A Strange Silence: Vietnam and the Supreme Court

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I. INTRODUCTION

Unlike American military operations in Grenada, Panama, and the Persian Gulf, the Vietnam War was neither short nor popular. The Vietnam War continued from the latter part of 1964 into 1973,[1] and during these years the lower federal courts were obliged to consider many suits claiming that the war was unconstitutional. Although every federal court that considered the question held in favor of the Government for one reason or another, the Supreme Court—despite many opportunities—never reviewed any case presenting the question. The Vietnam War and its attendant domestic strife finally ended without a single Supreme Court decision on whether the war was constitutional, or whether the question of constitutionality presented a nonjusticiable controversy. In sum, the Court never said anything at all concerning the Vietnam War.

True, the Court did decide important cases generated by the war. Most lawyers are familiar with the *O'Brien*, *Tinker* and *Pentagon Papers* cases,[2] to mention only significant First Amendment decisions whose facts concerned the war. But the Court declined review of every case presenting claims that the war and conscription in aid of the war were unconstitutional. Denied the privilege of discretionary review, the lower federal courts could not avoid decisions on claims that the war was unconstitutional, but whether these lower court decisions were right was never addressed by the Supreme Court.

Was the war unconstitutional or unlawful? Was conscription during the war unconstitutional or unlawful because it facilitated an unconstitutional war, or because Congress had not declared war? Are the preceding questions nonjusticiable? The Court never answered these questions, nor will these questions be explored here. Rather, the Court's strange silence on these questions is the subject of this

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1. For purposes of this article, the Vietnam War began in August 1964, when North Vietnamese patrol boats attacked an American warship in the Gulf of Tonkin and President Johnson ordered retaliatory bombing of military targets in North Vietnam. MICHAEL MACLEAR, THE TEN THOUSAND DAY WAR 111-12 (1981). Congress then approved the Tonkin Gulf Resolution, which authorized the President "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." Southeast Asia Resolution, H.R.J. Res. 1145, 88th Cong., 2d Sess., 78 Stat. 384 (1964). The first American combat personnel were deployed in South Vietnam in March 1965. MACLEAR, *supra* at 128. The last American combat personnel were withdrawn from South Vietnam on March 29, 1973. *Id.* at 312.

2. United States v. O'Brien, 391 U.S. 367 (1968); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); New York Times Co. v. United States (Pentagon Papers Case), 403 U.S. 713 (1971).

article. Why did the Court choose silence when it had numerous opportunities to address these important questions? The Court's silence on the Vietnam War is a fact, but this phenomenon of continuing willful and enigmatic silence has passed apparently unnoticed by commentators on the war. Because the Court never explained its silence concerning the Vietnam War, the reasons for its silence are necessarily speculative. This exercise in speculation may be informed by an initial review of those lower federal court cases addressing the constitutionality of the Vietnam War, the constitutionality of conscription, and the justiciability of these questions. These Vietnam cases include only those presented to the Supreme Court for review. The cases are presented chronologically and all, save one suit invoking the Court's original jurisdiction, were decided by the lower federal courts.

Vietnam cases presenting no claim that the war was unconstitutional, or no claim that conscription was unconstitutional for facilitating an unconstitutional war, are not included in the case review, for these cases did not present the basic questions. Hence, cases claiming that exemptions and deferments from conscription created unconstitutional classifications denying equal protection under the Fifth Amendment are omitted.[3] Even if a federal court had held that exemptions and deferments from conscription denied equal protection—and no court accepted such claim during the war[4]—the court's decision would not necessarily hold that Congress lacked the constitutional power to

3. Vietnam War inductees unsuccessfully challenged nearly every statutory exemption and deferment from conscription. *E.g.*, United States v. Fallon, 407 F.2d 621 (7th Cir.), *cert. denied*, 395 U.S. 908 (1969) (rejecting constitutional challenge to statutory classifications favoring women, ministers and divinity students, fathers, students, and men older than 26 years); Smith v. United States, 424 F.2d 267 (6th Cir. 1970) (rejecting constitutional challenge to exemption for men employed in war industries); United States v. Valentine, 288 F. Supp. 957 (D. P.R. 1968) (rejecting statutory and constitutional argument that Puerto Rican citizens could not be inducted).

Some black men challenged induction on the ground that pervasive underrepresentation of blacks in the membership of local draft boards was forbidden race discrimination and thus deprived local boards of lawful authority to induct any black registrant. This claim was rejected in two leading cases from the Fifth Circuit, Clay v. United States, 397 F.2d 901 (5th Cir. 1968), *vacated on other grounds sub nom.*, Giordano v. United States, 394 U.S. 310 (1969), and Sellers v. McNamara, 398 F.2d 893 (5th Cir. 1968), *cert. denied sub nom.*, Sellers v. Laird, 395 U.S. 950 (1969) (Justice Douglas, joined by Chief Justice Warren and Justice Marshall, dissented). Although the Court never reviewed the race discrimination claim presented in *Clay* and *Sellers*, the inductee in *Clay*, who was the world heavyweight boxing champion Muhammad Ali, finally prevailed in the Supreme Court for reason of errors relating to his individual claim for conscientious objector status. Clay v. United States, 403 U.S. 698 (1971). On remand to the Fifth Circuit, Clay's conviction for refusing induction was reversed and the prosecution dismissed. United States v. Clay, 446 F.2d 1406 (5th Cir. 1971).

4. After the Vietnam War *and* conscription had ended, a federal district court held that exempting women from conscription denied equal protection to a man indicted for refusing induction; the court dismissed the indictment. United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975). The Ninth Circuit reversed for the reason that the sex-based classification was rationally related to a legitimate government interest, and the Supreme Court declined review. United States v. Reiser, 531 F.2d 673 (9th Cir.), *cert. denied*, 429 U.S. 838 (1976).

In a case decided long after the Vietnam War and conscription ended, the Supreme Court held that requiring only males to register under the selective service statutes did not violate the equal protection component of the Fifth Amendment. Rostker v. Goldberg, 453 U.S. 57 (1981).

conscript, but only that the challenged classifications were impermissibly underinclusive for irrationally excluding persons who should be included.[5] Also omitted from review are cases in which individual litigants sought to escape the consequences of their "civil disobedience" by asserting only their sincere personal beliefs that the Vietnam War was unconstitutional, unlawful, unjust, or immoral. Whether a person's sincere belief that the war or conscription was illegal should provide a defense to civil or criminal liability is a different question than whether the war was unconstitutional. A defense based solely on sincere belief would not require a court to decide the constitutionality of the war but only whether a person's sincere belief excuses liability or defeats the culpability required to impose liability. No federal court accepted a defense of sincere belief in any Vietnam case not related to the conscription of conscientious objectors.[6] For conscientious objectors subject to conscription during the Vietnam War, the Supreme Court held that the statutory exemption applied to "secular" as well as "religious" conscientious objectors, but that the claimant must object to all war, not to particular wars the claimant believed unjust.[7]

The review of cases presenting basic questions concerning the constitutionality of the Government's war policies reveals that the Supreme Court had many opportunities to decide these questions, but all petitions for review were refused. The Court's silence during the Vietnam War denied guidance to the lower courts and denied the American people the Court's considered judgment on the constitutionality of this divisive military conflict.

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5. If a man attacked conscription for the *sole* reason that women are exempted, his equal protection claim does not challenge the power of Congress to conscript persons for military service but challenges only the asserted underinclusive gender-based classification—men *and* women alike should be subject to conscription. If the male plaintiff prevailed on the merits, an appropriate judicial *remedy* for the denial of equal protection might well prohibit conscription of men until Congress decided whether to correct the defective classification politically (1) by extending conscription to women, or (2) by ending conscription of any person. When a plaintiff prevails in an equal protection case, the successful litigant should enjoy the fruits of victory. Hence, the plaintiff disfavored by the invalid classification should ordinarily receive the benefits enjoyed by the favored class as the proper judicial remedy. Because no federal court accepted an equal protection attack on conscription during the Vietnam War, the problems surrounding an appropriate judicial remedy were never addressed.

6. *E.g.*, United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), *cert. denied sub nom.*, Berrigan v. United States, 397 U.S. 909 (1970) (sincere belief no defense to criminal prosecution for vandalizing draft board office); Autenreith v. Cullen, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970) (sincere belief no basis for tax refund); United States v. Boardman, 419 F.2d 110 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970) (sincere belief no defense to criminal prosecution for failing to report for civilian work); United States v. Malinowski, 472 F.2d 850 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973) (sincere belief no defense to criminal prosecution for providing false tax information).

7. Welsh v. United States, 398 U.S. 333 (1970) (statutory exemption applies to both secular and religious conscientious objectors); Gillette v. United States, 401 U.S. 437 (1973) (statutory exemption requires objection to all war; distinction between all war and particular wars does not violate First Amendment).

II. THE VIETNAM CASES

A. *The First Vietnam Case*

The first reported judicial reference to the Vietnam War occurred in *United States v. Mitchell*,[8] decided by a district court in December 1965, approximately nine months after American combat forces were first deployed on Vietnamese territory. In *Mitchell*, a criminal prosecution for refusing induction, the defendant moved to dismiss the indictment on several grounds, among which were claims that conscription was unconstitutional because Congress had not declared war, that the Government was committing war crimes in Vietnam, and that American military activity in Vietnam violated international law and treaties to which the United States was signatory. Many of Mitchell's claims, asserted in this first reported Vietnam case, were presented time and again, in one form or another, to federal courts throughout the Vietnam War.

Mitchell's motion to dismiss the indictment was denied and he was convicted of refusing induction. To Mitchell's defensive claims, the trial court's response is summarized by this statement: "These contentions are wholly without merit and have been repeatedly and consistently rejected by the courts of the United States."[9] The court additionally held that Mitchell lacked standing to assert that conscription unconstitutionally subjected him to combat service in an undeclared war in Vietnam: "Until inducted and ordered to Vietnam, his claim of unconstitutional application of the [Selective Service] Act is premature."[10] Mitchell appealed his conviction to the Second Circuit, which reversed and remanded for retrial solely because the trial court abused its discretion by allowing Mitchell only five days to secure counsel.[11] Mitchell was retried and again convicted.

In *United States v. Mitchell* (December 1966)[12] the Second Circuit decided Mitchell's second appeal, in which he challenged the trial court's exclusion of proffered evidence that American military operations in Vietnam violated treaties to which the United States was signatory and thus rendered conscription unlawful as an adjunct to illegal military activity. The Second Circuit held that Mitchell's evidence was properly excluded because the constitutional power of Congress to provide armed forces by conscription is a "matter quite distinct" from the use of such forces by the President and Congress.[13] Because the power to conscript is unaffected by the alleged illegal use of the armed

8. 246 F. Supp. 874 (D. Conn. 1965) *rev'd*, 354 F.2d 767 (2d Cir. 1966).
9. *Id.* at 897.
10. *Id.* at 898.
11. United States v. Mitchell, 354 F.2d 767 (2d Cir. 1966).
12. 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).
13. *Id.* at 324.

forces, Mitchell's claim that the armed forces were employed in an illegal war was not a defense to refusing induction. Like the district court in Mitchell's first trial, the Second Circuit held, in substance, that a man cannot avoid the criminal consequences of refusing induction by claiming that the armed forces, of which he would become an involuntary member, are employed by the Government to prosecute an unconstitutional war.

The Second Circuit's opinion in *Mitchell* might suggest that a man who had submitted to induction would then have standing to seek a post-induction judicial determination of his rights as an involuntary member of the armed forces engaged in an alleged unconstitutional war in Vietnam. However, the court specifically declined to address the rights, if any, of an inducted member of the armed forces. Because Mitchell had not submitted to induction, the court declared that "we need not consider whether the substantive issues raised by the appellant can ever be appropriate for judicial determination."[14] This statement plainly anticipates something beyond standing as a possible obstacle to judicial review of post-induction claims that the armed forces were engaged in an unconstitutional war in Vietnam, and that such a claim asserted by an inducted member of the armed forces might present a nonjusticiable political question.

The Supreme Court, with only Justice Douglas dissenting, denied review in *Mitchell*.[15] Because Mitchell invoked the Treaty of London, which declares that a war of aggression is a crime imposing individual responsibility on combatants, Justice Douglas believed that Mitchell's conviction and proffered defense presented issues that should be answered by granting review.[16]

The Second Circuit's opinion in *Mitchell* that the power to conscript for involuntary service in the armed forces is separate and distinct from the Government's use of the armed forces in military operations was not supported by reference to any decision of the Supreme Court. The Supreme Court has never decided whether a draftee might avoid conviction for refusing induction with the defense that conscription is itself unconstitutional because it directly facilitates an unconstitutional war. If conscription were held unconstitutional because it facilitates an unconstitutional war, surely a conviction for defying an unconstitutional exercise of congressional power could not stand. Because an unconstitutional penal statute is a nullity, every criminal defendant may assert the unconstitutionality of a penal statute as a defense, thus requiring a judicial decision on the defendant's

14. *Id.*
15. Mitchell v. United States, 386 U.S. 972 (1967).
16. *Id.* at 973-74.

claim. Although the Second Circuit rejected the constitutional defense in *Mitchell*, the case nevertheless presented an issue never specifically decided by the Supreme Court. Mitchell's defense that conscription was unconstitutional for facilitating an unconstitutional war appears neither frivolous nor devoid of substance, but the Supreme Court, save Justice Douglas, denied review.

B. *Other Vietnam Cases*

In *Luftig v. McNamara* (February 1967)[17] the appellant, a member of the United States Army, had sought an injunction in the district court against orders requiring him to engage in the Vietnam War. The district court denied relief on alternate grounds that the claim for injunctive relief presented a nonjusticiable political question and that the United States had not consented to the suit, which was "in essence" against the United States.[18] The District of Columbia Circuit affirmed on both grounds.[19]

The *Luftig* opinions in the district court and court of appeals do not reveal whether the plaintiff-appellant was an enlistee or draftee, or whether he had actually received orders to Vietnam or was seeking injunctive relief against future orders to Vietnam. Nor does either opinion explain *why* the plaintiff-appellant believed that a federal court should provide relief against present or future orders to Vietnam. All that is clear from the District of Columbia Circuit's opinion is that the district court was "eminently correct" in its grounds for dismissing the suit,[20] and that no question is "less suited" for the federal courts than "overseeing the conduct of foreign policy on the use and disposition of military power," which are matters committed exclusively to Congress and the President.[21] The plaintiff-appellant's constitutional claims in *Luftig*, if any, were not described and could not, in any event, overcome the complete bar created by what the court characterized as a nonjusticiable political question.

