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ESSAYS ON CREATIVE PROBLEM SOLVING -- Constitutional Law as Creative Problem Solving: Could the Warren Court Have Ended the Vietnam War?

Michal R. Belknap
California Western School of Law, mrb@cwsl.edu

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ESSAYS ON CREATIVE PROBLEM SOLVING

CONSTITUTIONAL LAW AS CREATIVE PROBLEM SOLVING:

COULD THE WARREN COURT HAVE ENDED

THE VIETNAM WAR?

MICHAL R. BELKNAP*

Vietnam was “an ugly, often brutal war” that cost fifty-eight thousand American lives.¹ The longest war in our nation’s history,² it “seemed to go on forever with few tangible results.”³ By early 1971, seventy percent of Americans considered the whole thing a “mistake.”⁴ Yet not until January 27, 1973 did the United States extricate itself from this futile conflict.⁵ Throughout the late 1960s, the nation’s “involvement in the Vietnam War” was the impetus for widespread political protest and constituted one of the country’s great “unresolved problems.”⁶ While fighting raged in Southeast Asia, the Supreme Court, led by Chief Justice Earl Warren, was establishing

* Professor of Law, California Western School of Law and Adjunct Professor of History University of California, San Diego. B.A., 1965, University of California at Los Angeles; M.A., 1967, Ph.D., 1973, University of Wisconsin; J.D. 1981, The University of Texas. The author wishes to thank Thomas Barton for his advice on how to approach the issues this article addresses, Marshall Brenner for his help with the research, Thomas Barton, Laurence Benner, Paul Gudel, Marilyn Ireland, and Mari Matsuda, for their critical readings of the manuscript, and Harry Scheiber, Gordon Bakken, and other participants in the annual meeting of the American Historical Association–Pacific Coast Branch and the members of California Western’s Faculty Development seminar for their comments and suggestions.

1. ROBERT D. SCHULZINGER, *A TIME FOR WAR: THE UNITED STATES AND VIETNAM, 1941-1975*, at 333, 335 (1997).

2. George C. Herring recognizes Vietnam’s claim to this dubious distinction in the title of his history of the war. See GEORGE C. HERRING, *AMERICA’S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975* (3d ed. 1996).

3. SCHULZINGER, *supra* note 1, at 333.

4. TERRY H. ANDERSON, *THE MOVEMENT AND THE SIXTIES: PROTEST IN AMERICA FROM GREENSBORO TO WOUNDED KNEE* 379 (1995).

5. This is the date on which Secretary of State William P. Rogers and North Vietnam’s Le Duc Tho signed the Paris peace accords, in which the United States agreed to withdraw all of its remaining troops from Vietnam. See SCHULZINGER, *supra* note 1, at 303.

6. JOHN MORTON BLUM, *YEARS OF DISCORD: AMERICAN POLITICS AND SOCIETY, 1961-1974* ix (1991).

a reputation for relentless judicial activism,⁷ exploiting its position within the American system of government to promote the policy preferences of its members and give the force of law to their views of what was right.⁸ Yet, the Warren Court studiously avoided the Vietnam “problem.” On that subject, as Roderic Schoen observes, it maintained a “strange silence.”⁹ Would it have mattered had the Warren Court spoken out? As Robert Schulzinger notes in his recent history of the Vietnam War, we can never really know the answers to such questions, for “history happens only one way.”¹⁰ Yet, there is reason to believe that had the Warren Court engaged in some “creative problem solving,” it could have increased significantly the chances for an early termination of America’s tragic military involvement in Vietnam.

The notion that lawyers should function as problem solvers has recently received the endorsement of Attorney General Janet Reno¹¹ and a number of legal scholars.¹² The literature on creative problem solving in a legal context is limited, however,¹³ and much of it has been produced by proponents of

7. “Today’s popular discourse frequently depicts the Warren Court disapprovingly as a model of judicial activism. . . .” MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 112 (1998).

8. “[T]he justices who formed the core of the late Warren Court . . . found that they had been placed in a position where they had a fair amount of discretion to do what they believed right, and they believed that they were authorized, by virtue of their selection for that position, simply to do what they believed right.” Mark Tushnet, *The Warren Court as History*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 17 (Mark Tushnet ed., 1993).

9. Roderic B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 WASHBURN L.J. 275 (1994). See generally Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 101-19 (1998). While my article deals only with the Warren era, Schoen’s discusses the failure of the Supreme Court under both Warren and his successor, Warren Burger, to confront the issue of the legality of the Vietnam War.

10. SCHULZINGER, *supra* note 1, at 334.

11. See *Reno Urges Degree in Problem-Solving*, SAN DIEGO UNION-TRIBUNE, May 2, 1998, at B-1. See generally Janet Reno, *Speech*, 31 NEW ENG. L. REV. 159 (1996).

12. See Symposium, *Conceiving the Lawyer as Creative Problem Solver*, 34 CAL. W. L. REV. 267 (1998). James M. Cooper, Executive Director of the McGill Center for Creative Problem Solving at California Western School of Law, contends that creative problem solving is “an evolving approach to the law, [that] can assist law students, attorneys and judges alike in proactively using law as a tool to heal society.” James M. Cooper, *Towards a New Architecture: Creative Problem Solving and the Evolution of Law*, 34 CAL. W. L. REV. 297, 302 (1998). Cooper equates “creative problem solving” with the use of law for purposes of social engineering, once advocated by proponents of sociological jurisprudence. *Id.* According to him, “[a]ttorneys, lawmakers, and jurists are the social engineers of our society. . . .” *Id.* at 319.

13. “Although the perspectives in the existing problem solving literature may be useful to the lawyer, none addresses the particular difficulties of solving problems in a legal setting.” Thomas D. Barton, *Creative Problem Solving: Purpose, Meaning, and Values*, 34 CAL. W. L. REV. 273, 276 (1998) [hereinafter Barton, *Creative Problem Solving*]. A law librarian, Phyllis Marion, has identified over eighty books and articles, including Professor Barton’s, that have something to do with problem solving by lawyers, but most of these deal with legal education and various forms of alternative dispute resolution and are of little value to anyone seeking creative solutions to broad societal problems, such as the Vietnam War. See Phyllis C. Marion, *Problem Solving: An Annotated Bibliography*, 34 CAL. W. L. REV. 537, 554-65

(1998); *See, e.g.*, Symposium, *Conceiving the Lawyer as Creative Problem Solver*, *supra* note 12, at 554-65; Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984); Barbara Bintliff, *From Creativity to Computerese: Thinking Like a Lawyer in the Computer Age*, 88 L. LIBR. J. 338 (1996); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995); Paul Brest, & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527 (1994); Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5 (1995); Paul D. Carrington, *A Tale of Two Lawyers*, 91 NW. U. L. REV. 615 (1997); David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449 (1943); Anthony D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461 (1987); John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45 (1996); Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993); Erwin N. Griswold, *Law Schools and Human Relations*, 1955 WASH. U. L. Q. 217 (1955); Andrea L. Johnson, *Teaching Creative Problem Solving and Applied Reasoning Skills: A Modular Approach*, 34 CAL. W. L. REV. 389 (1998); Michael Jordan, *Law Teachers and the Educational Continuum*, 5 S. CAL. INTERDISC. L.J. 41 (1996); Steven Keeva, *Opening the Mind's Eye*, 82 A.B.A. J. 48 (June 1996); Charles D. Kelso, *In Quest of a Theory for Lawyering: Some Hypotheses and a Tribute to Dean Soia Mentschikoff*, 29 J. LEGAL EDUC. 159 (1975); Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351 (1998); J.H. Landman, *The Problem Method of Studying Law*, 5 J. LEGAL EDUC. 500 (1953); Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243 (1993); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1988); Gordon A. Macleod, *Creative Problem-Solving for Lawyers?!*, 16 J. LEGAL EDUC. 198 (1963); Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994); Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV. 625 (1994); Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375 (1998); Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992); Jos G. Moust & Herman J. Nuy, *Preparing Teachers for a Problem-Based, Student-Centered Law Course*, 5 PROF. L. EDUC. 16 (1987); Stephen Nathanson, *Changing Culture to Teach Problem-Solving Skills*, 14 J. PROF. L. EDUC. 143 (1996); Stephen Nathanson, *Creating Problems for Law Students: The Key to Teaching Legal Problem Solving?*, 10 J. PROF. LEGAL EDUC. 1 (1992); Stephen Nathanson, *The Culture of Design*, 3 INT'L J. LEGAL PROF. 301 (1996); Stephen Nathanson, *Designing Problems to Teach Legal Problem Solving*, 34 CAL. W. L. REV. 325 (1998); Stephen Nathanson, *Developing Legal Problem-Solving Skills*, 44 J. LEGAL EDUC. 215 (1994); Stephen Nathanson, *Problem-Solving in Professional Legal Education*, 7 J. PROF. LEGAL EDUC. 121 (1989); Stephen Nathanson, *The Role of Problem Solving in Legal Education*, 39 J. LEGAL EDUC. 167 (1989); John Nivala, *The Architecture of a Lawyer's Operation: Learning from Frank Lloyd Wright*, 20 J. LEGAL PROF. 99 (1995/96); Gregory L. Ogden, *Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654 (1984); Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem Solving*, 4 CLIN. L. REV. 65 (1997); James Podgers, *Grassroot Lessons*, 83 A.B.A. J. 68 (Feb. 1997); Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121 (1994); Rhona K. M. Smith, *The International Impact of Creative Problem Solving: Resolving the Plight of Indigenous Peoples*, 34 CAL. W. L. REV. 411 (1998); Roy T. Stuckey, *Education for the Practice of Law: 'The Times They Are A-Changin''*, 75 NEB. L. REV. 648 (1996); Maria Tzannes, *Problem Based Learning in Legal Education: Intentionally Overlooked or Merely Misunderstood*, 31 LAW TEACHER 180 (1997); Leo H. Whinery, *The Problem Methods in Legal Education*, 58 W. VA. L. REV. 144 (1955);

alternative dispute resolution, who view litigation as the very antithesis of the thing they advocate.¹⁴ There has been no discussion of the possibility that litigation itself might serve as a vehicle for creative problem solving. Nor have legal scholars exhibited much awareness that judges might function as creative problem solvers.¹⁵

Yet the unique position that the Supreme Court occupies within the American system of government affords its Justices numerous opportunities to play that role.¹⁶ They cannot, of course, be truly proactive problem

Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319 (1999); Paul J. Zwier & Ann B. Hamric, *The Ethics of Care and Reimagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383 (1996).

