IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 42, Original

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

vs.

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

ON MASSACHUSETTS' MOTION FOR LEAVE TO FILE A COMPLAINT

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

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INTEREST OF THE AMICUS CURIAE

This amicus curiae brief is submitted by the Constitutional Lawyers' Committee on Undeclared War. This committee of over thirty members is comprised primarily of professors who teach constitutional law or aspects thereof in the nation's law schools. The few members who do not teach in the law schools have done significant

work on questions involving the constitutional aspects of the war. Among members of the committee are those who have devoted much study and attention over the years to the questions involved in this case. The committee members have a professional interest in the legal resolution of the questions, and are filing this brief in an effort to assist the Court in its task of resolving the critical constitutional issues raised by the Commonwealth of Massachusetts.

SUMMARY OF ARGUMENT

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

Massachusetts also has standing as *parens patriae*, asserting threats of injury to large and diverse classes of its citizens, many of whom would be unable to sue on their own behalf. *Massachusetts* v. *Mellon* is no bar to the state's *parens patriae* standing, since it does not seek to protect its citizens from the operation of federal stat-

utes but rather directs its challenge at Executive action which defies the Constitution.

Massachusetts also has standing as an original contracting party to the Constitution to assert its interest in the integrity of the guarantees contained in the "war clauses" of the Constitution. Massachusetts had exchanged its own power over war and foreign relations, asserted often during the period of the Articles of Confederation, for a constitutional guarantee that the new nation would conduct its warmaking according to the procedures specified in the Constitution.

Massachusetts has standing to assert its interest in the disposition of its militia. Since the federal government has no constitutional power of conscription, when it drafts men it in effect calls forth the state militia. But when called forth, the conscripted men may only be utilized for the purposes specified in Clause 15 of Article I, Section 8 of the Constitution. Sending Massachusetts citizens to fight in an undeclared foreign war is not one of the specified purposes, and hence the state is harmed by virtue of the unconstitutional usurpation of its militia.

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

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

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

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

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

VI. The war in Southeast Asia is not supported by a Congressional declaration of war or its equivalent. The Framers gave Congress the power to declare war because they were afraid that otherwise the Executive would get the nation into debilitating wars. Thus, the President's

commander-in-chief power was intended only to grant the right of commanding the armed forces and not to make decisions whether to go to war. Prior to 1950, all major wars were declared by Congress. Since the constitutionality of the undeclared Korean war of 1950 was not challenged, let alone overturned, in the courts, the stage may have been set for the Executive war in Southeast Asia, which has become the most protracted war in this nation's history.

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

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

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

Military appropriations and the renewal of the draft do not constitute a constitutional equivalent of a declaration of war. They fail to meet the three criteria of an equivalent authorization. If they were the equivalent of

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

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

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

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

ARGUMENT

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

A. Massachusetts Has Standing As a Proprietor.

1. Proprietary Rights and Financial Interests.

A state unquestionably has standing to sue an individual of another state in the original jurisdiction of the Supreme Court to protect or secure its own proprietary interests. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 50 U.S. (9 How.) 647 (1850); *Texas* v. *White*, 74 U.S. (7 Wall.) 700 (1869); *Missouri* v. *Illinois*, 180 U.S. 208 (1901). The interests must be real and tangible, and not simply the political power of some individuals in a state as held insufficient in *Georgia* v. *Stanton*, 73 U.S. (6 Wall.) 50 (1867). In that case there were slight allegations relating to real estate and buildings owned by the state of Georgia, but there was no evidence that the state itself would be deprived of its property under reconstruction, but rather simply that there was a threat of replacing the existing state government by another. *Supra* at 76-77. Subject-matter jurisdiction was thereupon denied on the ground that the rights asserted were "not of persons or property, but of a political character . . . ." *Supra* at 77.

The Commonwealth of Massachusetts in the present suit alleges sufficient injury and threat of injury to its own real and tangible proprietary interests as to satisfy the requirements for standing as a matter of original jurisdiction:

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

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

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

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

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

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

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

In addition to the foregoing particulars, there is a general threat to the economy of the Commonwealth in

a manner that is at least as real and tangible as that sustained as a basis for original jurisdiction in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945), resulting from the following:

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

(2) The burden upon agencies of the Commonwealth, such as welfare, veterans' affairs, and doctors and hospitals, resulting from claims by dependents and families of servicemen lost or wounded in the war.

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

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

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

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

The foregoing have been illustrations of damage to the proprietary interests of the Commonwealth. Similar to *In re Debs,* 158 U.S. 564, 586 (1894), quoted with approval in *Missouri* v. *Illinois, supra* at 236, "the wrongs complained of are such as affect the public at large." Any injury to the proprietary interests of a state is an injury to the citizens generally of that state, and vice versa. In respect of all these arguments, the Commonwealth is not a mere volunteer attempting to vindicate a provision of the Constitution, but is suing to protect its proprietary interests. See *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1922).

2. Other State Interests.

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

(1) The loss to the Commonwealth of young men and women killed in the war, who might have participated in their government through elective or appointive office. This loss is a direct injury to the Commonwealth's governmental processes, similar to that alleged in the Complaint filed in *South Carolina* v. *Katzenbach,* 383 U.S. 301

(1966). In Paragraph 8 of that Complaint, South Carolina alleged the right "to preserve to her inhabitants the most capable and just representative government through her election procedures," and "to insure a qualified electorate and the most capable and just government for her inhabitants." This same language applies to the present case.

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

(3) The disruption of the orderly conduct of school classes and school procedures in the Commonwealth's public school education system constitutes an adverse effect to a legitimate state interest. Many schools were forced to close early in the 1969-1970 year as the result of student demonstrations against the Vietnam war. The impact of this disruption and closing of the schools, and the threat of future disruptions, is not in substance different from that in *Pennsylvania* v. *West Virginia, supra* at 591-92, where the threat was interference with the supply of gas used to heat the schools.

(4) The loss to the Commonwealth of an estimated 1,300 inhabitants who have been killed in hostile action in Vietnam. A state is nothing more than the citizens who comprise it. *Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419, 463 (1792). The Commonwealth has lost a part of itself in the death of these inhabitants, and is threatened with further losses in the war.

3. The Possible Claims of Other States Are Irrelevant.

Massachusetts' standing to bring the present suit should not be defeated on the ground that other states generally might bring similar claims. There is no requirement in state suits that a state must be harmed in a way different from other states in order to have standing. In *Alabama* v. *Texas,* 347 U.S. 272 (1954), Alabama and Rhode Island, as complaining states, clearly had no interest differentiable from that of most of the other states. But even under the view that a state should show a differentiable interest, there are several factors that uniquely distinguish the Commonwealth in the present case:

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

(2) As one of the original thirteen states, Massachusetts has a particular interest in the integrity of those portions of the Constitution that change the Massachusetts Constitution of 1780 that antedated the Articles of Confederation. Specifically, the Commonwealth has an interest in maintaining its position of 1780 that an individual would not be required to serve in military action outside the territory of the Commonwealth unless either he gave his personal consent or consent was given by the legislature.

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

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

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

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

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

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

B. Massachusetts Has Standing As Parens Patriae.

1. Quasi-Sovereign Basis.

The Commonwealth has standing to bring the present suit as "quasi-sovereign or as agent and protector of her people against a continuing wrong done to them." *Georgia* v. *Pennsylvania R. Co., supra* at 443. In this capacity the Commonwealth is *"parens patriae,* trustee, guardian, or representative of all or a considerable portion of its citizens . . . ." *Kansas* v. *Colorado,* 185 U.S.

125, 142 (1902). To be sure, when a state is suing in its own proprietary right it is acting for its citizens, since the ultimate reality behind the term "state" is its people. *Chisholm* v. *Georgia, supra* at 463. In this sense an injury to all or to a considerable portion of the citizens of a state is an injury to the state itself, and it makes little difference whether the injury is labelled a state interest or a *parens patriae* interest. Under either label, the state is entitled to redress as a matter of original jurisdiction.

Nevertheless, the concept of *parens patriae* has taken firm hold as an independent basis for state standing in order to counter the argument raised in some of the earlier cases that a state was only a nominal plaintiff, suing for a few of its citizens' private rights. Of course in some cases examination of the evidence showed that the state was merely a nominal plaintiff, and jurisdiction was denied. See *Oklahoma ex rel. Johnson* v. *Cook,* 304 U.S. 387 (1938); *Oklahoma* v. *Atchison, T. & S.F. Ry.,* 220 U.S. 277 (1911). Because of this possibility the doctrine of *parens patriae* has over the years come to depend upon the existence of a number of factors which must be present if a state is to be allowed standing to assert its quasi-sovereign interests. What follows is a listing of these factors coupled in each instance with an indication of how Massachusetts squarely meets the test in the present suit:

(1) The state must assert at the outset a minimal proprietary interest of its own, characterized by Justice Holmes in *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 237 (1907) as a "makeweight." For a similar characterization see *Georgia* v. *Pennsylvania R. Co., supra* at 450. The minimal character of this proprietary interest is attested by the fact that no direct injury to the state's interest need be alleged. *Georgia* v. *Tennessee Copper Co., supra; Missouri* v. *Illinois, supra* at 241; *Kansas* v. *Colo-*

rado, supra; North Dakota v. *Minnesota,* 263 U.S. 365 (1923); *Georgia* v. *Pennsylvania R. Co., supra,* at 447-50. However, the requirement remains, presumably to negate the possibility that the state is suing solely on behalf of particular ascertainable citizens who are the real parties in interest.

Even if the proprietary interest must be substantial and direct, rather than minimal and "makeweight" as precedents allow, Massachusetts would easily meet the criteria. Her proprietary interests have been examined earlier and at length, and include damage to the state's economy, morale, schools and institutions, property, loss of revenues, degradation of political processes, burden on courts, loss of time of officials, and other interests previously examined.

(2) The second requirement is that the threatened injury must affect many people, or in the words of *Kansas* v. *Colorado, supra* at 142, a "considerable portion" of the state's citizens. There is no requirement that *all* of the state's citizens be affected, and certainly not that all be affected equally, for in *Missouri* v. *Illinois, supra,* the threatened pollution of the Mississippi River by Illinois would have clearly affected communities situated along the river in Missouri while having a diminishing effect on other citizens of the state. Larger effects could result from "contagious" diseases from the pollution spreading throughout the state. *Id.* at 241.

Massachusetts herein asserts a direct threat to a considerable portion of its citizens—those young men and women who are serving or who may be drafted to serve in the war. To them there is an unquestionable threat to "health and comfort," *id.* at 241. But there is also a threat to a much larger class of citizens, including the friends,

families, relatives, and fiancees of the servicemen. These are not only threats to comfort and welfare through loss of companionship, but also threats to income and support. Moreover, servicemen who come back in a weakened condition or having been subject to a disease, may be susceptible to a recurrence of that disease, may transmit it to other citizens of the Commonwealth, and may have to be supported by their family. Additionally, the welfare of businessmen in the state is impaired by the drain on the young manpower of the state who are drafted to serve in the war. Finally, the disruption of school classes in the Commonwealth, and mass demonstrations against the war in Southeast Asia, make it evident that few if any citizens of Massachusetts have not been adversely affected by this major, prolonged, costly war. That a substantial number of citizens are adversely affected is indicated by the passage by the Massachusetts legislature, and the signature into law the very next day by the Governor of Massachusetts, of the statute of April 2, 1970, requiring the attorney general of Massachusetts to bring the present suit.

(3) The suit must not be for the benefit of particular individuals. *Oklahoma ex rel. Johnson* v. *Cook, supra; New Hampshire* v. *Louisiana,* 108 U.S. 76 (1883). This is basically a contrapositive restatement of the previous factor. Some of the insistence on this factor stems from cases between states, such as *New Hampshire* v. *Louisiana, supra,* where it is a constitutional policy stemming from the Eleventh Amendment to make sure that a state is not a merely nominal plaintiff. When, as here, an individual and not a state is defendant, the full force of this policy does not apply. Nevertheless, there remains an insistence that the state is suing for itself and not on behalf of particular ascertainable individuals. One test

of this factor is whether the state will bear the expenses of litigation. In *North Dakota* v. *Minnesota, supra,* a suit was dismissed partially on the ground that groups of farmers were to bear the expenses of the suit. Another test is whether a single economic cross section of a state's population is injured. See *North Dakota* v. *Minnesota, supra* (farmers); *compare Oklahoma* v. *Atchison, T. & S.F. Ry., supra, with Georgia* v. *Pennsylvania R. Co., supra* (railroad shippers in both cases).

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

(4) Although the very concept of *parens patriae* implies, and by precedent affirms, that a state may sue on behalf of a large number of citizens who normally would have standing to sue on their own behalf, see *Georgia* v. *Tennessee Copper Co., supra,* in some cases there is a suggestion that the state has the right and duty to assert the claims of large numbers of its inhabitants when they are unable to recover because they have no legally recognizable injury. See *In re Debs,* 158 U.S. 564, 584 (1895). In *Georgia* v. *Pennsylvania R. Co., supra,* no individual consumer in the state might have been able to demonstrate the extent of his economic injury attributable to noncompetitive freight rates imposed by extrastate railroads. In *Missouri* v. *Illinois, supra* at 241, it was noted that "suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate. . . ."

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

2. Massachusetts v. Mellon Does Not Bar the Present Suit.

Certain language in *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923), may seem to stand in the way of the portion of the present case involving the Commonwealth's position as *parens patriae.* Mr. Justice Sutherland's language is as follows:

> We need not go so far as to say that a state may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here. Ordinarily, at least, the only way in which a state may afford protection to its citizens in such cases is through the enforcement of its own criminal statutes, where that is appropriate, or by opening its courts to the injured persons for the maintenance of civil suits or actions. But the citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as *parens patriae,* may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois, 180 U.S. 208, 241), it is no part of its duty or power to enforce their rights in

> respect of their relations with the Federal government. In that field it is the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

Id. at 485-86.

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

war—except, of course, continuing to refuse to declare war, a position that Congress has taken and the Executive branch of the government has ignored. It would *not* be an act equivalent to the refusal to declare war for Congress to consider affirmative legislation requiring troops to be withdrawn from Southeast Asia or to put similar directives in other legislation by way of amendment. There are two basic reasons why such action by Congress would not be the equivalent of a refusal to declare war. In the first place, Congress can defeat a motion to declare war by not giving it a majority vote in either house, whereas a majority must be attained in both houses in order to enact an affirmative statute ending an unwanted war. This difference in numerical voting requirements was instrumental in the issue of the seating of Representative Powell prior to any move to "exclude" him in the House where he presumably would vote on the issue of exclusion. See *Powell* v. *McCormack*, 395 U.S. 486 (1969). Secondly, the President of the United States, under whose sufferance the defendant in the present case acts, could veto any affirmative legislation by Congress. Since Congress could override such a veto only by two-thirds vote, this places an unconstitutional burden upon Congress to accomplish what it was given the power to accomplish by refusing to declare war.