The Supreme Court declined review in *Luftig*.[22]

In *Mora v. McNamara* (February 1967),[23] a case apparently similar to *Luftig*, the district court had dismissed the plaintiff-appellant's claim in an unreported decision, and the District of Columbia Circuit held the appeal in abeyance pending resolution of the appeal in *Luftig*. When the court affirmed and entered judgment in *Luftig*, the

17. 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967).
18. Luftig v. McNamara, 252 F. Supp. 819 (D. D.C. 1966), *aff'd*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967).
19. *Luftig*, 373 F.2d at 665.
20. *Id.*
21. *Id.* at 666.
22. Luftig v. McNamara, 387 U.S. 945 (1967).
23. 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967).

court summarily affirmed the district court's dismissal of the complaint in *Mora*.[24] And like *Luftig*, the Supreme Court declined review in *Mora*,[25] though not without dissents. Justices Stewart and Douglas each dissented in a separate opinion joined by the other. The facts of *Mora*, concealed by the unreported district court opinion and the summary affirmance by the court of appeals, are revealed only in Justice Stewart's dissenting opinion. Mora and his fellow plaintiffs were Army *draftees* ordered to a replacement station for shipment to Vietnam, at which time they filed suit to invalidate their orders for the reason that American military activity in Vietnam was "illegal."[26]

Justice Stewart observed that *Mora* presented "questions of great magnitude."[27] Is American military activity in Vietnam a "war" within the meaning of the constitutional text granting to Congress the power to declare war? If so, may the President order these draftees to participate in this "war" when Congress has not declared war? Of what relevance are present treaty obligations of the United States? Of what relevance is the Tonkin Gulf Resolution? Are Vietnam military operations within the terms of the resolution? If so, does the resolution represent an impermissible delegation of congressional war power to the unlimited discretion of the President?[28] Recognizing that consideration of these "large and deeply troubling" questions depends on the threshold issue of justiciability,[29] and disclaiming any view on the question of justiciability or the merits of the constitutional claims, Justice Stewart declared that the Court should nevertheless grant review: "We cannot make these problems go away simply by refusing to hear the case of three obscure Army privates."[30] In his dissent in *Mora*, Justice Douglas elaborated on points made in Justice Stewart's opinion and concluded that the petitioners in *Mora* "should be told whether their case is beyond judicial cognizance. If it is not, we should then reach the merits of their claims, on which I intimate no views whatsoever."[31]

In *United States v. Hart* (October 1967),[32] a criminal case, the defendant-appellant was convicted for refusing to report to his draft board for assignment to civilian employment after classification as a conscientious objector. On appeal to the Third Circuit, he argued, among other claims, that he could not be ordered to civilian employ-

24. *Id.*
25. Mora v. McNamara, 389 U.S. 934 (1967).
26. *Id.* (Stewart, J., dissenting).
27. *Id.*
28. *Id.* at 934-35.
29. *Id.* at 935.
30. *Id.*
31. *Id.* at 939 (Douglas, J., dissenting).
32. 382 F.2d 1020 (3rd Cir. 1967), *cert. denied*, 391 U.S. 956 (1968).

ment because the Government lacked constitutional authority to conscript men in time of peace. American military participation in the Vietnam War was not, he argued, supported by a declaration of war. In addition, he argued that the constitutional power of Congress to raise and support an army by conscription is dependent on a declaration of war.[33] The Third Circuit rejected this argument in a brief per curiam opinion: "[W]e do not subscribe to the . . . contention that the Board was without power to direct him to report . . . for assignment to civilian work."[34]

The Supreme Court, with Justice Douglas dissenting, denied review of Hart's conviction.[35] In his dissenting opinion, Justice Douglas stated that the Government was unable to cite a single Supreme Court opinion specifically holding that Congress possesses the constitutional power to conscript for the armed forces in the absence of a declaration of war.[36] Hart surely possessed standing to assert that conscription was unconstitutional without a declaration of war, but the Court declined an opportunity to answer an important question of constitutional law not specifically resolved by its earlier decisions.

In *United States v. Holmes* (November 1967)[37] a draft registrant classified as a conscientious objector was convicted for failing to report for civilian work. On appeal, the defendant asserted, among other claims, that compulsory civilian work in lieu military service during *peacetime* was a form of involuntary servitude prohibited by the Thirteenth Amendment. The Seventh Circuit rejected the Thirteenth Amendment defense. Compulsory civilian labor is an alternative to compulsory military service and is justified to preserve "discipline and morale in the armed forces."[38] The congressional power to raise armed forces and preserve their efficiency by requiring alternative civilian labor for conscientious objectors is not limited by the Thirteenth Amendment nor by the absence of a military emergency.[39]

The Supreme Court declined to review the Seventh Circuit's rejection of the Thirteenth Amendment claim in *Holmes*.[40] Justice Douglas dissented by opinion explaining his view that the Court had "never decided whether there may be conscription in absence of a

33. This statement of the claim is taken from the opinion of Justice Douglas, dissenting from denial of review, Hart v. United States, 391 U.S. 956, 958 (1968) (Douglas, J., dissenting).
34. *Hart*, 382 F.2d at 1020.
35. Hart v. United States, 391 U.S. 956 (1968).
36. The Government cited two decisions of the courts of appeals, which the Supreme Court had declined to review. *Id.* at 958. The Selective Draft Law Cases, 245 U.S. 366 (1918), upheld conscription during a declared war.
37. 387 F.2d 781 (7th Cir. 1967), *cert. denied*, 391 U.S. 936 (1968).
38. *Id.* at 784.
39. *Id.*
40. Holmes v. United States, 391 U.S. 936 (1968).

declaration of war. Our cases suggest (but do not decide) that there may not be."[41] If Justice Douglas was correct in this assertion, *Holmes* was another opportunity to decide this important constitutional question.

In *United States v. Butler* (February 1968)[42] the appellant, convicted for refusing induction, argued that conscription was unconstitutional on the day he refused induction, February 4, 1964, because conscription was not at that time *necessary* to meet armed forces personnel requirements. Congress, he argued, could have satisfied armed forces personnel requirements through *voluntary* enlistments by enhancing incentives for military service through increased pay and improved opportunities for education and training. Because conscription represents a substantial deprivation of personal liberty protected by the due process clause of the Fifth Amendment, Congress should have used a "less drastic" means for securing armed forces personnel. The trial court rejected the defendant's proffered evidence that enhanced pay and benefits would provide sufficient volunteers for military service and so preclude the need for conscription.

The Sixth Circuit rejected Butler's constitutional defense. As the court viewed the appellant's constitutional argument, he would have a federal court declare conscription unnecessary and thus unconstitutional if the proffered evidence persuaded the court that there were better or different non-compulsory methods available to Congress for securing armed forces personnel.[43] Relying on a 1954 Fifth Circuit case presenting a similar constitutional argument, the Sixth Circuit held that federal courts lack power to review congressional judgments relating to the military strength necessary for national safety and the methods for securing those forces.[44] The "necessity" of conscription is a decision committed exclusively to Congress.

The Sixth Circuit's rejection of Butler's constitutional defense to his conviction for refusing induction was presented to the Supreme Court, which denied review.[45]

In *United States v. Prince* (July 1968)[46] the appellant was convicted for failing to report for induction. Among other claims, he apparently argued that conscription was unconstitutional because it aided an unconstitutional war. Citing its earlier response to the same defense in *Mitchell*,[47] the Second Circuit held that the appellant could not "successfully defend himself by challenging the use of the selective

41. *Id.* at 938 (Douglas, J., dissenting).
42. 389 F.2d 172 (6th Cir.), *cert. denied*, 390 U.S. 1039 (1968).
43. *Id.* at 176.
44. *Id.* at 177-78 (citing Bertelsen v. Cooney, 213 F.2d 275 (5th Cir. 1954)).
45. Butler v. United States, 390 U.S. 1039 (1968).
46. 398 F.2d 686 (2d Cir. 1968), *cert. denied*, 393 U.S. 946 (1969).
47. United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1968).

service system to raise troops for the Vietnam conflict."[48] The Supreme Court declined review in *Prince*.[49]

In *Ashton v. United States* (December 1968),[50] an appeal from conviction for refusing induction, the appellant apparently argued that conscription was unconstitutional for want of an "emergency or declaration of war." The Eighth Circuit rejected the defense, citing, among other cases, *United States v. O'Brien*,[51] in which the Supreme Court, reviewing O'Brien's conviction for burning his draft card, had stated that the power of Congress to classify and conscript manpower for military service is beyond question.[52] Because O'Brien had not refused induction, nor was he challenging a conviction for refusing induction, the Supreme Court opinion in *O'Brien* does not seem precisely relevant to Ashton's claim. In any event, Ashton also argued the legality of using "draftees in Vietnam and of the Vietnam War itself."[53] Citing the Second Circuit decision in *Mitchell*,[54] the Eighth Circuit held that Ashton lacked standing to present these claims because he had not been ordered to serve in Vietnam.[55]

The Supreme Court declined review of the Eighth Circuit's opinion affirming Ashton's conviction.[56]

In *Simmons v. United States* (January 1969)[57] the appellant argued, among other claims, that his conviction for refusing to report for induction was void because the power of Congress to conscript "during peacetime is subject to the Bill of Rights."[58] The Fifth Circuit replied that its lack of competence to review congressional and presidential decisions providing personnel for the armed forces was "obvious" and required "no further discussion."[59] To the appellant's additional claim that American military participation in the Vietnam War violated treaties, the United Nations Charter, and "norms of international behavior," so that induction would make him a party to "war crimes," the court observed that it was unable to find "any constitutional authority" for judicial interference in matters of foreign affairs committed exclusively to Congress and the President.[60] Citing the Second Circuit decision in *Mitchell*,[61] in which the same argument

48. *Prince*, 398 F.2d at 688.
49. Prince v. United States, 393 U.S. 946 (1968).
50. 404 F.2d 95 (8th Cir. 1968), *cert. denied*, 394 U.S. 960 (1969).
51. 391 U.S. 367 (1968).
52. *Id.* at 377.
53. *Ashton*, 404 F.2d at 97.
54. United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1968).
55. *Ashton*, 404 F.2d at 97.
56. Ashton v. United States, 394 U.S. 960 (1969).
57. 406 F.2d 456 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969).
58. *Id.* at 459.
59. *Id.*
60. *Id.* at 460.
61. United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1968).

was rejected, the Fifth Circuit also held that the congressional power to raise armed forces was independent and distinct from the use of such forces, apparently concluding, like *Mitchell*, that a draftee lacks standing to challenge the use of American armed forces until he has been inducted.[62] Simmons refused induction, so his claim that he would become an unwilling "war criminal" was premature. The Supreme Court declined to review the Fifth Circuit's decision affirming Simmons' conviction for refusing induction.[63]

In *United States v. Fallon* (March 1969),[64] another appeal from a conviction for refusing induction, the appellant argued, among other claims, that conscription without a declaration of war constituted involuntary servitude prohibited by the Thirteenth Amendment. Citing its earlier holding in *Holmes*,[65] the Seventh Circuit again rejected the Thirteenth Amendment claim; the claim "is not founded on either logic or good sense."[66] The Supreme Court declined review in *Fallon*,[67] and so avoided another opportunity to examine the congressional power to raise armed forces by conscription in the absence of a formal declaration of war.

In *United States v. Battaglia* (March 1969),[68] an appeal from conviction for making false statements to a draft board, the appellant argued, among other claims, that the statute proscribing false statements was unconstitutional as applied to him because the United States was engaged in an undeclared war in Vietnam. His defense seemed to proceed on the proposition that a criminal statute designed to facilitate conscription is unconstitutional because conscription is unconstitutional without a congressional declaration of war.

The Seventh Circuit rejected the defense, observing that the appellant had not been ordered for induction, had not been inducted, and might not have been ordered to Vietnam if he had been inducted. Hence, the appellant lacked standing to claim that conscription in aid of the undeclared Vietnam War was unconstitutional.[69]

The Supreme Court, Justice Douglas dissenting without opinion, declined review in *Battaglia*.[70]

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62. *Simmons*, 406 F.2d at 460. Because a statute generally prohibited pre-induction judicial review of selective service classifications and orders for induction, claims that conscription was unconstitutional were presented as defenses to criminal prosecutions charging failure to report for induction. The statute was sustained in Clark v. Gabriel, 393 U.S. 256 (1968), though an exception to the statute was recognized when a local board's action clearly departed from statutory mandates, Oestereich v. Selective Service System Local Bd. No. 11, 393 U.S. 233 (1968).

63. Simmons v. United States, 395 U.S. 982 (1969).

64. 407 F.2d 621 (7th Cir.), *cert. denied*, 395 U.S. 908 (1969).

65. United States v. Holmes, 387 F.2d 781 (7th Cir. 1967), *cert. denied*, 391 U.S. 936 (1968).

66. *Fallon*, 407 F.2d at 624.

67. Fallon v. United States, 395 U.S. 908 (1969).

68. 410 F.2d 279 (7th Cir.), *cert. denied*, 396 U.S. 848 (1969).

69. *Id.* at 284.

70. Battaglia v. United States, 396 U.S. 848 (1969).

In *Kalish v. United States* (April 1969)[71] the appellant sought refund of federal excise taxes paid for telephone service in the amount of $4.92. Kalish asserted that the tax was unconstitutional because Congress imposed it to provide funds for an unconstitutional war in Vietnam. The Ninth Circuit declined to address the constitutional issues for the reason that Kalish lacked standing. Kalish was a federal taxpayer challenging a federal spending program, so he satisfied the first requirement of federal taxpayer standing recognized by the Supreme Court in *Flast v. Cohen*.[72] However, he failed to satisfy the second *Flast* requirement for federal taxpayer standing that Congress had breached a specific constitutional limitation on its taxing and spending powers by enacting the excise tax. The tax statute made no provision for the use of resulting revenues, and the Ninth Circuit would not "probe the legislative history" to unearth an improper legislative motive to invalidate an otherwise valid tax.[73]

The Supreme Court declined to review the Ninth Circuit's decision in *Kalish*.[74]

In *United States v. Pratt* (June 1969)[75] and *United States v. Mulloy* (June 1969)[76] the Sixth Circuit considered simultaneous appeals from convictions for refusing induction. Among apparently identical defenses asserted by Pratt and Mulloy were claims that conscription was unconstitutional and that the Vietnam War was illegal and violated international law. Without further elaboration, the Sixth Circuit rejected these defenses,[77] citing among other federal cases its earlier decision in *Butler*[78] and the Second Circuit's decision in *Mitchell*.[79]

Although the Supreme Court, with Justice Douglas dissenting, declined to review the Sixth Circuit's decision in *Pratt*,[80] the Court did review and reverse the Sixth Circuit's decision in *Mulloy*, but solely for reason that his local draft board had abused its discretion by refusing to reopen Mulloy's classification when he presented evidence supporting a change to conscientious objector status.[81] The Court in *Mulloy* made no reference to any claim that conscription was unconstitutional or that American military participation in the Vietnam War was unconstitutional.