14. See, e.g., LAVINIA HALL, *NEGOTIATION: STRATEGIES FOR MUTUAL GAIN* (1993); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); CAROLINE MAUGHAN & JULIAN WEBB, *LAWYERING SKILLS AND THE LEGAL PROCESS* (1995); STEPHEN NATHANSON, *WHAT LAWYERS DO: A PROBLEM-SOLVING APPROACH TO LEGAL PRACTICE* (1997); CHARLES B. WIGGINS & L. RANDOLPH LOWRY, *NEGOTIATION AND SETTLEMENT ADVOCACY: A BOOK OF READINGS* (1997); Thomas Disare, *A Lawyer's Education*, 7 MD. J. CONTEMP. LEGAL ISSUES 359 (1996); Robin Handley & Damien Considine, *Introducing a Client-Centered Focus into the Law School Curriculum*, 7 LEGAL EDUC. REV. 193 (1996); Ann L. MacNaughton, *Cross-cultural Conflict Resolution: Finding Common Ground in Disputes Involving Value Conflicts*, 33 WILLAMETTE L. REV. 747 (1997); Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995 (1993); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85 (1994); Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685 (1982); Edward D. Re, *The Role of the Lawyer in Modern Society*, 30 SAN DIEGO L. REV. 501 (1985); Reno, *supra* note 11; Annette J. Scieszinski, *Return of the Problem-Solvers: The Profession Needs to Focus on Helping People, Not Just Fighting Battles*, 81 A.B.A. J. 119 (June 1995); Harrison Sheppard, *American Principles & The Evolving Ethos of American Legal Practice*, 28 LOY. U. CHI. L.J. 237 (1996); Paul J. Spiegelman, *Integrating Doctrine, Theory, and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988); Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707 (1996); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119 (1997).

15. One notable exception is Thomas D. Barton, who has written by far, the most extended description of judicial problem solving. See Thomas D. Barton, *Justiciability: A Theory of Judicial Problem Solving*, 24 B.C.L. REV. 505 (1983) [hereinafter Barton, *Justiciability*]. See also Thomas D. Barton, *Therapeutic Jurisprudence and Creative Problem Solving: An Essay on Harnessing Emotion and Human Connection*, 5, 9-13 (publication pending in 5 PSYCHOL. PUB. POL'Y & L. (1999)) [hereinafter Barton, *Therapeutic Jurisprudence*]. Although most of those who have written on problem solving in a legal context have ignored the possibility that judges might function as problem solvers, legal historians have long recognized that judges can solve certain social problems, especially of an economic nature, by creating new legal rules. See, e.g., J. WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

16. This is a proposition which the late Professor Alexander Bickel would vigorously dispute. Bickel contended that the solution of great social problems with pervasive

solvers. Like other judges, Supreme Court justices must wait for litigants to bring problems to their attention,¹⁷ and in resolving those problems they are restricted by the way the parties have framed the issues and by the arguments they have presented. Also limiting the Court's options is the fact that, as Judge Robert Keeton notes, "Judges are not free to make choices expressing their own personal values."¹⁸ The standards of their profession obligate them to make choices that are reasoned and to apply rules that respect the principles and policies found in society's authoritative sources.¹⁹

For Supreme Court justices, that means chiefly following the Constitution. The Constitution is, however, a comparatively brief and often rather vague document, which frequently fails to provide clear answers to questions raised by litigants. Although obligated to provide reasoned explanations for its decisions, the Supreme Court enjoys wide latitude with respect to the substance of those rulings. This discretion enables it to resolve cases by articulating rules of constitutional law that will solve, or at least contribute to the solution of social problems.²⁰ Furthermore, because the Supreme Court enjoys essentially unlimited freedom to choose which disputes it will decide, it can select those that afford the best opportunities for creative problem solving. As David M. O'Brien points out, "Unlike other federal judges, . . . the justices have virtually complete discretion to screen out of the many cases they receive the few they will decide."²¹ "The power to

ramifications was best left to the political process. See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 175 (1970). According to him, the judicial process is too principle-prone, principle bound, and passive for this kind of problem solving. *Id.* He considered the Supreme Court "a most unsuitable instrument for the formulation of policy." *Id.*

17. See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 194 (2d ed. 1990).

18. ROBERT E. KEETON, *JUDGING* 19 (1990).

19. See *id.*

20. In a book that deals extensively with decisions of the U.S. Supreme Court, Gerald Rosenberg argues that courts cannot bring about major social change. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* 10 (1991).

21. O'BRIEN, *supra* note 17, at 194. This power was somewhat greater when O'Brien published the 1990 edition of his book than it was during the Warren Court era. Until 1988 the Supreme Court's appellate jurisdiction in certain cases was mandatory, which meant that theoretically it had no choice but to hear and decide these cases. In fact, it summarily disposed of most of them without full briefing or oral argument. Thus, it exercised a discretion with respect to which "mandatory" appeal cases it would hear that was, as a practical matter, quite similar to that which it exercised with respect to cases falling within its discretionary certiorari jurisdiction. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 2.4 (5th ed. 1995). In 1988 Congress enacted legislation placing almost all cases that the Supreme Court is authorized to hear within its certiorari jurisdiction, thus giving it total discretion as to whether to hear them or not. See Act of June 27, 1988, Pub. L. 100-352, 102 Stat. 662 (1988). Since the Warren Court cases in which litigants sought to challenge the legality of the Vietnam War all came within the Court's certiorari jurisdiction, the fact that appeal as a matter of right still existed in some cases during the late 1960s does not affect the argument presented in this article.

decide what to decide . . . enables the Court to set its own agenda.”²² This, in turn, allows it to function “like a roving commission, or legislative body, responding to social forces.”²³ The Supreme Court no longer sits primarily to resolve disputes between the litigants who bring cases to it. “Long ago, United States courts of appeals became . . . in practical effect the last resort for most cases in the federal courts.”²⁴ The essential role of the Supreme Court, its members agree, is to resolve issues of national importance.²⁵ Its function, according to the late Chief Justice William Howard Taft, is “to [expound] and stabiliz[e] principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit.”²⁶ Serving as a kind of “super legislature,”²⁷ the Supreme Court is in a position to “manage legal change.”²⁸ As Hugh Baxter explains, “Because the Court fills its docket almost entirely at its own discretion, a self-conscious majority of Justices can pursue a project of transforming an existing body of federal law by selecting the case or cases strategically most advantageous to that project.”²⁹

The Warren Court could have used this control over its docket to select from the many cases it was asked to review during the late 1960s, those that afforded the best opportunities for rendering decisions that could help to “solve” the Vietnam “problem.” Clearly, a solid majority of the justices viewed the war as a national problem.³⁰ The only zealous “hawk” on the Court was Abe Fortas.³¹ A longtime crony of Lyndon Johnson, he continued to serve as an advisor to the President after LBJ appointed him to the high tribunal in 1965.³² Among the subjects on which Johnson frequently consulted Fortas was Vietnam.³³ As Larry Berman reports, “In his unofficial capacity as friend, counselor and strategist, Fortas supported an unrestrained policy of stepping up the war.”³⁴ His colleague, Byron White, may also have

22. O'BRIEN, *supra* note 17 at 194.

23. *Id.*

24. KEETON, *supra* note 18, at 33.

25. *See* O'BRIEN, *supra* note 17, at 234.

26. *Id.*

27. “The current Court’s power to pick the cases it wants from a very large docket enables it to assume the role of a super legislature.” *Id.* at 246.

28. Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 UCLA L. REV. 343, 345 (1998).

29. *Id.*

30. *See* Belknap, *supra* note 9, at 87-97.

31. *Id.* at 89-90.

32. *See* LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 100, 200-03, 212-13, 222, 240-46, 293 (1990).

33. *See* Belknap, *supra* note 9, at 89. *See also* KALMAN, *supra* note 32, at 293-94.

