JUDGES UNDER THE SHADOW: JUDICIAL INDEPENDENCE IN THE UNITED STATES AND MEXICO

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I. MEXICAN AND UNITED STATES COURTS AS PART OF "THE DOMINANT POLITICAL ALLIANCE"

Political scientists, comparative lawyers, and other observers in the United States have long ignored and grossly under-estimated the political importance of the Latin American judicial systems. Such bodies have been considered as either rubber stamps for the majority will, as defined by the President, or facades for the oligarchic dictates of the *anciên regime.* Anglo-American scholars assume the dominance of *caudillismo* (political bossism) and *personalismo* in the leadership traits of Latin America to be simply incompatible with an independent judiciary, particularly on matters of individual constitutional rights; that is, no judge can long thwart a course of action to which the regime is committed or effectively intervene when politically sensitive issues are at stake. But these simplistic generalizations are founded upon and indeed have fostered wholly inadequate coverage and analysis of the courts, key legal actors, and constitutional law in our current textbooks on Latin American politics.[1] First studies relying on

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1. Texts examined were: R. ALEXANDER, TODAY'S LATIN AMERICA (1968), whose "status of the courts" comprised one-half of a page; J. BUSEY, LATIN AMERICA: POLITICAL INSTITUTIONS AND PROCESSES (1964), with coverage of about four pages; A. EDELMAN, LATIN AMERICAN POLITICS AND GOVERNMENT (1965), devoting about twenty of 470 pages to "Courts and Law"; J. LAMBERT, LATIN AMERICA: SOCIAL STRUCTURES AND POLITICAL INSTITUTIONS (1967), in-

anecdotal and hearsay evidence, like the rumor-monger in a small town, have become the unquestioned parents of our community's image of Latin American judicial processes.[2] What is lacking is a systematic comparative focus on the Latin American courts as important allocators of scarce resources and values within their respective national political systems[3] and as dynamic components of national political development.[4]

The all-purpose writ of *amparo* is widely regarded by Mexicans and foreign legal scholars as the nation's most effective deterrent against abuse at all levels of government.[5] In Mexico as in

cluding about eight pages on "administration of justice and the courts"; M. NEEDLER, LATIN AMERICAN POLITICS IN PERSPECTIVE (rev. ed. 1968), containing about four pages on the subject; A. VON LAZAR, LATIN AMERICAN POLITICS: A PRIMER (1971), devoting about four pages to "the judiciary"; and POLITICAL FORCES IN LATIN AMERICA: DIMENSIONS OF THE QUEST FOR STABILITY (B. Burnett & K. Johnson eds. 1968), including scattered references to judicial or legal topics, but no systematic treatment either singly or on a country-by-country basis.

2. A. EDELMANN, *supra* note 1, at 462, concludes, for example, that "independence [of the courts] is a high-sounding phrase in the paper constitutions and bears little resemblance to reality"; he excepts Brazil (pre-1964), Costa Rica, and, to a lesser extent, Mexico.

But Professor Edelmann principally supports his contention with references to the constitutional powers which the President *may* wield to frustrate judicial independence. His only evidentiary linkages with the "reality" of such judicial subordination are a few monographs on individual countries, none of which is or contains a comprehensive empirical study of the criteria for independence. These may include: (1) why and how cases are brought, and by whom, (2) what the courts actually decide and how frequently against the government's position, (3) the impact of these decisions on the political system, and (4) the extent to which unpopular decisions of the courts are reversed or unenforced. *See* text with notes 5-8 *infra*, and Theodore Becker's perceptive and pioneering critique of the existing literature, COMPARATIVE JUDICIAL POLITICS 161, 210, *et. seq.* (1970).

3. *See* T. BECKER, *supra* note 2 and *passim*, for his general comments on Latin American courts.

4. *See* Wiarda, *Law and Political Development in Latin America: Toward a Framework for Analysis*, 19 AM. J. COMP. L. 434 (1971); Karst and Rosenn, *Law and Development in Latin America*, 19 AM. J. COMP. L. 431 (1971).

5. Adopted by the national government in 1847, the Mexican writ of *amparo* has become almost the exclusive instrument for attacking unconstitutional acts committed by officials at either the state or federal level. The writ is geared to protect primarily the individual rights guaranteed by the first 29 articles of the Constitution. *See* LAW OF AMPARO arts. 1, 4. But because of modern substantive interpretations of articles 14 and 16 of the Constitution, the writ may extend to violations of other constitutional limits on governmental activity. Through these articles, officials are liable to *amparo* injunction if they fail to follow "essential formalities of procedure" and "laws issued prior to the act" (article 14); they must also demonstrate the competency of their authority

the United States, observers of the federal courts and their exercise of the extraordinary *amparo* action have not closely and empirically examined the *political* ramifications and effect of the judicial process—with one notable exception.[6] As a step toward

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and "the legal basis and justifications for the action taken" (article 16). This is comparable to the expansion of federal judicial power in the United States under the due process clauses of the fifth and fourteenth amendments and the equal protection clause of the latter. Mexican and Anglo-American scholars see few formal limits on the applicability of the *amparo* because of this incorporation of articles 14 and 16. See I. BURGOA, EL JUICIO DE AMPARO 166-76 (6th ed. 1968); Cabrera & Headrick, *Notes on Judicial Review in Mexico and the United States,* 5 INTER-AMERICAN L. REV. 253 (1963); Fix Zamudio, *Algunos aspectos comparativos del derecho de amparo en Mexico y Venezuela,* LIBRO-HOMENAJE A LA MEMORIA DE LORENZO HERRERA MENDOZA II 334, 344-56 (1970); and consider, *e.g.*:

> [I]f the federal Congress should enact a tax not included among those expressly sanctioned by article 73, which sets forth the powers conferred upon the legislative branch, any attempt to collect it would inflict an injury of the sort envisaged by article 16, and the act could be voided in *amparo.*

R. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT 124-25 (1971).

Officials or agencies thus enjoinable in *amparo* proceedings as "responsible authorities" include judges, administrative tribunals, bureaucrats functioning in a ministerial capacity, police officers, legislatures, and even the President of the Republic. Under articles 14 and 16, they are accountable for the aforementioned incorrect applications of existing laws as well as for violations of procedural due process. Laws *qua* laws which "by their mere promulgation" cause immediate injury likewise may be challenged as constitutionally defective (called the *amparo contra leyes*). LAW OF AMPARO art. 114(I); I. BURGOA, *supra,* at 604-05.

Unlike *erga omnes* or class action effects in the United States, however, *amparo* judgments affect only the individual parties to the case (*i.e., inter partes*), "without making any declaration as to the law or act upon which the complaint is based." MEXICO CONST. art. 107(II). The only exception is where the Supreme Court or circuit courts establish *jurisprudencia* by deciding the same way five consecutive times on the same point of law; such jurisprudence or precedent then binds all regular courts, labor mediation boards, and administrative tribunals in a fashion similar to the Anglo-American principle of *stare decisis.* LAW OF AMPARO arts. 192-93. Each person aggrieved by the offending law or act must nonetheless litigate his claim separately before the *amparo* court.

For a brief outline of the direct "legality" *amparo,* the indirect "legality" *amparo,* and the *amparo contra leyes,* the jurisdiction of the Mexican Supreme Court regarding all three, and comparisons with extraordinary writ actions in the United States, see Schwarz, *Exhaustion of Administrative Remedies under the Mexican Writ of Amparo,* 7 CALIF. WEST. L. REV. 331-35 (1971); Schwarz, *Mexican Writ of Amparo: Extraordinary Remedy against Official Abuse of Individual Rights: Parts I & II,* 10-11 PUBLIC AFFAIRS REPORT nos. 6, 1 (1969-70).

6. The notable exception to the dearth of systematic Mexican research on judicial output is González Casanova, in LA DEMOCRACIA EN MEXICO 29-31 and Appendices (2d ed. 1967), discussed *infra,* section V. The best Anglo-American

filling such a research gap, this article is devoted to examining the extent to which the Mexican federal courts, with their exclusive *amparo* jurisdiction, are as independent or effective in adjudicating constitutional-rights cases as their counterparts in the United States. "Independent" in this article means the inclination of the courts to decide on their merits "cases and controversies" legitimately presented, pressures exerted by other elements of the political system notwithstanding.

With a debt to the pioneering works of Theodore Becker and Donald Kommers,[7] one can posit four criteria by which such judicial independence can be evaluated on a "cross-national basis:" (1) the extent to which judges actually exercise their prerogatives against what Robert Dahl has called "the dominant political alliance,"[8] and other, localized power elites such as police and provincial governments; (2) the degree of citizen awareness of judicial remedies and their tendency to seek such relief when aggrieved by official action; (3) the frequency with which the courts' dispositions find support among key politicians, other judges, at the provincial level, law professors, pressure group leaders—particularly in labor and industry, and journalists with specialties in public law; and (4) the number of times that officials

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work on the *amparo* in terms of scope and emphasis on *some* of its political characteristics is by a political scientist, R. BAKER, *supra* note 5.

7. D. Kommers, *Cross-National Comparisons of Constitutional Courts: Toward a Theory of Judicial Review*, Paper delivered at 69TH ANNUAL MEETING OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION at 17-22 (Los Angeles: September, 1970); T. BECKER, *supra* note 2. The criteria represent a re-ordering and re-phrasing of Kommer's, based in part on Becker's general argument. Kommer does not, as does this writer, prefer to link the *exercise* of judicial review with determining its effectiveness or impact. His unequivocal statement, "the exercise of judicial review does not of course say anything about its effect" would appear to miss the political feedback that court decisions often reflect; *e.g.*, the "switch in time saving nine" which some observed in the Supreme Court's post-1937 decisions favoring the Roosevelt Administration and the New Deal, only after Roosevelt almost succeeded in "packing" the Court because of it's prior judicial obstruction.

8. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 JOURNAL OF PUBLIC LAW 279 (1957). "Dominant political alliance" refers to the coalitions controlling the three branches of the United States federal government. From his examination of the federal laws struck down by the Court, Dahl theorizes that the Justices are least likely to block a strong legislative majority on a major issue and most likely to succeed against a fragile or transient majority, or on a minor issue. Thus, far from sounding a constant, discordant note in the political system, the Court is an integral part of the "alliance."

named in the complaints and their superiors actually comply with "finalized judicial outputs" meaning decisions affirmed on appeal.[9] The political independence of the Mexican and United States federal courts will be measured here primarily in relation to how the federal courts of Mexico and the United States conceive of their judicial-political roles as expressed in decisions on constitutional questions presented to them in concrete, individual cases.

Both the Mexican and United States courts have a wide range of decisional options when confronted with cases that touch upon thorny "political questions." At one extreme are decisions not to decide at all, for fear that any position might not find general public acceptance or official enforcement, particularly if against a major policy or practice of the "dominant political alliance." At the other extreme is not only the decision to make a constitutional adjudication, or decide on the merits of the case presented, but a decision holding that one of those major policies or practices conflicts with a principled view of the Constitution. Alexander Bickel succinctly put the range of choice—and the frequent dilemma—facing the United States Supreme Court.

> The passive devices, producing decisions that fall short of constitutional adjudication, and constitutional doctrines properly so called are all points on a continuum of judicial power. And if, having regard to actual consequences, one views exercises of the power as ranging from the extreme of a denial of certiorari at one end to that of the judgment in the *School Desegregation Cases* on the other, it is evident that not all constitutional decisions have the same weight, the same reach, the same binding equality; not all encounter with equal degree of shock the counter-majoritarian difficulty; some are nearer the passive end than others.[10]

Before comparing the extent of judicial independence in both countries, the reader should be alerted to two cautionary points. First, no judicial system, including that of the United States, is apt to press for constitutional liberties to the point of encouraging, in the words of Theodore Becker, "strong antisystem counterelites (or those perceived as strong)" to carry out their threat of doing

9. *See* note 7 *supra*; regarding a general theory of the judicial process as a "system," see J. A. SIGLER, AN INTRODUCTION TO THE LEGAL SYSTEM (1968).

10. A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 207 (1962).

away with the system itself.[11] Professor Dahl discussed United States courts as *part* of the dominant political alliance[12] and Alexander Bickel has expressed a similar conclusion visualizing such a partnership as a real source of the Supreme Court's power.[13] Up to that point, however, there are important degrees to which judges can protect individual rights and minority dissent within the system.[14] Dahl, for example, holds that while "the main task of the [United States Supreme Court] is to confer legitimacy on the fundamental policies of the successful coalition," it also serves to confirm the basic constitutional procedures by which those coalitions are formed.[15] This is, of course, qualification to the point of contradiction. If the Court can *establish* those procedural guidelines albeit within a consensual context, then may it not also thwart major policy goals of the regime which, in the minds of the justices, run counter to the proper decision-making procedure? Even Dahl admits that "the Court operates to confer legitimacy, not simply on the particular and parochial policies of the dominant alliance, but upon the basic patterns of behavior required for the operation of a democracy."[16]

Studies of certain high courts of Latin America have yielded similar findings. Although generally disdainful of the political subordination of Latin American judicial systems, Professor Jacque Lambert concedes that some courts are effective in "braking" high-handed administrative actions through devices such as *amparo* and the imported habeas corpus. He concludes that

11. T. BECKER, *supra* note 2, at 165. Consider, *e.g.*, the difficulties in judicial prevention or control of using national emergency measures that exceed what is necessary to restore order; *i.e.*, adopting judicial review on the basis of "the less-restrictive alternative test." *Developments in the Law: The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1293-1303 (1972).

12. Dahl, *supra* note 8, at 294-95.

13. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 173-81 (1970).

14. *See* T. BECKER, *supra* note 2, at 166-67:

> Once we recognize that in no system will courts protect freedom of speech, assembly, and the like geared to doing away with the system when there is the slightest chance that this speech might actually generate the action it calls for, we can begin to talk about the degrees to which courts protect individual policy and subsystem disagreement within the system. Courts frequently are employed for this purpose—and the more independent the judiciary, the more likely that they will be employed in this way. . . . The one prerequisite to this maintenance of individual liberties against governmental oppression is a low threshold of popular outrage toward such actions developed among the citizenry as a whole or among society's influentials.

15. Dahl, *supra* note 8, at 295.

16. *Id.*

"there does exist a tradition of true judicial independence" in eight countries (including Mexico) as of 1967, on matters such as property rights and the arrest of political opponents.[17]

A second precaution: judicial independence cannot be measured strictly by the extent to which the courts challenge statutes, executive decrees, and administrative regulations as inherently unconstitutional; that is, by the extent of judicial review as traditionally defined. Judicial independence also should be tested through measuring how frequently illegal or constitutionally impermissible official *practices* are judicially attacked by way of extraordinary writ proceedings like the Mexican *amparo* or Anglo-American habeas corpus, mandamus, injunction, and certiorari. Indeed, many of the United States Supreme Court's most controversial decisions have not struck at laws *qua* laws at all, "only" at state and federal procedures for arresting, arraigning, and prosecuting suspected criminals; that is, official actions held to be in violation of the due process guarantees of the Federal Constitution's fourth, fifth, and sixth amendments.[18] When scrutiny is limited to the formal review powers of courts, especially supreme courts, one "utterly bypasses the daily low-level, eyeball-to-eyeball confrontation of the government and the governed at the local level through judicial administration of the law."[19] This is particularly important in evaluating the efficacy of the Mexican *amparo* writ.

With these precautions in mind, this article shall determine to what extent the United States Supreme Court and its Mexican counterpart experience in common the tension "between the principled universe of 'logic' and the expedient requirements of 'experience.' "[20] The respective responses of the two courts to this tension can best be disclosed and compared by charting the subject matter areas and the frequency with which they choose both ends of Professor Bickel's "continuum." The doctrines of political questions, and committed-to-agency-discretion, are at the passive end of that continuum in the Anglo-American courts, and will be developed in the next section as reference points for finding

17. J. LAMBERT, *supra* note 1, at 294-95.

18. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966), Mapp v. Ohio, 367 U.S. 643 (1961) and Gideon v. Wainwright, 372 U.S. 335 (1963).

19. T. BECKER, *supra* note 2, at 212.

20. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections between Law and Political Science*, 20 STAN. L. REV. 169, 236 (1968).

the extent of passivity in the Mexican *amparo* courts. Section III is an effort to delineate the Mexican equivalent of the United States' political question, the extent of their modification by the *amparo* courts, and how they compare with cases subject to judicial activism in the United States. Section IV will draw conclusions concerning the growing independence of the Mexican *amparo* courts in certain issue areas, particularly as they compare with areas of limited reviewability in the federal courts of the United States. The final section will chart the middle-range of options facing judges of both nations' judiciaries: where the judges, especially those of the Supreme Courts, veer toward either judicial activism or judicial modesty in deciding politically important or government-involved cases on their merits.

II. UNITED STATES DOCTRINES OF NON-REVIEWABILITY: VARYING CONCERNS FOR "SOVEREIGNTY" AND "EXPEDIENCY"

Under the political questions doctrine, the United States Supreme Court reaches the most extreme end of the scale on judicial self-restraint. It does so by disclaiming any responsibility for adjudicating an issue in the present *and* in the future on the ground that the case would better be resolved by the elective branches of the state or federal government.[21] Political questions differs from its twin doctrine of non-reviewability, committed-to-agency-discretion, in that it is judicially created, technically more deferential to the official policy-makers being challenged, and not restricted to the actions of federal administrative agencies.[22] However, many of the cases in which the committed-to-agency-discretion rationale has been adopted overlap with those in which a political questions analysis is appropriate; therefore they will be discussed together.

Both doctrines of non-reviewability are unique in the permanence of their effect. When the High Court denies a writ of

21. Some of the leading analyses of the doctrine are: Powell v. McCormack, 395 U.S. 486, 512-50 (1969) (majority opinion per Warren, C.J.); Baker v. Carr, 369 U.S. 186 (1962) (majority opinion per Brennan, J.); A. BICKEL, *supra* note 10, at 183-98; P. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 192-209 (1953); M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT ch. 5 (1964); Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Tigar, *Judicial Power, The "Political Questions" Doctrine, and Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970).

22. *See* discussion in section II B. *infra*.

certiorari or standing to sue on grounds other than those for non-reviewability, it has found only that the issue has not ripened, the petitioner lacks a concrete injury, his administrative remedies have not been exhausted, or that he has proper recourse via the abstention doctrine to state courts on matters of state law. In such cases, the litigant or a better party might well expect to return one day to the forum of the Court.[23] But "[o]nce the political questions doctrine has been applied to a particular issue, the rules of precedent and of stare decisis come into play and will prevent a judicial determination of this issue in future cases."[24] Thus, the political question "is not premised upon the specific constellation of the individual case; it attaches to the issue itself."[25] Essentially the same point can be made for committed-to-agency-discretion.[26]

Difficult to define operationally are the issues to which judicial non-reviewability attaches. What one recent observer notes in regard to political questions may also be applied to issues for agency discretion:

> [It] does not seem to be a doctrine at all, but a group of quite different legal rules and principles, each resting in part upon deference to the political branches of government. Such an assertion, however, while setting forth a characteristic of the political questions cases, does not uniquely describe them.[27]

A. The Political Questions Doctrine

Although constituting the most specific reference by which to compare non-reviewability rationale in other countries, classification of political questions by subject matter or issue area is also the easiest to perforate with exceptions. In *Baker v. Carr*,[28] the landmark reapportionment case and itself an erosion of a traditionally non-justiciable area, Justice Brennan defined five major

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23. Plaintiffs attacking the statutory ban on birth control devices in Connecticut, for example, were first denied standing for their failure to show "concrete injury" (Tileston v. Ullman, 318 U.S. 44 (1943)), then put off because the issue was insufficiently "ripe" for adjudication (Poe v. Ullman, 367 U.S. 497 (1961)). They finally gained access upon being tried and sentenced under the offending statute (Griswold v. Connecticut, 381 U.S. 479 (1965)).

24. Sharpf, *supra* note 21, at 537-38; *see also* M. SHAPIRO, *supra* note 21, at 190.

25. Sharpf, *supra* note 21, at 537.

26. *See* text and notes 101-03 *infra*.

27. Tigar, *supra* note 21, at 1163.

28. 369 U.S. 186 (1962).

categories: United States foreign relations, dates of the duration of hostilities, validity of legislative enactments, the status of Indian tribes, and "republican" forms of government. Professor Fritz Sharpf expanded these into seventeen separate issue areas.[29] His list shows that the great bulk of "political questions" have been declared in the area of foreign relations law, and within this field, "questions of international and domestic law which immediately concern the political and military interactions of the United States and foreign states."[30] But even in this "airtight" category of political questions there are notable exceptions to the Court's exercise of the doctrine. Sharpf himself inserts the word "perhaps" before three of these foreign-relations issue areas.[31] There are other exceptions where the federal courts have not completely subordinated individual property or civil rights to the Executive Branch's interpretations of treaties and policies toward foreign governments.[32]

Recognition of inconsistencies in applying traditional subject matter categories forces consideration of other, more functional criteria for distinguishing political questions from otherwise unrelated cases. Justice Brennan in *Baker v. Carr* introduces six "analytical threads" demarcating proper application of the doctrine, in five of which little rigor can be found.[33] To Professor Sha-

29. The validity of treaties under international and foreign constitutional law; the validity of federal statutes under international law; the international boundaries of the United States; the territorial sovereignty of foreign states; the existence of foreign insurgents, belligerants, and governments (*de facto* and *de jure*) and states; the effect which American courts should accord to acts of foreign insurgents, belligerents, and governments; the immunity of foreign diplomats and of foreign state-owned or operated vessels; the constitutionality of the exclusion and expulsion of aliens; the legality of a license for airline service abroad; the duration of the civil war (or war generally); the existence of a state of facts justifying an exercise of the war power against alien enemies, and against citizens suspected of participating in an insurrection; the necessity of continuing federal protection of Indians in a process of assimilation; the recognition of competing groups or persons as the lawful government or officers of a state; the validity of state laws under the republican-form-of-government clause of the Constitution (Guaranty Clause); the validity of statutes allegedly enacted in violation of procedural requirements; the validity of ratifications of a constitutional amendment; until Baker v. Carr, the constitutionality of state reapportionment statutes.