Justice Sutherland's emphasis upon "acts of Congress" and "statutes", in the language earlier quoted from *Massachusetts* v. *Mellon*, served as a distinguishing feature in *Georgia* v. *Pennsylvania R. Co.*, *supra* at 446-47, in which standing was allowed. In the latter case it was said that "this is not a suit like those in *Massachusetts* v. *Mellon*, and *Florida* v. *Mellon* [273 U.S. 12 (1927)], *supra*, where a State sought to protect her citizens from the operation of federal statutes." *Ibid.* In the present suit, the Com-

monwealth is praying for specific relief within ninety days of the entering of a decree in the suit unless Congress in the interim shall have declared or ratified the war. Far from seeking to protect her citizens against the operation of a federal statute, the Commonwealth here is seeking to secure to her citizens the protection of the procedures required by the federal Constitution.

Second, assuming for the moment that Justice Sutherland was not referring to Congressional representatives of the citizens of Massachusetts, but rather had in mind the possibility that the Attorney General or other Executive officers of the United States could represent them, it is clear that at least in the present suit neither the United States Attorney General nor the defendant nor any other Executive officer could in fact represent the citizens of Massachusetts. For in the present case the defendant as well as the Attorney General, serves at the will of the President. To expect one presidential appointee, on behalf of the public, to sue another presidential appointee for carrying out an important presidential policy, or to sue the President for violating the law, is just as unrealistic as the situation in the malapportionment cases, overturned by *Baker* v. *Carr*, 369 U.S. 186 (1962), where it once was expected that legislatures which were the product of malapportioned districts would set their own houses in order. In sum, Justice Sutherland's words in *Massachusetts* v. *Mellon* should not here be read to put the citizen in the posture of seeking legal redress from the branch of government that he alleges is violating the Constitution.[1]

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1. It may be noted that in *South Carolina* v. *Katzenbach*, *supra* at 324, the notion in *Massachusetts* v. *Mellon* that the federal government is the *parens patriae* for every American citizen was confined to Constitutional provisions that are addressed in terms only to the protection of individuals. When, as in the pres-

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

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

(2) The unconstitutionality alleged in *Massachusetts* v. *Mellon* was that Congress, in enacting the Maternity Act of 1921, had exceeded the general powers delegated to it by Article I, Section 8, and thereby had invaded the legislative province reserved to the States by the Tenth Amendment. See *Flast* v. *Cohen*, 392 U.S. 83 (1968). This type of claim lacks the specificity necessary to confer standing as required in *Flast* v. *Cohen, supra*, since the Tenth Amendment contains no limitations nor "prohibitory words" but rather is in the nature of a conclusory generalization. *Missouri* v. *Holland*, 252 U.S. 416, 433, 434 (1920). By contrast the present case relies upon specific

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ent case, the constitutional provisions at issue are addressed to the protection of states, and not solely to the protection of individuals, the result in the *Katzenbach* case, allowing state standing as a matter of original jurisdiction, is entirely applicable.

limitations in the Constitution, as discussed in the remainder of this Brief.

(3) The citizens of Massachusetts in *Massachusetts* v. *Mellon* claimed that they were adversely affected by increased federal taxation which would be used to fund the Maternity Act. However, it would have been difficult in the non-computer era of the 1920's to trace these funds, and the Supreme Court held that the taxpayers' interest in the moneys of the Treasury was "comparatively minute and indeterminable," "remote," "fluctuating and uncertain." *Massachusetts* v. *Mellon, supra* at 487. Today, in contrast, there is nothing minute nor uncertain about the vast amounts of federal money spent for financing the war in Southeast Asia, and even if precise amounts could not be traced to precise taxpayers (which may not be a technologically necessary hypothesis), taxpayers individually and as a whole are clearly paying substantial amounts to support the war, enough to invoke traditional equity jurisdiction. In addition, the state's interest in the present suit goes far beyond taxation, being founded upon direct and immediate threats to the health, safety, welfare, and indeed the lives, of a large and indeterminate number of the citizens of Massachusetts.

(4) The "standing" aspect of *Massachusetts* v. *Mellon* and *Frothingham* v. *Mellon* has been examined critically in *Flast* v. *Cohen, supra.* Concurring in *Flast* v. *Cohen* at 107, Mr. Justice Douglas said that "it would . . . be the part of wisdom . . . to be rid of Frothingham here and now." See also *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 90 S.Ct. 827 (1970); *Barlow* v. *Collins,* 90 S.Ct. 832 (1970). Subsequent cases have allowed states to challenge the constitutionality of acts of Congress. See *South Carolina* v. *Katzenbach, su-*

pra; Alabama v. *Texas, supra* (constitutional issue reached in denying motion for leave to file complaint); *cf. Alabama* v. *Texas,* 373 U.S. 545 (1963).

(5) Although decided only less than fifty years ago, *Massachusetts* v. *Mellon* is already, to borrow a phrase used in a different case, "a relic from a different era." *Reid* v. *Covert,* 354 U.S. 1, 12 (1957). It represented state resistance to the progressive welfare legislation of the national government, and the Supreme Court refused to stand in the way of beneficial national legislation. Today there are many signs that, exclusive of commerce and taxation cases where parochial interests still confront the needs of a nation, individual states are far more alert to the welfare of the people than is the national government.

For example, cases now in lower courts challenging pollution standards of federal agencies represent an attempt by states to assert the importance of health and welfare of the citizens against an enormous federal budget sanctified in terms of national defense. The danger to the entire human species from leakage of radioactive wastes from nuclear electric power plants is recognized by states in the face of federal assurances, inconsistent over time, that there is no danger. Similarly, in this thermonuclear era where the atomic stockpiles of the United States and the Soviet Union, having a combined firepower of the equivalent of over 100 tons of TNT explosive per capita world population, can destroy most of the planet and render the remainder uninhabitable in a couple of hours, states as well as individuals may justifiably assert their interest in seeing to it that Constitutional procedures relating to the war-making powers are scrupulously followed. The common sense of the people, given legal expression in the democracy set up under our

Constitution, is surely entitled to be heard on these issues of global survival. The states and the citizens, moreover, do not have the vast economic interest in the perpetuation of wars and the arms race that is built in to the sprawling bureaucracy of the federal government and the contributions from arms manufacturers to the political campaigns of those who seek control over the enormous federal budget.

Full force and effect should be given to the original jurisdiction of the Supreme Court as provided in Article III, Section 2, of the Constitution. The jurisdiction is not circumscribed in terms of subject matter. The Supreme Court in *Kansas* v. *Colorado, supra* at 140, said of the earlier exhaustive review of the original jurisdiction grant of power in *Missouri* v. *Illinois, supra,* that the review "demonstrates the comprehensiveness, the importance and the gravity of this grant of power, and the sagacious foresight of those by whom it was framed." These words should be linked with Justice Holmes' classic statement in *Missouri* v. *Holland,* 252 U.S. 416, 433 (1920), that "when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." The present suit asserts a state interest that exceeds all the requirements of previous suits by a state against a citizen under the original jurisdiction of the Supreme Court, and thus grows naturally out of the provisions of Article III, Section 2, as they have been interpreted so far in the history of this Republic.

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

A separate ground for original jurisdiction in the present case is that specific language in Article I, Section 8, of the Constitution amounts to a contractual guarantee to Massachusetts as a condition of her ratification of the Constitution on February 6, 1788. The defendant, by his actions under the color of his office, has violated the Commonwealth's contractual rights that a war would be declared only by the elected representatives of the people in Congress.

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

The claim that the Constitution is a compact among the several states and that the national government is a limited creation of the states was made with great force in the early days of the Republic by Thomas Jefferson and James Madison and articulated in the Virginia and Kentucky Resolutions of 1798 and 1799. The Resolutions, denying the validity within the states of the Alien and Sedition Acts on the ground that they were unconstitutional, were necessitated by the refusal of Federalist judges to permit the constitutionality of those Acts to be challenged in court. See Kelly & Harbison, The American Constitution 207 (3d ed. 1963). The position of the Resolutions was vindicated historically when the Sedition Act was allowed to lapse on March 3, 1801, and by the First Amendment decisions of the twentieth century which clearly indicate that the Sedition Act would not have survived a judicial test of its constitutionality.

The compact theory of the Constitution was articulated with great force and clarity by John C. Calhoun in 1831. Unfortunately, southern states put the theory to an

extreme use, denying other specific requirements of the Constitution, and necessitating eventually the Civil War. In that war, national unity prevailed over the extreme view of the compact theory that states had a right to nullify federal laws and secede from the Union. In recent years, extreme claims that a state could interpose itself between the people and the national government in cases where the Supreme Court had already made clear the constitutionality of the national government's actions, have been effectively dealt with by the Supreme Court. See, *e.g., Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916, 922, *stay denied,* 364 U.S. 500 (1960).

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

The compact theory of the Constitution can be derived from an examination of the Articles of Confederation and the Constitution. Under the Articles of Confederation, "each state retains its sovereignty, freedom

and independence" (Article II). Thus, when the new Constitution was proposed, each state retained its sovereignty. The new Constitution reflected this by providing in Article VII for its ratification by Conventions of Nine States, and further providing that the Constitution would then be established "between the States so ratifying the same."

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

guarantees contained in the Constitution concerning the manner in which the obligations of war may be validly enforced against the states and their citizens. For this limited purpose only, and not as a general theory nor as a characterization of the nature of the Constitution in its entirety, does this brief claim that certain clauses in Article I, Section 8, of the Constitution constitute contractual guarantees.

Like the Virginia and Kentucky Resolutions, the present policy of Massachusetts reflected in its Act of April 2, 1970, is to press for a judicial test of constitutionality. The Virginia and Kentucky Resolutions were necessitated by the arbitrary refusal of Federalist judges to allow a challenge in their courts of the constitutionality of the Alien and Sedition Acts. Similarly here the federal judiciary has not permitted a test of the constitutionality of the war in Southeast Asia in the normal case of a draft or service resister who has raised the issue. As Mr. Justice Stewart said in dissenting from the denial of certiorari in *Mora* v. *McNamara,* 389 U.S. 934, 935 (1967), "We cannot make these problems [of the constitutionality of the war] go away simply by refusing to hear the case of three obscure Army privates." Unlike the Virginia and Kentucky Resolutions, however, the present suit does not assert an incompatibility of an act of Congress with a provision in the Constitution. There is no attempt to nullify any federal law. Rather, the Commonwealth here is asserting that the defendant has not respected the failure of Congress to declare war, and thus the defendant has acted to nullify Article I, Section 8, Clause 11. In so doing, he has violated a contractual obligation owed to Massachusetts by all federal officers whose authority derives from the Constitution.

2. The Commonwealth Has a Particular Interest in the Integrity of the Guarantees in Article I, Section 8, Clauses 11-16 of the Constitution.

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

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

fense and war, it in return received contractual assurances in the new Constitution that the new nation's war powers would be conducted in certain ways according to the specific provisions in Article I, Section 8.

The Massachusetts Constitution of 1780 specifically provided that no inhabitants of the Commonwealth serving in the state's militia could be transported or obliged to march out of the limits of the Commonwealth's territory "without their free and voluntary consent, or the consent of the General Court [legislature]." Massachusetts Constitution of 1780, Chapter II, Section I, Article VII. Thus inhabitants of the Commonwealth could not be forced to partake in foreign hostilities unless they themselves consented or unless consent was specifically given (general grants of power by the legislature to the Governor were disallowed) by the legislature. Certainly this basic right of the inhabitants of the Commonwealth not to be coerced to fight in foreign hostilities unless their own *legislative* representatives agreed (or unless they personally volunteered) was not lightly discarded when Massachusetts ratified the United States Constitution. The necessity for legislative consent to the war powers of the Governor of Massachusetts was paralleled by the specific war powers given to the United States Congress by the new Constitution.

Massachusetts therefore has a clear and specific interest in the integrity of the Constitutional guarantees in Article I, Section 8. In its statute of April 2, 1970, the Commonwealth has reaffirmed the relationship between its Constitution of 1780 and the United States Constitution. The statute provides that "no inhabitant of the Commonwealth . . . shall be required to serve outside the territorial limits of the United States in the conduct of armed hostilities" in violation of the constitutionally established procedures of Article I, Section 8. In short, the statute says

that a citizen may not be coerced, contrary to his freely given consent, to serve abroad in armed hostilities not declared to be a war by the legislature which represents him nor subsequently ratified (consented to) by that legislature.

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

The Commonwealth's assertion of a violation of specific contractual obligations under Article I, Section 8 of the Constitution is not a "generalized grievance" about the "conduct of government or the allocation of power in the Federal System." *Flast* v. *Cohen, supra* at 106. Rather, it is a claim that the defendant's action "exceeds specific constitutional limitations" and thereby demonstrates a "nexus" between the plaintiff as a state ratifying the Constitution and the precise constitutional infringement by the defendant's actions of the Congressional prerogative to declare war. *Id.* at 102.

The Supreme Court has recognized the basic distinction in matters of jurisdiction and standing between a generalized complaint that a branch of the federal government has exceeded its constitutional powers, and a specific claim of violation of a specific constitutional limitation. In *Flast* v. *Cohen, supra,* the Court found taxpayer standing with respect to a claimed infringement of the Establishment and Free Exercise Clauses of the First Amendment. In *South Carolina* v. *Katzenbach, supra,* South Carolina had standing to assert an alleged violation by Congress of the specific provisions of the Fifteenth Amendment. The present suit involves the breach of specific constitutional limitations, specified in the remainder of this Brief which is here incorporated by reference, and does not rest upon generalized allegations that any branch of government has exceeded its powers.

In addition, there is a substantive nexus between the status of the plaintiff and the specific constitutional provisions at issue. It has been argued previously that the Commonwealth of Massachusetts, by virtue of its sovereign status prior to the ratification of the Constitution and also because of its Constitution of 1780, had a specific interest as a state in the nature of the war powers given to Congress by the Constitution. Here it only remains further to indicate that the provisions of Article I, Section 8, relating to war powers and the militia are governmental in nature, and hence logically linked to a state that may assert them as a matter of original jurisdiction.[2] In *South Carolina* v. *Katzenbach, supra*, South Carolina was given standing as a matter of original jurisdiction to assert a state interest in seeing to it that its powers over elections were not defeated by federal action that went beyond the confines and procedures of the Fifteenth Amendment. While Massachusetts is not claiming any state power over war in the present case, it is saying that it gave up that power in return for a guarantee that its citizens would not be coerced into fighting a war in violation of the procedures specified in Article I, Section 8, Clauses 11 to 16. Therefore there is a logical link in the present case, similar to that in *South Carolina* v. *Katzenbach,* between the status of the plaintiff and the specific Constitutional provision asserted by the plaintiff. In both cases, the plaintiff claims

2. It may be noted that in *South Carolina* v. *Katzenbach, supra* at 323-24, a state was held to have a justiciable interest as a matter of original jurisdiction in a clause of the Constitution addressed to the protection of state interests such as the Fifteenth Amendment. A distinction was drawn between such clauses and those that are addressed in terms solely to individuals, such as the Due Process Clause and the Bill of Attainder Clause. In the present suit, Massachusetts is asserting rights based upon the war power clauses of Article I, Section 8, which are not addressed in terms solely to individuals.

that a branch of the federal government has taken action which exceeds its Constitutional authority and which has thereby violated a constitutional guarantee made to the states.

