

JUL 22 1970

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. **42**—
—, ORIGINAL
—

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF,

v.

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

**MOTION OF
THE COMMONWEALTH OF MASSACHUSETTS
FOR LEAVE TO FILE COMPLAINT and COMPLAINT**

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DEFENDANT.

MOTION FOR LEAVE TO FILE COMPLAINT

The Commonwealth of Massachusetts, pursuant to Rule 9 of the Rules of this Court, moves for leave to file the attached complaint against Melvin R. Laird, as he is Secretary of Defense.

COMMONWEALTH OF MASSACHUSETTS

By its Attorneys,

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COMPLAINT

1. The Commonwealth of Massachusetts brings this suit under the mandate contained in a special emergency act passed by its Legislature and approved by its Governor (Appendix A). The defendant, Melvin R. Laird, as he is Secretary of Defense, and several of his predecessors in office, have issued orders and have otherwise acted in compliance with orders of the President of the United States in the prosecution of armed hostilities in Indochina (the Vietnam war) without a declaration of war or its constitutional equivalent by Congress, in violation of the Constitution of the United States, causing injury to the Commonwealth and to its inhabitants.

2. The Commonwealth is a sovereign state of the United States of America, was one of its founders and was an original party to the compact of sovereign states known as the Constitution of the United States.

3. The defendant, Melvin R. Laird, is a resident and citizen of a state other than the Commonwealth of Massachusetts and is presently Secretary of the Department of Defense, an executive department of the United States, and serves by appointment of the President.

4. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and under 28 U.S.C. Section 1251(b).

5. The United States is now and for the last five years has been actively engaged in armed hostilities in Indochina. An estimated half million United States military personnel, support and combat, are now in Vietnam and actively participating in those hostilities. Over thirty billion dollars annually is now being spent by the United States to support this military effort. Approximately one hundred United States military personnel are now dying every week in the hostilities and many more each week are being wounded.

6. Over the last decade more than 2,000,000 United States servicemen have served in the Indochina theater, more than 42,000 have been killed in action, an estimated 300,000 have been wounded, approximately five hundred have been captured or interned, and an estimated 1,000 are still missing in action. Over \$110,000,000,000 has been spent by the United States in this conflict which is the longest war in its history.

7. The United States is at war, yet Congress has never made a formal declaration of war or taken any action equivalent to a declaration of war, nor has Congress specifically ratified any executive actions which have involved this country in the war.

8. In 1950 the United States commenced giving military aid to French forces in Indochina. Upon the fall of Dien Bien Phu, the signing of the Geneva Accords, and the commencement of the evacuation of the French from Indochina in 1954, the United States began giving military

aid directly to Indochina, particularly the State of Vietnam. Through orders from the executive department, the United States Military Assistance Advisory Group (MAAG), comprising several hundred United States military advisors, took over from the French the training of the South Vietnamese Army. In 1957 several advisors were injured when enemy forces bombed United States installations, and in 1959, allegedly for the first time in the hostilities, several advisors were killed as a result of a Communist attack. The number of advisors in Vietnam was raised in 1960 by the executive department from 300 to 700.

9. In 1961, the United States increased its military aid to South Vietnam and, through presidential orders, increased the number of advisors serving in Vietnam to 4,000 by the beginning of 1962 and to 11,000 by the end of that year. About fifty United States citizens had died by the end of 1962 as a result of hostile action from the enemy. Congress had not made any declaration of war, nor had the executive requested any such declaration although there was time and opportunity to do so.

10. As the fighting in Vietnam continued and escalated, the United States increased its military aid to South Vietnam. The executive department, through presidential orders, increased the number of military advisors in South Vietnam from 16,000 at the end of 1963 to 23,000 at the close of 1964. United States deaths due to enemy action in Vietnam rose to over 200 at the close of 1964. Congress still had not made a declaration of war.

11. In August 1964, in response to alleged attacks by North Vietnamese gunboats upon United States vessels in the Gulf of Tonkin, the President ordered air action against the gunboats and enemy installations in North Vietnam. Two United States aircraft were lost and sub-

stantial damage done to enemy gunboats and installations. Congress then passed the so-called Gulf of Tonkin Resolution authorizing certain executive action in response to the gunboat incident. However, the resolution was not equivalent to a declaration of war as later conceded by the executive in 1970.

12. In 1965 armed hostilities escalated substantially in Vietnam and, through executive authorization and direction, United States participation in the hostilities escalated correspondingly. No congressional declaration of war was made.

13. United States military aircraft flew increasing numbers of strike sorties over North Vietnam, the number increasing from 160 in February 1965 to 1500 in April 1965; although no United States strike sorties had been flown in South Vietnam before February, over 3,200 were flown in March and April.