Sharpf, *supra* note 21, at 537 n.69.

30. *Id.* at 596.

31. *Id.* at 537 n.69.

32. *See, e.g.*, notes 261-62 and accompanying text *infra.*

33. 369 U.S. 186, 217 (1962). "Threads" two through six have little rigor if only because the Court itself has so often appeared to ignore them. These are: (2) a "lack of judicially discoverable and manageable standards" for

piro, "one of the few relatively successful rationales for political questions"[34] is Justice Brennan's first and most emphasized criterion: a political question exists when there is "a textually demonstrable commitment of the issue to a coordinate political department." That is, a specific reference to the separation of powers principal of the Constitution. Such deference on constitutional grounds does indeed appear as a theme in almost all the political questions cases, domestic as well as foreign.[35]

Unfortunately for the rigor of the separation of powers rationale, two major difficulties appear. First, such a thread does not satisfactorily explain the Court's withdrawal from the Guarantee Clause cases—those in which existing *state* governments were attacked as not "republican" in the sense of article IV of the Federal Constitution.[36] Second, there are too many exceptions to the Court's ambiguous abstention in the presence of any "textually demonstrable commitment" to the two *national* branches of government. The most dramatic blows, not only to the separation of powers criterion as stated in *Baker*, but to the political questions

resolving the case; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial dscreton;" (4) a threat of "expressing lack of respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question," or the danger of speaking with more than one voice especially in foreign relations matters.

34. M. SHAPIRO, *supra* note 21, at 206.

35. As Justice Brennan put it in Baker v. Carr, "the non-justiciability of a political question is primarily a function of the separation of powers." 369 U.S. 186, 217 (1962). There are indeed many examples of where the Court deferred to the powers of Congress or the President in declaring "political questions"; such as complaints that (1) Kansas took too long to ratify an amendment to the Federal Constitution (Coleman v. Miller, 307 U.S. 433 (1939)); (2) an "enrolled statute" appearing to differ from the bill originally passed was invalid (Field v. Clark, 143 U.S. 649 (1892)); (3) an incumbent Rhode Island government should be denied Congressional representation and unseated because it lacked the requisite "republican" character under the Constitution (Luther v. Borden, 7 How. 1 (1849)); and (4) Congress invalidly abrogated a Chinese-U.S. treaty by restricting immigration quotas after the treaty went into effect (the Chinese Exclusion Cases, 130 U.S. 581, 602, *et. seq.* (1889)).

36. The key issue for Chief Justice Taney in Luther v. Borden, was really not the challenge to Congress or the Presidency. It was, *inter alia,* the difficulty in choosing between a rebellious "republican" faction and the incumbent "legitimate" government of Rhode Island. The Court, said Taney, could not possibly find "controlling points of law" sufficient to establish the propriety of conflicting claims. 7 How. 1, 10, 14-15 (1849). In Pacific Telephone v. Oregon, 223 U.S. 118 (1912), likewise, the Court found a political question for reasons other than concern for Congress's power. *See* text with note 71 *infra.*

doctrine generally, came with *Powell v. McCormack*[37] and the more recent *Pentagon Papers* cases.[38] In *Powell*, Chief Justice Warren with the support of seven other Justices told Congress that it could not exclude, by majority vote, a duly elected member on grounds other than those of age, citizenship, and residence as specified in the Constitution. The Supreme Court's intervention and finding in favor of Powell, like the Reapportionment Cases and the later precedent of *Bond v. Floyd*,[39] thus greatly undercut all justifications of political question rulings in challenges of legislative prerogatives. *Powell*, however, represented a particularly dramatic departure, directly challenging the Congress's authority over its own membership as well as the latter's interpretation of internal operating procedures.[40] The *Pentagon Papers* cases likewise signify a direct confrontation with the Executive Branch, dealing not only with the release of classified materials on the history of the Vietnam War—that is, a sensitive foreign relations matter —but the internal classification procedures themselves. Over the argument of three Justices' that "the very nature of executive decisions as to foreign policy is political, not judicial," the Court squelched Government attempts to enjoin publication of documents "leaked" to the *Washington Post* and *New York Times*.[41]

Decrying the lack of explanatory rigor in the separation of powers justification, Professor Martin Shapiro asserts that the only pattern left in political questions cases is the Court's refusal to adjudicate "issues of basic sovereignty," where the Court is called to judge the validity or viability of whole governments, whether these be state, national or foreign.[42] The sovereignty rationale in United States political question cases appears similar to the traditional civil-law restriction on the Mexican federal courts: that the judiciary cannot assume what is essentially a legislative prerogative in determining who has the ultimate power or sovereignty

37. 395 U.S. 486 (1969).

38. New York Times Co. v. United States, United States v. Washington Post Co., 403 U.S. 713 (1971).

39. 385 U.S. 116 (1966), wherein the Court enjoined, on remand, the Georgia Legislature from excluding a legislator because of his expressed opposition to United States actions in Vietnam.

40. *See* Symposium, *Comments on Powell v. McCormack,* 17 U.C.L.A. L. REV. 1 (1969).

41. 403 U.S. 713 (1971) (dissenting opinion of Harlan, J.); *see also* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

42. M. SHAPIRO, *supra* note 21, at 176-85.

to make laws.[43] For example, just as the United States Court said it lacked authority to pass on the President's recognition of a foreign government,[44] even if recognition validates the seizure and sale of property owned by United States citizens,[45] so also would it not question whether the existing government of Oregon was not "republican" because of its adopting of initiative and referendum procedures.[46] "[A]n analysis of the subject matter of 'political questions' cases therefore suggests that 'political' for the Court means basically not the interpretation and constitutional review of laws but the very existence of laws or legal systems."[47]

There are several reasons why this thesis involving sovereignty should be adopted with caution. First, it does not completely account for Justice Brennan's sweeping dictum in *Baker v. Carr* that all political questions in the future will be limited to separation of powers issues; that is, no *state* action ordinarily reachable through the fourteenth amendment shall be immunized from federal judicial scrutiny.[48] According to Professor Sharpf:

> Potentially the most far reaching expansion of the doctrine into the field of reapportionment has been reversed on grounds that may well militate against the further vitality of the political question even for questions arising under the Guarantee Clause.[49]

Second, like *Baker*'s impact on the Guarantee Clause issue area, *Powell v. McCormack* threatens the future validity of sover-

43. This principle is reflected in article 107 (II) of the Mexican Constitution, which states:

> [T]he judgment [in *amparo*] shall always be such that it affects only private individuals, being limited to affording them redress and protection in the special case to which the complaint refers, without making any general declaration about the law or act on which the complaint is based.

See R. BAKER, *supra* note 5, at 269-71; and analysis of political rights as nonjusticiable in Mexico, text with notes 155-67 *infra*.

44. Rose v. Himeley, 4 Cranch 241 (1808).

45. Oetjen v. Central Leather Company, 246 U.S. 297 (1918); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

46. Pacific Telephone v. Oregon, 223 U.S. 118, 150-51 (1912).

47. M. SHAPIRO, *supra* note 21, at 180.

48. Justice Brennan's warning was direct:

> Our review reveals that in the Guaranty Clause cases and in the other "political questions" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the states, which gives rise to the "political question." . . . . *We have no question decided or to be decided by a political branch of government coequal with this Court.*

369 U.S. 186, 226 (1962) (emphasis added).

49. Sharpf, *supra* note 21, at 596.

eignty in the so-called "enactment cases" where the Court refused to void Kansas's belated ratification of the Child Labor Amendment[50] or to consider whether an "enrolled statute" differed from the original passed by Congress.[51] One might question whether the sovereignty thesis is still the reason for judicial abstinence on such issues in light of the *Powell* decision. If the Court can prohibit Congress from excluding a member like Powell for extra-constitutional reasons, as defined by the Justices, then may not that same Court also prohibit Congress from "excluding" as well a belatedly ratified amendment or questionable statute? And if it can prohibit such exclusions, might it not also compel Congress to *accept* those questionable enactments?

Third, the Supreme Court's traditional stance that federal taxpayers' suits constitute political questions received a recent jolt with *Flast v. Cohen*.[52] Under *Frothingham v. Mellon*[53] and other cases[54] petitioners protesting state and Congressional expenditures for wars, religious programs and welfare policies were long denied standing to sue in the federal courts on the ground that such suits touched on "the highest attribute of sovereignty," the power to tax.[55] In *Flast* the Court finally held that a plaintiff had standing to challenge a federal spending program if he could show that Congress violated a specific limitation on its taxing and spending power; the limitation in this case being the Establishment and Free Exercise of Religion clauses of the first amendment.[56] Justice Stewart concurred:

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50. Coleman v. Miller, 307 U.S. 433 (1939).

51. Field v. Clark, 143 U.S. 649 (1892).

52. 392 U.S. 83 (1968).

53. 262 U.S. 447 (1923).

54. Massachusetts v. Mellon, 262 U.S. 447 (1923), dismissing Massachusetts' complaint that her sovereignty was violated by Congressional taxation supporting the Maternity Act of 1921; the *Frothingham* doctrine apparently moved an appellate court to invoke political questions in a taxpayer's suit against military spending in Vietnam, Sarnoff v. Shultz, 457 F.2d 809, *cert. denied*, 409 U.S. 929 (1972); suits against state tax laws were similarly prevented in South Dakota v. North Carolina, 192 U.S. 186 (1904) and Doremus v. Board of Education, 342 U.S. 429 (1952). Federal non-reviewability here becomes intertwined with the doctrine of "deferral": federal district courts are statutorily prevented from reviewing state tax policies, unless effective remedies are lacking. 28 U.S.C. 1341 (1970). Unless interfering with interstate commerce or other federal statutes, levies of public utility rates are similarly "deferred." 28 U.S.C. 1342 (1970).

55. South Dakota v. North Carolina, 192 U.S. 286, 319 (1904).

56. 392 U.S. 83, 105 (1968).

> The present case is thus readily distinguishable from *Frothingham* . . . where the taxpayer did not rely on an explicit constitutional prohibition but instead questioned the scope of the powers delegated to the national legislature by Article I of the Constitution.[57]

Fourth, it is difficult to see how some of the alien-rights cases where the Court has invoked the doctrine have anything to do with the sovereignty of one country in relation to another. In *Harisiades v. Shaughnessy* and *Galvan v. Press*[58] the Justices wrestled with the issue of whether resident aliens could be deported for past membership in the Communist Party under the Alien Registration Act of 1950, even if such membership was terminated long before the statute's enactment. Although in *Galvan* Justice Frankfurter chose to invoke the doctrine of political questions, he did so with heavy emphasis on the separation of powers rationale, speaking little of the issue being "vital" to the sovereignty of the United States or any other country.[59] Furthermore, at the opposite end of the spectrum from political questions are decisions at least marginally related to alien rights but in which the Court nonetheless has taken an activist stand against government policy.[60] In *Afroyim v. Rusk* the Court invalidated a congressional statute and overruled precedent barely nine years old with the comment:

> We reject the idea expressed in *Perez v. Brownell*, 356 U.S. 44 (1958), that, aside from the Fourteenth Amendment, Congress has any general power, expressed or implied, to take away an American citizen's citizenship without his assent. *This power cannot, as Perez indicated, be sustained as an implied attribute of sovereignty possessed by all nations* . . . .[61]

These cases can be coupled with those in which the Court has upheld aliens' claims of substantive and procedural rights violated

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57. *Id.* at 114.

58. 342 U.S. 580 (1952); 347 U.S. 522 (1954).

59. 347 U.S. 522, 530-32 (1952); *but see* Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

60. These cases involved claims brought by those denied their citizenship for various statutory reasons including defection to a foreign country to avoid military service (Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)), remaining in the petitioner's country of birth for more than three years (Schneider v. Rusk, 377 U.S. 163 (1964)), and voting in a foreign election (Afroyim v. Rusk, 387 U.S. 253 (1967)).

61. 387 U.S. 253, 257 (1967) (emphasis added).

during extradition and exclusion proceedings.[62] Together they question any abiding judicial concern for issues of sovereignty as weighed against the irreparable loss of citizenship or residence suffered at the hands of some "foreign policy."

The varying application of the political questions doctrine casts doubt upon even the functional criteria of Professor Sharpf. To Sharpf, three factors and considerations, "in various combinations, may persuade the Court that in deciding a particular issue it would overreach the limits of its own responsibility."[63] These are:[64] (1) difficulties for the Court having full access to information about the case;[65] (2) the need for uniformity of decision by the United States government, or the danger of "speaking with more than one voice;"[66] and (3) the need to defer to the wider duties of the political departments, or the rationale of "embarrassment."[67] But, as Professor Sharpf admits, these functional criteria for political questions have little applicability beyond foreign relations and national security law, and even here he sees political questions as generally giving way to judicial review "when important individual rights are at stake."[68]

There are thus few consistencies or certainties in the Supreme Court's application of the so-called political questions doctrine, at least not from the standpoint of subject matter classifications, Brennan's analytical threads, Shapiro's notion of sovereignty, or Sharpf's functionalism in domestic law cases. Rather, it seems that the Court, in delineating individual cases as "off limits" to

62. *See* notes 173-74, 246-55 and accompanying text *infra.*

63. Sharpf, *supra* note 21, at 567.

64. *See id.* at 566-83.

65. *E.g.*, where the President, both as Commander-in-Chief and as the nation's organ for foreign affairs, has intelligence services available whose reports are not and ought not be published to the world. Thus, in a controversy arising from a C.A.B. decision on a foreign air route, it was held to be "intolerable that courts, without relevant information should review and perhaps nullify actions of the Executive taken on information properly held secret." Chicago and Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

66. *E.g.*, where the Court is asked to choose whether a foreign government "recognized" by the Executive possessed sufficient status, as such, to validly confiscate property of United States citizens. *See* Oetjen v. Central Leather Company, 246 U.S. 297 (1918).

67. *E.g.*, where the Court felt it could not stop the President from enforcing the Reconstruction Acts because it could not then protect him from impeachment once he had obeyed the Court's order. Mississippi v. Johnson, 71 U.S. 475, 501 (1867).

68. Sharpf, *supra* note 21, at 584.

review, has linked something like Shapiro's sovereignty idea with that of expediency, or the Justices' concern for the ultimate enforceability of a decision on the merits. It is plausible that behind the Court's frequently expressed desire to avoid clashes of sovereignties there is a well-founded fear that decision in those cases would not find minimal consensus among the key opinion leaders or government agencies—a sufficient consensus, at any rate, to make those decisions effective. In this light, the real function of finding a political question is to provide another "way out" of potentially difficult conflicts with other branches of government, particularly the federal government. It has, then, a "passive virtue" role similar to denials of certiorari, dismissals of appeals for want of a substantial federal question, a lack of ripeness or standing on other than political question grounds, or insistence on prior exhaustion of remedies.

It is far too simple to assert, however, that political questions are dictated solely by a "hot potato" or "opportunistic" theory of judicial decision-making. In criticizing Alexander Bickel on this point, Professor Sharpf makes two arguments why political questions cannot be so easily explained: (1) the Court has too many other devices, those mentioned above, for avoiding decisions and (2) it has already decided too many cases which were really "hotter" or more politically sensitive at the time than those tapped by the insulating wand of political questions.[69] For Martin Shapiro, too:

> The Court labels "political" a decision on who owns the Falkland Islands for purposes of settling a marine insurance claim or on whether or not Nebraska has ratified the Child Labor Amendment, but it does decide cases like *Dred Scott,* the income tax case, the school desegregation cases, and *Dennis v. United States.* It may well be true that the Court has occasionally used the "political questions" doctrine as one of its many devices for avoiding "hot ones," but it is impossible to predict whether questions are or are not going to be labeled "political' by comparing their fever charts.[70]

Such a conclusion underestimates the impact of marked political circumstances which must have influenced the Court's deliberations on many, though certainly not all, of the major political questions cases outside as well as within the foreign relations area.

69. *Id.* at 533-38.

70. M. SHAPIRO, *supra* note 21 at 184.

It seems safe to assume, for example, that no matter how the Court would have been justified in deciding a guarantee clause case involving the legitimacy of the initiative and referendum petitions in 1912,[71] it would not have risked so bold a stroke against a fundamental plank of the then "dominant" Progressive movement. Similarly, Chief Justice Marshall did not directly void the application of Georgia law in Cherokee Indian territory, especially since he knew full well that President Andrew Jackson would not enforce such a decision.[72] In 1869, the Court passed to Congress the final determination of Texas's status in the Union, citing *Luther v. Borden*, one of the guarantee clause cases.[73] But to further placate the Radical Republican majority of Congress, Chief Justice Chase said that in terms of the state's standing to recover U.S. bonds, "Texas never left the Union."[74] Strong prospective hostility from the Congress must also have figured in the Court's refusal to void enforcement of the Reconstruction Acts in the plaintiff states of the old Confederacy,[75] or to strike a duly enrolled statute regardless of the alleged prima facie conflict with the original,[76] or to countermand a state governor's announced refusal to extradite an escaped slave under the Fugitive Slave Law.[77]

71. Pacific Telephone v. Oregon, 223 U.S. 118 (1912).

72. Cherokee Nation v. Georgia, 5 Peters 1 (1831). According to John Frank, "the status of the Indian tribes became a political question because Marshall realized that Jackson and the State of Georgia had no intention of letting the judiciary solve the problems of the Cherokees." Frank, *What is a Political Question*, in THE COURTS, A READER IN THE JUDICIAL PROCESS 387 (R. Scigliano ed. 1962). After Marshall finally did step in to protect the Cherokee "nation," in Worcester v. Georgia, 6 Peters 515 (1832), President Jackson reportedly made his famous reply, "John Marshall has made his decision; now let him enforce it." H. J. CARMAN *et al.*, A HISTORY OF THE AMERICAN PEOPLE I 365 (2d ed. 1961).

73. Texas v. White, 7 Wall. 700 (1869).

74. *Id.* at 719-36.

75. Georgia v. Stanton, 6 Wall. 50 (1867); Mississippi v. Stanton, 4 Wall. 475 (1867).

76. Field v. Clark, 143 U.S. 649 (1892).

77. Kentucky v. Dennison, 24 How. 66 (1861). The time was 1861, a year charged with emotion over slavery and imminent civil war. The law under which Kentucky demanded extradition was the Fugitive Slave Law; any court would have incurred great wrath from both sides had it decided this question. Moreover, in this particular case the Court would have had to countervail the flat prior refusal by the Governor of Ohio to enforce any decision going against him. On the other hand, the Court was faced also with a constitutional command which could not be any more specific: that any person or slave fleeing from an "offense" in another state "shall on demand of the executive authority of the state from which he fled, be delivered up, on claim of the party to whom

In the enactment case of *Coleman v. Miller*,[78] the Court yielded to severe political pressures by not deciding whether Kansas had taken too long to ratify the proposed Child Labor Amendment. The amendment itself was an effort to override the Court's 1918 decision invalidating Congressional regulation of child labor practices in the states.[79] That the Court found a political question in *Coleman* was entirely consistent with concurrent moves generally away from further conflict with the social and economic "recovery-and-reform" programs of the New Deal.[80] As the majority opinion itself perceived "the nature of the times:"

> When a proposed amendment springs from a conception of economic needs, it would be necessary in determining whether a reasonable time has elapsed since its submission, to consider economic conditions prevailing in the country . . . . In short, the question of reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions . . . which can hardly be said to be within the appropriate range of [judicial] evidence . . . .[81]

Judicial submission to Congressional authority and public opinion in the Alien Registration Act cases[82] can be similarly explained. Here alien petitioners, all long-time residents of the United States, protested their deportation for association with the Communist party. The cases were decided in the early 1950's, the time of the Korean War, the height of the McCarthy frenzy, and the heyday of the philosophically conservative majority of Justices Vinson, Clark, Burton, Minton, and Reed (joined on occasion by Justices Frankfurter and Jackson). This was the same Court that had al-

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such service or labour may be due . . . ." U.S. CONST. art. IV. The Court, on the horns of a dilemma, did the only expedient thing: it avoided deciding an issue which already helped put the country on the abyss of civil war.

78. 307 U.S. 433 (1939).

79. Hammar v. Dagenhart, 297 U.S. 251 (1918).

80. The Coleman non-decision was in part reflective of the "switch in time" by the Court favorably responding to Franklin Roosevelt's landslide victory in the 1937 election and his subsequent, nearly successful effort to "pack the court." Robert McCloskey described the result:

> The crucial point is [regarding the post-1937 period] that the Court's doctrines were no longer set up as a barrier against regulations as such. The question of whether America should become a welfare state was now referred directly to the political branches of government.

R. MCCLOSKEY, THE AMERICAN SUPREME COURT 187 (1960).

81. 307 U.S. 433, 444 (1939).