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

Mr. Justice Sutherland in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), upheld a specific delegation of authority from Congress to the President in the field of foreign relations. Unnecessary to his argument on the distribution of power between Congress and the President were some remarks he made concerning the distribution of power between the states and the national government. He remarked by way of dicta that on matters of "external sovereignty" the "colonies in their collective and corporate capacity as the United States of America" inherited external sovereignty from Great Britain. The states, however, "severally never possessed international powers." *Id.* at 316.

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

Historically, the colonies did not exist in any "collective" or "corporate" capacity, whether before or after the Revolution, and whether before or during the period of the Articles of Confederation. Indeed, even during the period of the Articles of Confederation the states participated at many times more actively and with more authority in foreign relations than did the Confederation itself. The

Massachusetts navigation act of 1785, for example, conflicted with the Treaty with France of 1778, even in the admission of John Jay, secretary of foreign affairs. See Jensen, The New Nation 297 (1950). States such as Massachusetts, Rhode Island, New Hampshire, and Pennsylvania in the period 1784-86 passed protective tariffs which were inconsistent with the Confederation's foreign policy and with reciprocal understandings with such countries as France that had opened all their ports to American trade. *Id.* at 293-94. Another illustration is furnished in a letter of the Duke of Dorset of 1785. He wrote to John Adams, Benjamin Franklin, and Thomas Jefferson, inquiring on behalf of Great Britain as to their powers to negotiate a treaty of commerce. The Duke asked them "whether you are merely commissioned by Congress, or whether you have received separate powers from the respective States." He mentioned that the "public in general" knew how little the authority of Congress could avail "where the interests of any one individual State was even concerned," and concluded that "the apparent determination of the respective States to regulate their own separate interests" renders necessary the appropriate powers for the negotiators. 2 Diplomatic Correspondence of the United States, 1783-89, at 297-98 (1833). Thus, even in matters of negotiating a treaty with Great Britain, the states were generally regarded as possessing the ultimate sovereignty both *de facto* and, due to the insistence of the Duke of Dorset on separate powers from the states, *de jure*. Moreover, among themselves the states regarded each other as separate nations. James Madison said of the Articles of Confederation in 1787: "it is in fact nothing more than a treaty of amity of commerce and of alliance between independent and sovereign States." Quoted in 1 Morison & Commager, The Growth of the American Republic 143 (1940). It is well known that the Articles did not give the national Con-

gress control over taxation or trade, did not set up a federal executive or judiciary, and gave no enforcement powers to Congress. In this light it would be erroneous to claim that the Articles created a sovereignty that was unified, recognized abroad, and effective enough to eclipse the powers of the states. In reality the situation was one of divided sovereignty in a loose federal system, with individual states taking increasing initiative depending upon their degree of interest in any given situation. Clearly the situation was dramatically altered by the new Constitution, which specifically took these sovereign powers over foreign relations away from the states and gave them to the new national government.

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

Massachusetts has a direct interest in the disposition of its own state militia. U.S. Constitution, Second Amendment. The militia can be called into service only for the three purposes specified in Article I, Section 8, Clause 15 of the Constitution. A recently published article has made it very clear that the original understanding of the Framers of the Constitution was that the Federal government had no power of conscription. See Friedman, Conscription and the Constitution: The Original Understanding, 67 Mich. L. Rev. 1493 (1969). Hence, as shall be shown later in this brief, if the national government has drafted men into service, it must in effect have done so under Clause 15 by "calling forth" the militia of the states. Cf. *United States* v. *Crocker,* 420 F.2d 307 (8th Cir. 1970). The distinction between the national army and calling forth the militia is unimportant when a war has been declared by Congress, since that constitutes one of the purposes of Clause 15. However, when there has been no act of Congress, it is clear that the states can assert an interest in their own

militia. The militia of a state comprises "all males physically capable of acting in concert for the common defense." *United States* v. *Miller*, 307 U.S. 174, 179 (1938). This brief does not contend that there is no federal conscription power, but rather that when a young man is drafted by the federal government he has in effect been "called forth" from his state militia which has been deemed to have drafted him as a surrogate for the federal government. It follows that Massachusetts has an interest in making sure that it is not being deprived of its own state militia for purposes other than the three purposes specified in Clause 15. Such a deprivation would be even more immediate and direct than the Fifteenth Amendment deprivation alleged by South Carolina which was sufficient to establish original jurisdiction in *South Carolina* v. *Katzenbach, supra.*

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

The logical party to represent the able-bodied males of a state constituting the state militia is the state itself. The Massachusetts statute of April 2, 1970, simply restates the original understanding of the Constitution to the effect that inhabitants of Massachusetts cannot be forced against their will to fight in the Vietnam War unless pursuant to a law of Congress. The statute is a concrete embodiment of the state's interest in the preservation of its own militia.

Massachusetts has standing to preserve its own militia against appropriation by the national government for unconstitutional purposes.

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

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

The Commonwealth has a legal interest in the effectiveness of the Senate. Its equal suffrage in the Senate cannot be changed even by amendment to the Constitution. Article V. Clearly this requirement of Article V could not be circumvented by a constitutional amendment depriving the Senate of all of its powers under Article I. Similarly, the powers of the Senate cannot constitutionally be curtailed short of an amendment, as by the defendant in the present case, without opportunity being given to the plaintiff for judicial redress. In brief, the plaintiff here is asserting "a plain, direct and adequate interest in maintaining the effectiveness of [its] votes" when it invokes its representation in the Senate and its right of suffrage in that body as a basis for its standing to bring the present suit. *Coleman* v. *Miller*, 307 U.S. 433, 438 (1939), quoted with approval in *Baker* v. *Carr, supra* at 208.

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

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

remitted in the interests of convenience, efficiency and justice." *Georgia* v. *Pennsylvania R. Co., supra* at 464-65; 28 U.S.C. 1251(b). None of these criteria can be met in the present suit.

There would be no gain in convenience nor in efficiency if a lower federal court were to first hear this cause, since it would undoubtedly be appealed to the Supreme Court for review. There is some doubt whether the Supreme Court could refuse to hear the case on review under its certiorari power, as that would deprive a state of its right to be heard in the Supreme Court under Article III, Section 2. Moreover, the Framers of the Constitution may have provided for original jurisdiction not merely to give a state an appropriate forum commensurate with its dignity, but also to ensure that if necessary the Supreme Court itself be exposed to direct trial testimony in some cases which could be of fundamental importance to the nature of the Union. Not all state claims are of this level of significance, but the probability can be high as exemplified in *South Carolina* v. *Katzenbach, supra,* and in the present case.

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

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

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

If the Supreme Court, however, should find that the question of jurisdiction over the subject matter in the present case is inextricably tied in with the merits of the substantive controversy—for example, the nexus between the Commonwealth's status and the specific provisions of the Constitution that allegedly have been violated—then it is argued in the alternative that the Supreme Court postpone its decision on jurisdiction until all parties have had the opportunity to present their arguments orally on the merits. After all the evidence is in, the Court could rule whether jurisdiction over the subject matter has been established.

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

The defendant may attempt to argue that, because of its statute of April 2, 1970, Massachusetts is attempting to nullify federal law, to interpose itself between the federal government and the citizens, or to intrude upon an area which is preempted by the federal government. This argument if raised would be a red herring, since the Massachusetts statute is not a necessary part of the present suit. At best it reflects some of the rights and interests which give Massachusetts standing. However, all of Massachu-

setts' rights and interests, as detailed in Part I of this brief, exist entirely apart from the statute. The interest of the state as a proprietor, its interest as parens patriae, its contractual interest, its interest in the effectiveness of the Senate, its interest in the integrity of its own militia, and so forth, do not depend upon the existence of the statute. These interests, wholly without any statute, permit Massachusetts to be a plaintiff in this Court.

As a plaintiff before the Supreme Court, Massachusetts can seek judicial redress based upon the United States Constitution. The mere act of seeking judicial relief based upon the Constitution can in no way be said to constitute nullification, interposition, or an intrusion upon an area constitutionally preempted by the federal government.[3]

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

As was recently ruled by the United States Court of Appeals for the Second Circuit, the doctrine of sovereign immunity does not bar a challenge to the constitutionality of the war in Southeast Asia. *Berk* v. *Laird,* Docket No. 35007, June 19, 1970. For sovereign immunity does not bar an action, such as the present case, where it is alleged that officers of the government have exceeded their constitutional authority. *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-91 (1949). With specific respect to a state suing an officer of the government as a matter of original jurisdiction, the present suit is in the same position as the case of *South Carolina* v. *Katzenbach, supra.*

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3. It may be noted that Massachusetts is advising its citizens not to violate federal law or executive orders. Contrast *Cooper* v. *Aaron,* 358 U.S. 1 (1958); *Bush* v. *Orleans Parish School Board, supra.*

IV. THE PRESENT CASE PRESENTS JUSTICIABLE QUESTIONS.

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

1. Claim and Relief Sought Admit of Judicial Resolution.

Massachusetts' claims possess the general attributes of justiciability because there is a duty which " 'can be judicially identified and its breach judicially determined, and . . . protection for the right asserted can be judicially molded.' " *Powell* v. *McCormack, supra* at 517. The defendant has a duty to obtain a Congressional declaration of war, or a specific and intentional Congressional authorization of war, before sending men to fight in a war in Southeast Asia. That duty has been breached. Judicial relief for Massachusetts' claims can be molded by enjoining the defendant from continuing his breach of duty, or by declaring that the defendant's actions are in violation of the Constitution, or both. (The Declaratory Judgment Act, 28 U.S.C. §2201 (1964 ed.) provides that "any court of the United States . . . may declare the rights . . . of any interested party . . . whether or not further relief is or could be sought.")

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

The "political question doctrine", whatever its validity or justification in other cases, cannot be invoked to defeat Massachusetts' right to a determination of the merits of the present dispute without causing a drastic and deleterious alteration of the equilibrium set up among the three branches of the federal government. At the heart of the

present dispute is the issue of the distribution of power between Congress and the Executive. It is this brief's contention that the war in Southeast Asia is unconstitutional because it has neither been declared nor specifically and intentionally authorized by Congress, and hence the Executive Branch has acted unconstitutionally in prosecuting the war. Although the "political question doctrine" has appeared in many and diverse cases, no Supreme Court case has been found where that doctrine has been held applicable to the issue of the distribution of power between Congress and the Executive. Quite the contrary, there have been numerous cases of historical significance involving the issue of the distribution of power between Congress and the President where the "political question doctrine" was not even seriously invoked as posing a potential objection to justiciability. See, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Field* v. *Clark*, 143 U.S. 649 (1892); *United States* v. *Curtiss-Wright Export Corp.*, *supra*; *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).[4]

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4. Included among the numerous cases involving the distribution of powers between Congress and the President where the political question doctrine was not invoked have been a number of cases involving the war powers. The legality of the seizure of prizes and the war power of Congress were adjudicated in *Bas* v. *Tingy*, 4 U.S. (4 Dall.) 37 (1800) and *Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1 (1801). The legality of the seizure of prizes under the international law of war when there had been no Congressional declaration of war was adjudicated in *The Prize Cases*, *supra*. The international law of prize in war was enforced against the Navy in *The Paquette Habana*, 175 U.S. 677 (1900). The personal liability of a naval captain who seized a prize under the direct order of the President in time of war, but contrary to an act of Congress, was adjudicated in *Little* v. *Barreme*, 6 U.S. (2

The reason for the absence of the "political question doctrine" from cases where the issue is the distribution of power between Congress and the Executive is clear and compelling. Whatever else the term "political question" may connote, its core meaning is that the Constitution has committed the resolution of a particular issue to a political department rather than to the judiciary. See *Powell* v. *McCormack, supra,* at 518-521, 548-549. But when the very question is *which* branch of government, the Executive or the legislative, has the constitutional authority to resolve a particular issue, then there is obviously no constitutional commitment of the power of final decision to either of the political branches. Rather, there is a traditional issue for the judiciary—the determination of which branches have what powers. Indeed, in a case involving the distribution of power between Congress and the Executive, the Supreme Court has a duty to be the umpire or referee so as to make sure that the constitutional equilibrium of power in the federal government is not destroyed. If the third branch of government were to abstain from the role of umpire, there would be a flat denial of the possibility of the rule of law in the government of the United States. Judicial abstention in such a case would mean that the question of the distribution of power between the legislature and the Executive would not be decided on legal grounds but would be re-

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Cranch) 169 (1804). Numerous other cases could be cited in which the Supreme Court heard and decided issues involving the war power. See, *e.g., Hirabayashi* v. *United States, supra; Korematsu* v. *United States, supra; United States* v. *Macintosh,* 283 U.S. 605 (1931); *The Pedro,* 175 U.S. 354 (1899); *Tyler* v. *Defrees,* 78 U.S. (11 Wall.) 331 (1870); *Fleming* v. *Page,* 50 U.S. (9 How.) 603 (1850); *Commercial Trust Co.* v. *Miller,* 262 U.S. 51 (1923); *Martin* v. *Mott,* 25 U.S. (12 Wheat.) 19 (1827); *Hamilton* v. *Kentucky Distilleries & W. Co.,* 251 U.S. 146 (1919); *Fleming* v. *Mohawk Wrecking Co.,* 331 U.S. 111 (1947); *Dakota Central Tel. Co.* v. *South Dakota,* 250 U.S. 163 (1919); *Woods* v. *Miller Co.,* 333 U.S. 138 (1948); *Texas* v. *White, supra.*

solved by the naked force of power that either branch could muster. Appeals would be made to popular emotions; access to mass communications media would become of paramount importance; and even the spectre of a police state could be raised by the realization that one man is Commander-in-Chief of the world's most powerful armed forces. Perhaps a basic structural, though unnoticed, reason why such a fight for power has never occurred in the history of the United States is that the Supreme Court has never disqualified itself from the position of authoritative arbiter in respect of issues of the distribution of power between Congress and the President. If it became known as a result of the present case that the Supreme Court were disqualified, and that there was thus no legal standard by which the judiciary could resolve a legislative-executive issue, then there might be a rapid disintegration of the equilibrium between the two branches that constitutes the heart of the American system of checks and balances.

For this fundamental reason, this brief contends that there is not, and cannot be, a barrier to the present suit on the basis of the so-called "political question doctrine."

