IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 42, ORIGINAL

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

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

ON MASSACHUSETTS' MOTION FOR LEAVE TO FILE COMPLAINT

AMICUS CURIAE BRIEF ON BEHALF OF THE LAWYERS COMMITTEE ON AMERICAN POLICY TOWARDS VIETNAM

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BRIEF OF THE LAWYERS COMMITTEE ON AMERICAN POLICY TOWARDS VIETNAM, AMICUS CURIAE.*

Interest of the Amicus Curiae

The Lawyers Committee on American Policy Towards Vietnam is an unincorporated association organized in 1965 for the purpose of studying and disseminating information on the issues of the American involvement in the War in Vietnam, particularly the legal issues. It sponsored and prepared a memorandum of law, entitled "American Policy Vis-a-vis Vietnam", which constituted one of the first scrutinies of American policy from the viewpoint of its international and constitutional illegality which was published in the Congressional Record on September 23, 1965 and mailed to 193,000 lawyers and 3,750 law professors. In

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* Consent to the Filing of an *Amicus Curiae* brief has been given by the attorneys of the Commonwealth of Massachusetts and the Solicitor General, Department of Justice.

January 1967 it had also caused the preparation and publication of a book on the subject known as "Vietnam and International Law", written by Professor John H. E. Fried and Professor Richard A. Falk, both of whom are recognized authorities in the field of International Law.

This volume has been translated into a number of foreign languages and a second edition was thereafter published, by reason of the wide circulation achieved by the first edition, both in the United States and abroad. The Committee invited eminent authorities to serve as its Consultative Council, consisting of Professors Falk and Fried, as well as Quincy Wright, Professor Emeritus of International Law, University of Chicago and formerly President of the American Society of International Law; Hans J. Morgenthau, Professor of Political Science and Modern History, University of Chicago; Saul H. Mendlovitz, Professor of International Law, Rutgers University of Law; Richard J. Barnet, Co-Director, Institute for Policy Studies, Washington, D.C.; John H. Herz, Professor of International Relations, City University of New York; Stanley Hoffman, Professor of Government and International Law, Harvard University; Wallace McClure, Lecturer on International Law, University of Virginia and Duke University; Richard S. Miller, Professor of Law, Ohio State University, College of Law; William G. Rice, Professor of International Law, University of Wisconsin Law School; and Burns H. Weston, Professor of International Law, University of Iowa, College of Law.

Lawrence R. Velvel, Professor of Law, University of Kansas, School of Law, joined the Consultative Council in 1968 and undertook to write a book on the constitutional aspects of the war. The book, entitled "Undeclared War and Civil Disobedience: The American System in Crisis" is to be published by The Dunellen Company in October 1970 under the sponsorship of the Lawyers Committee.

In 1969 the Honorable Wayne Morse, former U. S. Senator from Oregon, became honorary chairman of the Lawyers Committee.

The Lawyers Committee is deeply concerned about the effect on the American political system, as well as world peace, of the acts of the Executive in initiating, prosecuting and expanding a major foreign war without Congressional authority and in violation of treaty obligations and international law. We believe that the nation is faced with a constitutional crisis which must be resolved by the courts, since they are not inhibited by the same political considerations as the Congress.

In the hope that we can contribute to the resolution of that crisis, the Lawyers Committee is filing this brief *Amicus Curiae* in an effort to be of assistance to the Court in resolving the crucial Constitutional issues presented by the Commonwealth of Massachusetts in its action challenging the Constitutionality of the Executive's authority to wage war in Southeast Asia without Congressional authorization.

Summary of Argument

This brief is intended to supplement the brief for the Commonwealth of Massachusetts by expanding on certain arguments and presenting others not touched on by the Commonwealth. It will not deal with all of the issues involved in this case.

From the standpoint of the future of constitutional government in America, the question of whether there has been a usurpation of the war power by the President is perhaps the most important one presented by the war in Southeast Asia. The Constitutional Convention decided that to prevent the concentration of too much power in one person, the power to declare war should be given to Congress alone, leaving to the Executive only the power to repel sudden attack. The importance of maintaining this separation of powers exists today as much as it did in 1789, if not more so. The attempts of government attorneys to justify Executive action by stating that there are at least 125 precedents in which we have engaged in armed conflict without a declaration of war, are invalid. In most of the cases the engagements were very limited with only minor hostilities and they resulted from circumstances quite different from those in the case of Vietnam. In a few cases the President acted unconstitutionally and was criticized for it, but a usurpation of the war power by one Executive does not justify a usurpation by another.