82. Harisiades v. Shaughnessy, 342 U.S. 580 (1952), Galvan v. Press, 347 U.S. 522 (1954), both discussed in text with notes 58-59 *supra*.

ready legitimized, though not via political questions, government prosecutions of internal Communist threats[83] and broad congressional latitude to deny full hearings to excluded aliens.[84] One appellant had shown no Communist ties since 1929, but Justice Jackson nonetheless denied relief, standing on the now-familiar ground of government sovereignty:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenancy of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to largely immunize them from judicial inquiry or interference.[85]

As a rationale for political questions, however, sovereignty seems to have little bearing on this kind of dispute.[86] John Frank's pointed remark regarding Justice Jackson's reasoning is a reminder that other, extra-judicial factors probably intervened in that case:

> The Court either has a duty to review or it does not. If it does have a duty, then it should excuse itself for some clear-cut and categorical reasons and not for some misty notion about the distribution of power. To find a shade of a shadow of a scintilla of a reason for thus treating a human being because of anything in *Luther v. Borden* or in the *Waterman Steam Ship* case seems to me all wrong.[87]

Refusals by the Court to consider attacks on the constitutionality of United States involvement in Vietnam presents a current example of expediency and sovereignty as combined explanations for non-reviewability in the United States. In *Mora v. McNamara*[88] and *McArthur v. Clifford*,[89] the Supreme Court denied certiorari to a pair of draft-resisters challenging the President's intervention in Vietnam on the basis that Congress had not declared

83. Dennis v. United States, 341 U.S. 494 (1951); American Communications Co. v. Douds, 339 U.S. 382 (1950). *See also* Feiner v. New York, 340 U.S. 315 (1951), affirming the conviction of a leftist speaker for prompting "angry muttering and pushing" by the crowd.

84. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

85. Harisiades v. Shaughnessy, 342 U.S. 580, 588-89.

86. *See* Critique of Martin Shapiro's thesis in text with notes 58-59 *supra.*

87. Frank, *supra* note 72, at 390.

88. 389 U.S. 934 (1967).

89. 393 U.S. 1002 (1968).

war. In *Massachusetts v. Laird*,[90] the state legislature sought declaratory judgment relief on the same grounds, and likewise asked that the Secretary of Defense be enjoined from "carrying out, issuing, or causing to be issued any further order directing any inhabitant of the [state] to Indochina for the purpose of participating in combat or supporting combat troops in the Vietnam war."[91] Thus, the cases involve committed-to-agency-discretion doctrine as well as a political question because the petitioners attacked the conscription authority of the Defense Secretary.[92] The rationale for non-reviewability in all three Vietnam-war challenges apears the same as other political questions cases: they deal with issues and circumstances of such political explosiveness that they could ultimately prevent a viable remedy for the litigants.[93]

Whether one looks at these cases as avoidances of fundamental questions of sovereignty, or "hot potatoes," or both, one must nonetheless see them as more than acts of sheer expediency. There are, to be sure, alternative ways of saying that, given the vulnerability of the Supreme Court to outside political restraints, it is often necessary for it to resort to experience, rather than principled logic as being the whole course of the common law.[94] The ultimate concern is that a judicial decision on the merits of the petitioner's grievance would irreparably damage the prestige, strength, and independence of the Federal Judiciary at that particular point in time. Apt here is John Roche's summary of the value of *all* measures for implementing judicial self-restraint, including the doctrine of political questions:

> Judicial self-restraint and judicial power seem to be the opposite sides of the same coin: it has been by judicious application of the former that the latter has been maintained.

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90. 400 U.S. 886 (1970).

91. *Id.* at 129.

92. *See* section II *B infra.*

93. *See* Justice Douglas's lengthy dissent in Massachusetts v. Laird, 400 U.S. 886-900 (1970), in which he questions the grounds of lack of standing and non-justiciability in the *per curiam* denial of certiorari; *e.g.*, at 135:

> The Solicitor General urges that no effective remedy can be formulated. He correctly points out enforcing or supervising injunctive relief would involve immense complexities and difficulties. But there is no requirement that we issue an injunction. . . . I restrict this opinion to the question of the propriety of a declaratory judgment that no Massachusetts man can be taken against his will and made to serve in that war. *Powell* involved just one man while this case involves large numbers of men. But that goes only to the mechanical task of making any remedy granted available to all members of a large class.

94. *See generally*, Deutsch, *supra* note 20.

> A tradition beginning with Marshall's coup in *Marbury v. Madison* . . . suggests that the Court's power has been maintained by a wise refusal to employ it in unequal combat.[95]

Thus, particularly in issues concerning basic sovereignty, the device of political questions becomes another means for a structurally undemocratic agency of government to perform a democratic function. By avoiding such "self-inflicted wounds" as the *Dred Scott, Legal Tender,* and *Income Tax* decisions of the Nineteenth Century and the anti-New Deal holdings of 1935-1937,[96] the Court feels that it can more consistently protect constitutional rights and liberties in the future.[97]

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95. Roche, *Judicial Self-Restraint*, in THE COURTS: A READER IN THE JUDICIAL PROCESS, *supra* note 71, at 384.

96. The phrase, "self-inflicted wounds", refers to three decisions which so went against the tide of political and economic reform at the times they were decided that the Court lost its respect and credibility as the national arbiter of the Constitution for years to come. These decisions were Dred Scott v. Sanford in 1857, declaring slaves to be constitutionally unprotected and thus nullifying the Missouri Compromise of 1820; the Legal Tender Case (Hepburn v. Griswold, 8 Wall. 603 (1870)), striking down the "greenback" redemption act as unconstitutional; and the Income Tax Cases (Pollock v. Farmer's Loan and Trust Co., 157 U.S. 429, 158 U.S. 601 (1895)), invalidating the nation's first comprehensive personal income tax statute. E.S. CORWIN, AMERICAN CONSTITUTIONAL HISTORY 138 (A. Mason and G. Garvey eds. 1964). The difficulties for the Court in getting these "backward" cases accepted by the public were compounded by the great divisions on the Court itself. Corwin also suggests that the several Supreme Court decisions against the New Deal constitute a fourth "self-inflicted wound." *Id.* at 134-38.

97. All this does not miss the real danger, of course, in promoting judicial self-restraint and non-reviewability in particular. The workings of *stare decisis* may too easily elevate a restrictive decision into a category closed to future (or near-future) adjudication. Political questions cases are particularly susceptible to this kind of transcendental result. The Court's view that draft-resisters' claims on Vietnam are too closely bound up with the great issues of national security, and thus subject to summary dismissal, seems too facile. Like the alien-rights cases of the 1950's, it compresses the subject matter of such claims into the broad analytical category of separation of powers or sovereignty without sufficient regard for the unique circumstances and rights of each petitioner.

It would seem that as constitutional arbiter the Court should open up for scrutiny the substance of policies, even one delicately interwined with national defense, when the choice is to sacrifice the guarantee of each citizen or alien to the fundamentals of procedural fairness in *all* administrative decisions. In Alderman v. United States, 394 U.S. 165 (1969), for example, the government asserted it could not reveal certain documents relating to the preparation of a defendant's case and evidence of government wrongdoing. The Court simply gave the government a choice: disclose or dismiss. *See also* United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968), *appeal denied* 399 U.S. 267 (1970); Tigar, *supra* note 21, at 1175-78.

B. The Doctrine of Committed-to-Agency-Discretion

Much of the sovereignty or expediency rationale for avoiding political questions can be seen in the grounds which the United States federal courts have chosen to deny or severely restrict review of certain kinds of executive or administrative decisions. The doctrine of "committed-to-agency-discretion" is yet another dimension of the courts' deferral—some say surrender—to the dominant political alliance on selected issues. Committed-to-agency-discretion is, like political questions, a doctrine of nonreviewability, but differing from it in three important respects. First, as the name implies, committed-to-agency-discretion specifically refers to the discretion accorded to federal administrative agencies, and not the acts per se of the President, Congress, or other elective offices. Second, its origins and main authority are derived from statutes, primarily section 10 of the Administrative Procedures Act rather than federal case law.[98] The judiciary does, of course, have a large hand in determining the extent to which review is proper on the basis of other statutes.[99]

Third, the doctrine does yield to certain nonfrivolous constitutional claims. These may include an absence of due process or "contentions that the administrator acted beyond his jurisdiction or in violation of a clear statutory duty."[100] Rules like "substantial evidence," however, have permitted the federal courts to give wide birth indeed to administrative findings of fact.[101] "Abuse of discretion," in fact, is a spindly argument for a litigant aggrieved by federal administrative action.[102] Thus, when a court invokes committed-to-agency-discretion, it unequivocally "expresses a general presumption against review."[103]

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98. 5 U.S.C. § 701(a) (supp. II, 1967) states:

> This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

99. It is common for courts to join doctrines of common-law standing (referring to ripeness, adverseness, substantial personal injury, etc.) with committed-to-agency-discretion. *See, e.g.*, Gregory Electric Co. v. United States Dep't of Labor, 268 F. Supp. 987 (D.S.C. 1967); *see also* Saferstein, *Non-Reviewability: A Functional Analysis of Committed-to-Agency-Discretion*, 82 HARV. L. REV. 367, 377-79 (1968).

100. Saferstein, *supra* note 99, at 370.

101. For a discussion of the substantial evidence rule, see M. SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 130 (1968).

102. *Id.* at 136, 239, *et. seq.*; NLRB v. Remington Rand Corp., 94 F.2d 862 (1938).

103. Saferstein, *supra* note 99, at 370. The author points out that under the

It has been suggested that eight major factors have influenced federal judges to find that certain disputes are committed-to-agency discretion.[104] These are: statutory granting of broad agency discretion;[105] expertise and experience required to understand subject matter of agency action;[106] the "managerial" nature of the agency being challenged;[107] impropriety of judicial intervention in the mandated policy-making functions of elective officials;[108] necessity in certain cases of informal agency decision-making;[109] inability of reviewing court to ensure the correct result in highly complex or technical questions;[110] the need for expeditious operationalizing of Congressional programs already under way;[111] and, finally, the existence of other methods for preventing abuses of discretion.[112] One of these factors by itself rarely is controlling; rather, it is "their cumulative effect on the interests of the individual, the agency, and the courts [which] determines

doctrine judges not only abstain from reviewing the substance of the administrative decision but the procedures for deciding as well:

> [E]ven when the claimant alleges unfairness in a particular aspect [of the agency determination], it is usually unwise for the court to consider this claim as distinct from an attack on the merits when conducting the threshold inquiry into reviewability. Issues which seemingly are separable and nondiscretionary such as fact-finding or procedure, themselves often shape the ultimate discretionary determination.

Id. at 368.

104. *Id.* at 380-95.

105. Schilling v. Rogers, 363 U.S. 666 (1960), rejecting even partial review of Director of Alien Property Office's determination that petitioner was ineligible for return of certain kinds of property.

106. *See, e.g.,* Note, *Dismissal of Federal Employees—the Emerging Judicial Role,* 66 COLUM. L. REV. 719, 732 (1966), regarding government personnel action as non-reviewable because of the need to recognize "the difficulty of judicially proving the intangibles inherent in an evaluation of on-the-job performance."

107. Community National Bank v. Gidney, 310 F.2d 224 (6th Cir. 1962), denial of review of Comptroller's decision certifying a particular branch bank.

108. Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103 (1948).

109. Oscar Mayer Co. v. United States, 268 F. Supp. 977 (W.D. Wis. 1967), refusing to hear reasons for vacating rate suspension, done without hearings.

110. *See, e.g.,* Safterstein, *supra* note 99, at 390, noting that, on remand, agency may reach the same result using different grounds to which the reviewing judge is unable to respond or decide the same way with *apparent* redetermination of the issue, but in reality not re-thinking the problem at all.

111. Road Review League v. Boyd, 270 F. Supp. 650 (S.D. N.Y. 1967), denying temporary injunction against a federal interstate highway already under construction.

112. Hamel v. Nelson, 226 F. Supp. 96 (N.D. Cal. 1963), complaint non-reviewable because intra-agency appeal still pending.

whether review should be denied."[113] As they would interact with each other, the factors are thus credited with explanatory power similar to Professor Sharpf's functional criteria regarding political question cases in the foreign-relations area. Such factors enable the federal courts to side-step possible damage to the "efficient" and "creative" use of limited agency resources in the face of those agencies' highly complicated daily workloads, to say nothing of enabling the courts themselves to conserve their resources.[114]

One wonders whether this kind of interpretation really stands up against a thorough analysis of these factors, taken singly or collectively, and their supporting cases.[115] The weaknesses apparent from an application of Professor Sharpf's functionalism or Justice Brennan's analytical threads are instructive here. Surely, an expediency-oriented theory of judicial motivation might better explain a court's decision to commit some particularly sensitive case to agency discretion rather than to substantiate non-reviewability on the grounds that the case involves "determinations that lie outside sound judicial domain in terms of aptitude, facilities, and responsibility."[116] Thus, ambiguous labels like "expertise and experience required to understand subject matter" and "managerial nature of the agency," are lawyers' euphemisms obscuring the practical or political circumstances of the decision. The only two criteria of any analytical rigor are "necessity for informal decision-making" and "existence of other methods of preventing abuses of discretion." The latter, however, is a restatement of the rule that administrative remedies must be exhausted rather than any air-tight indicator of non-reviewability. The exhaustion rule, of course, does not intrinsically prevent the litigant from returning to the same court with the same issue once he has fully exploited his ordinary opportunities for redress.[117]

The United States federal courts have been heavily criticized

113. Saferstein, *supra* note 99, at 379.

114. *Id.* at 371.

115. *See* cases cited notes 105-12 *supra.*

116. *See* Curran v. Laird, 420 F.2d 122, 128 (D.C. Cir. 1969). The circuit court concluded that the administrative decisions were "inextricably intertwined with and permeated by assumptions and conclusions of national defense strategy." *Id.* at 131.

117. *See* Comment, Administrative Procedures Act, 10(c), 5 U.S.C. § 701 (1971); *The Timing of Judicial Review under the Administrative Act,* 56 CALIF. L. REV. 1491, 1502-13 (1968).

for avoiding or severely restricting judicial review of administrative decisions in at least four issue areas involving to a greater or lesser degree the President's war or national security powers.[118] Specifically, the issue areas include: (1) alien deportation and exclusion proceedings,[119] (2) military courts-martial generally, regardless of the issues raised,[120] (3) draft board denials of claims by conscientious objectors and other draft-resisters *prior* to induction or criminal prosecution,[121] and (4) denials of objections to the legality or constitutionality of United States military actions in Vietnam.[122] In each of these areas, the Court and other federal tribunals have declined to intervene citing one or more of the various functional criteria supporting committed-to-agency-discretion. A careful reading of such cases, however, tempts one to explain the avoidances in terms of the courts' ultimate concern for questions of national sovereignty in a foreign-relations context *and* the probability of more "self-inflicted wounds" if they decide the issues on their merits. Illustrating this point is one of the cases which is conducive to explanation under either of the United States non-reviewability rationales. In *Mora v. McNamara*[123] the Supreme Court denied certiorari to a draft-resister whose challenges of the Vietnam intervention and the Defense Secretary's discretionary power to conscript for that conflict were dismissed by the lower courts.[124] One commentator highlighted the political

118. Other areas of non or limited reviewability, not related to national security or foreign policy, have been criticized as well; *e.g.*, (1) actions of Federal Parole Boards, (2) discretion of United States Attorneys and independent regulatory agencies as prosecutors, and (3) the Secretary of Labor's extensive authority over minimum wage requirements of government contractors. *See* K. DAVIS, DISCRETIONARY JUSTICE 132-33, 208-11, 177-79 (1969).

119. *See* text with notes 58-59, 83-87 *supra;* text and notes 250-55 *infra.*

120. *See* text with notes 227-32 *infra.*

121. Generally, a draft resister can only challenge his induction order after being inducted or in a criminal proceeding after indictment. *See* White, *Conscientious Objector Claims: A Constitutional Inquiry*, 56 CALIF. L. REV. 625, 657-58 (1968). On the other hand, the Supreme Court has recently allowed pre-induction lawsuits "where the Court is not asked to challenge the draft boards' interpretations of the facts." Osterech v. Selective Service, 393 U.S. 233 (1968). Similarly, it will review where the board has "lawlessly" changed the classifications of war protesters. Breen v. Selective Service, 396 U.S. 460 (1970). *See also* McKart v. United States, 395 U.S. 185 (1969), permitting pre-induction review without exhaustion of administrative remedies where the issue is solely one of statutory interpretation.

122. *See* text and notes 94-99 *supra,* and notes 130-32 with accompanying text *infra.*

123. 389 U.S. 934 (1967).

124. *Id.*

or expediency reasons for the Court's committing this case to agency discretion; the functional convergence with political questions is clear:

> Even if the Justices privately thought that the President exceeded his constitutional authority in sending Mr. Mora to fight in Vietnam, it would not so declare and presume to restrain the President. Nor would the Court adjudicate claims that acts of the political branches violate international law. If it heard the case, the Court would have to decide that the issues are "political questions" and not justiciable; or, that even if the war is illegal, Mora is not justified thereby in refusing to serve and therefore the legality of the war is not properly in issue; or that the war is not in fact illegal.[125]

III. MEXICAN POLITICAL QUESTIONS: COMPARISONS WITH JUDICIAL ACTIVISM IN THE UNITED STATES

The Mexican version of political questions shares with its United States counterpart the attribute of permanent attachment to the issue itself. It differs, however, from Anglo-American doctrines of non-reviewability in four important respects: (1) it is specified in the Constitution and federal statute, although the federal courts have alternatively expanded and restricted its scope in case law; (2) it is generally confined to the single, "Constitutional Writ," the *amparo*; (3) it covers subject matter which differs in most instances from the categories to which doctrines of political questions and committed-to-agency-discretion apply in the United States; and (4) a wider and more discernible variety of cases are immune from judicial review; that is, the scope of the Mexican doctrine is broader and not as susceptible to exceptions when petitioners assert constitutional rights.

Mexico's political questions and judicial limits stem from the nation's European civil law tradition,[126] the historical concentration of power in the National Executive and Government (even while giving lip service to the constitutional principles of feder-

125. Henkin, *On Drawing Lines*, 82 HARV. L. REV. 63, 90-91 (1968).

126. Consider R. BAKER, *supra* note 5, at 271:

> In a . . . general sense, the Supreme Court's willingness to decide constitutional questions of broad policy significance is restricted by the civil law tradition within which it operates. The strict distinction between legislative and judicial functions postulated by the civil law necessarily entails a conception of the judicial role that would exclude decisions of a manifestly legislative character.

See also J. MERRYMAN, THE CIVIL LAW TRADITION: INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 140-48 (1969).

alism and separation of powers), and, most importantly, the ideology and political interests thrust up by the cataclysmic Revolution of 1910-1920. Prior to the Revolution, the long "forced peace" of Dictator Porfirio Díaz had stabilized social, economic, and legal institutions. Great strides were made toward systematizing the laws of *amparo*, civil procedure, criminal justice, and aliens' rights.[127] But for thirty-four years it also was a time wherein the courts favored the political allies and hacks of the ancien regime: the large landowners, wealthy businessmen, foreign investors, military elites, Church hierarchy, and local *jefes políticos*. Closest to the Dictator toward the end were the engineers and apostles of Positivism, the French-speaking and Indian-despising *científicos* (scientists).[128] Put simply, all those who benefited from the era's disproportionate and superficial prosperity also benefited inordinately from the operation of the law.

It comes as no surprise, therefore, to find the *tumulto* of the Revolution giving rise to a powerful legal philosophy of its own: that the federal courts and Law of Amparo had failed the vast majority of Mexicans on two broad counts. First, most laws had not been geared to the problems of the disadvantaged and dispossessed Indians, *mestizos*, small private and communal (*ejido*) farmers, urban laborers, and other "common people."[129] Second, the laws which were relevant, such as those governing criminal proceedings, were enforced against these disadvantaged classes.[130] Thus the writers of the revolutionary Constitution of 1917 sought to extend the *amparo*'s protective shield around the emerging revolutionary constituency. At the same time, they took steps to restrict the judicial access of those profiting from the old order. The result of these efforts is the Mexican equivalent of the doctrine of political questions. This section will focus on five of these

127. *See* Cosio-Villegas, The Porfiriato: Legend and Reality, in HISTORY OF LATIN AMERICAN CIVILIZATION II 295-300 (L. Hanke ed. 1967); in regard to the evolution of the *amparo* during this "formative half-century," see I. BURGOA, *supra* note 5, at 123-28; H. FIX ZAMUDIO, EL JUICIO DE AMPARO 232-41, 277 (1964); N.R. MUNOZ VASQUEZ, EVOLUCION DEL JUICIO DE AMPARO DESDE EL PUNTO DE VISTA DE SUS LEYES REGLAMENTARIAS 95 *et seq.* (UNAM Law Thesis, 1963).

128. Cosío-Villegas, *supra* note 127, at 298; C. CUMBERLAND, MEXICO: STRUGGLE FOR MODERNITY ch. 8 (1968).

129. *See* C. CUMBERLAND, *supra* note 128, ch. 8; PARKES, A HISTORY OF MEXICO 285-310 (1938).