14. United States dependents were evacuated from South Vietnam in February 1965.

15. In the spring of 1965 the executive department, through presidential orders, deployed four United States Marine battalions to South Vietnam, two of which were combat units.

16. United States helicopter activity in Vietnam increased to 90,000 flying hours in the first quarter of 1965.

17. The direct cost of the Vietnam war effort increased to \$1,700,000,000 for fiscal year 1965.

18. In June 1965, by order and direction of the executive, the United States Military Command in South Vietnam for the first time sent United States troops into combat to fight alongside the South Vietnamese.

19. The December 1965 draft call of 45,000 men was significantly higher than the draft call in any month during the previous decade.

20. By the end of 1965, over 1,100 United States military personnel had been killed in the war and over 4,000 wounded.

21. Over 350 United States aircraft were lost in the war in 1965.

22. At the end of 1965 the executive had increased the number of United States troops in Vietnam to over 184,000. Still Congress had not declared war.

23. The direct cost of the Vietnam war effort increased to over \$6,500,000,000 for fiscal year 1966.

24. In April of 1966 the United States increased its air strikes over enemy infiltration routes to one hundred per day.

25. The involvement of United States troops in the fighting continued to increase in 1966. United States troops were deployed to the Mekong Delta area where heavy fighting took place, and United States bombers staged heavy raids near Hanoi, North Vietnam.

26. By the close of 1966, the executive department increased United States troop strength in Vietnam to over 385,000, more than double the strength at the close of 1965.

27. By the end of 1966 over 6,600 United States military personnel had died as a result of the armed hostilities in Vietnam. The total number of United States military personnel wounded increased to 37,700. Congress still had not made a declaration of war.

28. The direct cost of the Vietnam war effort increased to over \$19,000,000,000 for fiscal year 1967.

29. By 1967, other allied nations aiding the United States and South Vietnam in the fighting were Korea, Australia, New Zealand, Thailand, and the Philippines. About thirty other nations were sending non-combat support to South Vietnam.

30. In February 1967 United States artillery units

shelled North Vietnam, and 25,000 allied troops engaged in a major war action in South Vietnam near the Cambodian border.

31. The United States intensified its air attacks on North Vietnam in 1967.

32. By the close of 1967 over 11,000 United States military personnel had died in the war and over 88,000 had been wounded.

33. In August 1967 the executive increased the permissible troop level in Vietnam to 525,000. At the end of 1967 United States troop strength had risen to a total of 485,600. Still Congress had made no declaration of war.

34. As of February 1968 allied military forces in Vietnam (United States included) numbered 1,300,000. United States ground forces included 102 maneuver battalions. These ground forces were supported by 3,100 United States helicopters. The United States river patrol forces had almost 160 vessels. About 1,000 United States fighter attack aircraft were supporting the war effort flying about 30,000 attack sorties a month.

35. In early 1968 enemy troops launched a major offensive against South Vietnam (so-called "Tet Offensive") attacking major cities (including Saigon).

36. Following the Tet Offensive an additional 10,500 United States troops were airlifted to South Vietnam.

37. United States combat deaths as of the beginning of March 1968 had risen to a total of about 18,700; the number of United States military personnel wounded had risen to over 115,000.

38. The United States ceased bombing North Vietnam in November 1968 but continued to bomb Communist supply routes in Laos and to send reconnaissance aircraft over North Vietnam.

39. By the close of 1968 over 25,000 United States troops had been killed in the war and over 190,000 wounded.

United States troop strength in Vietnam totalled 536,000. Still Congress had not declared war.

40. In the early part of 1969 enemy forces launched another major offensive against South Vietnam.

41. Also in early 1969 the executive reduced the authorized troop ceiling in Vietnam from 549,000 (as it stood in January) to 484,000.

42. In 1969 the United States continued air attacks along the "Ho Chi Minh Trail" in Laos.

43. Later in 1969 the executive authorized a further reduction of United States troops by 50,000. United States troop strength in Vietnam at the close of 1969 was 474,000. As of November 1969 over 33,000 United States military personnel had died in the war, over 258,000 had been wounded, nearly 1,000 were missing, and more than 400 had been captured or interned. Congress still had not made a declaration of war.

44. In April 1970 the executive announced a projected troop withdrawal of 150,000 men over the next year. Ten days following this announcement the executive ordered United States troops to enter Cambodia for the purpose of destroying enemy sanctuaries in that country. This order was executed without initial authorization or subsequent ratification by Congress.