34. LARRY BERMAN, LYNDON JOHNSON’S WAR: THE ROAD TO STALEMATE IN VIETNAM 87 (1989). On October 14, 1967, Fortas wrote a memorandum in which he declared: “We should take or make an early opportunity to state, emphatically, that we’re going to see this through to a successful conclusion. Nothing, I think, is as destructive as the notion that we may quit.” *Id.*

been a “hawk.”³⁵

Far more of the Justices were “doves.” Arthur Goldberg viewed the Vietnam War as such a serious national problem that he allowed Johnson to talk him into resigning from the Court to become United States Ambassador to the United Nations (thereby creating a place for Fortas). Johnson assured Goldberg he was committed to negotiating a peaceful solution to the conflict and promised him a major role in working out a settlement.³⁶ Goldberg left the bench before there was any real opportunity to pursue judicial resolution of the Vietnam dilemma,³⁷ but William O. Douglas, who opposed the war with even greater fervor, served until after the Warren Court came to an end with the retirement of the Chief Justice in June of 1969. As early as 1964, Douglas, who had been a friend of Johnson since the 1930s, “gave the President hell” about his Vietnam policy.³⁸ Later, he tried on four separate occasions to provide the administration with private channels of communication for negotiating an end to the war.³⁹ All of these efforts came to naught, and Douglas eventually became convinced that where Vietnam was concerned, LBJ simply could not be trusted.⁴⁰ He became publicly critical of Johnson’s war and wrote so many opinions expressing his negative views that Representative F. Edward Hebert (D. La.) demanded he be disqualified from all cases involving Vietnam, the draft, and the armed forces.⁴¹

Douglas’s longtime liberal ally, Hugo Black, was far less outspoken,

35. White’s colleague, Justice Hugo Black, considered him a supporter of the war. *See* BOB WOODWARD & SCOT T. ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 126 (1979). In his recent biography of White, Dennis Hutchinson says nothing at all about the reticent Justice’s position on the Vietnam War. *See* DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* (1998).

36. DAVID L. STEBENNE, ARTHUR J. GOLDBERG: A NEW DEAL LIBERAL 347-48 (1996).

37. Goldberg resigned on July 25, 1965. *See* Susan N. Herman, *Arthur Joseph Goldberg*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 193 (Melvin I. Urofsky ed. 1994). At that time President Johnson’s huge escalation of the American military role in Vietnam was just beginning. This country did not undertake sustained bombing of North Vietnam until February 1965. Between then and July it committed itself to deploying nearly 200,000 ground troops to South Vietnam. *See* SCHULZINGER, *supra* note 1, at 170-80. The first cases challenging the legality of the Vietnam War did not reach the Supreme Court until 1967. *See* Belknap, *supra* note 9, at 108-09 n.279.

38. JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 419 (1980). According to Simon, Douglas attacked Johnson’s war policy while they were driving back to the White House from a dinner honoring Douglas. The argument continued for hours. His source is Sidney Davis, a friend of Douglas, who was present during the conversation. *Id.*

39. *See* HOWARD BALL & PHILLIP J. COOPER, *OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS AND AMERICA’S CONSTITUTIONAL REVOLUTION* 299 (1992).

40. *See* Belknap, *supra* note 9, at 91-92. Two of these initiatives involved having North Vietnamese leaders participate in *Pacem in Terris* convocations staged in 1965 and 1967 by the Parvin Foundation and the Center for the Study of Democratic Institutions, two organizations with which Douglas was associated. *Id.* at 91. The other two involved Douglas passing along messages from the North Vietnamese that had come to him via Moscow and the Indian ambassador to the United States, who was an old friend of his. *Id.* at 92.

41. *See* BALL & COOPER, *supra* note 39, at 306.

mainly because he did not want to impair the friendship that he and his wife, Elizabeth, enjoyed with the Johnsons.⁴² During a conversation with his clerk, Charles Reich, however, he declared, "I am not and never have been a friend of the Vietnam war."⁴³ In private, Black called the war "the worst thing that has ever happened to this country."⁴⁴ Like Black, Potter Stewart maintained a discrete public silence on the subject. Several years after the war ended, however, Stewart gave an interview to CBS News, that he requested not be broadcast until after his death. In it he stated unequivocally that he considered the Vietnam War unconstitutional.⁴⁵ When Fortas wrote an opinion for the Court in 1969 that referred to what was going on in Southeast Asia as a "war," Stewart protested so strongly that his hawkish colleague was forced to resort to euphemisms, such as "hostilities" and "conflict," to characterize the fighting.⁴⁶

Although never publicly condemning the war, Stewart did join Douglas several times in protesting the Court's refusal to rule on its legality.⁴⁷ Although William Brennan refrained from openly aligning himself with them until 1973, he too disliked what was going on in Southeast Asia.⁴⁸ So did John Marshall Harlan, who concluded there was something seriously wrong with the Vietnam War, and that the problem was a lack of moral leadership from the White House.⁴⁹ Although Harlan was a proud veteran of World War II and the most conservative member of the Warren Court, in late 1970 he joined Douglas and Stewart in dissenting from the Court's refusal to hear a case challenging the constitutionality of the Vietnam conflict.⁵⁰ Like Brennan and Harlan, Thurgood Marshall kept his views to himself until well after Warren's retirement. The reason may have been that

42. See ROGER K. NEWMAN, HUGO L. BLACK: A BIOGRAPHY 580 (1997).

43. *Id.* at 579. Reich had decided to boycott a dinner the President was giving in Black's honor because of his opposition to Johnson's Vietnam policy. *Id.*

44. *Id.* at 580.

45. See Belknap, *supra* note 9, at 93.

46. JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: *TINKER v. DES MOINES* AND THE 1960s, at 170-71 (1997).

47. See, e.g., *Atlee v. Richardson*, 411 U.S. 911, 911 (1973) (disagreeing with the Court's summary affirmation of judgment below, noting probable jurisdiction, and advocating oral argument); *Massachusetts v. Laird*, 400 U.S. 886, 900 (1970) (Douglas, J., dissenting); *Mora v. McNamara*, 389 U.S. 934, 935 (1967) (Stewart, J., dissenting).

48. See Belknap, *supra* note 9, at 94. In November 1970, during discussions within the Court about *Massachusetts v. Laird*, 400 U.S. 886 (1970), he took the position that the Court should not rule on the constitutionality of the Vietnam War unless Congress explicitly condemned what the President was doing and he continued to fight the war anyhow. See WOODWARD & ARMSTRONG, *supra* note 35, at 126. Finally, however, he joined with Douglas in opposing summary affirmation in a mandatory appeal case raising the issue of the constitutionality of the war. See *Atlee v. Richardson*, 411 U.S. 911, 911 (1973) (advocating finding probable jurisdiction and setting case for oral argument).

49. See WOODWARD & ARMSTRONG, *supra* note 35, at 127.

50. See Belknap, *supra* note 9, at 95-96; *Massachusetts v. Laird*, 400 U.S. 886, 900 (1970) (Douglas, J., dissenting).

he supported the war,⁵¹ but more likely it was that he did not wish to criticize the policies of President Johnson, who had appointed him. In 1973, with Richard Nixon now in the White House, Marshall wrote an opinion in a case challenging the legality of the bombing of Cambodia that the United States had undertaken in support of its military operations in Vietnam. In it he expressed the view that “the final history of the Cambodian War” was “unlikely to make pleasant reading” and added, “The decision to send American troops ‘to distant lands to die of foreign fevers, and foreign shot and shell’ . . . may ultimately be adjudged to have been not only unwise but also unlawful.”⁵²

Like several of his colleagues, Chief Justice Warren became an opponent of the Vietnam War. A World War I veteran, Warren was extremely patriotic and had supported every American war since 1917.⁵³ In addition, the Chief Justice liked and admired Lyndon Johnson.⁵⁴ Hence, he initially endorsed military intervention in Vietnam, convinced the United States would not be there without a good reason, and that the White House would not have gotten the country into this war unless it was in the national interest.⁵⁵ Warren retained his faith in Johnson until late 1966, continuing to believe it was his duty to support the President.⁵⁶ Sometime after the beginning of 1967, however, his support for LBJ’s policies began to wane, diminishing as antiwar protest at home escalated along with the ground fighting in Vietnam. To one of his clerks, a saddened Warren expressed growing doubts about the course of the war.⁵⁷

Despite the fact that most of his colleagues shared those doubts, Warren’s normally activist Court studiously avoided ruling on the legality of what was going on in Vietnam. The reason was not lack of opportunity. According to Douglas, at least nineteen cases challenging the legality of this “presidential” war were filed with the Supreme Court over the years.⁵⁸ Some litigants contended that the Vietnam conflict violated international law.⁵⁹

51. Black considered Marshall a hawk. See WOODWARD & ARMSTRONG, *supra* note 35, at 126. Before his appointment, Marshall had endeared himself to Johnson by criticizing Dr. Martin Luther King, Jr. for leading the civil rights movement in the wrong direction by linking it with opposition to the Vietnam War. See MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991*, at 68 (1997).

52. *Holtzman v. Schlesinger*, 414 U.S. 1304, 1315 (1973) (opinion in chambers).

53. See G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 368 (1982).

54. See *generally id.* at 306.

55. See ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 483 (1997).

56. *Id.* Referring to Johnson, Warren told columnist Drew Pearson, “He’s working hard on Vietnam. He will find some way out.” *Id.*

57. See *id.* at 483-84.

58. WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 151-52 (1980). Some of these cases reached the Court after Warren Burger replaced Warren as Chief Justice following the 1968-1969 term.