130. *See* MUNOZ VASQUEZ, *supra* note 127, at 176-79, 182-83.

issue-areas which are insulated from direct judicial review in Mexico: free exercise of religion, electoral malfeasance and dismissals of government employees and legislators, expulsion of aliens by Presidential order, decisions of most "decentralized" administrative agencies, and the rights of private landowners against agrarian reform policies.[131]

Revolutionary reaction against the Church and its excessive, inequitable control of public education and land under Díaz produced one of the first political question obstacles to the jurisdiction of *amparo* courts. Article 3 (II) of the Constitution flatly states:

> Private persons may engage in education of all kinds and grades. But as regards elementary secondary, and normal education (and that of any kind or grade designed for laborers and farm workers), they must previously obtain, in every case, the express authorization of the public power. Such authorization may be refused or revoked by decisions *against which there can be no judicial proceedings or recourse.* (emphasis added)

Although this provision relates solely to denying the Church control over education, it and other considerations have apparently led to a policy of non-reviewability of almost all issues arising from disestablishment and state efforts to curtail freedom of religious expression. The Mexican constitutional equivalent to the United States free exercise of religion clause actually encourages such judicial abstinence by its equivocal phrasing:

> Everyone is free to embrace the religion of his choice and to practice all ceremonies, devotions, or observances of his respective faith, either in places of public worship or at home, provided they do not constitute an offense punishable by law. Every religious act of public worship must be performed strictly inside places of public worship, which shall at all times be under governmental supervision.[132]

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131. Commentaries reviewed on the Mexican counterpart to the United States political questions doctrine included: I. BURGOA, *supra* note 5, at 450-53; I. BURGOA, EL JUICIO DE AMPARO EN MATERIA AGRARIA 76 *et. seq.* (1964); R. BAKER, *supra* note 5, at ch. 5; O. A. HERNANDEZ, CURSO DE AMPARO: INSTITUCIONES FUNDAMENTALES 162-63 *et seq.* (1966); Alcalá-Zamora y Castillo, *Judicial Protection of the Individual against the Executive in Mexico,* in JUDICIAL PROTECTION AGAINST THE EXECUTIVE 771-79 (Max-Planck-Institut fur Auslandisches Offentliches Recht und Volkerrecht 1970); Fix Zamudio, *Judicial Protection against the Executive in Mexico,* in *id.* at 713-70.

132. MEXICO CONST. art. 24.

Article 130 of the Constitution similarly qualifies its substantive declaration that, "Congress cannot enact laws establishing or prohibiting any religion," with:

> The federal powers shall exercise the supervision required by law in related matters relating to religious worship and outward ecclesiastical forms. Other authorities shall act as auxiliaries of the Federation.

The article then enumerates a host of restrictions on all denominational ministers, churches as social and property-holding institutions, "periodical publications of a religious character," and religious-oriented political parties.[133]

Because of these substantive constitutional restrictions and the attendant political climate, the Mexican federal courts have avoided adjudicating challenges to official suppression of religious expression—a self-imposed, blanket reinforcement of political questions which is not so apparent in other issue-areas constitutionally or statutorily limiting judicial review. A detailed examination of the *Compilación de jurisprudencia de la Suprema Corte for 1917-1965*,[134] the annual *Informe* of the President of the High Court for 1967-1971,[135] and cases reported individually in the *Semanario Judicial de la Federación*[136] for a thirty-three month period during 1964-1968 reveals no instance where the Court ruled on the merits of a civil, criminal, or administrative action involving government favoritism or discrimination against a particular religion. This conspicuous absence is all the more remarkable considering the great religious violence sparked by the so-called *Cristero* Rebellion in 1926. Its turbulent aftermath extended into the early 1940's.[137] The solution to the crisis was indeed political, involv-

133. *Id.* art. 130.

134. Formally compiled in ten volumes as an appendix to the record of the Mexican Court, the summary of precedent is entitled JURISPRUDENCIA DE LA SUPREMA CORTE DE JUSTICIA DE LOS FALLOS PRONUNCIADOS EN LOS ANOS DE 1917 A 1965 (1965) (hereinafter cited as JURISPRUDENCIA).

135. INFORME RENDIDO A LA SUPREMA CORTE DE LA NACION POR SU PRESIDENTE. . . . (hereinafter cited as INFORME . . . (year): — SALA).

136. The SEMANARIO JUDICIAL DE LA FEDERACION is the monthly record of Supreme Court "theses" or decisions (hereinafter cited as S.J.F.).

137. This was a violent civil conflict between those backing the Government's anti-clerical actions and those, often led by priests, resisting such policies. Beginning with a crackdown on open religious activities, foreign priests, and Catholic schools, the strife was only partially abated with the arbitration of U.S. Ambassador Dwight Morrow in 1928. Violence and political protest continued until 1941. *See* C. CUMBERLAND, *supra* note 128, at 278-90.

ing police power and negotiation among contending political leaders[138] but not judicial rule-making, adjudication, or the writ of *amparo*.[139]

In the United States, on the other hand, Supreme Court interpretations of the first amendment's establishment and free exercise clauses have a long if sometimes glacial history. But whether the Court upheld state and federal governmental limits on free exercise or struck down violations of the establishment clause, it has in fact ruled on the merits of the claims presented. It is difficult to imagine a Mexican *amparo* court reacting as the United States Court did in *West Virginia Board of Education v. Barnette* by invalidating in time of declared war, no less, state action compelling school children to salute the Flag on pain of expulsion from school.[140] Other dramatic examples abound: upholding the claims of military conscripts to conscientious-objector status on the ground of unorthodox as well as orthodox "religious" beliefs in pacificism if certain conditions are met;[141] denial of a school board's contention that its mandated prayer reflected the desire of the parental majority for "free exercise of religion" while declaring the official prayer violative of the establishment clause;[142] and insisting that parents have a first amendment right to send their children to religious schools.[143] In contrast, the Court has held that neither "released time" for religious teaching of public school students, nor free public transportation for parochial students provided "for the benefit of the child," breached the separation of church and state principle.[144] An objection on religious

138. *Id.* at 285, 291.

139. Minister Mariano Azuela of the Mexican Supreme Court declared that the prohibition on judicial review regarding government restrictions on parochial school programs "was in fact a dictatorial imposition," threatening the constitutional right to "freedom of education." In Mexico, he said,

> it was impossible to set up a school without official permission, which was granted at the whim of the authorities; any such school was tied to the official programmes laid down by the government, which reserved the right to close the school down, and there was no action for amparo [possible] to prevent it from doing so.

Seminar on Amparo, Habeas Corpus, and other Similar Remedies 51 (Conference at Mexico, D.F., 1961).

140. 319 U.S. 624 (1943).

141. Welch v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

142. Engel v. Vitale, 370 U.S. 421 (1962); *see also* Abington Township v. Schempp, 374 U.S. 203 (1963).

143. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

144. Zorach v. Clauson, 343 U.S. 306 (1952); Everson v. Board of Education, 330 U.S. 1 (1947).

grounds has been declared an acceptable "nexus" of personal interest sufficient for standing to challenge federal spending programs in the courts.[145] Even more recently the Court has upheld on the merits *most* of the 1963 federal educational assistance act pertaining to the church-related recipient colleges.[146]

A second departure from the United States political question is the Mexican constitutional definition of "strictly political-electoral matters" as non-reviewable issues. Specifically, *amparo* suits cannot be brought against electoral commissions, members of such commissions, or faulty voting tabulations.[147] The Law of Amparo also prohibits judicial scrutiny of any *legislative* action in the "election, suspension, or removal of functionaries" where the appropriate state or Federal constitutions expressly confer such discretion on the legislatures.[148] A rationale behind both of these restrictions is the concern for governmental sovereignty similar to what Martin Shapiro has seen in United States political question cases.[149] Considering well-established precedent of the Mexican Supreme Court, Professor Ignacio Burgoa reasons that the Mexican federal courts do not decide challenges of the "political-electoral process" because "the writ of amparo is ineffective in determining whether the origins of [constitutional] authorities are illegitimate or incompetent."[150]

The Mexican Court has similarly ignored its authority to intervene in the nation's electoral processes under article 97 of the Constitution which provides for a special proceeding whereby the Court may "investigate the conduct of any federal judge or magistrate, or any act or acts constituting violations of any individual guarantee, or the violation of a public election, or some other crime punishable by federal law."[151] It has been postulated that the Court's infrequent and unsuccessful attempts in this area result primarily from the political pressures exerted by the dominant political party in Mexico, the Party of Revolutionary Institutions (PRI), and the President.[152] The Supreme Court has never initiated its own investigation of electoral mishaps nor acceded to

145. Flast v. Cohen, 392 U.S. 83 (1968).
146. Tilton v. Richardson, 403 U.S . 672 (1971).
147. *See* LAW OF AMPARO art. 73 (VII).
148. *Id.* art. 73 (VIII).
149. *See* text with notes 42-47 *supra.*
150. I. BURGOA, *supra* note 5, at 452.
151. MEXICO CONST. art. 97 para. 3.
152. R. SCOTT, MEXICAN GOVERNMENT IN TRANSITION 270-71 (2d ed. 1964).

petitions by state officials to do so, on the ground that such action would impede state sovereignty.[153] Petitions from voters and opposition political parties are given even shorter shrift; and these, says Professor Robert Scott, "come as a matter of course after every election now that the revolutionary party [the PRI] has become all-powerful."[154] Recent cases of such judicial abstention have been critically reported.[155]

After 1962 and *Baker v. Carr*,[156] little similarity remains between the United States and Mexico on political questions on the question of official discretion in the management of elections. To be sure, the Mexican Supreme Court has left the door open to relief for those claiming deprivations of "political rights"—as long as petitioners can show that such deprivations involve

> the violations of individual guarantees, a fact that cannot be judged *a priori*. [When this complaint is made], the amparo relating to it must be admitted and transmitted in order to establish, in a final judgement, the validity of the main contentions.[157]

Professor Burgoa takes the Court's exception of "individual guarantees" to mean rights such as public hearings, "legality" of procedure, and properly authorized searches and seizures.[158] He cites no cases supporting these exceptions, however, and the records of the Supreme Court disclose only one classification so exempted: where the plaintiffs, as public "administrative" employees, were arbitrarily dismissed or denied their salaries.[159]

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153. *Id.* at 270. *See also* the central Supreme Court ruling in this area, *Varios del Comité Nacional Directive del PAN*, 93 S.J.F. *6a época* 60, *primera parte* (Plenary) (1946, rept'd March, 1965). In that case, decided coincidentally in the same year as the leading United States political question case involving electoral reapportionment (Colegrove v. Green, 328 U.S. 549), the Court gave several reasons for not investigating election misdeeds as petitioned to do so by PAN, the principal opposition party in Mexico. *Inter alia*, the Court held it could only investigate such allegations "to maintain the peace of the nation." Irreparable injury to private parties was no ground for judicial intervention "because the laws establish other organs and ordinary recourses to resolve such problems."

154. R. SCOTT, *supra* note 152, at 271.

155. *See* K. JOHNSON, MEXICAN DEMOCRACY: A CRITICAL VIEW 131-32 (1971).

156. 369 U.S. 186 (1962).

157. COMPILACIÓN DE LA JURISPRUDENCIA DE LA SUPREMA CORTE DE JUSTICIA, 1917-1965 (hereinafter cited as COMPILACIÓN . . . .), 6a parte, Material General: Thesis 90, at 164.

158. I. BURGOA, *supra* note 5, at 451-53.

159. COMPILACIÓN . . . ., *supra* note 57, Thesis 89, at 163. *See also* R. BAKER, *supra* note 5, at 161-62.

It is difficult indeed to visualize the Mexican Court validating, as did the United States Court, causes of action against election officials who "willfully alter and falsely count and certify ballots of voters."[160] Also in contrast to this Mexican political question, the United States Court has enjoined state efforts to exclude Negro voters from primary elections through regulating political parties.[161] It has outlawed, on fifteenth amendment grounds, a state policy which eliminated a city's Negro voters as participants in city elections.[162] It has ordered state legislatures to reapportion not only lower houses but upper houses on the basis of equal population districts,[163] and has applied the same standard to Congress[164] and local governing bodies.[165] Finally, in *Powell v. McCormack*,[166] the justices held that Congress had no vested constitutional authority to expel one of its members by simple majority vote and thus deny voters of that member's district the product of their free electoral choice. Here is a direct challenge of the power of the federal legislature to determine, in the words of the Mexican *amparo* prohibition, "the election, suspension, or removal of functionaries."[167]

Article 33 of the Mexican Constitution protects a third kind of official action from judicial review.

> [Foreigners] are entitled to the guarantees granted by the [first twenty-nine articles of the] present Constitution; but the Federal Executive shall have the *exclusive* power to compel any foreigner whose remaining he may deem inexpedient to abandon the national territory immediately and without the necessity of previous legal action. (emphasis added)

The Mexican President's power of expulsion is one of the few exceptions to the rule that aliens' rights are equal to those of citizens,[168]

160. United States v. Classic, 313 U.S. 299 (1941).

161. Smith v. Allwright, 321 U.S. 649 (1944).

162. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

163. Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); *but see* Mahan v. Howell, 93 S. Ct. 979 (1973).

164. Wesberry v. Sanders, 376 U.S. 1 (1964).

165. *See, e.g.*, Hadley v. Junior College District, 397 U.S. 50 (1970); Avery v. Midland County, Texas, 390 U.S. 474 (1969); Sailors v. Board of Education, 387 U.S. 105 (1967).

166. 395 U.S. 486 (1969).

167. *See* text and note 148 *supra*.

168. Thus the broad procedural protections of articles 14 and 16 of the Constitution are ordinarily available to aliens as well as citizens, particularly the guarantee of a "legal hearing." *See supra* note 5, and Schwarz, *supra* note 5, at 338 n.37, for a brief analysis of those two constitutional articles.

and the only exception to the general bar against arbitrary deportations and banishments provided by article 22 of the Law of Amparo.[169] Nonetheless, the President's authority in this respect appears absolute in the absence of any Supreme Court decision to the contrary.[170] Such sweeping discretion in the hands of an already powerful Executive has been heavily criticized in Mexico as deterring freedom of dissent and other exercises of constitutional liberties.[171] Judicial detachment from abuses of Presidential discretion under article 33 is manifestly similar to the United States Supreme Court's attitude toward deportations and exclusions of so-called "enemy" and other non-resident aliens under the various national security and immigration acts.[172] But most aliens subject to deportation in the United States can obtain declaratory judgment, habeas corpus, or injunctive relief from most arbitrary denials of procedural fairness by the administrative authorities.[173] There is no equivalent provision in the United States to the broad expulsion power granted to the Mexican President.[174]

Comparable in some ways to the committed-to-agency-discretion doctrine in the United States, Mexican federal courts gen-

169. *See* LAW OF AMPARO art. 22 (II), and text with notes 252-53 *infra*.

170. *See* R. BAKER, *supra* note 5, at 139; Fix Zamudio, *supra* note 131, at 724.

171. *See* Alcalá-Zamora y Castillo, *supra* note 131, at 777 n.15. A dozen Mexican attorneys, about a third of those interviewed for their reaction in 1968, regarded this grant of discretion to an already powerful chief executive as anomalous in a country prizing the rights of the individual. Others, however, argued that article 33 would be used, if at all, to oust foreign "agitators" threatening national security in some direct fashion—with Fidel Castro's Cuba the most frequently mentioned target of the President's wrath. But in August of 1972 United States Professor Kenneth Johnson cited *supra* note 155, was "quietly hustled out of the country" after being held incommunicado for 48 hours. Dr. Johnson's offense was to have written the aforementioned book critical of the PRI monopoly and on the trip to Mexico in question to have been seen openly with leaders of PAN, the opposition party. *See* Los Angeles Times, August 29, 1972, § II, at 10, col. 1.

172. *See* Galvan v. Press, 347 U.S. 522 (1954) and Harisiades v. Shaughnessy, 342 U.S. 580 (1952), regarding summary deportation of resident aliens; Shaughnessy v. United States *ex. rel.* Mezei, 345 U.S. 206 (1953), affirming a dubiously grounded exclusion of an alien for security reasons without full disclosure of reasons to excluded resident; Johnson v. Eisentrager, 339 U.S. 763, 775 (1950), upholding "summary arrest, internment, and deportation", during declared war, of resident enemy aliens; and Ludecke v. Watkins, 335 U.S. 160 (1948), deportations of "alien enemies" held non-reviewable. *See also* R. SOKOL, FEDERAL HABEAS CORPUS 57-62 (2d ed. 1969).

173. *See* text with notes 246-49 *infra*.

174. *See* R. SOKOL, *supra* note 172, at 60-61; *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1239-40 n.213 (1970).

erally must treat "decentralized public organizations" (*organismos decentralizados*) as private parties and therefore immune to direct *amparo* attack.[175] The core reason for such status is that these agencies, most notably the National University of Mexico and the Institute of Social Security in its capacity as dispenser of insurance benefits, function not as authoritative, "coercive" institutions but as based on cooperative, voluntary memberships peculiar to their "autonomous" roles. In the case of the University, this would apply to such internal relationships as those between the faculty and students and in such external relationships as between the campus and community.[176] The federal courts have been chastised by those who see this judicially-created variety of committed-to-agency-discretion as leaving students, faculty, and administrative employees of the University without any legal recourse in the event of conflict with the Administration.[177]

The reasons for judicial abstention in this area might be roughly similar to two grounds for committed-to-agency-discretion in the United States: "the necessity of informal decision-making" and the lack of expertise and experience of the courts in weighing "the intangibles inherent in the evaluation of on-the-job performance."[178] But the Mexican doctrine of "private parties" applied to such agencies to leave them immune from constitutional-rights litigation has no counterpart in the constitutional or administrative law of the United States. The only conceivable similarity might be where, under such liability statutes as the Federal Tort Claims Act, damages are not recoverable against state and federal gov-

175. I. BURGOA *supra* note 5, at 206-14; Fix Zamudio, *supra* note 131, at 721-22. This does not mean, of course, that actions of all such agencies are forever beyond *amparo* review. The Administrative Chamber of the Court or the federal circuit courts may review final judgments of the Federal Fiscal Tribunal which has appellate "cassation" jurisdiction over autonomous fiscal agencies like the Institute of Social Security when it assesses quotas for payment by employers and employees. ORGANIC LAW OF THE FEDERAL FISCAL TRIBUNAL art. 22 (I). Labor disputes in the same Institute and other decentralized agencies similarly may be appealed to the Federal Boards of Conciliation and Arbitration, and then, via the "direct amparo," to the Labor Chamber or the Supreme Court or a circuit court. *See generally* LAW OF AMPARO art. 158 regarding the direct amparo jurisdiction of the Supreme Court. In that article, the Fiscal Tribunal and labor boards are considered as administrative courts, and thus subject to the same procedural and substantive requirements as regular state and federal courts.

176. I. BURGOA, *supra* note 5, at 210-14; Alcalá-Zamora y Castillo, *supra* note 131, at 777 n.16.

177. Alcalá-Zamora y Castillo, *supra* note 131, at 777.

178. *See* text with notes 106, 109 *supra*.

ernments if the injury resulted from the "discretionary" or intentional, vis-á-vis "ministerial" or negligent, action of a particular official.[179] Such exceptions to liability may lie even where the state or federal legislature has waived its "sovereign immunity" from suit.[180] Thus, whether or not immunity is waived, usually it is only the offending officer or officers who can be sued, in effect, as "private" respondents or defendants in tort.[181]

The final political question for Mexican *amparo* courts is the apparently unequivocal constitutional denial of standing for private landholders to challenge presidential grants (restorations) or expansions of land and water rights of communal peasant farmers.[182] However, the Supreme Court has significantly modified these restraints and in the process has expanded its own review power, showing an increasing independence from the dominant political alliance on a subject of great importance to the revolutionary ideology.

Article 27, the constitutional section on agrarian reform, was mainly designed to protect the communal farmers of the *ejidos* and *núcleos de población* whose land claims often antedated the Spanish Conquest. Under the Díaz Dictatorship, these lands had been confiscated as being held without title and were frequently turned over to foreigners, native aristocrats, and the Church.[183] After

179. Federal Tort Claims Act, 28 U.S.C. § 2680(a) and § 1346(b) (1970).

180. *Developments in the Law—National Security Interest and Civil Liberties, supra* note 11, at 1302 n.78 (1972).

181. *But see* speculation in Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1558-59 (1972), on the basis of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In that case, the Supreme Court held that civil damages for violations of constitutional rights may be brought against federal officers, regardless of a lack of statutory authority to do so. On remand, the circuit court applied the same recovery rights as upheld earlier under section 1983 (42 U.S.C. 1983), when state officers "under color of state law" violate similar constitutional guarantees, especially those of the Fourth Amendment. *See* Monroe v. Pape, 365 U.S. 167 (1961). "The *Bivens* decision leads to the rather striking conclusion that section 1983 may simply be unnecessary: money damages, as well as equitable relief, may be obtained in suits founded directly upon the Constitution." Dellinger, *supra,* at 1559.

182. MEXICO CONST. art. 27 (XIV) states:

> Landowners affected by decisions granting or restoring communal lands and waters to villages, or who may be affected by future decisions, shall have no ordinary legal right or recourse and cannot institute *amparo* proceedings. Persons affected by such decisions shall have only the right to apply to the federal government for payment of the corresponding indemnity.

183. *See* text and notes 126-30 *supra.*

becoming the central concern of the 1910-1920 Revolution, the communal farmers then became the political base of the Agrarian Sector of the PRI.[184] The restriction on *amparo* litigation in article 27 (XIV) was enacted as part of this revolutionary pattern. Because of the need to modernize and increase production in the agrarian economy, important exceptions to this restriction on *amparo* suits developed. In 1947, President Miguel Aleman forced Congress into amendment of the Constitution and Agrarian Code allowing the President to issue "certificates of inaffectability" (*certificados de inafectibilidad*) which allowed holders to sue in federal courts.[185] Ostensibly, such certificates enabled private farmers who either had been very productive or could be classified as "small rural proprietors" (*pequeñas propiedades*),[186] or both, to enjoin the agriculture ministry from expropriating their lands and attaching them to existing communal farms. But Mexican Presidents beginning with Aleman were suspected of using the certificates instead as means for political patronage or delegating excessive authority for such purposes to the Secretariat of Agriculture and Livestock and the various Agrarian Commissions.[187]

In the law schools, in the legal commentaries, and among practicing lawyers, opposition to the conduct of agrarian reform in Mexico began to focus on two basic points: (1) the procedure for issuing certificates of inaffectability placed excessive discretionary authority in the hands of the President and his Secretary of Agriculture, in effect putting both the policy formulation and the administration of agrarian programs outside the scope of any judicial—and therefore constitutional—controls; and (2) this practice effectively denied, as well, the constitutional due process right of the small rural proprietor to an administrative hearing and

184. *See* R. SCOTT, *supra* note 152, at 162-63, 171-72.

