BRIEF FOR CONSTITUTIONAL LAWYERS' COMMITTEE ON UNDECLARED WAR AS AMICUS CURIAE, MASSACHUSETTS V. LAIRD

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SPECIAL INTRODUCTION

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Editorial Note

On November 9, 1970 the Supreme Court denied Massachusetts' motion to invoke the Court's original jurisdiction for the purpose of challenging the constitutionality of the war in Southeast Asia. By giving no reasons for its denial, the Court has chosen to keep the questions inherent in a challenge to the war's constitutionality alive in the lower courts.

The Review herein reprints the Amicus Curiae Brief for the

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Constitutional Lawyers' Committee on Undeclared War in support of the Commonwealth's motion. The Review believes that the continuing importance of the issues—justiciability, congressional authorization for the war, and even state standing—coupled with the Brief's thoughtful treatment more than justifies a departure from our usual practice of publishing only original material.

A reasonable question at this point might be, "Why is the Government's Brief not also reprinted?" The answer is simply that, in the Review's judgment, the Amicus Brief fairly states the issues and suggests opposing arguments. This is not to say that all the Government's arguments are suggested or that the Government does not put them more forcefully. It is only to say that, on balance, we found the risk of prejudice to the Government not sufficient to justify reprinting an additional brief.

For readers who consider availing themselves of the Government's Brief, however, we point out that it understandably does not address itself to all of the theories of standing put forth by the Amicus. Rather, it seeks primarily to counter arguments for standing based on the theory of parens patriae and on the theory that the Massachusetts statute purporting to exempt that state's citizens from service in unauthorized wars confers a sovereign interest sufficient for standing. Also, the Government, again understandably, avoids arguing on the merits except to state that if confronted by the issue they would contend that military appropriations and extensions of the draft constitute sufficient congressional authorization for the war. The remainder of the Government's Brief is devoted to arguing that original jurisdiction should be denied because the issue is non-justiciable.

The text of the Amicus Brief appears in its original form except for minor typographical corrections and the deletion of citations and related text thought more appropriate to a footnoto. The deleted material now appears in footnote form, and all citations have been "Whitebooked." Finally, the Review has added a number of citations and explanatory notes; these additions are indicated by brackets ([ ]). The foregoing changes were made primarily for the convenience of our readers. For the same reason, we have included the table of contents to the Brief.

4. Id. 14-17.
5. Id. 26-28.
6. Id. 17-41.
The special introduction by Professor Maurice Kelman is intended to place the principal litigation in a time-perspective with other efforts to obtain a judicial pronouncement on the war's constitutionality. Though, as Professor Kelman notes, the issue of state standing is of secondary importance, the Review believes that it is nonetheless significant. The impact of a state's presence as party plaintiff on the outcome of litigation as sensitive as that under discussion cannot altogether be discounted.
INTRODUCTION: COURTS AND THE CONSTITUTIONALITY OF THE VIETNAM WAR

MAURICE KELMAN

At the height of the Korean war, the United States Supreme Court dared to set aside a unilateral action the President had taken to meet a "grave emergency" which threatened the production of armaments and placed the lives of combat troops in greater jeopardy.¹ "With all its defects, delays and inconveniences," said Mr. Justice Jackson, "men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up."²

In the anguish of another undeclared Asian war—costlier, longer, and morally more corrosive—one recalls the Steel Seizure Case not as a mighty restraint against presidential excess but as a distinctly peripheral instance of judicial review. The great constitutional question, then as today, was not whether the President could temporarily nationalize steel production on his own authority; it was whether the war itself, for which steel was so essential, had been sanctioned by proper constitutional process. But for reasons at which we can only guess, the legality of the Korean "police action" went unchallenged in the courts.³

The Court recently has observed, "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."⁴ Thus, the Korean experience does not foreclose nor has it inhibited questions about the constitutional legitimacy of the war in Vietnam. Indeed the execu-

¹ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the Steel Seizure Case).
² Id. 655 (concurring opinion).
³ The single reported exception is United States v. Bolton, 192 F.2d 805 (2d Cir. 1951), in which a draft refusal defendant was held to lack standing to challenge conscription for the Korean war. Compare the Steel Seizure Case, where Justice Jackson stated: "I do not, however, find it necessary or appropriate to consider the legal status of the Korean enterprise to dismountenance argument based on it." 343 U.S. at 643.
tive branch's official apologia seems to have stoked rather than muted doubts within Congress and the legal community. And for the first time in the history of the nation (in world history, in fact) serious efforts have been mounted to obtain a domestic judicial determination of the constitutionality of an ongoing war.

The earliest lawsuits questioning the war's constitutionality foundered on the shoals of judicial incredulity. "[T]his is obviously a political question that is outside of the judicial function," Judge Holtzoff declared in 1966, as he dismissed sua sponte a soldier's action to enjoin army officials from ordering him to Vietnam. The Court of Appeals for the District of Columbia, including Judge (now Chief Justice) Warren Burger, agreed con brio. The district court was "eminently correct," "no discussion or citation of authority is needed," an opinion is unnecessary except as a warning to the bar that "resort to the courts is futile, in addition to being wasteful of judicial time, for which there are urgent legitimate demands." Army reservists, draft resisters, and citizen-taxpayers generally fared no better than active-duty soldiers in convincing the courts of the justiciability of their challenge to the war. In the conspiracy trial of Dr. Spock and four other war opponents, the trial judge

10. 373 F.2d at 665.
refused even to hear argument on motions asserting the illegality of our Vietnam involvement.\textsuperscript{14}

Yet the issue, like the war, refuses to die. Some of the reasons given by lower courts for denying adjudication are so manifestly makeweight as to arouse a suspicion of willful default—serving of course only to provoke further litigation. For example, the District of Columbia courts ruled that an action by a serviceman seeking injunctive relief against the Secretary of Defense constitutes an unconented suit against the United States.\textsuperscript{15} The proposition was deemed too obvious to require citation—despite well-known cases in which federal officials, including cabinet officers, have been restrained from unconstitutional acts.\textsuperscript{16} For further example, the Second and Eighth Circuits held that the defendant in a draft-refusal prosecution lacks standing to question the war because he may not be sent to Vietnam,\textsuperscript{17} a position which ignores the causal connection between the draft and the war.\textsuperscript{18}

However, in 1968 Judge Charles Wyzanski chose not to slam the courtroom door in the face of a draft refuser on spurious grounds of prematurity or sovereign immunity.\textsuperscript{19} Instead he confronted the issue of the war's justiciability in an opinion whose quality contrasts with the brusque \textit{ipse dixit} of other federal courts. Judge Wyzanski recognized, as the Supreme Court has,\textsuperscript{20} that to pronounce a question

\begin{enumerate}
\item J. Mitford, \textit{The Trial of Dr. Spock} 91 (1969).
\item In addition to the \textit{Steel Seizure Case}, see Land v. Dollar, 330 U.S. 731 (1947); United States v. Lee, 106 U.S. 196 (1882); \textit{cf.} Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).
\item Ashton v. United States, 404 F.2d 95 (8th Cir. 1968), \textit{cert. denied}, 394 U.S. 960 (1969) (participating in the Court of Appeals decision was Judge, now Mr. Justice, Blackmun); United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), \textit{cert. denied}, 386 U.S. 972 (1967).
\item If a young man would not, or might not, have been called for induction save for the increased manpower requirements occasioned by Vietnam and if it is his claim that the unconstitutionality of the war renders military conscription per se invalid, the denial of "standing" may even approach a failure of due process. \textit{Cf.} Estep v. United States, 327 U.S. 114 (1946); H. Hart & H. Wechsler, \textit{The Federal Courts and the Federal System} 323-325 (1953). Combining the pre- and post-induction cases referred to in the text would produce total preclusion of a judicial forum. However the Second Circuit finds no problem of sovereign immunity and is willing to entertain actions by men in service. \textit{See} Berk v. Laird, 429 F.2d 302 (2d Cir. 1970).
\end{enumerate}
“political” is itself a profound act of constitutional interpretation; justiciability and substance are “so close as often to overlap.”21 His conclusions: Article I, section 8 does not inflexibly demand a formal declaration of war by Congress, but allows a “limited undeclared war approved by the President and Congress.”22 The choice between conducting limited undeclared war and unlimited declared war is for the political departments of government, involving, as such choice must, information and policy factors which “elude the normal processes of the judiciary.”23 Notable, however, is the court’s emphasis on mutual action by the Executive and Congress (Judge Wyzanski used the phrases “joint action” and “cooperative action”). This is enormously significant, because the decision seems to indicate that the court will review the supportive conduct of Congress and determine for itself whether an undeclared war has received legislative approval. And that is the very nub of the war challengers’ case. Few legal critics of the war would insist that a traditional declaration of war is a sine qua non under article I. Many would urge, however, that legislative approval cannot be extorted by logistical measures (military appropriations, renewals of selective service) thrust upon Congress as necessary to avoid the failure of a military enterprise already underway. Although Judge Wyzanski did deduce constitutionally sufficient war authorization from Congress’ record of supportive enactments, including the Gulf of Tonkin Resolution, the unique aspect of his decision is that the important constitutional question was taken to be justiciable.

By 1970 the Southeast Asian hostilities had lengthened into the most protracted war in our history, and other federal courts began to follow Judge Wyzanski in treating the challenges with appropriate seriousness.24 However, no court to date has declared the war unconstitutional. Indeed two district judges in New York have come to Judge Wyzanski’s conclusion that Congress has given affirmative authorization.25 But a consensus seems to have developed around

22. Id. 515.
23. Id. A further option is a limited declared war, a concept which is not inherently contradictory or without historical precedent. See PUSEY, THE WAY WE GO TO WAR 49-53 (1969).
the premise that the President has no right to commit the nation to war without the collaboration of Congress. To this extent the courts have opposed the Executive's own concept of his inherent powers. Thus in *Berk v. Laird* the Second Circuit specifically rejected the Government's contention that "the President's authority as Commander-in-Chief, in the absence of a declared war, is co-extensive with his broad and unitary power in the field of foreign affairs." On the contrary, said the court:

[T]he power to commit American military forces under various sets of circumstances is shared by Congress and the executive. History makes clear that the congressional power "to declare War" conferred by Article I, section 8, of the Constitution was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative which was enjoyed by the British sovereign.

From lower court decisions, then, the following pertinent constitutional issues can be distilled:

1. May the President wage a foreign war without a formal declaration of war or some other form of congressional authorization or concurrence?

2. Is it open to courts to determine on the record of congressional actions whether a war not formally declared has been authorized in the constitutional sense, or is the question "political"?

3. By furnishing military manpower and funds for the conduct of the Vietnam war, has Congress given constitutional assent?

Every attempt to draw the Supreme Court into a decision of these or related matters has failed, although Justice Douglas' continuing dissent from passive virtue may have contributed to the lower courts' growing receptiveness to the issues.

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26. *429 F.2d 302, 304 (2d Cir. 1970).*
27. *Id. 305.*
The most recent and certainly the most dramatic approach to the Supreme Court was the Commonwealth of Massachusetts' attempt to bring an original action against the Secretary of Defense, seeking to protect that state's servicemen from involuntary assignment to Southeast Asia. The amicus curiae brief submitted by the Constitutional Lawyers' Committee on Undeclared War—a brief subscribed by more than a score of constitutional law teachers—supports the position of Massachusetts. While much of the brief necessarily is devoted to the question of the state's standing as a party, of more general import are the arguments addressed to the questions enumerated above.

The brief not only opposes the concept of presidential war-making on strong textual and historical evidence, but it argues that article I, section 8, demands either a declaration of war by Congress in the traditional form or a substantially equivalent authorization. Contrary to the lower courts, the amicus maintains that such supportive measures as military appropriations and renewals of the draft are not constitutionally akin to an express declaration of war. Members of Congress, the brief argues, approve these measures for a variety of reasons unrelated to their views on the war. In support, the brief cites legislative history showing that those voting for appropriations and draft renewals often attempted expressly to negate any inference of war approval, some stating that they felt compelled to provide material support for those committed to battle regardless of the propriety of that commitment. The Gulf of Tonkin Resolution is dismissed chiefly on the ground that it was not intended as authority for Americanizing and escalating the fighting in Vietnam (at least that is what some members of Congress said in explaining their concurring votes). According to the amicus, the congressional authorization contemplated by the Constitution must meet three tests: It must be "intentional," "specific," and the "product of a separate and distinct choice by Congress that is detached from other legislation." Any lesser standard, it is argued, would reverse the constitutional distribution of authority, in effect granting the President power to initiate a war subject only to subsequent counteraction by Congress.

In the previously mentioned case of Berk v. Laird, the Second Circuit offered what might be termed the rock-bottom test of unconstitutionality—executive war-making carried on without any "mu-

tual participation by Congress."31 Obviously that does not describe Vietnam or any other sustained military venture of major proportions. The Court of Appeals left it to the plaintiff to suggest a criterion by which judges can decide how much or what kind of congressional participation is enough, and a favorable ruling on justiciability depended to a considerable degree on whether a "judicially discoverable and manageable standard" could be adduced for resolving the constitutional question on the merits.32 The three-part test urged by the amicus brief in Massachusetts v. Laird is, among other things, responsive to the Second Circuit's challenge.33

The outcome in Massachusetts, however, was sheer anticlimax. A six member majority of the Supreme Court—including, for what it is worth, all the Justices appointed by Presidents Kennedy, Johnson, and Nixon34—summarily denied the Commonwealth leave to file its bill of complaint. It would be inaccurate, though, to describe the decision as a clear victory for the Government, for the basis of the dismissal in the absence of an opinion is necessarily conjectural. We cannot know whether the suit failed on justiciability or on standing or on both grounds. If the obstacle was solely a lack of standing, the Court's action would not have significant implications for the rather different and more conventional forms of litigation now in the lower courts; but if the Supreme Court concluded that a political question was at issue, and more, that the matter is so self-evidently political as to deserve no oral argument, the game is entirely lost. In view of the growing body of judicial doubt that the war issue is constitutionally "political," an interpretation of the Court's action as a sub silentio holding of non-justiciability is quite implausible. A more credible construction is that the Court by its cryptic avoidance in Massachusetts v. Laird has chosen to keep the legal questions alive in the lower courts, as it has done by denying certiorari in previous war cases.

As for the dissents in Massachusetts, all that can be said about

31. 429 F.2d 302, 305 (2d Cir. 1970).
32. Other indicia of "political questions" are summarized in Baker v. Carr, 369 U.S. 186 (1962), which continues to be the most authoritative expression on the subject. See Powell v. McCormack, 395 U.S. 486 (1969).
33. A more detailed formula, including when as well as how Congress must act, was proposed by the plaintiff on remand to the district court in Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970).
34. Chief Justice Burger and Justices White, Marshall, and Blackmun. Rounding out the majority were Justices Black (Roosevelt-appointed) and Brennan (Eisenhower-appointed).
Justices Harlan and Stewart is that they desired oral argument on standing and justiciability. Justice Stewart's position is consistent with his earlier expressions of readiness to decide the war's litiga-
bility. Justice Harlan might appear to be a new convert to that view. However, the appearance could be misleading since the war cases previously before the Court invoked discretionary review, and Justice Harlan's usual practice is to refrain from registering an indi-
vidual dissent in such instances. A separate opinion by Mr. Justice Douglas was not unexpected, but whereas Justices Harlan and Stewart carefully avoided any intimation of their ultimate views, Justice Douglas came much closer in Massachusetts to declaring his substantive position than he has in the past. Thus he stated, if some-
what tentatively, that the Commonwealth did have standing in a parens patriae capacity, and that the questions presented were proper for judicial decision. He also joined other federal courts in asserting that presidential warmaking, except for the power to repel sudden attacks, is contrary to article I.

The foregoing is not meant to exhaust or even to identify all the difficult constitutional questions involved in war litigation but simply to place in a time-perspective the effort in Massachusetts v. Laird to extract answers from the Court. Whether the Court can avoid giving any answers until the questions become moot is problematical. The litigation, like the war (in some form), appears likely to persist. Whether the Court should stay its hand is yet another matter. The very uncertainty of the constitutionality of the war in Indochina erodes public confidence in the Executive and Legislative branches of our government. Perhaps it is time for the third branch to recall Mr. Justice Jackson's admonition concerning the Court's role in the preservation of a free society, under law.

37. "I believe that Massachusetts has standing and the controversy is justiciable. At the very least, however, it is apparent that the issues are not so clearly foreclosed as to justify a summary denial of leave to file." 400 U.S. at 887.
38. It is interesting to note that Justice Douglas did not refer to the State's alternative theory of proprietary standing or to the amicus' theory of the State's standing as an original contracting party to the Constitution.
39. See note 2 supra and accompanying text.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 42, Original

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

vs.

MELVIN R. LAIRD, as he is Secretary of Defense,

Defendant.

ON MASSACHUSETTS’ MOTION FOR LEAVE TO FILE A COMPLAINT

AMICUS CURIAE BRIEF ON BEHALF OF THE
CONSTITUTIONAL LAWYERS’ COMMITTEE
ON UNDECLARED WAR

INTEREST OF THE AMICUS CURIAE

This amicus curiae brief is submitted by the Constitutional Lawyers’ Committee on Undeclared War. This committee of over thirty members is comprised primarily of professors who teach constitutional law or aspects thereof in the nation’s law schools. The few members who do not teach in the law schools have done significant work on questions involving the constitutional aspects of the war. Among members of the committee are those who have devoted much study and attention over the years to the questions involved in
this case. The committee members have a professional interest in the legal resolution of the questions, and are filing this brief in an effort to assist the Court in its task of resolving the critical constitutional issues raised by the Commonwealth of Massachusetts.

SUMMARY OF ARGUMENT

I. Massachusetts has standing to bring an original suit in the Supreme Court challenging the constitutionality of defendant's actions in sending Massachusetts citizens to fight in the undeclared war in Southeast Asia. In its proprietary and financial role, Massachusetts has standing because defendant's actions cause the state to lose significant tax revenue, cause it to incur expenses in dealing with demonstrations against the war, cause harm to the state's economy, and impair its efforts at improving the physical characteristics of the state. Other state interests that are harmed include the electoral and governmental processes, and a disruption of schools. That other states may have suffered similar injuries does not bar Massachusetts from bringing suit. Moreover, Massachusetts' injuries are different from, and in some aspects greater than, those of many other states.