The same result follows from the other tests of "political questions" mentioned in *Baker* v. *Carr, supra* at 217. For Massachusetts here is asking for an interpretation of the Constitution. "Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate branch of government,' nor does it involve an 'initial policy determination of a kind clearly for nonjudicial discretion.'" *Powell* v. *McCormack, supra* at 548-549. Moreover, a constitutional determination by its very nature involves "judicially manageable standards." *Ibid.* The standards, indeed, derive from Clauses 11-16 of Article I, Section 8 of the

Constitution, and are spelled out specifically in later portions of this brief.[5] Additionally, a judicial resolution of Massachusetts' claim will not result in "multifarious pronouncements by various departments on one question," *Baker* v. *Carr, supra* at 217, for it is the responsibility of the Supreme Court to act as the ultimate interpreter of the Constitution. *Powell* v. *McCormack, supra* at 549. Finally, the test mentioned in *Baker* v. *Carr, supra* at 217, of "an unusual need for unquestioning adherence to a political decision already made," has never been a factor in any case involving the constitutionality of the war power or of the distribution of power between the legislative and executive branches. But even if the defendant in the present case were to claim that a decision by the Supreme Court that the war in Southeast Asia is unconstitutional would have serious domestic or international consequences, such a suggestion ultimately rests upon an assumption which is impermissible under a Constitution that gives the lawmaking and war-declaring powers to Congress: it rests upon the assumption that Congress cannot be trusted to decide what future steps the United States should take in Southeast Asia and to consider the domestic and international consequences of various steps. If the Supreme Court were to rule that the war is unconstitutional, it would then be up to Congress to decide whether and to what extent continued hostilities should be specifically and intentionally authorized in Southeast Asia. Congress might decide to authorize the continuation of the war for an unlimited amount of time. Or, it might authorize the continuation of hostilities for a length of time sufficient to ensure that American forces are withdrawn in an orderly manner, in

5. We are informed that the Government conceded that there are judicially manageable standards for resolving the question of the constitutionality of the war in the case of *Berk* v. *Laird*, Southern District of New York, July 22, 1970.

full consultation with the Commander-in-Chief as to the domestic and international consequences of the necessary rate and manner of withdrawal. Whatever Congress may decide, it can be trusted to act responsibly in light of all domestic and international political consequences, since it is the body authorized by the Constitution to make these decisions in the first place.

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

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

This brief relies on the militia clauses only for the following narrow purpose: to argue that there is no constitutional authority to send citizens who have been conscripted into the armed services to serve in hostilities abroad in the absence of explicit Congressional authorization. There is no attempt made here to argue that federal conscription is invalid, or that Congress does not have the power to send conscripted soldiers abroad. Rather, Massachusetts can assert the narrow, though real and tangible, interest in the preservation of its own militia to the effect that its militia

cannot be injured or threatened with injury for an unconstitutional purpose.

At the basis of this position is the scheme envisaged by the Framers of the Constitution and spelled out with great care in Article I, Section 8, Clauses 11-16, Article II, Section 2, Clause 1, and the Second Amendment. On the one hand, Congress could "raise and support Armies," and "provide and maintain a Navy," but, as was well understood by all the Framers without exception, there was to be no federal power of conscription. See Friedman, Conscription and the Constitution: The Original Understanding, 67 Mich. L. Rev. 1493 (1969). This is evidenced even by the definition in the dictionaries of the period of the word "army," which signified voluntary enlistment. See Webster, American Dictionary of the English Language (1828); Murray, New English Dictionary on Historical Principles (1888-1928); Perry, Royal Standard English Dictionary (1796). By contrast, the term "militia" signified the whole body of men physically able to serve in the military, or as defined in *United States* v. *Miller,* 307 U.S. 174, 179 (1939), "all males physically capable of acting in concert for the common defense." Thus, on the other hand, Congress was given the power in Clauses 15 and 16 to call forth the militia for three fundamental purposes: to execute the laws of the Union, to suppress insurrections, and to repel invasions. There would have been no need for these clauses if Congress, in raising an army, could conscript citizens for service. Rather, the existence of these clauses, in addition to the evidence of all the debates and understanding of the Framers of the Constitution reported in *Friedman, supra,* demonstrates that Congress was given two alternative types of power. Congress could raise and appropriate money for a volunteer army and navy (with a two-year limit on the term of army appropriations

so as to guard against a permanent standing army); or if Congress needed the services of larger numbers of soldiers it could call forth the militia upon whose large numbers the nation was to rely for large scale military actions.[6] The volunteer army was not limited in terms of its functions, undoubtedly on the basis that a freely consenting individual could choose to serve in hostilities abroad if Congress was willing to pay the price for inducing him to do so. But a conscripted man, called forth from the state militia to serve in the national armed services, could be compelled only within the purposes specified in Clause 15. The limited nature of the militia is spelled out by a former attorney general. See 29 Ops. Atty. Gen. 322 (1912).

Although on several occasions when a large scale military force was deemed necessary, Congress has purported to draft citizens into the national armed services, it is important to be clear about the underlying constitutional mechanism involved. There is no constitutional authority given to Congress to conscript citizens for armed service, and hence. apart from what Congress may have appeared to have been doing, in fact any selective service law or selective draft law was a "calling forth" of the militia into national service. Since all able-bodied males are ipso facto members of their states' militias, to draft them means to call them forth from their states' militias to serve in the national army.[7]

There has been considerable controversy whether this conscription process (which amounts to "calling forth" the militia) can occur in peacetime. See, e.g., *United States* v.

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6. On this point, *Friedman, supra,* contains much history taken from the Constitutional Convention, the State ratifying conventions, the federalist papers, and other sources of the period.

7. The same is not true of the National Guard, which is a voluntary organization whose members have agreed to serve in the federal army when called upon to do so.

Crocker, 420 F.2d 307 (8th Cir., 1970); *Friedman, supra;* Freeman, The Constitutionality of Peacetime Conscription, 31 Va. L. Rev. 40 (1944). Clause 15 gives Congress the power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Particularly in this day when mechanized and airborne warfare may break out suddenly, the language of Clause 15, read in the light of the Necessary and Proper Clause, does not necessarily forbid peacetime conscription for the purpose of preparing for any of the eventualities contemplated in Clause 15. But while peacetime conscription may be legal in order to prepare for the possibility of having to execute a law of the Union, suppress an insurrection, or repel an invasion, this does not mean that the militia can be sent abroad to fight in a war when there is no law to execute which declares or specifically authorizes the war. Otherwise the limitation of purposes in Clause 15 would effectively be read out of the Constitution.

Large numbers of the militia of Massachusetts have (in effect) been called forth under the Military Selective Service Acts to participate in the federal armed forces. A significant portion of these draftees have been ordered to participate in the war in Southeast Asia. It is with respect to this latter group that there has been an unconstitutional usurpation of Massachusett's militia. For the war in Southeast Asia fits none of the three purposes specified in Clause 15. There is no "insurrection" or "invasion" involved. See 29 Ops. Atty. Gen., *supra.* And the war is not in execution of any law of the Union.

If Congress were to declare war under Article I, Section 8, Clause 11, such declaration would be a "law" of the Union under Clause 15. The militia called forth under Clause 15 would thus be obliged to fight at home or abroad

in the service of the federal armed forces in direct execution of the law that declared the state of war.[8]

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

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8. Although the reasoning has been criticized, the Selective Draft Law Cases, 245 U.S. 366 (1918) reached the proper result in upholding conscription during World War I. Such conscription was in effect a calling forth of the militia for the purpose of executing the law which declared war and specifically authorized the use of the armed forces against Germany.

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

A. Military Hostilities of the Scope and Duration of the Present Indochina War Effort by the United States Are Constitutionally Dependent on a Declaration of War by Congress.

1. The Congressional Power to Declare War.

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

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

It is not by accident that this distribution of authority came to be plainly stated. The draftsmen of the Constitution were the beneficiaries of experience under the

British Crown where the powers of commitment to war and prosecution of war were joined in the office of the King, and they consciously sought to avoid the abuses which that joinder had indulged. Abraham Lincoln's reading of the Founding Fathers' lodging of the power to declare war in Congress conformed to this view. Lincoln said:

> Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our Convention understood to be the most oppressive of all kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us. (1 Basler, The Collected Works of Abraham Lincoln 452 (1953).)

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

> [T]he history of republics has but too fatally proved, that they are too ambitious of military fame and conquest, and too easily devoted to the views of demagogues, who flatter their pride, and betray their interests. It should therefore be difficult in a republic to declare war; but not to make peace. The representatives of the people are to lay taxes to support a war, and therefore have a right to be consulted, as to its propriety and necessity . . . . This reasoning appears to have had great weight with the Convention, and to have decided its choice. Its judgment has hitherto obtained the unqualified approbation of the country. (2 Story, *Commentaries on the Constitution of the United States*, 89-90 (2d ed. 1851).)

The Framers' fear of executive license in committing the republic to war was so great that during the Constitutional Convention, Elbridge Gerry, responding to a suggestion to lodge the war power in the Presidency, stated

that he had "never expected to hear in a republic a motion to empower the executive alone to declare war." 2 Farrand, Records of the Federal Convention 318 (1923 ed.).

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

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

The Supreme Court early recognized that power given to Congress was the exclusive means whereby the nation was to be committed to war. *Talbot* v. *Seeman,* 5 U.S. (1 Cranch) 1 (1801), involved the legality of the seizure of a French ship, the *Amelia*:

> In order, then, to decide on the right of Captain Talbot, it becomes necessary to examine the relative situation of the United States and France at the date of the recapture.
>
> The whole powers of war being by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry . . . . (*Id.* at 28.)

As grave and great as were the consequences of the commitment of our nation to war in 1787, the Vietnam

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

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

This observation is of more than historical significance, since apologists for the Executive prosecution of an undeclared war in Southeast Asia have included the claim that Presidents have frequently engaged in military operations without consulting or receiving the authorization of Congress. However, it is extremely doubtful that even a consistent, long-term practice of the Executive Branch to violate an express requirement of the Constitution could become self-validating. In *Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* for example, the Supreme Court responded to the proposition that Presidents had in the past acted without Congressional authority, as follows: "But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out powers vested by the Constitution. . . ." *Id.* at 588-589. In any event, however, Presidential action until 1950 has demonstrated compliance with the Constitutional requirement that a

commitment of this nation to a major war must rest upon a formal Congressional act declaring or specifically authorizing that commitment.

The United States has been involved in eight major wars: The War of 1812, the Mexican War of 1846-48, the Civil War, the Spanish-American War, World Wars I and II, the Korean "Police Action", and the Vietnam War.

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

	No. of Troops	Deaths	Wounded	Total Casualties
World War II	16,353,659	407,316	670,846	1,078,162
Civil War (Union Casualties)	2,213,363	364,511	281,881	646,392
Vietnam (approximations)	10,000,000	45,000	300,000	345,000
World War I	4,743,826	116,708	204,002	320,710
Korea	5,764,143	33,629	103,284	136,913
Mexican War	78,718	13,283	4,152	17,435
War of 1812	286,730	2,260+	4,505	6,765+
Spanish American War	306,760	2,446	1,662	4,108

Data on prior wars was obtained from the 1970 World Almanac, page 162.

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

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

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

> Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that War be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper, and under the seal of the United States, against the vessels, goods, and effects of the government of the said United Kingdom of Great Britain and Ireland, and the subjects thereof. 2 Stat. 755.

The Mexican War of 1846-1848 was authorized by an explicit Congressional declaration of war, dated May 13, 1846, which in terms authorized the President to use the armed forces of the United States to prosecute the war. 9 Stat. 9-10.

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

> And be it further enacted, That all the acts, proclamations, and orders of the President of the United States after the fourth of March, eighteen hundred and sixty-one, respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States. 12 Stat. 326.

The Spanish-American War was authorized by a joint resolution of Congress, dated April 20, 1898, which was

followed by a formal declaration of war on April 25, 1898 explicitly authorizing the President to use the armed forces of the United States to prosecute the war. 30 Stat. 364.

The First World War was authorized by an explicit Congressional declaration of war, dated April 6, 1917, which in terms authorized the President to employ the armed forces to carry on war against Germany. 40 Stat. 1.

The Second World War was authorized by explicit Congressional declarations of war, dated December 8, 1941 (Japan) and December 11, 1941 (Germany and Italy), in terms directing the President to use the armed forces to carry on war. 55 Stat. 795-97.

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

The Korean War of 1950, like the war in Southeast Asia today, was not a war declared by Congress nor specifically and intentionally authorized by that body. It was brought to an end as the result of the election of President Eisenhower in 1952. Unfortunately its constitutionality was not challenged in the courts, for the war set in motion a vast military-industrial complex, of which President Eisenhower warned the nation as he left office in 1960, which welcomed an increasing unauthorized commitment by the Executive Branch in the war in Southeast Asia. The tragic cost and waste of the Vietnam War might have been averted had it been made very clear in 1950 that the Executive cannot unilaterally plunge this

nation into war. Today there is a second chance—to assert the primacy of the Constitution in matters of the engagement of this nation in a major war. A third chance may never come, because the next war could be suicidal for the human race.

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

2. The Power of the President.

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

Nor is it relevant to the present case whether in relation to the Gulf of Tonkin incident in 1964 the President was justified in using American forces to repel an attack when there was no time to obtain a Congressional

declaration or specific authorization of war. For the point at issue in this case is whether, even though the President has the Constitutional authority to repel a sudden attack, he can then engage in a long and major war without at any point obtaining a Congressional declaration or a specific authorization of war. Obviously the President cannot do so. Rather, if he wishes to engage in a war subsequent to repelling an attack, he must obtain a Congressional declaration or specific and intentional authorization of war. This was illustrated when, after engaging in action to repel the Japanese attack on Pearl Harbor on December 7, 1941, the President proceeded to obtain a declaration of war against Japan the very next day.

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

It is sometimes claimed that Presidential powers in the field of foreign affairs give the President the constitutional right to fight a war that has not been declared or specifically and intentionally authorized by Congress. See *e.g.*, Legal Adviser, The Legality of United States Participation in the Defense of Viet Nam, 75 Yale L.J. 1085, 1100 (1966). Although there has been discussion over the years as to the extent of the President's general

foreign affairs powers, it is clear that one foreign affairs power which does not belong to the President is the power to decide whether this nation shall engage in a war. This power was specifically given to Congress by the Framers of the Constitution. Any claim that the President can operate unconstitutionally in the area of "foreign relations" has been destroyed by *Reid* v. *Covert,* 354 U.S. 1, 5-6 (1957), which stated that "The United States is entirely a creature of the Constitution. Its power and authority have no other source."

Nor can it be argued that the President's status as commander-in-chief makes the Vietnam war constitutional. The executive's commander-in-chief claim in this respect was squarely rejected by the Second Circuit Court of Appeals in *Berk* v. *Laird, supra,* as it also was by the District Court of the Eastern District of New York in *Orlando* v. *Laird,* No. 70 C 745, July 1, 1970. It is clear that the commander-in-chief power can not give the President the power to fight a war that has not been declared nor specifically and intentionally authorized by Congress. Were the situation otherwise, the President, as commander-in-chief, could usurp Congress' power to decide whether this nation shall fight a war. Such a result would (1) violate the teaching of *Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* where it was ruled that the commander-in-chief power cannot enable the Executive to usurp a Congressional power; (2) create military supremacy by making the President, in his military role, supreme over the civilian Congress which has the constitutional authority to decide whether we fight a war; and (3) eliminate a safeguard upon which the state ratification conventions relied when ratifying the Constitution—the safeguard that the President's power as commander-in-chief is subject to Congress' power to declare war. 2

Story, *supra* at 305. The commander-in-chief power, then, does not empower the President to fight wars that have not been authorized by Congress. Rather it only gives him the power to direct our military strategy and tactics in military actions that *have* been authorized by Congress.