Congress has taken no action which can be deemed an authorization of armed hostilities in Southeast Asia or a ratification thereof. Congressional appropriations are not equivalent to a declaration of war and do not constitute a legislative ratification of the undeclared war. Thus, there has been no Congressional action authorizing anything like the large-scale military action in Southeast Asia that has developed into the longest and one of the most devastating wars in American history and there was no circumstance that gave the President authority to engage in such a war without Congressional approval.

The constitutional question as to the President's usurpation of the war power is important to the preservation of our form of government, regardless of whether one believes that the United States should or should not have entered

the war in Vietnam or Cambodia or whether Congress would or would not have declared war if the question had been presented to it.

The armed hostilities conducted in Southeast Asia are not authorized in the powers granted to the President, not only because of the division of powers laid down by the Constitution, but also because they are conducted in violation of the obligations of the United States under the United Nations Charter and other treaties not to employ military force in its international relations, which treaties are, under the Constitution, part of the supreme law of the land. The conduct of the war by the Executive has also involved violations of the laws of war which are embodied in treaties that are part of the law of our nation.

All of these questions of constitutional and international law and treaty obligations cry out for a judicial determination, if ours is to be a nation ruled by laws rather than men. The Supreme Court should declare unconstitutional the Executive's actions in waging war in Southeast Asia and grant to the Commonwealth of Massachusetts appropriate injunctive relief.

Argument

THE PRESIDENT HAS NO CONSTITUTIONAL AUTHORITY TO ENGAGE IN MILITARY HOSTILITIES IN THE ABSENCE OF AN ARMED ATTACK ON THE UNITED STATES OR CONGRESSIONAL AUTHORIZATION.

A. *The Constitutional Authority of the Executive Has Not Been Enlarged by any Precedents.*

It is impossible to avoid the express words of the Constitution in Article 1, Section 8 to the effect that "... the Congress shall have power ... to declare war...." The brief for the Commonwealth of Massachusetts documents the reasons which impelled the Constitutional Convention to

limit the war-making power to the Congress, leaving to the Executive the power to repel a sudden attack. However, the government lawyers in their attempt to justify the acts of the President in prosecuting the war in Southeast Asia have developed a theory to the effect that the words of the Constitution no longer mean exactly what they say. Two reasons are given. One is that the conditions are different in the 20th Century and the other is that precedents have resulted in a modification of the original meaning of the Constitutional language. The Memorandum of the Legal Advisor of the Department of State, dated March 4, 1966, (Congressional Record Vol. 112, No. 43, March 10, 1966, pp. 5274-5279; Point IV A) makes the following two statements supporting the constitutionality of the President's power to engage in war without a Congressional declaration:

> (1) "In 1787 the world was a far larger place and the framers probably had in mind attacks on the United States. In the 20th Century the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security."
>
> (2) "Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior Congressional authorization, starting with the 'undeclared war' with France (1798-1800)."

Similarly, William H. Rehnquist, Assistant Attorney General of the United States, in an article entitled "The President and Cambodia: His Constitutional Authority" (NYLJ June 8, 9, 1970) stated "our history is replete with instances of 'undeclared wars,' from the war with France in 1798 through 1800 to the Vietnamese War."

First we must point out that the example of an undeclared war given both by the Legal Advisor to the State Depart-

ment and Mr. Rehnquist, that with France from 1798 to 1800, was not an undeclared war at all. It is an example of the fact that a war declared by Congress need not be a general or total war, but may consist of limited hostilities authorized by Congress in specific terms. In the *Eliza* case (4 Dall. 37) cited in the Rehnquist article, the Supreme Court did not decide that a limited war need not be "declared" or authorized by Congress as Mr. Rehnquist indicates. It held that the conflict with France was in fact a war, though limited in nature and specifically authorized by Congress.