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71. 411 F.2d 606 (9th Cir.), *cert. denied*, 396 U.S. 835 (1969).
72. 392 U.S. 83 (1968).
73. *Kalish*, 411 F.2d at 607.
74. Kalish v. United States, 396 U.S. 835 (1969).
75. 412 F.2d 426 (6th Cir. 1969), *cert. denied*, 401 U.S. 1012 (1971).
76. 412 F.2d 421 (6th Cir. 1969), *rev'd*, 398 U.S. 420 (1970).
77. *Pratt*, 412 F.2d at 427; *Mulloy*, 412 F.2d at 422, referring to *Pratt*.
78. United States v. Butler, 389 F.2d 172 (6th Cir.), *cert. denied*, 390 U.S. 1039 (1968).
79. United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).
80. Pratt v. United States, 401 U.S. 1012 (1971).
81. Mulloy v. United States, 398 U.S. 410 (1970).

In *Velvel v. Nixon* (August 1969)[82] the appellant, a law professor, filed suit as a citizen and federal taxpayer, seeking a declaratory judgment that American participation in the Vietnam War was unconstitutional without a congressional declaration of war. The district court dismissed the complaint for lack of standing, for the reason that the case presented a nonjusticiable political question, and for the reason that the United States had not consented to suit.[83] The Tenth Circuit affirmed, relying only on the plaintiff-appellant's lack of standing. The court held that the appellant had neither established the requisite personal interest in the issue presented nor satisfied either requirement for taxpayer standing recognized by the Supreme Court in *Flast v. Cohen*.[84] The appellant, as a citizen-taxpayer, was not a proper party "to contest the allocation of power between Congress and the President."[85]

The Supreme Court, with Justice Douglas dissenting, declined to review *Velvel*.[86]

In *Kemp v. United States* (September 1969),[87] another appeal from a conviction for refusing induction, the appellant argued, among other claims, that conscription was unconstitutional and that induction would compel him to participate in the commission of war crimes.[88] The Fifth Circuit, citing its earlier decision in *Simmons*,[89] which presented similar claims, rejected Kemp's defenses.[90]

The Supreme Court declined review in *Kemp*, though Justice Douglas dissented.[91] The Court in *Kemp* again avoided an opportunity to decide two important questions concerning the Vietnam War: Does the power of Congress to conscript depend on a declaration of war, and was the Vietnam War an unlawful aggressive war violating treaties to which the United States was signatory?

In *United States v. Owens* (September 1969),[92] another appeal from a conviction for refusing induction, the appellant argued that the illegality of the Vietnam War was a defense to refusing induction. He claimed that conscription facilitated an illegal war in Vietnam which violated treaties to which the United States was signatory. But the Sixth Circuit followed the Second Circuit's decision in *Mitchell*,[93] con-

82. 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970).
83. *Id.* at 237.
84. 392 U.S. 83 (1968).
85. *Velvel*, 415 F.2d at 239.
86. Velvel v. Nixon, 396 U.S. 1042 (1970).
87. 415 F.2d 1185 (5th Cir. 1969), *cert. denied*, 397 U.S. 969 (1970).
88. *Id.* at 1187.
89. Simmons v. United States, 406 F.2d 456 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969).
90. *Kemp*, 415 F.2d at 1188.
91. Kemp v. United States, 397 U.S. 969 (1970).
92. 415 F.2d 1308 (6th Cir. 1969), *cert. denied*, 397 U.S. 997 (1970).
93. United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

cluding that the congressional power to raise armed forces is separate and distinct from the use of armed forces personnel after induction.[94] Because no treaties or laws cited by Owens prohibited Congress from raising armed forces, his claim that the Vietnam War was illegal was both premature and nonjusticiable when offered as a defense to a prosecution for refusing induction. Had Owens submitted to induction, "he might never have been assigned to Vietnam."[95] The Supreme Court declined review in *Owens*.[96]

In *United States v. Rehfield* (September 1969)[97] the appellant was convicted of destroying his draft card. Among other claims, he argued that American military participation in the Vietnam War violated various treaties to which the United States was a party and that the conscription laws were invalid for aiding an illegal war. Citing *Mitchell*,[98] the Ninth Circuit agreed with the Second Circuit that the congressional power to raise armed forces is separate and distinct from the presidential use of the armed forces. Even if the Vietnam War were illegal, that fact would provide no defense for criminal destruction of Rehfield's draft card.[99]

The Supreme Court denied review in *Rehfield*.[100]

In *United States v. Crocker* (January 1970),[101] another appeal from a conviction for refusing induction, the appellant argued that conscription was unconstitutional for the reason that the congressional power to raise "armies" refers only to "professional troops," who are not subject to conscription, while the power to conscript "citizen troops" is governed by the congressional power to "provide for calling forth the militia."[102] According to the appellant, conscription of "citizen soldiers" through the congressional power "to raise armies" unconstitutionally circumvented the "process for calling forth the militia." The power "to raise armies" does not distinguish between war and peace, but the Militia Clause requires that the militia be called expressly to "execute the laws," to "suppress insurrections," and to "repel invasions."[103]

Describing this argument as one based on constitutional history, the Eighth Circuit conceded that it had not been advanced when the Supreme Court first addressed the power of Congress to "raise ar-

94. *Owens*, 415 F.2d at 1313.
95. *Id.*
96. Owens v. United States, 397 U.S. 997 (1970).
97. 416 F.2d 273 (9th Cir. 1969), *cert. denied*, 397 U.S. 996 (1970).
98. United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).
99. *Rehfield*, 416 F.2d at 275.
100. Rehfield v. United States, 397 U.S. 996 (1970).
101. 420 F.2d 307 (8th Cir.), *cert. denied*, 397 U.S. 1076 (1970).
102. *Id.* at 308.
103. U.S. Const. art. I, § 8, cl. 15.

mies" by conscription in the *Selective Draft Law Cases* in 1918.[104] While Crocker's argument was "serious and thoughtful," the Eighth Circuit declared that it could not overturn decisions of the Supreme Court and affirmed the conviction.[105]

The Supreme Court, Justice Douglas dissenting, denied review in *Crocker*.[106]

In *United States v. Leavy* (January 1970),[107] another appeal from a conviction for refusing induction, the appellant argued "a gallimaufry of claims" based on an undeclared war, a treaty and international charters, and the Fifth, Sixth and Thirteenth Amendments.[108] The Ninth Circuit held the claims "premature, without merit, or foreclosed to us,"[109] citing among other federal decisions the *Selective Draft Law Cases*[110] and the Second Circuit decision in *Mitchell*.[111]

The Supreme Court declined review in *Leavy*.[112]

In *Massachusetts v. Laird* (November 1970),[113] possibly the most inventive suit seeking a Supreme Court decision on the legality of the Vietnam War,[114] the state in behalf of its inhabitants invoked the Court's original jurisdiction by suing a citizen of another state, who happened to be Secretary of Defense Melvin Laird. The state, as parens patriae, sought the Court's judgment that American participation in the Vietnam War was unconstitutional for want of initial authorization or later ratification by Congress and requested injunctive relief prohibiting Secretary Laird from ordering any of the state's "inhabitants" to Indochina for combat or in support of combat forces participating in the Vietnam War.[115]

Although the suit was within the Court's constitutional original jurisdiction because a state was a party,[116] the Court's original jurisdiction by statute was not exclusive.[117] After considering the state's

104. Selective Draft Law Cases, 245 U.S. 366 (1918).
105. *Crocker*, 420 F.2d at 309.
106. Crocker v. United States, 397 U.S. 1011 (1970).
107. 422 F.2d 1155 (9th Cir.), *cert. denied*, 397 U.S. 1076 (1970).
108. *Id.* at 1157.
109. *Id.* at 1157-58.
110. Selective Draft Law Cases, 245 U.S. 366 (1918).
111. United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).
112. Leavy v. United States, 397 U.S. 1076 (1970).
113. 400 U.S. 886 (1970).
114. Another case is not merely inventive, it is bizarre. In Perdue v. Supreme Court of the United States, 439 F.2d 806 (9th Cir. 1971), the plaintiffs filed a complaint seeking a declaratory judgment that the Supreme Court be *ordered* to decide whether the Vietnam War was legal! In a short but remarkably temperate opinion, the Ninth Circuit affirmed the district court's unreported dismissal of the complaint, observing that lower federal courts lacked authority to enlarge the Supreme Court's constitutional and statutory jurisdiction to include cases "between private citizens and the [Supreme] Court or Justices of the Court." *Id.* at 807. The plaintiffs in *Perdue* did not seek review in the Supreme Court.
115. This statement of the state's suit is taken from the dissenting opinion of Justice Douglas. *Laird*, 400 U.S. at 886 (Douglas, J., dissenting).
116. U.S. Const. art. III, § 2, cl. 2.
117. 28 U.S.C. § 1251(b)(3) (1988).

motion to file the complaint and the Government's response, the Court curtly declined to exercise its original jurisdiction: "The motion for leave to file a bill of complaint is denied."[118] Three Justices dissented. Justice Douglas asserted that the state had the requisite standing to present the issues, which he considered justiciable. He explained that the questions of standing and justiciability were neither clearly foreclosed by earlier Supreme Court decisions nor were they frivolous and devoid of substance. Justices Harlan and Stewart, unwilling to follow Justice Douglas so far, would have set the case for argument on the questions of standing and justiciability.[119]

[Rebuffed in this effort to secure decisive judicial resolution of the constitutional issues generated by the Vietnam War through an original proceeding in the Supreme Court, the state then sued the Secretary of Defense in a district court, where the complaint was dismissed.[120] Dismissal of the state's complaint was affirmed on appeal to the First Circuit for the reason that American participation in the Vietnam War was the product of "jointly supportive actions of the two branches to whom the congeries of the war power have been committed."[121] This holding suggests that the First Circuit's judgment was that the legality of the Vietnam War was a nonjusticiable political question if Congress and the President were cooperating but could become justiciable if Congress and the President were in opposition respecting the challenged military activity.

Because the plaintiffs did not seek review of the First Circuit's decision in the Supreme Court, it cannot be known if the Court might have considered questions on appeal that it was unwilling to consider directly by exercising its original jurisdiction in *Massachusetts v. Laird*.[122]]

In *Pietsch v. President of the United States* (November 1970)[123] a taxpayer filed suit seeking a judgment declaring that American military participation in the Vietnam War was unconstitutional and enjoining the President and other federal officials from collecting an income tax surcharge enacted by Congress. His complaint was dismissed by the district court. On appeal, the Second Circuit held that the taxpayer's complaint seeking to enjoin collection of the surtax was properly dismissed pursuant to a federal statute.[124] On the separate complaint seeking declaratory and injunctive relief that the Vietnam War was unconstitutional, the Second Circuit held that a taxpayer

118. *Laird*, 400 U.S. at 886.
119. *Id.* at 900 (Harlan and Steward, JJ., dissenting).
120. Massachusetts v. Laird, 327 F. Supp. 378 (D. Mass.), *aff'd*, 451 F.2d 26 (1st Cir. 1971).
121. Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971).
122. 400 U.S. 886 (1970).
123. 434 F.2d 861 (2d Cir. 1970), *cert. denied*, 403 U.S. 869 (1971).
124. 434 F.2d at 862-63.

could not have standing unless he was challenging the expenditure of federal funds to prosecute the Vietnam War. Citing *Flast v. Cohen*,[125] which held that taxpayer standing to challenge federal expenditures required the asserted violation of "specific constitutional limitations" on the congressional taxing and spending power, the Second Circuit held that the congressional war power has never been considered a "specific" limitation on congressional taxing and spending powers.[126] The taxpayer's suit was properly dismissed for want of standing.

The Supreme Court, without dissent, denied review in *Pietsch*.[127]

In *Orlando v. Laird* (April 1971)[128] two Army enlistees in separate suits challenged the orders sending them to Vietnam, claiming that the responsible officials had exceeded their constitutional authority by ordering the enlistees "to participate in a war not properly authorized by Congress."[129]

In an earlier related opinion, *Berk v. Laird*,[130] which involved one of the enlistees whose appeals were consolidated in *Orlando*, the Second Circuit held that an enlistee's claim that orders to combat must be authorized by joint action by Congress and the President was justiciable.[131] Thus, in *Berk*, the Second Circuit held that the constitutional power of Congress to declare war, granted by the War Clause, contained a discoverable judicial standard *requiring* some level of mutual participation by Congress and the President in conducting military operations.[132] The Second Circuit had then remanded *Berk* to the district court to allow the plaintiff-enlistee "to provide a method" by which a court could decide whether action taken by Congress is "sufficient to authorize various levels of military activity" undertaken by the President.[133]

The *Orlando* suit in the district court was held in abeyance pending the Second Circuit's decision in *Berk*.[134] Upon remand of *Berk*, the district judge in *Orlando* held that Orlando's orders to Vietnam were constitutional because Congress had fully authorized the Vietnam War from its earliest stages through conscription and by appropriations to support the war.[135] In *Berk* after remand, the district judge found the requisite threshold joint action between Congress and the President but held that the *sufficiency* of congressional participa-

125. 392 U.S. 83 (1968).
126. 434 F.2d at 863.
127. Pietsch v. President of the United States, 403 U.S. 920 (1971).
128. 443 F.2d 1039 (2d Cir. 1971).
129. *Id.* at 1040.
130. Berk v. Laird, 429 F.2d 302 (2d Cir. 1970).
131. *Id.* at 305.
132. *Id.*
133. *Id.*
134. Orlando v. Laird, 443 F.2d 1039, 1040 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).
135. *Id.* at 1040.

tion required to authorize the President to conduct the war presented a nonjusticiable political question.[136] Orlando and Berk appealed to the Second Circuit, where their appeals were considered together in *Orlando*.

