

Massachusetts In The Federal Courts: The Constitutionality Of The Vietnam War, by Anthony A. D'Amato*, 4 Journal of Law Reform 11 (1970) Code A70c

I. INTRODUCTION

One of the most singular pieces of legislation in American constitutional history passed both houses of the Massachusetts legislature on April 1st, 1970, and was signed into law on the following day by Governor Francis W. Sargent. It provides that, except for an emergency, no inhabitant of Massachusetts inducted into or serving in the armed forces "shall be required to serve" abroad in an armed hostility that has not been declared a war by Congress under Article I, Section 8, clause 11 of the United States Constitution. The bill further directs the state's attorney general to bring a suit testing the legality of the war in the Supreme Court as a matter of original jurisdiction.

The Massachusetts legislature, in passing the bill, created a conflict between state law and national policy. It, thereby, hoped to place before the Supreme Court the question of the bill's constitutionality, and, derivatively, the constitutionality of the Vietnam War. The bill asserts the legislators' belief that both the state of Massachusetts and its citizens are denied their constitutional rights when the President of this country forces those citizens to fight in an undeclared, and thereby unconstitutional, war.

Massachusetts asked the Supreme Court to hear the case as a matter of original jurisdiction which may be invoked under Article III, Section 2 where a state sues a citizen of another state (the Secretary of Defense is a citizen of a state other than Massachusetts).

The staff members of Attorney General Robert H. Quinn's office believed that the Supreme Court should hear the case and declare the war unconstitutional. They filed an 87-page brief in the Supreme Court against Melvin R. Laird "as he is Secretary of Defense" requesting a declaration that the war is unconstitutional and an injunction against further prosecution of the war effort. An [page 12] amicus brief in the case was filed by the Constitutional Lawyers' Committee on Undeclared War. FN1

Nevertheless, the Supreme Court, by a six to three decision without majority opinion, declined to grant Massachusetts' motion for leave to file a bill of complaint. FN2 Thus, Massachusetts is forced to take its case to the lower federal courts for determination. Justice William O. Douglas, dissenting, said that the Court should not have deferred to executive pressures by refusing to grant jurisdiction. Instead, Justice Douglas asserted that the Court should uphold its constitutional duty to resolve questions of conflicts between branches of governments as it has often done before.

Notwithstanding the Supreme Court's refusal to hear this case as a matter of original jurisdiction, the briefs submitted by Massachusetts and the Constitutional Lawyers' Committee on undeclared War as amicus suggest why the federal courts should hear this case and why they should declare the Viet Nam war unconstitutional. Substantial portions of the amicus' brief were put before the California court in *Mottola v. Nixon* FN3 which held that the military-reservist plaintiffs had a sufficient personal stake in their challenge of the constitutionality of the Vietnam war to fulfill

the standing requirement. In addition, the court ruled that the political question and sovereign immunity doctrines were not bars to the suit. With regard to the political question issue, Judge Sweigert wrote that "to strike down as unconstitutional a President's war-time seizure of a few private steel mills but to shy away on 'political question' grounds from interfering with a presidential war itself, would be to strain at a gnat and swallow a camel." FN4

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THE LEGAL ISSUES

A. *Standing*

The Secretary of Defense raises two objections to the federal courts hearing this case: lack of standing and political question.

The issue of standing centers on whether Massachusetts, as a state, has the right to sue Secretary Laird upon a grievance that only a draftee would appear to have. There are several answers why Massachusetts does have this right. First, Massachusetts has certain proprietary rights as a state which are jeopardized by the Vietnam War—her schools, whose classes have been disrupted; her state buildings and police forces, disrupted by mass demonstrations against the war; her economy, hurt by inflation resulting from war spending and by inadequate funding of federal welfare programs. Massachusetts, in support of its assertion of proper standing, cites the recent case of *South Carolina v. Katzenbach*, FN5 where jurisdiction was founded on a controversy between a state and a citizen of another state under Article III, Section 2 of the Constitution. In that case South Carolina claimed that the Voting Rights Act violated the Fifteenth Amendment, and asserted among other things, that damage resulted from the disruption of her electoral procedures. Massachusetts can similarly claim a disruption in the orderly processes of state government due to a Federal action of doubtful constitutionality.

