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Presidential War-Making Power: A Political Question

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THE history of the United States is fraught with controversy as to the competing domains of President and Congress to commit military forces abroad for the purpose of conducting hostilities. The controversy reached a climax during the Vietnam debacle, but even that dreary episode and the congressional attempt to curb presidential power as a consequence thereof hardly can be said to have solved the constitutional dilemma. To those of simplistic mental bent the answer is cryptic and crystal clear. The use of armed force abroad is a power granted to the Congress through that body's constitutional power to declare war. Nevertheless, the Korean and Vietnam ventures, both major conflicts, were carried on with no congressional declaration of war. Moreover, considerably more than one hundred military ventures of lesser intensity have been conducted without congressional authorization.

History then, if not the Constitution, would appear to justify what might be termed presidential warmaking. Jurists, statesmen, and politicians have found constitutional justification for the use of armed force abroad based solely upon presidential initiative. Others have disputed such assertions with vehemence, and have sought a constitutional answer from the federal courts. No clear-cut answer has been forthcoming.

I. THEORETICAL VIEWPOINTS

The use of force abroad by the President without proper congressional authorization or as a transgression of international law may well be considered a political question. The fact that the federal judiciary does not decide political questions has long been established, for the notion is prevalent that certain matters are entrusted by the Constitution to the political departments of government (that is, to the executive or legislative branches) and thus fall outside of the judicial province. This reticence...
may seem anomalous to one familiar with the principle of judicial review as espoused by Chief Justice John Marshall in the celebrated case of *Marbury v. Madison.*\(^1\) According to Marshall, the judicial power extends to cases and controversies arising under the Constitution, the laws, and treaties of the United States.\(^2\) When judicial interpretation of these legal instruments becomes requisite, it behooves the courts to act, not to relinquish their authority. Nevertheless, such abandonment may occur if the question is deemed political, although the decision as to judicial abstention rests finally with the courts.\(^3\)

What is a political question? No truly clear-cut definition has emerged that would permit accurate prediction. The political question doctrine, according to one writer, is “in a state of some confusion.”\(^4\) Another has proclaimed that “there is little agreement . . . [as to] its constitutional basis; whether abstention is required or optional; how the courts decide whether a question is political; and which questions are.”\(^5\)

In comparing decisions of the Supreme Court in the political question field, each appears to be ad hoc in nature, applicable to that case and state of facts only. Certain theories and explanations, however, do exist as to the meaning of the political question. One explanation asserts that gaps or lacunae exist in the law, and when no rules are present upon which a decision can be based, the courts have no power to decide. They are not empowered to create policy.\(^6\) Resort to this argument is still made at times in discussing the difference between political and juridical questions in the international legal sphere.\(^7\) Today, however, the assertion is viewed as too simplistic and based on an out-of-date philosophy that viewed the judges as powerless to formulate law.

1. 5 U.S. (1 Cranch) 137 (1803).
2. U.S. CONST. art. 3, § 1. In *Marbury* Marshall went on to say, however, that the President was “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.” 5 U.S. at 165-66.
5. L. Henkin, Foreign Affairs and the Constitution 210 (1972). See also Schwartz & McCormack, The Justiciability of Legal Objections to the American Military Effort in Vietnam, 46 TEXAS L. REV. 1033, 1042 (1968), in which the authors assert that the term “political question” is merely a label that the courts apply after a decision is made that the matter at issue should be determined solely by a political department. Another writer says that there is in reality no such thing as a political question. It is only “a cluster of disparate legal rules.” Tigar, supra note 3, at 1135.
6. Field, supra note 3, at 512; see Scharpf, supra note 3, at 555-58.
A more acceptable rationale views the political question doctrine as a facet of the constitutional principle of the separation of powers. When the Constitution expressly or impliedly commits the exclusive power of decision over a subject matter to a political department of government, that matter is not within the judiciary's province for determination. If a court were to decide such a case, it would be guilty of usurpation of power, thereby violating the separation of powers doctrine. This theory permits the judiciary to abstain from deciding a claim only when the power of judicial decision is denied by the Constitution.8

Other jurists take a broader viewpoint. While not questioning the view that courts should abstain constitutionally when the issue has been committed to the autonomous decision of the President or the Congress, a court nevertheless might refuse to hear the case for prudential or functional reasons.9 These reasons permit a certain discretion and flexibility by a court when it is called upon to consider the avoidance of a judicial determination on the merits. Still another approach would allow forbearance on functional grounds. Here the court succumbs to certain practical factors from a judicial point of view, such as problems involved in gaining access to the information or the lack of judicially manageable standards for decision.

Professor Louis Henkin, in researching the political question doctrine, admits that a constitutional commitment for autonomous decision by a political department demands court abstention. Nevertheless, he finds that courts, in effect, do decide the political question cases, particularly in the foreign relations area, by concluding that the conduct of the political department involved was constitutionally within its power.10 In other words, the court decides that the executive or legislative branch was correct in its assessment that the matter was a political question with which the court could not interfere.