185. MEXICO CONST. art. 27 (XIV para. 3).

186. The *pequeña propiedad* is expressly limited and protected from arbitrary expropriation by article 27 (XV) of the Constitution. *See* text with note 194 *infra*.

187. Several lawyers interviewed in Mexico expressed such cynicism. Similarly, grants of *pequeña propiedad* have been criticized as in reality a reinstatement of *latifundismo*. According to John Gerassi, the 100-hectare limit set by the Constitution is a subterfuge because,

> 100 hectares of irrigated land represent extremely valuable property. In addition, the *latifundistas* get around the law by having 100 hectares "owned" by each member of their families. Hundreds of presidential friends have been given land and, accumulated at 100 hectares per family member, they have become today's *latifundistas*.

J. GERASSI, GREAT FEAR IN LATIN AMERICA 105 (2d ed. 1965).

appeal prior to confiscation, a denial not challengeable through the indirect administrative *amparo*.[188] As the level of criticism of national agrarian reform policy increased in both frequency and intensity, the Administrative Chamber of the Court began to respond to its legal "reference groups." Until the mid-1960's, the Court sitting en banc had refused to review any case wherein "landowners [were] affected by ownership or restitutory grants of lands or waters . . . even though substantial violations of procedure are alleged."[189] The federal courts also denied standing to litigants challenging laws or actions threatening small agricultural properties.[190]

In 1962, however, the Administrative Chamber laid down precedent (*jurisprudencia*) in favor of the non-certificate holding *pequña propiedad* petitioners, culminating a series of similar holdings which began in 1954.[191] It not only granted standing to

188. Burgoa mainly criticizes the "certificating" discretion of the President as infringing on the constitutional roles of the Federal Judiciary and the *amparo*. He also argues that *amparo* should lie against land distribution affecting the small rural properties defined in article 27 (XV). But he agrees that in all other cases Presidential and gubernatorial grants and enlargements of title to the communal farmers should remain non-reviewable. I. BURGOA, ELJUICIO DE AMPARO EN MATERIA AGRARIA, 88-110 (1964). A whole host of law school theses, reflecting criticism among young lawyers, shared Burgoa's assessment of the problem. *See, e.g.*, A. GUILBOT SERROS, REINSTITUTION DEL JUICIO DE AMPARO EN MATERIA AGRARIA (UNAM Law Faculty, 1957). Others stressed the need for administrative hearings to determine whether applicants for certificates of inaffectability actually were eligible to receive or renew them, as well as to ascertain the entitlements of competing *ejidatarios* and small rural proprietors; *amparo* would then be the resort of those denied such procedural equality. *See, e.g.*, F. DE LA CRUZ, NECESIDAD DE REGLAMENTAR EL ULTIMO PARRAFO DE LA FRACCION 14 DEL ARTICULO 27 CONSTITUCIONAL (UNAM Law Faculty, 1963). Equal hearing rights for *pequeña propiedad* holders would seem especially necessary with the special standing and procedural advantages accorded to *ejidos* and *núcleos* in the 1963 reforms of the *amparo* law; *see* LAW OF AMPARO arts. 22 (II), 74, 39, 123; MEXICO CONST. art. 107 (II, VIII, d).

189. COMPILACIÓN . . . ., 3a parte (Administrative): Thesis 21 at 40; JURISPRUDENCIA, Thesis 749, IV, at 1366-67. The series of five cases establishing the precedent began with that of *Talavera Mariano, Sucesión de*, 74 S.J.F. 5a época 2398 (Oct. 27, 1942).

190. I. BURGOA, *supra* note 188, at 91.

191. COMPILACIÓN . . . . 3a parte (Administrative): Thesis 79 at 95-101. This is the first thesis attacking "total Presidential discretion" directly on the matter of small properties and, further, strongly insructing agrarian authorities on the concrete title rights of such property owners; see discussion with note 194 *infra*. Earlier decisions of the Administrative Chamber, however, had paved the way for this result by allowing *amparo* suits to test the execution of Presidential decrees affecting non-certificated small properties. COMPILACIÓN . . . ., 3a parte (Administrative); Thesis 75, 77, at 91-93, 93-94.

litigants seeking indirect amparo relief, but upheld on their merits, trial court decisions in favor of such petitions. Because of the 1958 amendments to the Law of Amparo,[192] the five-man Chamber could not impugn the constitutionality of those state and federal codes denying the right of hearing and procedural fairness to the small proprietors. But it could, and on several occasions did, uphold or ensure "final suspensions" of such confiscatory proceedings until these procedural rights were recognized.[193] The responsible authorities and third-party *comuneros* raised the objection that the small rural proprietors in many cases did not have title, as granted by the President pursuant to article 27 of the Constitution, and thus lacked sufficient "legal interest." The Court ruled that plaintiffs could constitutionally and statutorily claim ownership based on "positive prescription;" that is, according to article 66 of the Agrarian Code, by possessing lands not exceeding the acreage limits fixed by article 27 (XV) of the Constitution "in public, peaceful, and continuous fashion." Said possession must also have been prior to the application of the *ejidos* for expansion by at least five years.[194] Further, article 27 (XV) expressly holds liable "the mixed commissions, local governments, and any other authorities charged with agrarian proceedings" if they make grants which affect "small agricultural or

192. LAW OF AMPARO art. 84 (I,a) and ORGANIC LAW OF THE FEDERAL JUDICIARY art. 11 (IV bis., a), *as amended*, provide monopoly jurisdiction for the whole or Plenary Court over all petitions attacking the inherent constitutionality of state or federal laws. If the *amparo* petition includes a "legality" issue with one of constitutionality, the former is remanded to the Supreme Court chamber or circuit court for interpretation of the statute or its execution, but only after the whole Court has ruled on the validity of the law in the abstract. LAW OF AMPARO, art. 92. One might well see this as a direct effort to limit the growing independence of the Administrative Chamber. As a partial response to the great backlog and delays produced by this Plenary Court monopoly, the 1968 reforms permitted each chamber to apply existing jurisprudence of the Plenary Court to "*amparo* against the laws" coming before it.

193. *See, e.g., Amparo en revisión de Ascensión Ramos y coags.*, 84 S.J.F. 6a época 14, 3a parte (Administrative) (June 17, 1964). There, *pequeña propiedad* petitioners sought to prevent the Governor and state agrarian commission from evicting them from lands they had occupied for more than twenty years. The Federal District Court denied injunctive relief. On appeal, the Administrative Chamber reversed on the narrower ground that petitioners had been denied their right to "a hearing for their defense as against the claims of third parties" (i.e., the neighboring *ejido*). The Court then remanded to the lower court, with instructions that the agrarian commission provide the necessary hearing as to ownership rights—even in the absence of *statutory* authority to do so.

194. *See* COMPILACIÓN . . . ., *supra* note 191, at Thesis 79.

livestock properties in operation." In most instances, however, the Court has left the merits of the ownership claims to the determination of ministerial authorities when the proceedings have been consistent with constitutional due process.[195]

The *jurisprudencia* of the Court on this issue reflects a position similar to that adopted in response to attacks on the constitutionality of the Vietnam war as pressed by draft-resisters in the United States: the Supreme Court stops short of making a judgment on the validity of the policy itself, but does intervene to guarantee that the full light of an evidentiary hearing will be shed on such claims, either within the agency's decisional process or in later judicial proceedings. If the government refuses to permit such disclosures, its offending action is suspended.[196]

While at least partially satisfying many critics in the legal profession, the Mexican Court's new position was definitely unsatisfactory to leaders of the Agrarian Sector in the PRI, some state governors, and other authorities charged with responsibility for agrarian reform. As the decisions in favor of the procedural rights of the *pequeña propiedad* continued,[197] criticism of the Administrative Chamber and the Court generally became more intense and widespread. Newspaper articles criticized the decisions on four "revolutionary" grounds:[198] (1) article 27 (XIV) of the Constitution expressly forbids such judicial review of Presidential grants without the aforementioned certificates; (2) the new rulings contradict the Supreme Court's own precedent which since 1942 had mandated denial of standing and any relief in federal court to small rural proprietors;[199] (3) the contradictory *jurisprudencia* favorable to the private farmers rests on fragile statutory support, article 66 of the Agrarian Code, and in fact contravenes the intent of Congress as expressed in the debates over the Alemán

195. *See, e.g.*, the *Ascensión Ramos* case, 84 S.J.F. 6a época 14, 3a parte (Administrative), (June 17, 1964).

196. *See* comment on Alderman v. United States, note 97 *supra.*

197. *See, e.g.*, the cases and accompanying arguments in INFORME . . . 1970: SEGUNDA SALA (Administrative): Theses at 53, 62-67, 76, 85.

198. *See* Lemus García, *El amparo en materia agraria: trabajos presentados durante del Congreso extraordinario de la Confederación Nacional Campesina, 25 al 28 de agosto de 1967*, El Día (September 7, 1967); Martínez Camberos, *Apuntes para el estudio de un conflicto entre ejecutorias de la Suprema Corte de Justicia*, El Día (January 29, 1968); Hinojosa Ortíz, *Tesis anti-constitucional antiagrarista de la Suprema Corte de la Nación*, El Día (date unknown, 1968).

199. *See* note 189 *supra.*

Reform of 1946, that is, to grant supreme authority over all agrarian reform policy to the President; and (4) the Supreme Court had caused "great dislocations" in the *ejidos* while encouraging abuse "on the part of the large estates [*latifundia*] whose owners delay and obstruct administrative proceedings empowered to find sufficient arable land for the growing *ejidatario* population."[200]

The Supreme Court has thus far stood its ground in the face of such political pressure,[201] although it has conceded to the government on marginal issues involving agrarian policy.[202] Federal courts in general have encountered great obstacles in some parts of the country when it comes to enforcing politically unpopular decisions. The President of the Court frankly complained about the lack of cooperation from some state governors and military zone commanders whose help was requested by federal district judges and the Supreme Court, but who failed to move promptly, if at all, against invasions by communal farmers onto lands possessed by small private owners supposedly protected by *amparo* injunctions.[203] Two district judges interviewed in outlying towns

200. Hinojosa Ortíz, *supra* note 198. The writer further suggests that the Supreme Court has become the willing accomplice of the conservative-aristocratic party, the PAN, by its decisions favoring private agriculturalists.

201. *See* cases and theses cited note 197 *supra*; INFORME . . . 1971: SEGUNDA SALA (Administrative): Theses 14, 16, 21, 25-27, 38, respectively found at 54-55, 59, 64-66, 68-71, 79-80. All cited directly or indirectly refer to the various procedural rights of affected small rural landholders and the competency of the Court to review them.

202. *See, e.g., Amparo en revisión de Camila Magana Cuevas*, 133 S.J.F. 6a época 18, 3a parte (Administrative) (1968), denying that the legal office of the federal agriculture ministry had the character of "responsible authority" and thus his "investigative" functions were not enjoinable under *amparo*; *Amparo en revisión de Villalba Ruíz*, 134 S.J.F. 6a época 18, 3a parte (Administrative) (1968), denying amparo because proprietor failed to demonstrate his physical working of the land in question; and two cases cited in INFORME . . . 1970: SEGUNDA SALA (Administrative), at 71-72, 74, placing formal limits on the kinds of "proofs" and title claims which can be offered by small private farmers .

203. Interview with Lic. Presidente Agapito Pozo, in Mexico City, August, 1968. Securing executive compliance of final amparo decrees is difficult, both politically and procedurally. If the responsible authority fails to comply with final suspension order, devices known as the *queja* (complaint), used in cases of excessive or deficient execution, and the *incidente de inejecución*, for complete lack of execution, may be employed to order such compliance. LAW OF AMPARO arts. 95-97, 105-08. These must be processed through the Plenary Court at the initiative of the plaintiff (*quejoso*) favored by the judgment. No federal district judge is empowered to issue his own contempt or non-compliance citation. COMPILACIÓN . . . ., Material General: Thesis 105, at 207. Burgoa strongly criticizes this restriction, *supra* note 5, at 547n.

If the offending authority continues to defy the judgment or repeats the

expressed similar sentiment more intensely. On the other hand, a number of the Administrative Chamber's own cases indicate that the Federal Public Minister's Office is cooperating to some extent by bringing penal actions against responsible authorities and third-party *ejidos* who fail to carry out *amparo* judgments.[204]

IV. MEXICAN JUDICIAL ACTIVISM: COMPARISONS WITH LIMITED-REVIEWABILITY AREAS IN THE UNITED STATES

The Mexican Supreme Court's treatment of agrarian *amparo* cases, an area supposedly forbidden to judicial scrutiny, illustrates the increasing independence of the Mexican Federal Judiciary in deciding constitutional-rights cases on their merits. The *amparo* courts have expressed this independence mainly by demanding that all litigants be accorded a wider degree of procedural fairness in official decisions, whether such decision-makers be municipal officials, federal and state administrators, law enforcement officers, or judges.[205]

Insistence on proper administrative and judicial procedures in *amparo* litigation at times has borne down heavily on official discretion in politically sensitive areas. These have included state

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enjoined acts, at the initiative of the original trial judge or interested parties, the Plenary Court can order his removal from office and his appearance before a district judge for appropriate criminal action as brought by the Public Minister. LAW OF AMPARO art. 108. On conviction, the authority then can receive up to six years' imprisonment and a 1000-peso fine. *Id.* art. 199; FEDERAL PENAL CODE 213. Such convictions are rare.

It should be noted that "there exists no particular statute nor immunity for public servants in civil conflicts." MEXICO CONST. art. 114. Further, the Supreme Court can demand suspension of immunity if the authority claims "constitutional status" to avoid removal from office. LAW OF AMPARO art. 109. Many lawyers interviewed in Mexico, however, see the key problem of judicial enforcement as the lack of cooperation of the Federal Public Minister in bringing such criminal sanctions against the abusive official. *See, e.g.*, Alcalá-Zamora y Castillo, *supra* note 131, at 174, who criticizes the exorbitant discretionary powers of the Public Minister in criminal prosecutions generally.

204. *See, e.g., Amparo en revisión de Comisariado Ejidal del Poblado Tumbiscatío* . . . 133 S.J.F. 6a época 15, 3a parte (Administrative) (1968).

205. "[In Mexico] the average citizen . . . looks to the courts for technical interpretations of the law or protection against arbitrary applications by capricious individuals, and to the presidency when he wishes to influence basic policy." R. SCOTT, *supra* note 152, at 272. In light of the actual performance of *amparo* courts since 1940, however, this should be amended as follows: ". . . for the protection against arbitrary applications by capricious individuals and *non-elective agencies.*"

and federal taxation of income and real property;[206] military control over pensions,[207] housing,[208] and non-service-connected crimes by soldiers;[209] denials to aliens of professional licenses and due process in deportation actions;[210] the application of international treaties to Mexican citizens;[211] and methods of expropriating real property for public purposes, including the aforementioned agrarian reform programs.[212]

Four of these issue areas are by contrast either non-reviewable or very narrowly reviewable by United States courts consistent with such doctrines as political questions, committed-to-agency-discretion, and deferral to state courts.[213] First, Mexican *amparo* precedent has long held that federal and state tax laws may be reviewed as to their substantive constitutionality and procedural fairness.[214] The Mexican judicial position is clear: in all such cases the *amparo* petition should be heard; the United States argument that the plaintiff lacks sufficient "juridical interest" to sue

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206. *See* note 213 and accompanying text *infra.*

207. *See* text and notes 235-36 *infra.*

208. Similar to broad restrictions on military decisions in other administrative areas, the Administrative Chamber has compelled the Directive Committee on Military Housing to provide equitable remedies and procedures to those threatened with eviction on military property. *See* INFORME . . . 1968: SEGUNDA SALA (Administrative): Thesis at 24.

209. *See* text and note 234 *infra.*

210. *See* notes 237-39, 244, 252-53 and accompanying text *infra.*

211. *See* text and notes 258-59.

212. *See* text with notes 182-204 *supra.*

213. Deferral is a judicial doctrine limiting federal jurisdiction relative to matters of state law. Unlike doctrines of non-reviewability, however, deferral to state courts presupposes the existence of adequate or substantially equivalent state remedies as available to litigants asserting federal-rights claims. Regarding federal deferral to state taxation laws or rate-fixing, see *supra* note 54. Adequacy or equivalency of state remedies are particularly required in federal civil rights cases. *See* Civil Rights Act of 1968, 42 U.S.C. § 3610(c)-(d) (1970). *See generally,* on deferral as opposed to abstention, Schwarz, *supra* note 5, at 343 n.66.

214. Already noted is the expansion of *amparo* jurisdiction under the due process guarantees of constitutional articles 14 and 16, despite the theoretical line drawn at the first twenty-nine articles of the Constitution specifying individual rights. *See supra* note 5.

> Thus far, the jurisdiction conferred by articles 14 and 16 has been used most frequently to combat violations of section IV, article 31, and . . . article 73, the latter listing powers delegated to the federal Congress. Virtually all these cases have been concerned with the validity of tax measures.

R. BAKER, *supra* note 5, at 131 n.36; and *see, e.g., Cooperativa La Azteca coags.*, 79 S.J.F. 6a época 20, la parte (Plenary) (1964).

the spending agency is invalid.[215] The United States federal courts under *Frothingham v. Mellon* and other decisions have traditionally rejected taxpayers' suits against state and federal spending for wars, religious programs, and welfare policies,[216] on the ground that such suits touched on the inherent sovereignty or the very existence of the political system.[217] More recent opinions have opened the standing door a crack, but only to litigants challenging federal[218] and state[219] expenditures financing instruction in religious schools as violative of the establishment and free exercise clauses of the first amendment.

The Mexican position favoring taxpayers' suits represents an interesting contrast to the *Frothingham* pattern in the United States, especially since it comes from a judicial system based on the European civil law principle of "legislative supremacy:"

> The Court is within its powers to judge the unconstitutionality of fiscal laws, just as it can that of any other law. This power may be exercised broadly, analyzing if there is insufficient generality [in the application of the law]; if it contradicts its own principles; if the powers of other authorities are invaded; if the rights to a hearing for the litigants are not observed; if the laws are made retroactive; in sum, if the [fiscal laws] are within the general principles of individual guarantees [of the Constitution].[220]

It would be difficult to find a judicial philosophy closer to Chief Justice Marshall's classic "It is a *Constitution* we are expounding," uttered in another famous tax case.[221] Perhaps the real reason behind the Mexican Court's marked independence in this area is the special relationship between the Administrative Chamber and the highly prestigious Federal Fiscal Tribunal.[222] The Fiscal Tribunal is similar in function to the United States Tax Court but possesses broad review powers more like those of the French

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215. *See* the especially activist judicial philosophy advanced by Sr. Ministro Manuel Yañez Ruíz, *El Problema Fiscal y la Supreme Corte de Justicia de la Nación, Octubre de 1970*, INFORME . . . 1970: Annex 21, at 329-423.

216. *See* notes 53-55, and accompanying text *supra*.

217. South Dakota v. North Carolina, 192 U.S. 186 (1904).

218. Tilton v. Richardson, 403 U.S. 672 (1971), text with note 146 *supra;* Flast v. Cohen, 392 U.S. 83 (1968), discussed in text with notes 52, 56-57, 145 *supra.*

219. Lemon v. Kurtzman, 403 U.S. 602 (1971).

220. Ministro M. Yañez Ruíz, *supra* note 215, at 422.

221. McCulloch v. Maryland, 4 Wheaton 316, 407 (1819).

222. *See* section V *infra.*

administrative tribunal, the *Conseil d' Etat.* The Mexican Tribunal oversees and screens for "illegality" all actions of the fiscal agencies of the Federal Government, including those operating the Federal District.[223] It is known for its hard-headed review of administrative decisions for their substantive conformity with existing revenue statutes and the due process rights of taxpayers or other assessed citizens.[224] Thus, by the time the Government's case has reached the Administrative Chamber on direct appeal, it has been subjected to thorough and often critical scrutiny by the Tribunal. One survey revealed that the Chamber upheld the Tribunal against the federal fiscal authority in at least 60 per cent of the proceedings where the latter had appealed via the special *revisión fiscal* recourse.[225] This contrasts with greater percentages of "pro-government" decisions in the Civil, Criminal, and Labor Chambers of the Court.[226]

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223. As of 1967 congressional reforms, the Federal Fiscal Code and Organic Law of the Fiscal Tribunal broadly define the term "fiscal" as it relates to the Tribunal's jurisdiction. It may now hear appeals from fines levied by any federal agency, competency disputes between treasury departments of the two federal entities, pension administration by the Institute of Social Security and Public Employees' Services and Secretariat of Defense, enforcement of public works contracts let by "dependencies of the National Executive Branch," and, most importantly and most frequently, all tax assessments by the Treasury Secretary or Treasurer of the Federal District "when the injury is not reparable by any other administrative recourse." ORGANIC LAW FEDERAL FISCAL TRIBUNAL arts. 22, 23, and 123 (*as revised,* 1967). *See also* Carrillo Flores, *Origines y desarrollo del Tribunal Fiscal de la Federación,* REVISTA DEL TRIBUNAL FISCAL DE LA FEDERACION 15, 30 (no. 3 extraordinario, 1967); Fix Zamudio, *supra* note 131, at 720, 722, 726-29, *et seq.*

224. ORGANIC LAW FEDERAL FISCAL TRIBUNAL arts. 228-30 (*as revised,* 1967). HERRIMAN & LEE, FINANCING URBAN DEVELOPMENT IN MEXICO 39-47, 57-63 (1967). Reviewing only the legality and procedural sensitivity of fiscal agency decisions, and nullifying those not in accord with the Federal Fiscal Code, gives to the Fiscal Tribunal its "cassation" function. Unlike *amparo* courts, the Tribunal does not void such acts as unconstitutional nor substitute its own interpretation of the statute in the individual cases brought before it. *See,* FIX ZAMUDIO, EL JUICIO AMPARO 327-28 (1964); Carillo Flores, *supra* note 223, at 30-31.

