

The Massachusetts Antiwar Bill

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Chicago

One of the most singular pieces of legislation in American constitutional history passed both houses of the Massachusetts legislature on April 1st, 1970, and was signed into law, effective immediately, on the following day by Governor Francis W. Sargent. It provides that no inhabitant of Massachusetts inducted into or serving in the armed forces "shall be required to serve" abroad in an armed hostility that has not been declared a war by Congress under Article I, Section 8 of the United States Constitution. Exceptions are made for an "emergency" or when the President is acting as Commander-in-Chief. A further provision of the bill orders the state Attorney General to bring appropriate legal action on behalf of Massachusetts servicemen who are required to serve abroad in an undeclared war, and in addition on behalf of the Commonwealth itself. All servicemen notifying the Attorney General under this bill are to be joined as parties in the legal action. The Attorney General is directed to bring action directly in the Supreme Court as a matter of original jurisdiction, but should this fail, to bring another such action in an inferior federal court.

The bill is not "absurd"¹ nor an April Fool's joke as some have tried to contend. Debate in the Massa-

chusetts legislature, where the bill passed in the Senate 29 to 3 and in the House by a vote of 127-97, was deadly serious. It focused upon the immense cost to the American economy and the morale of American youth of the undeclared war in Vietnam and justified the bill as an attempt to secure Supreme Court adjudication of the legality of unilateral executive action which got this country entangled in Vietnam in the first place. At the present writing similar or identical bills to the Massachusetts statute are in the process of being introduced into the legislatures of Illinois, Ohio, Maine, New York, Rhode Island, and California. And Massachusetts in July 1970 filed an original action in the Supreme Court to test the constitutionality of the Vietnam War in a case entitled *Massachusetts v. Laird*.

In months to come lawyers and bar associations will be called upon to comment upon, or perhaps sponsor, similar bills in these and other states. The public and their elected representatives will want to know answers to questions such as the following:

- (1) Is it constitutional for a state to pass such a bill?
- (2) Doesn't the bill "interpose" the state against the federal government?
- (3) What is the purpose of the bill?
- (4) Wouldn't the bill hamstring the President?
- (5) What will the Supreme Court decide?

Of course these questions cannot be answered definitively, but opinion

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¹ Letter to the Editor, by William B. Dunn, New York Times, April 13, 1970.

can and should be given by lawyers because the problem is preeminently a legal one. I shall try to indicate briefly some of the factors that could go into one's answer to the preceding questions.

Constitutionality of the Bill

Many states have enacted statutes that were later found to conflict with federal laws and were thus struck down by federal courts. There is nothing "unconstitutional" about a state passing a law which is later determined in federal court to conflict with a valid federal law. The purpose of the Massachusetts Antiwar Bill is precisely to get judicial review, eventually by the Supreme Court, on its constitutionality. If the Supreme Court determines that the various Selective Service and other federal laws relating to Vietnam are constitutional despite the lack of a Congressional declaration of war for Vietnam, then of course the Massachusetts statute will become null and void. On the other hand, as we shall see below, there is a very significant chance that the Massachusetts act itself would prevail over all the federal laws because the latter will be held to be invalid on the basis that an undeclared war is an unconstitutional war.

Nor can the bill interrupt the present war effort. Any serviceman, under the pain of court-martial, has to accept all orders, including orders to serve in Vietnam. If he refuses to serve, and is court-martialled, his defense may be that the Vietnam War and orders pertaining thereto are illegal because Congress never formally declared war as required by the Constitution. This procedure has always been available to servicemen in defense of court-martial; the Massa-

chusetts statute does not help the serviceman-defendant in this regard in any way except for providing, at the state's expense, the services of the Attorney General. An innovation that the statute does provide is that a serviceman can bring an affirmative action (in advance of having to refuse a received order) invoking the Massachusetts act in a claim that the Vietnam war is unconstitutional. But while his case is pending, such a serviceman will have to continue to obey his orders, again under pain of court-martial. As Governor Sargent of Massachusetts said to the press upon signing the act, "Massachusetts servicemen should realize the bill's enactment provides no license for them to disobey lawful orders received from military authorities." Indeed the bill does not place a serviceman in a dilemma, as it might had it contained wording *prohibiting* him from serving in an undeclared war. Instead the act simply says that he shall not be "required" to serve. Thus a serviceman cannot violate the Massachusetts act if he chooses to serve, but he *can* invoke the act and its services of the Attorney General if he chooses to contest the legality of the war.