Massachusetts also has standing as parens patriae, asserting threats of injury to large and diverse classes of its citizens, many of whom would be unable to sue on their own behalf. Massachusetts v. Mellon\(^1\) is no bar to the state's parens patriae standing, since it does not seek to protect its citizens from the operation of federal statutes but rather directs its challenge at Executive action which defies the Constitution.

Massachusetts also 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 the Constitution. Massachusetts had exchanged its own power over war and foreign relations, asserted often during the period of the Articles of Confederation, for a constitutional guarantee that the new nation would conduct its warmaking according to the procedures specified in the Constitution.

Massachusetts has standing to assert its interest in the disposition of its militia. Since the federal government has no constitutional power of conscription, when it drafts men it in effect calls forth the state militia. But when called forth, the conscripted men may only

\(^1\) [262 U.S. 447 (1923).]
be utilized for the purposes specified in Clause 15 of Article I, Section 8 of the Constitution. Sending Massachusetts citizens to fight in an undeclared foreign war is not one of the specified purposes, and hence the state is harmed by virtue of the unconstitutional usurpation of its militia.

Finally, Massachusetts has standing to assert the integrity of its equal suffrage in the Senate, which is impaired when the President decides to fight a war without authorization by the Senate as one of the two houses of Congress.

II. The present suit raises no issue of interposition, nullification, or preemption, since Massachusetts seeks merely a judicial decision based upon the Constitution, a decision in which the Massachusetts statute of April 2, 1970, is plays no necessary part.

III. The doctrine of sovereign immunity does not bar this suit, since it is alleged that defendant has exceeded his constitutional authority.

IV. The present case is justiciable because the defendant is breaching an identifiable duty and relief can be judicially molded. The case does not present a political question. Rather it presents a classic judicial question as to the distribution of powers between the Executive and Legislative branches. The equilibrium of the constitutional system must be maintained by the judicial branch assuming the role of arbiter when the decision is which of the branches possesses certain powers. Additionally, the criteria of Baker v. Carr do not apply since Massachusetts is merely seeking an interpretation of the Constitution, there is a clear and manageable standard for resolving the issue (the standard that Congress must declare war or specifically and intentionally authorize it), and Congress can be trusted to intelligently weigh the consequences of possible future courses of action in Southeast Asia should the war be declared unconstitutional.

V. Massachusetts can maintain that its citizens may not be compelled to serve abroad in undeclared wars. Yet its militia, or able-bodied men, are in effect being “called forth” for this constitutionally impermissible purpose by virtue of the federal draft. The use of the state militia in foreign wars would be permissible under a declaration of war or a specific and intentional authorization of war. But Congress has done neither with respect to the war in Southeast Asia.

2. [MASS. GEN. LAWS ANN. ch. 174, §§ 1-2 (1970).]
3. [369 U.S. 186 (1962).]
VI. The war in Southeast Asia is not supported by a Congressional declaration of war or its equivalent. The Framers gave Congress the power to declare war because they were afraid that otherwise the Executive would get the nation into debilitating wars. Thus, the President's commander-in-chief power was intended only to grant the right of commanding the armed forces and not to make decisions whether to go to war. Prior to 1950, all major wars were declared by Congress. Since the constitutionality of the undeclared Korean war of 1950 was not challenged, let alone overturned, in the courts, the stage may have been set for the Executive war in Southeast Asia, which has become the most protracted war in this nation's history.

The President's power to repel a sudden invasion or to protect American citizens abroad in an emergency, whatever its limits, cannot be stretched to include the war in Southeast Asia. Whatever the initial need for troops, as soon as the emergency is over the President must seek a Congressional declaration of war or its equivalent in order to continue military action.

Neither the President's foreign affairs powers nor his power as commander-in-chief can be used to read Article I, Section 8, Clause 11 out of the Constitution.

Congress need not declare war in such terms. But a Congressional authorization of hostilities must at least be specific, intentional, and discrete. Under these criteria, it is Congress, and not the President, which must decide whether to fight and, if so, the entity or the forces and territory against which armed force shall be used. Lacking this specificity, a Congressional delegation of [the power to declare] war to the President would be constitutionally impermissible as amounting to an amendment of Congress' war-deciding powers.

Military appropriations and the renewal of the draft do not constitute a constitutional equivalent of a declaration of war. They fail to meet the three criteria of an equivalent authorization. If they were the equivalent of a declaration of war, it would be the President who decides to go to war with Congress having at best a veto after the fact. The burden of changing a course already set in motion would then fall upon Congress. Moreover, the President could veto any attempt by Congress affirmatively to get out of war. Finally, under Supreme Court precedent, appropriations do not ratify Executive acts when important constitutional issues are at stake. The number of logical defects and complexities in attempting to infer Congressional authorization from subsequent appropria-
tions suggests that attention should be paid to the simple and reasonable alternative: that Congress can specifically and intentionally authorize the use of military force.

The Gulf of Tonkin Resolution\textsuperscript{4} does not authorize the war. The Executive has disclaimed reliance upon it, and the Senate has repealed it. Nor did Congress intend to authorize the war when it passed the Resolution.

The SEATO treaty\textsuperscript{6} does not authorize the war. For it states that the decision to go to war must be made in accordance with America's "constitutional processes."

In conclusion, the Supreme Court should declare that the war in Southeast Asia is unconstitutional, and grant to Massachusetts the relief it seeks.

\textbf{ARGUMENT}

\textbf{I. MASSACHUSETTS HAS STANDING TO BRING THE PRESENT SUIT IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT.}

\textbf{A. Massachusetts Has Standing As a Proprietor.}

1. Proprietary Rights and Financial Interests.

A state unquestionably has standing to sue an individual of another state in the original jurisdiction of the Supreme Court to protect or secure its own proprietary interests.\textsuperscript{8} The interests must be real and tangible, and not simply the political power of some individuals in a state as held insufficient in \textit{Georgia v. Stanton}.\textsuperscript{7} In that case there were slight allegations relating to real estate and buildings owned by the state of Georgia, but there was no evidence that the state itself would be deprived of its property under reconstruction, but rather simply that there was a threat of replacing the existing state government by another.\textsuperscript{8} Subject-matter jurisdiction was thereupon denied on the ground that the rights asserted were "not of persons or property, but of a political character . . . ."

\textsuperscript{4} [S.J. Res. 189, 88th Cong., 2d Sess. (1964); H.R.J. Res. 1145, 88th Cong., 2d Sess. (1964).]


\textsuperscript{6} Missouri v. Illinois, 180 U.S. 208 (1901); Texas v. White, 74 U.S. (7 Wall.) 700 (1869); Pennsylvania v. Wheeling & Belmont Bridge Co., 50 U.S. (9 How.) 647 (1850).

\textsuperscript{7} 73 U.S. (6 Wall.) 50 (1867).

\textsuperscript{8} \textit{Id.} 76-77.

\textsuperscript{9} \textit{Id.} 77.
The Commonwealth of Massachusetts in the present suit alleges sufficient injury and threat of injury to its own real and tangible proprietary interests as to satisfy the requirements for standing as a matter of original jurisdiction:

(1) The Commonwealth is deprived of tax revenues that would have come from the income of servicemen who have been killed or disabled in the war.

(2) The Commonwealth is deprived of tax revenues resulting from the fact that Massachusetts servicemen earn far less in military service than they would otherwise earn if employed as civilians in Massachusetts.

(3) The Commonwealth is deprived of sales tax and other types of tax revenues due to the fact that all its citizens have decreased purchasing power resulting from increased taxes that its citizens have had to pay to the federal government to support the war effort.

(4) The Commonwealth has had to spend state money to pay for additional police protection for its citizens as the result of mass public demonstrations against the prosecution of the war.

(5) Buildings owned by the Commonwealth, including the state capitol buildings, have been damaged as the result of mass demonstrations against the prosecution of the war.

(6) The courts of the Commonwealth have been burdened and saddled with additional expenses by cases arising out of the mass public demonstrations against the prosecution of the war, and by other kinds of cases arising because of the war.

(7) Vast amounts of time of officials of the Commonwealth, to the economic detriment of the Commonwealth, have been and are being diverted from other important state business to devising means of controlling mass public demonstrations against the war.

In addition to the foregoing particulars, there is a general threat to the economy of the Commonwealth in a manner that is at least as real and tangible as that sustained as a basis for original jurisdiction in Georgia v. Pennsylvania R. Co.,\textsuperscript{10} resulting from the following:

(1) The loss of substantial human resources of the Commonwealth, by the death, disability, or absence of its inhabitants who had served, are serving, and may be called upon to serve in the war.

(2) The burden upon agencies of the Commonwealth, such as

\textsuperscript{10} 324 U.S. 499, 450 (1945). [The “real and tangible threat” to the economy of Georgia was rate fixing by northern railroads which acted to the detriment of a Georgia-owned railroad.]
welfare, veterans' affairs, and doctors and hospitals, resulting from claims by dependents and families of servicemen lost or wounded in the war.

(3) The burden of inflation upon the Commonwealth, stemming from deficit federal financing of the war and having direct repercussions within Massachusetts.

(4) The loss of money that would otherwise be pumped into the economy of the Commonwealth, as a result of higher federal income taxes paid by inhabitants of the Commonwealth to support the war.

(5) The injurious effect upon public welfare programs in the Commonwealth, such as urban renewal, model cities, mass transportation, highways, anti-pollution, manpower training, and public health and welfare, because of the inadequate funding of such programs by the federal government. The Commonwealth, particularly because of its large urban population, has become dependent upon the federal government for the partial financing of many public welfare programs in the state. Under normal conditions, the federal government in funding these public welfare programs would merely be returning to the Commonwealth funds collected through federal income taxation from citizens of the Commonwealth. At present, these funds are being largely diverted to the war.

(6) The decline in public morale, and the feeling of popular resentment toward all forms of government and law, stemming from popular opposition to the war and a growing public conviction, reflected in the statute of the Commonwealth of April 2, 1970,11 that the war in Southeast Asia is illegal and unconstitutional. This popular resentment has produced an unhealthy business and social climate, and a distrust of established procedures, institutions, and respect for law and order.

The foregoing have been illustrations of damage to the proprietary interests of the Commonwealth. Similar to In re Debs,12 quoted with approval in Missouri v. Illinois,13 "the wrongs complained of are such as affect the public at large." Any injury to the proprietary interests of a state is an injury to the citizens generally

12. 158 U.S. 564, 586 (1894) [(allegation that railroad employees refused to work with Pullman cars in any capacity, sympathizing with strikers at the Pullman car factory)].
13. 180 U.S. 208, 236 (1901) [(allegations that Chicago dumped sewage that would be discharged into the Mississippi River causing dangerous health conditions in Missouri)].
of that state, and vice versa. In respect of all these arguments, the Commonwealth is not a mere volunteer attempting to vindicate a provision of the Constitution, but is suing to protect its proprietary interests.  

2. Other State Interests.

In addition to proprietary and financial interests, the Commonwealth has been injured in other respects which have been held to afford a sufficient basis for judicial relief as a matter of original jurisdiction in previous cases, including:

(1) The loss to the Commonwealth of young men and women killed in the war, who might have participated in their government through elective or appointive office. This loss is a direct injury to the Commonwealth's governmental processes, similar to that alleged in the Complaint filed in South Carolina v. Katzenbach.  

In Paragraph 8 of that Complaint, South Carolina alleged the right "to preserve to her inhabitants the most capable and just representative government through her election procedures," and "to insure a qualified electorate and the most capable and just government for her inhabitants." This same language applies to the present case.

(2) Similarly, the integrity of the Commonwealth's voting and electoral procedures are impaired to the extent that there are large numbers of absentee voters who cannot be present within the state to hear and question candidates for state office. This again falls within the allegations upheld in South Carolina v. Katzenbach. Massachusetts servicemen, both abroad and on extrastate bases within the United States, fall into the category of absentee voters if they are otherwise qualified as voters.

(3) The disruption of the orderly conduct of school classes and school procedures in the Commonwealth's public school education system constitutes an adverse effect to a legitimate state interest. Many schools were forced to close early in the 1969-70 year as the result of student demonstrations against the Vietnam war. The impact of this disruption and closing of the schools, and the threat of future disruptions, is not in substance different from that in Pennsyl-

16. [Motion for Leave to File Complaint at 5, South Carolina v. Katzenbach, 383 U.S. 301 (1966).]
vania v. West Virginia, where the threat was interference with the supply of gas used to heat the schools.

(4) The loss to the Commonwealth of an estimated 1,300 inhabitants who have been killed in hostile action in Vietnam. A state is nothing more than the citizens who comprise it. The Commonwealth has lost a part of itself in the death of these inhabitants, and is threatened with further losses in the war.

3. The Possible Claims of Other States Are Irrelevant.

Massachusetts' standing to bring the present suit should not be defeated on the ground that other states generally might bring similar claims. There is no requirement in state suits that a state must be harmed in a way different from other states in order to have standing. In Alabama v. Texas, Alabama and Rhode Island, as complaining states, clearly had no interest differentiable from that of most of the other states. But even under the view that a state should show a differentiable interest, there are several factors that uniquely distinguish the Commonwealth in the present case:

(1) A statute was passed in Massachusetts on April 2, 1970, specifically authorizing the state attorney general to bring the present suit. The existence of the statute puts Massachusetts in a different position from all the other states which have not passed such legislation, and is the concrete embodiment of the particular interest of the Commonwealth.

(2) As one of the original thirteen states, Massachusetts has a particular interest in the integrity of those portions of the Constitution that change[d] the Massachusetts Constitution of 1780 that

17. 262 U.S. 553, 591-92 (1922).
19. 347 U.S. 272 (1954) [state asserted that submerged lands are not federal property thereby rendering unconstitutional the Submerged Lands Act of 1953 which authorized the sale of such property].
The attorney general shall, in behalf of any inhabitants thereof who are required to serve in the armed forces of the United States in violation of section one of this act, bring an appropriate action in the Supreme Court of the United States as the court having original jurisdiction thereof under clause two of section 2 of Article III of the Constitution of the United States to defend and enforce the rights of such inhabitants and of the commonwealth under section one; but if it shall be finally determined that such action is not one of which the Supreme Court of the United States has original jurisdiction, then he shall bring another such action in an appropriate inferior federal court.]
antedated the Articles of Confederation. Specifically, the Commonwealth has an interest in maintaining its position of 1780 that an individual would not be required to serve in military action outside the territory of the Commonwealth unless either he gave his personal consent or consent was given by the legislature.21

(3) To the same effect, the Massachusetts statute of April 2, 1970, secures the Commonwealth's interest in its own militia, protected by Article I, Section 8, Clause 15 of the Constitution22 from serving abroad in any war not pursuant to a federal law.

(4) Obviously some states are more adversely affected by foreign wars than other states. In the present war in Southeast Asia, some states whose populations are largely dependent for their livelihood on war and defense contracts, probably would lack motivation to contest the constitutionality of the war. By contrast, Massachusetts clearly felt sufficient harm to bring the present suit.

(5) Massachusetts has lost more of its able-bodied young men to the war than the great majority of other states.

(6) Massachusetts has suffered harm from mass demonstrations against the war, which have occurred in some other states but not in all states.

(7) Popular morale obviously differs from state to state. The damage to public morale in Massachusetts as the result of the prosecution of the war in Southeast Asia is especially severe and distinguishable, and was a factor leading to the passage by the legislature of the statute of April 2, 1970.

For these reasons, and similar ones that could be given, Massachusetts has suffered and is suffering a particular burden by the prosecution of the war and is entitled to specific redress.

B. Massachusetts Has Standing As Parens Patriae.

1. Quasi-Sovereign Basis.

The Commonwealth has standing to bring the present suit as "quasi-sovereign or as agent and protector of her people against a continuing wrong done to them."23 In this capacity the Commonwealth is "parens patriae, trustee, guardian, or representative of all

21. [Mass Const. ch. II, § 1, art. VIII, § 63 (1780).]
22. ["The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ." U.S. Const. art. I, § 8.]
or a considerable portion of its citizens . . . .” To be sure, when a state is suing in its own proprietary right it is acting for its citizens, since the ultimate reality behind the term “state” is its people. In this sense an injury to all or to a considerable portion of the citizens of a state is an injury to the state itself, and it makes little difference whether the injury is labelled a state interest or a parens patriae interest. Under either label, the state is entitled to redress as a matter of original jurisdiction.

Nevertheless, the concept of parens patriae has taken firm hold as an independent basis for state standing in order to counter the argument raised in some of the earlier cases that a state was only a nominal plaintiff, suing for a few of its citizens' private rights. Of course in some cases examination of the evidence showed that the state was merely a nominal plaintiff, and jurisdiction was denied. Because of this possibility the doctrine of parens patriae has over the years come to depend upon the existence of a number of factors which must be present if a state is to be allowed standing to assert its quasi-sovereign interests. What follows is a listing of these factors coupled in each instance with an indication of how Massachusetts squarely meets the test in the present suit:

(1) The state must assert at the outset a minimal proprietary interest of its own, characterized by Justice Holmes in Georgia v. Tennessee Copper Co., as a “makeweight.” The minimal character of this proprietary interest is attested by the fact that no direct injury to the state's interest need be alleged. However, the requirement remains, presumably to negate the possibility that the state is suing solely on behalf of particular ascertainable citizens who are the real parties in interest.

Even if the proprietary interest must be substantial and direct, rather than minimal and “makeweight” as precedents allow, Massachusetts would easily meet the criteria. Her proprietary interests have been examined earlier and at length, and include damage to the state's economy, morale, schools and institutions, property, loss

of revenues, degradation of political processes, burden on courts, loss of time of officials, and other interests previously examined.

(2) The second requirement is that the threatened injury must affect many people, or in the words of Kansas v. Colorado,\textsuperscript{29} a "considerable portion" of the state's citizens. There is no requirement that all of the state's citizens be affected, and certainly not that all be affected equally, for in Missouri v. Illinois,\textsuperscript{30} the threatened pollution of the Mississippi River by Illinois would have clearly affected communities situated along the river in Missouri while having a diminish[ed] effect on other citizens of the state. Larger effects could result from "contagious" diseases from the pollution spreading throughout the state.\textsuperscript{31}

Massachusetts herein asserts a direct threat to a considerable portion of its citizens—those young men and women who are serving or who may be drafted to serve in the war. To them there is an unquestionable threat to "health and comfort."\textsuperscript{32} But there is also a threat to a much larger class of citizens, including the friends, families, relatives, and fiancées of the servicemen. These are not only threats to comfort and welfare through loss of companionship, but also threats to income and support. Moreover, servicemen who come back in a weakened condition or having been subject to a disease, may be susceptible to a recurrence of that disease, may transmit it to other citizens of the Commonwealth, and may have to be supported by their family. Additionally, the welfare of businessmen in the state is impaired by the drain on the young manpower of the state who are drafted to serve in the war. Finally, the disruption of school classes in the Commonwealth, and mass demonstrations against the war in Southeast Asia, make it evident that few if any citizens of Massachusetts have not been adversely affected by this major, prolonged, costly war. That a substantial number of citizens are adversely affected is indicated by the passage by the Massachusetts legislature, and the signature into law the very next day by the Governor of Massachusetts, of the statute of April 2, 1970, requiring the attorney general of Massachusetts to bring the present suit.