Massachusetts can also sue as *parens patriae* for harm against her own citizens, of whom over 1,300 young men so far have given their lives in the war. This principle is not necessarily limited to those drafted and sent to fight in Vietnam, but may extend to the tremendous suffering of their relatives, families, and fiancées. Prior cases have held that a state can sue as *parens patriae* when the health and comfort of its citizens are endangered by activities of another state or person, as for example in pollution cases crossing state lines. FN6 Here Massachusetts is claiming a similar widespread injury to its citizens as a result of the disruptions of the war.

There are three additional, independent grounds for giving Massachusetts standing in the federal courts. First, Massachusetts has standing to assert the integrity and effectiveness of its suffrage in the Senate, guaranteed to it by Article V of the [page 14] Constitution. Since the effectiveness of the Senate is impaired when a war is prosecuted which the Senate, as a house in Congress, has not declared or otherwise authorized, Massachusetts' interest in the effectiveness of its suffrage in the Senate is impaired as well.

Second, Massachusetts has standing as an original contracting party to the Constitution to assert its interest in the integrity of the guarantees contained in the "war clauses" of Article I, Section 8. The Massachusetts Constitution of 1780, which antedated by nine months the Articles of

Confederation, said that no Massachusetts inhabitant could be forced to fight in a war external to the Commonwealth unless he had either consented or consent was specifically given by the Massachusetts legislature. In ratifying the United States Constitution, Massachusetts exchanged its constitutional protection of its inhabitants for the procedural guarantees contained in the new Constitution. These basic rights of the inhabitants were not discarded at the point of ratification. Rather the right for a Massachusetts inhabitant not to be coerced to fight in a foreign war without legislative consent (or unless he volunteers) was preserved in Article I, Section 8: Congress shall declare war. The contract between Massachusetts and the United States is violated when the constitutional procedures are not followed and, thereby, the rights of Massachusetts citizens are not upheld.

The third non-traditional basis for state standing is contained only in the amicus brief. It presents an argument based upon clauses 15 and 16 of Article I, Section 8 of the Constitution, neither of which have previously received much judicial attention with respect to standing.

Immediately preceding these clauses, Congress is given the power to raise and support armies, provide and maintain a navy, and make rules for the regulation of the land and naval forces. Following this, clauses 15 and 16 of Article I, Section 8 give Congress the power

to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

A better understanding of the terms used in these clauses and the motivations of the Framers in drafting them will demonstrate their significance with regard to the issue of standing. To the [page 15] Framers of the Constitution there was a fundamental difference between the federal "army" and the state "militia." The "army," as that term signified in the vocabulary of the day, was strictly a volunteer organization. Congress could "raise and support" an army by making army salaries sufficiently attractive to induce men to serve in it. However, there was to be *no* federal power of conscription, for the Founding Fathers shared a fear that the new national government would become too powerful if it were given the authority to draft citizens directly into a national armed force. FN7 In the event of a conflict which might find the size of the army raised in this manner insufficient, the Framers provided for "calling forth" the militia—to supply the new government with a body of men large enough to solve any of the emergencies specified in clause 15: suppressing an insurrection, repelling an invasion, or (most broadly) executing a law of the Union. The "militia" was nothing more than the able-bodied young men of the several states. FN8 In other words, a citizen of a state is automatically a member of its militia (if he is otherwise physically fit). But this in turn means that a citizen is actually "drafted" into his state militia, if he is called upon to serve at any time. The militia is *not* a voluntary organization, while the federal army *is*.

In 1918, in a much-criticized opinion, the Supreme Court held that the federal government could draft citizens to fight in World War I. FN9 The present amicus brief for Massachusetts argues

that this case reached the *right* result, though for the wrong reasons. When Congress conscripts civilians for a declared war it is in effect "calling forth" the state militia—that is, it is tapping citizens who are already members of their state militias. Although Congress may purport to draft civilians directly into the federal army, the Constitution gives Congress no power of conscription. Thus the underlying constitutional mechanism must be that Congress is "calling forth" the militia when it purports to draft young men. Since World War I was a declared war, fighting in that war was clearly in execution of a congressional mandate issued strictly within constitutional boundaries. In other words, it was in execution of a law of the Union declaring war against Imperial Germany. Execution of a law of the Union is a proper purpose for calling forth the militia under clause 15, and hence the federal government had a right to do so both in World War I and World War II.