On appeal in *Orlando*, the enlistees argued that the sufficiency of congressional authorization for the war is justiciable because appropriate judicial standards may be derived from the War Clause, which gives only Congress the power to declare war. Congressional authorization manifested only through conscription and appropriations is insufficient; only *explicit* congressional authorization to conduct military operations in Vietnam would be "sufficient" to vindicate the congressional war power, though Congress need not formally declare that America is "at war with North Vietnam."[137]

An additional argument focused on the escalation of military operations in Vietnam over time. The President requested extensions of conscription and ever-increasing appropriations to expand the military operations, effectively placing Congress in a "strait jacket" and compelling surrender of its prerogatives to the President.[138] Beyond asserting that the suits presented nonjusticiable political questions, the Government argued that Congress had "sufficiently" authorized the Vietnam War by approving the Tonkin Gulf Resolution and approving appropriations *expressly* designated for military operations in Vietnam.[139]

The Second Circuit in *Orlando* reiterated its judgment in the earlier *Berk* decision that a justiciable question is presented under the congressional war power when the threshold question is whether Congress has taken "any action . . . sufficient to authorize or ratify" the challenged military operations.[140] But once this threshold test for justiciability is satisfied, the precise form or means of congressional authorization is a nonjusticiable political question: "The form which congressional authorization should take is one of policy, committed to the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions."[141] Citing the Tonkin Gulf Resolution, congressional appropriation of billions of dollars for Vietnam military operations, and congressional extension of conscription to meet military requirements for Vietnam operations, the court found ample evidence that Congress had authorized, ratified, and mutually

136. *Id.* at 1040-41.
137. *Id.* at 1041.
138. *Id.*
139. *Id.*
140. *Id.* at 1042.
141. *Id.* at 1043-44.

participated in the President's military activities in Vietnam, which satisfied the justiciable threshold requirement of participation by Congress.[142] Because congressional participation in the Vietnam War was plainly sufficient, whether Congress must formally declare war was a nonjusticiable political question. If Congress and the President agree to conduct war, a *judicial* holding that such cooperative legislative and executive activity is unconstitutional unless war is formally declared by Congress would be "extremely unwise" and would "constitute a deep invasion of the political question domain."[143] Even without the congressional participation manifested by the Tonkin Gulf Resolution, the Second Circuit concluded that the congressional actions of supplying money and personnel for "protracted" military operations were sufficient to protect the congressional prerogative to declare war.[144]

The Second Circuit affirmed the dismissals of the complaints in *Orlando* and *Berk*, and the Supreme Court denied review, with Justices Douglas and Brennan dissenting without opinion.[145]

Two enlistees ordered to combat duty in Vietnam possess the requisite standing to assert that their orders were unconstitutional because the Vietnam War was not properly authorized by Congress. The Supreme Court nevertheless declined to review their claims and so avoided an opportunity to decide whether the Second Circuit had properly resolved this important constitutional issue when it held that the precise form of congressional authorization for the Vietnam War was a nonjusticiable political question.

In *Perkins v. Laird* (September 1971)[146] the Eighth Circuit also considered a claim that the Vietnam War was unconstitutional because Congress had not declared war. Relying solely on the Second Circuit decision in *Orlando*,[147] the Eighth Circuit held that the claim presented a nonjusticiable political question and denied relief.[148]

The Supreme Court, with Justices Douglas and Brennan dissenting, denied review in *Perkins*.[149]

In *DaCosta v. Laird* (October 1971)[150] a *draftee* ordered to Vietnam, like the enlistees in *Orlando*,[151] alleged that his orders were un-

142. *Id.* at 1042-43.
143. *Id.* at 1043.
144. *Id.* Although Congress had repealed the Tonkin Gulf Resolution before the Second Circuit's decision in *Orlando*, the court explained that repeal merely indicated that the resolution was "no longer necessary" because the President was seeking to end the war, and the "principal issue was the speed of deceleration and termination of the war." *Id.* at 1041 n.1.
145. Orlando v. Laird, 404 U.S. 869 (1971).
146. *Perkins*, an Eighth Circuit decision, was not published but is described in United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972).
147. Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971).
148. *Kroncke*, 459 F.2d at 702.
149. Perkins v. Laird, 405 U.S. 965 (1972).
150. 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972).
151. 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

constitutional because Congress had never declared war against North Vietnam. The district court, relying on the Second Circuit's earlier decision in *Orlando*, granted summary judgment for the Government.[152] On appeal in *DaCosta*, the draftee argued that congressional repeal of the Tonkin Gulf Resolution combined with the efforts in the Senate and House to hasten conclusion of the Vietnam War by adding restrictive amendments to appropriations measures had significantly altered the facts on which the Second Circuit relied in *Orlando* to find a "sufficiency" of congressional action authorizing Vietnam military operations.[153]

The Second Circuit disagreed with the appellant, observing that in *Orlando* it held that congressional appropriations and extensions of the draft for Vietnam military operations were alone sufficient to establish the requisite congressional participation, even without considering the Tonkin Gulf Resolution.[154] Repeal of the resolution reflected a congressional judgment that the resolution was no longer required in view of the President's stated intention to end the war. Although some members of Congress desired to accelerate the President's termination of the war by proposing restrictive amendments on appropriations measures, these amendments were defeated in both the House and Senate. Hence, a majority in Congress supported the President's plan for terminating the war.[155] The Second Circuit did observe that if the President were escalating the war rather than acting to terminate it, then "additional supporting action" by Congress might be required.[156] In sum, the means by which Congress and the President mutually participate in terminating the war presents a nonjusticiable political question no different than the nonjusticiable political question presented in *Orlando* concerning the means by which Congress and the President mutually participated in prosecuting the war.

The Vietnam-bound draftee in *DaCosta* sought review in the Supreme Court, but the Court denied review, with Justices Douglas and Brennan dissenting.[157]

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152. *DaCosta*, 448 F.2d at 1369.
153. *Id.*
154. *Id.*
155. *Id.* at 1370.
156. *Id.*
157. DaCosta v. Laird, 405 U.S. 979 (1972). In his short dissenting opinion, Justice Douglas again stated his view that the constitutional questions are "substantial and justiciable," *id.* His final paragraph, *id.* at 980-81, said:

> While we debate whether to decide the constitutionality of this war, our countrymen are daily compelled to undergo the physical and psychological tortures of armed combat on foreign soil. Families and careers are disrupted; young men maimed and disfigured; lives lost. The issues are large; they are precisely framed; we should decide them.

Id. (Douglas, J., dissenting).

An inductee ordered to Vietnam surely has standing, if any person does, to assert that such military orders are unconstitutional. Even if Congress and the President were mutually participating in terminating the war, that characterization of their joint action does not alter the fact that an inductee ordered to Vietnam might lose life or limb during the process of termination. The Supreme Court nevertheless avoided another opportunity in *DaCosta* to decide whether the Second Circuit had correctly resolved the important constitutional issues presented.

In *United States v. Camara* (December 1971)[158] the appellant, convicted for refusing induction, argued that the Vietnam War was illegal. The First Circuit, citing the Second Circuit's decision in *Mitchell*,[159] held that the inductee lacked standing to present this defense.[160] With Justice Douglas dissenting, the Supreme Court denied review in *Camara*.[161]

In *Sarnoff v. Connally* (March 1972)[162] federal taxpayers whose complaint was dismissed by the district court argued that certain provisions of federal foreign assistance statutes were invalid for delegating the power to wage war to the President without a congressional declaration of war by allowing federal expenditures to support military operations in Vietnam. This argument was rejected by the Ninth Circuit. Plaintiffs who challenge "foreign aid and appropriations aspects of congressional cooperation" in the Vietnam War present political questions that "we decline to adjudicate."[163] To support its holding, the Ninth Circuit cited other Vietnam War cases presenting similar questions from the Second, Fifth and District of Columbia Circuits, all of which had been denied review by the Supreme Court.[164]

The Supreme Court declined review in *Sarnoff*,[165] though Justices Douglas and Brennan dissented in an opinion asserting that taxpayer standing might exist under *Flast v. Cohen*,[166] for the taxpayers in *Sarnoff* asserted that federal funds were used by the President to conduct a war not declared by Congress. Only Congress has the constitutional power to declare war, so federal expenditures for an undeclared war might violate a specific constitutional limitation on the taxing and spending power.[167] To Justices Douglas and Brennan the taxpayer

158. 451 F.2d 1122 (1st Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).
159. United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1968).
160. *Camara*, 451 F.2d at 1126.
161. Camara v. United States, 405 U.S. 1074 (1972).
162. 457 F.2d 809 (9th Cir.), *cert. denied*, 409 U.S. 929 (1972).
163. *Id.* at 809-10.
164. *Id.* at 810.
165. Sarnoff v. Schultz, 409 U.S. 929 (1972).
166. 392 U.S. 83 (1968).
167. *Sarnoff*, 409 U.S. at 931-32 (Douglas and Brennan, JJ., dissenting).

standing issue presented in *Sarnoff* was "important and substantial," deserving review and oral argument.[168]

The next case, *Atlee v. Laird* (August 1972),[169] is unique among all Vietnam cases because it was decided by a three-judge district court whose judgment was subject to mandatory appeal in the Supreme Court by statute.[170] In all other Vietnam cases review was discretionary with the Supreme Court.[171] In *Atlee*, a divided district court held that the Vietnam claims were nonjusticiable and dismissed the complaint. The Supreme Court affirmed.[172] For this reason, discussion of *Atlee* and its significance is deferred to the next section of this article.

C. *The Last Vietnam Case*

This review of Vietnam cases ends with *Holtzman v. Schlesinger* (August 1973),[173] in which a member of Congress and Air Force officers sought an injunction prohibiting the President from bombing Cambodia, claiming that such bombing was unlawful in the absence of congressional authorization. In an unprecedented decision, the district court held that the Cambodian bombing was unlawful for want of congressional authorization and enjoined the President.[174] On appeal by the Government, a divided Second Circuit panel reversed the district court's judgment and dismissed the suit because it presented only nonjusticiable political questions and the plaintiffs lacked standing.[175]

The district court had enjoined the bombing for the reason that its continuation *after* American ground forces were withdrawn from Vietnam and *after* American prisoners of war had been repatriated represented a "basic change in the situation" in terms of the duration of prior congressional authorization, and that the decision to bomb Cambodia was a "tactical decision" not traditionally confided to the

168. *Id.* at 931.

169. 347 F. Supp. 689 (E.D. Pa. 1972) (three-judge court), *aff'd mem. sub nom.*, 411 U.S. 911 (1973).

170. The statute, 28 U.S.C. § 2282, authorized a three-judge court in suits seeking an injunction restraining the enforcement, operation or execution of any act of Congress on the ground that the challenged statute was unconstitutional. The statute was repealed by Congress in 1976. Pub. L. No. 94-381, 90 Stat. 1119 (1976). The plaintiffs in *Atlee* sought injunctive relief against the appropriation and expenditure of funds for prosecution of the Vietnam War, alleging that such appropriations and expenditures were unconstitutional. *Atlee*, 347 F. Supp. at 691.

171. All other Vietnam cases were presented to the Court by petition for discretionary writ of certiorari, except Massachusetts v. Laird, 400 U.S. 886 (1970), in which the Court declined to exercise its discretionary original jurisdiction.

172. Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972) (three-judge court), *aff'd mem. sub nom.*, Atlee v. Richardson, 411 U.S. 911 (1973).

173. 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

174. Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). The district court postponed the effective date of the injunction to permit the Government to seek a stay from the Second Circuit. *Id.* 361 F. Supp. at 566.

175. *Holtzman*, 484 F.2d at 1311, 1315.

President as Commander-in-Chief.[176] The Second Circuit rejected these conclusions because they "are precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary, which make the issue political" and thus beyond a court's competence to determine.[177] Nor would the Second Circuit accept the district court's judgment that withdrawal of American combat forces from Vietnam and repatriation of American prisoners of war had terminated congressional authorization to bomb Cambodia by virtue of the so-called Mansfield Amendment, for "we have no way of knowing whether the Cambodian bombing furthers or hinders the goals of the Mansfield Amendment."[178]

Although the Second Circuit in *Holtzman* held that issues decided adversely to the Government by the district court were nonjusticiable political questions, the court also held that the plaintiff Air Force officers lacked standing because none was "presently under orders to fight in Cambodia."[179] Congresswoman Holtzman lacked standing for the reason that none of the named defendants had denied her any right, as a member of Congress, to vote on bombing of Cambodia. She had fully participated in congressional debates surrounding the Vietnam War, and her vote in the House was "ineffective" only because a majority of her congressional colleagues voted contrary to her views.[180]

The Second Circuit announced its decision in *Holtzman* on August 8, 1973, fully aware that the President had declared that the Cambodian bombing would end on August 15, 1973, as required by the terms of a congressional appropriations bill approved by the President on July 1, 1973.[181] The plaintiffs in *Holtzman* sought review of the Second Circuit's decision in the Supreme Court, but the Court denied review in 1974, long after the case was rendered moot by cessation of Cambodian bombing.[182] The district court's unprecedented injunction prohibiting the President from conducting specific military operations is unique among all Vietnam cases for holding *against* the Government, but prompt reversal by the Second Circuit deprived the district court's judgment of any precedential significance. Although the Supreme Court never reviewed *Holtzman* on the merits, the status of the bombing injunction pending appeal ultimately engaged the full

176. *Id.* at 1310.
177. *Id.*
178. *Id.* at 1312.
179. *Id.* at 1315.
180. *Id.*
181. Affidavit of the Secretary of State, 484 F.2d at 1310 n.1.
182. Holtzman v. Schlesinger, 416 U.S. 936 (1974).