The Interposition Argument

The foregoing makes it plain that the old doctrines of "interposition" and "nullification" do not apply in the present case. Recently the Supreme Court approved a three-judge District Court definition of "interposition" as

an amorphous concept based on the proposition that the United States is a compact of states, any one of which may interpose its sovereignty against the enforcement within its borders of any decision of the Supreme Court or act of Congress, irrespective of the fact that

the constitutionality of the act has been established by decision of the Supreme Court.²

Obviously the proposed bill is not in defiance of any decision of the Supreme Court. Rather, it is an attempt to get a decision. No question of interposition or nullification can arise at this stage which is in advance of a determination by the Supreme Court as to the legality of an undeclared war.

Purpose

The purpose of the Massachusetts bill is purely and simply to obtain an authoritative judicial test of the constitutionality of an undeclared war. Earlier I said that a serviceman could raise this issue in defense to his refusal to obey an order to serve in Vietnam. Indeed, servicemen and inductees have raised the issue in a number of cases. But lower federal courts and military tribunals have uniformly dismissed such pleas on the ground that they are not justiciable, that they raise political questions. The Massachusetts statute, by throwing the weight of the state behind the serviceman, attempts to lower the justiciability barrier. It invokes the authority of the state, of the attorney general, and of the entire class of servicemen of that state who are similarly affected.

Of course, one might ask whether a genuine "political question" that is not adjudicable by a court should become any less so simply because a state has, in a sense, dramatized the issue. In reply it may not be unfair to say that lower federal courts and military tribunals have not justified

their invocation of the "political question" doctrine in refusing to hear pleas of the unconstitutionality of an undeclared war. In the light of recent decisions by the Supreme Court³ there would appear to be no basis upon which a court could deny to review the issue of the constitutionality of an undeclared war on any theory of "political questions." In a 1958 case the Supreme Court scrutinized very carefully an alleged congressional delegation to the executive of power to control passports,⁴ without raising the political question barrier. If that case did not involve a political question where there was nothing specific in the Constitution giving Congress a power in the first instance over passports, then *a fortiori* there should be no political question on the issue of an undeclared war when the Constitution in Article I Section 8 states that "The Congress shall have Power . . . to declare war." Our conclusion is reinforced by the fact that the Supreme Court has not invoked the "political question" ground in Vietnam cases even though lower courts disposed of these cases on that ground. Instead, the Court has relied solely upon its discretionary power to deny certiorari to such cases.

While not technically a "political question," the plea of unconstitutionality of an undeclared war certainly raises a large "political" issue. It is possible that the Supreme Court might feel a sort of political embarrassment in handling such a case. Yet this is not a legally articulable standard for denying review, particularly when the lives of individuals are at stake. Indeed, letting such cases

² *Bush v. Orleans Parish School Board*, 188 F. Supp. 916, 922 (1960), motion for stay denied, 364 U.S. 500 (1960).

³ *E.g.*, *Baker v. Carr*, 369 U.S. 186 (1962); *Powell v. McCormack*, 395 U.S. 486 (1969).