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

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

In a prior section of this Brief it has been shown that the declaration of war clause was placed in the Consti-

tution in order to accomplish a very specific purpose. The Framers were afraid of the dangers of the Executive geting this nation into war. They therefore wished to ensure that Congress, rather than the President, have the power to decide on war, and they carried out their intent by giving Congress the power to declare war. The entire purpose of the declaration of war clause is to ensure that Congress make the decision on war.

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

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

(1) The Congressional authorization must be *intentional.* The authorization of military hostilities must be so framed and presented that an intelligent and conscientious legislator would apprehend that assent to the measure constitutes an authorization of war, and as such, would be constitutionally determinative of executive power to prosecute such hostilities. Intentionality is not to be haphazardly implied from vague and ambiguous evidence of Congressional behavior over a period of time.

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

(3) The Congressional authorization must be the *product of a separate and distinct choice by Congress that is detached from other legislation.* The declaration of war clause, Article I, Section 8, Clause 11, stands alone. Its solitary position indicates that the Framers wanted separate and distinct action by Congress in order to declare war. It would have been preposterous to the Framers to imagine that a declaration of war could be inferred from action that Congress has taken on other legislative matters. It is critical that an authorization of war be separate and distinct from other legislation rather than be an inferred

result from legislation which is independently necessary for preserving the national security, such as defense appropriations or selective service. If authorization can be inferred from acts which are independently necessary for the national security, then Congress will be forced into the position of either refusing to pass these vital acts or else risk having their passage be construed as authorization of a major war. Indeed in obvious deference to the constitutional scheme envisaged by the Founders, every declaration of war by Congress in this nation's history has been a separate and distinct enactment or joint resolution, untied to any other legislation and certainly not inferred from other legislation.

Each of these requirements—intentionality, specificity, and product of a distinct choice—flow from the purpose and wording of Clause 11. If an authorizing bill is not framed and presented in a way which ensures that legislators know that they are intentionally authorizing hostilities, if it is not framed in a way that specifices the entities or the forces and territories against which armed force shall be used, or if it is not framed and presented independently of other legislation but instead is inferred from other legislation, then the purpose of Article I, Section 8, Clause 11, to have Congress make the decision on war is obviously thwarted. It is particularly important to be scrupulously aware of this danger when apologists for an Executive war urge that Congressional authorization be loosely inferred from Congressional behavior over a period of time. After all, it is precisely Executive wars, "the most oppressive of all kingly oppressions" in Lincoln's words, which the Framers were fearful of and sought to guard against by giving the decision to declare war to Congress.[9]

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9. The following are hypothetical examples of bills which, in the context of a Congressional desire to authorize military opera-

Normally these criteria would be superfluous to mention, but in the present case the Executive has argued that they can be ignored. The Executive has argued that in place of a Constitutional declaration of war or its equivalent, a sort of loose implied consent can be substituted. So long as "consent" can somehow be implied from Congressional actions, the argument goes, there is no need to pay attention to the words of the Constitution contained in Article I, Section 8, Clause 11.

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

The act of July 7, 1798, 1 Stat. 578, which was enacted during the era of the framers and which authorized limited warfare, provides an actual historical example which meets the three criteria of intentionality, specificity, and separateness and distinctness. The act said "That the President of the United States shall be, and he is hereby authorized to instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas. . . ."

We do not intend the above examples to be exhaustive of the possible verbal formulations by which Congress can issue an authorization which meets the three criteria necessary to have the constitutional equivalent of a declaration of war. But the examples do show possible verbal formulations which, in the above-mentioned context of a Congressional desire to authorize military operations in order to meet a given historical situation, would satisfy the duty required of Congress by Article I, Section 8, Clause 11 of the Constitution.

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

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

Congress of one of the most fundamental, important, carefully drafted, and democratically essential of its constitutional powers—the power to *decide* to go to war.

1. There Has Been No Congressional Declaration of War.

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

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

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

The Executive Branch has often contended that defense appropriations and renewals or amendments of the Selective Service Act constitute Congressional authorization for the undeclared war in Southeast Asia. Appropriations and the draft, however, do not meet the criteria for the constitutional equivalent of a war. Defense appropriations, however large, and the Selective Service Act,

however often renewed or amended, are not framed and presented in a manner which ensures that a legislator will apprehend that the appropriations or the draft will constitute a constitutional authorization of war. Appropriations and the draft thus do not meet the criterion that an authorization of war must be intentional. Indeed, abundant legislative history, compiled in the Appendix to this brief, demonstrates that many legislators who voted for defense appropriations during the Southeast Asian war were specifically intending that their votes *not* be interpreted as authorizing the war. This legislative history shows that, rather than intending to authorize a war, legislators had a number of other reasons why they felt compelled to vote for appropriations. Many felt that, as a matter of common humanity and morality, they could not deny appropriations to men who faced death in battle. Others felt they were unable to sever expenditures they opposed from those they favored. Some legislators, in accordance with a position partly derived from the statutory limitations set forth in Public Law 79-601, Sec. 103, 1946 U.S. Code Cong. and Admin. News 786-787, felt that it was procedurally inappropriate to discuss substantive policy when debating and voting on an appropriations bill. Others voted for appropriations because of the feeling that, even if the Southeast Asia war were to end immediately, American stocks of armaments and material had been depleted and thus appropriations were necessary to replenish them. For expressions of all these positions, see Appendix. All of these positions are reasonable explanations why voting to pass appropriations bills or extending the draft (for which similar reasons apply) cannot be construed to be an intentional authorization of war.

By referring to the expressed motivations of many legislators in voting affirmatively on appropriations bills, and by including an Appendix of their views, no claim is

intended that the views adumbrated reflect the motivations of all the members of Congress. Rather, the reasonableness of the views as explanations for voting, the leadership positions of the legislators who made them, and the fact that the views were expressed in Congress so as deliberately to counteract any claim that a vote for appropriations or the draft meant an authorization of the Vietnam war, suffice to cast considerable doubt on the proposition that appropriations or the renewal of Selective Service can constitute an intentional declaration of war. The variety of expressed motivations on the appropriations bills, moreover, suggests that any attempt to reconstitute the intent of Congress with respect to a single issue such as that of whether voting for appropriations was an implied authorization of war, would require elaborate techniques of content analysis, Guttmann scaling, "head counts," and psychological interviews to determine the probabilities, within statistically significant intervals, of whether a majority cluster of such a motivation existed at any time. The difficulty and uncertainty of this task is a good reason for rejecting it as a way of bypassing the declaration of war clause.

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

Events in the Vietnam war provide practical confirmation of the foregoing argument. The Executive, arguing at each step that prior appropriations or the Selective Service Act authorize his actions, has over time changed the nature of the American military commitment in terms of

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

transfer of power from one branch of government to the other.

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

(b) The Appropriations and Selective Service Argument Distorts the Constitutional and Legislative Processes.

It has been shown that the three criteria for a valid authorization of war are not met by the Executive's argument that appropriations and the Selective Service Act

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

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

In addition to the foregoing results wreaked by the appropriations and selective service argument, the nature of

the legislative process is also changed. Under the legislative process contemplated by the Constitution, those who wish to pass a new law have the burden of obtaining a majority in each house to vote in favor of the new law. Securing such a majority can be a difficult burden indeed, since in addition to other problems, there are always many legislators who reasonably desire to be very slow, careful, and deliberate when it comes to changing the existing situation by passing a new law. Thus the very need to secure a majority of legislators who wish to change the existing situation by passing a new law can in itself result in a lack of success in changing the existing situation. But under the appropriations and selective service argument, the burden of securing a legislative majority is reversed. If the President wishes to change the existing situation by obtaining a new law, he will simply decree that whatever change he wants is now the law; and then the burden will be on those who oppose the President's change to secure a majority of legislators willing to vote in favor of withholding appropriations in order to countermand the President's edict. Thus those who oppose the change in the law, instead of those who favor it, will have the burden of securing a majority, and they will have to secure a majority willing to overturn a presidential *fait accompli.* The enormous difficulty of doing this, and the terrible danger to the constitutional balance of powers of letting the President put Congress in such a position, is emphasized by Justice Jackson's words about the aggrandizement of Presidential power in *Youngstown Sheet & Tube Co.* v. *Sawyer, supra* at 653-54 (concurring opinion):

> [I]t is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-

Century sketch of a Government hoped for, not as a blueprint of the government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

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

Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution. Indeed, Woodrow Wilson, commenting on the President as leader both of his party and of the Nation, observed, "If he rightly interpret the national thought and boldly insist upon it, he is irresistible. . . . His office is anything he has the sagacity and force to make it." I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.

It seems clear, then, that the President should not be permitted to enact laws and thereby place the burden of

obtaining a majority upon those who wish to oppose his law by withholding appropriations. This applies with particular force to the issue of deciding whether to go to war. For here the burden of obtaining a majority is of special significance.

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

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

(c) The Appropriations and Selective Service Argument Is Contrary to Existing Law.

The Supreme Court has never held, when important constitutional matters are involved, that appropriations provide a legal basis for Executive action that is otherwise

of dubious constitutionality. In *Greene* v. *McElroy,* 360 U.S. 474 (1959), the petitioner lost his job with a defense contractor as a result of the revocation of his security clearance by the Department of Defense. The Department's security program was in apparent conflict with the requirements of constitutional due process, and this was the critical factor leading the Court to hold that the security program had not been authorized by Congressional appropriations. The Court said:

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

> or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. *Such decisions cannot be assumed by acquiescence or non-action. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, see Peters* v. *Hobby, supra, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.* (*Id.* at 506-07; emphasis added, footnote and citations omitted.)[10]

In the present suit, important constitutional matters are at stake and thus, like *Greene,* authorization should not be inferred from appropriations. Rather, there should be "explicit action" based upon "careful and purposeful consideration by those responsible for enacting and implementing our laws." *Id.* at 507. For without "explicit action by lawmakers" a decision of "great constitutional import and effect," namely the decision whether to go to war, "would be relegated . . . to administrators who, under our system of government, are not endowed with authority to decide them." *Ibid.*

In the past the Executive has cited *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139 (1937), *Fleming* v. *Mohawk Wrecking Co., supra, Brooks* v. *Dewar,* 313 U.S. 354 (1941), and *Ludecke* v. *Watkins,* 335 U.S. 160 (1948), for

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10. In *Ex Parte Endo,* 323 U.S. 283 (1944), the Supreme Court refused to find that appropriations ratified Executive action in a case involving the personal liberty of a concededly loyal person of Japanese ancestry.

the proposition that appropriations can ratify Executive action. From these cases it was deduced that defense appropriations authorize the current war. However, *Isbrandtsen, Fleming* and *Brooks*, unlike *Greene* or the present case, did not involve critical constitutional issues revolving about specific constitutional provisions. They involved issues which were trivial in comparison to those of the present case. Those cases thus cannot be taken to mean that appropriations serve to authorize Executive action of dubious legality in cases involving critical constitutional issues governed by constitutional provisions. The *Ludecke* case did involve an important matter, but the case does not stand for the proposition that appropriations ratify Executive actions which are otherwise illegal. The relevant issue was whether, under a particular statute, the President had power to act subsequent to the cessation of actual hostilities in World War II. Without so much as mentioning appropriations, the Supreme Court ruled that the statute itself gave him this power. In a footnote subsequent to the ruling, the Supreme Court included some dicta on appropriations, and even here the main burden of the dicta was that, in appropriating money, Congress had merely recognized that the statute itself had given the President the power to act after the cessation of hostilities. All of this is a far cry from saying that appropriations authorize the President to exercise a power he does not already have under a statute or under the Constitution.

(d) Summation of the Appropriations and Selective Service Argument.

It has been shown above that appropriations and the renewal of the draft do not meet the three criteria for a specific and intentional and discrete authorization which is the equivalent of a declaration of war. It has been shown

that the Executive's appropriations and draft argument warps the Constitution and the legislative process set up by the Constitution. And it has been shown that the Executive's appropriations and draft argument is contrary to existing law. Thus the appropriations and Selective Service actions by Congress cannot constitute the constitutional equivalent of a declaration of war.

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

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

The Gulf of Tonkin Resolution of August 10, 1964, Public Law No. 88-408, 78 Stat. 384 (1964), was three years later disclaimed by President Johnson as being necessary for authority to carry on military operations in Southeast Asia. President Johnson said in a news conference: "We did not think the resolution was necessary to do what we did and what we are doing." Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. 126 (1967). Nor does the current administration of President Nixon rely for authority upon the Gulf of Tonkin Resolution. On March 12, 1970, in response to a letter from Senator Fulbright, H. G. Torbert, Jr. stated on behalf of the Department of State:

> [T]his administration has not relied on or referred to the Tonkin Gulf resolution of August 10, 1964, as support for its Vietnam policy. . . . [T]he administration does not consider the continued existence of th[is] resolution . . . as evidence of congressional authorization for or acquiescence in any new military efforts or as substitute for the policy of appropriate and timely congressional consultation to which the administration is firmly committed . . . ." S.R. No. 91-872, 91st Cong., 2d Sess. 20-21 (1970).

Recently, Senator Dole, as a spokesman for the current Administration, reaffirmed that the Executive does not rely on the Gulf of Tonkin Resolution for authorization to conduct the current level of military activity in Southeast Asia. In response to questions of Senator Eagleton as to whether the administration relied on the Resolution, Senator Dole stated:

> (T)his Administration has not relied upon the Gulf of Tonkin Resolution and does not now rely on the Gulf of Tonkin Resolution. 116 *Cong. Rec.* 9591 (daily ed. June 23, 1970).

Moreover, any argument that the Resolution constitutes Congressional authorization for the military activity in Indochina is further weakened by the fact that the Senate has voted twice within the last two months to repeal the Resolution. *N.Y. Times,* June 25, 1970 at 1, col. 1. Therefore, since the Executive does not rely upon the Gulf of Tonkin Resolution as constitutional authority from the Congress for its prosecution of the war, the defendant cannot rely upon the Resolution as a constitutional basis for his actions.

It should be noted that the Executive's position of nonreliance on the Gulf of Tonkin Resolution is well-founded since the Executive is aware that Congress, in passing the Resolution, did not intend to give it the authority to in-

crease the level of military activity or to change the nature of the military operations in Southeast Asia. Although the Resolution has very broad, ambiguous wording, it has a very narrow intent since it was enacted in response to a particular set of circumstances, constituting a crisis situation, which the Executive represented as having occurred in the Gulf of Tonkin. On August 5, 1964, in asking Congress for "a Resolution expressing the unity and determination of the United States in supporting and in protecting peace in Southeast Asia," the Executive reported that on August 2 and August 4, 1964, two United States naval vessels operating in international waters in the Gulf of Tonkin were attacked by North Vietnamese patrol boats, and that on August 4, 1964, in response to these incidents he had ordered retaliatory air attacks on the North Vietnamese torpedo boat buses and their oil-storage depots. 110 *Cong. Rec.* 18132 (1964). As the March 20, 1970 letter to Senator Fulbright from H. G. Torbett, Jr. explains, Congress passed the Resolution in response to a crisis situation and understood that it only approved the Executive's limited response to that crisis and did not authorize increased military activity in Southeast Asia:

> Each of the resolutions specified in section 1 [Formosa resolution, Middle East resolution, Cuba resolution and Gulf of Tonkin resolution] was passed in response to a crisis situation in the affected area. Thus . . . the Tonkin Gulf resolution responded to an assault upon our naval forces in international waters. . . .
>
> The crisis circumstances giving rise to these Resolutions have long since passed. As indicated by the specific analyses below, the administration is not depending on any of these Resolutions as legal or Constitutional authority for its present conduct of foreign relations or contingency plans. S.R. No. 91-972, 91st Cong., 2d Sess. 20 (1970).