Court in a curious episode originating in disagreement between Justices Marshall and Douglas sitting as Circuit Justices.[183]

III. *ATLEE*: IS THE SILENCE BROKEN?

In *Atlee v. Laird* (August 1972)[184] a three-judge district court held that a class action suit challenging the constitutionality of American participation in the Vietnam War presented a nonjusticiable political question and dismissed the complaint.[185] Upon direct appeal to the Supreme Court, the district court's judgment was summarily affirmed per curiam. With Secretary of Defense Richardson substituted for former Secretary Laird, the Court's summary affirmance in *Atlee v. Richardson*[186] was its first, its last and its only decision pertaining to the legality of the Vietnam War. Three Justices, Douglas, Brennan and Stewart, dissented from the Court's summary affirmance in *Atlee*, stating that they noted probable jurisdiction and would set the case for argument.[187]

While a summary affirmance on appeal to the Supreme Court may have precedential significance, the Court's summary affirmance in *Atlee* cannot and should not be understood as the Court's holding that constitutional claims against the Vietnam War presented only nonjusticiable political questions. The facts and circumstances of the

183. Although the district court in *Holtzman* enjoined the Cambodian bombing, the court postponed the injunction to permit the Government to seek a stay from the Second Circuit, which stayed the injunction pending consideration of the Government's appeal on the merits. Holtzman v. Schlesinger, 484 F.2d 1307, 1308 (2d Cir. 1973). When the Second Circuit stayed the bombing injunction, the plaintiffs applied to Justice Marshall, as Circuit Justice, to vacate the stay and thus stop the bombing pending appeal, but Justice Marshall refused to vacate the stay. Holtzman v. Schlesinger, 414 U.S. 1304 (Marshall, Circuit Justice 1973). After Justice Marshall refused relief, the plaintiffs applied to Justice Douglas, as Circuit Justice, in Yakima, Washington, for the same relief Justice Marshall had denied. Noting unusual circumstances which to him justified a departure from the practice that a second Circuit Justice refers an application for relief once denied by another Circuit Justice to the full Court, Justice Douglas vacated the Second Circuit's stay of the bombing injunction. Holtzmann v. Schlesinger, 414 U.S. 1316 (Douglas, Circuit Justice 1973).

On the day after Justice Douglas vacated the Second Circuit's stay and restored the bombing injunction, the Government applied to Justice Marshall, as Circuit Justice, to stay the *district court's* bombing injunction, which had been restored by Justice Douglas on the preceding day. Justice Marshall then stayed the district court's bombing injunction "pending further order by this Court." Schlesinger v. Holtzman, 414 U.S. 1321, 1322 (Marshall, Circuit Justice 1973). In a final paragraph, Justice Marshall stated that he had communicated with other members of the Court, then in recess, and that all, save Justice Douglas, agreed with his decision as Circuit Justice to stay the bombing injunction. *Id.* Justice Marshall's order noting concurrence by the other Justices effectively converted his order as Circuit Justice to an order of the Court. Justice Douglas then entered an angry dissenting opinion to Justice Marshall's order, complaining that telephone polling of the Justices breached the rule that the "Court always acts in conference and therefore responsibly." *Id.* at 1323-24. The continuing spectacle of two Circuit Justices overruling each other's orders on successive days was avoided when Justice Marshall's order as Circuit Justice indicated concurrence by the full Court, except for Justice Douglas.

184. 347 F. Supp. 689 (E.D. Pa. 1972) (three-judge court), *aff'd mem. sub nom.*, 411 U.S. 911 (1973).

185. *Id.* at 709.

186. 411 U.S. 911 (1973).

187. *Id.*

Atlee litigation considered with related political and diplomatic developments preclude the conclusion that the Court's summary affirmance established that the claims presented in the Vietnam cases were nonjusticiable as a matter of constitutional law.[188]

The *Atlee* case was originally filed in the district court as a class action by plaintiffs asserting standing as "taxpayers, citizens, and voters."[189] They alleged that the Vietnam War violated the Constitution, treaties, and international law, and sought a permanent injunction against expenditure of funds to prosecute the war.[190] In unreported orders, an identical case, *Bernath v. Nixon*, was consolidated with *Atlee*,[191] and the plaintiffs in *Atlee* were expanded through intervention to include three active duty members of the Navy and four draft-eligible minors who faced "possible induction" because of the Vietnam War.[192] When *Atlee* was decided by the three-judge district court, the plaintiffs included persons asserting standing as taxpayers, as citizens, as voters, as active duty military personnel, and as minors subject to possible conscription. In defense, the Government asserted that the plaintiffs lacked standing, that the suit presented nonjusticiable political questions, and that the suit was, in effect, against the United States, which had not consented to suit.[193]

The district court in *Atlee* (and its companion case *Bernath*), with one judge dissenting, dismissed the complaints solely for want of justiciability and never addressed the additional defenses of lack of standing and nonconsensual suit against the United States.[194] Because *Atlee* was decided by a three-judge court, the plaintiffs exercised their statutory right of direct appeal to the Supreme Court. This statutory right of mandatory appeal makes *Atlee* unique among all Vietnam cases, for the Supreme Court review in *Atlee* was obligatory not discretionary. The Court disposed of the *Atlee* and *Bernath* appeals summarily with only two words: "Judgments affirmed."[195] The only judgments affirmed by the Court were the district court's judgments dismissing the complaints. Although the Court surely considered affirmance proper under the circumstances, the unexplained affirmance of the district court's judgments dismissing the complaints should not

188. The Court's summary affirmance of a lower court's judgment is not affirmance of the lower court's opinion. "Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below." Mandel v. Bradley, 432 U.S. 173, 176 (1977).

189. Atlee v. Laird, 339 F. Supp. 1347, 1353 (E.D. Pa. 1972), *aff'd mem. sub nom.*, 411 U.S. 911 (1973).

190. *Atlee*, 347 F. Supp. at 691.

191. Appellants' Jurisdictional Statement at 3, Atlee v. Richardson, 411 U.S. 911 (1973) (No. 72-997).

192. *Id.* at 2.

193. *Atlee*, 347 F. Supp. at 691 & n.3.

194. "In view of the result reached, we consider only the justiciability issue." *Id.* at 691.

195. Atlee v. Richardson, 411 U.S. 911 (1973).

be read as affirming the district court's *opinion* that the issues presented were nonjusticiable. This is especially true since the Government relied on two additional defenses, neither of which was addressed by the district court, and since military and diplomatic events occurring after the district court's decision but before the Supreme Court's affirmance may have rendered the complaints in *Atlee* and *Bernath* moot. In sum, the district court may have reached the "right" result in *Atlee* for the "wrong" reason, or extrajudicial developments may have deprived the Supreme Court of a live controversy requiring a decision on the constitutional issues initially presented in *Atlee*.

The six Justices who joined the summary affirmance in *Atlee* might have concluded, as the Government argued, that the *Atlee* plaintiffs, individually and collectively, lacked the requisite standing to challenge the legality of American military operations in Vietnam. Although the original taxpayer-citizen-voter plaintiffs were joined by active duty members of the military and draft-eligible minors, no plaintiff asserted that he was serving in combat in Vietnam or had orders to Vietnam. Several federal courts had found standing for military personnel ordered to Vietnam, but no court had found standing without such orders. The possibility of future conscription seems to be an insufficient basis for standing to challenge the legality of the Vietnam War because draft-eligible plaintiffs might never be conscripted. And no federal court had recognized standing to challenge the Vietnam War based on a plaintiff's status as a taxpayer, citizen, or voter.[196] If the plaintiffs in *Atlee* lacked standing, which the district court declined to decide, a threshold requirement for federal court jurisdiction was not satisfied and dismissal of the complaints was proper for that reason alone. A federal court need not decide whether a claim is justiciable if the plaintiff lacks standing to present the claim.[197] If the Supreme Court affirmed the dismissal in *Atlee* for the reason that the plaintiffs lacked standing, the unexplained affirmance could not mean that the Court agreed with the district court's *opinion* that the claims in *Atlee* were nonjusticiable. Affirming dismissal for want of standing would leave the question of justiciability unanswered.

The Court's summary affirmance in *Atlee* could also be explained by something other than lack of plaintiff standing. Events occurring after the district court's dismissal of the complaints but before the

196. In a case decided after the Vietnam War ended, the Court held that persons suing only as United States citizens lacked standing to claim that members of Congress holding commissions in the armed forces reserve violated the Incompatibility Clause of the Constitution, U.S. Const. art. I, § 6. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

197. For example, in Baker v. Carr, 369 U.S. 186 (1962), and Powell v. McCormack, 395 U.S. 486 (1969), the Court specifically found standing before it addressed claims that only nonjusticiable political questions were presented.

Supreme Court's summary affirmance may have rendered the issues presented in *Atlee* moot. The district court's judgment of dismissal was entered in August 1972,[198] but the Supreme Court's summary affirmance was not entered until April 2, 1973.[199] What occurred between August 1972 and April 2, 1973? In late January 1973, a Vietnam peace agreement was signed in Paris and a ceasefire ordered.[200] On March 29, 1973, four days *before* the Court's summary affirmance in *Atlee*, the last American combat forces were withdrawn from South Vietnam.[201] These events cannot have escaped notice by the Justices. If the war had ended by April 1, 1973, the questions decided in the district court and preserved by statutory appeal to the Supreme Court had been resolved extrajudicially by diplomatic and political processes. If the war had ended by April 1, 1973, nothing the Court might say after that date on standing, justiciability or any other claim pertaining to the legality of the Vietnam War could adversely affect the interests of the plaintiffs or the Government. The suit in the district court sought to end the war through an injunction prohibiting expenditures to prosecute the war. Approximately seven months later, before the Court's disposition of the *Atlee* appeal, the controversy ceased to exist. What the plaintiffs sought in the district court, cessation of the Vietnam War, had been secured by the Government before the Court decided the appeal. If the Vietnam War had ended by April 1, 1973, no live controversy between the litigants remained for judicial resolution on April 2, 1973; intervening events had rendered the *Atlee* case moot.

Lack of plaintiff standing or mootness might explain the Court's summary affirmance in *Atlee*, but there is another reason for suggesting that summary affirmance should not be regarded as the Court's agreement with the district court's *opinion* that claims against the Vietnam War presented nonjusticiable political questions. What might be described as the doctrine of institutional prerogative should prevent this conclusion. Would the Supreme Court permit the opinion of a divided three-judge district court to represent the definitive resolution of the momentous constitutional and legal questions presented by litigation challenging the legality of American military operations in Vietnam? Merely posing the question suggests the answer, which must realistically be negative.

No federal court speaks with the authority and finality of the Supreme Court. If a majority of the Justices had agreed with the district court's opinion that suits challenging the Vietnam War were non-

198. August 7, 1972. *Atlee*, 347 F. Supp. at 689.
199. 411 U.S. at 911. "April 2, 1973. Judgments affirmed." *Id.*
200. MICHAEL MACLEAR, THE TEN THOUSAND DAY WAR 310 (1981).
201. *Id.* at 312.

justiciable, would they not explain that conclusion for themselves, or at least indicate that the judgment was affirmed for "the reasons stated by the district court?" Some constitutional questions may be resolved, at least temporarily, by the Court's summary affirmance of a lower court judgment, but it is scarcely conceivable that the Court by means of summary affirmance would hold that the entire federal judiciary, including the Court itself, was foreclosed from considering claims that American military operations in Vietnam, or elsewhere in similar circumstances in the future, violate the Constitution because such claims present nonjusticiable political questions. When a court holds that a controversy is nonjusticiable, it surrenders or renounces authority and power it might otherwise exercise to decide the controversy on the merits and establishes precedent for similar controversies in the future. If the Supreme Court believed that claims against the Vietnam War presented in *Atlee* were nonjusticiable, surely the Court would have written a considered opinion explaining why the federal judiciary should *voluntarily* surrender or renounce the power of decision on the merits it might otherwise exercise.

A decision that Vietnam War claims were not justiciable is much different in legal effect than a decision that a plaintiff lacked standing or a decision that the controversy had become moot. A suit dismissed for want of standing does not foreclose future litigation of the same issue by a different plaintiff with the requisite standing, and a suit dismissed for mootness does not foreclose litigation of similar issues in the future when there is a live controversy. A suit dismissed for want of justiciability, as the district court held in *Atlee*, means that the issues presented are not appropriate for judicial resolution now, nor would similar issues be appropriate for judicial resolution in the future if a like situation occurred. In terms of precedential significance, dismissal of litigation for want of standing or for mootness does not address the merits of the controversy, but a decision that the issues are nonjusticiable does establish precedent in that case and for similar cases that might arise in the future.

If the Vietnam War presented nonjusticiable issues, as the district court held in *Atlee*, then a future conflict occurring under similar circumstances in the Middle East, Central America, Africa or elsewhere would also be deemed nonjusticiable. Indeed, a holding of nonjusticiability could be deemed a holding on the merits, though of a different character than a holding that challenged activity does or does not violate a specific provision of the Constitution. A judicial holding that an issue is nonjusticiable presupposes that the plaintiff has alleged the requisite harm for standing and that the controversy remains alive rather than moot. If neither threshold requirement for federal court

jurisdiction—standing and a live controversy—is satisfied, the court, as a matter of logic, should never reach the issue of justiciability. When a federal court reaches the issue of justiciability, must not the court be deciding, implicitly, that the plaintiff has standing and that a live case or controversy is presented? If so, the court is confronted with this issue: Although this plaintiff has alleged the requisite injury for standing and a live controversy exists, is the controversy nevertheless inappropriate for judicial resolution? If the court decides the issue is nonjusticiable, litigants should not expect to secure judicial consideration in similar situations in the future. Conversely, if the court holds that the issue is justiciable, the court must then address the merits of the claim.

Given this analysis of the precedential consequences of a holding of nonjusticiability, can it be thought that the Supreme Court's summary affirmance in *Atlee* reflects its considered opinion that the Vietnam War presented nonjusticiable issues? Considering that the *Atlee* plaintiffs might have lacked standing, a threshold jurisdictional requirement explicitly ignored by the district court, and considering that the case might well have become moot before the Supreme Court summarily affirmed, it is unthinkable that the Supreme Court's affirmance of the *result* in *Atlee* should also be viewed as affirmance of the lower court's opinion that the issues were nonjusticiable. If a citizen involuntarily inducted into the armed forces and ordered to combat duty in Vietnam by the combined powers of the President and Congress does not present a justiciable controversy when he alleges that his death or injury might result from unconstitutional executive and legislative action, that judicial decision is of such transcendent importance for the present and the future that it must finally be made by the Supreme Court, not by summary affirmance of the judgment of a divided three-judge district court. The Court could explicitly accept and adopt the opinion of a lower federal court, but in *Atlee* would it not have said so if the Court agreed that the Vietnam issues presented were nonjusticiable? If the Vietnam cases presented nonjusticiable issues, the Supreme Court, as an institution mindful of its unique role in the American constitutional system and the importance of the claims presented, would not permit the opinion of a district court to stand for the future as the final and definitive judicial statement on these issues.