⁴ *Kent v. Dulles*, 357 U.S. 116 (1958).

stand on lower court determinations of "political questions" may be in a basic sense the denial of due process of law to servicemen who are claiming that a court must review all relevant legal issues when their lives or liberties are at stake. Moreover, one might argue that a Court should not concern itself with political embarrassment since judges are appointed for life for the very purpose of ensuring their political independence. Finally, even eminent justices can be quite wrong about entering into the "political thicket." When the Supreme Court in 1962 faced up to the constitutional issue of gerrymandered political districts, a milestone was achieved. Subsequent years have not at all substantiated the dire warnings of Justice Frankfurter that for the Court to deal with what he considered a clear instance of a "political question" would engender abuse and disrespect for the Court and a diminution of its authority in all other aspects of its work.⁵ Instead the Court has been greatly strengthened by its entry into the gerrymandered "political thicket."

At the Supreme Court level, as I have said, the Court has declined to hear Vietnam cases in the exercise of its discretionary power of certiorari. Yet the Court's own Rules indicate that review on certiorari depends largely on the case raising an "important question" or a "question of substance."⁶ The Supreme Court has not given a single reason in justification of its repeated refusal to grant certiorari to cases involving the Vietnam issue. As Justice Stewart said in a long and unusual dissent to the denial of certiorari in one of these

cases, "We cannot make these problems [of the constitutionality of the Vietnam war] go away simply by refusing to hear the case of three obscure Army privates."⁷ Massachusetts clearly agrees with Justice Stewart. It obviously cannot tell the Supreme Court *what* to decide (though Massachusetts has its own opinion, expressed in its statute) but it feels it has the right to ensure that the Supreme Court handles the case. It will naturally abide by the Supreme Court's decision. But at least, when that happens, the Constitution will have had its day in court.

Will the President Be Shackled?

Since 1945 we have heard many arguments to the effect that the President must be able to act quickly and decisively in the area of foreign relations, and that slow Congressional deliberation was possible only in former, unhurried times. Would the Massachusetts bill result in a shackling of presidential leadership and initiative?

In the first place, the bill recognizes an exception for "emergencies" or for presidential action as commander-in-chief. Surely if the United States were territorially attacked the President would respond without first checking with Congress. World War III, it has been said, could begin and end within a half hour. But the concept of an armed attack on territorial United States should not blind us to the long range of other possibilities, of which, perhaps, Vietnam is the opposite extreme. It took this country approximately a decade after 1954 of gradually increasing involvement in Vietnam before the public perceived that a full-scale war was going on.

⁵ Baker v. Carr, 369 U.S. 186, 266 (1962).

⁶ Supreme Court Rule 19 (1).

⁷ Mora v. McNamara, 389 U.S. 934 (1967).

Surely this fact alone indicates that the war was no immediate threat to our territory or national security, that it did not call for rapid executive reaction, and that Congress had plenty of time for full deliberation. Vietnam, indeed, may be the classic case of a situation where the Constitutional requirement of a declaration of war literally applies and is completely appropriate.

On a more fundamental level, it is arguable that the war in Vietnam cogently demonstrates the folly of departing from Constitutional imperatives.

The war in Vietnam may ultimately prove to be second only to World War II in terms of expense to the United States. The dollar cost of the war, including post-war veterans' benefits and interest on the war debt, may finally exceed 350 billion dollars. At home the war has triggered an inflation, increased interest rates to unprecedented levels, forced domestic reform and rehabilitation into the back seat, and caused widespread youthful alienation from the orderly processes of social institutions. It has resulted in over 40,000 death in battle of American youths, and perhaps another 10,000 related non-combat deaths. Both in psychological and in economic terms, the war has been an extraordinary burden.

If the aims of the Vietnam war were of vital importance to national security, the price paid for the war would have been accepted by the American people. But national leaders have been visibly unable to persuade the American people that our efforts in Vietnam, supporting a dictatorial and repressive regime in Saigon against the wishes of most of the people of that unfortunate land, are at all worthwhile. Indeed, our leaders have long since given up attempts

at persuasion, and are now talking simply in terms of avoiding American embarrassment by pulling out too abruptly. At the same time, however, the American public is witnessing an ironic replay of the early 1960's when step by step American military forces were getting enmeshed in Vietnam. Only today we are seeing it in Laos and in Cambodia. At the same time that our leaders are talking of withdrawing from Vietnam, there is a gradual escalation of American military activity in Laos and in Cambodia, and who knows that further efforts in countries such as Thailand or Indonesia.