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

The Congress adopted the Gulf of Tonkin Resolution on August 7, 1964 and the President signed it on August 10, 1964. In his message to Congress on August 5, 1964 requesting the Resolution, the President made it clear that he was not asking Congress to authorize greater levels of military activity or to change the nature of the military operations in the Indochina area:

> As I have repeatedly made clear, the United States intends no rashness and seeks no wider war. 110 *Cong. Rec.* 18132.

At the time of the Executive's request, the level of military forces was between 17,000 to 18,000 troops. 116 *Cong. Rec.* 9591 (daily ed. June 23, 1970) (Remarks of Senator Dole). By the end of 1964, the military forces in Vietnam had not greatly increased and are reported to have totaled 23,300. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1968,* 258 (89th ed. 1968). Statements made on the floor of Congress indicate that Congress did not intend to authorize an increase over the then current level of military operations in Vietnam. Senator Fulbright, one of the sponsors, indicated that the purpose of the resolution was "to prevent the spread of war, rather than to spread it." 110 *Cong. Rec.* 18462. During the debates on the Tonkin Resolution, Senator Brewster, observing that he "would look with great dismay on the landing of large

American armies on the continent of Asia," asked Senator Fulbright whether there was anything in the resolution which would approve, authorize or recommend or approve the landing of large American armies in Vietnam or China. *Id.* at 18403. Senator Fulbright replied, "There is nothing in the Resolution, as I read it, that contemplates it. I agree with the Senator that that is the last thing we would want to do." *Id.* Senator Morton also shared Senator Brewster's concern that the United States might send large American armies to southeast Asia. *Id.* at 18404. Senator Fulbright again agreed that the purpose of the Tonkin Resolution was to prevent this from happening. *Id.* Senator Nelson then asked whether Congress, by enacting the Tonkin Resolution, would be agreeing in advance that the President could land as many divisions as he deemed necessary and could then engage in direct military assault on North Vietnam. *Id.* at 18406. In response, Senator Fulbright indicated that this was not the sense of the Resolution and that he thought it would be very unwise under any circumstances to put a large land army on the Asian continent. Senator Nelson also made the following statement:

> (B)y enacting the resolution Congress should [not] leave the impression that it consents to a radical change in our mission or objective in South Vietnam. . . . I would be most concerned if the Congress should say that we intend by joint resolution to authorize a complete change in the mission which we have had in South Vietnam for the past 10 years and which we have repeatedly stated was not a commitment to engage in a direct land confrontation with our Army as a substitute for the South Vietnam Army or as a substantially reinforced U. S. Army to be joined with the South Vietnam Army in a war against North Vietnam and possibly China. *Id.* at 18407.

Senator Russell was also of the opinion that the purpose of the Resolution was to approve the retaliatory action that the President ordered in defense of the United States ships in the Gulf of Tonkin. *Id.* at 18411. On the House side, Representative Morgan, Chairman of the House Committee on Foreign Affairs, stated unequivocally, "The Resolution is definitely not an advance declaration of war. The committee has been assured by the Secretary of State that the constitutional power of Congress in this respect will continue to be scrupulously observed." *Id.* at 18539. On this same point, Congressman Adair indicated that Congress did not want the approval of the Tonkin Resolution to indicate that Congress was giving approval in advance for the President to take such actions as he might see fit to take in the future. *Id.* at 18543. Moreover, Congressman Fascell explicitly stated:

> This resolution is not a declaration of war. The language of the resolution makes that clear as does the legislative history. Therefore this resolution in no way impinges on the prerogative of the Congress to declare war. Furthermore, no one here today has advocated a declaration of war. . . .
>
> Mr. Speaker the pending resolution does, however, ratify and support the military action recently ordered and taken by President Johnson to respond to the unprovoked Communist armed attack against the U.S. Navy while in international waters. *Id.* at 18549.

It is evident that it was not the intention of Congress to authorize an increased level of military operations in Indochina. Rather the Resolution was meant only as approval of the Executive's use of force in response to an armed attack on United States navy vessels. Section 1 of the Resolution makes this quite clear through the language which says that Congress "approves and supports" the Executive's exercise of his constitutional authority in re-

sponse to the crisis in the Gulf of Tonkin. Section 2 of the Gulf of Tonkin Resolution is nothing more than the statement of "unity and determination" requested by the President. In that section Congress did not declare war; instead it affirmed that "consonant with the Constitution . . . the United States is . . . prepared . . . to take all necessary steps . . . ." One of the necessary steps, of course, would be specific and intentional authorization by Congress for increased levels of military activity and operations in Southeast Asia.

The foregoing analysis should serve to make it clear why even the Executive feels that its legal position is not helped by the Gulf of Tonkin Resolution. But even apart from that, it is clear that the Resolution does not satisfy the criteria of specificity and intentionality (although it does satisfy the third criterion of being the product of a separate and distinct choice by Congress) which are necessary to any authorization that could be deemed the equivalent of a Congressional declaration of war. Contemporaneous statements of Congressional leaders, as well as the face of the Resolution itself, reveal that the Resolution is a declaration of confidence in the President and a statement of future intention to support him and his policies. It is certainly not a conscious act equivalent to a declaration of war. But even if it were conceded for the moment that the Resolution was intended by Congress to be a declaration of war, then even Congress' wishes in that respect could not be upheld because the Resolution on its face lacks the specificity requisite to the equivalent of a declaration of war. Couched in general terms, and on its face delegating to the President the power to decide whether or not to engage in military hostilities, the Resolution could not be a permissible delegation of power under the Constitution. Massachusetts, as plaintiff in the present case, is en-

titled for the reasons given earlier on the issue of standing, to be able to enforce through the judiciary a respect for constitutional procedures required of both Congress and the President. A delegation of power by Congress to the President that amounts to a violation of the constitutional grant of power to decide whether to go to war which Article I, Section 8, Clause 11, gives to Congress alone, would infringe upon all the rights that Massachusetts has in bringing the present suit.

Apart from all these reasons, there is at present a considerable body of eminently respectable opinion which holds that the Executive obtained passage of the Gulf of Tonkin Resolution by seriously misleading Congress as to the events in the Gulf of Tonkin that occasioned the Resolution. See generally, The Gulf of Tonkin: The 1964 Incidents, Hearings Before the Comm. on Foreign Relations, U.S Senate, 90th Cong., 2nd Sess.; Pusey, The Way We Go To War 115-34 (1969). If passage of the Resolution was indeed obtained by misleading Congress, then serious questions would be raised whether the Resolution could serve as a basis for the war.

4. The SEATO Treaty Is Not Equivalent to a Congressional Declaration of War.

The Southeast Asia Collective Defense Treaty, T.I.A.S. 3170, known as the SEATO Treaty, has at times been mentioned as affording legal justification for the war in Vietnam. However, the operative language of the SEATO treaty provides, in Article IV, that in the event of aggression against any of the Parties to the treaty, each Party agrees to act "in accordance with its constitutional processes." It is clear that this language funnels back to the United States Congress the decision to go to war under the procedures specified in the United States Constitution and

thus obviously cannot purport to be a substitute for the considerations adduced elsewhere in this Brief. Even if the treaty did not contain this explicit language, the treaty provisions, whatever they are, cannot override the Constitution, since the United States has no constitutional power to commit itself to any treaty that overrides the Constitution. *Reid* v. *Covert, supra.* Thus it would be frivolous to contend that the issues in the present case are, or can be, affected by the SEATO treaty.

VII. CONCLUSION

For the reasons herein stated, it is prayed that:

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

Respectfully submitted,

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August, 1970.

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APPENDIX

APPENDIX

Senator Russell said:

"If Senators wish to punish the President by starving 300,000 American boys and leaving them in Vietnam, they should not only vote for the resolution of the Senator from Oregon but should also vote against the authorization [of money]. Senators have this power. But, I have an idea, if they do, that they will hear something from the American people. Every State in the Union has men in Vietnam. The people back in the 'boondocks' and in our towns, and those living in the fords of the creeks, have a high value of life. It is a matter of grief when one of those coffins, with the American flag draped over it, comes back home to a small town. It is not a matter of higgling and haggling about policy or Presidential power. It is a matter which strikes right into the homes of a whole community." 112 *Cong. Rec.* 4372.

Senator Ervin said:

"What you point out is one of the troublesome things about it. If a President takes action and puts our troops into battle overseas in an offensive war, and our boys are being shot at and killed, Congress is put in a position where it must furnish them with weapons to defend themselves on foreign soil." *National Commitments Hearings,* 220

Excerpts from the debates surrounding the 1965 Southeast Asian Emergency Appropriations follows:

"MR. KASTENMEIER. Mr. Chairman, in abruptly calling for $700 million, the President appears to be asking for an endorsement by Congress for the

administration policies in Vietnam and the Dominican Republic. Since he has asked for these funds and assuming he has need for them-although there is serious doubt about the urgency for $700 million to be spent in the remaining 2 months of this fiscal year-I am sure Congress will suport this measure, in some cases because of agreement with its implicit policy-in others because of an unwillingness to be placed on record as denying funds for elements of the Armed Forces abroad including 'equipment, aircraft, and ammunition'.

"In this situation, however, it must be clear that this vote cannot be construed as an unqualified endorsement of our policies in either southeast Asia or in this hemisphere. A vote for these funds does not expunge the grave reservations many in this country have over these policies. The President's request for funds, coming at a time when he could use other existing appropriations, must be seen for what it is-the engineering of consent. While he will receive the votes of consent, the debate over our policies will not end today. While the President has a duty in foreign policy, Congress has an equal responsibility to give national expression to the strong opposition to our policies throughout the country. Congress ought not to acquiesce and rubber-stamp policies which are, in some cases, radically different from those recently pursued.

"Recent polls on the President's popularity and the approval of his policies in Vietnam show there is strong opposition to current policies.

"For example, in a poll just completed in my district, 3,764 people answered the question on the war in Vietnam. Of these 2,345, or 62 percent of those responding favored an end to the war by either U.N. supervision of a neutralized Vietnam or complete American withdrawal, 1,021 or 27 percent favored the President's current program of increased use of U.S. military force, 296 or 8 percent favored continuing the Kennedy program of limiting our aid to assistance to the South Vietnamese Army, and 102 or 3 percent

favored more drastic measures than those now being pursued.

"Accordingly, it could be argued that a vote reflecting the view of my district would be in opposition to increased funds for the military, particularly in the light of our military occupation of the Dominican Republic.

"In fact, Mr. Chairman, the record will show that I have long been critical of heavy reliance on military force in Vietnam and elsewhere whether such policies are advocated by Mr. Goldwater, as they were last year, or by someone else and in this respect I find it increasingly difficult to answer critics who argue that this administration is now pursuing Mr. Goldwater's policies implicitly rejected by the voters last November.

"Our present policies have left our relations with other countries in shambles. The NATO alliance has never been in a greater state of disarray. While we may be receiving token lipservice support for our policies in Vietnam, we have little or no direct assistance in this effort as we had in Korea. The abrogation of the Kennedy policy of limiting our support to the South Vietnamese Army has changed the entire character of the war. We are now carrying a large part of the actual fighting of this war. The war is no longer limited geographically to South Vietnam and may be extended further at any time.

"In this hemisphere, our actions in the Dominican Republic have cost us friends, as the votes in the Organization of American States reflect.

"In this context, Mr. Chairman, I must in good conscience make it clear to the President and the country, that while I feel constrained to support the instant request for funds, my vote does not carry an unqualified endorsement of the underlying policies. The search for an alternative to the present policy must go on. Congress must continue to speak out against policies where they are weak and to offer alternatives." 111 *Cong. Rec.* 9527.

Mr. LINDSAY said:

"Mr. Chairman, I intend to vote for this resolution because the President has requested us to present a united front to the world on our involvement in Vietnam. An overwhelmingly favorable vote is requested also, and is important as an expression of our support to the American servicemen who are engaged in the Vietnam conflict.

"My vote, however, is not to be construed as an approval of the administration's whole policy in Vietnam; nor does it imply the endorsement of a blank check for the unexamined spending of more and more millions, the unilateral commitment of more and more of our Armed Forces and the expansion of the ground and air conflict into a major war, without allies and without the exercise of great diplomacy.

"I hope the President will recognize that many of us who vote in favor of this resolution do so in the hope that it will contribute, not to the widening of an unwanted war, but to the pursuit of an honorable peace." 111 *Cong. Rec.* 9530.

The CHAIRMAN said:

"The Chair recognizes the gentleman from Wisconsin [Mr. Reuss].

"MR. REUSS. Mr. Chairman, I shall vote for the resolution and the appropriation today because I believe that the troops we have committed in southeast Asia deserve the support-the supplies, the equipment, and the facilities-which the President has told us they need. That is what my vote today covers. It is not a vote for enlarging the present conflict in South Vietnam, or a vote of satisfaction with things as they are.

"I hope that we will work vigorously to rehabilitate the United Nations, and then try to obtain a United Nations presence in Vietnam to protect and pacify the area.

"I hope that we will make clear our determination that the people of South Vietnam will then have an

opportunity for democratic elections to determine their own future." 111 *Cong. Rec.* 9538.

Senator AIKEN said:

"I suppose that there may be different reasons for voting to approve the request of the President. Does the Senator from New York accept the statement that he would be voting to endorse the mistakes of the past and the plans for the future if he were to vote for this appropriation?

"Mr. JAVITS. I do not accept such a statement. I believe that there is all the difference in the world, as I tell my most respected colleague, between backing up what we have involved, or even the making of sufficient preparation should we wish to go further, and a command decision which would set forces in action in a totally new way from the way in which they had been used before.

"I do not regard a vote for the appropriation-which I propose to support-as being of the same character or quality as a command decision to send U.S. combat troops to participate in the ground struggle against the Vietcong." 111 *Cong. Rec.* 9454.

"Senator STENNIS. I shall first yield 10 minutes to the Senator from Tennessee.

"MR. GORE. Mr. President, U.S. soldiers are in South Vietnam under orders. They are there at the command of the Commander in Chief of the U.S. Armed Forces. They have no choice. I expect to support the appropriation. I find it untenable for American servicemen to be sent into an area of danger without having supplied to them the equipment and the materials by which they can execute their orders with maximum safety to themselves and the interest of the United States.

"However, lest my vote be interpreted as a 100-percent endorsement of the policy by which American combat troops are in South Vietnam, I wish to say emphatically that it is not." 111 *Cong. Rec.* 9497.

Senator JAVITS said:

"Mr. President, I have heard with great interest the view of the distinguished senior Senator from Tennessee. I associate myself with them. However, what I have to say is in addition to what the Senator has already said with respect to an offensive for peace, the design of the United States, and the reason for voting for this appropriation. I shall not repeat those words. They were excellently stated. I consider it a privilege to join in them.