59. See *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 387 U.S. 945 (1967); *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934

More argued that the United States was not legally at war in Vietnam, generally because Congress had never authorized the hostilities there with a declaration of war, as required by Article I, section 8 of the Constitution.⁶⁰ Ten times between March of 1967 and Warren's retirement in June of 1969, the Court refused to grant a writ of certiorari in one of these cases, thereby declining even to consider the legality of the war.⁶¹

Douglas repeatedly dissented from these denials of cert.⁶² "I thought the Court did a great disservice to the nation in not resolving . . . the most important issue of the sixties . . .," he wrote later in his autobiography.⁶³ He even urged his colleagues to set down for reargument a First Amendment challenge to a federal statute that punished draft card burning (a popular form of antiwar protest)⁶⁴ because neither side had brought up "the absence of a declaration of war in the case of Vietnam."⁶⁵ Douglas got Stewart to join

(1967); *Simmons v. United States*, 406 F.2d 456 (5th Cir. 1969), *cert. denied*, 395 U.S. 982 (1969). Opponents of the Vietnam War argued that it violated both the 1954 Geneva Accords, which ended the fighting between France and the Viet Minh forces of Ho Chi Minh, and several provisions of the United Nations Charter. *See Belknap, supra* note 9, at 104-05.

60. *See Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 945 (1967); *United States v. Hart*, 382 F.2d 1020 (3d Cir. 1967), *cert. denied* 391 U.S. 956 (1968); *United States v. Holmes*, 387 F.2d 781 (7th Cir. 1967), *cert. denied*, 391 U.S. 936 (1968); *United States v. Prince*, 398 F.2d 686 (2d Cir. 1968), *cert. denied*, 393 U.S. 946 (1968); *Ashton v. United States*, 404 F.2d 95 (8th Cir. 1968), *cert. denied*, 394 U.S. 960 (1969); *United States v. Fallon*, 407 F.2d 621 (7th Cir. 1969), *cert. denied*, 395 U.S. 908 (1969); *United States v. Battaglia*, 410 F.2d 279 (7th Cir. 1969), 396 U.S. 848 (1969). It is not always possible to determine from the Court of Appeals decisions in these cases the precise nature of the constitutional argument being made. In most of these cases, however, the essence of the defendant's argument appears to have been that, in the absence of a war, the conduct in which he had engaged was not unlawful. Hence, in order to rule in his favor, a court would necessarily have had to hold that the Vietnam conflict was not a "war" because there had been no declaration of war by Congress. *See Belknap, supra* note 9, at 108-09 n.279. In one case, the court below rejected the plaintiff's request for an injunction against the Secretary of Defense and the Secretary of the Army, forbidding them to send him to Vietnam, on grounds that his suit was nonjusticiable under the Political Question Doctrine, without ever bothering to explain at all the basis on which he claimed he was entitled to the injunction. *Luftig v. McNamara*, 252 F. Supp. 819 (D.C. 1966).

Although Congress never voted a declaration of war in Vietnam, it did, on August 6, 1964, pass the Tonkin Gulf Resolution, which declared its approval and support for the "determination of the President . . . to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." 78 Stat. 384 (1964) (repealed 1971). John Hart Ely asserts that on its face the Tonkin Gulf Resolution was "broad enough to authorize the subsequent actions President Johnson took in Vietnam." JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 16 (1993).

61. *See supra* text accompanying notes 59 and 60.

62. *See Mitchell v. United States*, 386 U.S. 972, 974 (1967) (Douglas, J., dissenting); *Mora v. McNamara*, 389 U.S. 934, 935-38 (1967) (Douglas, J., dissenting); *Holmes v. United States*, 391 U.S. 936, 937-38 (1968) (Douglas, J., dissenting); *Hart v. United States*, 391 U.S. 956, 958 (1968) (Douglas, J., dissenting).

63. DOUGLAS, *supra* note 58, at 152.

64. *See United States v. O'Brien*, 391 U.S. 367 (1968).

65. Memorandum from Mr. Justice Douglas [to the other members of the United States

him once during the Warren years in dissenting from a denial of certiorari in a case challenging the legality of the war.⁶⁶ On another occasion Stewart announced that he did not think the case the Court was being asked to consider raised the issue of the power to compel military service in an armed conflict abroad without a declaration of war, but that if it had, he would be voting with Douglas to grant cert.⁶⁷ Mostly, though, Douglas protested alone.⁶⁸ By December 5, 1968, he had become so discouraged with the other Justices' refusals even to consider the legality of the undeclared war in Southeast Asia that he turned down some National Guardsmen from the state of Washington, who had asked him to stay their shipment to Vietnam. Douglas explained that while the Court "has not decided the issue, it has refused to pass on it" and he saw no possibility that his colleagues would "take a different view of the basic constitutional questions" this time.⁶⁹

By refusing even to consider the issue Douglas believed it should decide, the Court, as Schoen points out, "effectively approved the Government's war policies."⁷⁰ It may, as he contends, have avoided legitimating those policies by allowing the government (which had prevailed below in all the cases in which certiorari was denied) to win without ruling in its favor on the merits.⁷¹ But the Court did nothing to help resolve what the country and a majority of its own members perceived to be a serious national problem. A New York woman wrote to Douglas in March of 1967, complaining that "the one branch of our government that today stands uncorrupted in the eyes of the world—the U.S. Supreme Court—[has] turned away from consideration of this vital issue . . ."⁷² A few months later Douglas received a letter from a seminarian, who insisted it was "vital that

Supreme Court] (Feb. 1, 1968) (on file in box 625, Earl Warren Papers, Manuscript Division, Library of Congress).

66. *Mora v. McNamara*, 389 U.S. 934, 934-35 (1967) (Stewart, J., dissenting).

67. Stewart said of the case the Court declined to hear: "It does not involve the power, in the absence of a declaration of war, to compel military service in armed international conflict overseas. If the latter question were presented, I would join Mr. Justice Douglas in voting to grant the writ of certiorari." *Holmes v. United States*, 391 U.S. 936, 936 (1968).

68. According to James F. Simon:

Douglas's isolation from his colleagues [on the issue of whether to rule on the Vietnam issue] became the subject of a joke by his admirers. During a recess at the trial of Dr. Benjamin Spock in Boston in 1968, the story goes, it was reported that the Supreme Court had upheld the federal statute that made it a crime to burn draft cards. "What was the vote," asked a dejected civil liberties attorney. "Seven to Douglas," was the reply.

SIMON, *supra* note 38, at 420.

69. *Drifka v. Brainard*, 89 S. Ct. 434, 435 (1968) (Douglas, J., dissenting).

70. Schoen, *supra* note 9, at 320.

71. *See id.* at 308-09.

72. Letter from Mary Hays Week, Director and Editor, *Fellowship of World Citizens*, New York City, to Justice William O. Douglas (Mar. 24, 1967), (on file in box 1576, William O. Douglas Papers, Manuscript Division, Library of Congress) [hereinafter Douglas Papers].

the question of the legality of this war be cleared up.”⁷³ Yet it never was. David Currie contends that “the Justices exhibited a realistic awareness of the practical limits of judicial power by refusing . . . to grant certiorari in cases questioning the constitutionality of the undeclared hostilities in Vietnam.”⁷⁴ As far as Schoen is concerned, however, “[n]o valid or legitimate reasons explain or justify [the Court’s] silence.”⁷⁵

Schoen is correct. The principal support for the ostensible astuteness of the Court’s silence on the constitutionality of the Vietnam War is the supposed nonjusticiability of the issue. “Nonjusticiable,” is, however, less a descriptive adjective than the statement of a conclusion. It is a term of art which denotes little more than that courts will not decide issues courts do not decide. It is a rationalization for caution masquerading as a rule of law. Justiciability is really, as Thomas Barton explains, just the relationship between adjudicative procedures and the problems such procedures are asked to resolve.⁷⁶ The quandary confronting the Warren Court was whether adjudicative procedures could resolve a problem lying within the realm of war and foreign affairs. Issues of this type have “traditionally been recognized as prime examples of ‘political questions,’” which courts should abstain from deciding for separation-of-powers reasons.⁷⁷ Such issues “have been cited as prime examples and a principle justification of” the Political Question Doctrine, which elevates to the level of a constitutional principle judicial abstention from deciding matters purportedly best left to Congress and the Executive.⁷⁸

Although the Warren Court never invoked the Political Question Doctrine in cases involving the Vietnam War, the reason was that it could achieve the same results by denying certiorari. In those rare instances when it has held issues to be nonjusticiable, the Supreme Court has always done so in order to reverse a decision below holding that a particular question *was* justiciable. Since no lower court ever treated the legality of the Vietnam conflict as a justiciable issue, all the Warren Court had to do to avoid a

73. Letter from Craig Kehl, Union Theological Seminary, New York City, to William O. Douglas, United States Supreme Court Justice (Nov. 22, 1967) (on file in box 1420, Douglas Papers, *supra* note 72).

74. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 457 (1990).

75. Schoen, *supra* note 9, at 321.

76. See Barton, *Justiciability*, *supra* note 15, at 505.

77. Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 469 (1976). See also FRANCIS D. WORMUTH & DEWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 232 (1986) (“the most common application of the political question doctrine is in cases raising legal issues related to the conduct of the foreign relations of the United States”).

78. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 210 (1972). As David O’Brien has perceptively observed, “[t]he doctrine’s logic is circular. ‘Political questions are matters not soluable by the judicial process; matters not soluble by the judicial process are political questions.’” O’BRIEN, *supra* note 17, at 210.

confrontation with the political branches over the prosecution of the war was to decline to review other judges' decisions; it did not have to invoke the Political Question Doctrine.⁷⁹ Although not technically based on that doctrine, the Court's cert denials manifested its spirit.