The Laotian and Cambodian fronts today bear a great resemblance to the Vietnam pattern of the early 1960's. Then, as well as now, the executive branch of the American government conducted its activities as secretly as possible, without mentioning them either to Congress or to the press except when forced to as the result of journalistic leaks. Then, as well as now, we were told that the military advisers to the President had secret, classified information the nature of which fully justified the military activities but which could not be revealed publicly.

The growing public disenchantment with the war in Vietnam in the last half of the 1960's, however, led to progressive revelations concerning the secrets known in the early 1960's only to the President and his top military advisers. The State Department, and then the Pentagon, and finally the President and his closest advisers, progressively "leaked" the truth to the American public in a series of white papers, speeches, reports, and testimony to Congressional committees. They did so because they were placed on the defensive, attempting to justify and rationalize our involve-

ment in Vietnam. However, as these secrets were unravelled, it became painfully obvious that they were in many cases based on false or misleading information, that they were internally inconsistent, and that they were premised upon unfounded hunches that were dubious at the time they were made and clearly absurd in retrospect.⁸ More and more well-informed leaders of American opinion are reaching the conclusion that there *was* no rational basis for our involvement in Vietnam in the first place, and that this is the real tragedy. On top of this, the bitter irony of history now suggests that we are witnessing the beginning of two more "Vietnams"—in Laos and in Cambodia—for the same non-reasons that prevailed when we slipped surreptitiously into Vietnam in the year following the French pull-out in 1954.

This recent history confirms an ancient tale—that executive-military leaders tend to embroil their nations into wars for bad or nonexistent reasons, and that it is a danger to a nation to entrust basic war-peace decisions to decision-makers who do not have to justify their actions upon a rational basis to representatives of the people. This is true irrespective of the party affiliations or personal ideologies of the executive-military leaders. The framers of our Constitution, mindful of the war-making activities of English and continental monarchs in the sixteenth, seventeenth and eighteenth centuries, wrote into the Constitution the requirement that only Congress has the power to declare war, and to raise and support armies and navies. No less an au-

⁸ See Falk, *International Law and the United States Role in the Viet Nam War*, 75 Yale L.J. 1122 (1966); Beal & D'Amato (eds.), *The Realities of Vietnam* (1968).

thority than President Lincoln said on this point:

The provision of the Constitution giving *warmaking* power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.⁹

It is the Constitutional requirement of Congressional declaration of war which the Illinois bill and the Massachusetts statute seek to enforce in the teeth of unilateral executive decision-making for Vietnam, Laos, and Cambodia.

What the Supreme Court Might Do

The Massachusetts antiwar bill is premised upon a conviction that there exists a *prima facie* case that the Vietnam war is unconstitutional because Congress has not made a declaration of war as required by Article I Section 8 of the Constitution. How the Supreme Court will decide this case on the merits is, of course, unknowable. To some extent the Justices, as human beings, will ask themselves what the effect will be upon public respect for law and for the judiciary if, at this late hour, the Court were to hold that the war violates the Constitution. Would such a ruling lead to cynicism on the part of the public that the Court did not decide much earlier such a basic question? Or, on the contrary, would such a decision by the Court strengthen

⁹ Basler, collected Works of Lincoln 452 (1953).

the respect for the rule of law in this nation on the basis that the public already believes that the plain words of the Constitution have been, and are being, violated in the case of Vietnam? We cannot answer these questions in advance, but we can be sure of at least one thing: that the very passage of the antiwar bill by Massachusetts, and its consideration and perhaps passage in other states as well, itself is a new factor in the Court's calculus of public reactions and expectations. For if a populous state of this nation actually passes legislation calling for a judicial determination of the constitutionality of the war, then that is significant data that the public questions the legal basis of the war. In such a situation, the most conservative course for the Court to follow—assuming that the Court is influenced in part by such considerations—would be to strengthen the public's respect for the rule of law indicated by the Massachusetts act, by applying the rule of law against the massive executive-military decision-making process that led to Vietnam. The Court can affirm the fact that we are a nation of laws, not of presidents.

