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

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE COMPLAINT

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Statement

This case is before the Court on the motion of the Commonwealth of Massachusetts for leave to file a complaint against Melvin R. Laird, as he is Secretary of Defense. The suit is brought pursuant to the mandate contained in a special emergency act passed by the Massachusetts Legislature and approved by the Governor. That act, a copy

of which is appended to the complaint, directs that the Attorney General of the Commonwealth initiate an appropriate action in this Court to defend and enforce the constitutional right of the Commonwealth not to be harmed by the executive's conduct of armed hostilities not authorized nor ratified by a Congressional declaration of war. The Commonwealth, accordingly, seeks leave to file this complaint in order to obtain a judicial determination whether United States participation in the Vietnam war is constitutional and for appropriate injunctive relief. The allegations and prayers of the complaint are incorporated herein by reference.

Constitutional, Statutory and Treaty Provisions Involved

U.S. CONST., ART. 1, § 8:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

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;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; —And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST., ART. 2, §2:

The President shall be 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; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. CONST., ART. 2, § 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other

public Ministers; he shall take Care that the Laws be faithfully executed and shall Commission all the Officers of the United States.

U.S. CONST., ART. 3, § 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

28 U.S.C. § 1251:

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

SOUTHEAST ASIA COLLECTIVE DEFENSE TREATY, Sept. 8, 1954, 6 U.S.T. 81, T.I.A.S. 3170:

The Parties to this Treaty, . . .

Reiterating their faith in the purposes and principles set forth in the Charter of the United Nations and their desire to live in peace with all peoples and all governments, . . .

Art. IV. 1. Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in

accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.

Summary of Argument

This Court has jurisdiction because the case presents for determination a constitutional controversy between a state and a citizen of another state. Since a state is a party, the Court has original jurisdiction. The Commonwealth has standing to bring this action as a sovereign state which has been substantially damaged by the continued prosecution of the Vietnam war, and as *parens patriae* of its inhabitants who have been substantially injured by continued prosecution of the war.

The complaint raises a claim which is justiciable in that it seeks a review by this Court of the constitutionality of acts and actions of coordinate branches of the Federal government. Because the Commonwealth has standing to raise the claim set forth in its complaint and because that claim is justiciable, this Court must take jurisdiction over the present action. Furthermore, consideration and determination of the claim presented is not barred by the "political question" doctrine because the Commonwealth asks that the Court confine its deliberations to the constitutional authority of the executive to wage war in Vietnam without a declaration of war by Congress. In no way does it ask that the wisdom or necessity of the executive's decisions to pursue that course of action be called into question.

Nor does the doctrine that courts will not interfere in matters relating to the recognition of foreign governments bar this action. The Commonwealth does not seek to re-

define the status nor invoke the rights of a foreign sovereign and thus the cases which hold that such foreign relations problems are nonjusticiable are inapposite.

Next, the Commonwealth argues that this Court should not refuse to take jurisdiction as an exercise of judicial restraint in view of the importance of the issue presented and attendant circumstances which require its resolution in this forum. This Court has indicated in the past that it will not side-step a question merely because it is controversial and since this Court is the only body which can resolve the present controversy definitively, it must do so.

Since the complaint alleges that officers of one branch of the Federal government have acted and are acting outside their constitutional and statutory authority, the Commonwealth's suit falls within a well-defined exception to the doctrine of sovereign immunity and is therefore not an unconsented suit against the United States.

Finally, the Commonwealth argues that the participation of the United States in the military action in Vietnam is unconstitutional. That the Indochina conflict is a war within the meaning of Article 1, Section 8, clause 11 of the Constitution cannot be doubted in the light of the definition accorded that term by this Court in past cases and the contemporary characterization of the Vietnam conflict by all three branches of the Federal government. Moreover, review of the pertinent portions of the debates of the Constitutional Convention of 1787 demonstrates conclusively that ultimate control over the military was accorded to the Congress by the exclusive grant of war-making powers to that branch. The debates do not indicate that the power accorded the President to repel sudden attacks can be used as authorization for the present level of military commitment on the part of the United States in Vietnam. Furthermore, there is nothing in the President's other powers, such as those incident to his role as Commander-in-Chief

or Chief Executive, which would authorize the acts and actions of the executive branch in committing the United States to fight in Vietnam. The Commonwealth concludes by reviewing various Congressional actions, including the so-called "Gulf of Tonkin" resolution and appropriations measures and argues that none of those actions manifests an intent on the part of the Congress to authorize or ratify the level of hostilities in which the United States has engaged in Vietnam.

Argument

I. This Court Has Original Jurisdiction In This Case, And The Commonwealth Of Massachusetts Has Standing To Bring This Suit.

The Commonwealth of Massachusetts properly invokes the original jurisdiction of this Court. The Constitution of the United States provides that "[t]he judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . ." U.S. Const., Art. 3, § 2, cl. 1. In the same clause it is provided that the judicial power shall extend "to all Cases, in Law and Equity, arising under this Constitution . . . ." Here both these separate and independent jurisdictional provisions are met: a controversy has arisen between a state (Massachusetts) and a citizen of another state (Secretary of Defense Laird), and the case arises under the Constitution since the Commonwealth alleges that the executive branch of the Federal government is exercising war-making powers conferred by the Constitution upon Congress alone.

Original jurisdiction in this case derives from a direct grant of power in the Constitution: "In all Cases . . . in which a State shall be Party, the supreme Court shall have

original Jurisdiction." U.S. CONST., ART. 3, § 2, cl. 2. It is true that this Court does not have exclusive jurisdiction in this case. 28 U.S.C. § 1251(b)(3). But in a case of such grave public importance, where a state is challenging the exercise of war-making powers by a branch of the Federal government, only the highest judicial tribunal in the nation should hear and determine the constitutional dispute. *United States* v. *Texas,* 143 U.S. 621, 643; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 357 (Black, J., concurring). The issue whether United States participation in the Vietnam war is constitutional is at least as important a public matter as whether Illinois was permitting the Mississippi River to be polluted, *Missouri* v. *Illinois,* 180 U.S. 208; whether a manufacturer in Tennessee was allowing noxious gases to drift over Georgia, *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230; whether West Virginia was curtailing the supply of natural gas from Ohio and Pennsylvania, *Pennsylvania* v. *West Virginia,* 262 U.S. 553; or even whether the Voting Rights Act of 1965 was unconstitutional, *South Carolina* v. *Katzenbach, supra.*

As with all other states, the Commonwealth surrendered to the Federal government its right to conduct its own foreign relations and to make war when it entered into the compact known as the Constitution of the United States. *Kansas* v. *Colorado,* 185 U.S. 125, 143-144. But this did not end for all time the possibility of controversies between the Commonwealth on the one hand and the Federal government and its officers on the other. The framers of the Constitution did not overlook such a possibility which they realized could endanger the permanence of the Union. They, therefore, entrusted the power and the duty to resolve such controversies to this Court "constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends." *United States* v. *Texas, supra,* at 644-645.

As Mr. Justice Douglas stated in *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439, 450:

> "The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State."

This Court should not deny the Commonwealth the opportunity to present to this tribunal a case of such great constitutional magnitude which could affect the lives not only of the citizens of the Commonwealth but also of all the citizens of the United States.

The Commonwealth is the proper party to bring this suit. In its sovereign capacity the war has caused it to suffer a great loss of life from among its citizenry, thereby losing forever their services in state government and tax revenues from their incomes; loss of tax revenues caused by its inhabitants' serving in the war at salaries greatly reduced from what they would earn as civilians; losses from the inadequate funding of federal programs, such as urban renewal, model cities, mass transportation, highways, anti-pollution, manpower training, and public health and welfare, such losses being caused by the diversion of funds from these vital programs to the support of the war effort; damage to public property caused by massive anti-war demonstrations; incurring of great expense for police protection in connection with such anti-war demonstrations; injury to its economy caused by the general adverse effect of the war on inflation and in the diversion of funds from Massachusetts inhabitants to the war effort through increased Federal taxes; and other direct and indirect damage to the operation of the government and economy of

the Commonwealth. The interest of the Commonwealth manifested by these myriad past, present, and future losses caused by the continued participation of the United States in the war is more than adequate to give it standing before this Court. Here, unlike other suits brought under the original jurisdiction of this Court, the Commonwealth's interest as a sovereign state is not merely "makeweight," it is substantial. *See Georgia* v. *Pennsylvania R.R. Co., supra,* at 450.

Apart from its interest in its sovereign capacity, the Commonwealth has a substantial interest as *parens patriae.* This interest alone is sufficient to give it standing to maintain this suit. It is not simply a nominal party representing the interests of a few individuals who can and must bring suit in their own behalf. *See Kansas* v. *United States,* 204 U.S. 331; *Oklahoma* v. *Cook,* 304 U.S. 387. It represents those thousands of Massachusetts inhabitants who have served, are serving, and will serve in the Vietnam war; the thousands who have been and will be wounded, many totally and permanently disabled; the 1,300 who have already given their lives in the war; the dependents and families of all those men and women who have served, are serving, and will serve in the war; the many inhabitants who have suffered injuries to their persons and property as a result of anti-war demonstrations; virtually all its inhabitants who are injured by increased Federal taxes and reduction of the value of their money caused by the continued prosecution of the war; and all its inhabitants who suffer in a multitude of subtle ways from the continued participation of the United States in the war. The Commonwealth alone can represent these many interests of its inhabitants. *Kentucky* v. *Indiana,* 281 U.S. 163, 173; *New Jersey* v. *New York,* 345 U.S. 369, 372.

This Court has frequently upheld a state's standing to bring an original suit in this Court where the health and

comfort of its inhabitants have been adversely affected or even merely threatened. *Missouri* v. *Illinois, supra; Kansas* v. *Colorado, supra; Georgia* v. *Tennessee Copper Co., supra; North Dakota* v. *Minnesota*, 263 U.S. 365; *Pennsylvania* v. *West Virginia, supra.* This Court, in fact, treated the question of standing in such circumstances as settled as early as 1901 in *Missouri* v. *Illinois, supra,* at 241:

> "[I]t must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them."

In addition to the two independent bases for bringing suit discussed above, the Commonwealth has standing to bring this suit solely on the basis that the economic welfare of its people is being harmed and threatened. In *Georgia* v. *Pennsylvania R.R. Co., supra,* Georgia alleged that certain railroads conspired to fix arbitrary, non-competitive freight rates resulting in the arresting of its economy. The Court said at page 451:

> "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. *These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.* Georgia's interest is not remote; it is immediate." (Emphasis supplied).

If the matters which arose in the *Georgia* case were of "grave public concern" then we submit that the matter which the Commonwealth seeks to bring before this Court

clearly suffices to bring this case under the umbrella of the Court's original jurisdiction.

It is true that this Court said in *Massachusetts* v. *Mellon,* 262 U.S. 447, 485, 486, that it could not 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 . . . it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate . . . ." But here the Commonwealth is not seeking to protect its citizens from the operation of a Federal statute: it is seeking instead to protect them from the unconstitutional exercise of the war-making power by the executive. Furthermore, in this case, the Federal government is the allegedly offending party; it would be no remedy at all for citizens to look to the United States to bring suit to test the constitutionality of the acts of its executive. *See,* for an example of the United States suing as *parens patriae, United States* v. *Minnesota,* 270 U.S. 181. There, it is important to note, the Federal government brought suit against a state to seek redress of wrongs done citizens of the United States and of the state.

This court in *Mellon* did not prohibit all original actions by states as *parens patriae* where a Federal statute was challenged. It recognized and anticipated the possibility that a case might arise where a state could maintain such a suit. "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 . . . ." *Massachusetts* v. *Mellon, supra,* at 485. This Court subsequently permitted an original suit to be filed by a state as *parens patriae* where the state's claim arose out of Federal law. *Georgia* v. *Pennsylvania R.R. Co., supra.*

The Commonwealth of Massachusetts, therefore, is the

proper party to bring this suit both in its capacity as a sovereign state and as *parens patriae* of its inhabitants.

II. It Is The Responsibility Of The Judiciary Under The Constitution To Review Acts And Actions Of The Coordinate Branches Of Government, Including Acts And Actions With Respect To The Power To Conduct Foreign Relations And The Power To Wage War.

On the floor of the Virginia Convention considering adoption of the Federal Constitution, John Marshall challenged the delegates: "To what quarter will you look for protection from an infringement on the Constitution if you will not give the power to the judiciary?" 3 J. Elliot, The Debates in the Several State Conventions, on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 254 (2d ed. 1861). *See also* H. Carson, The Supreme Court of the United States, Its History 116 (1891). The response to Marshall's challenge was Article 3, Section 2, clause 1 of the Constitution which provides that "[t]he judicial Power shall extend to all Cases, in Law or Equity, arising under this Constitution, the Laws of the United States and Treaties made . . . ." This grant of judicial power included the power to declare acts and actions of coordinate branches of the Federal government unconstitutional and therefore void. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137; H.M. Hart & H. Wechsler, The Federal Courts and the Federal System 14 (1953). *See also* The Federalist No. 81 (A. Hamilton).

In the historic case of *Marbury* v. *Madison,* in which this Court struck down an act of Congress for the first time, Mr. Chief Justice Marshall stated:

> "Why otherwise does it direct the judges to take an oath to support it? . . . How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!" *Marbury* v. *Madison, supra,* at 180.

In this manner the role of this Court, as defender of the Constitution, was born. As a coordinate branch of the government, this Court can neither encroach upon nor substitute its judgment for the lawful decisions of the legislative or executive branches. *Mississippi* v. *Johnson,* 71 U.S. (4 Wall.) 475; *Bartlett* v. *Kane,* 57 U.S. (16 How.) 263; *Williams* v. *Suffolk Ins. Co.,* 38 U.S. (13 Pet.) 415; *Luther* v. *Borden,* 48 U.S. (7 How.) 1. Yet, at the same time, it must consider constitutional questions when called upon to do so and must, as well, grant appropriate relief. This duty the Court cannot ignore. *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264. It is at the crossroads of these two concepts that the real meaning of the doctrine of nonjusticiable "political question" appears.