Portions of all of these theories pervade the Supreme Court decisions relating to political questions. In Baker v. Carr11 Justice Brennan wrote that political question cases are those concerned with "the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States."12 He

12. Id. at 210.
proposed the following factors for consideration in making a determination of a political question:

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 for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.13

This Supreme Court statement seems to establish three theoretical strands. The first is the constitutional commitment strand, which takes into account the constitutional duty of the courts to decide all cases and controversies arising thereunder unless the Constitution itself grants autonomous determination to another political department. The second two elements of the Brennan test (i.e., lack of judicially discoverable and manageable standards, or involvement of the judiciary in nonjudicial policy determinations) deal with functional standards and the functional approach. The last three factors (a lack of respect for the executive or legislative branch, the need for complete adherence to an already made political decision, or possibility of conflicting pronouncements on one question) are prudential in character, permitting court refusal to pass on the merits when not deemed circumspect.14

Given these criteria, the question arises: must a court abstain on political question grounds when cases question the legality of presidential use of force abroad, either because of a violation of international law or treaty, or because of a lack of congressional consent?

II. CONSTITUTIONAL COMMITMENT

Baker v. Carr lists as the first element of a political question the textually demonstrable constitutional commitment of the issue to another branch of government. This mind-boggling, tongue-twisting phrase gives one pause. We can agree that if the Constitution does in fact give the sole and autonomous decision over a matter to another department, then the courts should refrain from interference. To do otherwise would result in a violation of the doctrine of separation of powers. But the problem remains whether or not there is such a commitment. The Constitution is by no means clear in declaring when the court may be ousted from all power of judicial review

13. Id. at 217.
14. See G. Gunther, Constitutional Law, Cases & Materials 1688-89 (10th ed. 1980); L. Tribe, supra note 4, at 71 n.1. But see DaCosta v. Laird, 471 F.2d 1146, 1153 & n.12 (2d Cir. 1973), in which the court believes that the only strand that permits abstention because of a political question is the constitutional strand; the court therefore has no discretion to refuse to hear the case on prudential grounds.
as a result of a delegation of power to another department. Usually the power is simply granted by the Constitution, and for the most part the court has little hesitancy to exercise its judicial authority to decide the case at hand without invoking the political question idea.

The dilemma is highlighted by noting that even the most respected authority can reach erroneous conclusions in finding commitment to a political branch. Professor Herbert Wechsler, writing before the decision in *Powell v. McCormack*, opined that commitment was explicit as to certain constitutional provisions. He gave two examples: convictions after impeachment, which are given by article I, section 3 solely to the Senate to try, and the seating or expulsion of members of Congress by each House of the Congress, as permitted by article I, section 4 of the Constitution. Nevertheless, in *Powell* the Supreme Court concluded that there was no constitutional commitment of autonomous determination to the House of Representatives in its refusal to seat a member. In reaching this decision, the Court drew upon language of the Constitution and the intent of its framers, as well as fundamental principles of representative democracy believed to be implicit in the Constitution.

In *Baker* Justice Brennan recognized that the question of constitutional commitment was "itself a delicate exercise in constitutional interpretation and is a responsibility of this court as ultimate interpreter of the Constitution." Unfortunately, no extant Supreme Court interpretation clearly defines the constitutional commitment as to presidential use of force abroad without congressional authorization or in violation of international obligations. Authorities have discussed the matter. Many agree that resort to war or sustained hostilities on a large scale and of extensive duration should not be undertaken by an autonomous determination by the President, but rather may be resolved by judicial decisions.

Arguments of justiciability are often based on the bland statement that the Constitution expressly grants to the Congress the power to declare war. Because the power is vested in the legislative, not the executive, branch, the judicial power is called on to decide the constitutional question of sep-

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15. Strum points out that a court can always find a textually demonstrable commitment or even a judicially manageable standard if it so desires; if its desires are otherwise, it can fail to find the commitment or standard. P. STRUM, supra note 3, at 63.
18. *Id*.
aration of powers and prevent unconstitutional usurpations of authority.\(^{24}\) Moreover, the Court has decided cases of conflict in the exercise of legislative and executive power as well as the bounds of executive power under the Constitution.\(^ {25}\) The famous case of *Youngstown Steel & Tube Co. v. Sawyer*\(^ {26}\) is one example. The *Steel Seizure* case occurred during the Korean conflict, but the prime issue was not presidential use of force in Korea without congressional authorization. Rather, the focus of the case was on the presidential seizure of the steel mills occasioned by a domestic labor dispute and a takeover of private property without congressional authorization. An apt analogy can be made to a separation of powers violation. Still, the *Steel Seizure* case hardly can be considered precedent for presidential use of force abroad. True, the Court did see fit to intervene in this allocation of powers issue, and it has seen fit to act in other such instances.

On the other hand, the Court has adopted a hands-off attitude in such power struggles in certain instances. For example, article V of the Constitution has been held to grant exclusive power to the Congress over the amendment of the Constitution.\(^ {27}\) The Court also has consistently believed that the constitutional guarantee of a republican form of government to the states is a political question.\(^ {28}\) Furthermore, in *Goldwater v. Carter*\(^ {29}\) four Justices concluded that the President's power to terminate a treaty without congressional approval was political in nature.\(^ {30}\) None of these issues is expressly committed to a political department.