[page 16] The argument in the amicus brief to *Massachusetts v. Laird* is that the militia may only be utilized for purposes specified in clause 15 of Article I, Section 8, and sending citizens of Massachusetts to fight in an undeclared foreign war is not one of the specified purposes. The amicus brief does *not* argue that Congress cannot draft civilians in peacetime in preparation for a war nor that the government is forbidden to use a volunteer army to fight a war, but rather that the limitations of clause 15 are frustrated at the point when Congress purports to use a conscripted soldier for the unconstitutional purpose of fighting abroad in an undeclared war.

Massachusetts has standing to raise this argument because the militia was, and is, preeminently a creature of the *states*. The Second Amendment to the Constitution speaks of the militia "being necessary to the security of a free State," and clause 16 indicates the states' interest in the training of the militia. Thus, when the federal government utilizes the militia in a manner not sanctioned by the Constitution, the states are illegally deprived of a portion of their militia and hence should have standing to object to this deprivation.

B. Political Question

Aside from standing, the Secretary of Defense asserts that the case should be dismissed on the ground that it raises a "political question." The "political question doctrine" has in the past been invoked when a Supreme Court decision would embarrass a political branch of the government in its relations with foreign governments. FN10 For example, the Court would not presume to second-guess the Executive in a matter of the recognition of a foreign country. FN11 However, the case of *Massachusetts v. Laird* involves the issue of the division of power between the Executive and Congress. Neither the Massachusetts brief nor the amicus brief found a single case in Supreme Court history where the doctrine of "political question" was invoked in a case involving the distribution of powers between Congress and the President. Nor would it make sense to start such a precedent now, for that would effectively remove the federal judiciary as an "umpire" in this sensitive area involving the equilibrium of the separation of powers. [page 17] Indeed, the Supreme Court has in the past decided many cases of great importance involving legislative-executive powers quickly disposing of "political question" considerations. FN12

C. Constitutionality of the War

The questions of standing and political question must be resolved before a court can reach the merits of the case. Assuming both questions are answered in favor of Massachusetts, the initial substantive consideration is whether Congress by its action has given the equivalent of a declaration of war. Clearly Congress has never formally issued a declaration of war. Yet, over the past few years the government has raised various arguments, in cases in the lower courts, in addresses to Congress and in press conferences and publicity releases, to the effect that Congress by its actions has declared the existence of war.

At different times, different arguments seemed to be in "style." The first government argument was that the SEATO treaty provided the basis for our involvement in the war since treaties, along with laws of Congress, are the supreme law of the land. This argument has no validity. The operative language of the treaty is that in the event of aggression each Party to the treaty agrees to act "in accordance with its constitutional processes." FN13 In short, if a declaration of war is needed in the absence of a treaty, this language makes certain that it is also needed in the presence of the treaty. Thus, the treaty does not help substantiate the government's position.

A second argument was that the Gulf of Tonkin resolution was the equivalent of a declaration of war. Many Congressmen have been incensed by this argument, for the resolution was clearly not intended to be a declaration of war. The Congressmen cite the Congressional debates at the time to substantiate their knowledge that the resolution was adopted simply to approve the President's use of force in repelling attacks against two United States naval vessels operating in the Gulf of Tonkin on August 2 and August 4, 1964 [page 18]. The language of the Resolution, moreover, lacks the specificity of a declaration of war; indeed, it is so broad that it can be argued that *if* it is a declaration of war then it is an unconstitutional *delegation* of the power to decide whether to go to war from Congress to the President. FN14 Aside from the above, there is significant congressional opinion that the government misled the Congress about the events in the Gulf of Tonkin that occasioned the Resolution. FN15 Thus, the Gulf of Tonkin resolution lends little to the government case.

A third argument is based upon the military role of the executive. The government claims that as commander-in-chief, the President has the power and responsibility to protect American fighting forces in Vietnam, and therefore has to follow a reasonable course in de-escalating the war effort. To date, this has meant rotating troops in and out of Vietnam and not withdrawing the troops so quickly as to prejudice the position of the remaining troops. Even if this is arguably a political justification for the war, it clearly is not a legal one. Instead, this is a classic bootstrap argument: A war illegally started becomes legal because you have to protect the troops that were there illegally in the first place.

The fourth, and final, argument espoused by the government is that Congress in appropriating over \$110 billion on the war thereby authorized the war. The government suggests that if Congress did not approve the war, it would not have appropriated the money. This argument has a surface plausibility, and indeed raises basic questions about the war powers of Congress.