> "The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this court as ultimate interpreter of the Constitution." *Baker* v. *Carr,* 369 U.S. 186, 210-11; *Powell* v. *McCormack,* 395 U.S. 486, 548-49.

The critical distinction suggested by this passage and one to which we will return is this: questioning the constitutional authority of a coordinate branch is entirely different from questioning the wisdom of its acts. A court can decide whether or not a matter acted upon is committed to a coordinate branch by the Constitution and whether the action taken is within the constitutional authority of that branch. This kind of constitutional analysis of legislative or executive action is the essence of judicial review. A political question, on the other hand, arises when the Court is asked to inquire into the political desirability of the action.

It is clear that the duty of the courts to review governmental acts and actions under the Constitution extends to exercises of the power to conduct foreign affairs and the power to wage war.

> "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Baker* v. *Carr, supra,* at 211-12.

Accordingly, this Court has decided the constitutional scope of the treaty power vis-a-vis the states, *United States* v. *Belmont,* 301 U.S. 324, and vis-a-vis individual rights, *Reid* v. *Covert,* 354 U.S. 1. Questions in this field involving the allocation of power between the legislative and executive branches have never before been held to present a "political question" where a constitutional issue must also be determined. *B. Altman & Co.* v. *United States,* 224 U.S. 583. Moreover, although issues concerning the inter-

national boundaries of the United States are usually regarded as political, *Pearcy* v. *Stranahan,* 205 U.S. 257, the corresponding issue of whether territories concededly under the sovereignty of the United States are incorporated for purposes of applying the Constitution or Federal statutes have been decided with no mention of political question. *Balzac* v. *Porto Rico,* 258 U.S. 298. *Compare Chicago & Southern Air Lines* v. *Waterman Steam Ship Corp.,* 333 U.S. 103, [*and*] *Oetjen* v. *Central Leather Co.,* 246 U.S. 297, *with United States* v. *Pink,* 315 U.S. 203, 229-30, [*and*] *Zemel* v. *Rusk,* 381 U.S. 1.

A classic example of review in the field of foreign relations is *Reid* v. *Covert, supra.* The constitutional question in that case involved a provision of the Uniform Code of Military Justice and its applicability to offenses committed overseas by American servicemen or their dependents. The government argued that even though this provision, enacted by Congress, did not give the accused "Bill of Rights" protections, its applicability could be justified by an executive agreement between this country and Great Britain. Despite this joint action by the legislative and executive branches in foreign relations, this Court rejected the argument:

> "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution . . . . The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." *Reid* v. *Covert, supra,* at 16-17.

It is significant that no mention is made in *Reid* of the "political question" doctrine.

The authority of the Court to review exercises of the power to conduct foreign affairs also extends to an exercise of the power to make war.

> "It is fundamental that the great powers of Congress to conduct war and regulate the Nation's foreign relations are subject to the constitutional requirements of due process. [*United States* v. *Cohen Grocery Co.*, 255 U.S. 81,88; *Ex Parte Endo,* 323 U.S. 283, 298-300 (war powers); *Kent* v. *Dulles,* 357 U.S. 116, 125-130; *Shachtman* v. *Dulles,* 96 U.S. App. D.C. 287, 225 F.2d 938(1953) (foreign affairs powers). 'The war power of the United States like its other powers . . . is subject to applicable constitutional limitation.' *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156.] The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action. 'The Constitution of the United States is a law for rulers[1] and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.' *Ex Parte Milligan,* 4 Wall. 2, 120-121. The rights guaranteed by the Fifth and Sixth Amendments are 'preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual serv-

[1] *See also United States* v. *Lee,* 106 U.S. 196, 220. "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it." *Id.*, at 220. *See* C. Rossiter, THE SUPREME COURT AND THE COMMANDER IN CHIEF (1951).

> ice.' *Id.*, at 123. '[I]f society is disturbed by civil commotion — if the passions of men are aroused and the restraints of law weakened, if not disregarded — these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.' *Id.*, at 124.'' *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 164-65.

Nor has this Court been hesitant to carry out its duty to review exercises of the war-making powers. The case of *Little* v. *Barreme,* 6 U.S. (2 Cranch) 170, presented a controversy arising out of the United States policy of non-intercourse with France in the earlier nineteenth century. Congress had authorized the President to instruct commanders of warships to seize any american vessel sailing *to* France. The President adjudged this strategy to be insufficient and issued an executive order to stop and seize American ships which appeared to be sailing *from* France as well. Acting under this order, the defendant commander seized a Danish ship sailing from France which he believed to be American. He was sued in trespass and raised the defense that he reasonably believed the vessel to have been American. This Court stated that the defense was insufficient, holding that even if the ship had ''been an American, the seizure would have been unlawful.'' *Little* v. *Barreme, supra,* at 179. Thus, not only did this Court inquire into the foreign policy of the executive, but it ruled that the President did not have the authority to implement foreign policy in a manner which exceeded the limits of Congressional authorization.

Similarly, in *Mitchell* v. *Harmony,* 54 U.S. (13 How.) 115, this Court refused to foreclose itself from an inquiry into the merits of a defense based on the necessities of warfare. The Court ruled that a United States Army officer could

be found liable for property seizures during the Mexican War and remanded the case for a full hearing.

In the *Prize Cases,* 67 U.S. (2 Black) 635, this Court was faced with a constitutional question regarding the power of the President to blockade ports during the Civil War. The Court investigated the powers of the President and supported his interpretation of the Constitution, and consequently his actions. Yet the Court never refused to review the actions on the basis that a political question was involved. This is because even though the case arose from the effects of a political decision,[2] the ultimate question involved was a constitutional one. What if the Court had decided against the President? We submit that appropriate relief certainly would have been granted.

Again, in *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2, 120, the Court reviewed the power of the President to establish military tribunals in areas where the civil courts were open. In so doing, the Court relieved the petitioner of the death penalty imposed on him by a military tribunal, holding that only a civilian court had the power to try him for the offense charged. Speaking of the purpose of the Founders in providing constitutional guarantees, the Court said:

> "They knew. . .the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged

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[2] The fact that the political branches are responsible for a threatened deprivation of liberty is not decisive. As Mr. Justice Holmes said in *Nixon* v. *Herndon,* 273 U.S. 536, at 540: "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years, since *Ashby* v. *White,* 2 Ld. Raym. 938, 92 Eng. Reprint, 126, 1 Eng. Rul. Cas. 521, 3 Ld. Raym. 320, 92 Eng. Reprint, 710, and has been recognized by this court."

> at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the Judiciary disturb. . . ." *Id.*, at 125.

In *Ex Parte Quirin,* 317 U.S. 1, where a presidential wartime proclamation sought to deny captured enemy aliens access to the Federal courts, this Court reached the merits of a habeas corpus petition brought by alleged German saboteurs. In the midst of World War II, the Court stated that:

> "[N]either the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. . . .We pass at once to the consideration of the basis of the Commission's authority." *Ex Parte Quirin, supra,* at 25.

More recently, this Court was again called upon to establish the boundaries of executive authority regarding the war powers in the celebrated case of *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579. In that case the government argued that the President had power, as part of his general executive and war powers, to seize and operate a civilian steel plant threatened by strike. The country was in the midst of the Korean War and there was evidence that an impending strike would imperil the war effort. The precise issue facing the Court was whether the President, by virtue of his war powers and his foreign commitments in Korea, had the authority to order the Secretary of Commerce to seize and operate certain privately owned steel mills. The plaintiff requested temporary and permanent

injunctive relief and a declaratory judgment that the orders of the President were unconstitutional and, therefore, invalid. The Court took note of these arguments and the exigencies of the situation and then noted that:

> "The validity of the President's order of seizure is at issue and ripe for decision. Its validity turns upon its relation to the constitutional division of governmental power between Congress and the President." *Id.*, at 655.

Having taken jurisdiction, this Court then displayed no reluctance to investigate the issues, decide against the President and order appropriate relief.

> "The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand." *Id.*, at 589.

Evidencing his accustomed reluctance to review an exercise of executive power, but nonetheless concurring in the decision, Mr. Justice Frankfurter stated:

> "To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed public interest brings into action. And so, with the utmost unwillingness, with every desire to avoid judicial inquiry into the powers and duties of the other two branches of the

> government, I cannot escape consideration of the legality of Executive Order No. 10340." *Id.*, at 596.

Mr. Justice Frankfurter further stated:

> "The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government." *Id.*, at 597.

The parallels between *Youngstown* and the present situation are strikingly similar and need not be belabored. It is enough to observe that the basic thrust of *Youngstown* is that there are limits on the war powers of the President and that the judiciary is the proper body to identify and define those limits.

In addition to the cases just considered, this Court and various inferior Federal courts have, on several other occasions, taken jurisdiction to consider questions relating to the power to conduct foreign relations and the power to wage war. *See, e.g., United States* v. *Macintosh,* 283 U.S. 605, 622; *The Pedro,* 175 U.S. 354, 363; *Tyler* v. *Defrees,* 78 U.S. (11 Wall.) 331, 345; *Fleming* v. *Page,* 50 U.S. (9 How.) 603, 614-15, 618; *Talbot* v. *Seeman,* 5 U.S. (1 Cranch) 1, 28-29; *Bas* v. *Tingy,* 4 U.S. (4 Dall.) 37, 40 (opinion of Washington, J.), 43 (opinion of Chase, J.), 45 (opinion of Paterson, J.); *National Savings & Trust Co.* v. *Brownell,* 222 F.2d 395, 397 (D.C. Cir. 1955); *Hamilton* v. *McClaughry,* 136 F. 445, 449-51 (C.C.D. Kan. 1905); *Durand* v. *Hollins,* 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860); *United States* v. *Smith,* 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806); *United States* v. *Mitchell,* 246 F.Supp. 874, 898(D. Conn. 1965), *aff'd,* 369 F.2d 323 (2d Cir. 1966), *cert. denied,* 386 U.S. 972; *Savage* v. *Sun Life Assur. Co.,* 57 F. Supp. 620, 621 (W.D. La. 1944).

The foregoing, we submit, demonstrates that the fact that a case raises the issue of the constitutional power to wage war does not automatically make such a case nonjusticiable. The question of justiciability is a complex and enigmatic one not susceptible to simplistic rule. For guidance in resolving that question as it relates to the issue at bar it is once again necessary to look to the language of *Baker* v. *Carr.*

III. The Issue of the Constitutionality of the Vietnam War Does Not Present A Nonjusticiable Political Question.

In a rather extended discussion in *Baker* v. *Carr,* Mr. Justice Brennan set out the "analytical threads" of the doctrine of political question, any one of which, if inextricable from the case at bar, make the question nonjusticiable. *Baker* v. *Carr, supra,* at 217.

> "Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

None of these "analytical threads" is inextricable from the facts at bar.

A. *The Issue Is Not One Which Has Been Committed To A Coordinate Branch Of Government.*

The plaintiff in this case does not seek a determination as to the advisability of the decision of the President to engage the United States in the Vietnam war. Admittedly, that question is political and, therefore, nonjusticiable. *See Baker* v. *Carr, supra,* at 211-14. Instead, it seeks a determination whether the President, in so doing, has exceeded his constitutional authority.

Once the issue is clearly defined as the judicial assessment of executive action measured against a constitutional standard, the inapplicability of the first of these "analytical threads" becomes clear. The issue is the distribution of powers under the Constitution — a question not committed to another branch but one dealt with by this Court throughout its history. While the question whether the United States shall fight a war in Vietnam is not constitutionally committed to the judiciary, the question as to which political branch shall make that determination is.

Furthermore, before it can be determined whether there has been a textual commitment to a coordinate department of the government this Court must take jurisdiction and interpret the Constitution. In other words, this Court must first determine what power the Constitution confers upon the Congress and the executive through Article 1, Section 8, clause 11 and what power it confers upon the executive through Article 2, Section 2, clause 1. If an examination of these provisions discloses that the Constitution gives the Congress and the executive the undivided and unreviewable power to conduct foreign affairs and to wage war, review of this issue might well be barred

by the political question doctrine. On the other hand, if the Constitution gives each of these branches power only to conduct certain clearly defined and limited military activities then further consideration would be necessary to determine whether any of the other formulations of the political question doctrine are "inextricable from the case at bar." "In other words, whether there is a 'textually demonstrable contitutional commitment of the issue to a coordinate political department of government' and what is the scope of such commitment are questions [this Court] . . . must resolve for the first time in this case." *Powell* v. *McCormack, supra,* at 549.

B. *There Are Judicially Discoverable And Manageable Standards For Resolving The Issue In Question.*

Although the questions presented in the instant case are ones upon which reasonable men might differ, they are not questions without standards for resolution. The standards involved are specific clauses of the Constitution as discoverable and manageable as the rather amorphous equal protection clause interpreted and applied in *Baker, See Powell* v. *McCormack, supra,* at 549, and legislative pronouncements such as the Gulf of Tonkin resolution and war appropriation measures. Application of such peculiarly judicial instruments is a task that the courts undertake daily. *See Baker* v. *Carr, supra,* at 212-13. Furthermore, the relative ease with which courts have dealt with similar or related standards and/or issues in the past would indicate that the present claim involves no unmanageable or undiscoverable judicial standards. *See Youngstown Sheet & Tube Co.* v. *Sawyer, supra; Montoya* v. *United States,* 180 U.S. 261, 267; *Ex Parte Quirin, supra,* at 25; *The Pedro, supra,* at 363; *Masterson* v. *Howard,*

85 U.S. (18 Wall.) 99; *The Protector,* 79 U.S. (12 Wall.) 700, 702; *Tyler* v. *Defrees, supra,* at 345; *Ex Parte Milligan, supra,* at 120; *The Prize Cases, supra,* at 668; *Mitchell* v. *Harmony, supra,* at 135-37; *Fleming* v. *Page, supra,* at 614-15, 618; *Little* v. *Barreme, supra,* at 179; *Talbot* v. *Seeman, supra,* at 28-29; *Bas* v. *Tingy, supra,* at 40, 43, 45; *National Savings & Trust Co.* v. *Brownell, supra,* at 397; *Hamilton* v. *McClaughry, supra,* at 449-51; *Durand* v. *Hollins, supra,* at 112; *United States* v. *Smith, supra,* at 1230; *United States* v. *Mitchell, supra,* at 898; *Savage* v. *Sun Life Assur. Co., supra,* at 621; *United States* v. *Anderson,* 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968); *United States* v. *Averette,* 38 U.S.L.W. 2535 (C.M.A. April 3, 1970).