The courts have seen fit to hear a number of cases involving possible infringements of international law and treaties and have held that the Constitution does not forbid their breach by the President or the Congress. In these cases the courts have not treated the breach as a political question requiring abstention for reasons of textual commitment or otherwise. To

\(^{24}\) Velvel, *supra* note 22, at 482.

\(^{25}\) *See*, e.g., *United States v. Belmont*, 301 U.S. 324 (1937); *The Pocket Veto Case*, 279 U.S. 655 (1929); *Missouri v. Holland*, 252 U.S. 416 (1920); *Missouri Pac. Ry. v. Kansas*, 248 U.S. 279 (1919); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). This has been particularly true when personal rights are involved. *See*, e.g., *Reid v. Covert*, 354 U.S. 1 (1957); *Korematsu v. United States*, 323 U.S. 214 (1944). Schwartz and McCormack point out that the two basic issues in the Vietnam conflict were the constitutionality of the use of force without congressional authorization and the violation of treaty obligations. Schwartz & McCormack, *supra* note 5, at 1041-45. These were said to be questions of construction and interpretation that the Court had long considered to be outside the realm of the political question. *Id.*

\(^{26}\) 343 U.S. 579 (1952).

\(^{27}\) *Coleman v. Miller*, 307 U.S. 433 (1939).


\(^{29}\) 444 U.S. 996 (1979). In *Goldwater* the Court ordered the district court to dismiss Senator Goldwater's complaint challenging President Carter's authority to terminate the Panama Canal Treaty. *Id.*

\(^{30}\) *Id.* at 1002 (Rehnquist, J., concurring). Chief Justice Burger and Justices Stewart and Stevens joined in the concurrence. Justice Brennan was the only Justice reaching the merits. *Id.* at 1006. Justice Brennan believed that the case was justiciable and that no political question was involved, but at the same time he set forth the opinion that the President alone was empowered constitutionally to act to terminate the treaty with Taiwan through his power of recognition and withdrawal thereof. *Id.* at 1007.
the contrary, the issue has been decided on the merits, and the political department is held to have been acting constitutionally in failing to observe the international obligation. The courts reason that such power over foreign affairs has been granted to the department. Decisions taken by the political department within its constitutional authority, therefore, have not been considered to be invalid domestically, even though they may be invalid at international law.31

The Prize Cases,32 in which the President’s right to institute a belligerent blockade without a congressional declaration of war was held constitutional, illustrate the type of political question that the Court has not abstained from deciding. In The Prize Cases the Supreme Court held that the existence of war (here the Civil War) may be recognized by the President in advance of congressional declaration, and that he may take action such as the establishment of a belligerent blockade that in time of peace he would not be constitutionally empowered to institute. Indeed, the Court seemingly recognized a complete and unlimited power to defend and make war against invasion by a foreign power or rebellion. The court painted in the following broad strokes:

By the Constitution, Congress alone has the power to declare a national or foreign war. . . . The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the [armed services and the militia of the several states when called into actual service]. He has no power to initiate or declare a war either against a foreign nation or domestic state. . . .

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be “unilateral.”33

The Court went on to recognize that determining when an invasion or rebellion amounts to war is within the President’s purview, as is authorizing the defensive measures necessary to meet the challenge. In this respect the Court stated:

Whether the President, in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. . . . The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under

31. Moore, supra note 9, at 643-45; Schwartz & McCormack, supra note 5, at 1042; Tigar, supra note 3, at 1155-57. See generally L. Henkin, supra note 5.
32. 67 U.S. (2 Black) 635 (1863).
33. Id. at 668-69.
the circumstances peculiar to the case.\footnote{Id. at 670 (emphasis in original).}

The First Circuit in the case of \textit{Massachusetts v. Laird}\footnote{451 F.2d 26 (1st Cir. 1971).} provided some insight into the commitment factor in relation to the presidential deployment of forces in Vietnam. The question before the Court was whether the United States involvement in Vietnam was constitutional in the face of a lack of a declaration of war or an explicit ratification by the Congress. After stating that it would not rely on prudential or functional factors, the court directed its attention to the factor it considered dominant: the textually demonstrable commitment of the issue to a coordinate political department. The court found no express wording emanating from the Constitution to answer the commitment problem; thus, a constitutional interpretation involving a construction of the constitutional framework was in order.

In an earlier part of the decision the court acknowledged Congress's power to declare war independent of presidential cooperation. Moreover, the court noted that the executive could repel attack without the consent of Congress. Beyond these two instances of independent power the constitutional scheme was thought to envision a joint war-sharing power between the two branches of the government. Furthermore, no answer was given by the Constitution regarding the employment of force to engage in hostilities in the absence of a declaration of war. Nevertheless, the court pointed out that the founding fathers understood that hostilities could be conducted in the absence of a declaration of war or sudden attack. Although the congressional power of declaration might imply a negative that no other branch was empowered to act, the court refused to find a more general negative that without such declaration Congress could not support hostilities beyond repelling an attack. To bolster this position the court turned to article I, section 8, the constitutional power of the Congress to grant letters of marque and reprisal. According to the court, such an express grant would not have been necessary if it were dependent only upon a declaration of war; thus, the founders must have intended to give Congress the power to authorize hostile action even in time of peace. The court cited the old case of \textit{Bas v. Tingy},\footnote{4 U.S. (4 Dall.) 37 (1800).} which had legitimized a congressionally authorized but undeclared war by observing that an enemy could exist, even without a declared war.

