cases, cannot serve to justify a limited exception to the force of the exclusionary rule, one has a difficult time justifying a limitation upon the duty of the Court to consider the legality of a detention by consideration of all the legal rules which are conceded to be operative under the Constitution, laws and treaties of the United States.

---

169 *See* HART & WECHSLER, *supra* note 8, at 340.

170 *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

171 *See* HART & WECHSLER, *supra* note 8, at 323-25. *See also* United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820).

172 *See* notes 65, 108 *supra*.

173 185 F.2d 629 (2d Cir. 1950).

174 142 F.2d 503 (2d Cir. 1944).

175 394 U.S. 165 (1969).

This determination does not necessarily involve the Executive in litigating the validity of its claim to possess lawfully the power it exercises in conducting a war: it says only that so long as the Executive stays out of the federal courts, its "right to be let alone" is perhaps arguable, but when it comes into court it must be bound by the rules fashioned by the judiciary and the Congress for the protection of litigants' rights.

If there is a discretion not to decide, this is it: dismissal of a criminal case when the executive refuses to litigate the validity of its claim of power, and release from custody of a habeas petitioner when the executive resists inquiry into all the provisions of the "Constitution, laws and treaties," which the habeas corpus statute requires be inquired into when custody is challenged.

IV. Conclusion

The view of judicial review put forward here is surely not novel. Indeed, one hesitates to enter into a field so well plowed by others. It seems important, though, 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 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.

The notion that the President and his advisors have a broad, sweeping and arbitrary power to enforce the laws, or conduct military affairs, in any way they see fit is gaining increasing currency. This notion is aided, abetted and eventually given credence by a generalized and undifferentiated "deference"—which amounts in reality to capitulation—to assertions of executive power. In reality, if one examines the case law and history of judicial review, deference has been a burden-shifting and burden-building device. The litigant with a claim against a coordinate branch must carry the argument, bear the risk of non-persuasion and be able to convince by an appropriate quantum of proof. These rules may also at times be phrased as rules of ripeness or exhaustion, requiring the factual and legal picture to be filled in with considerable detail before the Court commits itself. This is the form which deference may permissibly take. To refer to an absolute refusal to decide, grounded in no explicit constitutional command, as "deference," is to misdescribe what is in fact surrender.

It is all very well, in this connection, to speak of "the people" as the ultimate guardian of principle in such a case, and perhaps

to so regard them is appropriate when justifying non-decision of broad-scale affirmative declaratory judgment or injunction suits addressed to large questions of national policy. But "the people"—this same undifferentiated mass—had historically, unmistakably and, at times, militantly insisted that when executive power immediately threatens personal liberty, a judicial remedy must be available.[176] This remedy need not, it has been thought, await the outcome of any election. Far from bespeaking a sensitive regard for a coordinate branch, therefore, judicial abdication in such cases contributes to the erosion of the formal structural guarantees which the Constitution codified. That these guarantees are eroding is evident from many events, and the reasons why have been commented upon. But for the Court to contribute to their erosion is, while understandable, not justifiable in terms of the principles of decision which are the Court's to keep.

---

[176] R. SOKOL, FEDERAL HABEAS CORPUS 3-18 (1969).