Deciding questions of this type, a matter of applying a constitutional or statutory standard to executive action, is clearly within the traditional cognizance of this Court and is, in fact, the very method by which the Court has fulfilled its unique role as the body which delineates the boundaries of power within our constitutional system.

C. *Resolution Of This Issue Does Not Require Policy Determinations Of A Kind Clearly Calling For The Exercise Of Nonjudicial Discretion.*

Typical of those cases requiring a nonjudicial policy determination are those challenging some aspect of national or foreign policy such as *Pauling* v. *McNamara,* 331 F.2d 796 (D.C. Cir. 1964), a suit to enjoin the United States testing of nuclear weapons. The complaint was dismissed on several grounds, among which was the ground that such a challenge to policy was nonjusticiable. The Court stated that "decisions in the large matters of basic national policy, as of foreign policy, present no judicially cognizable issues and hence the courts are not empowered to decide them." *Pauling* v. *McNamara, supra,* at 798.

Challenges to policy are not justiciable because authority to formulate and implement such policy is balanced in its entirety between the political departments. However, it is possible to challenge the constitutionality of the methods by which such policy was formulated and is being implemented. This possibility arises when one department has attempted to exercise the powers constitutionally assigned to another. "But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President." *Ex Parte Milligan, supra,* at 139. Thus, if the method of formulating and acting on the policy is in doubt, the challenge is actually an allegation of an unauthorized exercise of power. The challenge has nothing to do with the wisdom of the policy itself, and cannot on those grounds be designated a political question.

However, both types of cases can and often do arise from similar fact situations and are thereby often mistaken for one another. In *Pauling* v. *McNamara,* the plaintiffs sought to enjoin nuclear testing because such testing was potentially harmful to them. Since the authority to test was not in serious question, the Court was, in effect, being asked to weigh the value of testing against the value of preventing potential harm to plaintiffs. On a larger scale, this would be like challenging a war solely because it is potentially harmful. In each case the complainant is alleging that the executive ought not do something, while by implication, admitting the executive's authority to do it. Such a challenge is purely to political policy and is thus a political question.

But the instant case is different. The plaintiff does not maintain that the executive ought not conduct the war because it is harmful. The plaintiff alleges instead that the executive may not constitutionally order the Commonwealth's inhabitants to fight in the Vietnam war because that branch has not been given the authority, in

the manner prescribed by the Constitution, to conduct the war. A challenge to constitutional authority is one on which the courts may and do act. The courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Baker* v. *Carr, supra,* at 217.

A factual situation nearly identical with the one at bar, and a classic example of this mistaken identity, is the case of *Luftig* v. *McNamara,* 373 F.2d 664 (D.C. Cir. 1967), *cert. denied sub. nom. Mora* v. *McNamara,* 389 U.S. 934. In *Luftig,* the complainant, a private in the United States Army, brought suit for declaratory and injunctive relief to enjoin the Secretary of Defense and the Secretary of the Army from sending him to Vietnam. He argued that American military action in that country was unconstitutional and illegal and that the Army had no lawful authority to assign him there. In affirming the District Court's dismissal of the case as a political question, the Court of Appeals stated: "The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power. . . ." *Luftig* v. *McNamara, supra,* at 665-66.

That statement, while potentially accurate as the recital of a general proposition of law, is perhaps more accurately a good example of "the capacity of the 'political question' label to obscure the need for case-by-case inquiry," against which Mr. Justice Brennan warned in *Baker* v. *Carr, supra,* at 210. The analytical problem with *Luftig* is that the Court's concluding clause, ("these matters are plainly the exclusive province of Congress and the Executive."), begs the precise question raised by the case: are the powers presently being exercised by the executive granted to it by the Constitution or is it, in fact, exercising powers committed to the Congress? It is apparent from the cases cited in *Luftig,* which can be distinguished as being either non-

consent suits or challenges to the wisdom of executive acts (rather than to the executive's authority to act), and the *ipse dixit* quality of the opinion, that the delicacy of the subject matter obscured the real issues from the court. The same failure to make this critical analytical distinction appears in the recent case of *Velvel* v. *Johnson,* 287 F. Supp. 846 (D. Kan. 1968), *aff'd,* 415 F.2d 236 (10th Cir. 1969), *cert. denied,* 90 S. Ct. 864, which dismissed a taxpayer's suit against the war on grounds of standing, political question and non-consent by the government. (However, *see Berk* v. *Laird,* —— F.2d —— (1970), No. 35007 2d Cir., June 19, 1970, 2d Cir. Rep. 3379, 3382, where the Second Circuit Court of Appeals pointed out that "the issue on this appeal is not whether the courts are empowered to 'second-guess' the President in his decision to commit the armed forces to action, but whether they have the power to make a particular kind of constitutional decision involving the division of powers between Legislative and Executive branches.")

In other cases found to require a nonjudicial policy determination, courts have based their conclusions upon the lack of necessary factual information. This is not to be confused with the lack of judicially discoverable and manageable standards, but rather, is another formulation of the proposition that courts are not the appropriate body to formulate national foreign policy. In *Chicago & Southern Air Lines* v. *Waterman Steamship Corp., supra,* the Court stated: "Nor can courts sit *in camera* in order to be taken into executive confidences. . .the very nature of executive decisions as to foreign policy is political, not judicial." *Id.,* at 111.

However, the resolution of the instant case does not require that the Court be taken into executive confidences. The question here presented is simply whether the executive has the constitutional authority to send inhabitants of Massachusetts to participate in the Vietnam war. To decide

that question it is not necessary that the Court review all information relevant to deciding whether to fight the Vietnam war. The Court must know, simply, whether a war exists, by whom it was commenced, by whose authority it continues and whether the person or persons so commencing and continuing the conflict have the authority under the Constitution to do so. These questions can all be answered on the basis of readily ascertainable public information. Secret information is relevant only to non-reviewable policy determinations.

D. *Judicial Resolution Of The Issues Here Will Not Express A Lack Of Respect Due Coordinate Branches Of The Government.*

The requirement that the Court show respect to coordinate branches of government is also inextricably bound up in the doctrine of separation of powers. Because each of the three branches of government is co-equal with the other two and because each has powers and responsibilities of equal weight, each branch must respect the other two when they are carrying out their assigned responsibilities and exercising their assigned powers. This is not to say, however, that this Court cannot determine whether one of the coordinate branches has exceeded its constitutional authority in pursuing national policy. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra.* In the words of former Mr. Chief Justice Warren: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." *Powell* v. *McCormack, supra,* at 549.

The Court's resolution of this issue would not evidence a disrespect for a coordinate branch as much as show a respect for the Congress and, more importantly, the Con-

stitution. Any disrespect in such a decision would be that calm and principled disrespect which this Court has always maintained, not for an individual or branch, but for the unauthorized use of power, which would, in the name of crisis, abrogate the Constitution.

E. *Present Circumstances Do Not Require Unquestioning Adherence To A Political Decision Already Made.*

When a court refuses to hear a case because of the necessity to adhere to a political decision already made, it in effect decides that at that particular time there ought not be any judicial pronouncements on the issue in question. While refusing to ratify the challenged action, the court, for various reasons, feels that judicial review would be inappropriate. However, whatever circumstances might justify avoidance of a constitutional question on this basis, they do not exist on the present facts.

Resolution of the issues in the case at bar should not be avoided because those issues are difficult or so controversial that any decision would evoke disapproval and the possibility of non-compliance with the mandate of this Court. Such a contention does not do service to the integrity of the Court, and is a dangerous precedent. In fact, this Court has noted that it is an "inadmissible suggestion" that action might be taken in disregard of a judicial determination. *McPherson* v. *Blacker,* 146 U.S. 1, 24; *Powell* v. *McCormack, supra,* at 549, n. 86. *See* Revely, *Presidential War Making: Constitutional Prerogative or Usurpation,* 55 VA. L. REV. 1243, 1269 n. 74 (1970), for evidence of the fact that compliance with whatever the Court's mandate may be is a virtual certainty. For a different approach *see* Tigar, *Judicial Power, The "Political Question" Doctrine, and Foreign Relations,* to be published 17 U.C.L.A. L. REV. No.

6 (June, 1970). On the contrary, decision is required because there is a significant controversy. "To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action." *Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* at 596 (Frankfurter, J. concurring), and "[t]he alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility. *See United States* v. *Brown,* 381 U.S. 437,462 (1965); *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579, 613-614 (1952) (Frankfurter, J., concurring); *Myers* v. *United States,* 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)." *Powell* v. *McCormack, supra,* at 549.

But in any determination whether there is a need for unquestioning adherence, one must ask what the consequences of alternative decisions on the main issue will be. If the decision is favorable to the government, this Court will have ratified the action taken by the executive and the persistent and growing doubt as to the war's legality will be gone. The question of constitutional authority will have been put to rest.

If the decision is favorable to the plaintiff, the result will not be disastrous. If the Congress so decides, it could declare war, or it could establish guidelines for de-escalation. Even in the absence of congressional action, the Court need not order immediate withdrawal from Vietnam but may allow a reasonable time for compliance with its mandate. This was done in the desegregation cases and in the reapportionment cases and could be done here. *See Brown* v. *Board of Education,* 349 U.S. 294, 300-01; *Reynolds* v. *Sims,* 377 U.S. 533, 586-87. If it becomes necessary to use the injunctive power of this Court, such will be capable

of enforcement. All persons responsible for the assignment of Massachusetts inhabitants to Vietnam are within the jurisdiction of the Court, could be ordered either to perform or not perform certain acts and could be supervised in their carrying out of such directives.

As a practical matter, however, it would probably be sufficient that this Court declare that the executive does not have the inherent constitutional power to conduct the present level of hostilities in Vietnam. As such, if and until Congressional ratification of such hostilities is obtained, the executive could be considered to be in violation of the Constitution. (If necessary, the effect of such a declaration could be stayed for a period of time sufficient for the executive to seek such ratification).

"The availability of declaratory relief depends on whether there is a live dispute between the parties . . ." and on the instant facts the parties are in dispute as to whether the executive has the unilateral constitutional authority to wage the Vietnam war; "and a request for a declaratory relief may be considered independently of whether other forms of relief are appropriate . . ." *Powell* v. *McCormack, supra,* at 518, such as here where both declaratory and injunctive relief have been requested. This Court may well determine that declaratory relief, which is non-coercive and does not result in the Court ordering a coordinate branch to perform a particular act, may be the most appropriate form of relief at this stage of the proceeding. *Cf. Berk* v. *Laird, supra,* at 3386.

The contention that such a decision would hamper the executive's power to defend the nation in an emergency situation is invalid. It is clear that if the territorial security of the nation were in danger, the courts would be justified in dismissing a challenge to the executive's authority to conduct military activity. That the executive possesses the power of self-defense is established by the *Prize Cases,*

supra. But the Vietnam war does not present such a situation.

To attribute finality to the executive's current actions would not only grant to the executive a power expressly denied it under the Constitution, but would also make the executive judge of the limits of its own power which in turn would be an abdication of the constitutional role this Court has played since *Marbury* v. *Madison.* While judicial rubber-stamping of executive decisions may be an efficient and uncomplicated process and thereby in many respects enviable, it is not commensurate with the constitutionally ordained role of the judiciary.

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers* v. *United States, supra,* at 293 (Brandeis, J., dissenting).

Finality of executive decision can only be a concern of the courts when the decision is within the appropriate power structure of the Constitution.

F. *Resolution Of The Issues Will Not Result In An Embarrassing Confrontation Between Coordinate Branches Of The Government.*

The defendant may also contend that the case presents a political question because judicial resolution of the Commonwealth's claim would produce a potentially embarrassing confrontation between coordinate branches of the Federal government. However, a determination of whether

inhabitants of Massachusetts can be compelled to fight in the Vietnam war would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law. *Powell* v. *McCormack, supra,* at 548. Moreover, this Court should not be concerned with the possible embarrassment to the executive for "...[w]hen all is said and done, one is inclined to think that a rigid constitutional frame is on the whole preferable even if it serves no better purpose than to embarrass an overactive Executive." G. Hausner, *Individual Rights in the Courts of Israel,* International Lawyers Convention in Israel 1958 201, 228 (1959). *See also Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* at 614 (Frankfurter, J., concurring).

IV. The Issue Presented Does Not Necessitate Adjudication Of The Status Or Rights Of A Foreign Sovereignty; Therefore, Determinations Holding Such Foreign Relations Problems Nonjusticiable Are Inapposite.

In *Oetjen* v. *Central Leather Co., supra,* this Court made the broad statement that:

> "[t]he conduct of foreign relations of our Government is committed by the Constitution to the Executive and Legislative —'the political'— Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Id.,* at 302.

The cases discussed in the preceding section of our argument demonstrate however, that this proposition is a vast overstatement of the principle. *See Baker* v. *Carr, supra,* at 211-12. An examination of the holding in *Oetjen* and of

the cases therein relied upon will reveal the true rationale of the nonjusticiability doctrine as applied to foreign relations problems and will further demonstrate that the plaintiff's claim in the instant case is not thus foreclosed.

Oetjen involved the seizure of hides by General Villa, the leader of a political faction competing for power during the Mexican civil war. Prior to their seizure, these hides had been assigned to the plaintiff, but the defendant thereafter acquired them through a chain of sale traceable to Villa. The plaintiff's claim would fail if the Villa faction constituted the legitimate government of Mexico and the United States had, in fact, recognized Villa's government. Therefore this Court refused to review the executive's determination, holding the issue to be nonjusticiable because such a determination belonged solely to the executive department.