225. Interview with Carlos del Río Rodríguez, President, Federal Fiscal Tribunal (now Minister of the Supreme Court), in Mexico City, August, 1968. A perusal of the few *revisión fiscal* cases fully reported in S.J.F. for the period of January 1964-June 1966, and June through August, 1968, revealed that the President's estimate was, if anything, conservative. Of the 35 cases reported, the Administrative Chamber upheld Tribunal actions against Treasury officials in 30; three resulted in partial rulings for the government appellants, and only two affirmed the government's arguments against the Tribunal.

226. See tables in section V *infra.*

A second area in which Mexican federal courts take an activist stand relative to their counterparts in the United States is the reviewability of military courts-martial and administrative actions. The United States courts have maintained a highly restrictive attitude toward review of military courts-martial and, until recently, challenges of military jurisdiction over soldiers accused of off-duty or non-service-connected crimes. Only in *O'Callahan v. Parker* did the Supreme Court hold that federal habeas corpus relief was available to obtain civilian trials for servicemen charged with such crimes.[227] This breakthrough and others[228] notwithstanding, what one specialist held is still essentially true: "The decisions of courts-martial are not subject to direct review in the federal courts."[229] Even when ruling on habeas corpus petitions, the courts have predominately applied the "fair consideration" test to matters of fact as well as to federal-rights claims.[230] To the majority of judges this means simply,

> did the military consider the allegation? If so, the military determination is conclusive . . . . These courts, in other words, refuse to consider *de novo* any issue on which the military has made a decision.[231]

Clearly the military courts enjoy much greater deference from the federal bench in habeas corpus actions than do the more constitutional-rights-oriented *state* judicial systems.[232]

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227. 395 U.S. 258 (1969).

228. *See, e.g.,* Harris v. Cicone, 290 F. Supp. 729, 733 (W.D. Mo. 1968); White v. Humphrey, 212 F.2d 503 (3d Cir., *cert. denied,* 348 U.S. 900 (1954). In both cases, the court reviewed issues of constitutional rights de novo; such instances are rare indeed.

229. Comment, *God, the Army, and Judicial Review: The In-Service Conscientious Objector,* 56 CALIF. L. REV. 379, 380-81 (1968); and *see* Sherman, *The Military Courts and Servicemen's First Amendment Rights,* 22 HASTINGS L.J. 325, 326 (1971).

230. Burns v. Wilson, 346 U.S. 137, 140 (1953).

231. *Developments in the Law—Federal Habeas Corpus, supra* note 174, at 1218.

232. When considering a habeas petition from a state prisoner, the federal court can inquire de novo into questions of constitutional law and can repeat the process of applying the law to the facts, no matter how fully the state court has considered the issue and no matter how adequate the state procedures. If the state inadequately considered issues of fact, the federal court can redetermine them. But *Burns* has been read to prohibit inquiry into law or fact if the military has decided the issue.

Id. See also Comment, *Federal Habeas Corpus—The Underdeveloped Areas,* 41 WASH. L. REV. & ST. BAR J. 327, 335 (1966), to wit: "While partaking of due process, the applicable standard [i.e., "fair consideration"] sounds like review of an administrative rate-making decision."

The Mexican Supreme Court review of military courts-martial via the direct *amparo* procedure appears to be much broader as well as more common than in the United States. The issues cognizable by the Court range from whether the military tribunal correctly interpreted the Code of Military Justice to the accuracy of findings of fact.[233] The Plenary Court also has forthrightly denied the military courts jurisdiction in competency disputes with civilian courts over soldiers charged with off-duty or non-military crimes.[234] Finally, the Administrative Chamber of the Court has been under fire for upholding Fiscal Tribunal rulings against the Defense Secretariat in favor of revolutionary veterans[235] and unmarried mothers[236] in their claims for military pensions.

Protection and broad reviewability of a variety of aliens' claims to due process and legal equality by Mexican *amparo* courts is a third point of contrast with limited reviewability available in United States federal tribunals. Especially noteworthy are the successive *jurisprudencias* issued by the Mexican High Court against the constitutionality of the 1944 federal professional licensing law and state laws similarly discriminating against resident aliens.[237] The Court has found that a commercial income tax levied as a requisite for practicing a "non-commercial profession" was a dou-

233. *See, e.g., Amparo directo de Eleuterio de la Cruz,* cited as an "important thesis" in INFORME . . . 1970: PRIMERA SALA (Penal): Thesis at 40. Here an enlisted man convicted for murdering his superior officer had his sentence reduced to seven years from death, after a finding of fact that the crime was provoked by the officer's insults.

234. *Compilación . . . ., supra* note 157 primera parte (Plenary): Thesis 36, at 154-55.

235. *See* CASTELLANOS ALONSO, LA JURISDICCION MILITAR Y EL AMPARO (SALA MILITAR EN LA H. SUPREMA CORTE) (UNAM Law Faculty, 1965); the author sharply criticizes the Court for its anti-military decisions in this area and proposes a separate Military Chamber.

236. *Revisión fiscal de María Elena Fernández R.,* 133 S.J.F. 6a época, 3a parte (Administrative) (1968). In a series of *jurisprudencias* against the Secretariat of Defense, the Court found that those benefiting from favorable amparo judgments were entitled as well to reinstatement of all salaries and benefits "in order to restore matters to the state they were prior to the violation of guarantees which motivated the federal protection." INFORME . . . (1970): SEGUNDA SALA (Administrative): Theses at 38-43.

237. *See amparo en revisión,* 35 S.J.F. 6a época 141, primera parte (Plenary) (1960), cited and analyzed in J. L. SIQUIEROS & S.A. BAYITCH, CONFLICT OF THE LAWS: MEXICO AND THE UNITED STATES 53-57 (1968). *See also Amparo en revisión de F. Garcia Calderón,* in INFORME . . . 1970: SEGUNDA SALA (Administrative), at 288-89, denying that a Veracruz law regulating professions is retroactive.

ble, unequal tax compounding that already assessed on the plaintiff's income.[238] Alien doctors and lawyers have benefited from *amparo* judges' "supplying the deficiency of the complaint," in other words correcting technical errors in their petitions, when appealing denials of licenses to teach or practice by the Federal Director-General of Professions.[239]

In the United States, the Supreme Court has not made clear whether resident aliens have a uniform federal right to obtain relief under the fourteenth amendment's Equal Protection Clause against states which discriminate in matters of gaming licenses, private property ownership, and free entry into law, medicine, and other professions. This uncertainty continues in spite of its rulings in *Takahashi v. Fish and Game Commission*[240] and *Yick Wo v. Hopkins*,[241] striking down state denials of commercial licenses relying principally on the argument that the affected aliens "cannot live where they cannot work." It is true that state and federal courts, following *Takahashi*, have now apparently swung to the side of equal economic opportunity for aliens,[242] but confusion nonetheless persists because of the wide variety of state policies, some highly discriminatory, regarding the employment and property rights of aliens.[243] It seems only a comprehensive Supreme Court opinion will clarify the waters of aliens' economic rights now muddied by "judicial federalism."

On the matter of arbitrary deportations of resident aliens, the Mexican Law of Amparo expressly grants standing to chal-

238. *Amparo en revisión de P. Barrientos Castillo*, 132 S.J.F. 6a época 42, primera parte (Plenary) (1968); *see also Amparo en revisión de F. A. Ponce A.*, 98 S.J.F. 6a época 23, primera parte (Plenary) (1965).

239. *Amparo en revisión de M. Tulio Castro Guevara*, 105 S.J.F. 6a época 41, primera parte (Plenary) (1966).

240. 334 U.S. 410 (1948).

241. 118 U.S. 356 (1886).

242. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971), invalidating two states' denial of general assistance to aliens, on equal protection clause grounds; Purdy & Fitzpatrick v. California, 71 C.2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969), voiding Labor Code section prohibiting employment of aliens on public works; Note, *Constitutionality of Restrictions on the Aliens' Right to Work*, 57 COLUM. L. REV. 1012 (1957).

243. *See* Leger v. Sailer, 321 F. Supp. 250, 258-259 (1970); W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL RIGHTS AND LIBERTIES 817-18 (3d ed. 1970). Regarding the current diversity of state policies toward alien land ownership, see Comment, *Do We Live in Alien Nations?*, 3 CALIF. W. INT'L L.J. 75, 76-83 & appendices (1972-73), and Shames v. Nebraska, 323 F. Supp. 1321 (D. Neb. 1971).

lenge all alleged violations of statutory intent by an official's misapplication of a statute as well as violations of constitutional due process. Remaining beyond the *amparo*'s grasp, however, is the often-criticized power of the President to expel those he deems "inexpedient."[244] United States federal case law and statute have long held deportations and exclusions to be areas involving political questions and administrative discretion.[245] Increasingly, however, judicial review via habeas corpus has been opened up to ascertain whether the Immigration and Naturalization Service followed minimal standards of due process and substantive correctness in its proceedings. Thus, the prospective deportee is entitled to at least a fair hearing, prior notice, counsel of his choice, and, for other than "subversive" or "enemy" aliens, demonstration of "a minimal rational relationship to a proper governmental purpose."[246] For "friendly" resident aliens, by far the most favored class of aliens faced with deportation or exclusion,[247] habeas corpus is the common judicial remedy, although the declaratory judgment has become a supplemental attack of such orders.[248] A 1961 amendment to the Immigration and Nationality Act broadened the range of judicial fact-finding from the old standard of looking for *any* factual support of the agency action: the court may now determine "whether the administrative findings are supported by reasonable, substantial, and probative evidence on the record as a whole."[249]

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244. *See* discussion in text and notes 168-71 *supra*. The same article 33 of the Constitution authorizing such summary power by the President also equates aliens' rights with those of citizens in "non-political" areas. *See* R. BAKER, *supra* note 5, at 139.

245. *See* text and notes 82-86 *supra*. *See also* Shaughnessy v. United States *ex. rel.* Mezei, 345 U.S. 206 (1953), establishing exclusion of aliens for national security reasons as a political question.

246. *See* Schneider v. Rusk, 377 U.S. 163 (1964); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Yamataya v. Fisher, 189 U.S. 86 (1903); *see also* Sherman v. Immigration and Naturalization Service, 87 S. Ct. 483 (1966), for voiding of a deportation order lacking "clear, unequivocal, and convincing evidence that facts alleged as grounds for deportation are true."

247. See R. SOKOL, *supra* note 172, at 57-62.

248. 8 U.S.C. § 1105(a) (1964); Brownell v. Tom We Shung, 352 U.S. 180 (1956).

249. 8 U.S.C. § 1105(a)(4) (1964). Ostensibly this change applies to habeas review as well and represents an improvement over the old "no basis in fact" test limiting broad inquiry on behalf of petitioning aliens. Exclusions, however, appear not to be affected by the 1961 changes. *See Developments in the Law—Federal Habeas Corpus, supra* note 174, at 1247-48. *See also* Sherman v.

Judicial review of any deportation order, however, "is confined to an examination of the administrative record . . . . Therefore, the court has no authority to conduct a *de novo* hearing on the merits exploring the same ground covered in the administrative hearing."[250] Thus, even where he asserts constitutional-rights violations, the resident alien threatened with deportation cannot expect federal courts to scrutinize facts beyond the record or the Immigration and Naturalization Service's legal interpretation of those facts.[251] In Mexican cases of irreparable or "imminent" threats to fundamental rights such as deportation actions, the *amparo* judge may provisionally suspend the offending act without the necessity of formal briefs or complaint *(suspensión de oficio)*;[252] he then considers oral as well as written testimony at a later "constitutional hearing" designed to determine the need for permanent suspension *(suspensión definitiva)*.[253] The United States practice seems particularly restrictive when considering that procedural due process in deportation proceedings is spindly compared to the protection of federal rights in state trials. For example, the special inquiry officer is both judge and prosecutor; indigent aliens cannot obtain counsel at government expense; and administrative appeal "is incapable of supervising adequately the agency's adjudicative activities, since its institutional setting and assumptions are little different from that of the initial decision-maker."[254] One commentator concludes:

> Thus aliens have often been left to the mercy of administrative authority in habeas proceedings, not because of limitations on the power of the writ, but because their substantive rights are limited. That process which is due an alien is not necessarily coextensive with the constitutional protection af-

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Immigration and Naturalization Service, 385 U.S. 276 (1966); Bufalino v. Kennedy, 116 U.S. App. D.C. 266 (1963).

250. GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE 8.7 (1967), *as quoted* in R. SOKOL, *supra* note 172, at 42 n.53.

> 251. The power to expel aliens, being essentially a power of political branches of government, the legislative and executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.

Immigration and Naturalization Act § 241(a), *as amended*, 8 U.S.C.A. § 1251 (a) (1970). *See also* Kasravi v. Immigration and Naturalization Service, 400 F.2d 675 (1968).

252. LAW OF AMPARO arts. 17, 73 (xiii), 123-24.

253. *Id.* arts. 78, 80, 130-32.

254. *Developments in the Law—Federal Habeas Corpus, supra* note 174, at 1241-42.

> forded a citizen. Substantive constitutional rights may even vary between individual aliens on the basis of such factors as whether residency has been established or entry is being sought.[255]

A final issue on which standards of reviewability differ is the interpretation and domestic application of international treaties. Treaties and executive agreements seem to comprise one of the few issue areas ordinarily declared a political question by the United States Supreme Court.[256] In several well known cases rejecting individual constitutional rights claims, the Court has held as non-justiciable the question whether an act of state has been recognized by the United States under executive agreement, and the question whether treaty interpretations given by the Executive Branch are generally final.[257] By way of comparison the Mexican Supreme Court has determined that the application of treaties to domestic residents is a matter of constitutional law and thus eminently reviewable.[258] In one case, the Administrative Chamber granted standing to an *amparo* petitioner to challenge execution of a treaty violating "the formalities outlined in the Constitution, . . . according to [the due process and "legality" guarantees of] Article 14 especially." Further,

> under these conditions if the amparo is a means for controlling the legality of authoritative acts it must be considered admissible [when] it relates to the application of an international treaty, since to do the contrary would leave the

255. *Id.* at 1243.

256. *See* Baker v. Carr, 369 U.S. 186, 217 (1962); M. SHAPIRO, *supra* note 21, at 177; note 29 *supra*, regarding Professor Sharpf's "functional categories."

257. In U.S. v. Belmont, 301 U.S. 324 (1937), and U.S. v. Pink, 315 U.S. 203 (1942), the Court ordered the New York courts to honor demands of the United States as assignee of the Soviet Government under the Litvinov Assignment of 1933. In upholding the assignee against the deposits of certain banks, the decision confirmed the "extra territorial operation of confiscatory Soviet decrees." The Court has also applied the element of "finality" to the United States' abrogation of a treaty: "The question of whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts." Chinese Exclusion Cases, 130 U.S. 581, 602 (1889). *See also* Terlinden v. Ames, 184 U.S. 270 (1902), holding the right to habeas corpus in international extradition cases as within "the conclusion of the executive department of the Government" where treaty obligations are involved. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Court refused to examine the validity of a foreign expropriation by a government duly recognized, even if the complaint alleges that the expropriation violated customary international law.

258. *See* cases cited in R. BAKER, *supra* note 5, at 163 n.77.

citizen without any defenses.[259]

This is the direction of the Mexican *amparo* courts despite the fact that they have almost completely deferred to the Executive on other matters of foreign policy.[260]

One qualification may provide the reader with some perspective: judicial practices of limited reviewability in the United States are closer to the Mexican brand of "judicial activism" in the areas discussed than the wording of many of the cases cited might indicate. In regard to the treaty interpretation issue, for example, the United States Court has insisted that the Fair Labor Standards Act should apply to civilian workers on leased military bases in the Bermudas, in spite of the State Department's objection that such a decision would "embarrass American relations with Britain."[261] Martin Shapiro also points out that the execution of treaties is almost, but not quite, an absolute political question.[262] A similarly activist flavor can be detected in many other recent United States decisions in non or limited-reviewability issue areas. One need mention only the recent *Flast v. Cohen* break-through regarding taxpayers' suits on first amendment grounds,[263] *O'Callahan v. Parker* regarding habeas corpus review for certain kinds of courts-martial,[264] the alien "right-to-work" cases and minimal procedural due process holdings in deportation cases,[265] and the Fair Labor Standards Act decision in regard to treaty applications.

It may be concluded that the Mexican federal courts, especially in their exercise of *amparo* jurisdiction, are not as passively oriented to the Executive Branch as is commonly assumed. In a few areas, they are even more activist than their counterparts in the United States: most striking here is the broad reviewability

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259. *Amparo en revisión de Manuel Brana Li*, 98 S.J.F. na época 61, 3a parte (Administrative) (1965).

260. R. BAKER, *supra* note 5, at 162.

261. Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948).

262. The Court will not interpret or seek to enforce treaties in which such public rights as sovereignty over territory are involved. It will interpret treaties in order to enforce public or private rights arising from them. Whether public or private rights are involved, however, it will not determine the validity of a treaty or seek to enforce it against alleged abrogations or violations by the United States government.

M. SHAPIRO, *supra* note 21, at 177.

263. *See* text with notes 52-57 *supra*.

264. Text and notes 227-28 *supra*.

265. Text and notes 240-42 *supra*.

of federal and state tax laws and military courts-martials.[266]

V. INDEPENDENCE MEASURED: THE FREQUENCY AND DIRECTION OF "ANTI-GOVERNMENT" DECISIONS

A. The Mexican and United States Supreme Courts

The Mexican Supreme Court has pressed officialdom vigorously in several key policy areas.[267] *Amparo* courts appear willing to tackle almost every kind of procedural abuse in the administration and interpretation of laws as long as litigants meet the technical requisites for bringing the writ. Those subjected to rigorous constitutional standards via the *amparo* include judges, administrative tribunals, municipal officials, ordinary bureaucrats and agency chiefs, and law enforcement officers.[268] In at least two ways, however, Mexican federal judges have relied on Professor Bickel's "passive virtues" falling short of declaring the question non-reviewable. One, the Supreme and District Courts rarely challenge basic governmental policies by upholding "constitutionality *amparos*" (called *amparos contra leyes*)[269] against statutes, administrative regulations, and presidential decrees. Two, Mexican federal courts will defer to the discretion of responsible authorities in the face of certain politically sensitive issues, even while deciding on the merits.

The reluctance to void governmental enactments on constitutional grounds is primarily the result of an unfavorable congressional response in 1958 to this style of judicial activism: by granting monopoly jurisdiction over all "constitutionality *amparos*" to the Plenary Court, the Congress ensured that it would be an awkward and rarely successful remedy.[270] Fourteen out of a Court of twenty-one Ministers must now approve the five consecutive "theses" or decisions on the same legal point as necessary to establish *jurisprudencia* regarding the challenged law.[271] This is required in a body already rendered unwieldy by its organization into four chambers dealing with highly disparate subject mat-

266. *See* text and notes 214-26, 229-36 *supra.*

267. *See* text and notes 206-12 *supra.*

268. *See* this author's revision of Professor Scott's assessment of the political efficacy of the Mexican courts in note 205 *supra.*

269. *See* notes 5 and 192, for a brief outline of the "constitutionality *amparo*" procedure and effects.

270. Note 192 *supra; see also* R. BAKER, *supra* note 5, at 272.

271. LAW OF AMPARO art. 192.

ter, whose members have little formal interaction with those of the other chambers.[272] It is understandable that long-time Supreme Court Minister Felipe Tena Ramírez could recall only six jurisprudential declarations against statutes, decrees, or regulations between 1958 and 1966, a time when the Court decided more than 1,000 cases involving *amparos contra leyes*![273] When the Court does sustain such challenges, it more often directs them against state rather than federal legislation. Rarely does it ever question laws assigned a priority by the President and his "ruling family" within the PRI.[274] In direct contrast, the United States Supreme Court declared unconstitutional ten acts of Congress and many times that number of state laws during 1960-1967.[275] In the three years of 1961-1963, for example, the Court invalidated no less than forty-five state acts.[276]

Any survey of Mexican judicial output as it compares with that of the United States must incorporate Pablo González Casa-

272. Outside of the open deliberations of the Plenary Court every Tuesday, members of the Court meet most regularly with their own five-man chamber (Penal, Administrative, Civil, and Labor) in both formal session and informal conferences throughout the week. The most intensive interaction over case materials, however, seems to occur as the ministers of that chamber circulate and comment on "draft opinions" (*proyectos*) submitted by the "reporting minister" (*ministro relator*). *See* LAW OF AMPARO arts. 185-91, outlining some of the procedures used by the chambers in introducing, discussing, circulating, and voting on such opinions, along with provisions for dissenting and concurring opinions.