45. As of June 1970 United States troops were fighting in Cambodia and South Vietnam and flying interdiction missions over Laos.

46. From January 1, 1961 to July 1970 over 42,600 United States military personnel had died in the war and over 281,000 had been wounded. United States troop strength in Vietnam stands at about 400,000 as of July 1970. Congress has still not made a declaration of war.

47. As a result of the continued United States participation in the Vietnam war, the Commonwealth of Massachusetts, as a sovereign state and in its quasi-sovereign ca-

capacity as *parens patriae*, has been, is being, and will continue to be damaged in many ways.

48. An estimated 1,300 inhabitants of the Commonwealth have been killed in hostile action in Vietnam, and approximately 5,000 have been wounded, some totally and permanently disabled. Many have been mentally handicapped as a result of their participation in the war. The Commonwealth, in its quasi-sovereign capacity as *parens patriae*, represents the interests of said inhabitants, their dependents, families, and relatives, and the interests of the approximately 8,000 Massachusetts servicemen now serving in Indochina, their dependents, families and relatives. In addition the Commonwealth represents the interests of an indeterminable number of Massachusetts inhabitants who will be ordered by the executive, acting through the defendant, his employees and agents, to participate in the Vietnam war in the future, and the dependents, families, and relatives of those inhabitants. The health, welfare, and comfort of these Massachusetts inhabitants have been and will be adversely affected by the continued prosecution of the war.

49. The Commonwealth of Massachusetts, in its sovereign capacity, has, by the death, disability or absence of thousands of its inhabitants, suffered the loss of its human resources. This loss will continue so long as the war continues. This loss deprives the Commonwealth of, among other things, participation by such persons in their government through elective or appointive office, state employment, and civic contributions, and further deprives it of tax revenues that would accrue from their income.

50. The Commonwealth has suffered, is suffering, and will continue to suffer a substantial loss of tax revenues resulting from its inhabitants' serving in the war in that said inhabitants have paid, are paying and will pay a

lesser amount in taxes than they would if domiciled and gainfully employed within the Commonwealth.

51. Various agencies of the Commonwealth have been burdened with claims of dependents and families of Massachusetts inhabitants killed, lost, or wounded in the war, and with the claims of dependents and families of Massachusetts inhabitants who have served and are presently serving in the war.

52. The economy of the Commonwealth has been adversely affected by the war, which is and has been a major factor in the current, persistent and severe inflationary economic trend. The economy of the Commonwealth has also been adversely affected by the increased Federal taxes paid by its inhabitants to support the war effort, diverting monies which would otherwise flow into the economy of the Commonwealth.

53. The Commonwealth's voting and electoral procedures have been and are being impaired as a result of the war in that absentee voters of the Commonwealth who have served and are serving in Vietnam have not been or cannot be present within the Commonwealth to hear and question candidates for public office.

54. The Commonwealth has suffered substantially from inadequate funding of important Federal programs in the Commonwealth, such as urban renewal, model cities, mass transportation, highways, anti-pollution, manpower training, and public health and welfare. Such inadequate funding has been caused in large part by the monies being spent by the Federal government for the prosecution of the Vietnam war.

55. Mass demonstrations against the prosecution of the war have resulted in injury to persons and to property, both public and private, and have caused the Commonwealth substantial additional expense for police protec-

tion, have further burdened the Commonwealth's courts, and have so disrupted the orderly conduct of classes in the Commonwealth's public and private educational institutions that many were forced to close prior to the conclusion of the 1969-1970 academic year. Private and public property, including the state capitol buildings, have been and will continue to be threatened with further damage from anti-war demonstrations. As a result thereof, the orderly process of government has been and will be impaired.

56. Public morale and the faith of the public in a government under law has been and will be impaired by a growing popular conviction and realization that the Vietnam war is illegal and unconstitutional. This conviction finds expression in the language of the special legislation of the Commonwealth attached to this complaint as Appendix A. The decline of public morale has had and will continue to have a substantial adverse effect upon the institutions and governmental processes of the Commonwealth.

57. The Commonwealth through its representatives in Congress has been unconstitutionally deprived of an effective voice in the making of the decision whether to engage in the Vietnam war by the various acts of the executive.

58. The Commonwealth when it joined the compact of states forming the United States surrendered to the Federal government its sovereign right to conduct its own foreign relations and to make war. It has an interest, therefore, in maintaining the integrity of the Constitution which defines which branches of government shall exercise those important powers. Where, as here, one branch, the executive, has exercised war-making powers, which the Commonwealth and its sister states had agreed would be exercised only by Congress, the Commonwealth must have

a peaceful forum to present its case and to have the controversy resolved. The Commonwealth has no other effective forum.