Examination of the text of the Constitution supports the finding that the Framers intended the recognition of governments to be totally discretionary with the executive. The President has the power to "appoint Ambassadors," U. S. CONST., ART. 2, § 2, CL. 2, to "receive Ambassadors and other public Ministers," U. S. CONST., ART. 2, § 3, and "to make Treaties." U. S. CONST., ART. 2, § 2, CL. 2. Accordingly, he may thus decide to whom to send ambassadors, from whom to receive them, and with whom to make treaties. This discretion allows the President to recognize or withhold recognition of foreign sovereignties. The plaintiff in the instant case, unlike the plaintiff in *Oetjen,* does not seek to have this Court redefine the status of a foreign sovereignty.

The *Oetjen* case cites as precedent five cases falling into two categories. The first category includes *United States* v. *Palmer,* 16 U.S. (3 Wheat.) 610, and *Williams* v. *Suffolk Ins. Co., supra.* In the former case, this Court said, by way of dictum, that it could not decide if Spain and one of its

"colonies" should be considered nations at war with each other. In *Williams*, the Court would not examine the United States position that Buenos Aires had no sovereignty over the Falkland Islands. In both cases, as in *Oetjen*, the Court would not examine the status of a foreign nation.

Foster v. *Neilson*, 26 U.S. (2 Pet.) 253, is the progenitor and outstanding representative of the other three cases cited for authority in *Oetjen*. Here, the plaintiff sought to assert title to land in territory claimed by both the United States and Spain. The boundary dispute involved the meaning of a treaty selling the contested territory to the United States. Plaintiff's claim to the land under a grant from Spain could not be adjudicated as the Court, had it reached the merits, would have been adjudicating rights in a situation where the Constitution, by Article 2, calls for an univocal determination by the United States.

Neither of the concerns in these two strands of cases leading to the *Oetjen* dictum exists in the plaintiff's claim. It does not call into question the executive's view as to the status of North Vietnam vis-a-vis the United States; it does not challenge the determination that North Vietnam is a state committing aggression against another state. The plaintiff neither invokes the rights of North Vietnam nor disputes the rights of the United States with respect to North Vietnam. Plaintiff urges only that the alleged demands of foreign policy may not be invoked to create a smoke screen of nonjusticiability and thereby to obscure the usurpation of constitutionally delineated power.

V. Judicial Restraint Is Inappropriate With Respect To Such A Significant Constitutional Question.

To an extent the political question doctrine is not a jurisdictional limitation but an exercise in judicial self-restraint. *See* Finkelstein, *Further Notes on Judicial Self Limita-*

tions, 39 HARV. L. REV. 221 (1925); A. Bickel, THE LEAST DANGEROUS BRANCH (1962), (especially chapter 4 "The Passive Virtues"), and the conclusion of Mr. Justice Brennan in *Flast* v. *Cohen,* 392 U.S. 83, that:

> "[b]ecause the rules [of the nonjusticiability doctrine] operate in 'cases confessedly within [the Court's] jurisdiction,'. . . they find their source in policy, rather than purely constitutional, considerations . . . . The 'many subtle pressures' which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours." *Id.*, at 97.

As such it is a particularly inappropriate vehicle for disposing of the instant case. The earliest decisions of this Court demonstrate that Federal courts cannot and should not avoid consideration of important constitutional questions simply because the impact on the country will be great or because the decision may be controversial:

> "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, or whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens* v. *Virginia, supra,* at 403. *See also* Tigar, *Judicial Power, The "Political Question" Doctrine, and Foreign Relations, supra.*

The doctrine, to the extent that it bars all review of the lawfulness of executive decisions regarding the war powers because such review would be difficult or controversial is, in effect, an illegal amendment to the Constitu-

tion. Neither Article 3 nor Article 6 allows the courts to exempt the executive from any provisions of the Constitution under any circumstances. Nor does the Constitution preclude judicial review of constitutional questions involving war or foreign relations powers. In fact no principle would be more damaging, no concept more revolutionary, than that the President become a monarch upon waving the flag of war and hoisting the banner of foreign relations. *See Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* at 642 (Jackson, J., concurring). No interpretation of the Constitution would be more twisted, irrational and repugnant to the very idea of the separation of powers than that unlawful war-making actions of the President are non-reviewable.

Furthermore, this Court has never before refused to face questions because they were of a controversial nature. No questions could have been more hotly contested than those concerning the Federal bank, *Osbury* v. *Bank of the United States,* 22 U.S. (9 Wheat.) 738, the Federal income tax, *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U.S. 429, the Missouri Compromise, *Dred Scott* v. *Sanford,* 60 U.S. (19 How.) 393, and Child Labor Legislation, *Hammer* v. *Dagenhart,* 247 U.S. 251. No decision of any court at any time in our history has had a more pervasive effect on the fabric of our civilization than *Brown* v. *Board of Education, supra.* Even though each of these cases arose as a result of some controversial political decision, there was no mention of "judicial restraint" or "political question."

Moreover, there are additional considerations rooted in the tenor of the era in which we find ourselves that call upon this Court to not apply the principle of judicial restraint to the present facts. The first of these considerations is the mood of the young people of our nation upon whom the burden of Indochina falls most heavily. It is the spirit of the young which has been most dramatically shattered by what seems to them to be the official hypocri-

sies of two sets of standards: one, the standard of private morality, honesty and adherence to law expected of them, the other, a public morality, to which their elders pay allegiance, which can rationalize a war pursued outside of the Constitution. The most costly and permanent damage done to the American society by the Indochina war may eventually prove to be the alienation of its young people.

While there is tangible and visible evidence that the hypocrisy of the double standard of private and public morality deeply distresses the young, it is the apparent exemption which the executive seems to enjoy from constitutional strictures with respect to the war power which perhaps offends them most grievously, for it is this exemption which now jeopardizes their very existence. No one can say with conviction that the malaise of the young and the resultant unrest and violent disorder would cease immediately should this Court restore the constitutional balance. But the consequences of the Court's continued judicial avoidance of the issue are so predictably tragic that we believe the hope should be indulged.

The great men of political ideas have commented for two thousand years on the truth of the proposition that heterogeneous and dynamic societies are most safely governed by balances of power supported by the authority of a fundamental law. The Stoics, Aristotle, Montesquieu, Locke, and our own great synthesizer, Thomas Jefferson, have had their views substantially implemented in the American system of government. Power has been divided organically among the three coordinate branches of the Federal government, and power has been divided geographically between state and nation.

The complex balance of the components has shifted dramatically under the pressure of new technology, changing life-styles and new social visions. When these shifts occur they need to be tested against the irreducible constitutional

principles formally and consciously affirmed by this Court. This role — umpire of the federal system and referee of the separation of powers — has been played well throughout our Constitution's history. Relationships between the states and the nation, originally fixed by compromises between the locally and nationally oriented delegates to the Convention in 1787, have undergone many modifications. Each modification has been examined and refined by the Court against the imperatives of our constitutional scheme. This Court, throughout most of its history, has made judgments regarding the changing spheres of legislative and executive authority at the state and national level, including decisions respecting the emergency exercise of presidential powers. Indeed, one of the ironies of presidential power is that each of its extensions in the domestic area has been challenged and tested in the courts at each stage of its evolution.

We do not argue, therefore, that the federated principles drafted in the context of the social imperatives of 1787 be literally incorporated into the fundamental structure of law today. However, Article 1, Section 8, clause 11 gives to Congress, at the very minimum, the exclusive right and duty to make the decision to commit the country to war. Everything in the legislative history of the Constitutional Convention of 1787 affirms that principle without exception. Furthermore, there is nothing in case law or in the action of men in American politics which acts as precedent to negate that proposition. If the forces of history and the conditions of modern international life have made the logic of that provision obsolete, then the Court should so state in unequivocal terms. If indeed, as the government contends, war-declaring power has passed from the people and the Congress to the President and the executive branch by a kind of crude prescription and usage, then we submit that it is incumbent on the Court to tell the American

people that this is the case. At the very least, this Court must interpret Article 1, Section 8, clause 11 in the light of modern circumstances so as to assist the President and the Congress to find a new accommodation of roles which will maximize *both* national interests and the logic of operational democracy.

In a literal sense, it is true that a decision of this Court to take jurisdiction of the instant case will have a political impact, for questions of politics and constitutional rights cannot be mutually exclusive. *See Nixon* v. *Herndon, supra,* at 540. However, history has proven that a determined course of constitutional affirmation is worth the hazards of politics. It is axiomatic that in a democratic system in which the full exercise of constitutional rights depends upon proper exercise of politics both are weakened. We are aware that a ruling that presidential wars are unconstitutional invites the political response of public disillusionment and congressional confusion. However, to allow the power to commit an entire people to total war to become vested in a single man, by refusing to review such a concentration against the Constitution, is to indulge an arbitrary power and to invite dictatorship.

Despite the practices of other constitutional systems, for good or evil our system of federalism, logically and historically, relies on judicial intervention where there are basic constitutional disputes.

Rather than refuse to examine the merits of the arguments on the ground that the issue is a political one, this Court should assume a responsibility for the ramifications of those political issues. In this instance silence may well prove more destructive to our institutions of government than intervention. In the words of Senator Sam Ervin:

> "The consequences of this failure to observe the Constitution are all too evident. True, no Supreme Court

> decision has adjudged the war in Vietnam as unconstitutional on the grounds that Congress adopted no formal declaration of war and because the Senate gave no effective advice and consent. Instead, the declaration of unconstitutionality has come from the judgment of the people. We see the decree everywhere. For the first time in our memory, an incumbent President was forced from office. Young men whose fathers and brothers volunteered to serve their country now desert to Canada and Scandinavia rather than bear arms for the country's cause. Thousands march on Washington and picket the White House, the Capitol, and the Pentagon . . . .
> . . .[a]nd I cannot shake the feeling that ultimately the reason so many are now disrespectful and unresponsive to authority is because authority was disrespectful and unresponsive to the Constitution in the making of our policy in Vietnam." 115 CONG. REC. 7125 (daily ed. June 25, 1969)

The President of the United States and a large part of the Senate are in disagreement and angry confrontation. The people are confused about the proper allocation of power. To a greater degree than ever before young people no longer communicate with old, students with educators, blacks with whites and governed with governors. The educational system responsible for the most far-reaching technological advances known to man has struck the very government to which it pays allegiance. And an entire generation of Americans has come to believe that its system of government is not or perhaps cannot be responsive to the felt needs of its people, that events are truly in control of men. These are not historical precedents of little significance.

In this context, no court can stand by and refuse its

services to the structure of American government when it alone can bring historical perspective and political neutrality to the conflict; when it alone can apply the precepts of constitutional decision-making rather than the exigencies of political expediency; and law, not power, should be the yardstick for the resolution of this conflict.

The Framers anticipated that governing an independent and strongwilled people would not be easy. They feared monarchies and the centralization of power which they entail and took pains to avoid both. The product of their effort was a tripartite form of government whose beauty lay not so much in its distribution of power as in its ability to check the unconstitutional exercise of such power. The Framers' precautions notwithstanding, the power to control the military forces of the United States, including the awesome power to make war, has become increasingly centralized. The constitutional limitations placed on the executive branch of government have been increasingly ignored.

It is through this Court that the Framers intended that the Constitution be enforced and therefore, it is to this Court that the Commonwealth brings its grievance. The time to deal with the legality of the Indochina war is at hand for the consequences of not dealing with it have become too great.

VI. The Defense Of Sovereign Immunity Is Not Available To The Defendant In This Case.

The doctrine and defense of sovereign immunity has been widely criticized by commentators, *e.g.*, Jaffe, *The Right to Judicial Review I,* 71 Harv. L. Rev. 401 (1958) and *Suits Against Governments and Officers: Sovereign Immunity,* 77 Harv. L. Rev. 1 (1963); Walkup, *Immunity of the State from Suit by Its Citizens — Toward a More*

Enlightened Concept, 36 GEO. L.J. 310 (1948); Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine,* 59 HARV. L. REV. 1060 (1946); increasingly eroded by the Congress and state legislature, *e.g.,* creation of the Court of Claims, 10 STAT. 612 (1855); passage of Tucker Act, 24 STAT. 505 (1887), 28 U.S.C. § 1346(a) (1951); passage of Federal Tort Claims Act, 60 STAT. 812, 842 (1946), 28 U.S.C. § 1346 (b) (1958); and repudiated by the courts. *See, e.g., Colorado Racing Commission* v. *Brush Racing Association,* 136 Colo. 279, 284, 316 P.2d 582, 585-86 (1957); *Molitor* v. *Kaneland Community Unit District No. 302,* 18 Ill. 2d 11, 16-21, 163 N.E. 2d 89, 91-95 (1959). Moreover, this Court has increasingly indicated that in view of "expanding conceptions of public morality regarding governmental responsibility," the defense of sovereign immunity is an anachronism. *Keifer & Keifer* v. *R.F.C.,* 306 U.S. 381, 396; *see also F.H.A.* v. *Burr,* 309 U.S. 242, 245; *R.F.C.* v. *J.G. Menihan Corp.,* 312 U.S. 81, 84.

Indeed, the doctrine of sovereign immunity traditionally has operated only when money or property in which the government claims some interest is at stake. *See* H.M. Hart & H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1176 (1953). Perhaps in this area — economic rights as opposed to constitutional rights — application of the doctrine is not abhorrent, since alternative relief is normally available either in the Court of Claims or under the provisions of the Tucker Act. *See Malone* v. *Bowdoin,* 369 U.S. 643, 647 n.8. However, in the instant case, where concededly personal constitutional rights of "great magnitude," are involved, and where no alternative relief is available, the doctrine of sovereign immunity is inapplicable.

However, even assuming that this Court finds the doctrine of sovereign immunity applicable here, we submit that the allegations of the complaint fall within a well-recognized exception to the doctrine.