For the preceding reasons, the Court's summary affirmance in *Atlee*, which seems to decide something about the Vietnam War, should be viewed as deciding nothing about the Vietnam War. The summary affirmance in *Atlee* is no different in precedential effect than the other Vietnam cases in which the court refused discretionary review.

IV. The Court's Strange Silence

The preceding survey of Vietnam cases decided by the lower federal courts, which the Supreme Court declined to review, and the separate discussion of the Court's equivocal summary affirmance in *Atlee v. Richardson*,[202] establish the Court's strange silence on the constitutionality or legality of the Vietnam War. From the Second Circuit's *Mitchell* decision[203] in December 1966 through the same court's *Holtzman* decision[204] in August 1973, twenty-six Vietnam cases from the different courts of appeals were denied review by the Supreme Court. If the Court's refusal to exercise its original jurisdiction in *Massachusetts v. Laird*[205] and its equivocal affirmance in *Atlee* are added to cases presented from the courts of appeals, the Court declined review in not less than twenty-eight Vietnam cases. Although four Justices—Douglas, Harlan, Stewart, and Brennan—were willing to hear Vietnam cases, they never agreed in the same case, so the four votes required for review were never attained. Hence, a majority of at least six Justices determined that the Court would not decide a case presenting fundamental questions concerning the Vietnam War.

A. *The Vietnam Cases Summarized*

Initially, a brief summary of the claims presented in the Vietnam cases will provide a perspective for discussing the Court's silence on the war. Most Vietnam cases were criminal prosecutions against men who refused induction or civilian work in lieu of military service, or who were charged with other violations of the selective service laws. These men asserted defensive claims that conscription was unconstitutional in the absence of a congressional declaration of war; that conscription was illegal for facilitating an illegal war violating United States treaties and international law; that conscription aided the commission of war crimes in Vietnam; that conscription would subject the unwilling draftee to personal liability for war crimes; that conscription was unconstitutional because military personnel requirements could be met by volunteers responding to the inducement of enhanced military service benefits; and that the power to conscript for military service is qualified by the express conditions of the Militia Clause. The foregoing claims were usually rejected by the courts of appeals for the reason that the defendant lacked standing to challenge the use of American military forces in Vietnam until he had submitted to induction, or that the claims were generally nonjusticiable. No lower fed-

202. 411 U.S. 911 (1973).
203. United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1968).
204. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).
205. 400 U.S. 886 (1970).

eral court was able to cite a Supreme Court case addressing and specifically deciding any of these claims. True, the *Selective Draft Law Cases*,[206] decided by the Court in 1918, upheld conscription during World War I, but Congress had formally declared war. No Supreme Court decision since 1918 specifically addressed the constitutionality of conscription without a formal declaration of war, nor had any Court decision addressed the legality of conscription in aid of a war allegedly violating United States treaties or international law.

Four cases, two decided by the District of Columbia Circuit and two by the Second Circuit, were civil suits by enlisted and conscripted active duty military personnel ordered to duty in Vietnam. These military personnel asserted that their orders to Vietnam were unlawful because Congress had not declared war; that the President lacked constitutional authority to conduct a presidential war; that Congress had impermissibly delegated its war power to the President; that the war violated United States treaties and international law; that Congress had not properly authorized the President to conduct the war; and that repeal of the Tonkin Gulf Resolution rendered presidential continuation of the war unconstitutional for want of congressional authorization. While Vietnam-bound military personnel had standing to present these claims, both the Second and District of Columbia Circuits held that the suits presented nonjusticiable political questions inappropriate for judicial resolution. The District of Columbia Circuit, in *Luftig*[207] and *Mora*,[208] held that the claims were wholly nonjusticiable, but the Second Circuit, in *Orlando*[209] and *DaCosta*,[210] held that the claims were justiciable to the extent that the exclusive congressional power to declare war permitted a court to decide if Congress had sufficiently authorized the challenged military operations. If the requisite but minimal congressional authorization were found, the Second Circuit held that additional judicial review of the precise form or character of congressional authorization was foreclosed as a nonjusticiable political question.

Although the District of Columbia and Second Circuits differed slightly in recognizing the Government's defense that the claims were nonjusticiable, neither court cited a Supreme Court case addressing and specifically deciding these claims on the merits or holding that such claims are nonjusticiable. In the *Prize Cases*,[211] decided in 1863, during the Civil War, the Supreme Court addressed claims by owners

206. 245 U.S. 366 (1918).
207. Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967).
208. Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967).
209. Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).
210. DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972).
211. 67 U.S. (2 Black) 635 (1863).

of ships and cargo seized by Union forces after President Lincoln, without *specific* prior or concurrent congressional authorization, ordered a naval blockade of Confederate ports. The Court sustained Lincoln's blockade, observing that earlier acts of Congress authorized executive use of military force "in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States."[212] While approving the blockade as a legal use of executive powers, the Court also observed that the President's discretion to characterize the seceding states as belligerents "is a question to be decided by him" and the Court must be governed by the decision of the political department of the government "to which this power was intrusted;" the President must determine the degree of force the crisis requires.[213] And finally the Court declared that *if* the blockade exceeded the President's power, Congress had expressly ratified the President's unilateral action by retroactive legislation approving the blockade.[214] Although four Justices dissented in the *Prize Cases*, no decision of the Supreme Court had ever specifically addressed the merits or justiciability of constitutional, treaty, or international law claims challenging American military operations conducted on foreign soil and unrelated to repelling an invasion of American territory or suppressing domestic rebellion.

Five Vietnam cases were suits by federal taxpayer-citizens, who asserted that certain federal taxes were unconstitutional for generating revenue to prosecute an unconstitutional war; that the war was unconstitutional without a congressional declaration of war; that certain foreign assistance statutes were unconstitutional because Congress, without declaring war, had impermissibly delegated its war power to the President; and that expenditure of federal funds for aiding a war violating the Constitution, United States treaties and international law was unlawful. These taxpayer-citizen claims were rejected by the lower federal courts for the reason that the parties lacked standing or the suits presented nonjusticiable political questions. Although the Supreme Court had held that federal taxpayers lacked standing to challenge federal taxing and spending measures, the Court recognized an important exception to this rule in *Flast v. Cohen*,[215] decided in 1968, *during* the Vietnam War. In *Flast*, the Court held that a federal taxpayer had standing if the suit challenged federal expenditures and the taxpayer demonstrated that the expenditures exceeded "specific constitutional limitations imposed upon the

212. *Id.* at 668.
213. *Id.* at 670.
214. *Id.* at 670-71.
215. 392 U.S. 83 (1968).

exercise of the congressional taxing and spending power."[216] The First Amendment anti-establishment clause was held in *Flast* to be a "specific constitutional limitation" imposed on the congressional taxing and spending power, but the Court declined to identify additional "specific constitutional limitations," if any, that might exist.[217] After *Flast* was decided, federal taxpayers then claimed standing by asserting that the congressional war power was a "specific constitutional limitation" on the taxing and spending power, asserting that Congress could not constitutionally finance the Vietnam War without a declaration of war. The Court had never decided this question before *Flast* and declined to decide the question in Vietnam taxpayer cases presented after *Flast*.

Several plaintiffs' claims as taxpayers were combined with their claims as citizens. The Court had never addressed standing predicated only on the plaintiff's status as citizen. Although it refused to address this issue in the Vietnam cases, it rejected citizen standing in a case decided in 1974, *after* the Vietnam War ended.[218]

The preceding summary of Vietnam cases reveals that they presented a variety of important questions never specifically decided by the Supreme Court, questions the Court declined to answer during the Vietnam War and most of which remain unanswered today.

B. *Why?*

The Court's strange silence was decisive for the war policies of Presidents Johnson and Nixon and equally decisive against every plaintiff attacking conscription and the war in the federal courts. An initial explanation for the Court's silence is suggested by the remarkable uniformity of lower court decisions favoring the Government. Whether these lower court decisions were right or wrong, it is a fact that *every* lower court decision presented for Supreme Court review was favorable to the Government. If the Court had decided in advance that it preferred judicial silence on the Vietnam War, the Court was silent on Vietnam issues because no lower court decision provided cause to speak; no federal court had sustained an attack on conscription or the war. Had but one court of appeals decided for the plaintiff and against the Government in a single case, it is inconceivable that the Court would have declined review of a judicial decision that would otherwise jeopardize prosecution of the war by the political branches. But the Court was never asked to review a Vietnam case decided against the Government, so speculation on what the Court might have

216. *Id.* at 102-03.
217. *Id.* at 105.
218. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

done in that situation is pointless. What did occur is that all Vietnam cases presented to the court were decided for the Government and all were denied review, excepting the mandatory appeal in *Atlee v. Richardson*,[219] which the Court summarily and inconclusively affirmed. The Court's silence thus denied litigants, the public, and the political branches the benefit of its considered opinion and judgment on whether lower court judgments favoring the Government were correct.

Even recognizing that the Court's denial of discretionary review lacks precedential significance on the issues presented, the practical legal effect of the Court's silence was to validate the Government's prosecution of the war from beginning to end. Although the Court remained silent, its silence was little different in consequence to the Government than if the Court had reviewed a Vietnam case and rendered an opinion and judgment expressly favorable to the Government. Preventing judicial interference with prosecution of the war was surely the Government's primary objective in all Vietnam cases. Realizing that objective by default through the Court's silence or by opinions expressly favorable to the Government produces the same result. All Vietnam cases presented for review were decided favorably to the Government, and those favorable judgments were in practical effect approved by the Court's silence.

From the Government's perspective, the only difference between the Court's silent approval of favorable lower court judgments and an opinion and judgment by the Court expressly favorable to the Government is the level of certainty about how the Court would act in the future. By declining discretionary review of Vietnam decisions favorable to the Government, the Court retained its option to grant review in any future Vietnam case; declining review in today's Vietnam case would not foreclose the Court's review in tomorrow's Vietnam case. Had the Court reviewed a Vietnam case early in the war and ruled for the Government, its opinion and judgment would have produced a degree of judicial certainty on Vietnam issues never achieved by the Court's silence. Although the Court never established this degree of certainty by reviewing a Vietnam case, each case denied review increased the likelihood that future cases would be denied review. Over time, uncertainty would become certainty. As the Court denied review in each Vietnam case, the Government, as well as lower federal courts, could safely conclude that the Court would not review a Vietnam case in the future because it had not reviewed a Vietnam case in the past.

219. 411 U.S. 911 (1973).

The preceding discussion shows that the practical effect of the Court's silence on Vietnam issues was to sustain conscription in aid of the war and the Government's prosecution of the war. But stating this inescapable conclusion does not explain *why* the Court chose silence. The Court's silence, combined with lower court decisions uniformly favorable to the Government, sustained the war, and members of the Court surely understood this inevitable consequence of their silence on Vietnam issues. If the Court was willing to approve the war by silence, why was the Court unwilling to declare explicitly what its silence declared implicitly? *If* the Court desired to sustain the Government's prosecution of the war, options other than silence were available. First, the Court could have held that issues presented in the Vietnam cases were justiciable, reached the merits, and then decided the legal and constitutional claims for the Government. Second, the Court, like lower federal courts, could have held that the Vietnam cases presented only nonjusticiable political questions. The Court had three choices in the Vietnam cases: judgment on the merits; judgment that the issues were nonjusticiable; or silence. Of these choices, the court chose silence. Why?

One explanation for the Court's silence on Vietnam issues is that silence produces no precedent. Excepting the inconclusive summary affirmance in *Atlee v. Richardson*,[220] which may be explained by want of standing or by mootness, all Vietnam cases were presented to the Court by petition for discretionary review, and all Vietnam cases presented for review, including *Atlee*, held for the Government. The Court's silence thus effectively sustained the Government's prosecution of the war, but the Court did so without ever *holding* that the Government prevailed on the merits or *holding* that Vietnam issues were nonjusticiable. For the Government and private litigants challenging conscription and the war, the Court's silence in practical effect was no different than a specific holding by the Court that the Government did prevail on the merits or that the issues were nonjusticiable. From the Court's institutional perspective, however, there is a significant difference between deciding nothing and deciding something concerning conscription and the war. The Court makes no precedent for *itself* when it declines discretionary review, even though the lower court's judgment is not disturbed. Hence, the Court's silence effectively preserved all its decisional options for the future. A specific holding by the Court addressing the merits or declaring that the Vietnam issues were nonjusticiable would have produced much different institutional consequences for the Court. Its decision would have established precedent and, depending on its judgment on the merits,

220. *Id.*

would have either approved or disapproved prosecution of the war. And *if* the Court had held against the Government on the merits in a Vietnam case, the Court would be required to consider an appropriate remedy for the prevailing litigant.

But the Court could have avoided reaching the merits and held only that issues presented in the Vietnam cases were nonjusticiable. A specific holding that Vietnam issues were nonjusticiable would surely establish precedent that similar issues arising in the future are likewise nonjusticiable but, unlike a decision on the merits, would not require the Court to approve or disapprove prosecution of the war.

For the Court, the consequences of the three options presented by the Vietnam cases were quite different. The Court's silence produced no precedent but nevertheless permitted the Government to prosecute the war, thanks to the uniformity of lower court decisions favoring the Government. Had the Court reached and decided the merits in a Vietnam case, its decision would establish precedent and either approve or disapprove prosecution of the war. Had the Court decided only that the Vietnam cases presented nonjusticiable issues, its decision would establish precedent but would neither approve nor disapprove prosecution of the war. Because the Court's silence in practical effect sustained the Government's prosecution of the war, the Court was surely content with that result, though it was obviously unwilling to hold for the Government on the merits or to hold, like the lower courts, that the issues were nonjusticiable.

Recognizing that the Court's silence in practical effect sustained the Government's war policies, what might explain the Court's refusal to review a Vietnam case and render a decision on the merits? Perhaps the Court declined to review a Vietnam case on the merits because the outcome could not be predicted with certainty. Given the dearth of precedent on issues presented by the Vietnam cases, the outcome of the Court's review of Vietnam claims on the merits was hardly self-evident. Hence, a decision on the merits, if rendered by the Court in good faith after full deliberation on the briefs and oral arguments of the litigants, would not necessarily favor the Government; a decision on the merits might favor the litigants opposing the war.