(3) The suit must not be for the benefit of particular individuals.\textsuperscript{33} This is basically a contrapositive restatement of the previous

\begin{itemize}
\item \textsuperscript{29} 185 U.S. 125, 142 (1902).
\item \textsuperscript{30} 180 U.S. 208 (1901).
\item \textsuperscript{31} Id. 241.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938); New Hampshire v. Louisiana, 108 U.S. 76 (1883).
\end{itemize}
factor. Some of the insistence on this factor stems from cases between states, such as New Hampshire v. Louisiana,\textsuperscript{34} where it is a constitutional policy stemming from the Eleventh Amendment to make sure that a state is not a merely nominal plaintiff.\textsuperscript{35} When, as here, an individual and not a state is defendant, the full force of this policy does not apply. Nevertheless, there remains an insistence that the state is suing for itself and not on behalf of particular ascertainable individuals. One test of this factor is whether the state will bear the expenses of litigation. In North Dakota v. Minnesota,\textsuperscript{36} a suit was dismissed partially on the ground that groups of farmers were to bear the expenses of the suit. Another test is whether a single economic cross section of a state's population is injured.\textsuperscript{37}

In the present suit, the Commonwealth clearly is not suing on behalf of servicemen alone, but also on behalf of all its citizens generally who are affected by the war. The state is paying, and by the statute of April 2, 1970, is required to pay, all the expenses of the litigation.\textsuperscript{38} Moreover, no single group of citizens is affected; rather, the war has adversely affected businessmen, professional people, school children, young people and old, affiliated and unaffiliated persons, and servicemen.

(4) Although the very concept of \textit{parens patriae} implies, and by precedent affirms, that a state may sue on behalf of a large number of citizens who normally would have standing to sue on their own behalf,\textsuperscript{39} in some cases there is a suggestion that the state has the right and duty to assert the claims of large numbers of its inhabitants when they are unable to recover because they have no legally recog-

\textsuperscript{34} 108 U.S. 76 (1883).
\textsuperscript{35} [In Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1792), it was held that a state was liable to suit without its consent in a federal court by a citizen of another state. This led to the enactment of the eleventh amendment, providing that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States." Unless a state gives its consent or otherwise is found to waive its immunity, it is immune to all suits in the federal courts with the exception of those brought by the United States or another state. The amendment will not be defeated merely because the state brings the suit where it appears that both the burden and the benefit of prosecution go mainly to a group of its citizens. New Hampshire v. Louisiana, 108 U.S. 76, 88 (1883).]
\textsuperscript{36} 263 U.S. 365 (1923).
\textsuperscript{39} See Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).
nizable injury. In Georgia v. Pennsylvania R. Co., no individual consumer in the state might have been able to demonstrate the extent of his economic injury attributable to noncompetitive freight rates imposed by extra-state railroads. In Missouri v. Illinois, it was noted that "suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate . . . ."

In the present case there are many citizens of Massachusetts who probably would have no legally recognizable injury, yet whose health, comfort, or welfare is threatened by the defendant's actions. Relatives, friends, and financiers of servicemen fall into this category. Moreover, the most immediately affected group—the servicemen—have claims which the courts have refused to adjudicate. In this light, and indeed for this very reason, Massachusetts has the obligation and right to bring the present suit on their behalf and on behalf of all its other citizens as well.


Certain language in Massachusetts v. Mellon, may seem to stand in the way of the portion of the present case involving the Commonwealth's position as parens patriae. Mr. Justice Sutherland's language is as follows:

We need not go so far as to say that a state may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here. Ordinarily, at least, the only way in which a state may afford protection to its citizens in such cases is through the enforcement of its

40. See In re Debs, 158 U.S. 564, 584 (1895).
41. 324 U.S. 499 (1945).
42. 180 U.S. 208 (1901).
43. Id. 241.
44. 262 U.S. 447 (1923). [Both the state and a taxpayer attacked as unconstitutional the Maternity Act of 1921, ch. 135, §§ 1-14, 42 Stat. 224-26 (repealed 1927). This federal statute established a program of grants to those states which would undertake a program to reduce maternal and infant mortality. The taxpayer sought to enjoin the execution of the Act because the tax was for an allegedly illegal purpose (violate of the tenth amendment, and constituted therefore, deprivation of her property without due process. The state alleged that the Act was a usurpation of state power because it required a state to yield part of its reserved rights or lose a grant which it would otherwise be entitled to receive. The state further sought to protect, as parens patriae, the rights of its citizens, whose property had been taken by an allegedly unconstitutional act of Congress.]
own criminal statutes, where that is appropriate, or by opening its courts to the injured persons for the maintenance of civil suits or actions. But the citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances may sue in that capacity for the protection of its citizens (Missouri v. Illinois, 180 U.S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal government. In that field it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.\textsuperscript{46}

Upon inspection it will be seen that this language not only refrains from saying that a state can never sue, but moreover does not cover the present case. First, Justice Sutherland was discussing the operation of federal statutes. The present case does not involve any alleged unconstitutionality of a federal statute, but rather is directed at the alleged unconstitutional acts of the Executive branch of the government in defiance of the constitutional requirement that Congress pass a law authorizing or declaring war. The distinction goes to the substance of the reasoning employed by Justice Sutherland. He lays heavy emphasis upon the citizens of Massachusetts being “represented” by the United States in matters of the alleged unconstitutionality of a federal statute, and speaks of the situation when “such representation becomes appropriate.”\textsuperscript{46} The “representation” could be either by the citizens’ representatives in Congress or by the officers of the Executive. If Justice Sutherland meant the “representation” is to be in Congress, then the citizens’ remedy if they do not agree with a statute is to ask their representatives either to vote against it or to introduce repealing legislation. In the present case such representation in Congress is not applicable. The citizens of Massachusetts have already been represented in that Congress has not passed a law specifically authorizing or declaring war. There is nothing further that Congress could do or fail to do that would be the equivalent of not declaring war—except, of course, continuing to refuse to declare war, a position that Congress has taken and

\textsuperscript{45} 262 U.S. at 485-86.
\textsuperscript{46} Id.
the Executive branch of the government has ignored. It would not be an act equivalent to the refusal to declare war for Congress to consider affirmative legislation requiring troops to be withdrawn from Southeast Asia or to put similar directives in other legislation by way of amendment. There are two basic reasons why such action by Congress would not be the equivalent of a refusal to declare war. In the first place, Congress can defeat a motion to declare war by not giving it a majority vote in either house, whereas a majority must be attained in both houses in order to enact an affirmative statute ending an unwanted war. This difference in numerical voting requirements was instrumental in the issue of the seating of Representative Powell prior to any move to "exclude" him in the House where he presumably would vote on the issue of exclusion. In the latter case it was said that "[t]his is not a suit like those in Massachusetts v. Mellon, and Florida v. Mellon, where States sought to protect her citizens from the operation of federal statutes." In the present suit, the Commonwealth is praying for specific relief within ninety days of the entering of a decree in the suit unless Congress in the interim shall have declared or ratified the war. Far from seeking to protect her citizens against the operation of a federal statute, the Commonwealth here is seeking to secure to her citizens the protection of the procedures required by the federal Constitution.

Second, assuming for the moment that Justice Sutherland was not referring to Congressional representatives of the citizens of

47. See Powell v. McCormack, 395 U.S. 486 (1969). [When it appeared that the two-thirds vote necessary to "exclude" Powell from his seat would not be reached, the vote was used to "exclude" him from being seated. Members of the House who would not have voted to expel him had they been given a choice, ultimately voted for his exclusion.]


48a. 278 U.S. 12 (1927).

49. 324 U.S. at 446-47 (footnote added).
Massachusetts, but rather had in mind the possibility that the Attorney General or other Executive officers of the United States could represent them, it is clear that at least in the present suit neither the United States Attorney General nor the defendant nor any other Executive officer could in fact represent the citizens of Massachusetts. For in the present case the defendant as well as the Attorney General, serves at the will of the President. To expect one presidential appointee, on behalf of the public, to sue another presidential appointee for carrying out an important presidential policy, or to sue the President for violating the law, is just as unrealistic as the situation in the malapportionment cases, overturned by *Baker v. Carr*,50 where it once was expected that legislatures which were the product of malapportioned districts would set their own houses in order. In sum, Justice Sutherland's words in *Massachusetts v. Mellon* should not here be read to put the citizen in the posture of seeking legal redress from the branch of government that he alleges is violating the Constitution.51

Third, apart from the quoted language of Justice Sutherland, the case of *Massachusetts v. Mellon* as a whole should be distinguished from the present suit and confined to its facts, for the following reasons:

(1) *Massachusetts v. Mellon* and its companion case *Frothingham v. Mellon*52 may have involved a basic lack of ripeness which was antecedent to any other determination made in the case. There was apparently no claim that the federal government had actually spent any of the funds appropriated for the Maternity Act, and even if the defendant stood ready to spend such funds, there was apparently no further claim that any state had met the requirements of the Act and was in a position to receive federal funds. In contrast, the present suit involves not merely threats to the lives, health, welfare, and comfort of citizens of Massachusetts, but also alleges that such deprivations are actually occurring because of the continuing war in Southeast Asia.

50. 369 U.S. 186 (1962).
51. It may be noted that in South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966), the notion in *Massachusetts v. Mellon* that the federal government is the *parens patriae* for every American citizen was confined to Constitutional provisions that are addressed in terms only to the protection of individuals. When, as in the present case, the Constitutional provisions at issue are addressed to the protection of states, and not solely to the protection of individuals, the result in the *Katzenbach* case, allowing state standing as a matter of original jurisdiction, is entirely applicable.
52. [262 U.S. 447 (1923).]
(2) The unconstitutionality alleged in *Massachusetts v. Mellon* was that Congress, in enacting the Maternity Act of 1921, had exceeded the general powers delegated to it by Article I, Section 8, and thereby had invaded the legislative province reserved to the States by the Tenth Amendment. This type of claim lacks the specificity necessary to confer standing as required in *Flast v. Cohen*, since the Tenth Amendment contains no limitations nor "prohibitory words" but rather is in the nature of a conclusory generalization. By contrast the present case relies upon specific limitations in the Constitution, as discussed in the remainder of this Brief.

(3) The citizens of Massachusetts in *Massachusetts v. Mellon* claimed that they were adversely affected by increased federal taxation which would be used to fund the Maternity Act. However, it would have been difficult in the non-computer era of the 1920s to trace these funds, and the Supreme Court held that the taxpayers' interest in the moneys of the Treasury was "comparatively minute and indeterminable," "remote," "fluctuating and uncertain." Today, in contrast, there is nothing minute nor uncertain about the vast amounts of federal money spent for financing the war in Southeast Asia, and even if precise amounts could not be traced to precise taxpayers (which may not be a technologically necessary hypothesis), taxpayers individually and as a whole are clearly paying substantial amounts to support the war, enough to invoke traditional equity jurisdiction. In addition, the state's interest in the present suit goes far beyond taxation, being founded upon direct and immediate threats to the health, safety, welfare, and indeed the lives, of a large and indeterminate number of the citizens of Massachusetts.

(4) The "standing" aspect of *Massachusetts v. Mellon* and *Frothingham v. Mellon* has been examined critically in *Flast v. Cohen*. Concurring in *Flast v. Cohen*, Mr. Justice Douglas said that "it would . . . be the part of wisdom . . . to be rid of Frothingham here and now." Subsequent cases have allowed states to challenge the constitutionality of acts of Congress.

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53. [Act of Nov. 23, 1921, ch. 135, §§ 1-14, 42 Stat. 224-26 (repealed 1927).]
55. 392 U.S. 83 (1968).
59. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966); Alabama v. Texas,
(5) Although decided only less than fifty years ago, Massachusetts v. Mellon is already, to borrow a phrase used in a different case, "a relic from a different era." It represented state resistance to the progressive welfare legislation of the national government, and the Supreme Court refused to stand in the way of beneficial national legislation. Today there are many signs that, exclusive of commerce and taxation cases where parochial interests still confront the needs of a nation, individual states are far more alert to the welfare of the people than is the national government.

For example, cases now in lower courts challenging pollution standards of federal agencies represent an attempt by states to assert the importance of health and welfare of the citizens against an enormous federal budget sanctified in terms of national defense. The danger to the entire human species from leakage of radioactive wastes from nuclear electric power plants is recognized by states in the face of federal assurances, inconsistent over time, that there is no danger. Similarly, in this thermonuclear era where the atomic stockpiles of the United States and the Soviet Union, having a combined firepower of the equivalent of over 100 tons of TNT explosive per capita world population, can destroy most of the planet and render the remainder uninhabitable in a couple of hours, states as well as individuals may justifiably assert their interest in seeing to it that Constitutional procedures relating to the war-making powers are scrupulously followed. The common sense of the people, given legal expression in the democracy set up under our Constitution, is surely entitled to be heard on these issues of global survival. The states and the citizens, moreover, do not have the vast economic interest in the perpetuation of wars and the arms race that is built in to the sprawling bureaucracy of the federal government and the contributions from arms manufacturers to the political campaigns of those who seek control over the enormous federal budget.

Full force and effect should be given to the original jurisdiction of the Supreme Court as provided in Article III, Section 2, of the Constitution. The jurisdiction is not circumscribed in terms of subject matter. The Supreme Court in Kansas v. Colorado, said

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60. Reid v. Covert, 354 U.S. 1, 12 (1957).
61. [See, e.g., New Hampshire v. AEC, 406 F.2d 170 (1st Cir. 1969).]
62. [U.S. Const. art. III, § 2: "In all Cases . . . in which a State shall be Party, the Supreme Court shall have original Jurisdiction."]
63. 185 U.S. 125 (1902).
of the earlier exhaustive review of the original jurisdiction grant of power in *Missouri v. Illinois*, that the review "demonstrates the comprehensiveness, the importance and the gravity of this grant of power, and the sagacious foresight of those by whom it was framed." These words should be linked with Justice Holmes' classic statement in *Missouri v. Holland*, that "when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." The present suit asserts a state interest that exceeds all the requirements of previous suits by a state against a citizen under the original jurisdiction of the Supreme Court, and thus grows naturally out of the provisions of Article III, Section 2, as they have been interpreted so far in the history of this Republic.

C. Massachusetts Has Standing As a Contracting Party to the Constitution.

A separate ground for original jurisdiction in the present case is that specific language in Article I, Section 8, of the Constitution amounts to a contractual guarantee to Massachusetts as a condition of her ratification of the Constitution on February 6, 1788. The defendant, by his actions under the color of his office, has violated

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64. 180 U.S. 208 (1901).
65. 185 U.S. at 140.
66. 252 U.S. 416 (1920).
67. Id. 433.
68. [U.S. Const. art. I, § 8:
   The Congress shall have Power . . .
   To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
   To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
   To provide and maintain a Navy;
   To make Rules for the Government and Regulation of the land and naval Forces;
   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.]
the Commonwealth's contractual rights that a war would be declared only by the elected representatives of the people in Congress.

1. The Constitution for Present Purposes May be Considered a Compact or Contract.

The claim that the Constitution is a compact among the several states and that the national government is a limited creation of the states was made with great force in the early days of the Republic by Thomas Jefferson and James Madison and articulated in the Virginia and Kentucky Resolutions of 1798 and 1799. The Resolutions, denying the validity within the states of the Alien and Sedition Acts on the ground that they were unconstitutional, were necessitated by the refusal of Federalist judges to permit the constitutionality of those Acts to be challenged in court.69 The position of the Resolutions was vindicated historically when the Sedition Act was allowed to lapse on March 3, 1801, and by the First Amendment decisions of the twentieth century which clearly indicate that the Sedition Act would not have survived a judicial test of its constitutionality.70

The compact theory of the Constitution was articulated with great force and clarity by John C. Calhoun in 1831.71 Unfortunately, southern states put the theory to an extreme use, denying other specific requirements of the Constitution, and necessitating eventually the Civil War. In that war, national unity prevailed over the extreme view of the compact theory that states had a right to nullify federal laws and secede from the Union. In recent years, extreme claims that a state could interpose itself between the people and the national government in cases where the Supreme Court had already made clear the constitutionality of the national govern-

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70. [See, e.g., Taylor v. Mississippi, 319 U.S. 583 (1943) (unanimously reversed conviction of two Jehovah's Witnesses under a state sedition law for making such statements as: "It was wrong for our President to send our boys across in uniform to fight our enemies," and "these boys were being shot down for no purpose at all.") See also Bond v. Floyd, 385 U.S. 116 (1966). But see Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting) (upheld the Sedition Act of 1918, which, in short, prohibited criticism of the government; whereas the Sedition Act of 1798 prohibited criticism of individuals in government).]

71. [See VI R. Cralle, Works of John C. Calhoun 59-94 (1864); I W. Meigs, Life of John C. Calhoun 435 (1917).]
ment's actions, have been effectively dealt with by the Supreme Court.\textsuperscript{72}

The position of the southern states with respect to the issues resolved in the Civil War has denigrated the compact theory and makes its invocation today seem reactionary. But this historical fact should not be allowed to substitute for a logical and dispassionate assessment of the theory that was espoused by thinkers of the calibre of Jefferson and Madison. The theory itself represents a reasonable interpretation of the basis of the Republic, however unreasonable were the uses to which it was sometimes put in the Civil War period and its aftermath. Here it is claimed only that, for present purposes which do not include any attempt at nullification or interposition, the compact theory of the Constitution gives Massachusetts standing to sue in equity for an injunction against anyone who would violate the express words of the Constitution when the matter at issue was of particular relevance and importance to Massachusetts as a state at the time of ratification.