That exception occurs (1) when the action of an officer of the sovereign is beyond his statutory powers, or (2) when, even though the action of the officer is within the scope of his authority, the powers themselves or the manner in which they are exercised are unconstitutionally void. *Dugan* v. *Rank*, 372 U.S. 609, 621-22; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-02. Moreover, the government in another case has admitted to these exceptions to the doctrine. Brief for Appellees at 9, *Luftig* v. *McNamara, supra.*

The significance of this exception is immediately relevant here where the Commonwealth's challenge is to the statutory and/or constitutional authority of the executive. *See Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* at 585-88. In fact, this Court has on multiple occasions, without regard to the doctrine of sovereign immunity, nullified or prevented the actions of officials administering governmental programs in excess of their authority. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra; Hammer* v. *Dagenhart, supra; Waite* v. *Macy,* 246 U.S. 606; *Hill* v. *Wallace,* 259 U.S. 44; *Helvering* v. *Davis,* 301 U.S. 619; *Joint Anti-Facist Refugee Comm.* v. *McGrath,* 341 U.S. 123.

The Commonwealth submits that the reason that this Court has applied the doctrine of sovereign immunity with restraint, and held it to be "in disfavor," *F.H.A.* v. *Burr, supra,* at 245, is the fact that the Federal courts have been established to settle controversies between the citizens and their government as well as between citizens themselves. *United States* v. *Lee, supra,* at 220.

Further evidence in support of this conclusion is the fact that Congress contemplated that, under 28 U.S.C. §§ 1331 and 1361, individuals could sue to prevent officers of the executive from acting illegally or in violation of the Constitution. When Section 1331 was revised in 1958, the Senate Report accompanying the revision indicated a con-

gressional intent that Federal courts have jurisdiction over most significant categories of Federal questions. S. REP. No. 1830, 85th Cong., 2d Sess., 2 U.S. CODE CONG. & ADMIN. NEWS 3099, 3103 (1958). Moreover, the Senate was aware that many significant Federal questions involved illegal acts by Federal officials and/or the manner in which such officials administer the government, for the *Youngstown* case had been decided only a few years before.

Thus, in enacting the revised § 1331, Congress evinced the intent that the doctrine of sovereign immunity not bar cases raising Federal questions with respect to illegal actions on the part of Federal officials.

Analogous arguments with respect to § 1361 also lead to the conclusion that Congress intended that the Federal courts entertain suits questioning the legality of acts of officers of the executive, for § 1361 permits actions in the nature of mandamus to be brought against government officers. Since mandamus lies to compel an officer to perform his duty or to compel him to refrain from actions for which he has no authority, Congress intended, we submit, that the doctrine of sovereign immunity not bar plaintiffs from suing to prevent government officers from taking action outside their statutory or constitutional authority. S. REP. No. 1992, 87th Cong., 2d Sess., 2 U.S. CODE CONG. & ADMIN. NEWS 2784, 2785, 2786, 2787 (1962). Indeed, though the defendant will most assuredly assert that the doctrine of sovereign immunity bars this suit because it is in substance one against the United States, the Senate Report on the revised § 1361 specifically points out that this statute was designed to permit plaintiffs to bring "actions which are in essence against the United States." *Id.*, at 2786.

The irrationality inherent in a determination that the defendant is sovereignly immune from the present suit is at once apparent. Under such a determination, a government

established for the protection and welfare of its citizens would be allowed to bring harm upon those citizens without fear of being subjected to judicial scrunity — a total negation of the rule of law. A court, which has no difficulty in overturning the unconstitutional exercise of Federal legislative power would, in effect, refuse to apply the same standards to executive action. A government instituted as one of checks and balances between coordinate branches would find that it had only one branch with two not very effective checks. Clearly then, the doctrine of sovereign immunity cannot be a defense to this action.

VII. The Participation Of The United States In The Undeclared War In Vietnam Is Unconstitutional.

A. *The Indochina Conflict Is A War Within The Meaning Of Article 1, Section 8, Clause 11 Of The Constitution.*

Article 1, Section 8, clause 11 of the Constitution provides that "[t]he Congress shall have Power . . . *To declare War* . . . ." (Emphasis supplied). In order for this Court to make a determination that the executive has violated this clause of the Constitution, it must first determine that the conflict in Vietnam is a "war." The Convention debates of 1787 indicate that the Framers intended no esoteric use of the word "war" in Article 1. They did not, as the executive has in the past asserted, intend to refer only to those instances of military action in which the United States seeks to conquer another nation out of territorial designs, or other imperialist motives, or in former Undersecretary of State Katzenbach's words, wars of "aggression" or "conquest." *Hearings on S. Res. 151 Before The Senate Committee on Foreign Relations,* 90th. Cong., 1st Sess. 80-81 (1967) [hereinafter cited as *National Commitments Hearings*].

It is apparent from the history of the drafting of the Constitution, and from the exercise of common sense, that Congressional control over the nation's entry into war embraces all *major* military involvement. The concern of the Framers of the Constitution was that the President be denied the power to initiate warfare. 3 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION of 1787 250 (1911). There is not the slightest indication that the executive enjoys a special prerogative to initiate a "benevolent" war or a war of "limited objectives." On the contrary, having experienced the abuses inherent in treating warfare as a royal prerogative, the Framers distrusted the executive's belief in its ability to define national objectives. *See* Abraham Lincoln, quoted in E. Corwin, THE PRESIDENT: OFFICE AND POWERS 451 (4th ed. 1957); THE FEDERALIST No. 69 (A. Hamilton). Therefore, in giving the power to declare war to Congress, the Framers intended the word "war" to be defined in its commonly understood fashion. At the time of the drafting of the Constitution, war was considered to be "[t]hat state in which nations, under authority of their respective governments prosecute their rights by force." E. Vattel, THE LAW OF NATIONS, Book III — "Of War," Chapter 1, Section 1 (1760). The definition today remains remarkably similar to that early understanding. It can be "a period of armed conflict between political units," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961, Springfield, Massachusetts), or "a contention of States through their armed forces." 2 L. Oppenheim, INTERNATIONAL LAW §§ 55, 57 (7th ed. H. Lauterpacht 1952).

This Court adopted the essence of these varying definitions in *The Prize Cases,* where it found war to be "[t]hat state in which a nation prosecutes its right by force." *Prize Cases, supra,* at 666; *cf. Bas* v. *Tingy, supra,* at 40. This definition has been further interpreted by lower courts to

mean "a condition of armed hostility between states." *Navois Corp.* v. *The Ulysses II,* 161 F. Supp. 932, 939 (D. Md.), *aff'd per curiam,* 260 F.2d 959 (4th Cir. 1958); *accord, United States* v. *Bortlik,* 122 F. Supp. 225, 227 (M.D. Pa. 1954); *see* 2 L. Oppenheim, INTERNATIONAL LAW 209 (7th ed. H. Lauterpacht 1952); UNITED STATES ARMY FIELD MANUAL 27-10, *The Law of Land Warfare* 7 (1956). The definition has been used by the Court of Military Appeals in determining whether the Korean conflict was a war within the meaning of the Uniform Code of Military Justice. In holding Korea to be a war, the Court added much practical substance to the definition by stating:

> "We believe a finding that this is a time of war, within the meaning of the language of the Code, is compelled by the very nature of the conflict; the manner in which it is carried on; the movement to, and the presence of large numbers of American men and women on, the battlefields . . .; the casualties involved; the sacrifices required; the drafting of recruits to maintain the large number of persons in the military service; the national emergency legislation enacted . . .; the executive orders promulgated; and the tremendous sums being expended . . . ." *United States* v. *Bancroft,* 3 U.S.C.M.A. 3, 5, 11 C.M.R. 3, 5 (1953).

Furthermore, it is well settled that a state of war can exist prior to or even in the absence of a formal declaration. *See, e.g., Montoya* v. *United States, supra,* at 267; *The Pedro, supra,* at 363; *The Protector, supra,* at 702; *Masterson* v. *Howard, supra,* at 105; *Bas* v. *Tingy, supra,* at 38-39; *New York Life Ins. Co.* v. *Bennion,* 158 F.2d 260 (10th Cir. 1946), *cert. denied,* 331 U.S. 811, *rehearing denied,* 331 U.S. 867; *Navois Corp.* v. *The Ulysses II, supra,* at 938;

United States v. *Bancroft, supra;* J. Stone, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 304-05 (2d ed. 1959).

The Court of Military Appeals, in *United States* v. *Anderson, supra,* has held that such an undeclared state of war exists in Vietnam. In *Anderson,* the defendant, charged with desertion, alleged that the statute of limitations had run on his offense. The Court, holding that the statute of limitations on desertion was suspended "in time of war," upheld the conviction. In its opinion, the Court stated:

> "The current military involvement of the United States in Vietnam undoubtedly constitutes a 'time of war' in that area. . . ." *United States* v. *Anderson, supra,* at 589, 387.

The same conclusion was reached by the United States District Court for the District of Rhode Island:

> "[I]t can hardly be denied that a time of war does exist for this country. . . . [It is] certainly of such obviousness and immediacy as to demand judicial notice. The astronomical government expenditures in furtherance of the American effort in Vietnam exceeding two billion dollars a month, the macabre toll of young American lives, the explosion in the public forum rocking the country to its very foundation, the intimacy with the horror of human beings in mortal combat as relived on television sets, and the presence of approximately one-half million troops in Vietnam are all too real to dispute that we are indeed engaged in war: that a time of war does tragically exist." *H. P. Hood & Sons, Inc.* v. *Reali,* 308 F. Supp. 788, 789-90 (D.R.I. 1970).

Nor do the judicial conclusions referred to above seem

anomalous when put in the context of the military commitment this nation has made to the conflict in Indochina. This commitment has, at times, reached more than 550,000 and presently involves over 400,000 men; it has seen, to this date, approximately 42,000 men killed and over 280,000 wounded; it has seen this nation drop more bomb tonnage than was dropped on Germany and Italy in World War II, and, in pure military terms, it is, excluding the Civil War, the third largest military venture in the history of this nation. Note, *Congress, The President, and The Power to Commit Forces to Combat,* 81 HARV. L. REV. 1771, 1803 (1968); COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 91st Cong., 1st Sess., BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM (Comm. Print 1969). (Final statistics on troops killed and wounded obtained in a telephone conversation with Public Affairs Office of the Department of Defense, Washington, D.C.). Furthermore, both the executive and the legislative branches of the government have on several occasions indicated that they consider the conflict in Vietnam to be a war. In his news conference of July 28, 1965 former President Johnson spoke of the armed struggle, identified the enemy state, and described what we are contending for:

> "This is a different kind of war. There are no marching armies or solemn declarations. Some citizens of South Vietnam at times, with understandable grievances, have joined in the attack on their own government.
>
> But we must not let this mask the central fact that this is really war. It is guided by North Vietnam and it is spurred by Communist China. Its goal is to conquer the South, to defeat American power, and to extend the Asiatic dominion of communism." 2 Lyndon B. Johnson, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES — *1965* 794 (1966).

And, former Ambassador Cyrus Vance on one occasion expressed this hope:

> "Once again, therefore, I urge you [North Vietnam] to join with us in steps to reduce the level of violence and bring the war to an end and to discuss with us the withdrawal of all foreign forces from the South — yours as well as ours." Notes of remarks, Sept. 18, 1968, in 59 DEP'T STATE BULL. 363, 364 (1968).

The former President on other occasions observed that "[t]he war is dirty and brutal and difficult." Address at Johns Hopkins University, April 7, 1965, in 52 DEP'T STATE BULL. 606, 838-39 (1965). He did, in good faith, time and time again assure the world that "the United States . . . seeks no wider war." Message to the Congress, August 5, 1964, in 51 DEP'T STATE BULL. 261, 262 (1964).

In addition, members of Congress have referred to the Vietnam conflict as a "war." In discussing the Defense Supplemental Appropriations Bill, H. R. 17734, members of the 90th Congress repeatedly referred to the Vietnam conflict as a war which was carried out solely by the executive. *See, e.g.,* 24 CONGRESSIONAL QUARTERLY 1445 (June 14, 1968). Therefore, the Commonwealth submits that, as in *United States* v. *Anderson, supra,* at 590, 388, citing *Bas* v. *Tingy, supra,* at 40:

> "When a state of hostilities is expressly recognized by both Congress and the President, it is incumbent upon the judiciary to accept the consequences that attach to such recognition."

The consequence of the recognition in the instant case is a determination by this Court that the United States is at "war" within the meaning of the Constitution.

B. *The Executive Does Not Have The Constitutional Power To Wage War Without Congressional Authorization.*

1. *The power to commit this nation to war is granted exclusively to Congress by the Constitution.*

While both the executive and Congress have extensive war powers under the Constitution, we submit that it is clear that the ultimate control of the military establishment has been granted to the Congress. The source of this control is Article 1, Section 8, which provides, in pertinent part, that:

> "The Congress shall have power . . .
>
> * * *
>
> *To declare War . . .*
>
> 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. . . ." (Emphasis supplied).

The Framers' circumscription of executive authority to commit military troops to combat by placing the plenary military power, as well as the exclusive power to declare

war, in Congress, was a product of their historical experience.

By his "executive prerogative" the King of England had always had the power to commit that nation to war. In a desire to prevent the devastating ease with which one man could make that decision, the Framers were careful to vest the power to wage war in the body most representative of the people. *Berk* v. *Laird, supra,* at 3382. *See* Justice Story's analysis of the Framers' concern in 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 92 (5th ed. 1891);[3] E. Corwin, THE CONSTITUTION AND WHAT IT MEANS TODAY 61 (10th ed. 1948); C. Berdahl, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 79 (1921). That the Framers had strong feelings about this important decision is evidenced by the following statement of Alexander Hamilton:

> "The Congress shall have the power to declare war; the plain meaning of which is, that it is the peculiar and exclusive duty of Congress, *when the nation is at peace,* to change that state into a state of war; . . .in other words, it belongs to Congress only *to go to war.*" Hamilton, No. 1 of "Lucius Crassus" (Dec. 17, 1801) reprinted in R. Morris, ed., ALEXANDER HAMILTON AND THE FOUNDING OF THE NATION 526 (1957) (Original emphasis). *See also* J. Madison, DEBATES ON THE FEDERAL CONSTITUTION 439 (Elliot, ed. 1845).