With respect to the textual commitment problem, the court then went on to say:

\textit{As to the power to conduct undeclared hostilities beyond emergency defense, then, we are inclined to believe that the Constitution, in giving some essential powers to Congress and others to the executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation.}\footnote{451 F.2d at 33.}
In effect the issue was adjudicated on the merits. The matter of undeclared use of force beyond emergency defense is delegated to both political branches. As long as they share their power in harmony and over a prolonged period, the Constitution has not been breached. The case, then, illustrates that type of political question where the court decides, but finds that the Constitution is not violated. The political department or departments are held to be acting within their delegated constitutional powers.

The court did not resolve how it would rule if, in the absence of declaration and beyond repelling attack, the two branches were not mutually supportive, stating only that "[s]hould either branch be opposed to the continuance of hostilities . . . and present the issue in clear terms, a court might well take a different view." Although a dictum, this statement would make us believe that in those instances in which the President has conducted hostilities without congressional support over a long period of time and in an instance not involving emergency defense, the court might well hear the case and deny the existence of any political question impediment.

III. THE FUNCTIONAL DIMENSION

The second dimension of the political question doctrine, according to Baker v. Carr, is a functional one, the lack of judicially discoverable and manageable standards for resolving the issue as well as the impossibility of deciding without an initial policy decision of a kind not for judicial discretion. Coming to grips with the real meaning of this language is difficult. As to the manageable standards, this factor involves a lack of judicial decisional criteria, relevant data, and possibly the problem of devising effective judicial remedies. Gunther states that this strand "emphasizes the nature of the question and its aptness for judicial resolution in view of judicial competence." For example, in Coleman v. Miller, which among other matters involved the failure of the passage of the Child Labor Amendment within a reasonable time, causing loss of its vitality, the Court stated:

In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified.

The Court also wondered where criteria were to be found for a judicial

38. Id. at 34.
40. G. Gunther, supra note 14, at 1688.
41. 307 U.S. 433 (1939).
42. Id. at 453-54.
determination, for none existed in the Constitution, in a statute, or in the common understanding of the time.

Members of the Court often differ as to the existence or nonexistence of judicially manageable standards. In *Goldwater v. Carter* four members held that the issue of presidential termination of a treaty, the defense treaty with Taiwan, without Senate approval was a political question. Noting that the Constitution was silent as to Senate approval in such a case, the Court said that different termination procedures may be appropriate for different treaties. This would require that the issue be controlled by political standards. Moreover, since the case involved foreign relations, such relations were largely of a political nature. Justice Powell disagreed, finding no lack of judicially discoverable and manageable standards. He said, "Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue." The initial policy for the nonjudicial discretion element seems to overlap with the lack of judicially manageable standards as well as with some of the prudential elements, for if such standards are absent or if multifarious pronouncements would cause embarrassment, the policy decision is left to the political departments. But when is the policy not fit for judicial decision, and just what kind of policy is it that cannot or should not be made by the courts? Justice Douglas indicates not very helpfully in a dissenting opinion in *Massachusetts v. Laird* that if the wisdom of the policy is in issue it is not for a court's determination. The courts often say that they are not concerned with the wisdom of this or that measure with respect to a constitutional interpretation, but this is an easy escape that does little to explain. Courts undoubtedly do make policy decisions, particularly when faced with vague and ambiguous constitutional provisions, and one would hope that wisdom plays some part in them.

To a great extent, courts have regarded foreign relations problems to be policy-making matters within the province of the executive. Even here, though, not all foreign relations issues are regarded as political questions or are viewed as policy matters outside of judicial cognizance. Justice Brennan speaks of this in *Baker v. Carr*, but again we get little guidance as to which of such foreign relations issues are and which are not political questions. He did conclude in his dissent in *Goldwater v. Carter* that the question of whether the Constitution designates a branch of government as the repository of power to make a political decision is constitutional in

44. Id. at 999.
46. Id. at 893.
47. See Wallace, *The War-Making Powers: A Constitutional Flaw?*, 57 CORNELL L. REV. 719 (1972). Wallace points out that the war powers are essentially and inherently of a political nature that makes them difficult if not impossible to bring within the control of the judiciary. See also Scharpf, supra note 3, at 567.
nature. Thus, judicially manageable standards would be present.\textsuperscript{48} This conclusion follows Professor Velvel, who is of the opinion that the question of which branch is the repository of the power to fight a war is a judicial question. He would admit the decision by the properly designated authority to fight or not to fight could be a political question.\textsuperscript{49}

As to the departmental power to commit us to war, Velvel boldly states that the standards are manageable and ordained by the Constitution. This standard he finds in the express wording of the Constitution that grants to the Congress the power to declare war. He also would accept the statements of the founding fathers in the constitutional records that the President may repel sudden attacks without a declaration of war.\textsuperscript{50} The actual decision to repel would be a political question as well. Even so, the President should not be permitted to continue to fight over a period of time, with as much force as he desires, and at his own discretion and political decision. At some point he must obtain from Congress a declaration of limited or general war.