"What I say is a direct corollary to what has been said by the Senator from Tennessee. I cannot accept the statements of the President as to the meaning of my vote in support of this appropriation.

"I wish to make it crystal clear that I reserve the right to vote differently than as the President in his message said I would be voting if I were to vote in favor of the appropriation.

"The President has said:

'This is not a routine appropriation. For each Member of Congress who supports this request is also voting to persist in our effort to halt Communist aggression in South Vietnam.'

"If that were all he said, that would not be so bad. However, the President went on and said:

'For we will do whatever must be done to ensure the safety of South Vietnam from aggression. This is the firm and irrevocable commitment of our people and Nation.'

"The President then stated:

'South Vietnam has been attacked by North Vietnam. It has asked our help.'

"Mr. President, I want to be consulted again, I say to the President of the United States, before we send divisions, rather than some of our Air Force and troops to protect our people who fight a war in Asia.

I want to be consulted again. I expect to be consulted again.

"I do not want my vote in favor of the appropriation to stand as my vote for the continuation of that policy. Suppose we were to have differences with the South Vietnamese and they were to say to us: 'We do not want you here, Mr. American. Go home.' I want to be consulted again if we decide that we are not going to go home, but intend to stay, which we might very well do, and might have to do. I do not take my vote as a blank-check commitment. It may be of interest to have a person who describes himself as a liberal speak about blank-check commitments. However, this is a very important point. Let the President and the Congress act as a team. Let it not be assumed by anyone that voting for this $700 million, which we do advisedly, and which is pursuant to a resolution of August 10, 1964, gives a blank check to the President, and that it is the last request he will have to make of Congress except requests for more money.

"I hope the President will not let this vote go to his head. We are voting . . . ." 111 *Cong. Rec.* 9498.

"The Senator from Vermont is recognized for 6 minutes.

"Mr. AIKEN. Mr. President, I quote from the President's message yesterday:

'This is not a routine appropriation. For each Member of Congress who supports this request is also voting to persist in our effort to halt Communist aggression in South Vietnam.'

"Mr. President, I wish to make it plain that my vote is not intended as an endorsement of the costly mistakes of the past, nor as authority to wage war in the future unless such war has been declared by Congress. I realize quite clearly the position in which the President has found himself. I have wanted Lyndon Johnson to be a good President. I have wanted him to be a great President. I have wished with all my heart that I could help him with his problems.

"But I cannot let the impression go out from this Chamber that in voting for this appropriation I am giving blanket approval to waging undeclared war anywhere or delegating the right to express my thoughts to anyone." 111 *Cong. Rec.* 9499.

Senator CHURCH said:

"I understand that there is no limiting language that would reduce the powers the President now holds. But what concerns the senior Senator from Idaho, is that his vote, which he would like to give in support of the money requested because American lives are involved out there, and American troops must be furnished with all the equipment, supplies, ammunition, and protection that we can give them, may be construed as giving advance approval for decisions in the future that I have no possible way of knowing, such as the bombing of Hanoi, or, let us say, the enlargement of American combat forces in South Vietnam by some striking degree.

"I do not know what might happen. I would not want my vote to be construed as an endorsement of moves which might entirely change the character or dimension of our involvement in southeast Asia.

"As I understand it, the joint resolution is for the purpose of paying bills . . . .

"Mr. President, I should like to ask the Senator, once again, whether by voting for the joint resolution the Senator believes that each one of us endorses whatever action may take place in the future?

"Mr. STENNIS. Well, I do not think so. No, I do not think so. But that is a decision that every Senator must make for himself. It is not a blank check. I do not believe we are signing a blank check. We are backing up our men and also backing up the present policy of the President. If he substantially enlarges or changes it, I would assume he would come back to us in one way or another.

"Mr. CHURCH. I agree. The Senator knows that I have expressed misgivings about some aspects of our policy in Vietnam. At the same time I have supported the action the President has thus far taken in stepping up our military initiative. My views are on record. They have not changed.

"At the same time, I realize that our fighting forces in the field must be supported. But I would not want it to be said later-and it is for this reason that I have asked these questions of the Senator-that by my vote I have given carte blanche approval to future actions which I cannot possibly forecast, that might greatly change the character of the war out there." 111 *Cong. Rec.* 9500.

In discussing the Defense Appropriation Act of 1966, Senator Wayne Morse declared:

"Mr. President, I now turn to another concern. I find myself in a very difficult position in determining my vote on this bill. The bill contains many items with which I agree that I find it difficult to vote against it. But it provides $1,700 million to support what I consider to be an unconstitutional and illegal American war in southeast Asia, making it difficult for me to vote for it. I suppose we can say jocularly, 'For once, WAYNE MORSE is on the spot.'

"But, Mr. President, I have decided to vote for the bill, with the RECORD showing my reasons for so doing.

"American boys in South Vietnam did not go there of their own volition. They went there because they were sent by their Government. I fully realize that as long as they are there, they must have every possible bit of protection that can be given to them, although I deplore the fact that, in my opinion, they are sent there to participate in a war that is unwise, unconstitutional, and illegal, in that the President has no constitutional power to make war in the absence of a declaration of war.

"It will be said, 'You should not vote money to conduct such a war,' and there is much merit in that.

"But as a liberal, I never overlook human values. When I vote for a bill that includes that $700 million-and I will have a question to ask my good friend from Mississippi momentarily, as to where the $700 million came from, and its justification-I am voting still protesting the war, but I am voting to protect the human values of the American boys who are fighting and dying under governmental orders in that war.

"When I balance the two problems that I have just outlined, I feel that I can vote for it in good conscience. I deplore the action of my Government in conducting this war without living up, as I have been heard to say so many times, to its constitutional obligations and its international treaty obligations. I am voting for it in defense of the men who have been sent, and not in approval of their being sent.

"But the RECORD should also show my continued protest of the war itself. The President of the United States should make up his mind as to whether or not he wants to conform to the Constitution and the Congress should make up its mind as to whether or not it wants to declare war. In the absence of a declaration of war, the President, in my opinion, has no constitutional right to send a single American boy to his death in southeast Asia." 111 *Cong. Rec.* 21732.

The following statements occurred during the debates of the Supplemental Appropriations Act of 1966 (PL 89-374):

"Mr. DOW. Mr. Chairman, as one who is not in favor of escalating the conflict in Vietnam, let me say that I will vote for the bill before us to authorize a total of $4.8 billion as a Department of Defense supplement, southeast Asia, fiscal 1966.

"My affirmative vote for this bill is given with a sad heart. The men at the front should not be allowed to run short of the ammunition and equipment

they need to defend themselves. That is the only reason I can see to vote for this authorization.

"The situation is different from one last year when there was an earlier authorization for the Vietnam conflict. At that time I did not support it, for administration spokesmen told us that funds were available in other accounts without legislation. The legislation then was intended as an expression of policy.

"Although voting today for the new legislation for munitions, I still do not favor the policy of escalation which the legislation makes possible." 112 *Cong. Rec.* 4463.

Mr. KASTENMEIER said:

"Mr. Chairman, the vote today on the supplemental military authorization bill, like the war in Vietnam itself, poses a great dilemma for Americans inside and out of Congress. The fact is that our war policies have gotten us into a situation which cannot be reversed by a vote on a single measure, but which will require a significant change in our approach to the terms by which we are willing to accept a settlement. However strong my reservations, objections, or criticisms of the policies that are engulfing us in a southeast Asia war, I am constrained to view and to vote for this measure as one to provide material support for our troops in the field.

"I do want to emphasize that I oppose our war policy in Vietnam. I criticized it when it took the form of an excessive response to the naval attack on our ships in the Gulf of Tonkin. I opposed it when it extended our efforts to bombing North Vietnam. I opposed it last May when it changed our role from one of advising South Vietnamese in their war against the Vietcong to one of making it our war. I opposed it when the bombing of the north was to be resumed in January.

"Regrettably, I must come to a similar conclusion about the economic assistance we are providing Viet-

nam as well. Last week I reluctantly voted for the foreign aid supplemental appropriations as a longtime supporter of foreign aid. The outstanding fact about the billions of dollars of foreign aid we have poured into Vietnam in the 10-year period from 1954 to 1964 is that it is a failure. It has completely failed to establish a viable government in South Vietnam and as a result is responsible in large measure for us being involved in such a major war in that country. While I am not convinced that the economic aid we are now providing the Vietnamese can be effective while we are at the same time engaged in heavy military operations in the same areas, I voted for that measure in the hope that some improvement in the condition of the Vietnamese people will result. The time is rapidly approaching, however, when I will not be able to continue to support such expenditures, particularly in combination with military efforts with which I basically disagree.

"Thus, it should be clear that although I vote today in support of this authorization, it is the troops in the field that I vote to support and not the policies that got them there. Others have on the floor today sought to reaffirm the Gulf of Tonkin resolution which the President has relied on so extensively as the basis for the escalation of the war in Vietnam. Particularly, in the light of this intensification and the implication that further escalation lies ahead, I want it clearly understood that my vote today does not reaffirm that resolution. In fact, if the vote today were simply on the language of that resolution I would vote against it, in view of the construction that has been placed on it. Certainly if the war spreads, I may regret the action taken today and my own assent to it. I trust and pray that will not come to pass. 112 *Cong. Rec.* 4468.

"Mr. FRASER. Mr. Chairman, my vote for this supplemental appropriation for the Vietnam conflict is not an endorsement of the policies the United States has been following in Vietnam.

"I believe that some of our actions in Vietnam have not been wise. It seems to me that the reasoning of-

fered in support of those policies would lead us on a course of action in the future that is not in our national interest.

"My vote today is based on the need to sustain the troops already in Vietnam." 112 *Cong. Rec.* 4468.

Mr. BINGHAM said:

"Mr. Chairman, earlier today the distinguished gentleman from California [Mr. Cohelan] submitted a brief joint statement on behalf of 78 members of this House. I was privileged to be among the sponsors of this statement.

"I shall vote for H.R. 12889 for the purpose stated in the committee report. But in so voting, I do have reservations, and these reservations go somewhat beyond the terms of this joint statement. My vote does not mean that I am wholly satisfied with the administration's policies with respect to Vietnam. While I agree with President Johnson that we cannot withdraw from Vietnam and let the Communists take over, and while I salute him for resisting the pressures of those who would expand and escalate the war, I do not believe that we have yet been sufficiently resourceful or flexible in our efforts to get negotiations started. In fact, recent developments create the impression that the administration is no longer giving much thought to the question of how to achieve a negotiated settlement.

"Why, then, am I voting for this supplemental authorization bill? First, for the simple and obvious reason mentioned in the joint statement, that we must give our forces in Vietnam all the support they need, so long as they are there. The second reason is more complicated: I fear that a substantial vote against the authorization might actually impede our objective of getting talks started by encouraging Hanoi to continue its apparently total intransigeance.

"This leads to a question which I submit we should all ponder. It is certainly one of the key questions before us at this time. The question is: Why, in spite of all the President's efforts since last April to get dis-

cussions started with Hanoi, has Hanoi steadfastly refused to budge?

"Rather than discuss this question today, in the atmosphere of a debate on this defense authorization bill, I intend to examine it at some length tomorrow under special orders, and I would be glad to have any Members join in a discussion of the question at that time. 112 *Cong. Rec.* 4460.

"Mr. CLANCY. Mr. Chairman, I yield 3 minutes to the gentleman from New York [Mr. Kupferman].

"Mr. KUPFERMAN. Mr. Chairman, I am voting for this appropriation because I cannot leave our American troops in the lurch without proper protection on a foreign shore. But it must be pointed out that it was a great mistake to have put them and us in this position." 112 *Cong. Rec.* 4460.

Mr. RIVERS said:

"Our men are in Vietnam. They need our support and our help. Passage of this bill is that support and that help.

"Let the debate as to whether we should be in Vietnam, or how we should conduct the war in Vietnam, be carried on at another time. I will join in such debate. This is not the time for that debate. This is the time for only one thing-and that is to vote our fighting men the weapons that they need." 112 *Cong. Rec.* 4441.

Mr. ANDERSON said:

"Certainly, there is nothing in the wording of the legislation now before us which explicitly commits anyone to an approval of the various policies that have been pursued by the administration with respect to the matter of Vietnam. It could be argued that implicit in the approval of this authorization bill is the approval of current policy. However, I think that we would be establishing an unwise precedent indeed if we were to attempt to read too much into the passage

of a military authorization bill. By the same token, I think that the 76 Members of this body who have signed a manifesto or declaration that their vote for this measure does not carry with it approval for the escalation of the war or our deeper involvement in southeast Asia will also 'carry coals to Newcastle' . . . . I support this measure and with it the heroic sacrifices being made by our men in South Vietnam. At the same time I do not want history to record that by this vote I gave this administration my blank check with respect to its future conduct of policy in South Vietnam." 112 *Cong. Rec.* 4462.

Mr. ABBIT said:

"Mr. Speaker, I support the rule and the bill, H.R. 12889, the supplemental defense authorization bill, commonly known as the Vietnam military bill. This legislation is of vital importance, not only to our military men fighting in Vietnam but to all Americans.

"Our boys, through no choice of their own, are in Vietnam where they are being shot at, many of whom are being wounded, mutilated, and killed. It is inherent upon us to furnish them with all necessary military material that is at our command so that they will not be lacking one whit to protect themselves and to achieve the goals for which they have been sent. We either must furnish every needed article of offense and defense or else it is our duty to pull them out. We must support them wholeheartedly and fully or else bring our boys back home. It is not fair to them and it is not fair to America to do less." 112 *Cong. Rec.* 4431.

Mr. FARBSTEIN said:

"Mr. Chairman, in the past, I have expressed reservation about some of the administration's actions in Vietnam. Recently, I joined a number of other Representatives in urging the President, among other things, to deescalate our military efforts in Vietnam as a further effort to bring the war from the battle-

field to the conference table. I still feel no good can come from further escalation and do not wish this vote to be considered otherwise. I desire to create a climate leading to the conference table.

"Today we are faced with the task of voting on an appropriation for $4.8 billion for Vietnam. Each Member must do some soul searching before casting his vote. I, for one, have carefully reviewed my predilections and balanced them with the Nation's well-being.

"American boys are committing their lives and honor to this fight in the Far East. These young men must not be deprived of equipment, necessary hospitals, medical treatment, essential supplies, and helicopters needed to help them survive in this jungle war. The Congress, regardless of any reservations and unanswered questions on administration policy, must not fail to grant the funds to supply these brave men. I do not desire to be in the position of turning my back on our young men who are presently sacrificing their lives in Vietnam.

"On the scale, I find I must vote in favor of the appropriation." 112 *Cong. Rec.* 4448.

Senator JAVITS said:

"Mr. President, I feel moved to speak because I think there is a point of view which has not been expressed.

"Those of us, like myself, who will vote against the Morse amendment and want to table it, and who will vote for the bill to give the President additional funds, are not again writing a blank check.