Apart from motivation, what are the legal considerations, in brief, that would enter into a Supreme Court determination of the issue? The most important has already been mentioned: the precise words of the Constitution of Article I, Section 8, Paragraph 11, granting to Congress the power to declare war. There have been many cases in constitutional law where counsel have attempted to read into the words of the Constitution a reasonable exception, only to be met by a Supreme Court ruling that where the Constitution is clear no amount of argument can change the meaning of

plain words.¹⁰ Although ingenious arguments can, and have, been raised to the effect that there has been Congressional approval of the Vietnam war, or that the war is an exception to Congressional power to declare war, the plain fact is that the words of the Constitution are clear and unexceptional.

One argument that has been made points to the vast expenditures by Congress in support of a military budget that was clearly designated for Vietnam. However, this is not the same thing as declaration of war. If it were, then the Constitution would not have given to Congress the power to declare war *in addition to* the other Article I powers to raise and support Armies and to provide and maintain a Navy. Moreover, it is difficult for Congress not to give needed support in terms of food and ammunition to troops already in the field in Vietnam, and in this sense a Congressional appropriation to back up the President's action is not the political or legal equivalent of a decision by Congress in the first place to declare a state of war.

Counsel for the President have claimed that the Gulf of Tonkin Resolution of August 10, 1964, was the "functional equivalent" of a Congressional declaration of war.¹¹ This, of course, presents a question that can only be resolved by the Supreme Court. The Court might determine that Congress did not intend the

¹⁰ *E.g.*, *United States v. Sprague*, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters. . . .")

¹¹ Testimony of former Undersecretary of State Nicholas Katzenbach, *U.S. Commitments to Foreign Powers, Hearings Before the Committee on Foreign Relations of the United States Senate*, 90th Cong., 1st Sess. 82 (1967).

Resolution, occasioned by a claimed, and later disputed, attack on two American destroyers, to be a declaration of war. Additionally, the Court might determine that the Resolution cannot be construed to be a valid delegation of the power to make war to the President, since the Constitution gives the war-declaring power only to Congress. We cannot tell in advance what the Court might decide on this issue, and there is no point in repeating arguments that have been fully aired in the law reviews.¹² The important fact is that there is a good chance that the Court will come down on the side of Massachusetts.

Finally, the same conclusion should be drawn from the arguments that the American involvement in Vietnam is constitutional because it is the result of our SEATO treaty commitments. A treaty, however, is not passed upon by Congress as a whole but only by the Senate, and thus it cannot be the functional equivalent of a declaration of war. Indeed, the Southeast Asia Collective Defense Treaty itself recognizes this by stating in its operative article that each Party, to meet the common danger, will act "in accordance with its constitutional processes."¹³ Presumably these "constitutional processes" would have to include a Congressional declaration of war, for as the Supreme Court held in *Reid v. Covert*,¹⁴ the United States can *only* act according to the Constitution even if a treaty entered into by the United States purported to indicate otherwise. Indeed, this

insistence in *Reid v. Covert* upon constitutionality in the area of foreign relations, cutting back upon some of the more extravagant dicta in the earlier *Curtiss-Wright Case*,¹⁵ indicates that the Supreme Court in recent years has been more concerned than ever to insist upon precise conformity to the careful words of the Constitution.

Other Legal Questions

The questions dealt with so far have been designed to highlight the chief aspects of public and political concern with the Massachusetts anti-war bill. But when debate on this matter becomes more intricate, with the help of legal counsel, two other important problems can arise: the relevance of the "Prize Cases" and the issue of "standing." Let us examine these briefly.