That the Warren Court should have abstained from addressing the legality of the Vietnam War because the issue was political is ironic, for it repeatedly treated as justiciable matters far more central to the operation of the political process, and seemingly far less suitable for judicial resolution, than this one. In *Baker v. Carr*,⁸⁰ departing dramatically from precedent, the Court held that the malapportionment of state legislatures posed a justiciable issue.⁸¹ In *Powell v. McCormack*,⁸² the Justices ordered the House of Representatives to seat a duly elected member it had tried to exclude for misbehavior. The Chief Justice took the position that if a Congressman met the age, citizenship and residency qualifications set forth in the Constitution, his fellow Representatives could not deny him his seat.⁸³ The possibility that the House might ignore a judicial ruling to that effect did not trouble him. "From the *Brown* desegregation decision to the Reapportionment cases, he had always felt that the Justices' duty was only to decide the cases before them as they thought the Constitution required."⁸⁴ Warren wrote the opinion for a Court, none of whose members disputed his assertion that the issues raised by *Powell* were justiciable.⁸⁵

Those raised by the numerous cases challenging the legality of the Vietnam War were no less amenable to judicial resolution, even though they involved war and foreign affairs. The judicial rhetoric to the effect that all questions of this type are political is overstatement.⁸⁶ As Louis Henkin points out, the Political Question Doctrine purportedly prevents judicial review of claims that "the federal political branches have failed to live up to constitutional requirements or limitations."⁸⁷ Yet, there are actually very few cases in which the Supreme Court has "ordained or approved such judicial abstention from constitutional review," and none involves foreign affairs.⁸⁸

79. See Schoen, *supra* note 9, at 318-19.

80. 369 U.S. 186 (1962).

81. *Id.* at 237. In his opinion for the Court, Justice Brennan justified holding justiciable an issue the Court had previously treated as nonjusticiable by saying that the earlier rulings were interpretations of Article IV's Republican Government Clause, while this decision was based on the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 227-28.

82. 395 U.S. 486 (1969).

83. See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 758 (1983).

84. *Id.* at 759.

85. Justice Stewart did dissent, but he did so on the basis that the case was moot. See *Powell*, 395 U.S. at 560. See also SCHWARTZ, *supra* note 83, at 759.

86. See WORMUTH & FIRMAGE, *supra* note 77, at 232-33. "It should . . . be clearly understood that not all cases involving foreign affairs or defense are political questions in the technical sense." Casper, *supra* note 77, at 471.

87. HENKIN, *supra* note 78, at 213.

88. *Id.* John Hart Ely observes that, while it has become fashionable to assert, normally

“In the foreign affairs cases commonly cited the courts did not refrain from judging political actions by constitutional standards; they judged them but found them constitutionally not wanting.”⁸⁹ Throughout its history, John Hart Ely asserts, the Supreme Court has decided cases posing the question of whether Congress “had sufficiently authorized a military action the president was conducting.”⁹⁰

Avoiding this question by treating it as “political” theoretically says nothing about whether anything is constitutional, but in actuality it weakens the legal constraints on the challenged conduct.⁹¹ When the Supreme Court does that, it fails to perform what Chief Justice John Marshall long ago declared to be “emphatically the province and duty of the judicial department “to say what the law is.”⁹² Such abdication is inconsistent with judicial responsibility. “[W]ithdrawal is not a choice free from constraints,” Keeton points out, due to “the potential harm that [it] may cause to interests that . . . the judge was charged to serve while acting in [his or her] defined professional role.”⁹³ The idea that the Supreme Court could avoid affecting U.S. Vietnam policy by disposing of challenges to the legality of the war with opaque denials of certiorari is naive. As Keeton observes, “[t]he form of judicial reasoning that explores considerations of principle and policy underlying constitutional . . . declarations of law results in a choice that is neither more nor less value-laden than reasoning that contains no reference to principle or policy.”⁹⁴ By saying nothing, the Supreme Court said something, and it was the wrong thing. Its use of denials of certiorari to dispose of challenges to the legality of the war betrayed the sort of “lack of imagination” that, according to Barton, can result in a problem being “imprisoned within a decisional procedure that offers little prospect of solving” it.⁹⁵

What the times demanded was some creative problem solving that would develop and use legal procedures to resolve the Vietnam dilemma. “Problems,” Barton tells us, “are mismatches between the environment and human purpose.”⁹⁶ One way of solving them is to restructure the

under the heading of the “political question doctrine,” that there is something special about cases involving foreign affairs that renders ordinary exercises of judicial authority inappropriate, “[i]n such wholesale form, . . . this is just that—assertion—unsupported by Supreme Court precedent and affirmatively refuted by the language of the Constitution” ELY, *supra* note 60, at 55.

89. *Id.*

90. ELY, *supra* note 60, at 55.

91. *See* Casper, *supra* note 77, at 471. Among other things, as Casper points out, the effects of invoking the political question doctrine spill over into nonjudicial debates about the legal constraints whose nature and extent the Court has failed to delineate. *See id.*

92. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

93. KEETON, *supra* note 18, at 15.

94. *Id.* at 20.

95. Barton, *Creative Problem Solving*, *supra* note 13, at 275-76.

96. *Id.* at 273.

environment.⁹⁷ One does that by manipulating it to make it compatible with some frustrated human purpose.⁹⁸ Legal solutions to problems traditionally employ this approach, “relying on both power and truth to fashion rules that attempt to conform to social environments to the purposes of a person or group.”⁹⁹

By rendering, rather than avoiding, a decision on the constitutionality of the Vietnam War, the Warren Court could have reshaped the political environment in such a way that frustrated Americans might have realized their purpose to end U.S. involvement in the fighting. By the time Warren retired, the public clearly wanted an end to the war. Support for it had begun declining in early 1966, and by October of that year opponents outnumbered proponents 46 percent to 42 percent.¹⁰⁰ By 1967, the anti-war movement, once comprised mostly of young people and radicals, was seeping out into the broader society, enlisting the support even of lawyers and businessmen.¹⁰¹ “By the end of 1967, a consensus [had emerged] that the war had lasted long enough.”¹⁰² There was a brief upsurge in support for the military effort in Southeast Asia following the Communist Tet offensive at the end of January 1968, but thereafter approval of the war declined to 41 percent, as opposition rose to 49 percent.¹⁰³ Resentment toward Johnson for leading the nation into a quagmire in Vietnam forced him to abandon his quest for another four years in the White House¹⁰⁴ and contributed substantially to the defeat of his Vice President, Hubert Humphry, by Republican Richard Nixon.¹⁰⁵ President Nixon, who announced a comprehensive peace plan in May of 1969, that envisioned reducing significantly the number of American troops in Vietnam and turning the bulk of the fighting over to the South Vietnamese, enjoyed a brief honeymoon with the public.¹⁰⁶ An April Gallup poll found 44 percent of respondents favoring his Vietnam policy and only 26 percent opposing it. An ominous 30 percent were undecided, however.¹⁰⁷ In July Nixon’s ratings began to decline and by September 52 percent of those questioned expressed dissatisfaction

97. See Barton, *Therapeutic Jurisprudence*, *supra* note 15, at 4.

98. *Id.* at 6.

99. Barton, *Creative Problem Solving*, *supra* note 13, at 274.

100. See JEFFREY KIMBALL, *NIXON’S VIETNAM WAR* 42 (1998).

101. See ANDERSON, *supra* note 4, at 166.

102. SCHULZINGER, *supra* note 1, at 217.

103. See KIMBALL, *supra* note 100, at 42. Kimball characterizes the brief upsurge in support following the Tet offensive as a “rally-around-the-flag reaction.” *Id.* The long-run impact of Tet on support for the war was extremely negative. David Levy writes, “[t]he effect of the episode on American public opinion was titanic; indeed, the Tet offensive was probably the single most important event in reversing American support for the war.” DAVID LEVY, *THE DEBATE OVER VIETNAM* 144 (2d ed. 1995).

104. See LEVY, *supra* note 103, at 147-48.

105. See ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960’S*, 431-39 (1984).

106. See LEVY, *supra* note 103, at 154, 158-59.

107. See KIMBALL, *supra* note 100, at 165.

with his handling of the war.¹⁰⁸ Even in February a majority of Americans thought the United States had made a mistake in sending troops to fight in Vietnam in the first place. By September that figure was up to 58 percent.¹⁰⁹

Although most Americans wanted the United States out of Vietnam, they were confused and divided over how to end the war. A poll in the spring of 1967 found only 19 percent favored a withdrawal of American troops that would lead to a Communist takeover.¹¹⁰ Indeed, although the proportion of Americans endorsing a prompt retreat from Southeast Asia mounted from 1968 onward, it never exceeded 25 percent.¹¹¹ Most people wanted out of Vietnam but were unwilling to acknowledge that the United States had lost the war. Until 1971 polls consistently found a plurality favoring more intensive military action to end the conflict on terms favored by Washington.¹¹² Nixon won temporary support by accusing anti-war activists of promoting surrender to the Communists, while posing as the champion of reasonable steps toward peace.¹¹³ He evoked the wrath of much of the nation, however, when he invaded Cambodia in May of 1970, an action he insisted was essential to attain the kind of peace he advocated.¹¹⁴ Ironically, although doves excoriated Nixon, from early 1968 on, polls showed most of a war-weary public wanted to turn the fighting over to the South Vietnamese, which was the essence of his "Vietnamization policy."¹¹⁵ "A majority favored gradual withdrawal, Vietnamization, negotiations with the enemy, and a bombing pause—whatever the qualifications."¹¹⁶

The fact that most people qualified their support for most policies, sometimes to the point of endorsing incompatible objectives, meant that Vietnam was exactly the sort of problem that needed to be resolved by Congress. Indeed, only the national legislature was in a position to define precisely the problem the country was confronting. Was it simply how to get the United States out of Vietnam (the doves, characterization), or was it rather how to bring the war to a successful conclusion, so that Americans would no longer have to fight in Southeast Asia (the hawks' version)?¹¹⁷ Not

108. *Id.* at 166.