WHEREFORE, THE COMMONWEALTH OF MASSACHUSETTS respectfully prays that:

(1) A declaration enter that the United States present participation in the Vietnam war is unconstitutional in that it was not initially authorized or subsequently ratified by Congressional declaration.

(2) The defendant, Melvin R. Laird, as he is Secretary of the Department of Defense, his agents, employees, and successors, be enjoined from carrying out, issuing or causing to be issued any further orders which would increase the present level of United States troops in Indochina.

(3) The defendant, Melvin R. Laird, as he is Secretary of the Department of Defense, his agents, employees, and successors be further enjoined from carrying out, issuing, or causing to be issued any further orders directing any inhabitant of the Commonwealth of Massachusetts to Indochina for the purpose of participating in combat or supporting combat troops in the Vietnam war, and from extending the tour of duty of any inhabitant of the Commonwealth who may be serving in the Vietnam war, said injunction to become effective ninety days from the date of entry of a decree in this cause in the event Congress shall not have acted within said ninety days to make a declaration of war or otherwise to approve, ratify and authorize United States participation in the Vietnam war.

(4) For such other and further relief as to this Court may seem meet and just.

COMMONWEALTH OF MASSACHUSETTS

By its attorneys

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DANIEL J. JOHNEDIS

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Deputy Assistant Attorney General

July 1970.

APPENDIX A*Chapter 174***THE COMMONWEALTH OF MASSACHUSETTS**

**IN THE YEAR ONE THOUSAND NINE HUNDRED
AND SEVENTY**

AN ACT defining the rights of inhabitants of the Commonwealth inducted or serving in the military forces of the United States.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. No inhabitant of the Commonwealth inducted or serving in the military forces of the United States shall be required to serve outside the territorial limits of the United States in the conduct of armed hostilities not an emergency and not otherwise authorized in the powers granted to the President of the United States in Article 2, Section 2, of the Constitution of the United States designating the President as the Commander-in-Chief, unless such hostilities were initially authorized or subsequently ratified by a congressional declaration of war according to the constitutionally established procedures in Article 1, Section 8, of the Constitution of the United States.

SECTION 2. The attorney general shall, in the name and on behalf of the commonwealth and on 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 common-

wealth 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. Any inhabitant of the commonwealth who is required to serve in the armed forces of the United States in violation of section one of this act may notify the attorney general thereof, and all such inhabitants so notifying the attorney general shall be joined as parties in such action. If such action shall be commenced hereunder in an inferior federal court, the attorney general shall take all steps necessary and within his power to obtain favorable action thereon, including a decision by the Supreme Court of the United States.

House of Representatives, April 1, 1970.

Passed to be enacted, DAVID M. BARTLEY, Speaker.

In Senate, April 1, 1970.

Passed to be enacted, MAURICE A. DONAHUE, President.
April 2, 1970.

Approved,

(s) FRANCIS W. SARGENT
Acting Governor

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE, BOSTON 02133

[Seal]

April 2, 1970

The Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts
Dear Mr. Secretary:

I, Francis W. Sargent, pursuant to the provisions of Article XLVIII of the Amendments to the Constitution,

the Referendum II, Emergency Measures, hereby declare in my opinion the immediate preservation of the public convenience requires that the law being Chapter 174 of the Acts of 1970, entitled "AN ACT DEFINING THE RIGHTS OF INHABITANTS OF THE COMMONWEALTH INDUCTED OR SERVING IN THE MILITARY FORCES OF THE UNITED STATES." and the enactment of which received my approval on April 2, 1970, should take effect forthwith.

I further declare that in my opinion said law is an emergency law and the facts constituting the emergency are:

that legal proceedings under the authority of this act may be immediately initiated to produce a court decision on the rights of the inhabitants of the commonwealth inducted or serving in the military forces of the United States in the conduct of armed hostilities not authorized or ratified by a Congressional declaration of war.

Sincerely,

(s) FRANCIS W. SARGENT

Acting Governor

Commonwealth of Massachusetts

OFFICE OF THE SECRETARY, Boston, April 2, 1970.

I, John F. X. Davoren, Secretary of the Commonwealth, hereby certify that the accompanying statement was filed in this office by His Excellency the Acting Governor of the Commonwealth of Massachusetts at two o'clock and fifty-five minutes, P.M., on the above date, and in accordance with Article Forty-eight of the Amendments to the Constitution said chapter takes effect forthwith, being chapter one hundred and seventy-four of the acts of nineteen hundred and seventy.

(s) JOHN F. X. DAVOREN

John F. X. Davoren,

Secretary of the Commonwealth.