The compact theory of the Constitution can be derived from an examination of the Articles of Confederation and the Constitution. Under the Articles of Confederation, "each state retains its sovereignty, freedom and independence."\textsuperscript{73} Thus, when the new Constitution was proposed, each state retained its sovereignty. The new Constitution reflected this by providing in Article VII for its ratification by Conventions of Nine States, and further providing that

\begin{quotation}
72. See, e.g., Bush v. Orleans Parish School Bd., 188 F. Supp. 916, 922, (E.D. La.), stay denied, 364 U.S. 500 (1960). [In a consolidation of actions, including the United States against the state of Louisiana, injunctive relief was sought to prohibit enforcement of measures hastily enacted by the Louisiana Legislature to halt or fore-stall the partial desegregation of the New Orleans public schools. The first of these measures enacted, upon which the remaining measures were based, was a so-called "interposition" statute by which Louisiana declared that it would not recognize the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), or the orders of the Louisiana federal courts issued pursuant to the mandate of that case, until such time as the decision might become the law of the land by proper constitutional amendment. "Interposition" is a concept based on the proposition that the United States is a compact of states, any one of which may interpose its sovereignty against enforcement within its borders of any decision of the Supreme Court or act of Congress. The theory, in essence, denies the constitutional obligation of the states to respect those decisions of the Supreme Court or acts of Congress with which they do not agree. The court held the Louisiana statutory measures invalid on the basis that the keystone of the interposition theory—that the United States is a compact of states—was disavowed in the Preamble to the Constitution.]

73. ARTICLES OF CONFED. art. II.
\end{quotation}
the Constitution would then be established “between the States so ratifying the same.”

The new Constitution gave the states direct representation in the Senate by Article I, Section 3, providing that Senators would be chosen by the legislature of each state. Although this manner of choosing senators was changed in 1913 by the Seventeenth Amendment, no amendment can change a state’s “Equal Suffrage in the Senate.” The principle of one-man-one-vote is applicable to all state legislatures and the House of Representatives, but not to the Senate, in recognition of the special status of the Senate as originally the body to represent the sovereign states. These provisions, and indeed the entire history of the framing of the Constitution, represent a reasonable basis for the viewpoint that the Constitution is a compact among the states, and that the specific provisions of the Constitution constitute contractual guarantees to the states in return for their joining the Union. To say this much is not necessarily to imply the further extremist views of the compact theory which have been discredited by history. No claim is made here that the states may secede from the Union. No claim is made here that states may nullify federal laws which have been declared to be valid and constitutional by the Supreme Court. Nor is any claim made here that powers not expressly delegated to the national government must therefore be reserved to the states. Rather, the Commonwealth of Massachusetts is asserting only that it has a contractual right in the integrity of certain specific guarantees contained in the Constitution concerning the manner in which the obligations of war may be validly enforced against the states and their citizens. For this limited purpose only, and not as a general theory nor as a characterization of the nature of the Constitution in its entirety, does this Brief claim that certain clauses in Article I, Section 8, of the Constitution constitute contractual guarantees.

Like the Virginia and Kentucky Resolutions, the present policy of Massachusetts reflected in its Act of April 2, 1970, is to press for a judicial test of constitutionality. The Virginia and Kentucky Resolutions were necessitated by the arbitrary refusal of Federalist judges to allow a challenge in their courts of the constitutionality of the Alien and Sedition Acts. Similarly here the federal judiciary has not permitted a test of the constitutionality of the war in Southeast Asia in the normal case of a draft or service resister who has

74. [U.S. Const. art. VII.]
75. U.S. Const. art V.
raised the issue. As Mr. Justice Stewart said in dissenting from the
denial of certiorari in *Mora v. McNamara*, "We cannot make
these problems [of the constitutionality of the war] go away simply
by refusing to hear the case of three obscure Army privates." Unlike the Virginia and Kentucky Resolutions, however, the present
suit does not assert an incompatibility of an act of Congress with a
provision in the Constitution. There is no attempt to nullify any
federal law. Rather, the Commonwealth here is asserting that the
defendant has not respected the failure of Congress to declare war,
and thus the defendant has acted to nullify Article I, Section 8,
Clause 11. In so doing, he has violated a contractual obligation
owed to Massachusetts by all federal officers whose authority derives
from the Constitution.

76. 389 U.S. 934 (1967). [The petitioners were drafted into the army in 1965 and
were soon ordered to a West Coast replacement station for shipment to Vietnam.
They brought suit to enjoin the enforcement of those orders by the Secretary of
Defense and Secretary of the Army, also asking for a declaratory judgment that
the United States military activity in Vietnam was illegal. The district court dismissed
the suit, 252 F. Supp. 819 (D.D.C. 1966), the court of appeals affirmed, 373 F.2d 664
(D.C. Cir. 1967), and the Supreme Court denied certiorari in a memorandum de-
cision, 389 U.S. 934 (1967). In dissenting opinions to the memorandum decision,
Justices Stewart and Douglas argued that the constitutional issues arising out of
the undeclared war in Vietnam should be heard and decided by the Court on their
merits. The issues as stated by Justice Stewart were:

I. Is the present United States military activity in Vietnam a "war"
within the meaning of Article I, Section 8, Clause 11 of the Constitution?

II. If so, may the Executive constitutionally order the petitioners to par-
ticipate in that military activity, when no war has been declared by the
Congress?

III. Of what relevance to Question II are the present treaty obligations of
the United States?

IV. Of what relevance to Question II is the Joint Congressional ("Tonkin
Gulf") Resolution of August 10, 1964?

(a) Do present United States military operations fall within the terms
of the Joint Resolution?

(b) If the Joint Resolution purports to give the Chief Executive au-
thority to commit United States forces to armed conflict limited in scope
only by his own absolute discretion, is the Resolution a constitutionally im-
permissible delegation of all or part of Congress' power to declare war?

Id. 934-35.

77. 389 U.S. at 935.
2. The Commonwealth Has a Particular Interest in the Integrity of the Guarantees in Article I, Section 8, Clauses 11-16 of the Constitution.

Upon ratifying the Constitution in 1788, the Commonwealth of Massachusetts exchanged its own sovereign prerogatives with respect to the participation of its inhabitants in wars on foreign soil for the guarantees of the Constitution contained in Article I, Section 8. Thus, apart from any extreme characterization of the compact theory, Massachusetts may assert a particular interest in the integrity of those provisions of the new Constitution which changed a situation which was of immense and immediate importance to all of the citizens of the Commonwealth—the protection afforded them if they were to be drafted to fight in wars on foreign soil.

The Massachusetts Constitution of 1780, which antedated by nine months the coming into effectiveness of the Articles of Confederation, provided for plenary military and war powers in the Commonwealth of Massachusetts. In Chapter II, Section I, Article VII of the Massachusetts Constitution, the Governor was given military powers, to be exercised in accordance with the laws of the state, of a scope similar to those in any sovereign nation. During the subsequent period of the Articles of Confederation, the Commonwealth retained basic control over war powers and foreign policy generally, due to the facts that the Confederation had no direct taxation powers to finance any war disapproved of by Massachusetts and also that nine states out of thirteen had to have assented to any war or preparations for war or defense before it could be undertaken by the Confederation. In addition, there was no President, nor Chief Executive, nor Commander-in-Chief under the Articles of Confederation. When in 1788 the Commonwealth gave up its basic powers of self-defense and war, it in return received contractual assurances in the new Constitution that the new nation's war powers would be conducted in certain ways according to the specific provisions in Article I, Section 8.

The Massachusetts Constitution of 1780 specifically provided that no inhabitants of the Commonwealth serving in the state's militia could be transported or obliged to march out of the limits of the Commonwealth's territory "without their free and voluntary consent, or the consent of the General Court [legislature]." Thus inhabitants of the Commonwealth could not be forced to partake in foreign hostilities unless they themselves consented or unless

78. Mass Const. ch. II, § 1, art. VII (1780).
consent was specifically given (general grants of power by the legislature to the Governor were disallowed) by the legislature. Certainly this basic right of the inhabitants of the Commonwealth not to be coerced to fight in foreign hostilities unless their own legislative representatives agreed (or unless they personally volunteered) was not lightly discarded when Massachusetts ratified the United States Constitution. The necessity for legislative consent to the war powers of the Governor of Massachusetts was paralleled by the specific war powers given to the United States Congress by the new Constitution.

Massachusetts therefore has a clear and specific interest in the integrity of the Constitutional guarantees in Article I, Section 8. In its statute of April 2, 1970, the Commonwealth has reaffirmed the relationship between its Constitution of 1780 and the United States Constitution. The statute provides that “no inhabitant of the Commonwealth . . . shall be required to serve outside the territorial limits of the United States in the conduct of armed hostilities” in violation of the constitutionally established procedures of Article I, Section 8.79 In short, the statute says that a citizen may not be coerced, contrary to his freely given consent, to serve abroad in armed hostilities not declared to be a war by the legislature which represents him nor subsequently ratified (consented to) by that legislature.

3. A Specific Nexus Exists Between the Status of the Plaintiff and the Provisions of Article I, Section 8.

The Commonwealth’s assertion of a violation of specific contractual obligations under Article I, Section 8 of the Constitution is not a “generalized grievance” about the “conduct of government or the allocation of power in the Federal System.”80 Rather, it is a claim that the defendant’s action “exceeds specific constitutional limitations” and thereby demonstrates a “nexus” between the plaintiff as a state ratifying the Constitution and the precise constitutional infringement by the defendant’s actions of the Congressional prerogative to declare war.81

The Supreme Court has recognized the basic distinction in matters of jurisdiction and standing between a generalized complaint that a branch of the federal government has exceeded its

81. Id. 102-03.
constitutional powers, and a specific claim of violation of a specific constitutional limitation. In \textit{Flast v. Cohen},\textsuperscript{82} the Court found taxpayer standing with respect to a claimed infringement of the Establishment and Free Exercise Clauses of the First Amendment. In \textit{South Carolina v. Katzenbach},\textsuperscript{83} South Carolina had standing to assert an alleged violation by Congress of the specific provisions of the Fifteenth Amendment. The present suit involves the breach of specific constitutional limitations, specified in the remainder of this Brief which is here incorporated by reference, and does not rest upon generalized allegations that any branch of government has exceeded its powers.

In addition, there is a substantive nexus between the status of the plaintiff and the specific constitutional provisions at issue. It has been argued previously that the Commonwealth of Massachusetts, by virtue of its sovereign status prior to the ratification of the Constitution and also because of its Constitution of 1780, had a specific interest as a state in the nature of the war powers given to Congress by the Constitution. Here it only remains further to indicate that the provisions of Article I, Section 8, relating to war powers and the militia are governmental in nature, and hence logically linked to a state that may assert them as a matter of original jurisdiction.\textsuperscript{84} In \textit{South Carolina v. Katzenbach}, South Carolina was given standing as a matter of original jurisdiction to assert a state interest in seeing to it that its powers over elections were not defeated by federal action that went beyond the confines and procedures of the Fifteenth Amendment. While Massachusetts is not claiming any state power over war in the present case, it is saying that it gave up that power in return for a guarantee that its citizens would not be coerced into fighting a war in violation of the procedures specified in Article I, Section 8, Clauses 11 to 16. Therefore there is a logical link in the present case, similar to that in \textit{South Carolina v. Katzenbach}, between the status of the plaintiff and the

\textsuperscript{82} 392 U.S. 83 (1968).
\textsuperscript{83} 383 U.S. 301 (1966).
\textsuperscript{84} It may be noted that in \textit{South Carolina v. Katzenbach}, 383 U.S. 301, 323-24 (1966), a state was held to have a justiciable interest as a matter of original jurisdiction in a clause of the Constitution addressed to the protection of state interests such as the Fifteenth Amendment. A distinction was drawn between such clauses and those that are addressed in terms solely to individuals, such as the Due Process Clause and the Bill of Attainder Clause. In the present suit, Massachusetts is asserting rights based upon the war power clauses of Article I, Section 8, which are not addressed in terms solely to individuals.
specific Constitutional provision asserted by the plaintiff. In both cases, the plaintiff claims that a branch of the federal government has taken action which exceeds its Constitutional authority and which has thereby violated a Constitutional guarantee made to the states.

4. The Preceding Arguments Are Not Contradicted by the Curtiss-Wright Case.

Mr. Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*,85 upheld a specific delegation of authority from Congress to the President in the field of foreign relations. Unnecessary to his argument on the distribution of power between Congress and the President were some remarks he made concerning the distribution of power between the states and the national government. He remarked by way of dicta that on matters of “external sovereignty” the “colonies in their collective and corporate capacity as the United States of America” inherited external sovereignty from Great Britain. The states, however, “severally never possessed international powers.”86

This viewpoint is both historically inaccurate as well as tautological. As a form of words, it begs the question, for “sovereignty” in Justice Sutherland’s own definition was a unitary concept that could not be divided. By assuming that there was a single sovereign capacity among the colonies, his result follows that the states never possessed such sovereignty.

Historically, the colonies did not exist in any “collective” or “corporate” capacity, whether before or after the Revolution, and whether before or during the period of the Articles of Confederation. Indeed, even during the period of the Articles of Confederation the states participated at many times more actively and with more authority in foreign relations than did the Confederation itself. The Massachusetts navigation act of 1785, for example, conflicted with the Treaty with France of 1778, even in the admission of John Jay, secretary of foreign affairs.87 States such as Massachusetts, Rhode Island, New Hampshire, and Pennsylvania in the period 1784-86 passed protective tariffs which were inconsistent with the Confederation’s foreign policy and with reciprocal understandings with such countries as France that had opened all their ports

85. 299 U.S. 304 (1936).
86. Id. 316.
to American trade.\textsuperscript{88} Another illustration is furnished in a letter of
the Duke of Dorset of 1785. He wrote to John Adams, Benjamin
Franklin, and Thomas Jefferson, inquiring on behalf of Great
Britain as to their powers to negotiate a treaty of commerce. The
Duke asked them “whether you are merely commissioned by Con-
gress, or whether you have received separate powers from the
respective States.” He mentioned that the “public in general” knew
how little the authority of Congress could avail “where the interests
of any one individual State was even concerned,” and concluded
that “the apparent determination of the respective States to regu-
late their own separate interests” renders necessary the appropriate
powers for the negotiators.\textsuperscript{89} Thus, even in matters of negotiating
a treaty with Great Britain, the states were generally regarded as
possessing the ultimate sovereignty both \textit{de facto} and, due to the
insistence of the Duke of Dorset on separate powers from the states,
\textit{de jure}. Moreover, among themselves the states regarded each other
as separate nations. James Madison said of the Articles of Con-
federation in 1787: “it is in fact nothing more than a treaty of
amity of commerce and of alliance between independent and so-
vereign States.”\textsuperscript{90} It is well known that the Articles did not give the
national Congress control over taxation or trade, did not set up
a federal executive or judiciary, and gave no enforcement powers
to Congress. In this light it would be erroneous to claim that the
Articles created a sovereignty that was unified, recognized abroad,
and effective enough to eclipse the powers of the states. In reality
the situation was one of divided sovereignty in a loose federal sys-
tem, with individual states taking increasing initiative depending
upon their degree of interest in any given situation. Clearly the
situation was dramatically altered by the new Constitution, which
specifically took these sovereign powers over foreign relations away
from the states and gave them to the new national government.

D. Massachusetts Has Standing to Protect the Interests of Its
Own State Militia.

Massachusetts has a direct interest in the disposition of its own
state militia.\textsuperscript{91} The militia can be called into service only for the

\textsuperscript{88} \textit{Id.} 293-94.

\textsuperscript{89} \textit{2 Diplomatic Correspondence of the United States, 1783-89}, at 297-98 (1833).


\textsuperscript{91} U.S. Const. amend. II: [“A. well regulated Militia, being necessary to the
three purposes specified in Article I, Section 8, Clause 15 of the Constitution. A recently published article has made it very clear that the original understanding of the Framers of the Constitution was that the Federal government had no power of conscription.92 Hence, as shall be shown later in this brief, if the national government has drafted men into service, it must in effect have done so under Clause 15 by "calling forth" the militia of the states.93 The distinction between the national army and calling forth the militia is unimportant when a war has been declared by Congress, since that constitutes one of the purposes of Clause 15. However, when there has been no act of Congress, it is clear that the states can assert an interest in their own militia. The militia of a state comprises "all males physically capable of acting in concert for the common defense."94 This Brief does not contend that there is no federal conscription power, but rather that when a young man is drafted by the federal government he has in effect been "called forth" from his state militia which has been deemed to have drafted him as a surrogate for the federal government. It follows that Massachusetts has an interest in making sure that it is not being deprived of its own state militia for purposes other than the three purposes specified in Clause 15. Such a deprivation would be even more immediate and direct than the Fifteenth Amendment deprivation alleged by South Carolina which was sufficient to establish original jurisdiction in South Carolina v. Katzenbach.

The purposes for which able-bodied males of the states may be conscripted and called upon to serve under Article I, Section 8, Clause 15, are three in number: (1) to execute the Laws of the Union, (2) to suppress Insurrections, and (3) to repel Invasions. It is clear that (2) and (3) have no applicability to the war in Southeast Asia. Hence only (1) remains. However Congress has passed no law declaring war nor has it specifically and intentionally authorized the war and hence there is no warrant for able-bodied males of states to be conscripted to fight against their will in foreign hostilities.

The logical party to represent the able-bodied males of a state constituting the state militia is the state itself. The Massachusetts

security of a free State, the right of the people to keep and bear Arms, shall not be infringed."]

statute of April 2, 1970, simply restates the original understanding of the Constitution to the effect that inhabitants of Massachusetts cannot be forced against their will to fight in the Vietnam War unless pursuant to a law of Congress. The statute is a concrete embodiment of the state's interest in the preservation of its own militia. Massachusetts has standing to preserve its own militia against appropriation by the national government for unconstitutional purposes.

E. Massachusetts Has Standing to Maintain the Effectiveness of Its Representation in the Senate.

A separate ground for the Commonwealth's standing in the present suit is its interest in maintaining the effectiveness of its representation in the Senate. The United States Senate has not declared war. If war nevertheless is prosecuted, the Senate has been deprived by the defendant of part of its Constitutional power. In turn, the Commonwealth's interest in maintaining the effectiveness of its representation in the Senate has been impaired.

The Commonwealth has a legal interest in the effectiveness of the Senate. Its equal suffrage in the Senate cannot be changed even by amendment to the Constitution.95 Clearly this requirement of Article V could not be circumvented by a constitutional amendment depriving the Senate of all of its powers under Article I. Similarly, the powers of the Senate cannot constitutionally be curtailed short of an amendment, as by the defendant in the present case, without opportunity being given to the plaintiff for judicial redress. In brief, the plaintiff here is asserting "a plain, direct and adequate interest in maintaining the effectiveness of [its] votes"96 when it invokes its representation in the Senate and its right of suffrage in that body as a basis for its standing to bring the present suit.