"I do not, and I cannot accept the vote against the Morse amendment as being a reaffirmation. Reaffirmation is the word used by the Senator from Georgia [Mr. Russell]. He made a most moving speech, with which I agree in substance, as well as the speech of the Senator from Massachusetts [Mr. Saltonstall].

"I cannot accept the fact that this will be a reaffirmation of the resolution of August 1964. The fact is that as the President has handled this situation he leaves us no other alternative. He has left no alternative for those who disagree with his policies except to vote against an authorization on another occasion. As I agree with his policies to date, I shall vote for this authorization. But if tomorrow I disagree with his policies the President leaves us no alternative but to vote against an authorization, and I shall do so. 112 *Cong. Rec.* 4374.

Mr. CLARK said:

"I should like the Record to show my complete agreement with the position taken by the Senator from Arkansas. I shall vote against the Morse amendment and I shall vote in favor of the bill.

"I do both with a heavy heart, most reluctantly, as the least unacceptable of all available choices. But I wish to make it very clear indeed that my votes, both against the Morse amendment and for the bill, do not indicate an endorsement of the policy which I fear the administration is following." 112 *Cong. Rec.* 4382.

Mr. ROSENTHAL stated:

"I am not happy with the minimal role to which Congress is thus consigned. Nor am I convinced that the Congress has been adequately consulted or respectfully attended in the formulation of policies in Vietnam. But I do not accept the proposition that this vote today constitutes a considered and broad sense of Congress.

"I do not believe my own vote, simply as a vote, properly represents my viewpoint on this matter, any more than the total vote of Congress adequately represents the total sentiment of Congress. Complicated positions on matters of war and peace are not to be abbreviated by such simple symbolism. So I deny

the legitimacy of this vote as a deep expression of individual or collective viewpoint on the full range of policy in Vietnam. I am voting for support and supplies for the American troops already committed to Vietnam." 112 *Cong. Rec.* 4455.

Senator McGOVERN said:

"Mr. President, I am voting today to provide the necessary equipment and supplies for our forces in Vietnam. My Senate colleagues and my constituents know that I have opposed our growing military involvement in southeast Asia. I believe that we have no interest there that justifies the heavy loss of life involved in trying to settle a Vietnamese civil conflict with American troops.

"But since we have sent 300,000 men to southeast Asia, we have no practical alternative now except to provide them with the equipment they need to survive.

"I want to make it clear that my vote for this military equipment bill is not an endorsement of our Asia policy. Rather, my vote reflects my conviction that we must protect men we have sent into battle no matter how mistaken the policy may be that sent them to that battlefield." 112 *Cong. Rec.* 4409.

And on March 20, 1967, in introducing legislation on supplemental defense appropriations, Senator Russell framed his argument in favor of the bill in the following manner:

"It [the legislation] will not alter the course. . . .

"Presumably, it will not alter the course of negotiations one way or the other. But it will provide the materiel and equipment needed by our gallant men who are doing the fighting and dying thousands of miles from home. The funds contained in this bill are urgently needed for the ammunition, for the aircraft, for the trucks, for the travel, for all the multi-

tudinous operations of our forces and those alined with us in southeast Asia. A vote for this bill is a vote to give American soldiers, sailors, and airmen the tools needed to protect themselves and to continue the valorous assignment which they have been asked to perform. . . ." 113 *Cong. Rec.* 7189.

During the same debate, Senator Holland declared:

"Mr. President, I call attention to the fact that the distinguished Senators from Georgia [Mr. Russell], from North Dakota [Mr. Young], from Mississippi [Mr. Stennis], and from Maine [Mrs. Smith], and their associates, have told us that these amounts are necessary to be spent or committed between now and the end of this fiscal year, June 30—not far away—to give the greatest measure of protection that we can to our men who are fighting there, thousands of miles away, not because they want to but because our Government has sent them there.

"Mr. President, there may be plenty of arguments about the wisdom of our national position, and about whether we should ever have gotten into it; but it is inconceivable to me that anyone could argue on this floor that we should withhold the support which is recommended by honest, dedicated men and women as necessary to sustain our effort in Vietnam by the approximately half million American boys and girls who are there." 113 *Cong. Rec.* 7194.

And urging the support for the appropriations Holland later contended:

". . . The question is now: Shall we or shall we not appropriate funds which all of the authorities—who should know—including our own distinguished Senators who have studied this question—tell us must be appropriated to give our men the kind of protection, the kind of weapons, the kind of ammunition, the kind of equipment, the kind of clothing, the kind of living quarters, the kind of medical supplies which they need?

"Shall we do it, or shall we not?

"I think that is the only question. That is the simple question here." 113 *Cong. Rec.* 7197.

In explaining his vote for the supplemental Defense Appropriation Act of 1967, Congressman Cederberg observed:

> "[W]e have a commitment in Vietnam—and we can argue all we want as to whether we should be there or whether we should not be there—the fact is that we are there, and the fact is that when we have this mission we must do everything we can to support the men who are fighting it in every way we possibly can. 113 *Cong. Rec.* 6878.

Although concerned about United States military involvement in Vietnam, Senator Clark declared on August 22, 1967: "I think, of course, we should give full support and all necessary military equipment to protect their lives." 113 *Cong. Rec.* 23488.

And, on the same day, Senator Symington supported the military appropriations with the argument that:

> "These men have a right to count on Congress backing them up. Many of them did not want to go there. Tens of thousands of them have been drafted. They are fighting with superb courage in the American tradition.
>
> "There is no way, in my opinion, that you could make a blanket cut of 10 percent in this budget without definitely affecting the supplies, the ammunition, and the support that this country owes to the youth that Congress has approved drafting and sending to Vietnam in order to protect our future security. . . ." 113 *Cong. Rec.* 23470.

In voting in favor of the Defense Appropriations Act of 1968, Senator Fulbright declared:

". . . I ask that not only the Senate but the press report it in the proper context so that people are not led to the conclusion that, by voting for the military appropriations—which I intend to do—it is thereby endorsing a declaration of war, which was not my intent. 113 *Cong. Rec.* 23501.

The following remarks by Senators Gore and Pastore took place during the debates on the Department of Defense Appropriations Act of 1969:

"Mr. Gore: I am grateful for the able speech the Senator is making. I join him in opposing the amendment.

"With respect to policy, as the able senior Senator from Virginia is aware, I have resisted this country's policy in Vietnam. I have questioned it over a period of years. I believe in so doing I was within the proper function of a U. S. Senator.

"But the men who are there are there in consequence of a policy which, though I disapprove it, has nevertheless been the policy of the Government. The soldiers are there, not by their wish, but at the command of their Government, and I do not wish to withhold bombs, ammunition, artillery, weapons, equipment or whatever they need to execute this mission, erroneous as it may have been as a matter of policy. It is a mission assigned to them, and I wish to see them execute it with maximum efficiency and with maximum safety to themselves. 114 *Cong. Rec.* 18832.

". . .

"Mr. PASTORE. I wish the Senator from Tennessee had been here yesterday to hear the point I tried to make. I, too, have had my qualms about Vietnam, and whether or not we should have been involved there in the first place. But the Senator has put his finger right on the problem. I think it would be a tragic mistake for us to try to make the Senate of the United States a war room, to attempt to decide what kind of strategy we are going to follow.

"I think if Senators believe our policy ought to be changed, they should do whatever they can about changing the policy; but as long as our boys are there, we should not do anything which will serve in any way to demoralize our troops. We must promote their safety and do everything we possibly can to assist them while they are there. As the Senator from Tennessee has pointed out, they are not there by their own choice, and most of them would rather be at home." 114 *Cong. Rec.* 18832.

Congressman Bingham, commenting in the House on the same act, stated:

"Mr. BINGHAM. I thank the Chairman. I would just like to add, with all due respect for the distinguished members of the subcommittee, that it would be a wonderful thing if the various points of view on the underlying issues could be represented in the subcommittee, as is true in connection with other subcommittees.

"Mr. Chairman, I have supported all efforts to cut unnecessary expenditures out of this bill, including, particularly, the appropriations for the deployment of an anti-ballistic-missile system which I believe will provide us with no security and may well lead to a disastrous new phase of the arms race. I also supported the amendment proposed by the gentleman from California [Mr. Brown], which would have called for a cessation of all bombing in North Vietnam as a necessary step to meaningful negotiations. On that score, and in various other respects, I am in disagreement with our policies with regard to Vietnam, as I have said frequently in this House and elsewhere.

"These amendments having failed of adoption, the question now before me is whether to vote for or against the bill as a whole. Some Members who share my views on Vietnam and for whose judgment I have the greatest respect are voting against the bill. My reluctant decision, however, is to the contrary. The vast bulk of the funds appropriated by this legislation

are for purposes with which I cannot quarrel and which I must support, such as the pay of our armed services personnel and the provision of essential supplies and equipment for them. The recent tragic events in Czechoslovakia reemphasize the need for the United States to maintain a strong defense establishment no matter what happens in Vietnam.

"I know that there are expenditures contemplated in this legislation that are undesirable and others that are unnecessary. I believe that once again we have witnessed the phenomenon that requests by the military for appropriations are treated far more kindly and with a less critical eye in this House than the requests made by those officials who have charge of our essential domestic programs. Nevertheless, in my judgment, there is so much in this bill that is clearly necessary and desirable that, overall, an affirmative vote is called for.

"I might have considered casting a negative vote as a gesture of protest if I believed that such a gesture would be an effective way of pressing for a change of policy with respect to Vietnam, but I do not so believe. It would be a grave mistake for anyone, including the Saigon government, to measure the degree of dissatisfaction with our policy on Vietnam by the number of negative votes on this bill. The dissent on Vietnam is better measured by the 40 percent vote for the minority plank at the Democratic National Convention in Chicago." 114 *Cong. Rec.* 26567.

And in August, 1967, Senator Pastore announced his support for the Defense Appropriations Act of 1968 with the statement:

"Mr. President, I shall vote for this bill. I believe that all of us feel, right down deep in our hearts, that however we feel about Vietnam, we are there now, and cannot take our feeling out on those boys by not supporting this bill." 113 *Cong. Rec.* 23501.

And as late as July 6, 1970, Senator Church expressed similar opinion. Explaining his reasons for supporting the appropriations although he opposed the war, Church explained:

> "Mr. President, I first spoke out against the war in Vietnam in 1963. I have opposed this war; I have advised against it; I have tried to do everything in my power, as one Senator, to end it. However, Mr. President, I have also supported every appropriation to come before the Senate to provide the best of materiel to our men in the field. Once our men are there we must provide the best that money can offer until such time as we may bring them home. Just as I have supported all bills to grant aid to our men in the field, I intend to support legislation, such as the bill before this body today, which will grant them the finest in care when they return home with medical needs. It is our duty to provide the finest in medical care to our Vietnam veterans. I strongly support the Senator from California (Mr. Cranston) and the committee in their efforts to obtain more funds for the quality care of American boys who are wounded, either medically or psychologically, by the war in Vietnam." 116 *Cong. Rec.* 510598 (daily ed., July 6, 1970).

In discussing the Defense Appropriation Act of 1966, Senator Morse registered his "continued protest of the war itself." 111 Cong. Rec. 21732. Morse contended "in the absence of a declaration of war, the President in my opinion, has no constitutional right to send a single American boy to his death in Southeast Asia". 111 Cong. Record 21732. However, Morse went on to declare:

> "But I shall vote for it also because of its many other features with which I find myself in enthusiastic support; namely, the long overdue pay increase for the military; the provision that was adopted in regard to the so-called 35-65 formula in connection with the building of ships." *Id.*

Similarly, Congressman Farbstein was apparently persuaded to vote for military appropriations under this rationale. During Congressional debate of March 1, 1966 Farbstein and Rivers discussed the bills provisions.

> Mr. FARBSTEIN. "This bill also includes appropriations for housing, hospitals, doctors, food, and clothing for our Armed Forces; does it not?"
>
> Mr. RIVERS of South Carolina. "This bill and the rest of the supplemental together, yes. That is absolutely right. You cannot fight a war without taking care of such necessary things as that." 112 Cong. Rec. 4441

Congressman Edwards said:

> "Mr. Chairman, I believe my position is clear on our commitment in southeast Asia. I have been opposed to our military policy in Vietnam. I am strongly opposed to escalation of the war, and I am distressed by the deterioration of our foreign and domestic policies which has been brought on by our Vietnam operations.
>
> I will vote for H.R. 13546, the supplemental southeast Asia appropriation measure before this House today. I will do so because I feel it is unwise to decide policy issues through the appropriations process. It is the job of the authorizing committees to debate policy matters. It is the job of the Appropriations Committees to oversee the administration of duly authorized funds. . .
>
> My vote for this appropriation means two things. It does not alone mean that I do not believe it is proper to express any policy preferences in an appropriations measure. It also means that an appropriations measure should not be used by anyone else to express their policy preferences. My vote today is not an endorsement of our past policy in Vietnam. It is merely a certification of prior House action on authorization measures." 112 Cong. Rec. 5820.

Such a view was somewhat tangentially touched upon by Senator Russell when he introduced the supplemental defense appropriation bill of 1967. In introducing the bill Russell declared:

> "I have no intent at this time to initiate an extended discussion of the merits of the war in Vietnam. That ground has been well plowed, and is thoroughly understood by all concerned. Each Member of the Senate has his own individual views on this subject. This is not a political bill." 113 Cong. Rec. 7189.

On the same day Senator Young cautioned against determining war policy by means of an appropriation bill. Young stated:

> Mr. YOUNG. "If the Senate adopts the policy of determining war policy on an appropriation bill, would it not be a precarious situation, sometime in the future, when we might be engaged in another war, soldiers would be reluctant to enlist because they would not know whether they would be supported financially with adequate equipment and supplies which they would need to fight a war?" 113 *Cong. Rec.* 7198.

Congressman Laird said:

> "Mr. Chairman, even if the war were to end on June 30, 1967, these funds would be needed. Virtually every dollar that is to be appropriated in this bill is needed whether the war ends June 30 of 1967 or whether it ends on June 30, 1968 or 1969, because these stocks—aircraft, ammunition, and spare parts—have been used in the conduct of the war in Vietnam. We have drawn down our stocks all over the world, and the funds that are to be made available in this supplemental appropriation are needed to replace those stocks that have been used and consumed in fighting the war in Vietnam.
>
> I believe it is very important that we bear in mind today that what we are doing by our action in support-

ing this bill and in voting for this bill is restoring the equipment and the supplies that have been used in the conduct of the war during fiscal year 1967." 113 Cong. Rec. 6880.

Senator Young said:

"[w]e have been financing this war for some months by the reprograming of funds, borrowing from emergency funds, delaying housing, and by other means. Much of this money has already been committed for war purposes; and if we were to decide to get out of Vietnam tomorrow, I would think that most of this money would still be needed." 113 Cong. Rec. 7196.

CERTIFICATE OF SERVICE

I, Lawrence R. Velvel, an attorney for the amicus curiae in the above captioned case, hereby certify that the foregoing brief and appendix have been served on plaintiff and defendant by mailing three copies of same to the office of the Attorney General of Massachusetts, Statehouse, Boston, Massachusetts 02133, and to the Solicitor General, Department of Justice, Washington, D.C. 20530.

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