The Second Circuit largely agreed with this thesis in \textit{Berk v. Laird}.\textsuperscript{51} The court held that the constitutional grant of power to the Congress to declare war was intended to restrict the President's power to make war on his own initiative. This provision and others in the Constitution placed a duty of mutual participation on the Congress and the President in the prosecution of lengthy military activities abroad. Thus, the President's conduct of hostilities without significant congressional authorization would be justiciable, and the court could determine that it violated a judicially manageable standard found in article I, section 8. The court said:

If the executive branch engaged the nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for some mutual participation by Congress in accordance with Article I, section 8. But in this case, in which Congress definitely has acted, in part expressly through the Gulf of Tonkin Resolution and impliedly through appropriations and other acts in support of the project over a period of years, it is more difficult for Berk to suggest a set of manageable standards and escape the likelihood that his particular claim about this war at this time is a political question.\textsuperscript{52}

This opinion tells us straightforwardly that the independent use of force abroad by the President over a prolonged period of time without significant congressional authorization should not be considered a political ques-

\textsuperscript{48} 444 U.S. at 1006-07.
\textsuperscript{49} Velvel, \textit{supra} note 22, at 479-80.
\textsuperscript{50} \textit{Id} at 481-82.
\textsuperscript{51} 429 F.2d 302 (2d Cir. 1970). Several cases dealing with the question were decided by the Second Circuit. They are excellently discussed by Wenner, \textit{The Indochina War Cases in the United States Court of Appeals for the Second Circuit: The Constitutional Allocation of War Powers}, 7 N.Y.U. J. OF INT'L L. & POL. 137 (1974).
\textsuperscript{52} 429 F.2d at 305.
tion. The congressional grant of power to declare war presents a judicially discoverable and manageable standard. Still, problems do remain.

Velvel as well as the court in *Berk v. Laird* admit that the President does have some independent constitutional power to repel sudden attacks for a limited period of time.\textsuperscript{53} International legal rules can be and have been formulated stipulating in general what justifies a resort to self-defense. The rules themselves are vague, though, and subject to dispute by international legal authorities. Courts often do decide cases on nebulous rules and conflicting opinions, but their application by a court to decide the constitutionality of a presidential use of force in a claimed exercise of such right of self-defense and without congressional authorization would not be easy. When, for example, is the use of force against attack requisite? Must the attack take place against the actual territory of the attacked state? Against its citizens abroad when their lives are endangered and evacuation appears necessary? Against its armed forces, its ships or its planes? Against the territory of an allied state in a situation of so-called collective self-defense? Of what magnitude must the attack be to warrant self-defense? How imminent must it be? How much force is permissible in meeting the attack?\textsuperscript{54} If presidential self-defense is justified, how long may its use continue without congressional authorization?\textsuperscript{55} These questions present some of the issues for decision, and they seem to be bound up with international political decisions and with those of a military nature. Military and political facts are necessary to resolve them, and such facts and their acquisition usually are not considered to be within the province of the courts.

Justice Sutherland in the *Curtiss-Wright* case\textsuperscript{56} was aware of this dilemma when he noted that the President, not the Congress, can know the condition of affairs in foreign countries better, particularly in time of war. The President has diplomatic, consular, and other officials at his command. Sutherland also was of the opinion that if Congress is not well-situated to know all the facts, certainly the Court is not. Moreover, the efficacy of a judicial remedy is questionable, for a court decision of unconstitutionality might well draw the court into the military and political arena. That fact would necessitate the direction and supervision of the conclusion of the war, a task which a court is hardly equipped to perform. Finally, a court order to the President to terminate the illegal hostilities might bring about presidential defiance of the judiciary, not only embarrassing and weakening the judicial department, but also making the court's order ineffective.\textsuperscript{57} Judicial criteria, even though not completely lacking,

\textsuperscript{53} Velvel, *supra* note 22, at 481.
\textsuperscript{54} On problems associated with the right of self-defense, see A. THOMAS & A. THOMAS, *supra* note 7, at 249-60.
\textsuperscript{55} Moore, *supra* note 9, at 641.
\textsuperscript{56} United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
\textsuperscript{57} Strum is of the opinion that it was more than probable that the President would have disregarded any injunction from the Supreme Court calling the Vietnamese conflict illegal and attempting to terminate hostilities. Strum, *supra* note 21, at 560.
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would be sadly deficient. The Berk decision itself indicates something of the dilemma when it opines that drawing a judicial distinction between offensive and defensive wars would not be easy.

In Berk v. Laird the Second Circuit was able to find that the initial question of congressional participation in the military venture abroad did not lack a judicially discoverable standard. The court held that such standard required mutual participation by the two branches. Left open, however, were: (1) whether congressional participation through express or implied authorizations or ratifications short of a declaration of war was sufficient, and (2) whether judicially manageable standards could be formulated to test the adequacy of the congressional authorizations through resolutions, appropriations, and raising of armed forces for the hostilities, and other legislative acts of support.