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[3] "The power of declaring war. . .is, in its own nature and effects, so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation . . . . The co-operation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation, as it is in all others . . . . This reasoning appears to have had great weight with the (constitutional) convention, and to have decided its choice."

This proposition finds further support in the Federalist Papers, *See, e.g.*, THE FEDERALIST No.41, at 249-50 (H.Lodge ed. 1888) (Madison), which are to be given great weight in determining the true meaning of constitutional provisions, *Transportation Co.* v. *Wheeling,* 99 U.S. 273, 280. Moreover, it was the understanding of the States of the Union at the time of the ratifying of the Constitution, *See* Wilson, *State House Speech,* in Mason, FREE GOVERNMENT IN THE MAKING 265 (3d ed. 1965); 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 92-93 (5th ed. 1891), due to the fear of the people that without such an assignment of the war-making power, a single man would have massive power which would be used, to the great detriment of the populace, arbitrarily and without check, *See* E. Corwin, THE PRESIDENT: OFFICE AND POWERS 180 (4th ed. 1957); 1 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 316 (1911); it was recently reaffirmed by the 90th Congress of the United States:

> "There is no uncertainty or ambiguity about the intent of the framers of the Constitution with respect to the war power. Greatly dismayed by the power of the British Crown to commit Great Britain — and with it the American colonies — to war, fearful of the possible development of monarchical tendencies in their new republic, and fearful as well of the dangers of large standing armies and military defiance of civilian authority, they vested the power to commit the United States to war exclusively in Congress. This power was not, like certain others, divided between the executive and the legislature; it was conferred upon Congress and Congress alone . . . ." S. REP. No. 797, 90th Cong., 1st Sess. 8 (1967) [hereinafter cited as *National Commitments Report*];

and it has been recognized by this Court on several occasions. *See, e.g.,* "By the Constitution, Congress alone has the power to declare a national or foreign war. . . . [The President] has no power to initiate or declare a war. . . ." *Prize Cases, supra,* at 668; "Nothing. . .is plainer than that declaration of a war is entrusted only to Congress." *Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* at 642 (Jackson, J., concurring); ". . . the Constitution has delegated to Congress the power of originating war by declaration. . . ." *Ex Parte Milligan, supra,* at 18; "The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry. . . .Congress may authorize general hostilities. . .or partial hostilities, ..." *Talbot* v. *Seeman, supra,* at 28.

Thus, the Commonwealth contends that this Court must give effect to the obvious intent of Article 1, Section 8, clause 11 of the Constitution, namely, that only Congress can make the decision to wage war in Vietnam. *See* Velvel, *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable,* 16 KAN. L. REV. 449, 450-53 (1968); *Knox* v. *Lee,* 79 U.S. (12 Wall.) 457, 531; *United States* v. *Classic,* 313 U.S. 299, 316, *rehearing denied,* 314 U.S. 707.

2. *Nothing in the inherent powers of the executive, including the power to repel sudden attacks, justifies the extent of our military commitment in Vietnam.*

It has been suggested that the words of clause 11, "to declare war," mean only that the Congress has the authority "to announce," not to decide whether war shall be commenced, and that the actual power to commence war resides in the executive. *See, e.g.,* Department of State Memorandum, *The Legality of United States Participation in the*

Defense of Vietnam, reprinted in 75 YALE L.J. 1085, 1100-1101 (1966) [hereinafter cited as *Legal Advisor*]. This attempt of the executive branch to emasculate the constitutional provision which precludes the executive from initiating hostilities is without logical or authoritative support, as the Constitutional Convention debates on the subject clearly indicate. J. Madison, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 (G. Hunt & J. Scott, eds. 1920) [hereinafter cited as DEBATES].

At the convention, the Committee of Detail's draft gave the Legislature the power "[t]o make war." DEBATES, *supra,* at 341. Some delegates believed, however, that this clause would prevent the President from responding to an emergency situation before the Congress could assemble and act. Pierce Butler "was for vesting the power in the President." DEBATES, *supra,* at 418. Elbridge Gerry rejoined that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." DEBATES, *supra,* at 419.

Charles Pinckney objected to vesting the power "to make war" in the entire Legislature. He felt that the House "was too numerous for such deliberations. The Senate would be the best depositary, being more acquainted with foreign affairs. . . ." DEBATES, *supra,* at 418. George Mason "was against giving the power of war to the Executive, because [it was] not safely to be trusted with it; or to the Senate, because [it was] not so constructed as to be entitled to it." DEBATES, *supra,* at 419. Clearly Mason's overriding concern was to vest the war power in the body most representative of the people.

In order to clarify the distribution of the war power between the Legislature and the executive, Madison and Gerry moved "to insert '*declare*' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks." DEBATES, *supra,* at 418 (Emphasis in original text). Sher-

man agreed that while the executive should be able "to repel," he should not be able "to commence" war. DEBATES, *supra,* at 418-19.

The overriding purpose of the debates on the war clause clearly was to circumscribe the authority of *both* the Legislative and the executive so that the Government might not summarily involve the citizens in a burdensome war or present the people with a *fait accompli.* Oliver Elsworth stated that "[i]t should be more easy to get out of war, than into it." DEBATES, *supra,* at 419. Here the concern was with compounding a mistaken entry into war by limiting the ease with which the Government could make peace. George Mason was for "clogging rather than facilitating war." DEBATES, *supra,* at 419.

The debates clearly reveal that except for the President's authority "to repel sudden attacks," the Congress was to have exclusive power "to make war." "Declare" was substituted for "make" only to clarify that the President could act in emergency situations until such time as the Congress could convene to consider the matter.

See also Berk v. *Laird, supra,* at 3382; R. Russell, The United States Congress and the Power to Use Military Force Abroad, April 15, 1967, 42 (unpublished thesis in Fletcher School of Law and Diplomacy Library); Statement of Senator Ervin, *National Commitments Hearings, supra,* at 194; Note, *Congress, the President, and The Power to Commit Forces to Combat, supra,* at 1772-75; Comment, *The President, The Congress, and the Power to Declare War,* 16 KAN. L. REV. 82 (1967); *National Commitments Report, supra,* at 8-9; 2 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318-19 (1911). Moreover, The Legal Advisor for the Department of State concedes that the purpose of the Madison-Gerry Amendment was to give the executive the "power to repel sudden attacks." 54 DEP'T OF STATE BULL. 474, 484.

Furthermore, this Court acknowledged the foregoing to be the intent of the Framers in its decision in the *Prize Cases, supra,* where it concluded that the President has the authority to commit the military to action only in circumstances where emergency demands it.

> "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." *Id.,* at 668.

The fact that the Framers of the Constitution were willing to tolerate this one extraordinary exercise of the war powers by the executive offers no support for the contention that the executive now has the power to initiate war. In fact, in spelling out the one instance in which the executive, rather than the Congress, might initiate hostilities, the Framers emphasized their conscious decision to place exclusive control over the commencement of warfare with Congress in all other instances.

Therefore, we submit that the executive has no legal authority to initiate armed conflicts, or to continue existing hostilities, except when Congress provides it with that authority by delaring war. Neither does the executive have authority to take domestic actions in furtherance of such illegal wars. It may use force to repel sudden or imminent attacks, but as soon as time is available Congress must be asked for a limited or general declaration of war. Only in this way can the representatives of the people, rather than a small group of Presidential advisers, decide whether the price in lives and resources will outweigh the national interest involved.

This Court cannot refrain from striking down arbitrary or unauthorized executive actions, merely because they

take the form of a war or occur as part of a war effort. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra; Lichter* v. *United States,* 334 U.S. 742, 779. The fact that the locus of much of the executive's actions lies outside the boundary of the United States does not serve to clothe its acts with legal authority if they would otherwise be invalid. To claim that the holding in *Youngstown* should "stop at the water's edge" is, in the context of this case, to dangerously weaken the separation of powers principle:

> "Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* at 642 (Jackson, J., concurring) (Footnote omitted).

Such carte blanche treatment of the executive's overseas powers — inflation of the theory that the President is supreme in the field of foreign affairs, *cf. United States* v. *Curtiss — Wright Export Corp.,* 299 U.S. 304, 315-21 — does violence to any and all constitutional guarantees against arbitrary governmental action. *Cf. Afroyim* v. *Rusk,* 387 U.S. 253; *Aptheker* v. *Secretary of State, supra.*

Nor can reliance be placed on a generalized "executive power" or on the President's duty to faithfully execute the laws:

> "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Myers* v. *United States, supra,* at 177 (Holmes, J., dissenting).[4]

In other words, the President has no "implied," "inherent" or otherwise unlisted powers, *Youngstown Sheet & Tube Co. v. Sawyer, supra,* but instead derives his power totally from the provisions of the Constitution, *Ex Parte Quirin, supra,* at 25.

Any argument that a declaration of war is an outmoded instrument, not adapted to the realities of modern warfare, Statements of Undersecretary Katzenbach, *National Commitments Hearings, supra,* at 80-81, 161, 174, is not only without merit, but also runs squarely into the letter and spirit of the Constitution and the President's duty as a public official to enforce it. *Cooper* v. *Aaron,* 358 U.S. 1. Indeed, as one commentator has noted:

> "[I]f in 1787 it was the wiser course to entrust the decision as to war and peace to a broadly representative body rather than to the judgment of a single man, the greater hazards of the modern world seem to make it all the more important to retain this check on an impetuous executive." F. Wormuth, THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION 5 (1968). *See also* Kurland, *The Impotence of Reticence,* 1968 DUKE L.J., 619 (1968).

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[4]The line of cases beginning with *In re Neagle,* 135 U.S. 1, and *In re Debs,* 158 U.S. 564, is inapposite here because the basic constitutional command that Congress shall declare war clearly forbids the President to do the same thing. In those cases there was no constitutional or statutory command that the President not act in the manner in which he acted.

Furthermore, to hold that Article 1, Section 8, clause 11, of the Constitution is now meaningless would be in clear derogation of the principle that all constitutional provisions must be given full meaning and effect. *See Holmes* v. *Jennison,* 39 U.S. (14 Pet.) 540, 570-71; *accord, Wright* v. *United States,* 302 U.S. 583, 588; *see also Marbury* v. *Madison, supra,* at 174; *Ullmann* v. *United States,* 350 U.S. 422, 428, *rehearing denied,* 351 U.S. 928.

Vietnam does not represent an example of a President reacting to a military emergency which does not allow time for a thorough Congressional debate. The executive has in fact admitted this to be so in a State Department letter to the chairman of the Senate Foreign Relations Committee, reported in 28 CONGRESSIONAL QUARTERLY 785 (March 20, 1970). On the contrary, the military "emergency" in that country has existed for almost fifteen years. There has been ample opportunity for the executive to go to Congress and seek, in a straightforward fashion, authorization to conduct the present level of hostilities. Nowhere in the Constitution is it even contemplated that, given such an opportunity, the President have the power to unilaterally pursue a military involvement to the extent this nation is now involved in Vietnam.

3. *Nothing in the executive's power as "Commander-in-Chief" can justify the extent of our military commitment in Vietnam.*

Nor can power to engage the nation in war without Congressional authorization be found in the so-called "Commander-in-Chief" clause. U.S. CONST. ART. 2, § 2, CL. 1. This constitutional provision merely places the executive at the apex of the pyramid of military command, making him "first general and admiral." THE FEDERALIST No. 69,

at 430 (H. Lodge ed. 1888) (A. Hamilton);[5] *accord, Ware* v. *Hylton,* 3 U.S. (3 Dall.) 199, 273 (Iredell, J.); *Madsen* v. *Kinsella,* 93 F. Supp. 319, 323 (S.D. W. Va. 1950), *aff'd,* 343 U.S. 341. As Mr. Chief Justice Taney, speaking for this Court in *Fleming* v. *Page, supra,* stated:

> "As commander-in-chief, he [the executive] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. *Id.,* at 615.

However, it is clear that this power to direct or command the military forces of this nation includes, insofar as is here relevant, only the authority to "wage war which Congress has declared." *Ex Parte Quirin, supra,* at 26.

This Court interpreted the war making powers of the Constitution in just this fashion in *Ex Parte Milligan, supra,* where it stated that:

> ". . . the Constitution has delegated to Congress the power of originating war by declaration, when such declaration is necessary to the commencement of hostilities, ...
> . . . After war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it . . . is given to the President." *Id.,* at 18.

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[5] "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 declaring of war and to the raising and regulating of fleets and armies, all of which, the Constitution under consideration, would appertain to the legislature."

The same conclusion was reached by former Mr. Chief Justice Hughes, who, writing of the distribution of war powers under the Constitution, stated:

> "To the President was given the direction of war as the Commander-in-Chief of the Army and Navy. It was not in the contemplation of the constitution that the command of forces and the conduct of campaigns should be in charge of a council or that as to this there should be division of authority or responsibility. The prosecution of war demands in the highest degree the promptness, directness and unity of action in military operations which alone can proceed from the Executive. This exclusive power to command the army and navy and thus to direct and control campaigns exhibits not autocracy, but democracy fighting effectively through its chosen instruments and in accordance with the established organic law." 42 A.B.A. REP. 232, 233 (1917).

Explicitly, then, the Commander-in-Chief clause was never intended to abrogate or modify the provisions of Article 1, Section 8, clause 11, relative to the necessity of receiving Congressional authorization for the waging of war. R. Russell, The United States Congress and the Power to Use Military Force Abroad, *supra,* at 27-28, 63.

> 4. *Isolated incidents of United States use of military force abroad are not precedent for the waging of a war in Vietnam without Congressional authorization.*

The executive has, on numerous occasions in the past, committed armed forces to combat without Congressional authorization. However, the argument that these incidents

act as precedent for the present executive's commitment of troops in Vietnam is not legally persuasive. In the first place, not every episodic use of armed force constitutes a "state of war" within the meaning of the Constitution. J. Rogers, WORLD POLICING AND THE CONSTITUTION 21 (1945); Note, *Congress, The President and The Power to Commit Forces to Combat, supra,* at 1774. The isolated incidents cited by the government in support of its position in Vietnam,[6] 54 DEP'T STATE BULL. 474, 484 (1966), clearly are minor actions, Statement of Undersecretary Katzenbach, *National Commitments Hearings, supra,* at 81, which can be justified either on the grounds of protection of American lives and property or as military acts of pure self-defense in which the demand for action was immediate. *See* E. Corwin, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 142-156 (1917); J. Rogers, WORLD POLICING AND THE CONSTITUTION 56-57, 93-112, 123 (1945); Standard, *United States Intervention in Vietnam Is Not Legal,* 52 A.B.A. J. 627, 633 (1966).