A decision on the merits favoring the Government would approve the war, permit continuance of the war, and leave termination of the war to the judgment of Congress and the President, thus producing the same result as the Court's silence. But a decision on the merits against the Government would disapprove the war and compel the Court to provide an appropriate remedy for the constitutional violation, thus subjecting Congress and the President to the Court's

power of decision and obliging the political branches to respond to its remedial mandate. Because the Court knew that accepting a Vietnam case for review on the merits might produce a decision disapproving a war jointly initiated and prosecuted by Congress and the President, the Court might have been reluctant to address Vietnam claims on the merits. The Court had never (and has never) disapproved military operations approved by both political branches when armed conflict continued at the time of decision,[221] though the Court had disapproved war-related actions of the political branches after armed conflict had ended.[222] Suggesting that the Court declined review on the merits of Vietnam issues because it *might* decide against the Government and the war may explain the Court's silence. However, such an explanation attributes to the Court a cynical, unworthy and expedient abdication of its judicial responsibility, for the Court knowingly approved by silence what it might be led to condemn by judgment on the merits.

At least four Vietnam cases, and probably more, were initiated by litigants with proper standing.[223] If these litigants presented justiciable claims, it was improper for the Court to withhold judgment on the merits to avoid a precedential decision for or against the Government. The Court did in fact approve the Government's prosecution of the war by silence. A bare desire to avoid making precedent favoring the Government is unworthy for a judicial body whose primary and historic function is making precedent by resolving cases on the merits, especially when the Court had rendered judgment on the merits

221. The Court has expressly *approved* military activity undertaken by the political branches when armed conflict continued at the time of decision. *E.g.*, Prize Cases, 67 U.S. (2 Black) 635 (1863) (Civil War); Selective Draft Law Cases, 245 U.S. 366 (1918) (World War I); *Ex parte* Quirin, 317 U.S. 1 (1942) (World War II); Hirabayashi v. United States, 320 U.S. 81 (1943) (World War II); Korematsu v. United States, 323 U.S. 214 (1944) (World War II). An exception to the preceding cases is Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579 (1952), where the Court's judgment invalidating President Truman's war-related seizure of domestic steel mills was rendered while armed conflict continued in the Korean War. In the *Steel Seizure Case*, however, the Court observed that the President's action was contrary to a provision of the Defense Production Act, which authorized seizure in specified circumstances, and that Congress had refused to authorize emergency seizure of facilities to avoid work stoppages resulting from labor disputes. *Id.* at 585-86. The Korean War, like the Vietnam War, was prosecuted jointly by the cooperation of Congress and the President, but the war-related seizure was held contrary to specific congressional limitations on presidential power. Congress by silence had also declined to ratify the President's seizure of private property. *Id.* at 583.

222. *E.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (Franco-American Quasi War); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (Civil War); Duncan v. Kahanamoku, 327 U.S. 304 (1946) (World War II).

223. Four Vietnam cases were initiated by active duty military personnel ordered to Vietnam: Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); Mora v. McNamara, 387 F.2d 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934 (1967); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); DaCosta v. Laird, 451 F.2d 1122 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972). Military personnel subjected to possible death or injury in Vietnam surely possessed standing to assert that the war was unconstitutional or unlawful. Many Vietnam cases denied review by the Supreme Court presented claims that conscription was unconstitutional in the absence of a formal declaration of war. Men prosecuted and convicted for refusing induction surely had standing to assert this constitutional defense.

favorable to the Government's war policies in cases arising before the Vietnam War.[224]

True, the Vietnam cases, save *Atlee v. Richardson*,[225] were all subject to the Court's discretionary review, but much of the Court's modern jurisprudence, its modern precedent, has originated in cases granted discretionary review. The Court exists to decide cases on the merits and make precedent; deciding cases on the merits and making precedent are inseparable. If the Court's review of Vietnam issues on the merits had led to a judgment that the political branches' joint prosecution of the war was constitutional, the Government, the plaintiffs, and the American people deserved the Court's considered judgment that the political branches had not exceeded their constitutional powers. A decision for the Government on the merits would approve only the *powers* of Congress and the President to prosecute the war, but would not require the Court to approve the war itself. Whether continuation of a constitutional war is wise or foolish, justified or unjustified, would remain a political decision for Congress and the President, regardless of the Court's judgment that the political branches had not violated the Constitution. If the Court by silence avoided a decision on the merits that might have favored the Government by expedient reliance on its statutory discretion to accept or refuse review, evasion of its historic judicial responsibility was ignoble. The Court's power of discretionary review was not conferred by Congress to facilitate the Court's evasion of decision in those cases whose extraordinary importance demands adjudication. Conscription and the war continued for nearly seven years. Young Americans were killed and injured in appalling numbers. The war divided American society and produced substantial domestic violence. If the Vietnam cases presented justiciable questions, they deserved adjudication on the merits.[226]

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224. *E.g.*, Prize Cases, 67 U.S. (2 Black) 635 (1863) (Civil War); Selective Draft Law Cases, 245 U.S. 366 (1918) (World War I); Hirabayashi v. United States, 320 U.S. 81 (1943) (World War II).

225. 411 U.S. 911 (1973).

226. Avoiding decision by silence is different than making a "wrong" decision. Given the Supreme Court's power of *final* decision, describing its decisions on constitutional questions as "right" or "wrong" is a pointless exercise, though the Court itself may later overrule an earlier decision because that decision was "wrong." *E.g.*, Afroyim v. Rusk, 386 U.S. 253 (1967), *overruling* Perez v. Brownell, 356 U.S. 44 (1958); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976).

Appointment to the Supreme Court does not confer infallibility, to which many of the Court's divided opinions attest. A decision avoided by silence is never made, so it cannot be right or wrong. But the Court exists to make decisions, and it is foolish to suggest that the Court, composed of fallible human beings, should withhold decision because the decision might be wrong, when the rightness or wrongness of the decision cannot then be determined by reference to an external objective standard. Disagreement with the Court's decision does not make its decision "wrong," nor does agreement with its decision make the decision "right."

As before noted, in practical effect the Court's silence approved the Government's war policies but withheld specific judicial approval in a decision favoring the Government on the merits. If the Court declined to review Vietnam issues on the merits because it might decide for the Government, would a decision on the merits favoring the Government have threatened the Court as an institution, diminished its prestige, or endangered its unique role in the American constitutional system? No. And if the Court declined review on the merits because its judgment might approve of the prosecution of an unpopular war, and it simply lacked the courage to approve by opinion what it was willing to approve by silence, the Court's silence was a sad abdication of its self-proclaimed judicial power and responsibility.

If the Court withheld judgment on the merits of justiciable Vietnam issues to avoid a decision that might favor the Government's war policies, the preceding discussion concluded that its silence was inconsistent with the Court's historic judicial responsibilities. But a decision favorable to the Government was not the only possible result of reviewing justiciable Vietnam issues on the merits; review on the merits might have led the Court to a judgment that the Government's war policies were unconstitutional or unlawful, a possibility obviously more troublesome than a judgment approving prosecution of the war. But if the Court chose silence to avoid even a slight possibility of judgment against the Government on the merits, its silence deserves special condemnation. By this explanation, the Court consciously and cynically withheld its power of decision to excuse possible constitutional violations by the political branches and knowingly subjected thousands of young Americans to death and injury in an unconstitutional or unlawful war.

Even if the Court might have been led to judgment against the Government on merits, no legitimate reasons explain avoiding that possibility by a silence which allowed Congress and the President to conduct a war the Court might have held unconstitutional. Avoiding review on the merits of justiciable Vietnam issues that might result in a judgment holding the war unconstitutional cannot be explained by imputing to the Court the view that it should never hold that Congress, the President, or both have violated the Constitution. Actions of Congress and the President have never enjoyed immunity from judicial review, nor has the Court ever relieved Congress or the President from the duty to comply with the Constitution. On many occasions before the Vietnam War the Court had declared its power and duty to decide, in proper cases, whether congressional or presidential actions were constitutional, and had occasionally held against

Congress or the President on the merits.[227] True, Congress and the President were jointly prosecuting the Vietnam War, but that fact alone provides no obvious reason for the Court to suspend its power to review joint actions of the political branches, neither of which is separately relieved of compliance with the Constitution. The power of the Supreme Court to review legislative and executive actions for compliance with the Constitution cannot logically be limited to approving the challenged action, for the legitimacy of judicial review presupposes the power and propriety of approving or disapproving actions of the political branches.

Did the Court avoid decisions on the merits of justiciable Vietnam issues because there were legitimate reasons for avoiding the consequences of a judgment that might hold the Government's prosecution of the war unconstitutional? A judgment against the war probably would have been criticized by Congress, the President, or others. The Court's desire to avoid criticism is scarcely a legitimate reason for withholding judgment on the merits. The Court had decided many cases before the Vietnam War with knowledge that its judgment would produce severe criticism from official and nonofficial sources, and the certainty of criticism had not in the past caused the Court to withhold judgment or to evade the burdens of decision by declining discretionary review.[228] American courts, and certainly the Supreme Court, cannot reasonably expect to decide cases without resulting criticism.

Avoiding a decision on the merits that might have held against the war also avoided the possibility that Congress and the President would ignore or defy the Court's judgment. If Congress, the President, or both refused to obey the Court's judgment, the Court's institutional authority and prestige would be severely diminished. The problem of compliance with the Court's possible judgment on the merits against the Government arises because a prevailing plaintiff would be entitled to receive an appropriate judicial remedy for the constitutional violation. What judicial remedy would be appropriate? And would the remedy operate only prospectively or have retroactive effects as well? These problems are highly speculative because the

227. Congress: *e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Scott v. Sandford, 60 U.S. (19 How.) 393 (1847); Myers v. United States, 272 U.S. 52 (1926); Afroyim v. Rusk, 387 U.S. 253 (1967); Powell v. McCormack, 395 U.S. 486 (1969). President: Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Humphrey's Executor v. United States, 295 U.S. 602 (1935); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (dicta). In United States v. Nixon, 418 U.S. 683 (1974), decided *after* the Vietnam War ended, the Court rejected the President's claim of executive privilege to withhold evidence relevant to federal criminal prosecutions.

228. *E.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); School Dist. v. Schempp, 374 U.S. 203 (1963); Reynolds v. Sims, 377 U.S. 533 (1964). Roe v. Wade, 410 U.S. 113 (1973), was decided at the end of the Vietnam War.

appropriate judicial remedy would be governed by the nature of the constitutional violation or violations identified by the Court. For example, if the Court held that conscription was unconstitutional without a formal declaration of war by Congress, would the Court order that conscription cease forthwith and that all men inducted without a declaration of war be immediately released from military service? This seems unlikely. First, the Court might choose to grant only declaratory relief; thus its judgment would bind the conscience of the Government but would not enjoin the Government to act or refrain from acting. Whether Congress and the President heeded the Court's judgment on the merits would be decided by the political branches, which would bear the political consequences of continuing activity held by the Court to violate the Constitution. And even if injunctive relief were considered appropriate, in other cases of great moment the Court had exercised its unique equitable powers to permit an orderly response to the Court's mandate.[229]

There is simply no reason to believe that the Court, even if it had ruled against the Government on the merits, would mandate relief that would endanger American and allied military personnel then engaged in combat in Vietnam. Extraordinary situations may require extraordinary remedies, and the Court would be neither so foolish nor shortsighted as to deny Congress and the President time and latitude to correct the constitutional infirmity or to provide for the safety of American military personnel. Hence, there is no reason to believe the Court remained silent because a decision on the merits against the Government would have required a remedy producing catastrophic harm by leaving American forces in Vietnam defenseless or denying the Government the opportunity to safely extricate American forces from an unconstitutional war. Even if a judgment on the merits had produced a decision against the Government's prosecution of the war, the remedial flexibility available to the Court suggests that the political branches could not in good conscience justify noncompliance solely by claims of protecting American military forces then engaged in combat in Vietnam. Moreover, in a case decided early in the Vietnam War, though not addressing a Vietnam issue, the Court rejected possible noncompliance with its judgment as a permissible reason for withholding decision against the political branches.[230]

If the Court had decided that the Vietnam War was unconstitutional, providing for the safety of American military forces would be a primary factor in the judicial remedy, but that would not be the only

229. In Brown v. Board of Education, 349 U.S. 294 (1955), the Court invoked equitable principles to withhold immediate relief for victims of unconstitutional racial segregation in the public schools.

230. Powell v. McCormack, 395 U.S. 486, 549 (1969).

concern. The Court could not have enjoyed the prospect of possibly declaring a war in progress unconstitutional and then subjecting the Government to its remedial authority. Beyond concerns for the safety of American military personnel, a judgment that the war was unconstitutional or unlawful could create direct and possibly disastrous consequences for South Vietnam, could implicate American treaty obligations, and could affect present and future American relations with foreign nations. An infinite number of problems and complications, not all of which could have been foreseen, might result from the Court's judgment that the war was unconstitutional. Indeed, these uncertain consequences of a judgment against the Government suggest that the Vietnam cases, or at least some claims within those cases, presented only nonjusticiable political questions. Many of the elements of nonjusticiable political controversies identified by the Court in *Baker v. Carr*[231] were present in the Vietnam cases. However, the Court never held that the Vietnam cases presented nonjusticiable issues; the Court never said anything at all concerning the issues presented in the Vietnam cases.

If the Vietnam cases did present justiciable issues and the Court withheld judgment on the merits solely to relieve the Government of the inconvenience that could result from a decision against the war, this explanation for the Court's silence is neither legitimate nor persuasive. The Court has asserted its unique decisional prerogatives on many occasions, often in forceful terms,[232] and it would hardly be thought that the Court would withhold judgment because its decision would inconvenience the Government. The Constitution should not be suspended or made temporarily inoperative for the reason that the Government might be inconvenienced by the Court's judgment that a constitutional violation has occurred. Congress and the President are not exempted from compliance with the Constitution. The Constitution provides no guarantee that constitutional violations by either political branch will be overlooked or excused by the Court because a holding against the Government on the merits may produce consequences the Government would prefer to avoid.

The Court never reviewed any Vietnam issue on the merits. If the issues were justiciable, did the Court avoid decision on the merits because it feared either the possibility of judgment for the Govern-

231. 369 U.S. 186 (1962).

232. In Cooper v. Aaron, 358 U.S. 1, 18 (1958), *citing* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Court declared that "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since [*Marbury*] been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." In Powell v. McCormack, 395 U.S. 486 (1969), the Court observed that an "alleged conflict" resulting from its decision that the House of Representatives had excluded the plaintiff in violation of the Constitution "cannot justify" the Court avoiding its constitutional responsibilities. *Id.* at 549.

ment or the possibility of judgment against the Government? Avoiding decisions on the merits of justiciable Vietnam issues presented by litigants with requisite standing through cryptic silence would be an ignoble abdication of the Court's constitutional responsibilities, whether or not a judgment on the merits would have sustained or invalidated the Government's prosecution of the war. The Court had frequently declared its power and duty to adjudicate federal questions on the merits, but it withheld judgment on the Vietnam cases. The Court was willing to approve the war by silence but would neither confirm nor condemn that result by opinion for or against the Government. Although concealed by the privilege of discretionary review, the Court's apparent failure of courage was inexcusable.