Justice Chase, in his opinion in the *Eliza* case supra (also cited as *Bas* v. *Tingey*) said:

> "Congress is empowered to declare a general war or Congress may wage a limited war; limited in place, in object, in time.... What then is the nature of the contest subsisting between America and France? In my judgment it is a limited or partial war. Congress has not declared war in general terms; but Congress has authorized hostilities on the high seas by certain persons in certain cases." 4 Dall. 37, 43.

Before President Adams acted, Alexander Hamilton on May 17, 1798, had advised the President's Secretary of War, James McHenry, against Presidential action:

> "In so delicate a case, in one which involves so important a consequence as that of war, my opinion is that no doubtful authority ought to be exercised by the President." Memorandum entitled *Indochina: The Constitutional Crisis,* reproduced in Congressional Record May 13, 1970 S. 7117.

President Adams heeded Hamilton's advice and took no action against French depredations on American vessels until Congress passed a series of acts authorizing him to protect American commerce as well as enacting a number of statutes providing for belligerency.

In 1801 a conflict with Tripoli, one of the Barbary States, began. Tripoli had been marauding American shipping in an attempt to exact a payment of tribute. President Jefferson sent a squadron of ships to the Mediterranean instructing them to defend themselves and other American vessels but not to initiate hostilities. The Navy captured a Tripolitan ship, but after disarming it released it. In his annual message to Congress, on December 8, 1801, President Jefferson declared:

> "Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight." James D. Richardson, ed. *Messages and Papers of the Presidents,* 1789-1908 (Bureau of National Literature and Art, 1908) Vol. 1, pp. 326-7.

Congress responded to President Jefferson's message by passing on February 6, 1802 an act authorizing the President to arm American vessels, commission privateers, and "to cause to be done all such other acts of precaution or hostility as the state of war would justify, and may, in his opinion, require."

Thus in the first two limited wars in which the new nation found itself, both Presidents Adams and Jefferson declined to initiate hostilities until authorized by Congressional action, even though American shipping was being seriously interfered with by foreign powers. Although both Presidents had the means to order retaliatory action which might

have gained a temporary military advantage, Presidents Adams and Jefferson felt that the decision to commit American forces was not constitutionally theirs to make.

The cases in which the Executive has engaged United States forces in armed conflict without Congressional authorization fall into several categories.

One class of cases involved punitive or retaliatory action prompted by acts of piracy or attacks on United States citizens by persons who were not acting on behalf of a government. The Executive ordered naval action against various Pacific Islands, the West African coast and Central American countries.

Perhaps the most controversial of such cases was the attack by a United States Naval vessel on Greytown, Nicaragua in 1854. There were two rival companies set up to conduct travelers across the isthmus. One held a charter from the Nicaraguan Government and was favored by the United States. The other claiming a charter from the "Mosquito King" established what they called the sovereign state of Greytown. Incidents occurred between the two companies and an American Minister was slightly injured by mob action and American property damaged. A United States Naval vessel was sent to the scene to obtain redress and an apology for the attack on the Minister. After demanding indemnity and an apology from Greytown, the Commander bombarded the town resulting in its almost complete destruction.

The action was denounced from many sources in this country (including *The New York Times*) and abroad. The navy commander may have exceeded his orders but President Pierce finally decided to justify the action in a report to Congress by claiming that it was not an act of war because Greytown did not constitute an "organized political society" but a "piratical resort of outlaws or a camp of savages depredating on emigrant trains or caravans...."

James D. Richardson, ed. *Messages and Papers of the Presidents,* 1789-1908 (Bureau of National Literature and Art, 1908) Vol. 5, p. 282.

Mr. Rehnquist and others before him have cited the *Greytown* case as an example of the constitutional power of the President to take military reprisals against nations without authority of Congress. The case, however, has only a very limited application. John Bassett Moore, in denouncing Wilson's occupation of Vera Cruz as an unauthorized act of war, said:

> "The Greytown incident which has often been cited to prove that such a proceeding would not be war or an act of war, cannot properly be invoked as a precedent, since Greytown was a community claiming to exist outside the bounds of any recognized state or political entity, and the legality of the action taken against it was defended by President Pierce and Secretary Marcy on that express ground." *"The Control of the Foreign Relations of the United States"* in *The Collected Papers of John Bassett Moore* (Yale University Press 1944) Vol. 5, 196.