Article I, Section 8, clause 11 gives to Congress the power "to declare war." These words are open to a spectrum of interpretations, ranging from giving Congress the sole power to initiate war to merely allowing Congress to recognize a state of war by "declaring" its existence after it

has begun. The records of the Constitutional Convention show that the true meaning is very close to the first extreme—giving Congress the sole power to initiate war. Indeed, the original language proposed for this Article was power to "make" war. But because some delegates believed that this would prevent the President from responding to an emergency situation before Congress could assemble and act, the word was changed to "declare." FN16 In any event, the delegates clearly intended that only the Congress could initiate war. This [page 19] historical interpretation was clearly set forth in a recent Court of Appeals decision. FN17

Of course, it would be frivolous to contend that the constitution requires Congress to use the words "declare war" and none other. Surely Congress may authorize war, or it may specifically ratify a war in progress. FN18 However, to constitute the equivalent of a declaration of war, the amicus brief contends that an authorization or ratification must be intentional, specific and discrete. The intention cannot be loosely inferred from Congressional behavior over a period of time. To prevent the real power to wage and declare war from being broadly delegated to the President, the authorization must specifically name either an enemy or a location for hostilities. Furthermore, to avoid the chilling or coercive effect which might result if a declaration of war were inextricably tied to a piece of essential domestic legislation, the authorization must be contained in a separate legislative act. Military appropriation bills, and additions over the years to the Selective Service Act, do not meet these criteria.

Even more significantly, an appropriation bill usually is passed after the fact. A war has begun; then Congress is asked to support it. Many legislators have objected to this, saying that they cannot in good conscience withhold funds from American boys in the field who need munitions and food, even though they do not support the war effort by voting those funds. However, even apart from such objections, the appropriations argument turns the Constitutional scheme on its head. Instead of Congress making laws subject to Presidential veto, the President is in effect making a law by declaring a war, and Congress is only given a veto after the fact. This is a very hard "veto" to exercise, given the fact that a war contains momentum of its own which serves to justify it once it has begun. Moreover, if Congress attempts to pass affirmative legislation cancelling the war, the President could ultimately veto this legislation, thus necessitating a two-thirds Congressional vote to override the veto. Surely the Constitution is radically changed when it is interpreted as giving Congress the power to stop a war by a two-thirds vote rather than giving Congress the power to initiate war by a vote of the majority.

Although some appropriations bills may be considered to provide for money in *advance*, they can never be held to be the [page 20] equivalent of an authorization of war, due to vagueness. The fact that billions of dollars are spent for defense does not indicate which funds must be used in which place against what enemy. Even if it did, the President could support a war by juggling funds from one defense account to another. In short, this interpretation of the appropriations bills would amount to an overly broad delegation by Congress to the President of the power to decide on war. Unless the declaration-of-war clause is to be read out of the Constitution, Congress must be the body to exercise this power and not the Executive. Even if Congress *wants* to delegate it, Massachusetts brings this case to prevent such delegation.

III. CONCLUSION

The need to prevent executive wars has not waned since the days when the constitution was written. At the time of this country's most divisive war, President Lincoln, one of the greatest proponents of Presidential powers, said:

The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.FN19

Today, when this country is confronted with another tremendously divisive war, it is important that we not lose sight of the fact that the Constitution was a vehicle to forever eliminate the leadership of kings who after embroiling their nations in wars would go to parliaments to get bailed out.

The Massachusetts bill contests the power of Presidents to be kings. Massachusetts asks that the power to declare war be returned to the Congress, as provided by the terms of the Constitution. Massachusetts, in its complaint, requests that the President be given 90 days in order to obtain the explicit consent of Congress to prolong American fighting in the Vietnamese War; otherwise, the war must cease—air attacks must be halted and ground troops removed. This decision would force Congress to approve the war by affirmative legislation, require immediate [page 21] withdrawal (by its inaction), or provide a timetable for withdrawal on the grounds that it does not approve American involvement in the war yet feels immediate withdrawal strategically unadvisable. Regardless of its choice, the decision to declare war is again vested in the Congress.

The vision of the Framers, spelled out with great clarity in the Constitution, is now confronting the judiciary. The case may be heard, or it, and the clear intent of the Constitution, may be rendered a topic valuable only to academia thus vindicating those who assert that the constitutionality of the war will never be authoritatively decided.