F. The Present Suit Should Not Be Remitted to a Lower Court.

The Supreme Court can withhold original jurisdiction when there is another forum "to which the cause may be remitted in the

95. U.S. CONST. art. V. [But a state may consent to such deprivation, and thus such an amendment is not impossible, albeit improbable.]
interests of convenience, efficiency and justice."97 None of these criteria can be met in the present suit.

There would be no gain in convenience nor in efficiency if a lower federal court were to first hear this cause, since it would undoubtedly be appealed to the Supreme Court for review. There is some doubt whether the Supreme Court could refuse to hear the case on review under its certiorari power, as that would deprive a state of its right to be heard in the Supreme Court under Article III, Section 2.98 Moreover, the Framers of the Constitution may have provided for original jurisdiction not merely to give a state an appropriate forum commensurate with its dignity, but also to ensure that if necessary the Supreme Court itself be exposed to direct trial testimony in some cases which could be of fundamental importance to the nature of the Union. Not all state claims are of this level of significance, but the probability can be high as exemplified in South Carolina v. Katzenbach and in the present case.

Most importantly, justice would not be served by delaying the final disposition of this cause by remitting it to a lower federal court. For it is part of the Commonwealth's allegation that its inhabitants are being killed in action in the war in Southeast Asia. A delay in the disposition of this case would undoubtedly result in additional lives being lost in the war. Even if only a single life were threatened, that possibility has sufficed in the past for the Supreme Court to expedite its procedures to arrive at a timely disposition of the legal rights of all concerned.

G. In the Alternative, the Question of Original Jurisdiction Should Be Joined to the Merits.

It has been argued that Massachusetts has standing as a matter of right to have its case heard in the original jurisdiction of the Supreme Court. There is jurisdiction over the parties to this case. With respect to subject-matter jurisdiction, it has been argued that the Commonwealth more than meets all precedents and requirements for original jurisdiction.

If the Supreme Court, however, should find that the question of jurisdiction over the subject matter in the present case is inextricably tied in with the merits of the substantive controversy—for

98. U.S. CONST art. III, § 2: ["In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction."]
example, the nexus between the Commonwealth’s status and the specific provisions of the Constitution that allegedly have been violated—then it is argued in the alternative that the Supreme Court postpone its decision on jurisdiction until all parties have had the opportunity to present their arguments orally on the merits. After all the evidence is in, the Court could rule whether jurisdiction over the subject matter has been established.

II. THE PRESENT CASE RAISES NO ISSUE OF INTERPOSITION, NULLIFICATION OR PREEMPTION.

The defendant may attempt to argue that, because of its statute of April 2, 1970, Massachusetts is attempting to nullify federal law, to interpose itself between the federal government and the citizens, or to intrude upon an area which is preempted by the federal government. This argument if raised would be a red herring, since the Massachusetts statute is not a necessary part of the present suit. At best it reflects some of the rights and interests which give Massachusetts standing. However, all of Massachusetts’ rights and interests, as detailed in Part I of this brief, exist entirely apart from the statute. The interest of the state as a proprietor, its interest as parens patriae, its contractual interest, its interest in the effectiveness of [its representation in] the Senate, its interest in the integrity of its own militia, and so forth, do not depend upon the existence of the statute. These interests, wholly without any statute, permit Massachusetts to be a plaintiff in this Court.

As a plaintiff before the Supreme Court, Massachusetts can seek judicial redress based upon the United States Constitution. The mere act of seeking judicial relief based upon the Constitution can in no way be said to constitute nullification, interposition, or an intrusion upon an area constitutionally preempted by the federal government.69

III. THE PRESENT CASE IS NOT BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY.

As was recently ruled by the United States Court of Appeals for the Second Circuit, the doctrine of sovereign immunity does not bar a challenge to the constitutionality of the war in Southeast

Asia. For sovereign immunity does not bar an action, such as the present case, where it is alleged that officers of the government have exceeded their constitutional authority. With specific respect to a state suing an officer of the government as a matter of original jurisdiction, the present suit is in the same position as the case of *South Carolina v. Katzenbach*.

**IV. THE PRESENT CASE PRESENTS JUSTICIABLE QUESTIONS.**

Massachusetts' claims in the present suit are clearly justiciable. First, the claim presented and the relief sought are of the type which admit of judicial resolution. Second, the issue presented is not a so-called "political question."

1. **Claim and Relief Sought Admit of Judicial Resolution.**

Massachusetts' claims possess the general attributes of justiciability because there is a duty which "can be judicially identified and its breach judicially determined, and . . . protection for the right asserted can be judicially molded." The defendant has a duty to obtain a Congressional declaration of war, or a specific and intentional Congressional authorization of war, before sending men to fight in a war in Southeast Asia. That duty has been breached. Judicial relief for Massachusetts' claims can be molded by enjoining the defendant from continuing his breach of duty, or by declaring that the defendant's actions are in violation of the Constitution, or both. (The Declaratory Judgment Act provides that "any court of the United States . . . may declare the rights . . . of any interested party . . . whether or not further relief is or could be sought."

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100. Berk v. Laird, 429 F.2d 302 (2d Cir., 1970). [Appellant, an enlisted private first class in the United States Army, received military orders sending him to South Vietnam and in this action contended that certain executive officials of the United States Government exceeded their constitutional authority in commanding him to participate in military activities not properly authorized by Congress.]


2. The "Political Question Doctrine" Does Not Apply.

The "political question doctrine," whatever its validity or justification in other cases, cannot be invoked to defeat Massachusetts' right to a determination of the merits of the present dispute without causing a drastic and deleterious alteration of the equilibrium set up among the three branches of the federal government. At the heart of the present dispute is the issue of the distribution of power between Congress and the Executive. It is this Brief's contention that the war in Southeast Asia is unconstitutional because it has neither been declared nor specifically and intentionally authorized by Congress, and hence the Executive Branch has acted unconstitutionally in prosecuting the war. Although the "political question doctrine" has appeared in many and diverse cases, no Supreme Court case has been found where that doctrine has been held applicable to the issue of the distribution of power between Congress and the Executive. Quite the contrary, there have been numerous cases of historical significance involving the issue of the distribution of power between Congress and the President where the "political question doctrine" was not even seriously involved as posing a potential objection to justiciability.105


Included among the numerous cases involving the distribution of powers between Congress and the President where the political question doctrine was not invoked have been a number of cases involving the war powers. The legality of the seizure of prizes and the war power of Congress were adjudicated in Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800) and Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801). The legality of the seizure of prizes under the international law of war when there had been no Congressional declaration of war was adjudicated in The Prize Cases, 67 U.S. (2 Black) 655 (1863). The international law of prize in war was enforced against the Navy in The Paquete Habana, 175 U.S. 677 (1900). The personal liability of a naval captain who seized a prize under the direct order of the President in time of war, but contrary to an act of Congress, was adjudicated in Little v. Barreme 6 U.S. (2 Cranch) 169 (1804). Numerous other cases could be cited in which the Supreme Court heard and decided issues involving the war power. See, e.g., Woods v. Miller Co., 333 U.S. 138 (1948); Fleming v. Mohawk Wrecking Co., 331 U.S. 111 (1947); Korematsu v. United States, 329 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); United States v. Macintosh, 283 U.S. 605 (1931); Commercial Trust Co. v. Miller, 262 U.S. 51 (1923); Hamilton v. Kentucky Distilleries & W. Co., 251 U.S. 146 (1919); Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163 (1919); The Pedro, 175 U.S. 354 (1899); Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1870); Texas
The reason for the absence of the "political question doctrine" from cases where the issue is the distribution of power between Congress and the Executive is clear and compelling. Whatever else the term "political question" may connote, its core meaning is that the Constitution has committed the resolution of a particular issue to a political department rather than to the judiciary. But when the very question is which branch of government, the Executive or the legislative, has the constitutional authority to resolve a particular issue, then there is obviously no constitutional commitment of the power of final decision to either of the political branches. Rather, there is a traditional issue for the judiciary—the determination of which branches have what powers. Indeed, in a case involving the distribution of power between Congress and the Executive, the Supreme Court has a duty to be the umpire or referee so as to make sure that the constitutional equilibrium of power in the federal government is not destroyed. If the third branch of government were to abstain from the role of umpire, there would be a flat denial of the possibility of the rule of law in the government of the United States. Judicial abstention in such a case would mean that the question of the distribution of power between the legislature and the Executive would not be decided on legal grounds but would be resolved by the naked force of power that either branch could muster. Appeals would be made to popular emotions; access to mass communications media would become of paramount importance; and even the spectre of a police state could be raised by the realization that one man is Commander-in-Chief of the world's most powerful armed forces. Perhaps a basic structural, though unnoticed, reason why such a fight for power has never occurred in the history of the United States is that the Supreme Court has never disqualified itself from the position of authoritative arbiter in respect of issues of the distribution of power between Congress and the President. If it became known as a result of the present case that the Supreme Court were disqualified, and that there was thus no legal standard by which the judiciary could resolve a legislative-executive issue, then there might be a rapid disintegration of the equilibrium between the two branches that constitutes the heart of the American system of checks and balances.

For this fundamental reason, this Brief contends that there is


not, and cannot be, a barrier to the present suit on the basis of the so-called "political question doctrine."

The same result follows from the other tests of "political questions" mentioned in *Baker v. Carr.* 107 For Massachusetts here is asking for an interpretation of the Constitution. "Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate branch of government,' nor does it involve an 'initial policy determination of a kind clearly for nonjudicial discretion.'" 108 Moreover, a constitutional determination by its very nature involves "judicially manageable standards." 109 The standards, indeed, derive from Clauses 11-16 of Article I, Section 8 of the Constitution, and are spelled out specifically in later portions of this Brief. 110 Additionally, a judicial resolution of Massachusetts' claim will not result in "multifarious pronouncements by various departments on one question," 111 for it is the responsibility of the Supreme Court to act as the ultimate interpreter of the Constitution. 112 Finally, the test mentioned in *Baker v. Carr,* of "an unusual need for unquestioning adherence to a political decision already made," 113 has never been a factor in any case involving the constitutionality of the war power or of the distribution of power between the legislative and executive branches. But even if the defendant in the present case were to claim that a decision by the Supreme Court that the war in Southeast Asia is unconstitutional

107. 369 U.S. 186, 217 (1962). [The Court concluded that prominent on the surface of any case held to involve a political question is at least one of the following: "[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a Court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."]


109. *Id.*

110. [See pp. 130-32 infra.] We are informed that the government conceded that there are judicially manageable standards for resolving the question of the constitutionality of the war in the case of Berk v. Laird, No. 70-C-697 (E.D.N.Y., Sept. 16, 1970).


would have serious domestic or international consequences, such a suggestion ultimately rests upon an assumption which is impermissible under a Constitution that gives the lawmaking and war-declaring powers to Congress: it rests upon the assumption that Congress cannot be trusted to decide what future steps the United States should take in Southeast Asia and to consider the domestic and international consequences of various steps. If the Supreme Court were to rule that the war is unconstitutional, it would then be up to Congress to decide whether and to what extent continued hostilities should be specifically and intentionally authorized in Southeast Asia. Congress might decide to authorize the continuation of the war for an unlimited amount of time. Or, it might authorize the continuation of hostilities for a length of time sufficient to ensure that American forces are withdrawn in an orderly manner, in full consultation with the Commander-in-Chief as to the domestic and international consequences of the necessary rate and manner of withdrawal. Whatever Congress may decide, it can be trusted to act responsibly in light of all domestic and international political consequences, since it is the body authorized by the Constitution to make these decisions in the first place.

V. UNDER THE MILITIA CLAUSES OF THE CONSTITUTION CONSCRIPTS CANNOT BE SENT ABROAD TO FIGHT IN AN UNDECLARED WAR.

As argued in Part I of this Brief, Massachusetts has an interest in the disposition of its own state militia.\(^{114}\) The "militia" clauses of the Constitution, Article I, Section 8, Clauses 15 and 16, are part of a comprehensive scheme designed by the Framers to regulate the armed services of the United States. These clauses cannot be read out of the Constitution, but must be given full force and effect. The logical party to assert the integrity of these clauses is a state, since a militia, as contrasted with the land and naval forces of Clauses 12-14, is preeminent a creature of the states to be called forth by Congress only for the three purposes specified in Clause 15.

This Brief relies on the militia clauses only for the following narrow purpose: to argue that there is no constitutional authority to send citizens who have been conscripted into the armed services to serve in hostilities abroad in the absence of explicit Congressional authorization. There is no attempt made here to argue that federal

\(^{114}\) U.S. Const. Amend. II. [See pp. 109-11 supra].
conscription is invalid, or that Congress does not have the power to send conscripted soldiers abroad. Rather, Massachusetts can assert the narrow, though real and tangible interest in the preservation of its own militia to the effect that its militia cannot be injured or threatened with injury for an unconstitutional purpose.

At the basis of this position is the scheme envisaged by the Framers of the Constitution and spelled out with great care in Article I, Section 8, Clauses 11-16, Article II, Section 2, Clause 1, and the Second Amendment. On the one hand, Congress could "raise and support Armies," and "provide and maintain a Navy," but, as was well understood by all the Framers without exception, there was to be no federal power of conscription.116 This is evidenced even by the definition in the dictionaries of the period of the word "army," which signified voluntary enlistment.116 By contrast, the term "militia" signified the whole body of men physically able to serve in the military, or as defined in United States v. Miller,117 "all males physically capable of acting in concert for the common defense." Thus, on the other hand, Congress was given the power in Clauses 15 and 16 to call forth the militia for three fundamental purposes: to execute the laws of the Union, to suppress insurrections, and to repel invasions. There would have been no need for these clauses if Congress, in raising an army, could conscript citizens for service. Rather, the existence of these clauses, in addition to the evidence of all the debates and understanding of the Framers of the Constitution118 demonstrates that Congress was given two alternative types of power. Congress could raise and appropriate money for a volunteer army and navy (with a two-year limit on the term of army appropriations so as to guard against a permanent standing army); or if Congress needed the services of larger numbers of soldiers it could call forth the militia upon whose large numbers the nation was to rely for large scale military actions.119 The volunteer army was not limited in terms of its func-

116. See J. Murray, New English Dictionary on Historical Principles (1888-1928); W. Perry, Royal Standard English Dictionary (1796); N. Webster, American Dictionary of the English Language (1828).
118. Friedman, supra note 115.
119. On this point, Friedman, id., has included much history taken from the Constitutional Convention, the state ratifying conventions, the Federalist Papers, and other sources of the period.
tions, undoubtedly on the basis that a freely consenting individual could choose to serve in hostilities abroad if Congress was willing to pay the price for inducing him to do so. But a conscripted man, called forth from the state militia to serve in the national armed services, could be compelled only within the purposes specified in Clause 15.\footnote{120}

Although on several occasions when a large scale military force was deemed necessary, Congress has purported to draft citizens into the national armed services, it is important to be clear about the underlying constitutional mechanism involved. There is no constitutional authority given to Congress to conscript citizens for armed service, and hence, apart from what Congress may have appeared to have been doing, in fact any selective service law or selective draft law was a "calling forth" of the militia into national service. Since all able-bodied males are ipso facto members of the states' militias, to draft them means to call them forth from their states' militias to serve in the national army.\footnote{121}

There has been considerable controversy whether this conscription process (which amounts to "calling forth" the militia) can occur in peacetime.\footnote{122} Clause 15 gives Congress the power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Particularly in this day when mechanized and airborne warfare may break out suddenly, the language of Clause 15, read in the light of the Necessary and Proper Clause,\footnote{123} does not necessarily forbid peacetime conscription for the purpose of preparing for any of the eventualities contemplated in Clause 15. But while peacetime conscription may be legal in order to prepare for the possibility of having to execute a law of the Union, suppress an insurrection, or repel an invasion, this does not mean that the militia can be sent abroad to fight in a war where there is no law to execute which declares or specifically authorizes the war. Otherwise the limitation of purposes in Clause 15 would effectively be read out of the Constitution.

\footnote{120}{The limited nature of the militia is spelled out by a former attorney general. See 29 Op. Att'y Gen. 322 (1912).
\footnote{121}{The same is not true of the National Guard, which is a voluntary organization whose members have agreed to serve in the federal army when called upon to do so.
\footnote{122}{See, e.g., United States v. Crocker, 420 F.2d 307 (8th Cir. 1970); Freeman, \textit{The Constitutionality of Peacetime Conscription}, 31 Va. L. Rev. 40 (1944); Friedman, \textit{supra} note 115.
\footnote{123}{U.S. Const. art. I § 8, cl. 18.}
Large numbers of the militia of Massachusetts have (in effect) been called forth under the Military Selective Service Acts to participate in the federal armed forces. A significant portion of these draftees have been ordered to participate in the war in Southeast Asia. It is with respect to this latter group that there has been an unconstitutional usurpation of Massachusetts' militia. For the war in Southeast Asia fits none of the three purposes specified in Clause 15. There is no "insurrection" or "invasion" involved. And the war is not in execution of any law of the Union.

If Congress were to declare war under Article I, Section 8, Clause 11, such declaration would be a "law" of the Union under Clause 15. The militia called forth under Clause 15 would thus be obliged to fight at home or abroad in the service of the federal armed forces in direct execution of the law that declared the state of war.

Alternatively, if Congress were to pass any other law specifically authorizing the forces of the United States to fight in the war in Southeast Asia, that law also would be sufficient under Clause 15. However, as shall be specified at greater length later in this brief, Congress has neither declared war nor intentionally and specifically authorized by any other law the utilization of the militia for fighting in the war in Southeast Asia. In particular, military and defense appropriations cannot constitute such a law under Clause 15, because they are "executed" by the mere order to the Treasury to disburse funds. There is nothing more to execute once the funds have been disbursed. Hence, sending soldiers to fight in a war has nothing to do with executing an appropriations bill.

VI. THE MILITARY CAMPAIGN CURRENTLY BEING WAGED BY UNITED STATES FORCES IN SOUTHEAST ASIA IS UNSUPPORTED BY A CONGRESSIONAL DECLARATION OF WAR OR BY A SPECIFIC AND INTENTIONAL CONGRESSIONAL AUTHORIZATION OF WAR AND CONSEQUENTLY IS AN UNCONSTITUTIONAL EXERCISE OF EXECUTIVE POWER.