In Orlando v. Laird theSecond Circuit reiterated the Berk position that the power to declare war granted to the Congress is a manageable standard requiring mutual executive-legislative participation in the hostilities. Courts, therefore, could decide whether such mutual participation was present. The test for such participation, according to the court, was "whether there [was] any action by the Congress sufficient to authorize or ratify the military activity in question." This test was met by the Gulf of Tonkin Resolution, congressional appropriations for military operations in South East Asia, and the extension of the Selective Service Act with knowledge that inductees thereunder would be sent to Vietnam.

The Orlando court, however, considered the form and substance of the congressional authorization to be a political question. It was a matter of policy constitutionally within the discretion of the Congress and outside the competency of the judicial branch. No intelligible and objectively manageable standards were present that would permit the adjudication of such actions, for they dealt with difficult matters in the field of diplomacy, foreign affairs, and military strategy. Thus, the court concluded, "[the] constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question."

The same court wrestled with the problem again in DaCosta v. Laird. In this case the legality of the implementation of the President's directive ordering the mining of ports and harbors in North Vietnam and the continuation of air and naval strikes against military targets there was at issue. The crux of the plaintiff's complaint was that this unilateral presidential

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59. Id. at 1042.
60. Id. at 1043.
61. 471 F.2d 1146 (2d Cir. 1973). The Second Circuit previously had considered the contention that the repeal of the Gulf of Tonkin Resolution by the Congress removed legislative participation in the war and thus made it unconstitutional. DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971), cert. denied, 405 U.S. 979 (1972). The court was of the opinion that even with such repeal there was legislative action showing mutual executive-congressional participation. 448 F.2d at 1370.
 escalation of the war changed the course of the Vietnam conflict so radically as to make it completely different from that previously authorized and ratified by the Congress. Alternatively, the plaintiff asserted that such authorization and ratification of the war had been ended by the congressional Mansfield Amendment, which called for the termination of military operations there at the earliest possible date. A renewed congressional participation and support had become necessary to make the conflict constitutional. This question of participation, following earlier cases, was not political but, rather, judicial.

The district court agreed and devised a test that would require a determination as to whether the escalation was a foreseeable part of the continued prosecution of the conflict that had been authorized. The Second Circuit, however, thought this was an overly simplified viewpoint, concluding:

Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an "escalation" of the war or is merely a new tactical approach within a continuing strategic plan. What if, for example, the war "de-escalates" so that it is waged as it was prior to the mining of North Vietnam's harbors, and then "escalates" again? Are the courts required to oversee the conduct of the war on a daily basis, away from the scene of action? In this instance, it was the President's view that the mining of North Vietnam's harbors was necessary to preserve the lives of American soldiers in South Vietnam and to bring the war to a close. History will tell whether or not that assessment was correct, but without the benefit of such extended hindsight we are powerless to know.

Thus, an inquiry into the President's domain of tactical and strategic military decisions pursuant to his power as Commander-in-Chief was regarded as a political question. It was admitted that an escalation of the war might well require additional support by the Congress, and if a manageable standard were presented that would permit judicial resolution, a judicial question would exist. But no such standard had been forthcoming in the case.

This decision was followed by Holtzman v. Schlesinger, in which the Second Circuit had before it the constitutionality of the bombing and other military activities in Cambodia after the removal of American forces and prisoners of war from Vietnam. The district court issued an injunction prohibiting such military action. A political question was not thought to be involved, for a basic change in the war had occurred through the with-

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62. 471 F.2d at 1155.
63. Id.
64. 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974).
drawal of forces and the repatriation of prisoners. The change now re-
quired a judicial determination of congressional participation. Such
congressional authority and participation was thought to be a manageable
standard. The district judge then found that authority did not exist for the
Cambodian operation. In the absence of mutual participation by Congress
and the President, the bombing and other military action was illegal. In
reversing and remanding, the Second Circuit could see little to distinguish
the situation from that presented in the *DaCosta* case. Facts to be deter-
dined by the court as to whether the Cambodian bombing brought about
a basic change not within the tactical discretion of the President were said
to be:

precisely the questions of fact involving military and diplomatic ex-
pertise not vested in the judiciary, which make the issue political and
thus beyond the competency of that court or this court to determine.
We are not privy to the information supplied to the Executive by the
professional military and diplomatic advisers and even if we were, we
are hardly competent to evaluate it. If we were incompetent to judge
the significance of the mining and bombing of North Vietnam’s
harbors and territories, we fail to see our competence to determine
that the bombing of Cambodia is a “basic change” in the situation
and that it is not a “tactical decision” within the competence of the
President.66

The decisions of the Second Circuit in *DaCosta* and *Holtzman* present
something of a puzzle. A basic change in the conflict or escalation would
require congressional participation through some sort of authorization and
would not be a political question. At least the Second Circuit has so sug-
gested. Nevertheless, the court has refused to determine whether there has
been such change or escalation, or a new tactical approach within a contin-
uing strategic plan. The matter is a political question, which must be an-
swered by the military and the diplomats. The court’s decisions in these
two cases relate back to the *Curtiss-Wright* case and the notion that foreign
policy and military questions rest within the competency of the executive
and the Congress. Their resolution demands a proficiency that the courts
do not have, but which does exist in the two political branches and their
staffs.