There have been a number of other cases where United States forces have been ordered to pursue bandits or pirates who had taken shelter in such countries as Cuba, Spanish Florida, Mexico and Nicaragua. In some cases United States marines have been landed by order of the Executive to protect United States citizens from mob action. This happened in China, Egypt, Argentina, Uruguay and a number of Caribbean countries.

With a few exceptions these cases may be explained on the basis of the President's authority to protect United States citizens. Action to protect United States citizens in another country, sometimes referred to as "interposition,"

is distinguished from intervention in the internal or political affairs of another country. According to more than one authority, interposition to protect citizens is within the powers of the Executive under the Constitution, while intervention is an act of war and may be legally undertaken only on the authority of Congress. *Right to Protect Citizens in Foreign Countries by Landing Forces* (Government Printing Office 1934), pp. 44-48. Milton Orffutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (Johns Hopkins Press, 1928), p. 5.

The right of the Executive to use force to protect citizens abroad, however, does not extend to reprisals or punitive action. Secretary of State Henry Clay said in 1827:

> "The employment of force is justifiable in resisting aggressions before they are complete. But when they are consummated, the intervention of the authority of government becomes necessary if redress is refused by the aggressor." John Bassett Moore, *Digest of International Law* (Government Printing Office 1906) Vol. 7, 9. 163.

Thomas Jefferson, then Secretary of State, had this to say about the power of the Executive to make reprisals:

> "The making of a reprisal on a nation is a very serious thing.... it is considered an act of war, and never failed to produce it in the case of a nation able to make war; besides, if the case were important and ripe for that step, Congress must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not with the Executive." John Bassett Moore, *Digest of International Law* (Government Printing Office 1906) Vol. 7, p. 123.

To say that there are cases of United States forces being used in foreign countries without Congressional authoriza-

tion does not necessarily mean that the action was lawful. When Commodore Paulding invaded Nicaragua in 1857 to capture a pirate, President Buchanan confessed to Congress that Paulding's action was improper but insisted that he acted with good intentions. There was bitter criticism of Buchanan in Congress.

United States forces pursued bandits into Mexico a number of times, the last of which was when President Wilson sent a force in pursuit of Pancho Villa in 1916, bringing a protest from Mexico. In these cases the President probably exceeded his constitutional authority since the action was punitive in nature rather than strictly defensive.

In some cases the Executive has embarked upon a military venture for an ostensible purpose that provided a constitutional basis for the action but went on to use that as an excuse for further action that is not authorized under the Constitution. A notorious example of this was President Johnson's invasion of the Dominican Republic in 1965. There was a rebellion by the army against the military junta and former President Bosch was asked to return from exile. The military junta asked for assistance from the United States to prevent what they termed a communist takeover. In order to obtain the requested help the military junta was informed by American officials that it was necessary to advise the United States that American lives were in danger. President Johnson thereupon sent in 21,000 troops. When the American citizens were evacuated the troops did not leave but remained as an act of political intervention by the United States carried out by the Executive without Congressional authority.

Senator Fulbright commented on this as follows:

> "Four months later, after an exhaustive review of the Dominican crisis by the Senate Foreign Relations Committee in closed sessions, it was clear beyond

> reasonable doubt that although saving American lives may have been a factor in the decision to intervene on April 28, the major reason was a determination on the part of the United States government to defeat the rebel, or constitutionalist, forces whose victory at that time was imminent." J. William Fulbright, *The Arrogance of Power* (Random House 1966) p. 89.

Such action by President Johnson constituted a perversion of the Presidential power to protect United States citizens and certainly does not establish his right under the Constitution to take the nation to war in Vietnam.

Among the "historical examples" cited by Assistant Attorney General Rehnquist is President McKinley's dispatch of 5,000 United States troops at the time of the Boxer Rebellion in China in 1900. This venture began as an allied effort to rescue citizens in Peking and ended as a war with the government of China. This incident was merely an intervention initiated for the protection of citizens against a mob and thereafter converted into a war with the government of the state which was invaded. The unconstitutionality of this misadventure was compounded when China was obliged to sign a protocol, which was never submitted to the Senate, promising to pay an indemnity of $330 million, of which $24 million was to be paid to the United States.