273. Tena Ramírez, *La reforma de 1968, en materia administrativa, al Poder Judicial de la Federación*, 10 EL FORO 55, 68 (1968). The total of 1,000 came from INFORME . . . (1958-1966): Annex 11. Because of the Plenary monopoly granted in 1958, delay became the chief enemy of fairness in disposing of "amparos against the laws." The backlog of such cases in the Supreme Court went from 800 in 1958 to 2,422 in 1966. Tena Ramírez, *supra*, at 68. This author's survey of 57 important theses of the Plenary Court in 1968 (not all "constitutionality *amparos*") revealed an average wait of more than six years for plaintiffs, from admission of petitions to judgment. INFORME . . . 1968: Annex 10, at 137-80.

274. Of this author's sample of 49 fully-reported *amparos* against the laws decided during a thirty-three month period in 1964-1968, only eight represented a victory for the complainant, and five of these involved state rather than federal laws. S.J.F. (January, 1964-July, 1966, June-August, 1968).

275. J. SIGLER, THE COURTS & PUBLIC POLICY 218 (1970).

276. McCloskey, *Reflections on the Warren Court*, in LAW, POLITICS, & THE FEDERAL COURTS 164, 177 (H. Jacob ed. 1967). In all fairness, McCloskey's data are intended to demonstrate the hyper-activism of the Warren years. Even during the "least-activist" periods, however, the Supreme Court's invalidation rate far surpasses that of the Mexican Plenary Court. Between 1942 and 1952, for example, the United States Court struck down 57 state and two congressional acts. *Id.*

nova's exhaustive study of decisions made by Mexico's Supreme Court during the period 1917-1960.[277] Professor González, a political scientist at the National University, sought to measure the political independence of the Court in terms of concessions to *amparo* plaintiffs who named the President of the Republic as at least one of the responsible authorities.[278] Three of his findings are especially interesting in relation to judicial independence in the United States.

First, he established that plaintiffs won their *amparo* suits or gained "suspensions" in 34 per cent of the cases involving presidential action during the forty-three-year period. The remaining 66 per cent comprised petitions denied (34 per cent), dismissed, or not decided because of abandonment of the suit or other technical grounds pursuant to the "inadmissibility" and "discontinuance" provisions of the *amparo* law.[279] It is significant that concessions to plaintiffs increased from 26 per cent of all cases surveyed during 1917-1940, to more than 39 per cent between 1940 and 1960.[280] Such data bear striking resemblance to Robert Scigliano's finding that the United States Government prevailed in 64 per cent, or lost in 36 per cent of the cases in which it appeared as a party before the Supreme Court between 1900 and 1967.[281] Professor González concludes that the Mexican Court "acts with a certain independence with relation to the Executive Power, and constitutes, on occasion, a brake on the acts of the Pres-

277. González Casanova, *supra* note 6, at 29-31, Tables V-VIII in Appendix.

278. Two recent revisions of the *amparo* law would now distort or mitigate the significance of using the President as the exclusive referent for measuring judicial independence. The changes in 1958 caused the President to be less frequently named as the responsible authority; only in amparos against the laws must the President be challenged as the executing authority and the case decided in Plenary Court on the issue of abstract constitutionality. LAW OF AMPARO art. 84 (I,a); *see also* text and notes 269-74 *supra*. In such cases, the Plenary Court disproportionately favors the legislature and all other responsible authorities. *Id.*

The 1968 reforms also devalued the importance of the "President as responsible authority" for measurement purposes. The President may now be represented in all *amparo* proceedings by cabinet secretaries, sub-secretaries, bureau chiefs (in the absence of any of the former), and the *Procurador General* (attorney general) when so designated and in a matter "relative to his charge." LAW OF AMPARO art. 19.

279. González Casanova, *supra* note 6, at 31.

280. *See id.* Table V, at 186-87.

281. R. SCIGLIANO, THE SUPREME COURT & THE PRESIDENCY 177 (1971).

ident of the Republic or his collaborators."[282] He qualifies his thesis, however, in a fashion similar to Robert Dahl's view of the United States Court as part of the dominant political alliance and to what Jacque Lambert saw in the more independent Latin American judiciaries:[283] that although the Mexican tribunal exercises real power, it is not blocked "because on the great issues it follows the policy of the Executive, and serves in fact to give him greater stability."[284]

A second major conclusion of the González Casanova study is that Mexican judicial independence has benefited primarily the old landholding class (*latifundistas*) and the "new bourgeois interests" *(intereses de la nueva burguesía).* The latter comprises the corporate employers, financial institutions, and businessmen of urban Mexico. Together with the "great landed proprietors," they are the upper-middle income groups who have resisted the reforms of the Revolution.[285]

Finally, the sheer volume of decisions by the Mexican Court suggests an important dimension of judicial independence. According to Professor González, the Supreme Court decided fully 3,173 cases involving the President as respondent; more than 60 per cent of these (2,243) occurred during the last twenty years of the 1917-1960 period.[286] The Court's activity is even more impressive when looking at its total output. Between 1963 and 1971, the High Court resolved some 67,700 cases of all kinds; almost 90 per cent (60,100) of these were *amparos,* or direct challenges of some form of governmental abuse.[287] This represents an average of 6,683 *amparos* annually for the nine-year period. In contrast, the United States Supreme Court disposed of a record 3,645 cases on its 1970-1971 docket, but only 449 were by written opinion or per curiam decision, that is a dismissal rate of more

282. González Casanova, *supra* note 6, at 31.
283. *See* text with notes 10-17 *supra.*
284. González Casanova, *supra* note 6, at 31.
285. *Id.*
286. *Id.* Table V, at 186-87.
287. INFORME . . . (1963-1971): Annex 11. These figures do not include the 1000 or so cases "transmitted" or disposed in some way by the President of the Court each year. The average of 6,683 also encompasses the smaller yearly caseload for the Court caused by the 1968 reforms in the Law of Amparo, shifting cases of lesser importance to the Collegiate Circuit Courts. See text and notes 318-23 *infra.* The dispositions of the Supreme Court during 1963-1968 averaged 8,416; during 1969-1971, 5,700.

than 88 per cent. About 73 per cent of the written opinions involved federal, state, or local governments as parties (123 out of 168 decisions).[288] In the same year the Mexican Court decided 5,319 cases of all kinds with about one-third being dismissed, all but 388 of which were *amparo* actions.[289] Not only do these figures indicate the scope of activity and dynamism of the Mexican Supreme Court in relation to complaints against the government, but that the citizenry itself "is aware of judicial remedies and willing to seek such relief when aggrieved by official action."[290]

Professor González's conclusion that the principal function of the Mexican Court is to provide haven for the propertied elites of Mexico should not be accepted without qualification. His finding is not wholly supportable in light of the over-all filings and decisional output of the Labor, Administrative, and Penal Chambers. His conclusions on the 1940-1960 period, for example, are based entirely on the occupational backgrounds of plaintiffs filing actions in labor and agrarian matters and naming the President as the defendant. But even in this limited sample he does not consider the Court's actual responses to the petitions presented. Thus, González's own data on agrarian-rights decisions indicates a higher percentage of suits won by *ejidos* and small rural proprietors, possessing certificates of inaffectability, than those won by private farmers of larger holdings, also with certificates.[291] Moreover, an analysis of eighty fully reported *amparo* cases,[292] decided

288. *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 303-06 (1972).

289. INFORME . . . 1971: Annex 11.

290. *See* notes 7-9 *supra* and accompanying text.

291.

	Amparo and Suspensions				
Plaintiff	Conceded	Denied	Dismissed	Others	Total
Ejidos, Communidades, Pueblos	16	3	24	7	51
Small Proprietors	29	3	56	20	108
Other Farmers	13	5	29	4	51
Total	58	12	109	31	210
Percentage	28	5	52	15	100

Source: González Casanova, *supra* note 6, Table VIII, at 192.

292. In contrast to the record of the United States Supreme Court, the Mexican Court does not publish in its *Semanario Judicial de la Federación* the entire written opinion behind each thesis it adopts. Publication of the full opinion requires a majority vote of the deciding chamber, when the ministers consider that the case "involves legal questions of great importance or its complexity may be difficult to comprehend by way of [mere] extract." Preface to each monthly volume of S.J.F., paragraph VIII. The author's survey of some 3,000 theses reported for January, 1964-July, 1966, disclosed only 415 partial or complete opinions.

by the Labor Chamber during a thirty-three-month period during the 1960's, revealed that employers and workers appeared as plaintiffs on approximately a 1-1 ratio.[293] Finally, and most significantly, criminal defendants appealing their convictions or sentences in state and federal courts constitute the greatest single portion of the Court's caseload;[294] and about half of these are successful in *amparo* petitions to the Penal Chamber.[295] Surely the vast majority of such petitioners have far from an aristocratic or even middle-class background.

Some quantitative comparisons can be made between the rate of *amparo* judgments "against the government" in the Mexican Supreme Court and the frequency of similar holdings in the United States Court as expressed in full written opinions.[296] Other breakdowns will follow regarding the subject matter of such dispositions and the extent of pro-plaintiff rulings in the circuit and district courts of Mexico. Perhaps to his surprise, the reader will find that these comparisons do not comfortably fit any model of complete judicial subservience to the President, Executive Branch, PRI hierarchy, local *jefes políticos,* or any other political elites in Mexico.[297]

Table I represents a survey made of *amparo* cases decided by the Supreme Court as reported in the *Semanario Judicial* for a thirty-three month period during 1964-1966 and 1968; they

293. SEMANARIO JUDICIAL DE LA FEDERACIÓN (January, 1964-July, 1966, June-August, 1968). These represent direct amparo cases brought against labor arbitration boards; because such boards are marginally sympathetic to employees and unions, it is generally the employers—including government agencies acting in a "patrimonial" capacity—who initiate the *amparos.* Direct labor *amparos* take up about 22 percent of the Supreme Court's total caseload (average filings for 1969-1971).

294. Direct amparos in criminal cases amounted to about 27 per cent of the total filings in the Supreme Court during 1969-1971, or some 6600 out of 24,300 petitions. INFORME . . . (1969-1971): Annex 11.

295. *See* TABLE IV *infra.*

296. For both the Mexican and United States Courts, full written opinions constitute a small percentage of the published decisions. *See* note 292 regarding the Mexican practice, and TABLE III *infra,* for an example of United States proportions.

297. This would include those distinguishing between "legal" or private-law functioning of the Mexican courts and "political" or constitutional limits on executive power, with the United States courts exemplifying the latter function. It is difficult for this author to accept this all-too-facile but common distinction in regard to Latin American judiciaries. *See, e.g.,* M. NEEDLER, POLITICS & SOCIETY IN MEXICO 42 (1971), an otherwise excellent analysis of the loci of political power in Mexico, and text and notes 1-7 *supra.*

are compared with the United States Court's final dispositions with full written opinion during the three terms of 1966-1968.[298] A breakdown of these dispositions by subject matter appears in Table IV.

TABLE I: *Cases Disposed by Full Written Opinion*

	Won[a]	*Lost*[b]	*Other Dispositions*[c]	*Total*
United States Supreme Court	164 (46%)	132 (36%)	70 (18%)	366
Mexican Supreme Court	191 (42%)	254 (56%)	9 (1.3%)	454

a. This column indicates the number of cases in which the Court's decision was contra the government's position. "Government" means state, federal, or local government or agency, or an individual in the suit participating in an official capacity. All *amparo* cases, of course, are directed exclusively against "governments."

b. Cases decided in favor of the government's position. A case is counted "for" the government if as a party it prevails in part on the principal issue.

c. "Other dispositions" for the United States Court refers to all cases not including the "government"—per the definition in a.—as designated parties; *i.e.*, litigation which is "private." For the Mexican Court, "other" refers to cases remanded to other chambers of the Court or lower courts for lack of competency, and similar administrative action.

Table II presents a clearer measure of "win-loss" ratios in those cases where the government appeared as a party, by excluding all "other" dispositions of both high courts. For comparative purposes, the data of both the author and Robert Scigliano[299] regarding the United States Court are included below. Scigliano's figures refer exclusively to the federal government as a party.

TABLE II: *Cases Disposed by Full Written Opinion Involving the "Government" as a Party*

	Won[a]	*Lost*	*Total Sample*
United States Supreme Court			
(1966-68)	164 (55.4%)	132 (44.6%)	296
(1961-67)[b]	124 (36%)	221 (64%)	345
Mexican Supreme Court[c]	191 (43%)	254 (57%)	445

a. For a definition of "Won" and "Lost" see Table I *supra*. "Government" is defined the same as in Table I, except as stated below.

b. From SCIGLIANO, *supra* note 281, at 177, 178. The discrepancy between the two success rates of government litigants, again, is attributable to Scigliano's exclusive reference to the *United States* Government.

c. For the thirty-three month period cited in note 298 *supra*.

298. 81-83 HARV. L. REV. 128-29, 304-05, 280-81 (1967-1969); 79-108, 132-34 S.J.F. 6a época (January, 1964-June, 1966, and June-August, 1968).

299. R. SCIGLIANO, *supra* note 281, at 177, 178; and *id.*

By incorporating the number of cases dismissed for technical or other reasons, one can compare the output patterns of the Mexican and United States high courts in greater dimension. Figures for the Mexican Court in Table III represent Professor González's more comprehensive coverage of all cases decided between 1940 and 1960 wherein the President was a respondent.[300] Data for the United States tribunal dramatically contrasts the latter's ability to control its own docket through the highly discretionary writ of certiorari with the more obligatory jurisdiction of the Mexican Court.[302]

TABLE III: *Final Dispositions, Including Dispositions without Full Opinion*

	Won[a]	*Lost*	*Dismissed*	*Other*[b]	*Fed. v. State Jurisdiction*	*Total Sample*
United States Supreme Court (1966-68)	164 (1.9%)	132 (1.6%)	8081 (95.5%)	70 (.01%)	——	8447[c]
Mexican Supreme Court (1940-60)	884 (39.4%)	537 (24%)	732 (32.6%)	84 (3.8%)	6 (.2%)	2243

a. For a definition of "Won" and "Lost" see Table I *supra*. "Government" in the Mexican cases here refers exclusively to the President as responsible authority; for dispositions of the United States Court, "government" is defined as in Table I.

b. "Other" for the Mexican Court means cases remanded without action for lack of jurisdiction, etc.; for a definition of "other" as it applies to the United States Court, see Table I, *supra*.

c. Total dispositions for the three terms were 8,953 cases; however, 117 were subtracted as written opinions lacking anti- or pro-government designations, and 389 more were deleted as *per curiam* opinions without such designations.

The categorical breakdown of cases in Table IV reveals the varied response of the Mexican and United States Supreme Courts

300. Gonzalez Casanova, *supra* note 6, Table V, at 186.

301. *See* note 298 *supra*.

302. The mandatory nature of the Supreme Court's *amparo* jurisdiction was dramatically revised by the 1968 legislative reforms. The Administrative Chamber may now decide any "legality" *amparo* case involving a federal agency which the ministers deem "of transcending importance for the national interest" regardless of the monetary amount in controversy. ORGANIC LAW FEDERAL JUDICIARY art. 25 (III). Similar ambiguities in the new regulatory statutes permit the Civil and Labor Chambers varying degrees of selectivity over cases they can hear. *See id.* arts. 26 (III), 27 (III, a). Many Mexicans viewed these changes as bringing the Supreme Court, especially the Administrative Chamber, closer to the highly discretionary certiorari practice of the United States Court in cases arising from the United States Courts of Appeal. Felipe Tena Ramírez, however, points out the contrasts with the United States writ of certiorari; for example (a) the new discretion of the Administrative Chamber does not apply to state agencies or tribunals and (b) the Circuit Court can quash further appeal of the case on the ground that it finds no such "transcending importance" in it. Tena Ramírez, *supra* note 273, at 67.

to different subject matter. The subject-matter categories below are based on the Mexican division into "penal," "administrative," "civil," and "labor" case classifications and Supreme Court chambers. Each of the four sub-headings derives its title in turn from the competency of the authority challenged in *amparo* complaints. Sources are the same as those in Table I.

TABLE IV: *Cases Disposed by Full Written Opinion According to Subject Matter*[a]

	Won[b]	*Lost*	*Other*	*Total Sample*
Mexican Penal Chamber (*amparo*)	49 (49%)	50 (51%)		99
United States Court: Federal Criminal, Federal habeas corpus, and State Criminal Cases	98 (73.7%)	35 (26.3%)		133
Mexican Administrative Chamber[d] & Plenary Court (*amparo*)	(31)(56%) 39 (37.5%)	(23)(42%) 58 (55.8%)	(1) 7	(55) 104
United States Court: Federal (less NLRB), State, and Local Administrative Agencies	48 (39%)	76 (61%)		124
Mexican Civil Chamber (*amparo*)	69 (40%)	101 (60%)	1	171
United States Court: Civil Actions from State Courts (private litigation)	18 (75%)	6 (25%)		24
Mexican Labor Chamber (*amparo*)	34 (42.4%)	45 (56%)	1	80
United States Court: National Labor Relations Board Cases	0	14 (100%)		14
Totals:				
Mexican Supreme Court	191 (42%)	254 (56%)	9 (1.3%)	454
United States Supreme Court	164 (46%)	132 (36%)	70 (18%)	366

a. This Table represents a survey of Mexican cases for the years 1964-66, 1968; and United States cases in the years 1966-68.

b. For the significance of the "Won" and "Lost" columns see Table I *supra*.

c. See explanations for "other" in Table I *supra*.

d. Cases in parentheses were appealed to the Administrative Chamber from federal district court rulings on "legality" *amparo* complaints against state and federal administrative agencies. The horizontal column of figures immediately below combines these with the "constitutionality" *amparo* dispositions of the Plenary Court.

The data in Table IV suggest that the Mexican Supreme Court most sharply deviates from the norms of the other agencies of government when it decides complaints in criminal and administrative matters. The Administrative Chamber has developed an increasing independent posture in mandating procedural fairness in agrarian expropriation proceedings, state and federal tax administration, military decisions on pensions and salaries, and domestic applications of international treaties.[303] Particularly striking in examining the decisional record is the frequency with which the Administrative Chamber decides against the federal "fiscal" authorities in such broad and important policy areas as federal disbursements, fines, and revenue levies. This phenomenon is perhaps attributable to the Chamber's unique relationship with the Federal Fiscal Tribunal whose numerous decisions against the government are regularly upheld by the Chamber.[304]

The extent of the Mexican Supreme Court's independence in criminal *amparo* matters is less clear. Perhaps because it lacks a reinforcing buffer, or "lightning rod" of quasi-judicial specialists comparable to the Fiscal Tribunal, the Penal Chamber, more readi-

303. *See* text with notes 182-204, and section IV *supra*. A leading administrative lawyer and ex-Rector of the National University's law faculty isolated five areas of administrative law most affected by *amparo* decisions of the Supreme Court: agrarian reform, tax assessments, commercial and professional licensing, expropriation of private commercial property, and corporate structure and stock transfer. Interview with Lic. César Sepúlveda, in Mexico City, Aug. 7, 1968.

304. *See* text with notes 222-26 *supra*. The Chamber upholds its "right arm" in at least 60 per cent of all assessment cases wherein the federal government has appealed via the *revisión fiscal*. *See* text with note 225 *supra*. The 1968 reforms in the Organic Law, Federal Judiciary, and those of 1967 in the Federal Fiscal Code greatly restricted the ease with which the government could bring *revisiones fiscales* directly to the Supreme Court. *See* ORGANIC LAW, FEDERAL JUDICIARY art. 242. The result has been a marked decline in the number of such cases decided by the Court; *e.g.*, from 233 in 1968, to 91 in 1970.

One specialized study emphasized what the relationship between the Fiscal Tribunal and the Administrative Chamber means for the aspiring litigant aggrieved by some public financial policy:

> Supreme Court decisions have significantly influenced the Department of the Federal District's tax administration. In other areas of urban development, it appears that judicial review has been of little importance in reforming administrative practices. . . . [A] problem associated with amparo suits in the urban development field is the absence of an administrative tribunal like the Fiscal Court to translate Supreme Court Jurisprudence into primary obligations for administrative officials.

HERRIMAN & LEE, *supra* note 224, at 44-45. The same study also found that urban taxpayers won about 80 per cent of their cases in the Fiscal Tribunal against property taxes assessed on an "estimated rental rate" basis, or about five per cent of the total caseload of the Tribunal. *Id.* at 63.

ily than the Administrative Chamber, appears to withdraw to its "passive virtues" when confronted with politically sensitive issues. Pressure from the criminal law profession, however, has influenced the Penal ministers toward a position of at least *deciding* most of these issues.[305] Certainly the most salient and controversial example of the Penal Chamber's judicial modesty was its decision on the former federal crime of "social dissolution" (*disolución social*).[306] In 1966 the Penal Chamber of the Supreme Court finally ruled on nine separate *amparo* appeals from convictions under the anti-subversion statute and other crimes in federal trial courts.[307] Most were radical labor leaders who had been in prison since their arrests in 1959 for fomenting a national strike against the government-operated railroads. That the President of the Court remitted the accumulated appeals to the Penal Chamber instead of the Plenary Court indicated the Court's overwhelming desire to avoid judging the constitutionality of the controversial statute, in spite of the fact that the plaintiffs had raised such a challenge. Regarding several of the cases, however, the unanimous opinions went far beyond the "legality" of the trial judge's interpretation of the statute in denying the merits of the *amparo* petitions:

> Petitioners consigned to all their members within reach the method and form necessary to actuate the ultimate goal of . . . a socialist state, through use of printed Communist literature. [They also sought] to encrustate themselves in the working masses in order to agitate them *under the pretext* of obtaining quick recovery of all their rights under the Constitution. . . . [With] this method they would *eventually destroy* the structure of the State, and in its place find and construct a model of a socialist state patterned after those in countries like China, the Soviet Union, Poland, etc.[308]

305. *See, e.g.*, the plea for equity and active justice in the processing of criminal law cases, especially with reference to trial and appellate judges, by the incoming President of the Academy of Penal Processal Law, National Association of Lawyers. Adolfo Aguilar y Quevedo, *Justicia, meta suprema derecho, norma ineludible*, DISCURSO PRONUNCIADO EN LA TOMA DE POSESION DE LA PRESIDENCIA DE LA ACADEMIA DE DERCHO PROCESAL PENAL (Mexico, 1968).