The decisions also suggest that institutional checks other than judicial
restraint exist. Congress can, if it so desires, check the action of the Presi-
dent. If an escalation not to the liking of the Congress occurs, it can cut off
appropriations, institute impeachment proceedings against the President,
and appeal to public opinion through hearings and investigations. Thus
court abstention occurs in such an instance where manageable standards
are difficult at best to come by.67

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66. 484 F.2d at 1310.
67. *But see* Schwartz & McCormack, *supra* note 5, at 1047-48. The authors claim that
an institutional framework, such as that in *Baker v. Carr*, is not capable of correcting what
they believe to be an unconstitutional usurpation by the President. The potential interplay
between the departments is impaired. The executive denies to the Congress its constitu-
The courts have not directed their attention to the problem of judicially manageable standards in relation to infringements of international legal obligations by a use of armed force in foreign ventures, whether dealing with resort to force by the state, with the method by which the hostilities are conducted, or with the potential liabilities of the individual as to his responsibilities in an illegal war. Again, these problems would seem to involve that type of political question where the court does not abstain, but rather recognizes that the political department is constitutionally empowered to breach the international obligation involved.\(^6\) One might reason that if a challenge arose to a presidential commitment of force abroad in contravention of international obligation, the problem of judicially manageable standards would not be insuperable. The judiciary has commonly decided questions of international law and international treaty in controversies that private citizens have brought before the courts.\(^6\) International legal rules do exist, and even if they are nebulous, a court can resort to common law principles and methods.

The international rules are often vague, conflicting, and subject to dispute, particularly with respect to use of force abroad. What constitutes aggression and intervention is not at all clear. Intervention in time of civil strife is not at all settled. United Nations provisions relating to unilateral use of force and self-defense, individual and collective, are disputatious, and their meaning has engendered serious debate. So much disagreement exists on the international level as to the meaning of many rules that a standards problem could well exist. In attempting to delineate the meaning of the rules, a domestic court might well take a different position on an uncertain issue from that taken by other nations.\(^7\)

The situation would not be so difficult in making judicial decisions as to infractions of the laws of war. The United States is a party to a large number of treaties prescribing and proscribing conduct, and these documents set forth sufficient standards for court determination. Obtaining information and facts would not seem to be an insuperable hindrance.\(^7\)

### IV. The Prudential Dimension

The three prudential factors of *Baker v. Carr* express the Court's desire to avoid a clash with the political branch over an action alleged to be illegal, in our case a presidential commitment of force abroad without proper
congressional authorization. These criteria were given cursory treatment by the courts in all of their decisions relating to the Vietnam debacle, but legal writers have not ignored them.

As to the impossibility of independent resolution by the courts without expressing lack of respect due coordinate branches of government, one writer belittles this element with the observation that respect by one department of government by another department of government hardly has been a distinguishing characteristic of the American system.72 Moreover, no disrespect is shown to a branch of government by making a constitutional decision as to that branch's powers, for that is the court's duty, even if its interpretation is not in accord with that of the other department.73 Justice Douglas notes in his dissent in Massachusetts v. Laird, "It is far more important to be respectful to the Constitution than to a coordinate branch of government."74 Velvel points up the fact that where the executive and Congress disagree over the authority to authorize a war, the courts would show respect for Congress and its constitutional power in making a decision of presidential unconstitutionality. No disrespect would be shown to the President, for if that were the case, then disrespect would be shown each time the court has struck down a presidential action as outside constitutional bounds.75 One must remember that the court has on occasions addressed itself to the powers of the President vis-à-vis the Congress, as well as to his constitutional powers in war and military situations. These criteria, however, seem to be of little importance in a judicial attempt to solve the political question dilemma as to the legality of a presidential use of force abroad.

Is there "an unusual need for unquestioning adherence to a political decision already made?" Some would say that such a factor has no relevance where there is a question of usurpation of constitutional power. This would be particularly true when the matter at issue is concerned with one of the most important decisions a nation might be called on to make, the problem of peace or war. In such an instance finality should not be given to the presidential decision. To do so would endanger the whole constitutional framework.76

Closely related to the need for adherence to a political decision is the final criterion of Baker v. Carr, that is, the potentiality of embarrassment from "multifarious pronouncements by various departments on one question." Just what is signified by potentiality of embarrassment here? If the Court means that embarrassment would result simply because a political branch says that its action is legal and the judiciary disagrees, then the Court argues against its function of interpretation of the law and judicial

72. P. Strum, supra note 3, at 63.
73. Velvel, supra note 22, at 483.
74. 400 U.S. 886, 894 (1970). In Massachusetts v. Laird the Court rejected the State of Massachusetts' attempt to seek an adjudication of the constitutionality of the United States' participation in the Vietnam War. Id. at 886.
75. Velvel, supra note 22, at 483.
76. Id. at 483-84.
Moreover, any embarrassment and difficulties that might arise from a judicial decision on the question of the President's power to engage in hostilities abroad arguably is conjectural at best. Such a decision might well be beneficial. The Court might decide that the President was so empowered. This would extend a legal aura to his actions and bring about a more wholesome public attitude toward the military action. If the Court decided for illegality or unconstitutionality, Congress then might see fit to declare war. This again probably would have a unifying effect on the nation and would elicit a more favorable response from other nations as to the firmness of the United States' resolve. If Congress did not see fit to declare war, then efforts toward a peaceful accord probably would be made and, in such event, loss of life and destruction would cease.