Even assuming the President's right to send troops into a foreign country to protect United States citizens in danger, that does not extend to the right to take preventive action when he believes that Americans are threatened by some future danger. President Taft was presented with this problem in 1911 when a popular uprising threatened to overthrow the government of President Diaz in Mexico. He was advised by his Ambassador to Mexico that 40,000 American residents in Mexico, as well as large American investments, would be endangered by an uprising. President

Taft assembled troops along the border of Mexico and ships along the coast, but he did not take the initiative to invade the country. He said:

> "It seems my duty as Commander in Chief to place troops in sufficient number where, if Congress shall direct that they enter Mexico to save American lives and property, an effective movement may be promptly made. . . .
>
> "The assumption by the press that I contemplate intervention on Mexican soil to protect American lives or property is of course gratuitous, because I seriously doubt whether I have such authority under any circumstances, and if I had I would not exercise it without express Congressional approval. . . . " Fred L. Israel, ed., *The State of Union Messages of the Presidents, 1790-1966,* (Chelsea House), Robert Hector, Volume III, pp. 2447-448.

This precedent of President Taft's hardly supports President Nixon's constitutional authority to order the invasion of Cambodia. Nor does the frequently cited precedent of President Lincoln's calling up 75,000 volunteers to suppress the rebellion by Southern states, nor his proclamation of a blockade of the Confederacy in April 1861. President Lincoln did, in fact, have statutory power to call up the militia, but he had no statutory authority to issue his two proclamations on April 19 and April 27, 1861 for the blockade of the Confederacy. However, the blockade was proclaimed on the theory that a state of general war already existed by virtue of the Southern attacks on Federal property; war having been initiated by the South, the President, as Commander-in-Chief, was authorized to use any means of belligerency permitted by the international law of war, which includes the proclamation of a blockade.

Now it is significant that on July 4, 1861 President Lincoln asked a special session of Congress to ratify his actions,

"whether strictly legal or not." James D. Richardson, ed., *Messages and Papers of the Presidents, 1789-1908* (Washington: Bureau of National Literature and Art, 1908), Vol. 5, p. 662. Such ratification was never sought by President Johnson or President Nixon for their actions nor did they intimate that their actions might not have been "strictly legal." Important, too, is the point that on August 6, 1861 Congress declared that Lincoln's orders to the army and navy and his calling up militia and volunteers ". . . are hereby approved and in all respects legalized and made valid . . . as if they had been issued and done under the previous express authority and direction of the Congress." 12 Stat. 326.

The Supreme Court upheld the validity of the President's action in proclaiming a blockade in the *Prize Cases,* but these cases offer no support to the government's basic contention that the President possessed constitutional authority to order American armed forces into combat in Southeast Asia. What did the Supreme Court say in the *Prize Cases?* Let the text of the opinion speak for itself:

> "By the Constitution, Congress alone has the power to declare a national or foreign war. . . . The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is commander in chief of the armed services and the militia of the several States when called into actual service. He has no power to initiate or declare a war against a foreign nation or domestic State. . . .
>
> "If war be made by invasion from a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. Whether the hostile party be a foreign invader, or States organized in rebellion, it is nonetheless an act of war, even if the declaration be 'unilateral.' " 2 Black 635, at 668, 670.

Adverting to the Congressional ratification, Justice Grier, writing for the majority, noted:

> "Without admitting that such an act was necessary, it is plain that if the president had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, . . . the ratification has operated to perfectly cure the defect." 2 Black 635, at 671.

The precedent chiefly relied upon by the Government is President Truman's intervention in the Korean conflict. War broke out in Korea on Sunday, June 25, 1950. The next day (Monday) President Truman decided to enter the war. Merlo J. Pusey, Pulitzer Prize winner, author of *The Way We Go To War* had this to say about President Truman's action:

> "When the fateful presidential decision was made that Monday night, however, the Security Council had merely charged North Korea with a breach of the peace, called for withdrawal of the North Korean forces, and asked for assistance in the execution of that very limited resolution. The appalling fact is that the President plunged the United States into the war without a shred of authority from the Constitution or the laws or treaties and without so much as a request for military help from the United Nations. At that time the Security Council had not yet decided that any kind of sanctions would be desirable or necessary. The order to General MacArthur was given even before the South Korean government had asked officially for American aid.
>
> "The day after the President had put the Navy and Air Force into the war his action was reported to the Security Council in New York along with a declaration that it was 'the plain duty of the Security Council to

invoke stringent sanctions to restore international peace.' The Council approved a resolution offered by the United States Ambassador recommending that '. . . the members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.'