Although there is no exact precedent for the constitutional issue before us concerning the validity of an undeclared war, some persons have contended that the Prize Cases,¹⁶ are in point. The Court in 1863 was faced with the question of the validity of President Lincoln's seizure of ships carrying goods to the Confederate States when there was no Congressional declaration of war. Under the international law of the day, applicable in American courts, the right of prize and capture depended upon the validity of a blockade, which in turn depended upon the existence of a *de facto* war. The question then was: was this a "war" for these purposes. Although the Court answered in the affirmative, it did not go on to say that the undeclared civil war was a "war" for the purposes of internal American constitutional law. In other words, the existence of a *de*

¹² E.g., Velvel, *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 *Kans. L. Rev.* 449 (1968); other essays in Falk, *The Vietnam War and International Law* (2 vols., 1968-69).

¹³ SEATO Treaty, Art. 4, T.I.A.S. 3170, 209 U.N.T.S. 36.

¹⁴ 354 U.S. 1 (1957).

¹⁵ 299 U.S. 304 (1936).

¹⁶ 2 Black 635 (1863).

facto war for validating a blockade did not depend upon a Congressional declaration that a war existed. (A present-day analogue might be a determination that a state of war existed during the Korean conflict for the purpose of construing insurance claims even though there was no Congressional declaration of war.)¹⁷

In reaching its conclusion in the Prize Cases, the Supreme Court had to deal with the arguments of counsel that if there was a war for international law purposes, then Congress surely would have declared one as well. The Court answered this by pointing out that "a civil war is never publicly proclaimed. . . ." Indeed, Congress never did declare war against the Confederacy, though it had many occasions to do so and though it explicitly validated whatever President Lincoln requested by way of power to conduct the military effort. Rather, the understanding was that the Confederacy was engaged in an insurrection, not a war. As the Supreme Court stated,¹⁸ "By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution."

We thus see that by its very terms the Prize Cases could only apply to a civil insurrection within the United States, and that its language authorizing President Lincoln's seizure of the ships cannot be applied to a "national or foreign war." The Cases therefore are totally irrelevant to the presently proposed bill which deals with armed hostilities outside the territorial limits of the United States.

¹⁷ *Cariou v. New York Life Ins. Co.*, 124 F. Supp. 388 (S.D. Ill. 1954).

¹⁸ 2 Black 635, 668 (1863).

The question of standing in court to challenge the constitutionality of the President's actions requiring a serviceman to serve in an undeclared war is not as important a question as it may have been prior to recent Supreme Court decisions of 1968 and 1970.¹⁹ These cases have liberalized the "standing" requirements, requiring only that the plaintiff demonstrate a threatened injury in fact, and that his interest is arguably within the zone of interests to be protected or regulated by the constitutional guarantee in question. Under these requirements an affirmative allegation that being forced to participate in an undeclared and hence unconstitutional war substantially threatens the life and health of the plaintiff should clearly merit a finding of standing in a federal court. Nevertheless, there may still lurk in the "standing" rules an element of "self-restraint" for the Supreme Court's "own governance."²⁰ Here the Massachusetts statute does two important things to help ensure standing:

(a) The act makes the Commonwealth an actual party in interest. It will attempt to sue (in the Supreme Court directly, if possible under the "original jurisdiction" rules, but in any event in a lower court) to defend and enforce the rights of its own inhabitants. The Attorney General will probably allege that the State itself suffers if some of its inhabitants are killed in a foreign war. Such an argument at least avoids the disability in *Massachusetts v. Mellon*,²¹

¹⁹ *Flast v. Cohen*, 392 U.S. 83 (1968); *Association of Data Processing Service Organizations Inc. v. Camp*, 90 S. Ct. 827 (1970); *Barlow v. Collins*, 90 S. Ct. 832 (1970).