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125. Although the reasoning has been criticized, the Selective Draft Law Cases, 245 U.S. 366 (1918), reached the proper result in upholding conscription during World War I. Such conscription was in effect a calling forth of the militia for the purpose of executing the law which declared war and specifically authorized the use of armed forces against Germany.
A. Military Hostilities of the Scope and Duration of the Present
Indochina War Effort by the United States Are Constitutionally
Dependent on a Declaration of War by Congress.

1. The Congressional Power to Declare War.

The Congressional power to declare war is the result of a
carefully and forcefully drawn division of the warmaking power
between the Executive and Legislative organs of the Republic; the
historical origin and contemporary consequences of that division
give it special importance in the general scheme of the separation
of powers.

While Article II, Section 2, Clause 1, makes the President the
“Commander-in-Chief of the Army and Navy of the United States,
and of the militia of the several states, when called into the actual
service of the United States,” Article I, Section 8, Clause 11, grants
to Congress the power “to declare War, grant letters of Marque
and Reprisal and Make Rules concerning Captures on Land and
Water,” and Clause 15 grants to Congress the power to call forth
the militia for three specified purposes.

It is not by accident that this distribution of authority came to
be plainly stated. The draftsmen of the Constitution were the
beneficiaries of experience under the British Crown where the
powers of commitment to war and prosecution of war were joined
in the office of the King, and they consciously sought to avoid the
abuses which that joinder had indulged. Abraham Lincoln’s reading
of the Founding Fathers’ lodging of the power to declare war in
Congress conformed to this view. Lincoln said:

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 oppres-
sions; and they resolved to so frame the Constitution that
no one man should hold the power of bringing this
oppression upon us.\(^{126}\)

Justice Story’s view of the policies underlying Article I, Section 8,
Clause 11, was very similar:

[The history of republics has but too fatally proved, that
they are too ambitious of military frame and conquest, and

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too easily devoted to the views of demagogues, who flatter their pride, and betray their interests. It should therefore be difficult in a republic to declare war; but not to make peace. The representatives of the people are to lay taxes to support a war, and therefore have a right to be consulted, as to its propriety and necessity . . . . This reasoning appears to have had great weight with the convention, and to have decided its choice. Its judgment has hitherto obtained the unqualified approbation of the country.\textsuperscript{127}

The Framers' fear of executive license in committing the republic to war was so great that during the Constitutional Convention, Elbridge Gerry, responding to a suggestion to lodge the war power in the Presidency, stated that he had "never expected to hear in a republic a motion to empower the executive alone to declare war."\textsuperscript{128}

Correlatively the commander-in-chief power of the President was understood to be limited in the sense described by Alexander Hamilton in the Federalist No. 69:

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy; while that of the British king extends to the \textit{declaring} of war and to the \textit{raising} and \textit{regulating} of fleets and armies,—all of which, by the Constitution under consideration, would appertain to the legislature.\textsuperscript{129}

The Supreme Court early recognized that power given to Congress was the exclusive means whereby the nation was to be committed to war. \textit{Talbot v. Seeman,}\textsuperscript{130} involved the legality of the seizure of a French ship, the \textit{Amelia}:

In order, then to decide on the right of Captain Talbot, it becomes necessary to examine the relative situation of the United States and France at the date of the recapture.

The whole powers of war being by the Constitution of

\textsuperscript{127} 2 J. Story, \textit{Commentaries on the Constitution of the United States} 89-90 (2d ed. 1851).
\textsuperscript{128} 2 M. Farrand, \textit{Records of the Federal Convention} 318 (1929).
\textsuperscript{129} The \textit{Federalist} No. 69, at 490-31 (H. Lodge ed. 1888) (A. Hamilton).
\textsuperscript{130} 5 U.S. (1 Cranch) 1 (1801).
the United States, vested in Congress, the acts of that body
can alone be resorted to as our guides in this inquiry . . . \textsuperscript{131}

As grave and great as were the consequences of the commitment
of our nation to war in 1787, the Vietnam war affords staggering
evidence of the proportions that a commitment to war can assume
today. In Vietnam, Laos and Cambodia we are confronting no
major world power, and no nuclear weapons have been employed.
Yet, over one-half million Vietnamese and over forty-five thousand
Americans have lost their lives. The war has cost over one hundred
billion dollars, and has become the most protracted war in
American history.

Thus, the policies which moved the draftsmen of the Constitu-
tion to lodge with Congress the power to place our country at war
speak with greatly magnified force in our own era. Yet, with the
perversity that not infrequently characterizes the affairs of men,
it is in our own era that the Executive Branch has first acted at
serious odds with the express constitutional provision which places
that power in the hands of the legislative branch.

This observation is of more than historical significance, since
apologists for the Executive prosecution of an undeclared war in
Southeast Asia have included the claim that Presidents have fre-
quently engaged in military operations without consulting or
receiving the authorization of Congress. However, it is extremely
doubtful that even a consistent, long-term practice of the Executive
Branch to violate an express requirement of the Constitution could
become self-validating. In \textit{Youngstown Sheet & Tube Co. v. Saw-
yer},\textsuperscript{132} for example, the Supreme Court responded to the propo-
sition that Presidents had in the past acted without Congressional
authority, as follows: "But even if this be true, Congress has not
thereby lost its exclusive constitutional authority to make laws
necessary and proper to carry out powers vested by the Constitution
. . . ."\textsuperscript{133} In any event, however, Presidential action until 1950
has demonstrated compliance with the Constitutional requirement
that a commitment of this nation to a major war must rest upon
a formal Congressional act declaring or specifically authorizing that
commitment.

The United States has been involved in eight major wars: The
War of 1812, the Mexican War of 1846-48, the Civil War, the

\begin{itemize}
\item \textsuperscript{131} \textit{Id.} 12.
\item \textsuperscript{132} 943 U.S. 579 (1952).
\item \textsuperscript{133} \textit{Id.} 588-89.
\end{itemize}

The following chart demonstrates the levels of the Vietnam war with others in our history:134

<table>
<thead>
<tr>
<th></th>
<th>No. of Troops</th>
<th>Deaths</th>
<th>Wounded</th>
<th>Total Casualties</th>
</tr>
</thead>
<tbody>
<tr>
<td>World War II</td>
<td>16,353,659</td>
<td>407,316</td>
<td>670,846</td>
<td>1,078,162</td>
</tr>
<tr>
<td>Civil War (Union</td>
<td>2,213,363</td>
<td>364,511</td>
<td>281,881</td>
<td>646,392</td>
</tr>
<tr>
<td>Casualties)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vietnam (approximations)</td>
<td>10,000,000</td>
<td>45,000</td>
<td>300,000</td>
<td>345,000</td>
</tr>
<tr>
<td>World War I</td>
<td>4,743,826</td>
<td>116,708</td>
<td>204,002</td>
<td>320,710</td>
</tr>
<tr>
<td>Korea</td>
<td>5,764,143</td>
<td>54,246</td>
<td>103,284</td>
<td>157,530</td>
</tr>
<tr>
<td>Mexican War</td>
<td>78,718</td>
<td>13,283</td>
<td>4,152</td>
<td>17,435</td>
</tr>
<tr>
<td>War of 1812</td>
<td>286,730</td>
<td>2,260+</td>
<td>4,505</td>
<td>6,765+</td>
</tr>
<tr>
<td>Spanish American</td>
<td>306,760</td>
<td>2,446</td>
<td>1,662</td>
<td>4,108</td>
</tr>
<tr>
<td>War</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Prior to the Korean conflict, each maximum commitment of American military resources to armed hostilities received the explicit approval of the Congress.

Thus, it is possible to distill from the American historical experience the standard which Congress has inevitably followed before committing this nation’s military resources to prolonged and bloody combat.

The War of 1812 was authorized by an explicit Congressional declaration of war, dated June 18, 1812, which recited:

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that War be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form

as he shall think proper, and under the seal of the United States, against the vessels, goods, and effects of the government of the said United Kingdom of Great Britain and Ireland, and the subjects thereof. 135

The Mexican War of 1846-1848 was authorized by an explicit Congressional declaration of war, dated May 13, 1846, which in terms authorized the President to use the armed forces of the United States to prosecute the war. 136

The commitment of the nation's military resources to the Civil War was authorized by a joint resolution of Congress, dated August 6, 1861, which stated:

And be it further enacted, That all the acts, proclamations, and orders of the President of the United States after the fourth of March, eighteen hundred and sixty-one, respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States. 137

The Spanish-American War was authorized by a joint resolution of Congress, dated April 20, 1898, which was followed by a formal declaration of war on April 25, 1898 explicitly authorizing the President to use the armed forces of the United States to prosecute the war. 138

The First World War was authorized by an explicit Congressional declaration of war, dated April 6, 1917, which in terms authorized the President to employ the armed forces to carry on war against Germany. 139

The Second World War was authorized by explicit Congressional declarations of war, dated December 8, 1941 (Japan 140) and December 11, 1941 (Germany 141 and Italy 142), in terms directing the President to use the armed forces to carry on war.

Thus, in every prolonged and bloody military struggle in this nation's history prior to Korea the principle was reaffirmed that Congress must, in some explicit form, manifest its unequivocal will to embark this nation upon major armed hostilities as a constitutional precondition to involving this nation in war, whether it be de jure or de facto.

The Korean War of 1950, like the war in Southeast Asia today, was not a war declared by Congress nor specifically and intentionally authorized by that body. It was brought to an end as the result of the election of President Eisenhower in 1952. Unfortunately its constitutionality was not challenged in the courts, for the war set in motion a vast military-industrial complex, of which President Eisenhower warned the nation as he left office in 1960,\footnote{"[W]e must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist." N.Y. Times, Jan. 18, 1961, \S 1, at 22, col. 4.} which welcomed an increasing unauthorized commitment by the Executive Branch in the war in Southeast Asia. The tragic cost and waste of the Vietnam War might have been averted had it been made very clear in 1950 that the Executive cannot unilaterally plunge this nation into war. Today there is a second chance—to assert the primacy of the Constitution in matters of the engagement of this nation in a major war. A third chance may never come, because the next war could be suicidal for the human race.

Thus, the Congressional power to declare or specifically authorize war has been recognized in every major war prior to 1950. Historical precedent, the intention of the Framers, and the text of the Constitution all reinforce the proposition that it is Congress, and not the President, which is required by the Constitution to declare or intentionally and specifically authorize war.

2. The Power of the President.

Whatever power the President, acting alone, may have to deploy the armed forces of the United States in emergency situations, his power does not extend so far as to wipe out Congressional powers over a major war such as the present war in Southeast Asia. In the present case the issue is not presented whether the President is justified to deploy troops abroad in situations such as the protection of American civilians, or to use the armed forces in emergency or near-emergency situations. Historically the President has asserted
his powers as Commander-in-Chief for some such situations, and at other times he has sought specific Congressional authorization. It is not relevant here whether, as a moot historical point, all of these past situations were valid under the Constitution. Whether they were or not, none of them approached the level of magnitude of the Vietnam War.

Nor is it relevant to the present case whether in relation to the Gulf of Tonkin incident in 1964 the President was justified in using American forces to repel an attack when there was no time to obtain a Congressional declaration or specific authorization of war. For the point at issue in this case is whether, even though the President has the Constitutional authority to repel a sudden attack, he can then engage in a long and major war without at any point obtaining a Congressional declaration or a specific authorization of war. Obviously the President cannot do so. Rather, if he wishes to engage in a war subsequent to repelling an attack, he must obtain a Congressional declaration or specific and intentional authorization of war. This was illustrated when, after engaging in action to repel the Japanese attack on Pearl Harbor on December 7, 1941, the President proceeded to obtain a declaration of war against Japan the very next day.

Congress' constitutional power to decide whether the nation shall fight a war such as that in Southeast Asia would effectively be read out of the Constitution if the President, after repelling an attack, could then himself decide to engage in a long and major war. Particularly because not every attack need lead to a war—viz. the attack on the U.S.S. Pueblo in 1968—it is important that Congress' power to decide whether to go to war not be read out of the Constitution. Moreover, it is sometimes unclear whether an attack alleged by the President has in fact occurred, and for this reason too, Congress' power to make the decision on war must be maintained.

It is sometimes claimed that Presidential powers in the field of foreign affairs give the President the constitutional right to fight a war that has not been declared or specifically and intentionally authorized by Congress. 344 Although there has been discussion over the years as to the extent of the President's general foreign affairs powers, it is clear that one foreign affairs power which does not belong to the President is the power to decide whether this nation

shall engage in a war. This power was specifically given to Congress by the Framers of the Constitution. Any claim that the President can operate unconstitutionally in the area of "foreign relations" has been destroyed by Reid v. Covert, which stated that "The United States is entirely a creature of the Constitution. Its power and authority have no other source."

Nor can it be argued that the President's status as commander-in-chief makes the Vietnam war constitutional. The executive's commander-in-chief claim in this respect was squarely rejected by the Second Circuit Court of Appeals in Berk v. Laird, as it also was by the District Court of the Eastern District of New York in Orlando v. Laird. It is clear that the commander-in-chief power cannot give the President the power to fight a war that has not been declared nor specifically and intentionally authorized by Congress. Were the situation otherwise, the President, as commander-in-chief, could usurp Congress' power to decide whether this nation shall fight a war. Such a result would (1) violate the teaching of Youngstown Sheet & Tube Co. v. Sawyer, where it was ruled that the commander-in-chief power cannot enable the Executive to usurp a Congressional power; (2) create military supremacy by making the President, in his military role, supreme over the civilian Congress which has the constitutional authority to decide whether we fight a war; and (3) eliminate a safeguard upon which the state ratification conventions relied when ratifying the Constitution—the safeguard that the President's power as commander-in-chief is subject to Congress' power to declare war. The commander-in-chief power, then, does not empower the President to fight wars that have not been authorized by Congress. Rather it only gives him the power to direct our military strategy and tactics in military actions that have been authorized by Congress.

Moreover, it is plainly wrong to argue, as the Executive recently has, that as commander-in-chief the President has the power to decide to fight a Southeast Asian war of whatever duration and scope he thinks to be necessary for the protection of American troops. This Executive claim is a bootstrap argument because it would enable the Executive to indefinitely continue fighting a war which was
illegal in the first place. Precisely because it is an argument which enables the Executive to fight a war for years and years without at any time obtaining a Congressional declaration or specific and intentional authorization of war, it nullifies Congress' constitutional power to make the decision on whether the nation shall fight a war, how big a war shall be fought, and how long a war should be fought. The President, as commander-in-chief, can repel an immediate attack on American troops when there is no time to obtain a Congressional declaration or specific and intentional authorization of war. But he cannot then continue to fight as big a war as he pleases, for as long as he pleases, against whomever he pleases, wherever he pleases, on the theory that he is protecting his troops. Rather, he must obtain the requisite Congressional declaration of war or its equivalent.

B. There Has Been No Congressional Declaration of War or Its Equivalent with Respect to Southeast Asia.

In a prior section of this Brief it has been shown that the declaration of war clause was placed in the Constitution in order to accomplish a very specific purpose.\textsuperscript{151} The Framers were afraid of the dangers of the Executive getting this nation into war. They therefore wished to ensure that Congress, rather than the President, have the power to decide on war, and they carried out their intent by giving Congress the power to declare war. The entire purpose of the declaration of war clause is to ensure that Congress make the decision on war.

Both constitutionally and practically, it is of vital importance to ensure that the purpose of Article I, Section 8, Clause 11, be preserved in its full integrity. When Congress formally declares a limited or a general war, the purpose of the clause is clearly preserved because Congress is making the decision on war. But Congress need not necessarily issue a formal declaration of war in order for the purpose of the Clause to be preserved. Rather, there can be a Congressional directive which constitutes the equivalent of a formal declaration of war.

To be the constitutional equivalent of a declaration of war, however, the directive must meet three criteria which ensure the preservation of the purpose that Congress be the body which makes the decision whether to go to war:\textsuperscript{152}

\textsuperscript{151} See pp. 122-23 \textit{supra}.

\textsuperscript{152} [The authors here rely on the purpose and wording of U.S. Const. art. I, § 8, cl. 11.]
(1) The Congressional authorization must be *intentional*. The authorization of military hostilities must be so framed and presented that an intelligent and conscientious legislator would apprehend that assent to the measure constitutes an authorization of war, and as such, would be constitutionally determinative of executive power to prosecute such hostilities. Intentionality is not to be haphazardly implied from vague and ambiguous evidence of Congressional behavior over a period of time.

(2) The Congressional authorization must be *specific*. That is an authorization for a major war must specifically say that it authorizes the President to use the armed forces of the United States against a certain enemy or against named forces and territory. It may be noted that this has been done by every declaration of war in American history. It is not enough for the authorization to merely say that the President may, if he wishes, conduct war. It would not be enough, for example, if Congress were to authorize the President "as he deems necessary to use all necessary force to preserve peace and freedom throughout the world." This enactment would be so broad as to constitute, in effect, a constitutional amendment, since it would give the President the power of decision on whether or not to engage in war against any nation or in any locality. Surely, if an authorization of military force is to be considered the constitutional equivalent of a declaration of war, it is reasonable to require that the authorization be specific at least in its designation of the entities against which or the forces and territories against which the force may be employed. Any less concrete enactment could only be conceived of as a transfer of the power to commit the nation to war from Congress to the President.

(3) The Congressional authorization must be the *product of a separate and distinct choice by Congress that is detached from other legislation*. The declaration of war clause, Article I, Section 8, Clause 11, stands alone. Its solitary position indicates that the Framers wanted separate and distinct action by Congress in order to declare war. It would have been preposterous to the Framers to imagine that a declaration of war could be inferred from action that Congress has taken on other legislative matters. It is critical that an authorization of war be separate and distinct from other legislation rather than be an inferred result from legislation which is independently necessary for preserving the national security, such as defense appropriations or selective service. If authorization can be inferred from acts which are independently necessary for the national security, then Congress will be forced into the position of
either refusing to pass these vital acts or else risk having their passage be construed as authorization of a major war. Indeed in obvious deference to the constitutional scheme envisaged by the Founders, every declaration of war by Congress in this nation's history has been a separate and distinct enactment or joint resolution, untied to any other legislation and certainly not inferred from other legislation.