* * *

"Nevertheless, President Truman sought to justify his commitment of the United States to war by what the Security Council had done.

* * *

"The implication that he had sent American forces into the war after the Security Council had called for military assistance to South Korea is an inexcusable distortion. No doubt he assumed that the appearance of going to war under the U.N. banner would take the curse off his unilateral action. When history is written without varnish, however, we must add to Mr. Truman's usurpation of the war power a deceptive statement which seemed to say that the United States had responded to a U.N. call for the use of military force when in fact the U.N. at that time had issued no such call." Merlo J. Pusey, *The Way We Go To War,* (Houghton, Mifflin Co. 1969), pp. 89-92.

President Truman's unilateral action was, moreover, a violation of the United Nations Participation Act of 1945 (27 USC 287d; 59 Stat. 621 as amended 63 Stat. 735 [1949]) which explicitly required approval by Congress of any agreement to supply troops to the United Nations. President Truman neither sought nor received any Congressional authorization.

President Truman's action was clearly a usurpation of the war-making power of Congress. There are other examples of Presidents engaging in military operations without Congressional authority but most of them can be distin-

guished from the Southeast Asia War in some manner. Many were for the protection of American citizens or property; some were acts of reprisal or the suppression of piracy. Most of them involved little or no violent collision with the forces of another state.

One of the most comprehensive and authoritative treatises on the war powers of the President was written by Francis D. Wormuth, Professor of Political Science at the University of Utah. *The Vietnam War: The President* v. *the Constitution,* a Center Occasional Paper (the Center for the Study of Democratic Institutions, 1968). He discussed a statement made by the Legal Adviser to the State Department to the effect that "there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization." Memorandum of March 4, 1966 entitled *The Legality of United States Participation in the Defense of Viet-Nam* submitted to the Senate Committee on Foreign Relations (Congressional Record Vol. 112 No. 43 pp. 5274-5279 and reproduced in *Vietnam and International Law,* by Consultative Council of Lawyers Committee on American Policy Toward Vietnam, O'Hara Books, 1967 pp. 113-130).

Professor Wormuth said:

> "Most of the State Department's 125 purported precedents for the Vietnamese War were interventions for the protection of citizens; a few were acts of reprisal and there were a few others. The mere fact that they occurred does not establish their legality. If this were true, the frequency with which banks are robbed would establish the legality of bank robbery. The analogy is worth pursuing. Just as a bank robber "acts only when he thinks he can escape apprehension, so on most occasions when Presidents have usurped

> the war power there has been little likelihood of complaint or political retribution. Landings on the soil of states that had no navies, and acts of violence against defenseless distant ports, disturbed no domestic interest. They were more likely to produce applause than censure.'' Wormuth, p. 32.

The fact that President Truman usurped the power of Congress in committing the nation to a major war in Korea does not make it legal. It is the most troublesome precedent we have. But even the Korean War has its point of distinction. It purported to be a peace keeping action of the United Nations, and, no doubt, many people in Congress and the nation who might otherwise have protested on constitutional grounds were reluctant to do anything that would weaken the authority of the United Nations. However, constitutional procedures are not in opposition to the nation's obligation to support the United Nations. They merely provide the means by which the nation is to give that support. When that support consists of going to war, it is for the Congress, not the President, to make the decision.

The claim by the Johnson administration that we have been engaged in ''collective self defense'' in Vietnam, even if it had validity under international law, would not authorize the President, from the standpoint of constitutional law, to engage in hostilities without Congressional action. President Johnson claimed that South Vietnam had been attacked by North Vietnam at the close of 1964. (See testimony of Secretary of State Rusk at Senate Foreign Relations Committee hearings in January-February 1966. Theodore Draper, *Abuse of Power* [Viking Press 1967], pp. 73-75.) While the President may have the power to defend Americans who are subject to attack on his own authority, that does not extend to the protection of Vietnamese, regardless of the urgency. In 1851 Daniel Webster, as Secretary of State, spoke forcefully on the subject, in relation to a dis-

pute between France and Hawaii (then an independent nation). He said:

> "By these [the Constitution and the laws] no power is given the Executive to oppose an attack by one independent nation on the possessions of another. We are bound to regard both France and Hawaii as independent states, and equally independent, and though the general policy of the Government might lead it to take part with either in a controversy with the other, still, if this interference be an act of hostile force, it is not within the Constitutional power of the President. . . ." John Bassett Moore, *Digest of International Law* (Government Printing Office 1906) Vol. 7, p. 163.