The only arguable exception to this statement is the Korean conflict which can be legally justified, if not explained, as prolonged resistance to sudden attack.

A similar argument from "historical precedent" was made in the *Youngstown* litigation. The executive argued that it had the authority to seize the steel mills under the war powers granted it by the Constitution and cited several past seizures, unauthorized by Congressional action, as

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[6] For an excellent factual analysis of these incidents, *see* F. Wormuth, THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION 21-35 (1968); E. Corwin, TOTAL WAR AND THE CONSTITUTION 144-50 (1947); R. Leopold, THE GROWTH OF AMERICAN FOREIGN POLICY 96-98 (1962); Note, *Congress, The President and The Power to Commit Forces to Combat, supra,* at 1787-89. For evidence of the fact that some of the incidents included in the 125 examples of the presidential use of military force abroad are erroneously included, *see* Revely, *Presidential War Making, supra,* at 1258-59.

support for that argument. The argument was flatly rejected by the District Court:

> "[I]t is difficult to follow [defendant's] argument that several prior acts apparently unauthorized by law, but never questioned in the courts, by repetition clothe a later unauthorized act with the cloak of legality." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 103 F. Supp. 569, 575 (D.D.C. 1952), *aff'd,* 373 U.S. 579.

Furthermore, the reasons for insisting on strict obedience to the constitutional division of powers, regardless of past practices, are practical and not academic for:

> "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* at 594 (Frankfurter, J., concurring).

For the above reasons, the Commonwealth of Massachusetts urges this Court to reaffirm the proposition that the use of the war-making powers of the executive "is a process which begins when war is declared." *Ludecke* v. *Watkins,* 335 U.S. 160, 167.

C. *Congress Has Never Expressly Authorized The Indochina War Nor Can Authorization Be Implied From Other Congressional Actions Including The So-Called "Gulf Of Tonkin" Resolution.*

The record is clear that Congress has never expressly declared war against any nation in Indochina. 2 Lyndon B. Johnson, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED

STATES — *1965* 794 (1966); *National Commitments Report, supra,* at 23-27; Statement of Senator Gore, *National Commitments Hearings, supra,* at 109-110; *cf.* War Declaration Against Japan, 55 STAT. 795, (1941); *Navois Corp.* v. *The Ulysses II, supra,* at 941; Eagleton, *The Form and Function of the Declaration of War,* 32 AM. J. INT'L LAW 19, 22 (1938). Furthermore, Congressional inaction in the face of the executive's military commitment in Indochina has not served to authorize or ratify that commitment. The Constitution presupposes a positive Congressional decision on whether to commit the nation to war. The issue must not be avoided. It is a decision which the representatives of the people are called upon to make since the people will most severely feel its consequences. The Framers' intent is satisfied not only by a specific act labelled "Declaration of War" but also, as was the case in the undeclared war with France in 1797, by an act or resolution stating that as of a certain time the armed forces of the United States may commence a military action against a particular nation. *See Bas v. Tingy, supra.*

However, it must be unmistakably clear from whatever Congressional action is relied upon as authorization for the war, that this nation has "made up its mind in an adequate way." Comments of Ambassador George Kennan, *Hearings on S. 2793 Before the Senate Committee on Foreign Relations,* 89th Cong. 2d Sess. 419; *see also Myers* v. *United States, supra,* at 293 (Brandeis, J., dissenting). The Commonwealth submits that there is no act or resolution of Congress which manifests the intent of that body to authorize the commitment which this nation has made in Indochina.

The only Congressional resolution dealing expressly and exclusively with the war is the Southeast Asia Resolution. PUB. L. No. 88-408, 78 STAT. 384 (1964) [hereinafter cited as the TONKIN RESOLUTION]. The Senate has recently re-

pealed that resolution and in our view whatever force it had in buttressing the executive's argument that the resolution constitutes Congressional authorization for the commitment which the United States has made in Indochina no longer exists. However, in anticipation that the defendant will argue that the resolution remains in full force and effect until both branches of the Congress repeal it, *See* TONKIN RESOLUTION § 3, and because it is the single most important action of the Congress with respect to the Vietnam war, we will treat it in some detail.

1. *The Tonkin Resolution does not constitute a Congressional declaration of war.*

On August 4, 1964, two United States naval vessels allegedly operating in international waters in the Gulf of Tonkin were allegedly attacked by the naval forces of North Vietnam. R. Hull & J. Novogrod, LAW AND VIETNAM 176 (1968); *see* 110 CONG. REC. 18409-60 (1964); *The Gulf of Tonkin, the 1964 Incidents, Hearings Before the Committee on Foreign Relations*, 90th Cong. 2nd Sess. 22 *passim* (1968) [hereinafter cited as *Tonkin Gulf Hearings*]. In direct response to this attack, President Johnson ordered air units of the 7th Fleet into action against military installations in North Vietnam supporting the alleged attacks.

On August 5th, the President asked the Congress for "a resolution expressing the unity and determination of the United States." Message to the Congress, Aug. 5, 1964, in 51 DEP'T STATE BULL. 261, 262 (1964). The Congress responded by adopting, on August 7, a "Joint Resolution: To promote the maintenance of international peace and security in southeast Asia." This resolution was signed by the President on August 10.

The text of the resolution is as follows:

"Whereas naval units of the Communist regime in Vietnam, in violation of the principles of the Charter of the United Nations and of international law, have deliberately and repeatedly attacked United States naval vessels lawfully present in international waters, and have thereby created a serious threat to international peace; and

"Whereas these attacks are part of a deliberate and systematic campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors and the nations joined with them in the collective defense of their freedom; and

"Whereas the United States is assisting the people of southeast Asia to protect their freedom and has no territorial, military or political ambitions in that area, but desires only that these peoples should be left in peace to work out their own destinies in their own way: Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress 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.

"Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast

> Asia Collective Defense Treaty requesting assistance in defense of its freedom.
>
> "Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress." 110 CONG. REC. 1847.

The executive branch has taken a series of shifting and seemingly inconsistent stands on the effect of the Tonkin Resolution, arguing, on occasion, that it could fight the war even if the Resolution had never been passed or was repealed, Letter from executive to Chairman of Foreign Relations Committee, reported in 28 CONGRESSIONAL QUARTERLY 785 (March 20, 1970), and at other times claiming that the Resolution authorizes at least the current level of military commitment in Indochina. *Legal Advisor, supra,* at 1102-06; Statement of Undersecretary Katzenbach, *National Commitments Hearings, supra,* at 82. To the extent that the basis for this latter position is a literal reading of the language of the resolution, devoid of any attempt to ascertain Congressional intent, the position is simply unpersuasive. A literal reading of the language of the Tonkin Resolution could be said to authorize military commitment at any point on the spectrum from the sending of a limited number of advisers and economic aid to the initiation of a third world war. That the Resolution is literally capable of authorizing such multitudinous levels of military commitment graphically demonstrates that the intent of the Resolution cannot be understood outside the context of its legislative history. It is that history which unmistakably demonstrates that Congress did not intend and did not see itself as authorizing the executive to wage a conflict such as the present war in Vietnam.

Because the Resolution was intended as a response to an alleged surprise attack on two American ships, it was enacted in an atmosphere of urgency and haste.

> "The prevailing attitude was not so much that Congress was granting or acknowledging the executive's authority to take certain actions but that it was expressing unity and support for the President in a moment of national crisis . . . ." *National Commitments Report, supra,* at 20.

The last thing in the mind of Congress was to open the way for United States participation in a full-scale war.

> "In adopting the resolution Congress was closer to believing that it was helping to *prevent* a large-scale war by taking a firm stand than that it was laying the legal basis for the conduct of such a war. When Congress declared war on Japan on December 8, 1941, it expected and intended that the full military power of the United States would be brought to bear against Japan. When Congress adopted the Gulf of Tonkin Resolution, it had no such expectation." *National Commitments Report, supra,* at 21. (Original emphasis).

In seeking the Resolution from the Congress, the President had reassured the nation that he sought only a "response limited and fitting" to the North Vietnamese attacks upon our destroyers in the Gulf of Tonkin, 110 CONG. REC. 18459 (1964) (President Johnson's Address to the Nation); and in his message to Congress supporting the Resolution the President stated:

> "As I have repeatedly made clear, the United States

intends no rashness, and seeks no wider war." N. Y. Times, Aug. 4, 1964, cited in 110 CONG. REC. 18132 (1964).

The subsequent Congressional debates, which are convincing, if not conclusive evidence of Congressional intent, *See Arizona* v. *California,* 373 U.S. 546, 572-77, indicate that a large number of legislators did not anticipate nor understand the Resolution to authorize greatly increased participation on the part of the United States in the Vietnam hostilities.

In the Senate the remarks of Senator Fulbright are perhaps the most helpful in ascertaining Congressional intent for it was he who managed and sponsored the resolution on the floor. Throughout the debates, the Senator defended the Resolution as not expanding the rather limited American military commitment in Southeast Asia. (Then involving approximately 16,000 men serving in an advisory capacity to the Army of the Republic of Vietnam. Statement of Secretary McNamara, *Tonkin Gulf Hearings, supra,* at 21.). He assured Senator McGovern that the American policy of confining the war to South Vietnam would not be changed by the resolution. 110 CONG. REC. 18402-3. He assured Senator Brewster that there was nothing in the Resolution which contemplated the landing of large land armies on the continent of Asia. *Id.*, at 18403. He continued by stating that the United States must not become involved in an Asian land war and that the purpose of the Resolution was to deter North Vietnam from spreading the war. The Senator admitted that while the language of the Resolution might not prevent the President from escalating the war, it was clearly the Congressional intent and understanding of the Resolution that he be so limited. *See also* 110 CONG. REC. 18404-07 and 18410, where Senator Fulbright expressed similar statements in defense of the

Resolution to other Senators. For statements of other Senators expressing like views, *See* 110 CONG. REC. 18408-10, 18417-19, 18423, 18456-67.

On the second day of debate, when it appeared that the scope of the authorization under section 2 was unclear, Senator Nelson introduced an amendment which would have limited United States participation to "the provision of aid, training assistance, and military advice." 110 CONG. REC. 18459 (1964). The amendment was rejected because in the words of Senator Fulbright, "[i]t states fairly accurately what the President has said *would* be our policy . . . . I do not believe it is *contrary* to the joint resolution, but it is an enlargement." 110 CONG. REC. 18459 (1964) (Emphasis supplied). However, Senator Fulbright rejected the amendment so as not to create a delay at a time when speed was thought to be essential. The House was then voting on the Resolution and Senator Nelson's amendment, if accepted, would have forced a House-Senate Conference thereby delaying final approval. The Senator, in summarizing, stated that the Resolution was calculated "to prevent the spread of the war, rather than to spread it." 110 CONG. REC. 18462 (1964).

In the House the Resolution was presented and debated in the same fashion as just discussed. Congressman Morgan, the floor manager for the Resolution, assured the House that the Resolution was "definitely not an advance declaration of war. The committee has been assured by the Secretary of State that the constitutional prerogative of the Congress in this respect will continue to be scrupulously observed." 110 CONG. REC. 18539 (1964). This sentiment was echoed by Congressman Adair, at 18543; and Congressman Fascell, at 18549, among others.

The Congressional intent behind the Tonkin Resolution was made abundantly clear not only in the debates which took place while the Resolution was under consideration,

but also in the 1967 Senate Foreign Relations Committee Hearings on United States Commitments to Foreign Powers. *National Commitments Hearings, supra,* at 72 *passim.* During these hearings Senator Fulbright unequivocally restated that the Resolution was not a declaration of war, that it did not represent a Congressional decision to wage a full-fledged war against a foreign government, and that it was, rather, a response to an attack on United States forces in a situation which had been presented as an emergency. *National Commitments Hearings, supra,* at 82-83. The Senator went on to state that the Resolution illustrates the distinction which must be made between repelling an attack and waging war in the broad sense. He indicated that the Resolution had been passed quickly in order to support the President in his immediate response to the attacks on our ships, and further said that it was passed and must be interpreted against a background of repeated statements by Presidents Johnson and Kennedy that America's policy was not to fight in Asia, that its armed forces would not be used there, and "that American boys would not do the fighting that Asian boys should do for themselves." *National Commitments Hearings, supra,* at 87.

Other Senators voiced similar sentiments as to the intent of the Tonkin Resolution. Senator Gore stated, "I did not vote for the Resolution with any understanding that it was tantamount to a declaration of war." *National Commitments Hearings, supra,* at 88. He went on to state that he knew of no one who, when the Resolution was considered, interpreted it in the light "of a commitment of combat troops against which the President had declared." *National Commitments Hearings, supra,* at 109.

Senator Percy was quoted as stating that a survey showed that forty Senators publicly disagreed with the President's position, and that he did not know if the Re-

solution would have been approved if it had been expressed that over 500,000 Americans would eventually be committed in Vietnam. *National Commitments Hearings, supra,* at 114. Senator Hickenlooper stated that few if any Congressmen who voted for the Resolution thought they were "authorizing an all-out war all over Vietnam." He continued, "[the Resolution has been] used as a lever to open the door to a much wider operation than anybody really thought about." *National Commitments Hearings, supra,* at 118.

The Congressional debate on the Tonkin Resolution together with the statements of Senators at the National Commitments Hearings demonstrate that, in passing the Tonkin Resolution, the Congress intended an authorization falling far short of that which the executive may now claim. These sources also point out that the very broad language, upon which the executive may seek to rely, was not made tighter for two reasons: (1) there was no time, as the executive had requested a hasty reply to deal with an urgent situation and (2) the Congress was under the impression that the executive understood the narrowness of the authorization which the Resolution provided. These sources also point out that while the language of the Resolution may be read technically to authorize full scale war in Asia, the Congress actually believed that the Resolution was to be used to prevent such a war. It is in this context that this Court must now look to and interpret the language of the Resolution.