Footnotes

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FN1 The Committee is composed primarily of young law school teachers of constitutional law. The brief was written by Anthony D'Amato and Lawrence Velvel, with substantial contributions by Lawrence Sager, Jon Van Dyke, Harrop Freeman and Richard Cummings.

FN2 *Massachusetts v. Laird*. (U.S. Sup. Ct. Nov. 9, 1970), *N.Y. Times*, Nov. 10, 1970, at 1, col. 5 (city ed).

FN3 39 U.S.L.W. 2166 (N.D. Cal. Sept. 10, 1970).

FN4 *Id.* at 2166-67. Although the court in *Mattola* did not reach the merits of the case, two United States District Courts have recently ruled on the ultimate question of the war's validity, upholding it in each case. In *Berk v. Laird*, 39 U.S.L.W. 2201 (E.D.N.Y., Sept. 16, 1970), the court held that Congress had authorized through legislative actions the use of U.S. Armed Forces

in Vietnam, thereby making unnecessary a formal declaration of war. A similar argument was advanced by the court in *Orlando v. Laird*, 39 U.S.L.W. 2069 (E.D.N.Y. July 1, 1970), as it pointed to Congressional appropriations for the war, amendments to the Selective Service Act, and approval of veteran's benefits for participants in the conflict as examples of action taken in lieu of a declaration of war.

Another recent decision determined, however, that the political question doctrine prevented the court from reaching the merits. *Davi v. Laird*, 39 U.S.L. W .2228, 2229 (D. W . Va. Oct. 9, 1970) held that "the issue of whether a certain instance of hostilities requires a formal declaration for its legitimation inescapably presents a political question. ..." Disagreeing with Judge Sweigert's interpretation of the *Orlando* case, the *Davi* court refused to acknowledge that *Orlando* could be interpreted as a discussion of the merits of the Vietnam wars legality.

FN5 383 U.S. 301 (1966).

FN6 *See. e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*. 180 U.S. 208 (1901).

FN7 *See Freeman. The Constitutionality of Peacetime Conscription*, 31 VA. L. REV. 40 (1944); *Friedman, Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493 (1969).

FN8 *United States v. Miller*, 307 U.S. 174, 179 (1939).

FN9 *Selective Draft Law Cases*, 245 U.S. 366 (1918).

FN10 *Baker v. Carr*, 369 U.S. 186, 226 (1962) where the court finds that reapportionment is not within the considerations preventing judicial determination under the doctrine of political question. One example the court cites of a true political question is the instance where "we risk embarrassment of our government abroad."

FN11 369 U.S. at 212, n. 35, where the court cited its opinion in *United States v. Klinton*, 5 Wheat. 144, 149, that "recognition of foreign governments to strongly defies judicial treatment that without executive recognition, a foreign state has been called 'a republic of whose existence we know nothing.'"

FN12 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S., 579 (1952). In the Court and concurring opinions, it was emphasized both that the President lacked the Constitutional power to seize private property and, also, that regardless of such power, the President was precluded from exercising it when confronted with specific legislation designed to meet the emergency. Thus, in this instance, the court upheld the legislative determinations when they conflicted with subsequent Presidential actions.

See also the Japanese Exclusion cases of World War II, *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex Parte Endo*, 323 U.S. 283 (1944); the Prize cases of the Civil War, 67 U.S. (2 Black) 635 (1863); and the passport case of *Kent v. Dulles*, 357 U.S. 116 (1958); and others: *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Bas v. Tingey*, 4 U.S. (4 Dall.) 37 (1800); *The Pedro*, 175 U.S. 354 (1899); *Woods v. Miller Co.*, 333 U.S. 138 (1948).

FN13 T.I.A.S. 3170

FN14 78 Stat. 384 (1964).

FN15 *See PUSEY, THE WAY WE GO To WAR* 115-34 (1969); *Hearings Before Senate, Comm. on Foreign Relations, 90th Cong., 2nd Sess.* (1968).

16 J. MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787* 341 (Int'l ed. G. Hunt & J. Scott 1920).

FN17 *Berk v. Laird*. No.35007 (2d Cir.. June 19. 1970).

FN18 War was declared against Japan on December 8, 1941; since the war had started for the United States the preceding day, Congress, in a sense, was ratifying an on-going war.
FN19 R. BASLER, THE COLLECTED WORKS OF ABRAHAM LINCOLN 452 (1953).