But deciding Vietnam issues on the merits was only a first option for the Court. The preceding discussion assumes that the Vietnam cases presented *justiciable* issues and asserts that withholding judgment on the merits was improper. But the Vietnam cases may not have presented justiciable issues, so a second option for the Court was to review a Vietnam case and to hold that the issues were nonjusticiable political questions. This second option, like the first option of judgment on the merits, was rejected for the third option, which was silence.

Given that the Vietnam cases presented issues containing the elements of nonjusticiable controversies,[233] what might explain the Court's refusal to hold that the Vietnam cases presented nonjusticiable issues? Recalling that the practical effect of the Court's strange silence was approval of the Government's war policies, a specific holding of nonjusticiability would have permitted Congress and the President to continue the war, but would remove the federal judiciary from the controversy. If the Court believed that the issues presented in the Vietnam cases were nonjusticiable, perhaps the Court believed there was no need to confirm that conclusion by a specific holding because no decision presented for review had held otherwise. When the Court

233. In Baker v. Carr, 369 U.S. 186 (1962), the Court explained that the doctrine of nonjusticiable political questions is primarily a function of separation of powers within the Federal Government. *Id.* at 210, 217. The Court then identified six factors to consider in deciding whether a case presents nonjusticiable political questions:

> 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.

Id. at 217. The reader is invited to consider how many of these relevant factors were present in Vietnam cases claiming that conscription in aid of the war and the war itself were unconstitutional.

holds that issues presented in a live controversy by a litigant with requisite standing are nevertheless nonjusticiable the Court voluntarily surrenders the power of decision it might otherwise exercise. Regardless of the reasons given by the Court for holding that a case presents nonjusticiable issues, the Court declares that it and lower federal courts should not decide this case nor others like it that might arise in the future. Because the merits of the legal or constitutional claims are never reached when the Court holds that the issues are nonjusticiable, a holding of nonjusticiability does not establish conventional precedent, but a holding of nonjusticiability surely has precedential significance for similar cases in the future. The Court voluntarily renounces its ultimate power of decision on the merits by a considered judgment that it should not decide the issues presented. If the Court in one case yields its ultimate power of decision for reason that the issues are nonjusticiable, that holding must establish precedent for nonjusticiability in like cases.

Assuming that the Court believed that the Vietnam cases presented only nonjusticiable issues, what might explain the Court's choice of silence rather than a specific holding of nonjusticiability? There is no reason to believe that the Court is less jealous of its constitutional prerogatives than Congress or the President.[234] Fully aware that holding Vietnam issues nonjusticiable would amount to a declaration that the Court renounces its ultimate power to decide whether the war was legal or whether Congress, the President, or both were acting consistently with the Constitution, the Court may have concluded, perhaps cynically, that it should not formally yield nor disclaim its ultimate power of decision on the merits of constitutional claims when there was no compelling reason for doing so. In no Vietnam case presented to the Court for review had a federal court held against the Government or threatened interference with prosecution of the war by the political branches. Because no federal court held that Vietnam issues were justiciable, there was no *need* for the Court to declare that Vietnam issues were nonjusticiable. If the Court will on rare occasions hold that certain controversies are nonjusticiable and thus renounce its ultimate power of decision, it will do so only when necessary to correct a lower court's *erroneous* finding of justiciability. Whether the Court addresses justiciability by opinion or remains silent might then depend on the judgment of the lower court. If the lower court held the issues nonjusticiable, and the Court agrees, the Court will ratify by silence and so avoid making needless precedent explicitly renouncing its power of decision. But if the lower court held the issues nonjusticiable, and the Court *disagrees*, the Court will

234. See cases cited, *supra* note 232.

grant review, hold the issues justiciable, and decide the case on the merits to preserve its power of final decision on constitutional claims.[235] The Court's silence on the Vietnam cases might then be explained by its unstated view that the lower courts had correctly held that claims presented in the Vietnam cases were nonjusticiable.[236]

The Court's silence on Vietnam issues had precisely the same effect as accepting review and holding the issues nonjusticiable. All lower courts held for the Government, so the Court's decision to decline review had no effect on the Government's prosecution of the war. Similarly, had the Court held that the Vietnam issues were non-

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235. In Powell v. McCormack, 395 U.S. 486 (1969), the lower court held that the plaintiff's suit challenging his exclusion from the House of Representatives presented a nonjusticiable controversy. On *discretionary* review, the Supreme Court held that the issues were justiciable and decided the claims on the merits for the plaintiff. *Id.* at 516-51. The Court corrected the lower court's *erroneous* holding of nonjusticiability in *Powell*. If the Court had believed that the claims in *Powell* were nonjusticiable, would discretionary review have been granted?

The Court may also grant discretionary review to correct a lower court's *erroneous* holding that justiciable issues were presented. In Gilligan v. Morgan, 413 U.S. 1 (1973), the Court reviewed a lower court's decision that claims pertaining to training of National Guard personnel were justiciable. The Supreme Court, on discretionary review, held that the issues were nonjusticiable. *Id.* at 11-12. If the lower court in *Gilligan* had correctly held the issues nonjusticiable, would the Supreme Court have granted review? If the Court's strange silence on Vietnam War claims is considered with *Powell* and *Gilligan*, there is reason to believe that the Court is not disposed to affirm by opinion a lower court's *correct* decision that the claims are nonjusticiable.

Decisions by the Supreme Court renouncing its power of final decision on the merits of constitutional claims for the reason that the case presents only nonjusticiable political questions are extremely rare in the Court's jurisprudence since its 1973 decision in *Gilligan*, *supra*. In Goldwater v. Carter, 444 U.S. 996 (1979), on discretionary review, six Justices agreed that a suit found by the lower court to present justiciable issues should be dismissed. Of the six Justices, four stated that the issues were nonjusticiable, *id.* at 1002, one stated that the issues were justiciable but not ripe for adjudication, *id.* at 997, and the other concurred in dismissal of the complaint without opinion, *id.* at 996. If the lower court in *Goldwater* had held the issues nonjusticiable, would the Supreme Court have granted review if it also believed the issues were nonjusticiable? Not until 1993, in a case concerning the Senate's procedure in trying the impeachment of a federal judge, did the Court affirm by opinion a lower court's judgment that a case presented a nonjusticiable political question. Nixon v. United States, 113 S. Ct. 732 (1993). While the Court's opinion in *Nixon* did affirm the lower court's holding, the Court's opinion has only limited impact, for it will affect only individual federal officers subjected to infrequent impeachment and trial proceedings in Congress.

236. Review of "political question" cases arising since the Vietnam War ended reveals that, until 1993, the Supreme Court had never *affirmed* by opinion a lower court's judgment that the case presented only nonjusticiable political questions. In Nixon v. United States, 113 S. Ct. 732 (1993), the Court did affirm a lower court's judgment that questions concerning the Senate's procedure in trying impeachment of a federal judge were nonjusticiable. The Court held that "the word 'try' in the Impeachment Clause does not provide an identifiable textual limit on the authority which is committed to the Senate." *Id.* at 740.

With the single exception of *Nixon*, however, the Court's modern practice is consistent with a view that the Court will seldom grant discretionary review when it believes the lower court correctly held that the case presented only nonjusticiable political questions. *See* Tiffany v. United States, 931 F.2d 271 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 867 (1992); United States v. Herrada, 887 F.2d 524 (5th Cir. 1989), *cert. denied*, 495 U.S. 958 (1990); United States v. Sitka, 845 F.2d 43 (2d Cir.), *cert. denied*, 488 U.S. 827 (1988); Smith v. Reagan, 844 F.2d 195 (4th Cir.), *cert. denied*, 488 U.S. 954 (1988); Morgan v. United States, 801 F.2d 445 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 911 (1987); Texas Ass'n of Concerned Taxpayers v. United States, 772 F.2d 163 (5th Cir. 1985), *cert. denied*, 476 U.S. 1151 (1986); Flynn v. Shultz, 748 F.2d 1186 (7th Cir. 1984), *cert. denied*, 474 U.S. 830 (1985); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); Wymbs v. Republican State Exec. Comm., 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); Occidental of Umm al Qaywayn, Inc. v. Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979); Dickson v. Ford, 521 F.2d 234 (5th Cir.), *cert. denied*, 424 U.S. 954 (1975).

justiciable, that decision would have had no effect on the Government's prosecution of the war. The Court's silence thus preserved its full power of decision for the future, for it is undecided by the Court to this day whether the Vietnam cases presented justiciable or nonjusticiable issues. The Court never answered this question, and the Court was unwilling to hold that the Vietnam issues were nonjusticiable, even if it believed they were, when no Vietnam case presented for review had held to the contrary. Reviewing a Vietnam case and holding the issues nonjusticiable would needlessly surrender the Court's ultimate power of decision without any compensating benefit to a litigant or to Congress and the President, for the Court's judgment of nonjusticiability would merely confirm the lower court's correct opinion that the case presented only nonjusticiable political questions.

Although the Court's silence on the Vietnam War might be explained by its view that the cases presented only nonjusticiable political questions, extracting this reasoning from the Court's silence is purely speculative. The Court's silence may also be explained by its view that the Vietnam issues were justiciable but that it would deny review on the merits solely to avoid making precedent by judgment either for or against the Government and the war. Indeed, the Court's silence on the Vietnam War might be explained for reasons not considered in this article. Explanation displaces silence, but silence forecloses explanation. The Court's willful silence on the Vietnam War forecloses certain explanation.

V. Conclusion

The Vietnam War, the longest in American history, continued from 1964 to 1973. Despite many opportunities to review cases presenting claims by plaintiffs with requisite standing that conscription in aid of the war and the war itself were unconstitutional, the Supreme Court declined to review and decide any Vietnam case on the merits or to hold that the cases presented only nonjusticiable political questions. The Supreme Court's only response to many cases presenting claims that the war was unconstitutional was a strange silence, which effectively approved the Government's war policies. The Court would not review Vietnam claims on the merits and decide for the Government. The Court would not review Vietnam claims on the merits and decide against the Government. The Court would not review Vietnam claims and decide they were nonjusticiable. The Court would only avoid decision by silence. The reason or reasons for the Court's silence were and remain concealed by the unexplained exercise of its privilege of discretionary review.

Ever since its historic 1803 decision in *Marbury v. Madison*,[237] the Court has asserted its prerogative, responsibility and duty to decide cases arising under the Constitution and subject to its jurisdiction. But the constitutional claims presented in the Vietnam cases were met only by the Court's strange silence. This article asserts that no valid or legitimate reasons explain or justify this silence. No lower court was able to cite an earlier decision by the Court resolving any of the different issues presented in the Vietnam cases. As a result, the Court could not justify its silence by claiming that the Court had already decided identical or similar issues in analogous cases. Nor can it be thought that the privilege of discretionary appellate review conferred by Congress was intended to permit the Court to evade by silence the burdens of judgment and decision in momentous cases of first impression. Only the desire to preserve all its decisional options for the future by making no precedent whatsoever in the Vietnam cases seems to explain the Court's strange silence, and this explanation is inconsistent with the Court's historic and traditional role in the American system of constitutional government.

Long ago, in *Martin v. Hunter's Lessee*,[238] a litigant argued that the Court should not exercise the power of final judicial decision because its power might be abused. The Court agreed that any court with the power of final decision might abuse the power, but the mere possibility of abuse could not defeat the Supreme Court's power of final decision in cases arising under the Constitution. The Court's evasive, perplexing, even craven silence on the Vietnam War was then and seems now a sad and arrogant abuse of its power of final decision.

VI. Epilogue

Little has changed since the Vietnam War ended twenty years ago. Constitutional questions avoided by the Supreme Court's strange silence on the Vietnam War remain unanswered by the Court to this day.

Congressional adoption of the War Powers Resolution[239] over President Nixon's veto in 1973, after the Vietnam War ended, surely presents a new element for judicial consideration in any case presenting claims that Congress, the President, or both have undertaken military operations violating the Constitution. But the Supreme Court has since declined review of a court of appeals decision that a suit by members of the House of Representatives challenging American military activities in El Salvador presented only nonjusticiable political

237. 5 U.S. (1 Cranch) 137 (1803).
238. 14 U.S. (1 Wheat.) 304 (1816).
239. 50 U.S.C. §§ 1541-1548 (1988).

questions, despite allegations that presidential actions violated both the War Powers Resolution and the constitutional prerogative of Congress to declare war.[240]

Nor did the Court's legacy of silence from the Vietnam War permit lower federal courts to escape their obligation of decision in cases challenging American military operations in the Persian Gulf War.[241] Given the Supreme Court's silence on the Vietnam War, perhaps the Court, even more than Congress, the President, and the American people, was grateful for the prompt and successful conclusion of this most recent American war, for the victory rendered any constitutional claims judicially moot. But would the Court maintain its strange silence on constitutional claims in the future if American military forces are again involved in a war comparable in character and duration to the Vietnam War? If this question is ever answered, it will be answered only by the Supreme Court.

240. Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

241. *E.g.*, Ange v. Bush, 752 F. Supp. 509 (D. D.C. 1990) (claims against military preparation for war held nonjusticiable, though plaintiff had standing); Dellums v. Bush, 752 F. Supp. 1141 (D. D.C. 1990) (members of Congress sought to prevent war unless Congress expressly consented; plaintiffs had standing and claims were *justiciable*, though claims not ripe for adjudication); Pietsch v. Bush, 755 F. Supp. 62 (E.D. N.Y.), *aff'd mem.*, 935 F.2d 1278 (2d Cir. 1991) (plaintiff as taxpayer-citizen lacked standing to challenge war). It appears that the plaintiff in *Pietsch*, who appeared *pro se*, is the same Walter G. Pietsch whose taxpayer suit challenging the Vietnam War was also dismissed for lack of standing in Pietsch v. President of the United States, 434 F.2d 861 (2d Cir. 1970), *cert. denied*, 403 U.S. 920 (1971). If so, Mr. Pietsch cannot be faulted for lack of perseverance.