²⁰ *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

²¹ 262 U.S. 447 (1923).

where the state was held to have no interest in light of the fact that the real plaintiff, Mrs. Frothingham, had no standing and that the state itself was not compelled to do anything. It builds instead on the precedents of *Georgia v. Penn. R. Co.*,²² and *South Carolina v. Katzenbach*,²³ which both allowed original jurisdiction for the plaintiff states.

(b) The proposed bill essentially makes a class action of the individual serviceman's case. By joining as parties a large number of servicemen who are all asserting the same claim, the old *Frothingham v. Mellon*²⁴ result might be avoided even if Frothingham has any validity after the recent standing cases. The *Frothingham* case stressed the fact that the plaintiff was asserting that she suffered something in an indefinite way in common with people generally. This notion—that there must be some discrete individuality to a case—lurks in the background of much of the older thinking about standing and justiciability. It is countered by adding to the number of plaintiffs, so that the litigants in court actually represent a substantial portion of the total class of persons similarly affected. The proposed bill extends such a class to the entire state of Massachusetts.

Conclusion

No other court, at home or abroad, can claim as much power as the United States Supreme Court. In its earliest days it successfully arrogated to itself the power to make definitive interpretations of the Constitution. The American people have become accustomed to Constitutional inter-

pretation by the Supreme Court, and expect it whenever an important issue presents itself. Thus the Court has inherited a responsibility as well as a power—the responsibility to make final constitutional determinations when basic challenges to legality arise.

One could hardly imagine a more fundamental constitutional doubt arising in the mind of the American public than that of the legality of a major war. The Supreme Court has ducked this issue so far, but now Massachusetts—in its revolutionary tradition of two centuries ago—is leading the way for confrontation of the issue. The Supreme Court should, and must, accept the issue for adjudication and deliver a reasoned opinion. In a way, doing so would be more important for the ideal of the rule of law in this nation than even what the disposition of the case will be on the merits. The Court will fulfill a historic role as a teacher for the American public by handing down a reasoned decision as to the legality under the Constitution of an undeclared war.

In this day when the concept of "law and order" has a hollow ring in the minds of many of the youth of this nation, largely because of Vietnam,²⁵ it is vital for the executive branch of our government to behave strictly according to the letter of the law and the Constitution. When a substantial doubt arises as to the legality of executive action, the President should indeed welcome a defini-

²⁵ Not solely because the war is undeclared, but also because of substantial doubts concerning the legality of the methods by which the war is being conducted. See, e.g., D'Amato, Gould, & Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 Cal. L. Rev. 1055 (1969).

²² 324 U.S. 443 (1944).

²³ 383 U.S. 301 (1966).

²⁴ 262 U.S. 447 (1923).

tive interpretation from the Supreme Court. But even if the President fears such a resolution of the issue, the Supreme Court should take the longer view required by the ideal of a government under law and take on the case.

If the Court holds that the undeclared war in Vietnam is constitutional, most doubts on this particular issue will be allayed and public confidence will be restored. If the Court holds the other way, the President will have no choice but to dismantle

forthwith the military effort in Southeast Asia, unless Congress passes a formal declaration of war. If he has to dismantle the military effort, the President can persuasively claim that he is doing his duty under law even though he personally would have not done so had he not been legally compelled. There can be no embarrassment for a statesman in such a position. On either alternative, the Chief Executive can only gain in stature and in respect.



Bleeding Hearts

In an impromptu exchange with reporters, he described as "bleeding hearts" any of those who questioned his calling out troops to protect Federal officials and diplomats in Ottawa.

"There are a lot of bleeding hearts around who just don't like to see people with helmets and guns," he said. "All I can say is go on and bleed. But it is more important to keep law and order in the society than to be worried about weak-kneed people who don't like the looks of . . ."

—Trudeau, Pierre Elliott, (Prime Minister of Canada), *The New York Times*, October 18, 1970, Sec. 4, p. 1, col. 2.