109. *Id.*

110. *Id.* at 42.

111. See SCHULZINGER, *supra* note 1, at 217. According to Schulzinger, before late 1967 fewer than ten percent of the public favored immediate withdrawal. See *id.* Some of the inconsistencies in the public opinion figures reported by scholars are explained by two phenomena identified by Jeffrey Kimball. One is that the wording of the questions poll takers asked tended to influence their findings. The second is that they did not ask the same questions consistently over long periods of time. KIMBALL, *supra* note 100, at 42. Hence, it is often difficult to determine whether the results of two different polls are really comparable or not.

112. See SCHULZINGER, *supra* note 1, at 217.

113. See LEVY, *supra* note 103, at 154, 159.

114. See SCHULZINGER, *supra* note 1, at 285-86, 289.

115. KIMBALL, *supra* note 100, at 42.

116. *Id.*

117. I am indebted to my colleague, Paul Gudel, for pointing out that social problems

until there was some agreement about national purpose could the proper means be found to solve the Vietnam problem. By holding that Congress must affirmatively authorize whatever additional military action was taken in Vietnam, the Supreme Court could have made unavoidable some painful prioritizing that the country's leaders had been dodging.¹¹⁸ It could also have given to a body structurally suited to the task the difficult job of working out the uncomfortable compromises between means and ends necessitated by the conflicting demands of a public unprepared to accept either the indefinite military involvement in Vietnam that "winning" required or the Communist takeover that would result from immediate withdrawal. Only Congress could ensure that the course of action the nation pursued, while one about which most people had serious reservations, would enjoy the support, however grudging, of a majority of Americans. The Supreme Court was in a position to restructure the political environment in such a way that Congress would have to act. All the Court had to do was hold the war unconstitutional because there had been no declaration of war, thus making it necessary for Congress to authorize whatever was done in Vietnam from then on. As Ely asserts, "[C]ourts have no business deciding when we get involved in combat, but they have every business insisting that the officials the Constitution entrusts with that decision be the ones who make it."¹¹⁹ That is all the Warren Court had to do.

Had it required congressional authorization of military operations in Vietnam, it might well have ended the war. To be sure, as long as Johnson remained in the White House, Democratic Senators and Representatives were reluctant to challenge administration policy.¹²⁰ But once Nixon became

often involve not merely mismatches between environment and human purpose but profound disagreements over purpose. He analogizes the debate over Vietnam to the current one over abortion, and considers the objectives of hawks and doves as incompatible as those of the "pro-life" and "pro-choice" forces.

118. When President Johnson agreed in July of 1965 to continue a gradual buildup of U.S. forces in Vietnam, he did so largely for the purpose of avoiding such prioritizing. "Johnson expected by downplaying the significance of the new commitment, he would avoid a divisive public debate and prevent the sort of public war weariness that had wrecked the Truman administration during the Korean War." SCHULZINGER, *supra* note 1, at 175. He also hoped to prevent Congress from making a decision that successful prosecution of the war was more important than his domestic agenda:

At the height of his authority with Congress, he feared that congressional discussion of Vietnam would interfere with passage of his ambitious program of domestic reform legislation, the Great Society. Some of the President's aids believed a forthright statement that the United States had raised the stakes in Vietnam "would create the false impression that we have to have guns, not butter—and would help the enemies of the president's domestic legislative agenda."

Id.

119. ELY, *supra* note 60, at 54.

120. Stanley Karnow contends, "Lyndon Johnson was never confronted by more than token resistance on Capitol Hill to his Vietnam policies." STANLEY KARNOW, *VIETNAM: A HISTORY* 505 (1997). That is an overstatement. The number of Democratic Senators and

President in 1969, party loyalty no longer restrained the Democratic majority on Capitol Hill.¹²¹ Even among Republican legislators, opposition to the war mounted.¹²² If forced to take affirmative action authorizing further military operations in Vietnam, Congress probably would have done so, but in a way that required them to be terminated relatively soon. Furthermore, if the President failed to comply with those congressional limitations, he would have been doing something the Supreme Court had declared not just illegal but unconstitutional. That would have been a political burden no Chief Executive, especially one elected with a minority of the popular vote, as Nixon was in 1968, would want to carry into a campaign for re-election.¹²³

Thus, the Warren Court had an opportunity to engage in some “systems intervention” problem solving along the lines of that advocated by proponents of Critical System Heuristics.¹²⁴ In analyzing any social system, practitioners of that brand of systems analysis seek to identify the system’s designer, its decision maker, its beneficiaries, and those who, although not directly involved in the system, are affected by it.¹²⁵ They then ask a series of questions, designed to determine both what the roles of those groups are with respect to the system and what they ought to be.¹²⁶ Applying this

Representatives who opposed the Johnson administration’s Vietnam policy grew dramatically between 1964 and 1968. See SCHULZINGER, *supra* note 1, at 152-53, 218-26. Among the opponents was J. William Fulbright of Arkansas, the chairman of the powerful Senate Foreign Relations Committee. See *id.* at 219-21, 225. Furthermore, even many supporters of administration policy wanted to assert congressional oversight and assert the prerogative of Congress to declare war. These included both Republicans, such as Senator Jacob Javits of New York, and Democrats, such as Senator Jennings Randolph of West Virginia. See *id.* at 223.

121. See SCHULZINGER, *supra* note 1, at 278. “Many Democrats had previously resisted tying the hands of a president of their own party; now that a Republican occupied the White House, more Democrats favored restricting the President’s independence in foreign affairs.” *Id.* Among those who now spoke out was Senate Majority Leader Mike Mansfield (D. Mont.). See KARNOW, *supra* note 120, at 609. Another was Senator Sam Ervin, a fervent hawk while Johnson was President, who now supported a measure “preventing the president from involving the United States in undeclared wars in the future or any other foreign commitments without adhering to the constitutional process of affirmation by the Senate.” SCHULZINGER, *supra* note 1, at 278.

122. Republican opponents included Senators John Sherman Cooper of Kentucky, George Aiken of Vermont, Jacob Javits of New York, Charles Percy of Illinois, and Hugh Scott of Pennsylvania, the Minority Whip. See SCHULZINGER, *supra* note 1, at 278; KARNOW, *supra* note 120, at 609.

123. In the 1968 presidential election Nixon, although getting 31 more electoral votes than the 270 needed for a majority in the Electoral College, received only 43.4 percent of the popular vote. Democrat Hubert Humphry got 42.7 percent, and American Independent Party candidate George Wallace received 13.5 percent. See MATUSOW, *supra* note 105, at 437.

124. See ROBERT L. FLOOD & MICHAEL C. JACKSON, CREATIVE PROBLEM SOLVING: TOTAL SYSTEMS INTERVENTION 205 (1991).

125. *Id.*

126. Critical Systems Heuristics was devised by students of management. Central to the Critical System Heuristics school of systems analysis is the concept of “boundary judgments.” These are determinations about what is inside the social system planners are trying to design and what belongs to its environment. *Id.* at 204. They also represent, according to Robert

approach to the American governmental system, one identifies the Supreme Court as its designer.¹²⁷ That means the Court is in a position to determine who ought to be the “decision taker” with respect to matters, such as whether the country will undertake military operations. What it decides about that should depend on who the beneficiary of the system ought to be and what its purpose should be. The beneficiary of the American governmental system is, presumably, the American people, and its purpose should be to implement their policy preferences. With respect to Vietnam, therefore, Congress was the most suitable “decision taker.”¹²⁸ The Supreme Court was in a position to

Flood and Michael Jackson, “justification breakoffs,” since they reveal the scope of responsibility accepted by the designers in justifying their design to the affected. *Id.* Finally, they determine how the system affects and is affected by the four groups connected with it. *See id.* at 206-07. “The task is to find a means of interrogating systems designs to reveal the boundary judgments being made, and a means of postulating alternative boundary judgments, that is of asking what the boundaries *should be.*” *Id.* at 205. This requires answering questions about the designer of the system, the “decision taker” within it, the beneficiary of the system (“client”), and those affected by, but not involved in it (“witnesses”). *See id.* The boundary questions checklist developed by Critical Systems Heuristics pioneer W. Ulrich has both an “is” mode and an “ought” mode. *See id.* at 205-07. The latter, which is most relevant to the present discussion, consists of the following questions:

- (1) Who ought to be the *client* (beneficiary) of the system S to be designed or improved?
 - (2) What ought to be the *purpose* of S, i.e. what goal states ought S be able to achieve so as to serve the client?
 - (3) What ought to be S’s *measure* of success (or improvement)?
 - (4) Who ought to be the *decision taker*, i.e. have the power to change S’s measure of improvement?
 - (5) What *components* (resources and constraints) of S ought to be controlled by the decision taker?
 - (6) What resources and conditions ought to be part of S’s *environment*, i.e. not controlled by S’s decision taker?
 - (7) Who ought to be involved as *designer* of S?
 - (8) What kind of *expertise* ought to flow into the design of S, i.e. who ought to be considered an expert and what should be his role?
 - (9) Who ought to be the *guarantor* of S, i.e. where ought the designer seek the guarantee that his design will be implemented and will prove successful, judged by S’s measure of success (or improvement)?
 - (10) Who ought to belong to the *witnesses* representing the concerns of the citizens that will or might be affected by the design of S? That is to say, who among the affected ought to get involved?
 - (11) To what degree and in what way ought the affected be given the chance of *emancipation* from the premises and promises of the involved?
 - (12) Upon what *world views* of either the involved or the affected ought S’s design be based?
- Id.*

127. One might argue, of course, that with respect to the constitutional system, the designers were the Framers, and the Court’s role is that of “guarantor” (i.e. the individual or entity whom the designer seeks to guarantee that his design will be implemented). *See id.* at 207.