Each of these requirements—intentionality, specificity, and product of a distinct choice—flow from the purpose and wording of Clause 11. If an authorizing bill is not framed and presented in a way which ensures that legislators know that they are intentionally authorizing hostilities, if it is not framed in a way that specifies the entities or the forces and territories against which armed force shall be used, or if it is not framed and presented independently of other legislation but instead is inferred from other legislation, then the purpose of Article I, Section 8, Clause 11, to have Congress make the decision on war is obviously thwarted. It is particularly important to be scrupulously aware of this danger when apologists for an Executive war urge that Congressional authorization be loosely inferred from Congressional behavior over a period of time. After all, it is precisely Executive wars, "the most oppressive of all kingly oppressions" in Lincoln's words, which the Framers were fearful of and sought to guard against by giving the decision to declare war to Congress.  


154. The following are hypothetical examples of bills which, in the context of a Congressional desire to authorize military operations in order to meet a given historical situation, would meet the three criteria of intentionality, specificity, and separateness and distinctness, and which would therefore be the constitutional equivalent of a declaration of war. (1) "The President is hereby specifically authorized and directed to employ the armed forces of the United States to carry on hostilities against Country X." Or (2) "The President is hereby authorized and directed to use the armed forces to carry on military action against the forces and territory of Country X." Or (3) "The President is hereby specifically authorized and directed to employ the armed forces of the United States to carry on military operations against National Liberation Coalition X."

The Act of July 7, 1798, I Stat. 578, which was enacted during the era of the framers and which authorized limited warfare, provides an actual historical example which meets the three criteria of intentionality, specificity, and separateness and distinctness. The act said "That the President of the United States shall be, and is hereby authorized to instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas. . . ."
Normally these criteria would be superfluous to mention, but in the present case the Executive has argued that they can be ignored. The Executive has argued that in place of a Constitutional declaration of war or its equivalent, a sort of loose implied consent can be substituted. So long as "consent" can somehow be implied from Congressional actions [sic], the argument goes, there is no need to pay attention to the words of the Constitution contained in Article I, Section 8, Clause 11.

To the contrary, consent to the Vietnam war cannot be inferred from the actions of Congress in the past decade, as this brief shall demonstrate. But even if consent could reasonably be inferred, the Constitution does not say that consent is a substitute for Clause 11. The Constitution does not say that the President has the power to initiate or declare war, and that the burden is upon Congress to negate a presumed inference of its own consent. Nor does it even say that the President may initiate war and that the war will be validated by subsequent implied consent from Congress. Instead, the Constitution puts Congress in the driver's seat, not the President. Congress must be driving, and not merely being taken for a ride.

To put any other interpretation upon the Constitution would be to stand it on its head. Congress would be placed in the untenable position of being a rubber stamp, a body that exists solely to give consent to a de facto situation created and perpetuated by the Executive. Moreover, the momentum created by the President would change the Constitutional priorities and burdens on Congress, for it is extremely difficult not to appropriate money to support troops already in the field, or not to supply more manpower to relieve and/or protect troops already in the field. By seizing the initiative, the President would put Congress in the difficult, if not immoral, position of being forced to obstruct an on-going war effort, at the possible cost of lives of troops in the field, in order possibly to assert what was its prerogative in the first place—the power to initiate a war. And even if Congress were to pass a law terminating the war, the President could promptly veto such a law, thus drastically increasing the numerical burden on Congress to override the

We do not intend the above examples to be exhaustive of the possible verbal formulations by which Congress can issue an authorization which meets the three criteria necessary to have the constitutional equivalent of a declaration of war. But the examples do show possible verbal formulations which, in the above-mentioned context of a Congressional desire to authorize military operations in order to meet a given historical situation, would satisfy the duty required of Congress by Article I, Section 8, Clause 11 of the Constitution.
veto and save the legislation. Surely this procedure is a perversion of the clear constitutional scheme so carefully detailed by the Framers. In effect it robs Congress of one of the most fundamental, important, carefully drafted, and democratically essential of its constitutional powers—the power to decide to go to war.

1. There Has Been No Congressional Declaration of War.

Congress has never formally declared war with respect to Southeast Asia. This undisputed fact should be viewed in the context of the duration of the war, the most prolonged in this nation's history. Nor is the war on American soil. These observations indicate that there was probably more time and more physical opportunity for the President to ask Congress to declare or specifically and intentionally authorize war than in any previous war in history. One might possibly conclude that one reason that the President never asked Congress to declare war was that the President felt that Congress would turn down his request and place him in a politically embarrassing position. If this is true, it is certainly no excuse for the Supreme Court now to ignore the Constitution to justify the Executive's fear of embarrassment.

2. Congressional Appropriations and Selective Service Amendments Are Not Equivalent to a Declaration of War.

(a) They Do Not Meet the Criteria for Declaring War.

The Executive Branch has often contended that defense appropriations and renewals or amendments of the Selective Service Act155 constitute Congressional authorization for the undeclared war in Southeast Asia.156 Appropriations and the draft, however, do not meet the criteria for the constitutional equivalent of a [declaration of] war. Defense appropriations, however large, and the Selective Service Act, however often renewed or amended, are not framed and presented in a manner which ensures that a legislator will apprehend that the appropriations or the draft will constitute a constitutional authorization of war. Appropriations and the draft thus do not meet the criterion that an authorization of war must be intentional. Indeed, abundant legislative history, compiled in the Appendix to this Brief,157 demonstrates that many legislators who voted

156. [See Brief for Defendant at 24-31.]
157. [The Appendix, which extensively quotes relevant legislative history, is not
for defense appropriations during the Southeast Asian war were specifically intending that their votes *not* be interpreted as authorizing the war.\(^{158}\) This legislative history shows that, rather than intending to authorize a war, legislators had a number of other reasons why they felt compelled to vote for appropriations. Many felt that, as a matter of common humanity and morality, they could not deny appropriations to men who faced death in battle.\(^{159}\)

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158. [E.g., 113 Cong. Rec. 23501 (1968) (remarks of Senator Fulbright); “I do not want history to record that by this vote I gave this administration my blank check with respect to future conduct of policy in South Viet Nam.” 112 Cong. Rec. 4462 (1965) (remarks of Senator Anderson); 112 Cong. Rec. 4374 (1966) (remarks of Senator Javits); “I hope the President will recognize that many of us who vote in favor of this resolution do so in the hope that it will contribute not to the widening of an unwanted war, but to the pursuit of an honorable peace.” 111 Cong. Rec. 9530 (1965) (remarks of Congressman Lindsay); 111 Cong. Rec. 9527 (1965) (remarks of Congressman Kastenmeier); 111 Cong. Rec. 9499 (1965) (remarks of Senator Aiken); 111 Cong. Rec. 9498 (1965) (remarks of Senator Javits); 111 Cong. Rec. 9454 (1965) (remarks of Senator Javits).]

159. [E.g., 116 Cong. Rec. S10598 (daily ed. July 6, 1970) (remarks of Senator Church); 114 Cong. Rec. 18832 (1969) (remarks of Senator Gore); 114 Cong. Rec. 18832 (1969) (remarks of Senator Pastore); “I believe that all of us feel, right down deep in our hearts, that however we feel about Vietnam, we are there now and cannot take our feelings out on those boys by not supporting this bill.” 113 Cong. Rec. 23501 (1967) (remarks of Senator Pastore); “I think, of course, we should give full support and all necessary military equipment to protect their lives.” 113 Cong. Rec. 23488 (1967) (remarks of Senator Clark); 113 Cong. Rec. 23470 (1967) (remarks of Senator Symington); 113 Cong. Rec. 7189 (1967) (remarks of Senator Russell); 113 Cong. Rec. 6878 (1967) (remarks of Congressman Cederberg); 113 Cong. Rec. 6878 (1967) (remarks of Senator Holland); “My vote is based on the need to sustain the troops already in Viet Nam.” 112 Cong. Rec. 4468 (1966) (remarks of Congressman Frasier); 112 Cong. Rec. 4468 (1966) (remarks of Congressman Kastenmeier); 112 Cong. Rec. 4463 (1966) (remarks of Congressman Dow); 112 Cong. Rec. 4460 (1966) (remarks of Congressman Bingham); 112 Cong. Rec. 4460 (1966) (remarks of Congressman Kupferman); 112 Cong. Rec. 4455 (1966) (remarks of Congressman Rosenthal); 112 Cong. Rec. 4448 (1966) (remarks of Congressman Farbstein); 112 Cong. Rec. 4441 (1966) (remarks of Congressman Rivers); 112 Cong. Rec. 4431 (1966) (remarke of Congressman Abbitt); “My vote reflects my conviction that we must protect men we have sent into battle no matter how mistaken the policy may be that sent them to that battlefield.” 112 Cong. Rec. 4409 (1966) (remarks of Senator McGovern); 111 Cong. Rec. 21732 (1965) (remarks of Senator Morse); 111 Cong. Rec. 9538 (1965) (remarks of Congressman Rues).]
Others felt they were unable to sever expenditures they opposed from those they favored.\textsuperscript{160} Some legislators, in accordance with a position partly derived from . . . statutory limitations,\textsuperscript{161} felt that it was procedurally inappropriate to discuss substantive policy when debating and voting on an appropriations bill.\textsuperscript{162} Others voted for appropriations because of the feeling that, even if the Southeast Asia war were to end immediately, American stocks of armaments and material had been depleted and thus appropriations were necessary to replenish them.\textsuperscript{163} All of these positions are reasonable explanations why voting to pass appropriations bills or extending the draft (for which similar reasons apply) cannot be construed to be an intentional authorization of war.

By referring to the expressed motivations of many legislators in voting affirmatively on appropriations bills, and by including an Appendix of their views, no claim is intended that the views adumbrated reflect the motivations of all the members of Congress. Rather, the reasonableness of the views as explanations for voting,

\textit{safety to themselves and the interest of the United States.”} 111 Cong. Rec. 9497 (1965) (remarks of Senator Gore).\textsuperscript{\[160\]} 114 Cong. Rec. 26567 (1969) (remarks of Congressmen Bingham); “This bill also includes appropriations for housing, doctors, food, and clothing . . . .” 112 Cong. Rec. 4441 (1966) (remarks of Congressman Farbstein); “The bill contains many items with which I agree that I find it difficult to vote against it. But it provides $1,700 million to support what I consider to be an unconstitutional and illegal American War . . . .” 111 Cong. Rec. 21732 (1966) (remarks of Senator Morse).\textsuperscript{\[161\] Act of Aug. 2, 1946, Pub. L. No. 79-601, § 103, 160 Stat. 821. These amendments to the Standing Rules for the Senate deal specifically with amending appropriations bills, particularly the procedure employed by the Committee on Appropriations.\textsuperscript{\[162\]} 113 Cong. Rec. 7198 (1967) (remarks of Senator Young); 113 Cong. Rec. 7189 (1967) (remarks of Senator Russell); “I am strongly opposed to escalation of the war . . . [but] I will vote for . . . the supplemental Southeast Asia appropriation measure . . . because I feel it is unwise to decide policy issues through appropriations process.” 112 Cong. Rec. 5820 (1966) (remarks of Congressman Edwards); “Let the debate as to whether we should be in Vietnam, or how we should conduct the war in Vietnam, be carried on at another time. I will join in such debate. This is not the time for that debate.” 112 Cong. Rec. 4441 (1966) (remarks of Congressman Rivers).\textsuperscript{\[163\]} [“Much of this money has already been committed for war purposes; and if we were to decide to get out of Vietnam tomorrow, I would think that most of this money would still be needed.” 113 Cong. Rec. 7196. (1966) (remarks of Senator Young); “We have drawn down our stocks all over the world, and the funds that are to be made available in this supplemental appropriation are needed to replace those stocks that have been used and consumed in fighting the war in Vietnam.” 113 Cong. Rec. 6880 (1966) (remarks of Congressman Laird).]
the leadership positions of the legislators who made them, and the fact that the views were expressed in Congress so as deliberately to counteract any claim that a vote for appropriations or the draft meant an authorization of the Vietnam war, suffice to cast considerable doubt on the proposition that appropriations or the renewal of Selective Service can constitute an intentional declaration of war. The variety of expressed motivations on the appropriations bills, moreover, suggests that any attempt to reconstitute the intent of Congress with respect to a single issue such as that of whether voting for appropriations was an implied authorization of war, would require elaborate techniques of content analysis, Guttmann scaling, "head counts," and psychological interviews to determine the probabilities, within statistically significant intervals, of whether a majority cluster of such a motivation existed at any time. The difficulty and uncertainty of this task is a good reason for rejecting it as a way of bypassing the declaration of war clause.

Defense appropriations and the draft also fail to meet the criterion that a constitutional authorization of war need be specific. Thus the suggestion that appropriations or the draft authorize a war results in the constitutionally impermissible consequence of totally transferring from Congress to the Executive the power to decide whether, against whom, and where to fight a war.

Events in the Vietnam war provide practical confirmation of the foregoing argument. The Executive, arguing at each step that prior appropriations or the Selective Service Act authorize his actions, has over time changed the nature of the American military commitment in terms of enemies and geography. Starting with relatively small engagements against the Viet Cong in South Vietnam, the war was expanded so that ultimately the United States was also fighting the North Vietnamese and engaging in armed hostilities in or over Laos, Cambodia, and North Vietnam. The surprise registered in Congress and in the public at large when the President moved troops into Cambodia in the spring of 1970 provides further indication of the patent falsity of any claim that appropriations and draft extensions authorize a war. When Congress enacted appropriations bills and extended the Selective Service, it had no way of knowing that the President was going to invade Cambodia. Finally, if appropriations and the Selective Service serve to authorize a war, then even today the President can engage this nation in any war, against any other country, and in any corner of the globe, on the theory that already existing appropriations serve to authorize his actions or that later ones will serve to ratify a war
which Congress could not have foreseen in the first place. For the Executive to argue at any point in time that future Congressional appropriations or additions to the draft will ratify what he has decided to do is an invalid argument for another reason as well: it proceeds on the assumption that in the present the President has a constructive authorization, derived from potential future Congressional legislation, to make war. But the content of that construction authorization would \textit{ipso facto} be unconstitutionally vague and hence impermissible as a delegation of power, since it purports to authorize in the present \textit{any} decision by the President to go to war against any country in any location. Thus, even on the Executive's own theory of future potential ratification, the constructive delegation of power that results lacks the specificity required of any delegation if it is to be a constitutional authorization rather than a wholesale transfer of power from one branch of government to the other.

Appropriations and the draft also fail to meet the third criterion that an authorization of war need be separate and distinct from other legislation rather than being inferred from the passage of legislation which may be vital to the national security and which therefore cannot be turned down by Congress. Obviously this nation needs an army in order to provide us with a defense and a deterrence against potential assailants in this dangerous world. This need for military preparedness exists wholly apart from the Southeast Asian war, and thus Congress has seen fit to institute and renew the draft. It is also obvious that this nation needs defense appropriations if it is to sustain the armed forces which are necessary to provide national security. Thus, to infer authorization from the existence of appropriations and the draft is to force Congressmen into a dilemma where they must refuse to enact legislation which is vital to national security, or risk having the passage of such legislation be construed as an authorization for war—an authorization, moreover, for past acts of war which have already taken place and so cannot be stopped, and for future acts of war which will in turn become \textit{faits accomplis} by the time of the next annual budget or proposed renewal of Selective Service, when they will be used in a new round of forcing Congressmen into the same dilemma they previously faced.

\textbf{(b) The Appropriations and Selective Service Argument Distorts the Constitutional and Legislative Processes.}

It has been shown that the three criteria for a valid authorization
of war are not met by the Executive's argument that appropriations and the Selective Service Act serve to authorize the war in Southeast Asia. The Executive's argument also must fall because it grossly distorts the Constitution and the legislative process. As has been pointed out before, the Framers of the Constitution intended that Congress make the decision on whether to go to war. However, if the President can take the nation into war without a Congressional authorization, and if the war becomes legal if Congress later appropriates money or renews the draft, then the President—not Congress—will have the power to make the initial decision on war, and Congress will be reduced to merely having a veto power involving the cutting off of the appropriations necessary to support men in battle. Moreover, since appropriations for the armed forces are normally made for a period of one year, and army appropriations can be made for up to two years, the President will be able to fight a war for a very long period of time, on the basis of preexisting appropriations, before new funds are refused by Congress.

All of this destroys our plan of government. Since under the appropriations and selective service argument the Executive will be able to take the nation into war in the first instance, it was a useless and nonsensical act for the Framers in Article I, Section 8, Clause 11, to give Congress the power to make the decision whether this country shall fight a war. Since the Executive will be exercising the war-deciding power which the Constitution reserves to Congress, the Constitutional separation of powers is destroyed. Since the Congressional role will be reduced to merely vetoing a war it does not like, the constitutional scheme by which Congress has the lawmaking power and the President the veto power is turned around, so that the President has the lawmaking power and Congress has the veto power.

In addition to the foregoing results wreaked by the appropriations and selective service argument, the nature of the legislative process is also changed. Under the legislative process contemplated by the Constitution, those who wish to pass a new law have the burden of obtaining a majority in each house to vote in favor of the new law. Securing such a majority can be a difficult burden indeed, since in addition to other problems, there are always many legislators who reasonably desire to be very slow, careful, and deliberate when it comes to changing the existing situation by passing a new law. Thus the very need to secure a majority of legislators who wish to change the existing situation by passing a new law can in itself result in a lack of success in changing the existing situation.
But under the appropriations and selective service argument, the burden of securing a legislative majority is reversed. If the President wishes to change the existing situation by obtaining a new law, he will simply decree that whatever change he wants is now the law; and then the burden will be on those who oppose the President’s change to secure a majority of legislators willing to vote in favor of withholding appropriations in order to countermand the President’s edict. Thus those who oppose the change in the law, instead of those who favor it, will have the burden of securing a majority, and they have to secure a majority willing to overturn a presidential fait accompli. The enormous difficulty of doing this, and the terrible danger to the constitutional balance of powers of letting the President put Congress in such a position, is emphasized by Justice Jackson’s words about the aggrandizement of Presidential power in Youngstown Sheet & Tube Co. v. Sawyer:164

[I]t is relevant to note the gap that exists between the President’s paper powers and his real powers. The Constitution does not disclose the measure of actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyal-

164 343 U.S. 579, 653-54 (1952).
ties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution. Indeed, Woodrow Wilson, commenting on the President as leader both of his party and of the Nation, observed, "If he rightly interpret the national thought and boldly insist upon it, he is irresistible. . . . His office is anything he has the sagacity and force to make it." I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.