On the other hand, the embarrassment and difficulties that might arise from a Court pronouncement should not be minimized. Professor Henkin admits that adherence to a political decision already made and the embarrassment that multifarious pronouncements could create might well call for judicial abstention of consideration of "issues of war and peace, where a judicial decision . . . could have grave consequences for the national interest in its international relations, where indeed the President might feel compelled to disregard the Court." Courts might refuse, in particular—as in the Vietnam cases—to step into a major confrontation between the President and the Congress to protect the congressional domain when Congress itself can but will not do it.

The need for uniformity of decision and the problem of embarrassment from multifarious pronouncements is easily exaggerated, but dangers do exist when a clash occurs between President and Congress over problems of war and peace. A judicial declaration stating that the United States was acting illegally in resorting to armed force abroad, whether that illegality was caused by a violation of the Constitution or international law or treaty, could have devastating consequences on the continued conduct of hostilities, orderly withdrawal, and any negotiations for a peaceful end of the conflict. The psychological impact on the troops and the population of the nation could be dire. It has been said that a mere declaratory judgment of illegality should have little effect on peace negotiations, and, if it did, the Congress could remedy the problem by a declaration of war. But what if negotiations did break down? And what if Congress did not

77. See generally P. STRUM, supra note 3.
78. Schwartz & McCormack, supra note 5, at 1049-50; Velvel, supra note 22, at 483-85.
79. Schwartz & McCormack, supra note 5, at 1050; Velvel, supra note 22, at 484.
80. A court decision calling the use of force illegal could be mitigated by the type of decree that the court might render. A court ultimatum to get the troops out would not be necessary; rather, the court could use its equity powers to call upon the military to end the conflict with all deliberate speed as it did with respect to school segregation in Brown v. Board of Educ., 349 U.S. 294 (1955). Nevertheless, some court involvement would be necessary and such involvement and supervision in the winding down of foreign fighting would hardly seem to be within the province of the judiciary. Schwartz & McCormack, supra note 5, at 1051-52; Velvel, supra note 22, at 484.
81. Henkin, supra note 10, at 289.
82. Velvel, supra note 22, at 484.
declare war? A judicial declaration of illegality by the Supreme Court of the United States, whether in the form of a declaratory judgment or other remedy, would inevitably tend to strengthen the contender and hinder negotiations for peaceful settlement. And one must always remember that a domestic court decision would be rendered with only one party to the conflict before the court—the United States.83

Similar prudential considerations would tend to make a court wary in deciding on the merits the question of a violation of international law by the use of force abroad. Calling the hostilities internationally illegal could hinder peaceful settlement of the conflict in the same manner as a court declaration of unconstitutionality. The psychological impact on the contending parties and the nation would be profound. On the other hand a court declaration calling certain conduct violative of the long established laws of war would not have such serious consequences. The specific unlawful conduct could be ended. The continuation of the hostilities between the contenders would be little affected.84

V. Conclusion

Judicial review is such a basic and fundamental principle in the constitutional system of the United States that shock was felt during the Vietnam conflict at the refusal of the Supreme Court of the United States to review the legality of the presidential commitment of armed forces. True, the Court in refusing to review did not base its refusal upon the political question doctrine. It either summarily affirmed or denied certiorari of cases coming up to it.85 Nevertheless, the political question doctrine was invoked in the cases, and the Court’s disregard of the problem (other than through certain dissenting opinions) without a reasoned opinion has been criticized.86 Even so a majority of the Court would not introduce itself into what Justice Frankfurter once called the political thicket.87 The Court, in so doing, capitulated in the Vietnam cases and permitted the decision regarding presidential warmaking to be made through the interplay of political forces between the political branches. It refused to pull political chestnuts out of the fire. In effect, the matter was left up to the Congress, which probably had ample power to end the hostilities if it had so desired. The Court stayed out of the international political jungle of war and peace.

Lower federal courts were less timorous, but even they approached the issues soft-footedly and with apparent trepidation. As has been discussed,
the First Circuit in *Massachusetts v. Laird*\(^8^8\) found a presidential use of armed force abroad, when Congress acquiesces, to be constitutional even though no formal declaration has been made. This is not a political question of the type demanding judicial abstention. Rather, it is a political question where the Constitution permits the political departments to act as long as they act in concord.

From other courts of appeals decisions we know that the constitutional requirement demands joint executive and legislative participation in the initiation of prolonged military activities abroad, and that again this is not a political question.\(^8^9\) A formal declaration of war is not requisite. Indeed, the form and substance of congressional authorization is a political question. The cases do not deal with the autonomous power of the President to engage in foreign hostilities other than a recognition of and apparently a restriction of the power to the repelling of sudden attacks.

\(^8^8\) 451 F.2d 26 (1st Cir. 1971).

\(^8^9\) See notes 51, 58, 61, 71 supra and accompanying text.