128. A decision taker has “the power to change S’s (the system’s) measure of improvement.” *Id.* Given the fact that the “client” (the American people) wanted to end this country’s military involvement in Vietnam, but was also unwilling to accept defeat there, only Congress was really in a position to determine what sort of resolution of the Vietnam dilemma would constitute success.

place in its hands the decision about how long the United States should continue to fight in Vietnam. Two things suggest it ought to have assumed responsibility for making that allocation of decision-making authority. The first is that whether the President or Congress should decide if the United States will go to war is a matter that is supposed to be controlled not by either of them but by an external factor, the Constitution. The second is that, because of its expertise in interpreting the Constitution, the Court was the expert best suited to design a governmental system for determining whether and how long America would continue to fight in Vietnam.¹²⁹

Hence, it should have intervened in this constitutional controversy. Although unwilling to rule on the constitutionality of the war, the Supreme Court eventually found itself forced to play a part in the national political conflict over Vietnam. Two years after Warren retired as Chief Justice, the *New York Times* and the *Washington Post* obtained surreptitiously made copies of the TOP SECRET "Pentagon Papers," a documentary history of how the United States became militarily involved in Southeast Asia.¹³⁰ When the Justice Department sought injunctions to prevent the two newspapers from publishing this classified material, the Supreme Court quickly granted review and handed down a decision denying the Nixon administration what it sought, on the grounds that enjoining publication of the Pentagon Papers would violate the First Amendment.¹³¹ Two things about its ruling in *New York Times Co. v. United States* are significant. One is that the decision affected the political debate over Vietnam. By preventing the government from halting publication of the Pentagon Papers, the Supreme Court ensured that the public would gain access to information likely to raise grave doubts about the wisdom and candor of those who had led the nation into the war, and consequently about the desirability of continuing the military effort.¹³² The second is that some Justices viewed this less as a freedom of the press

129. As noted above, one can view the Framers as the designers of the American constitutional system and characterize the Court's role as that of guarantor that their system will be implemented. See *supra* text accompanying note 127. The refusal of the Supreme Court to explicate the respective responsibilities of the President and Congress in initiating hostilities effectively left the matter ungoverned by any legal framework. The absence of such a framework, as Gerhard Casper points out, "tends to create unnecessary tensions between the executive and the legislative branches. . ." Casper, *supra* note 77, at 491. Certainly, that was the effect of the Supreme Court's failure to hold that Congress must authorize military operations in Vietnam.

130. "Pentagon Papers" was a popular name. The official title of the study was History of U.S. Decision Making Process on Vietnam.

131. See *New York Times Co. v. U.S.*, 403 U.S. 713 (1971). In its brief per curiam opinion, the Court did not explicitly mention the First Amendment, but the cases it cited in ruling against the government because it had failed to meet the heavy burden required to overcome the presumption that prior restraints are unconstitutional were First Amendment rulings. See *id.* at 714 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), *Near v. Minnesota*, 283 U.S. 697 (1931), and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971)). See generally DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* (1996).

132. See RUDENSTINE, *supra* note 131, at 330, 332-33.

dispute than as a separation of powers one, in which the principal issue was the proper division of authority between the executive and legislative branches.¹³³ The Court nevertheless heard and decided the case.

It should have been no less willing to resolve the separation of powers issue of which branch was the proper one to make the decision about whether the United States should be militarily involved in Southeast Asia. *United States v. Nixon* strongly suggests that the Court could have decided this politically sensitive question without precipitating a separation of powers crisis.¹³⁴ In that case, which it decided only five years after Warren's retirement, the Court rejected President Nixon's claim that "executive privilege" entitled him to withhold from the courts subpoenaed tape recordings and documents that revealed his involvement in the cover-up of a burglary at the Watergate offices of the Democratic National Committee.¹³⁵ At the same time, the House Judiciary Committee was considering articles of impeachment against Nixon, one of which charged him with failure to turn over tapes and other material it had subpoenaed, which he claimed were protected by executive privilege.¹³⁶ The Court's decision was bound to influence events on Capitol Hill, arraying the Constitution on the side of those members of the Judiciary Committee who were arguing for impeachment.¹³⁷ Although involving itself in this most titanic of inter-branch struggles, the Court did so merely by deciding a case that litigants had brought to it, which happened to raise essentially the same issue over which the President and Congress were fighting. Simply by performing its normal function of interpreting the Constitution, the Court facilitated the solution of a major national problem.¹³⁸ Furthermore, it did so without inflicting any injury on itself. According to Watergate historian Stanley I. Kutler, "[D]espite the political bearing of the Court's role, the public to a large extent perceived the Justices as being above politics and parties—serving as

133. See *id.* at 303-04, 311-13, 315-16. That members of the Supreme Court should have viewed the case this way is hardly surprising, for that is the way the attorney who represented the *New York Times*, Yale Law School's Professor Alexander Bickel, argued it. See *id.* at 291.

134. 418 U.S. 683 (1974).

135. See generally STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 508 (1990).

136. See *id.* at 529, 485.

137. "While the Judiciary Committee weighed the President's political future, the Supreme Court dealt only with his claims of executive privilege to keep his tapes from the Special Prosecutor [handling the criminal prosecution of those allegedly involved in covering up White House links to the Watergate burglary]. The issue was not literally framed as deciding Nixon's ultimate fate, but the reality was plain." *Id.* at 508.

138. The Court handed down its decision in *United States v. Nixon* on July 24, 1974. See *id.* at 515. On July 26 the House Judiciary Committee voted to impeach the President. See *id.* at 525-26. On August 5 Nixon revealed the contents of one of the tape recordings at issue in the case before the Supreme Court, which proved that he had been involved in a conspiracy to obstruct justice. See *id.* at 534. Most of his Republican supporters deserted him, making his eventual impeachment by the House and removal by the Senate inevitable. See *id.* at 536-41, 544. On August 8, 1974 Richard Nixon resigned from the Presidency. See *id.* at 547-48.

disinterested constitutional arbiters."¹³⁹

Numerous Vietnam cases presented the Warren Court with similar opportunities to play the role of disinterested constitutional arbiter. All involved what Ely regards as the ideal type of litigant to raise the issue of the constitutionality of an undeclared war: an individual adversely affected by the President's decision to initiate hostilities without congressional authorization.¹⁴⁰ Some of these men were soldiers, who had been ordered to Vietnam.¹⁴¹ Others were resisting conscription into the army being used to fight the war.¹⁴²

Some of their cases would not have been suitable tools for promoting solution of the Vietnam problem. *Mitchell v. United States*,¹⁴³ for example, involved "America's foremost draft challenger,"¹⁴⁴ but he was contesting his conscription on the ground that the Vietnam War violated various treaty obligations of the United States.¹⁴⁵ Thus, a ruling in his favor would not have had the effect of requiring Congress to authorize the hostilities.

Many of the cases the Court was asked to review, however, did raise the issue of the constitutionality of the war. Furthermore, in some of them this issue was only one of several put forward by the petitioner, and it was presented in such a way that the Court could hold the war unconstitutional without ruling against the government. The petitioner could not win without a favorable holding on the constitutional question, so a judicial pronouncement on it would not have been dicta. Because that issue was a preliminary one, however, ruling against the war did not necessitate rendering judgment for the petitioner. For example, in *Hart v. United States* a draft resister contended that the clause in Article I, Section 8 giving Congress the power to raise and support armies did not authorize peacetime

139. *Id.* at 508.

140. See ELY, *supra* note 60, at 54. These cases were unlike *Massachusetts v. Laird*, 400 U.S. 886 (1970), where a state sought to invoke the Supreme Court's original jurisdiction in cases in which a state is a party as a way of getting the Court to rule on the constitutionality of the war.

141. See *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934 (1967); *Luftig v. McNamara*, 252 F. Supp. 819 (D.D.C. 1966), *aff'd*, 373 U.S. F.2d 664 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 945 (1967). Ely believes the paradigmatic party to raise the issue of the constitutionality of a war would be "a member of the armed forces ordered to the theater of operations." ELY, *supra* note 60, at 54.

142. See *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967); *United States v. Hart*, 382 F.2d 1020 (3rd Cir. 1967), *cert. denied*, 391 U.S. 956 (1968); *United States v. Holmes*, 387 F.2d 781 (7th Cir. 1968), *cert. denied*, 391 U.S. 936 (1968); *United States v. Butler*, 389 F.2d 172 (6th Cir. 1968), *cert. denied*, 390 U.S. 1039 (1968); *United States v. Prince*, 398 F.2d 686 (1968), *cert. denied*, 393 U.S. 946 (1968); *Simmons v. United States*, 406 F. 2d 456 (5th Cir. 1969), *cert. denied*, 395 U.S. 908 (1969); *Fallon v. United States*, 407 F.2d 621 (7th Cir. 1969), *cert. denied*, 395 U.S. 908 (1969); *Ashton v. United States*, 404 F.2d 95 (8th Cir. 1966), *cert. denied*, 394 U.S. 960 (1969).