It seems clear, then, that the President should not be permitted to enact laws and thereby place the burden of obtaining a majority upon those who wish to oppose his law by withholding appropriations. This applies with particular force to the issue of deciding whether to go to war. For here the burden of obtaining a majority is of special significance.

When the nation is at peace, many legislators will be most hesitant, unless the nation is physically attacked, to change the situation by authorizing a war. Consequently the President might not be able to obtain a majority in each house to vote in favor of a specific and intentional authorization of war. But if the President takes the nation into war without Congressional authorization, the practical situation will be different with respect to the burden of obtaining a majority. Many legislators, for a variety of reasons earlier suggested, will not vote for legislation which would cut off the use in the war of defense appropriations. Even if a majority of legislators could be amassed, the President could veto the bill and thus raise the burden much higher to the 2/3rds majority level. Thus the appropriations argument points to a way for Presidents to get us into wars and a virtual guarantee that Congress cannot get us out of them.

The Vietnam war may very well have provided us with an example of a war in which the President could at no time have gotten a majority of Congress to authorize getting into the war, but once in, a majority of Congress (or two-thirds if necessary to override a Presidential veto) could not be amassed to get the nation out of the war.
(c) The Appropriations and Selective Service Argument
Is Contrary to Existing Law.

The Supreme Court has never held, when important constitutional matters are involved, that appropriations provide a legal basis for Executive action that is otherwise of dubious constitutionality. In Greene v. McElroy,\textsuperscript{165} the petitioner lost his job with a defense contractor as a result of the revocation of his security clearance by the Department of Defense. The Department's security program was in apparent conflict with the requirements of constitutional due process, and this was the critical factor leading the Court to hold that the security program had not been authorized by Congressional appropriations. The Court said:

[The Executive argues that] Congress, although it has not enacted specific legislation relating to clearance procedures to be utilized for industrial workers, has acquiesced in the existing Department of Defense program and has ratified it \textit{by specifically appropriating funds to finance one aspect of it}. If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. In many circumstances, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred. Thus, even in the absence of specific delegation, we have no difficulty in finding, as we do, that the Department of Defense has been authorized to fashion and apply an industrial clearance program which affords affected persons the safeguards of confrontation and cross-examination. But this case does not present that situation. We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed

\textsuperscript{165} 360 U.S. 474 (1959).
procedures are necessary and warranted and has authorized their use. *Such decisions cannot be assumed by acquiescence or non-action. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.*

In the present suit, important constitutional matters are at stake and thus, like *Greene*, authorization should not be inferred from appropriations. Rather, there should be “explicit action” based upon “careful and purposeful consideration by those responsible for enacting and implementing our laws.”* For without “explicit action by lawmakers” a decision of “great constitutional import and effect,” namely the decision whether to go to war, “would be relegated . . . to administrators who, under our system of government, are not endowed with authority to decide them.”

In the past the Executive has cited *Isbrandtsen-Moller Co. v. United States*, Fleming v. Mohawk Wrecking Co.,* Brooks v.

166. *Id.* 506-07 (emphasis added; footnotes and citations omitted). In *Ex Parte Endo*, 323 U.S. 283 (1944), the Supreme Court refused to find that appropriations ratified Executive action in a case involving the personal liberty of a concededly loyal person of Japanese ancestry.

167. 360 U.S. at 507.

168. *Id.*

169. 300 U.S. 139 (1937) [The main issue in *Isbrandtsen* was whether the Secretary of Commerce had the right to require a steamship company to file a summary of its books in light of the international nature of its business. The issue which relates this case to Executive powers was whether the President had the right to abolishe the Shipping Board and transfer its function to the Department of Commerce. The Court found this issue moot because Congress had effectuated the transfer by passing the Merchant Marine Act, 46 U.S.C. § 1114 (a) (1964).]

170. 331 U.S. 111 (1947). [The issue was whether the President, in consolidating agencies after the termination of World War II, had the power to transfer an officer of one agency to another without consent of the Senate. The Court held that the President had the power to transfer officers already existing by law without confirmation by the Senate of the officer had already been confirmed in his prior position. This power of the President was derived from the First War Powers Act of 1941, ch. 595, §§ 601-05, 55 Stat. 838.]
Devar,\textsuperscript{171} and Ludecke \textit{v. Watkins}\textsuperscript{172} for the proposition that appropriations can ratify Executive action. From these cases it was deduced that defense appropriations authorize the current war. However, \textit{Isbrandtsen, Fleming} and \textit{Brooks}, unlike \textit{Greene} or the present case, did not involve critical constitutional issues revolving about specific constitutional provisions. They involved issues which were trivial in comparison to those of the present case. Those cases thus cannot be taken to mean that appropriations serve to authorize Executive action of dubious legality in cases involving critical constitutional issues governed by constitutional provisions. The \textit{Ludecke} case did involve an important matter, but the case does not stand for the proposition that appropriations ratify Executive actions which are otherwise illegal. The relevant issue was whether, under a particular statute, the President had power to act subsequent to the cessation of actual hostilities in World War II. Without so much as mentioning appropriations, the Supreme Court ruled that the statute itself gave him this power. In a footnote subsequent to the ruling, the Supreme Court included some dicta on appropriations, and even here the main burden of the dicta was that, in appropriating money, Congress had merely recognized that the statute itself had given the President the power to act after the cessation of hostilities.\textsuperscript{173} All of this is a far cry from saying that appropriations authorize the President to exercise a power he does not already have under a statute or under the Constitution.

(d) \textbf{Summation of the Appropriations and Selective Service Argument.}

It has been shown above that appropriations and the renewal of the draft do not meet the three criteria for a specific and intentional and discrete authorization which is the equivalent of a declaration of war. It has been shown that the Executive’s appropriations and draft argument warps the Constitution and the legislative process set up by the Constitution. And it has been shown that

\textsuperscript{171} 313 U.S. 354 (1941). [The issue was whether the Secretary of the Interior had the power to issue temporary licenses to livestock holders for grazing privileges on public lands. The Court held that Congress confirmed and ratified the Secretary’s action by appropriating money for improvements of public ranges.]

\textsuperscript{172} 335 U.S. 160 (1949). [The issue was whether the President’s power under the Alien Enemy Act, 50 U.S.C. § 21 (1968), to deport alien enemies in time of a “declared war” was terminated by cessation of actual hostilities. The Court held that the President’s powers were not terminated absent the signing of a peace treaty.]

\textsuperscript{173} Ludecke \textit{v. Watkins}, 335 U.S. 160, 173 n.19 (1948).]
the Executive's appropriations and draft argument is contrary to existing law. Thus the appropriations and Selective Service actions by Congress cannot constitute the constitutional equivalent of a declaration of war.

The foregoing arguments are even more compelling when it is realized that ready at the hand of Congress there exists a plain and clear vehicle, a wholly reasonably and adequate alternative, by which Congress can authorize war without warping the Constitution or prior law: Congress can specifically and intentionally authorize war in a bill which is separate and distinct from other legislation. During the long history of the Vietnam war, America's most protracted war, Congress at any time at its convenience could have made such a specific and intentional authorization of war if it had desired to authorize the war.

3. The Gulf of Tonkin Resolution Is Not Equivalent to a Congressional Declaration of War.

The Gulf of Tonkin Resolution of August 10, 1964,174 was three years later disclaimed by President Johnson as being necessary for authority to carry on military operations in Southeast Asia. President Johnson said in a news conference: "We did not think the resolution was necessary to do what we did and what we are doing."175 Nor does the current administration of President Nixon rely for authority upon the Gulf of Tonkin Resolution. On March 12, 1970, in response to a letter from Senator Fulbright, H. G. Torbert, Jr. stated on behalf of the Department of State:

[T]his administration has not relied on or referred to the Tonkin Gulf resolution of August 10, 1964, as support for its Vietnam policy. . . . [T]he administration does not consider the continued existence of [the] resolution . . . as evidence of congressional authorization for or acquiescence in any new military efforts or as substitute for the policy of appropriate and timely congressional consultation to which the administration is firmly committed . . . .

174. S.J. Res. 189, 88th Cong., 2d Sess. (1964); H.R.J. Res. 1145, 88th Cong., 2d Sess. (1964); "[C]ongress approves and supports the determination of the President, as Commander-in-Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."


Recently, Senator Dole, as a spokesman for the current Administration, reaffirmed that the Executive does not rely on the Gulf of Tonkin Resolution for authorization to conduct the current level of military activity in Southeast Asia. In response to questions of Senator Eagleton as to whether the administration relied on the Resolution, Senator Dole stated: "[T]his Administration has not relied upon the Gulf of Tonkin Resolution and does not now rely on the Gulf of Tonkin Resolution."177 Moreover, any argument that the Resolution constitutes Congressional authorization for the military activity in Indochina is further weakened by the fact that the Senate has voted twice within the last two months to repeal the Resolution.178 Therefore, since the Executive does not rely upon the Gulf of Tonkin Resolution as constitutional authority from the Congress for its prosecution of the war, the defendant cannot rely upon the Resolution as a constitutional basis for his actions.

It should be noted that the Executive's position of non-reliance on the Gulf of Tonkin Resolution is well-founded since the Executive is aware that Congress, in passing the Resolution, did not intend to give it the authority to increase the level of military activity or to change the nature of the military operations in Southeast Asia. Although the Resolution has very broad, ambiguous wording, it has a very narrow intent since it was enacted in response to a particular set of circumstances, constituting a crisis situation, which the Executive represented as having occurred in the Gulf of Tonkin. On August 5, 1964, in asking Congress for "a Resolution expressing the unity and determination of the United States in supporting and in protecting peace in Southeast Asia," the Executive reported that on August 2 and August 4, 1964, two United States naval vessels operating in international waters in the Gulf of Tonkin were attacked by North Vietnamese patrol boats, and that on August 4, 1964, in response to these incidents he had ordered retaliatory air attacks on the North Vietnamese torpedo boat bases and their oil-storage depots.179 As the March 20, 1970 letter to Senator Fulbright from H. G. Torbett, Jr. explains, Congress passed the Resolution in response to a crisis situation and understood that it only approved the Executive's limited response to that crisis and did not authorize increased military activity in Southeast Asia:

Each of the resolutions specified in section 1 [Formosa

resolution, Middle East resolution, Cuba resolution and Gulf of Tonkin resolution] was passed in response to a crisis situation in the affected area. Thus . . . the Tonkin Gulf resolution responded to an assault upon our naval forces in international waters. . . .

The crisis circumstances giving rise to these Resolutions have long since passed. As indicated by the specific analyses below, the administration is not depending on any of these Resolutions as legal or Constitutional authority for its present conduct of foreign relations or contingency plans.180

That the Resolution was enacted in response to a crisis situation, i.e., the alleged attack on United States naval vessels in the Gulf of Tonkin, and approved a limited response to that crisis situation and was not intended to authorize greatly increased levels of military activity or to allow the Executive to prosecute a war, is clear from the comments which the Executive, the Congressmen and the Senators made during the debates on the Resolution.

The Congress adopted the Gulf of Tonkin Resolution on August 7, 1964 and the President signed it on August 10, 1964. In his message to Congress on August 5, 1964 requesting the Resolution, the President made it clear that he was not asking Congress to authorize greater levels of military activity or to change the nature of the military operations in the Indochina area: "As I have repeatedly made clear, the United States intends no rashness and seeks no wider war."181 At the time of the Executive’s request, the level of military forces was between 17,000 to 18,000 troops.182 By the end of 1964, the military forces in Vietnam had not greatly increased and are reported to have totaled 23,300.183 Statements made on the floor of Congress indicate that Congress did not intend to authorize an increase over the then current level of military operations in Vietnam. Senator Fulbright, one of the sponsors, indicated that the purpose of the resolution was "to prevent the spread of war, rather than to spread it."184 During the debates on the Tonkin Resolution, Senator Brewster, observing that he would look with great dismay on the landing of large

181. 110 CONG. REC. 18132 (1964).
184. 110 CONG. REC. 18462 (1964).
American armies on the continent of Asia,” asked Senator Fulbright whether there was anything in the resolution which would approve, authorize or recommend or approve the landing of large American armies in Vietnam or China.\textsuperscript{185} Senator Fulbright replied, “There is nothing in the Resolution, as I read it, that contemplates it. I agree with the Senator that that is the last thing we would want to do.”\textsuperscript{186} Senator Morton also shared Senator Brewster’s concern that the United States might send large American armies to Southeast Asia.\textsuperscript{187} Senator Fulbright again agreed that the purpose of the Tonkin Resolution was to prevent this from happening.\textsuperscript{188} Senator Nelson then asked whether Congress, by enacting the Tonkin Resolution, would be agreeing in advance that the President could land as many divisions as he deemed necessary and could then engage in direct military assault on North Vietnam.\textsuperscript{189} In response, Senator Fulbright indicated that this was not the sense of the Resolution and that he thought it would be very unwise under any circumstances to put a large land army on the Asian continent. Senator Nelson also made the following statement:

[By enacting the resolution] Congress should [not] leave the impression that it consents to a radical change in our mission or objective in South Vietnam. . . . I would be most concerned if the Congress should say that we intend by joint resolution to authorize a complete change in the mission which we have had in South Vietnam for the past ten years and which we have repeatedly stated was not a commitment to engage in a direct land confrontation with our Army as a substitute for the South Vietnam Army or as a substantially reinforced U.S. Army to be joined with the South Vietnam Army in a war against North Vietnam and possibly China.\textsuperscript{190}

Senator Russell was also of the opinion that the purpose of the Resolution was to approve the retaliatory action that the President ordered in defense of the United States ships in the Gulf of Tonkin.\textsuperscript{191} On the House side, Representative Morgan, Chairman of the House Committee on Foreign Affairs, stated unequivocally,

\textsuperscript{185} Id. 18403.
\textsuperscript{186} Id.
\textsuperscript{187} Id. 18404.
\textsuperscript{188} Id.
\textsuperscript{189} Id. 18406.
\textsuperscript{190} Id. 18407.
\textsuperscript{191} Id. 18411.
“[The Resolution] is definitely not an advance declaration of war. The committee has been assured by the Secretary of State that the constitutional prerogative of Congress in this respect will continue to be scrupulously observed.” On this same point, Congressman Adair indicated that Congress did not want the approval of the Tonkin Resolution to indicate that Congress was giving approval in advance for the President to take such actions as he might see fit to take in the future. Moreover, Congressman Fascell explicitly stated:

This resolution is not a declaration of war. The language of the resolution makes that clear as does the legislative history. Therefore this resolution in no way impinges on the prerogative of the Congress to declare war. Furthermore, no one here today has advocated a declaration of war. . . .

Mr. Speaker the pending resolution does, however, ratify and support the military action recently ordered and taken by President Johnson to respond to the unprovoked Communist armed attack against the U.S. Navy while in international waters.

It is evident that it was not the intention of Congress to authorize an increased level of military operations in Indochina. Rather the Resolution was meant only as approval of the Executive’s use of force in response to an armed attack on United States navy vessels. Section 1 of the Resolution makes this quite clear through the language which says that Congress “approves and supports” the Executive’s exercise of this constitutional authority in response to the crisis in the Gulf of Tonkin. Section 2 of the Gulf of Tonkin Resolution is nothing more than the statement of “unity and determination” requested by the President. In that section Congress did not declare war; instead it affirmed that “consonant with the Constitution . . . the United States is . . . prepared . . . to take all necessary steps . . . .” One of the necessary steps, of course, would be specific and intentional authorization by Congress for increased levels of military activity and operations in Southeast Asia.

The foregoing analysis should serve to make it clear why even the Executive feels that its legal position is not helped by the Gulf of Tonkin Resolution. But even apart from that, it is clear that the

192. Id. 18539.
193. Id. 18543.
194. Id. 18549.
Resolution does not satisfy the criteria of specificity and intentionality (although it does satisfy the third criterion of being the product of a separate and distinct choice by Congress) which are necessary to any authorization that could be deemed the equivalent of a Congressional declaration of war. Contemporaneous statements of Congressional leaders, as well as the face of the Resolution itself, reveal that the Resolution is a declaration of confidence in the President and a statement of future intention to support him and his policies. It is certainly not a conscious act equivalent to a declaration of war. But even if it were conceded for the moment that the Resolution was intended by Congress to be a declaration of war, then even Congress' wishes in that respect could not be upheld because the Resolution on its face lacks the specificity requisite to the equivalent of a declaration of war. Couched in general terms, and on its face delegating to the President the power to decide whether or not to engage in military hostilities, the Resolution could not be a permissible delegation of power under the Constitution. Massachusetts, as plaintiff in the present case, is entitled for the reasons given earlier on the issue of standing, to be able to enforce through the judiciary a respect for constitutional procedures required of both Congress and the President. A delegation of power by Congress to the President that amounts to a violation of the constitutional grant of power to decide whether to go to war which Article I, Section 8, Clause 11, gives to Congress alone, would infringe upon all the rights that Massachusetts has in bringing the present suit.

Apart from all these reasons, there is at present a considerable body of eminently respectable opinion which holds that the Executive obtained passage of the Gulf of Tonkin Resolution by seriously misleading Congress as to the events in the Gulf of Tonkin that occasioned the Resolution. If passage of the Resolution was indeed obtained by misleading Congress, then serious questions would be raised whether the Resolution could serve as a basis for the war.

195. [See pp. 85-111 supra.]
4. The SEATO Treaty Is Not Equivalent to a Congressional Declaration of War.

The Southeast Asia Collective Defense Treaty,¹⁹⁷ known as the SEATO Treaty, has at times been mentioned as affording legal justification for the war in Vietnam. However, the operative language of the SEATO treaty provides, in Article IV, that in the event of aggression against any of the Parties to the treaty, each Party agrees to act "in accordance with its constitutional processes." It is clear that this language funnels back to the United States Congress the decision to go to war under the procedures specified in the United States Constitution and thus obviously cannot purport to be a substitute for the considerations adduced elsewhere in this Brief. Even if the treaty did not contain this explicit language, the treaty provisions, whatever they are, cannot override the Constitution, since the United States has no constitutional power to commit itself to any treaty that overrides the Constitution.¹⁹⁸ Thus it would be frivolous to contend that the issues in the present case are, or can be, affected by the SEATO treaty.

VII. Conclusion

For the reasons herein stated, it is prayed that:

1. The Supreme Court grant leave to the Commonwealth of Massachusetts to file its complaint against Melvin R. Laird as he is Secretary of Defense.

¹⁹⁸ Reid v. Covert, 354 U.S. 1 (1957).