306. FEDERAL PENAL CODE arts. 145, 145 bis (1969). These provisions were finally abolished by Decree of July 27, 1970. *See* note 313 *infra.*

307. *Amparos directos de Valentín Campa S., Francisco Carballo S., Dionisio Encinas, Roberto Cruz G., Enrique Hernández C., Gilberto Rojo R. y otros, Enrique Ortega A., Alberto Lumbreras, y Demetrio Vallejo Martínez y otros,* 105 S.J.F. 6a época 12, 2a parte (Penal) (March 24, 1966).

308. *Id.* at 37 (emphasis added).

In their violent confrontations with federal riot police and the army during 1968 and 1969, university students commonly voiced demands that the President and Congress rescind the ambiguously phrased anti-subversion statute.[309] Although top on the Mexican students' purge list, *disolución social* or a comparably broad anti-subversion law seemed generally acceptable to the nation's legal community.[310] Political dissenters, in fact, would find only partial constitutional support in the language of articles 6 through 9.[311] Article 6, for example, the Mexican Constitution's principal guarantee of free speech, holds:

> The expression of ideas shall not be subject to any judicial or administrative investigation, *unless it offends good morals, infringes the rights of others, incites to crime, or disturbs the public order.* (emphasis added)

Not surprisingly, the modesty of the Supreme Court and the legal profession in dealing with the ambiguities and "chilling effects" of the social dissolution statute was reflected in several federal trial court rulings on *amparo* petitions. After hundreds of students and other protesters had been arrested, jailed, and allegedly mistreated by police after the disturbances in 1968, one judge threw out no less than eighty-six such petitions in a single action; they were held inadmissible because the police acts "were not determined, nor imminent, nor probable in the future."[312] Nineteen months after arrest uncounted persons remained imprisoned without trial.[313]

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309. *See* K. JOHNSON, MEXICAN DEMOCRACY: A CRITICAL VIEW, at 152 and *passim*. The most challenged section of the statute read:

> [The penalties of this section will apply to any] foreigner or Mexican national who in written or spoken fashion, or by whatever other means, engages in political propoganda among foreigners or Mexican nationals, diffusing ideas, programs, or other norms of action of whatever foreign government which disturb the public order or affect the sovereignty of the State of Mexico.

FEDERAL PENAL CODE art. 145 (pre-1970).

310. The most conspicuous of the law's critics interviewed by this writer in 1968 and 1971 were the President of the criminal lawyer's association cited *supra* note 305 and Lic. Santiago Oñate, both of Mexico City. The majority of lawyers interviewed, however, say the *disolución social* statute as a necessary though undesirable weapon against "fifth columnists," with Cuban-supported guerillas as the main target. For a more detailed analysis supporting the main tenets of the controversial law, see J. Reyes Tayabas, *Estudio sobre los Articulos 145 y 145 bis. del Código Penal que rige para toda la República en materia de fuero federal*, 12 EL FORO 23 (1968).

311. *See id.* at 42-44.

312. El Heraldo (Mexico City), Sept. 4, 1968, at 1 and *passim*.

313. Times of the Americas (Coral Gables, Fla.), Mar. 11, 1970. At the initiative of President Gustavo Díaz Ordáz, Congress finally repealed the social

The Plenary and Penal Chambers of the Court have occasionally responded with something like principle in dealing with politically significant cases. On the question of soldiers accused of non-service-connected crimes, for example, the Plenary Court has granted competency to civilian rather than military courts.[314] The real record of the Court on criminal matters, however, is one of general and impartial availability to defendants aggrieved by errors in the day-to-day functioning of ordinary trial and appellate courts, errors vitally important perhaps only to the individuals affected. In 1968, because of the great number of direct *amparo* appeals from final judgments brought annually (6,000 in 1968 alone), and the resulting backlog in the Penal Chamber (3,000 at the end of 1967),[315] the Congress shifted to the Collegiate Circuit Courts the direct review of all but federal-military convictions and sentences of more than five years' imprisonment.[316] In spite of its present jurisdiction, the Penal Chamber received more than 2,000 criminal *amparos* in 1971. This, plus the nearly 50 percent success rate of petitioners,[317] suggests that the Chamber does perform effectively as a "judicial ombudsman."

dissolution statute in July, 1970. It is noteworthy that the federal courts played no catalytic role in developing pressure for challenging the law, although a number of prominent lawyers, bar associations,, and legal scholars testified on both sides of the issue in Congressional hearings. Thus, as with settlements of election irregularities and religious expression issues, so also did Mexican elective and administrative officials make this important legal decision without judicial interference or guidance. *See* CAMARA DE DIPUTADOS. PRESIDENTE DE LA COMISION EDITORIAL. DEROGACION DE LOS ARTS. 145 Y 145 BIS DEL CODIGO PENAL PARA EL DISTRITO Y TERRITORIOS FEDERALES (1970).

The result was not entirely a libertarian victory. In place of articles 145 and 145 bis, the 1970 reformers instituted a new title called "Crimes against the Security of the Nation;" *i.e.*, FEDERAL PENAL CODE arts. 127-45, 364-66, 419 (1970). Here the Congress attempted to define more precisely subversive acts such as "treason," "espionage," "sedition," "rebellion," etc. But much of the old style vagueness and overbreadth in regard to free expression of ideas remained in the language of the new law. For example, a citizen may still receive up to six years' imprisonment for rioting if, among other acts, he "threatens an authority by intimidating or obligating him to make some determination." Further, any one who "directs, organizes, incites, compels or economically patronizes others" to commit said crime may suffer the same fate. *Id.* art. 131. The description of this "crime" could well apply to the principal function of opposition political parties or pressure groups in any democratic nation.

314. *See* note 234 *supra.*

315. INFORME . . . 1968: Annex 11.

316. The Supreme Court also would hear cases wherein civil damages arising from a crime were accompanied by a sentence of more than five years' imprisonment. ORGANIC LAW, FEDERAL JUDICIARY art. 24 (III).

317. *See* TABLE IV *supra.*

B. The Mexican Federal District and Circuit Courts

Essentially the same tribute could be paid to the other judicial components of the *amparo* system. Special attention should go to the Collegiate Circuit Courts, whose review power was greatly enhanced with the 1968 reforms in the Law of Amparo and Organic Law of the Federal Judiciary. Roughly parallel in function to the United States Courts of Appeal, the circuit courts now share jurisdiction over a number of cases formerly heard exclusively by the four chambers of the Supreme Court.[318] The most important changes expanded the number of three-judge circuit courts to thirteen, located throughout the country, and empowered them to formulate their own *jurisprudencia* in a fashion similar to that of the Supreme Court.[319] The thirteen circuit courts disposed of 21,349 cases in 1971; almost all were *amparos* or *amparo*-related, representing an increase of more than 175 per cent over 1968.[320]

An analysis of a typical Collegiate Circuit Court, with a jurisdiction over most of northwestern Mexico, reveals that about one in four *amparo* petitioners succeeded "against the government."[321] During the period of June 1, 1970 through May 30, 1971, the Fifth Circuit Court in Hermosillo, Sonora, decided some 1,330 "legality" *amparos* of all kinds. Almost 60 per cent of these were direct *amparo* appeals from final judgments rendered in civil and criminal courts, state administrative tribunals, and labor arbitration boards.[322] The remainder were indirect *amparo* appeals from *amparo* judgments in federal district courts (called *amparos en revisión*); they involved, in criminal cases, errors committed by

318. *See* text and notes 302, 316 *supra*; ORGANIC LAW, FEDERAL JUDICIARY arts. 11, 24, 25, 26, 27, and 7 bis. These changes drew the jurisdictional boundaries between the Supreme and circuit courts essentially around the amount of money involved in the controversy (in regard to civil and administrative cases); severity of the sentence (penal); level of the respondent authority—i.e., whether a state or federal tribunal (penal, civil, and administrative); and the social or "transcending" importance of the issue itself (civil, administrative, and labor).

319. LAW OF AMPARO art. 193 bis. Such *jurisprudencia* requires, however, a unanimous vote of the three-man circuit court; the appropriate chamber of the Supreme Court decides between "contradictory" precedents. *Id.* art. 195 bis.

320. INFORME . . . 1971: Annexes 9-10.

321. Data obtained from the monthly records of the Collegiate Circuit Court, Fifth Circuit (Hermosillo, Sonora), for the period June 1, 1970-May 30, 1971. The author appreciates access to such records given by the Secretary of Accords, Lic. Francisco Córdoba Romero.

322. *Id.* *See also* jurisdictional sources and delineations note 329 *supra*.

judges, prosecutors, or jailers outside the trial or final sentence of the court.[323]

Although petitioners won one quarter of all *amparo* cases, only in direct *amparo* decisions can the exact percentage of "anti-government" holdings be determined. This is because court data does not show the number of indirect *amparos* wherein the responsible authority was appealing a "final suspension" ordered by the federal district judge. Except in rare circumstances, the government cannot initiate direct *amparo* litigation and as a respondent must appear by some person or agency, for example, as judge, bureaucrat, or labor board.[324] The important finding, then, is that direct *amparo* petitioners, the majority of litigants before the Fifth Circuit, were granted relief in 24 per cent of the cases decided. Government respondents gained denials on the merits in 53 per cent, and 23 per cent were dismissed or remanded for lack of jurisdiction. Challengers of state and federal labor boards, constituting about one-third of the direct *amparo* caseload, achieved the highest success rate of 31 per cent. The success rate for appeals by convicts was third lowest with 16 per cent.[325]

For many Mexican attorneys and common people interviewed in 1968 and 1971, the Federal District Courts represent the "thin black line" against official abuse in the towns and countryside. They are undermanned—only fifty-five judges scattered throughout the nation—and woefully understaffed. Nonetheless, the district courts receive and process an enormous number of *amparo*

323. Pursuant to ORGANIC LAW, FEDERAL JUDICIARY arts. 24, 7 bis., the only *amparos en revisión* heard by the Penal Chamber, other than cases involving "constitutionality" precedent already established, are those which concern extra-judgment violations of the "fundamental rights" protected by article 22 of the Constitution. The circuit courts, therefore, are empowered to review the rest of these abuses as they come up from trial determination in the federal district courts.

324. Only when "their patrimonial interests are affected" may official agencies act as *amparo* plaintiffs. LAW OF AMPARO art. 9. The Supreme Court has defined such "interests" essentially as statutory responsibilities of securing and controlling large amounts of capital and real property, as well as its role in public employment. COMPILACIÓN, 3a parte (Administrative): Thesis 87, at 108. Government agencies most frequently appear as *amparo* plaintiffs before the Civil and Labor divisions of the Court, challenging lower court or labor board decisions which attacked their discretion on matters of public property or employee relations. *See also* I. BURGOA, *supra* note 5, at 331-36, for a critique of this standing for government on the ground that the *amparo* is fundamentally and exclusively a vehicle for protecting individual constitutional rights.

325. Data from Fifth Collegiate Circuit, cited in note 321 *supra*.

petitions each year: some 58,000 filings in 1971, or 72 per cent of all *amparos* entering the Federal Judiciary that year.[326] These trial judges in *amparo* cases deal primarily with appeals for help by criminal suspects and defendants claiming that their injuries at the hands of law enforcement cannot await final dispositions of ordinary trials or appellate proceedings. The applications are then processed with the speed and procedural economy outlined for indirect *amparo* trials.[327] More than 62 per cent (36,500) of the district courts' caseload in 1971 comprised such emergency petitions for relief from criminal proceedings.[328] The "little man" does therefore avail himself of the *amparo* writ, at the local level as well as at the Supreme Court Building in Mexico City.

Given the accessibility of the Federal District Courts, how do they respond to these complaints? In 1971, the record for such tribunals was as follows:[329]

TABLE V: *Amparos Disposed by Final Judgment in Mexican Federal District Courts, by Subject Matter, 1971*

	Won[a]	*Lost*	*Cases Remanded, Dismissed, combined, etc.*	*Total Decided*
All Areas:				
Penal, Civil, Administrative and Labor	7,206 (13%)	5,989 (11%)	42,787 (76%)	55,982
Administrative[b] and Labor	(14%)			13,164 (20%) 1,167
Total	2,011 (14%)	1,002 (7%)	11,318 (79%)	14,331
Criminal and Civil	(12.5%)			35,325 (63%) 6,326
Total	5,195 (12.5%)	4,987 (12%)	31,469 (75.5%)	41,651

a. For a definition of "Won" and "Lost" see Table I *supra*. For the purposes of this Table, "government" means any court, police agency, administrator, or labor arbitration board named as the responsible authority in the *amparo* petition of the plaintiff.

b. The *Informe* of the Supreme Court did not break down the concessions and denials of amparo petitions as to Administrative, Labor, Civil, and Criminal categories, although it did give the total number of cases decided in all four categories. Because of the disproportionately large number of Administrative and Criminal *amparos*, however, one can reasonably assume that the percentages given for each set (Administrative-Labor, Criminal-Civil) approximate the percentages given for the two main categories.

326. INFORME . . . 1971: Annexes 1, 2, and *passim*.

327. *See* LAW OF AMPARO arts. 78-80, 117-18, 123-24, 130-32, 145-57. For a brief comparison of these proceedings with Anglo-American uses of habeas corpus, mandamus, prohibition, injunction, and "removal" petitions, *see* Schwarz, *The Mexican Writ of Amparo: Extraordinary Remedy against Official Abuse of Individual Rights: Part I*, 10 PUBLIC AFFAIRS REPORT No. 6 (1969).

328. INFORME . . . 1971: Annexes 1-2.

329. *Id.*

Before scoffing at the fact that only 12.5 per cent of criminal *amparo* petitions were granted on their merits, consider that less than 5 per cent of the applications for federal habeas corpus in the United States were decided by the Federal District Courts in favor of the applicant for the writ; the other 95 per cent were held to be without merit.[330]

VI. SUMMARY AND CONCLUSIONS

As compared with United States federal courts, to what extent do the Mexican *amparo* courts limit the exercise of governmental power? One method of answering this central question is primarily through analyzing and quantifying decisions; the decisions or lack thereof reflecting the courts' own perceptions of their roles in response to issues brought before them. There are, of course, many other comparative indicators of judicial independence and discretion.[331] This article has reviewed the accessibility of *amparo* courts and the willingness of a vast number of individuals to seek such forums when aggrieved by official action.[332] Also mentioned were some of the problems and prospects for enforcing politically significant decisions.[333] Further research, however, through a more general theory of judicial "impact,"[334] could well investigate the extent to which such decisions and the High Court itself are accepted and followed by a separate, pro-Court political constituency. There is evidence, for example, that the Mexican Supreme Court is not blessed with such a strong political entourage.[335] Future research might also pursue such intriguing comparative data as proportionate budgetary allotments to the ju-

330. The percentages cover the year 1965 and the first nine months of 1966, in which United States District Courts decided 8,618 petitions for federal habeas corpus, mostly from state prisoners. UNITED STATES CODE: CONGRESSIONAL & ADMINISTRATIVE NEWS, 89th Congress, 2d Session 3663-34, 3667 (1967).

331. *See* text with notes 7-9 *supra.*

332. *See* text with notes 290, 294, 315-17, 326-28 *supra.*

333. *See* note 203 and accompanying text *supra.*

334. *See* THE IMPACT OF SUPREME COURT DECISIONS (T. Becker ed. 1969).

335. *See, e.g.,* R. BAKER, *supra* note 5, at 271-72. T. Becker ed., *supra* note 334, at 191 points out:

> [I]n order for the Court (acting as an institution) to legitimate anything, its decisions must have visibility. Legitimacy, after all is said and done, must imply a certain level of recognition in the society of specific actions taken by the Court as well as some knowledge about the general power of judicial review.

While it is true that the *amparo* remedy itself is well known and frequently used, the "visibility" of "specific actions" or decisions of the Supreme Court is not so evident in Mexico. It would be this writer's estimate, for example, that popular identification of the United States Court with decisions like Brown v. Board of

diciary, socio-economic and political backgrounds of Supreme Court justices, and the incidence and intensity of legislative reprisals against the courts, for example, through constitutional amendment or jurisdictional restrictions.[336]

The answer to the question posed initially, "how and where independent?," is of necessity mixed and relative; much depends on the tribunal and issue area involved. Although both Supreme Courts rely on a doctrine of political questions as well as other forms of non-reviewability, the Mexican Court's restrictions primarily flow from specific constitutional and statutory provisions, and have not been so nearly fraught with exceptions as those of its United States counterpart. Furthermore, the two differ widely on the kinds of cases held to be almost or completely non-reviewable. Mexico broadly denies its courts *amparo* jurisdiction over cases involving free exercise of religion, challenges of electoral counting or administration, dismissals of certain "public functionaries," summary deportation of persons deemed undesirable by the President, direct review of most "decentralized agencies" at the federal level, and agrarian land expropriations. None of these would be immune from federal judicial review in the United States as long as individual rights under the Constitution or statute were properly raised. On the other hand, Mexican jurists would find it strange that United States Courts traditionally have abstained from, or severely restricted, review of state and federal tax laws, military courts-martial and administrative actions, administrative rationale for deportations, state practices adversely affecting the economic status of resident aliens, and the interpretation of international treaties and executive agreements.[337]

Education or "busing," the School Prayer Case (Engel v. Vitale), capital punishment (Furman v. Georgia), or even the Pentagon Papers Case (New York Times, *et. al.* v. United States) would find little similarity in Mexico. On the other hand, such lack of specific recognition can partly be explained by the "relativity" effect of judicial decisions (affecting only the parties to the case) which elevates the familiarity of the procedure—*i.e.*, the *amparo*—rather than any particular product of that procedure.

336. *See, e.g.*, Fouts, *Policy-Making in the Supreme Court of Canada, 1950-1960* in COMPARATIVE JUDICIAL BEHAVIOR 257, 286-87 (G. Schubert & D. Danelski eds. 1969), regarding the need for research into various "external influences on the Supreme Court." *See also* R. BAKER, *supra* note 5, on the potentially great but rarely exercised power of Congress to restrict the Mexican Court's jurisdiction or reverse established decisions under the "amending clause" (article 135) of the Constitution.

337. *See* sections III and IV *supra.*

As to those cases actually reviewed on the merits, there is no question that the Mexican federal courts have been reluctant to exercise their constitutional-rights jurisdiction in the independent, forthright, or comprehensive manner of the United States federal courts. Tables I through IV bear this out regarding the United States Supreme Court, as does a recent study finding that during the period of 1957 to 1968 the Court decided 70 per cent of the cases surveyed in a way favorable to the "civil rights and civil liberties" position.[338] It would be safe to assume that the Penal and Administrative Chambers of the Mexican Court would not come close to such a figure in similar cases. The Mexican tribunal has particularly subordinated claims to constitutional protection on issues involving freedom of political and non-political expression, association, and demonstration. Relative to United States Supreme Court decisions in the first amendment area,[339] the Mexican Court has strongly identified with the dominant political alliance, refusing to invalidate statutes where claims of vagueness or "chilling effects" on free expression were raised.[340]

On the other hand, the Mexican *amparo* courts have increasingly chosen *not* to resort to Professor Bickel's passive virtues in certain issue areas. Both the Administrative Chamber and Ple-

338. Note, *Civil Rights and Civil Liberties Decisions of the United States Supreme Court, 1967-68 Term*, 38 REV. JUR. U.P.R. 211, 320-21 (1969), with a listing of decisions regarding certain asserted rights as follows:

Disposition of Cases by Court
Cumulative: 1957-1968

	Favorable	Unfavorable	Total
Civil Rights	72	9	81
Internal Security	48	27	75
Freedom of Expression	71	21	92
Immigration and Nationality	11	8	19
Other Criminal Proceedings	155	85	240
Total	357	150	507

339. *See, e.g.*, Coates v. Cincinnati, 402 U.S. 611 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); United States v. Robel, 389 U.S. 258 (1967); Yates v. United States, 354 U.S. 298 (1957). All carried issues similar to the *disolución social* case in the Mexican Court discussed in text with notes 306-13; the four United States decisions, however, struck down or greatly restricted the application of laws that punished various kinds of political expression or association as the direct threats to the governmental system or public order. In all four cases, the Court sided clearly with the petitioners who were arguing that the broad wording of the statutes or the lower court's interpretation of them were offensive to the first amendment.

340. *See* the discussion of the *disolución social* case in the text with notes 306-24 and note 339 *supra*.

nary Court have broadly upheld the challenges of small private farmers, the *pequeñas propiedades,* against the confiscatory actions of agrarian reform commissions, an area formerly set off as a political question. Definitive *amparo* judgments against the government have also been rendered in cases raising the issues of income and property taxation; military jurisdiction over non-service-connected crimes; courts-martial generally; military policy toward pensions, housing, and salaries; aliens' rights to professional licenses; and criminal due process issues not involving the anti-subversive laws.[341]

It is surprising, in fact, that the Mexican federal courts have largely charted their own courses, with or without political pressures from local *políticos* or national elites. The high percentages of cases won by *amparo* plaintiffs and the great volume of cases initiated each year demonstrate that the Mexican judiciary is an important allocator of values, scarce resources, and sanctions in the national political system. Clearly, such an authoritative role can no longer be ignored by scholars in the United States.

341. *See generally* section IV and text with notes 303-04, 314-17 *supra.*