143. 386 U.S. 972 (1967).

144. Beverly Woodward, *Vietnam and the Law: The Theory and Practice of Civil Challenge*, COMMENTARY, Nov. 1968, at 75, 78.

145. See *Mitchell*, 386 U.S. at 972-74 (Douglas, J., dissenting).

conscription.¹⁴⁶ To prevail he needed to convince the Court both that a state of war could exist only if Congress declared it and that if there were no war, the draft was unconstitutional. The Justices could have ruled for him on the first question (thus declaring the Vietnam conflict unconstitutional), then decided the case in favor of the government by holding that Article I, Section 8 authorized peacetime conscription. *Fallon v. United States*¹⁴⁷ was similar, except that the petitioner's contention was that in the absence of a declaration of war, the draft violated the Thirteenth Amendment.¹⁴⁸ In *Simmons v. United States*¹⁴⁹ the claim was that "compulsory service can be justified only by extreme necessity and . . . the power of Congress to rise and support armies in peacetime are subject to the Bill of Rights."¹⁵⁰ In cases of this type the Supreme Court could have held that the United States was still at peace because Congress had not declared war, and yet have done so in a way that interfered not at all with military operations or even with the draft.

Holding the war unconstitutional in either *Mora v. McNamara*¹⁵¹ or *Luftig v. McNamara*¹⁵² would have required some judicial intrusion into military affairs, but it would have been minimal and easily rectified by Congress. In *Mora*, three army privates who had been ordered to a West Coast replacement station for shipment to Vietnam, brought suit to prevent the Secretary of Defense and the Secretary of the Army from carrying out those orders and requesting a declaratory judgment that American military activity in Vietnam was "illegal."¹⁵³ *Luftig* was similar. A soldier sought an injunction against the Secretary of Defense and the Secretary of the Army, forbidding them to order him to Vietnam "or its immediate area" to engage in the war there.¹⁵⁴ Had the Court ruled in his favor, it would have prevented the military from sending one man to a theater where hundreds of thousands were fighting. A decision in favor of the *Mora* plaintiffs would have

146. See *Holmes*, 391 U.S. 956, 958 (Douglas, J., dissenting). The petitioner in *Holmes v. United States* made essentially the same argument. See *id.* at 936, 937-38 (Douglas, J., dissenting). During World War I the Supreme Court had upheld the constitutionality of conscription during a declared war. *Selective Draft Law Cases*, 245 U.S. 366 (1918).

147. 395 U.S. 908 (1969).

148. See *United States v. Fallon*, 407 F.2d 621, 623 (7th Cir. 1969).

149. 395 U.S. 982 (1969).

150. *Simmons v. United States*, 406 F.2d 456 (1969).

151. 389 U.S. 934 (1967).

152. 387 U.S. 945 (1967).

153. 389 U.S. at 934 (Stewart, J., dissenting). The *Mora* plaintiffs (Privates Dennis Mora, James Johnson, and David Samas) were popularly known as the Ft. Hood Three. See Belknap, *supra* note 9, at 112. Besides challenging the constitutionality of the Vietnam War, they also, like David Henry Mitchell, argued that it was illegal under international law. See 389 U.S. at 934-35 (Stewart, J., dissenting). Their suit, along with *Luftig*, would seem to disprove two contentions of John Hart Ely. One is that members of the armed forces are not likely to file suits challenging presidential wars. See ELY, *supra* note 60, at 57. The other is that "a suit brought by a serviceman ordered to the theater of operations is . . . likely to come too late to do much good in compelling congressional consideration of the war in question." *Id.*

154. *Luftig v. McNamara*, 252 F. Supp. 819, 819 (1966).

prevented it from sending only three soldiers to Vietnam. Of course, hundreds, and perhaps thousands, of disaffected members of the armed forces would promptly have filed similar suits. But Congress could have mooted all of them, and sent Luftig and the *Mora* plaintiffs off to Vietnam, simply by declaring war.¹⁵⁵ Only if the President could not persuade it to do that would there have been any substantial disruption of military operations.

Although the effect of holding the war unconstitutional, even in *Mora* or *Luftig*, would have been merely to require Congress to take a vote, the Justices might have refrained from acting out of fear that the President and the military would defy them, thereby damaging the image and influence of the Supreme Court. Civil War history offered a disturbing example of such defiance; under orders from President Abraham Lincoln, a Union Army general had refused to comply with the writ of habeas corpus issued by Chief Justice Roger B. Taney¹⁵⁶ in *Ex parte Merryman*.¹⁵⁷ Warren seems to have realized, however, that in the last half of the twentieth century such defiance was unlikely. Once, after his Court ordered the Army to release a prisoner, one of his law clerks asked him how they were going to make the military comply. When Warren told the clerk not to worry, the young man reminded him that President Andrew Jackson had supposedly once responded to a ruling handed down by an earlier Chief Justice by declaring that John Marshall had made his decision, now let him enforce it. Warren replied, "If they don't do this, they've destroyed the whole republic, and they aren't going to do that."¹⁵⁸

Nor was the military or the President going to ignore a decision that the hostilities in Vietnam were unconstitutional unless Congress authorized them. Nixon, after all, complied with a Supreme Court ruling that he must turn over Watergate tapes, even though revelation of what was on one of them forced him to resign the Presidency. According to Kutler, "He knew he

155. This is essentially the scenario that John Hart Ely envisions. According to him, the paradigmatic plaintiff to attack the constitutionality of a war would be "a member of the armed forces ordered to the theater of operations." ELY, *supra* note 60, at 54. He would come to court challenging the legality of the conflict, "the court would ask whether Congress had authorized it, and if it hadn't, rule the war unconstitutional unless and until such authorization was forthcoming. . . ." *Id.* He goes on to say that it would refrain "from issuing an actual withdrawal order long enough to give Congress a reasonable time to consider the issue." *Id.* Personally, I doubt that any court would ever issue an order of that type, and were one to do so, I would consider it a violation of the separation of powers. However, such an intrusion on the constitutional prerogatives of the Commander in Chief would be unnecessary; without going beyond deciding the cases of individual soldiers, sailors, and airmen, a court could effectively make it impossible for the President to continue to fight an unconstitutional war unless he openly defied the judiciary. For the reasons discussed below, I consider it unlikely that Lyndon Johnson or Richard Nixon would have done that.

156. See WORMUTH & FIRMAGE, *supra* note 77, at 118-19.

157. 17 F. Cas. 144 (D. Md. 1861). In this case Chief Justice Taney was acting in his capacity as Circuit Justice for Maryland, rather than in his capacity as Chief Justice of the Supreme Court.

158. SCHWARTZ, *supra* note 83, at 759.

could not defy the Court . . .”¹⁵⁹ Nixon discussed the possibility of purporting to abide by its decision while continuing to withhold materials, but he dropped that idea after his supporters warned him that full compliance was the only option.¹⁶⁰

The legal culture of the late twentieth century was such that compliance was the only option, even for the Commander in Chief in time of war.¹⁶¹ During the Korean conflict President Harry Truman seized the nation’s steel mills, whose output was vital to the national defense, in order to keep them from being idled by a strike.¹⁶² When the Supreme Court ruled in *Youngstown Sheet and Tube Company v. Sawyer*¹⁶³ that the Constitution did not give him the authority to take such action, Truman promptly dispatched a letter to the Secretary of Commerce, ordering him to return the confiscated mills to their owners.¹⁶⁴ “The President complied less than thirty minutes after the Justices finished reading their opinions in the Steel Seizure cases.”¹⁶⁵

There is little reason to doubt that Nixon or Johnson would have done the same thing had the Warren Court declared the Vietnam War unconstitutional. Rather than provoking a political backlash and possible impeachment by doing something the Supreme Court had declared unconstitutional, they would have turned their attention to lobbying Congress for authorization to take the military actions in Southeast Asia that they believed the national interest required. And as Harold Hongju Koh points out, “even in foreign affairs, executive decisions based on legislative consent will more likely express the consent of the governed than those generated by the executive bureaucracy alone.”¹⁶⁶

The Warren Court was in a position to dictate that decisions about how long and in what way the United States would continue to fight in Vietnam must be made by the national legislature. The Court failed to do that. Perhaps it is unrealistic to expect judges to have dealt with a problem that perplexed and befuddled Congress, a succession of Presidents, and the American people. Perhaps the absence of any consensus about what the Vietnam problem was, let alone how to solve it, made judicial intervention impolitic. Yet, the young men who faced conscription and shipment to Southeast Asia in the late 1960s did not enjoy the luxury of deciding not to

159. KUTLER, *supra* note 135, at 513.

160. *Id.* at 515.

161. “Legal culture is the matrix of values, attitudes, and assumptions that have shaped both the operation and the perception of the law.” KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 6 (1989).

162. See PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918-1969*, at 288-89 (1972).

163. 343 U.S. 579 (1952).

164. See KUTLER, *supra* note 135, at 515.

165. *Id.*

166. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 136 (1990).

decide. They had to choose between obedience to the orders of their government and imprisonment or exile for refusing to fight in what many considered an unlawful war. The decisions they made cost many young men their lives and others their liberty. These men suffered because of a decision the Warren Court refused to make. Its failure to rule on the constitutionality of the Vietnam War represents a lost opportunity. Americans of the Vietnam generation paid a high price for the Warren Court's failure to try a little creative problem solving.