Initially, it should be observed that Section two of the Resolution qualifies the broad grant of power to the President by requiring that it be exercised "[c]onsonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its [the United States'] obligations under the Southeast Asia Collective Defense Treaty."

From the inclusion of this clause it must be inferred that the Congress intentionally reserved to itself the power to declare war, if such became necessary, in Southeast Asia. Such a procedure would be "[c]onsonant with the Constitution of the United States . . ." which grants such power exclusively to Congress. Furthermore, the Congress had been virtually assured of such a reservation and respect of its power by Secretary Rusk who, when appearing before a joint hearing of the Senate Foreign Relations and Armed Services Committees when the Resolution was pending before Congress, stated:

> "Therefore, if the Southeast Asia situation develops, and if it develops in ways which we cannot now anticipate, there will continue to be close and continuous consultation between the President and the Congress." Statement of Secretary Rusk, *Southeast Asia Resolution, Joint Hearings Before the Senate Committee on Foreign Relations and the Senate Committee on Armed Services,* 88th Cong. 2d Sess. 3 (1964).

The second half of this clause also must not be overlooked, for it restricts the Resolution's grant of power to just those actions which are "[c]onsonant with . . . the Charter of the United Nations and in accordance with its [the United States'] obligations under the Southeast Asia Collective Defense Treaty." To interpret the Resolution as an authorization of war would be to put it in conflict with each of the named as well as other international agreements, all of which prohibit this nation's waging of a war in Southeast Asia. *See Memorandum of Law of Lawyer's Committee on American Policy Toward Vietnam,* 111 CONG. REC. 24903-24910 (1965); Lawyers Committee on American Policy Towards Vietnam, VIETNAM AND INTERNATIONAL

LAW 25-42, 67-70 (1967). Furthermore, this Court has held that "[b]y the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other." *Chae Chan Ping* v. *United States,* 130 U.S. 581, 600. It has also been held that treaties and statutes should be construed in such a manner as to give effect to both instruments. *Whitney* v. *Robertson,* 124 U.S. 190. If the Tonkin Resolution is to be construed so as to give effect to treaties to which the United States is a party, it cannot be held to authorize a war in Southeast Asia. Read in this light, as its legislative history and the Constitution command that it must, Section two of the Resolution cannot be interpreted as authorization of executive action, which by its very nature would either require a declaration of war by Congress, or be in violation of international law.

Furthermore, Section 1 of the Resolution, in which "Congress 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 to prevent further aggression . . ." cannot act as authorization for the waging of a large scale war. This clause, in the words of one commentator,

> "merely approves what could obviously be done without such approval: the repelling of an attack on American armed forces. Were this the entirety of the resolution, present operations would be justified only under the implausible construction that they were a continuing and necessary defensive response to the Gulf of Tonkin incident." Note, *Congress, The President and The Power to Commit Forces to Combat, supra,* at 1804.

Taken as a whole, the Resolution may properly be understood as the statement of "unity and determination" which the President had requested. Message to Congress, Aug. 5, 1964 in 51 DEP'T STATE BULL. 261, 262 (1964). It clearly does not rise to the status of a declaration of war.[7] The word "war" was never used, no specific enemy or enemies were named, and no definite call for hostilities was made. The Resolution lacks the clear and unambiguous declaration of Congressional intent which is necessary to commit the resources and the people of this nation to a large scale war. At most, the Resolution was an affirmation that "[c]onsonant with the Constitution . . . the United States is . . . prepared . . . to take all necessary steps . . ." in the defense of its Southeast Asian allies. If, in this defense, it becomes necessary for this nation to go to war, one such "necessary step" is a Congressional declaration to that effect.

Even had Congress intended it, the Tonkin Resolution could not operate as a Congressional declaration of war. To so construe the Resolution would result in an unconstitutional delegation of that body's legislative power to declare war. This Court has recognized that the governmental power of the United States is divided by the Constitution among the leigslative, executive and judicial branches. *See Hampton & Co.* v. *United States,* 276 U.S. 394, 406; *Evans* v. *Gore,* 253 U.S. 245, 247. It is basic and vital to the integrity of the Constitution that great care be taken in insuring

[7] At least two courts have considered the question to date. In *United States* v. *Anderson, supra,* two of the three judges of the Court of Military Appeals rejected the view that the Resolution could act as a declaration of war. *United States* v. *Anderson, supra,* (Opinions of Judge Kilday and Judge Ferguson), and in *H. P. Hood & Sons Inc.* v. *Reali, supra,* the United States District Court for the District of Rhode Island concluded that: "The Gulf of Tonkin Resolution is not equivalent to a 'declaration of war' for purposes of the war clause. President Johnson's message to Congress on August 5, 1964 and the Congressional Records support this position." *Id.*, at 791.

that basic constitutional powers are not delegated by the Congress to the President. *Wayman* v. *Southard,* 23 U.S. (10 Wheat.) 1; *Field* v. *Clark,* 143 U.S. 649, 692; *Springer* v. *Philippine Islands,* 277 U.S. 189, 201; *O'Donoghue* v. *United States,* 289 U.S. 516, 530-31.

Congress can delegate its decision-making power in those instances where it is impossible for the Congress to gather all the facts necessary to the decision-making process and where the enabling legislation sets forth adequate standards for the exercise of the power that is granted. *Panama Refining Company* v. *Ryan,* 293 U.S. 388; *Kent* v. *Dulles,* 357 U.S. 116, 129.

In the *Panama Refining Company* case this Court further stated that "[w]e cannot regard the President as immune from the application of these constitutional principles." *Id.,* at 433. While it may be argued that this latter principle was modified by *United States* v. *Curtis-Wright Corp., supra,* at 304, which held that Congress has wide discretion in delegating the power to conduct foreign affairs to the President, this Court has recently re-emphasized the *Panama* language by stating, "that simply because a statute deals with foreign relations . . . [does not mean that] . . . it can grant the Executive totally unrestricted freedom of choice." *Zemel* v. *Rusk, supra,* at 17.

The Tonkin Resolution, if read as a declaration of war, is clearly a grant of unrestricted war making power, in effect a blank check, to the President. For example, the Resolution does not state when the executive may commence the war; it does not name those nations which he must take measures to protect, nor those nations against which he can take belligerent military action; it does not enumerate the types and/or levels of military assistance which he is authorized to grant, the length of time in which he can continue to take such action, nor any other of the elements traditionally made part of a declaration of limited or un-

limited war. It would be hard to conceive of a more simple delegation of unlimited and thereby unconstitutional legislative power than that granted by the Tonkin Resolution if it was truly intended to be a delegation of the power to wage war. Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable, supra,* at 455; Note, *Congress, The President and The Power to Commit Forces to Combat, supra,* at 1801.

United States v. *Curtis-Wright Corp., supra,* is inapposite here. In that case, Congress authorized the President to issue proclamations prohibiting, at such times as he should specify, the sale of arms to countries fighting in the Chaco. This Court, relying upon the constitutional grant of discretionary power to the President in the area of foreign affairs, held the resolution to be a constitutional delegation of legislative power. However, the President has no comparable constitutional grant of discretionary power to wage war. In the first place, war is not solely a matter of foreign affairs, but is equally a matter of internal concern. The economy is distorted, young men face conscription, injury, and death, the citizenry faces either a sharp rise in taxes or a sharp cut in needed domestic programs — or, as now, both. The impact of war does not remain outside the three-mile limit. *See Korematsu* v. *United States,* 323 U.S. 214.

Secondly, and because of these considerations, the power to wage war is constitutionally granted to the Congress and not to the executive. While the President's judgment may well be necessary in determining whether to go to war, it can never alone be sufficient. Any attempt to delegate in any way the power of Article 1, Section 8, clause 11, must be adjudged unconstitutional.

Therefore, the Tonkin Resolution must be construed narrowly to authorize only limited defensive measures as

those voting for its passage anticipated and intended. No other construction is warranted.[8]

2. *War appropriation measures are not a constitutional substitute for express Congressional authorization of the Vietnam war.*

The executive branch has suggested that Congress, by appropriating the money necessary to carry on the Vietnam war, has in effect ratified that war to the extent required by Article 1, Section 8, clause 11 of the Constitution. *Legal Advisor, supra,* at 1106-1108; Statements of Undersecretary Katzenbach, *National Commitments Hearings, supra,* at 75. However, war appropriations are approved only after hostilities have been commenced, when, as a practical matter, Congressmen have no alternative but to support our fighting men. 112 CONG. REC. 4372 (1966) (Remarks of Senator Russell); *Id.,* at 4382 (Remarks of Senator Clark); *National Commitments Hearings, supra,* at 219-220 (Remarks of Senator Ervin); *Id.,* at 219 (Remarks of Senator Hickenlooper); *Id.,* at 235 (Remarks of Representative Findley).

Executive requests for appropriations to continue or enlarge the hostilities in Vietnam have often been couched in language which itself implicitly acknowledges the lack of any viable option other than appropriating the money. Even the controversial May 1965 supplemental appropriation request in which the President claimed that "each Member of Congress who supports this request is voting to continue our efforts to try to halt Communist aggres-

[8] As a postscript, it might be added that the executive has admitted unofficially in a State Department letter to the Chairman of the Senate Foreign Relations Committee that it "is not depending on. . .[the Tonkin Resolution] as legal or constitutional authority for its present conduct of Foreign Relations. . . ." Reported in 28 CONGRESSIONAL QUARTERLY 785 (March 20, 1970).

sion," May 4, 1965, Remarks to House and Senate Committeemen, in 52 DEP'T STATE BULL. 816 (1965), contained the additional statement that the additional funds were needed to equip and supply United States forces and "to build facilities to house and to protect our men and our supplies," 52 DEP'T STATE BULL. 816 (1965), and that "[t]o deny and delay this means to deny and to delay the fullest support of the American people and the American Congress to those brave men who are risking their lives for freedom in Vietnam." 111 CONG. REC. 9284 (1965). *See* C. Rossiter, THE AMERICAN PRESIDENCY 51-52 (2d ed. 1960).

This Court has recognized that only explicit Congressional action and not the appropriation of money or the failure to repeal can be used to ratify an unconstitutional executive action, for "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." *Greene* v. *McElroy,* 360 U.S. 474, 507. *See also Ex Parte Endo,* 323 U.S. 283, 303 n. 24.

Furthermore, members of Congress have repeatedly emphasized that their votes for appropriation measures must not be construed as authorization for the executive's war in Vietnam. *See* R. Hull & J. Novogrod, LAW AND VIETNAM 179 (1968); Comment, *The President, the Congress and the Power to Declare War, supra,* at 90; *Kenworthy, Senate to Avoid Vietnam Clash,* N.Y. Times, March 1, 1966, at 1, col. 7. While it is a familiar practice of the executive to act first, present Congress with a *fait accompli,* and then ask for its ratification, L. Wilmerding, THE SPENDING POWER 9-18 (1943); E. Corwin, THE PRESIDENT: OFFICE AND POWERS 399 n. 58 (4th ed. 1957); Lieutenant Colonel B. Hollander, *The President and Congress — Operational Control of the Armed Forces,* 27 MILITARY L. REV. 49 (1965), it is a decidedly unwise practice when the executive

chooses to initiate a war. We submit that if the passage of appropriation measures had been thought to be sufficient for an authorization of war, the Framers would have felt no need to entrust Congress with the additional power to declare war. *See* Russell, The United States Congress and the Power to Use Military Force Abroad, *supra,* at 55-60.

3. *Nothing in the SEATO Treaty authorizes the executive's conduct of an undeclared war.*

The SEATO Treaty, SOUTHEAST ASIA COLLECTIVE DEFENSE TREATY, September 8, 1954, 6 U.S.T. 81, T.I.A.S. 3170 [hereinafter cited as SEATO TREATY], does not authorize the executive's prosecution of an undeclared war. Senate debates make it abundantly clear that the Treaty was ratified on the assumption that the executive would seek Congressional approval before committing any troops pursuant to our Treaty obligations. *See Hearings before the Senate Committee on Foreign Relations on the Southeast Asia Collective Defense Treaty,* 83rd Cong., 2d Sess. *passim* (1955). Moreover, the language of the Treaty itself, that each signatory will "act. . .in accordance with its constitutional processes," SEATO TREATY, ART. 4 PARA. 1, precludes any unauthorized commitment of United States troops to Indochina. To interpret this Treaty harmoniously with the Constitution, *See Cook* v. *United States,* 288 U.S. 102, the words "constitutional processes" require that Congress and not the executive authorize the commitment of troops. Construed otherwise, the Treaty would conflict with the Constitution and be void. *Reid* v. *Covert, supra,* at 15-19; *Geofroy* v. *Riggs,* 133 U.S. 258, 267; *The Cherokee Tobacco,* 78 U.S. 616, 620. Since treaties are approved by the Senate alone, and the nation cannot be committed to war without authorization by both houses of Congress, the ratification of the SEATO Treaty cannot serve as a *Congressional*

authorization of war. F. Wormuth, THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION 37-39 (1968).

The continuing vitality and wisdom of the fundamental constitutional concept of separation of powers, particularly with respect to the war power, is beyond dispute. Nonetheless, there is a very real danger that that most innovative of all the Framers' ideas may not survive the Vietnam war. There are those who say that it has already been relegated to historical obscurity. It is doubtless of great importance that Congress face up to its legislative responsibility and make an unequivocal, unhedged and unconcealed decision to make war or peace. It is of greater importance, however, that this Court fulfill its responsibility to protect those republican institutions established by the Constitution. This, in sum, is the prayer of the Commonweatlh of Massachusetts.

Conclusion

The motion of the Commonwealth of Massachusetts for leave to file a complaint against Melvin R. Laird, as he is Secretary of Defense, should be granted.

Respectfully submitted,

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