When President Nixon sent troops into Cambodia on April 30, 1970 he attempted to justify it as action to save American lives. But it was not protective action in response to an attack on American soldiers. The lack of any urgency is evidenced by the fact that the enemy had left the sanctuary areas, and the fact that the enemy bases he sought to destroy were said to have existed for several years. The President ordered the army to invade a country whose neutrality we were obligated to respect. While he claimed to do so on a temporary basis and in support of the government he did not claim to have obtained the consent of that government or to have informed it of his intentions.

The sanctity of political boundaries has long been recognized in relation to the war powers of the President. In 1805 the United States was involved in a dispute with Spain over the boundary between Louisiana and Florida. President Jefferson sent a special message to Congress advising of the intent of Spain to advance on American territory. He said:

> "Considering that Congress alone is Constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their

authority for using force in any degree which could be avoided. I have barely instructed the officers stationed in the neighborhood of the aggressions to protect our citizens from violence, to patrol within the borders actually delivered to us and not to go out of them but when necessary to repel an inroad or to rescue a citizen or his property." James D. Richardson, ed. *Messages and Papers of the Presidents, 1789-1908* (Bureau of National Literature and Art 1908) Vol. 1, p. 389.

The language of Abraham Lincoln with respect to the sanctity of boundaries is especially significant. Lincoln was a member of Congress when President Polk sent an army into Mexico in 1846 before a declaration of war was made by Congress. Polk was severely cirticized by Lincoln and other Congressmen who voted for a resolution critical of the President for "unconstitutionally' commencing the war—the Resolution adopted by the House by a vote of 85 to 81 on January 3, 1848. Lincoln wrote to his friend Herndon:

"Let me first state what I understand to be your position. It is that if it shall become necessary to repel invasion, the President may, without violation of the Constitution, cross the line and invade the territory of another country, and that whether such necessity exists in any given case the President is the sole judge. . . .

" . . . Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such a purpose, and you allow him to make war at his pleasure. Study to see if you can fix any limit to his power in this respect, after having given him so much power as you propose. . . .

> "The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and improverishing 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 oppression upon us. But your view destroys the whole matter and places our President where Kings have always stood." Arthur B. Lapsley, ed. *The Writings of Abraham Lincoln* (Putnam's 1905), Vol. 2, pp. 51-2.

If then the President may not invade a *neighboring* nation "whenever he shall deem it necessary to *repel an invasion,*" how specious is the claim that the President was authorized to send armed forces into Cambodia—hardly a *"neighboring nation"* and hardly "necessary to *repel an invasion*" of the United States.

B. *Constitutional Safeguards Are Not Nullified by 20th Century Conditions.*

Defenders of the exercise of Executive power without Congressional authority like to point out the necessity for rapid action to meet emergencies, because of the new conditions existing in the 20th Century.

It is popular to discount constitutional safeguards as relics of an older age when men had more leisure. The President is impatient with the legislative process. The Legal Advisor to the State Department says that in the 20th Century the world has grown too small to give the Constitution the meaning which the Constitutional Convention intended. See Point IV A of *The Legality of United States Participation in the Defense of Viet-Nam*—Memorandum from the Department of State, Office of the Legal Advisor,

March 4, 1966. Congressional Record, Vol. 112, No. 43, March 10, 1966, pp. 5274-5279.

On the contrary it is remarkable how adaptable the Constitution is to the changed conditions of modern times. The key to the President's war-making power from the beginning has been the word "urgency." When the United States is attacked the President must respond immediately using his powers as Commander-in-Chief. There is no time for Congress to act and none is necessary because we are at war as a result of the attack. The same urgency justifies Presidential action to protect citizens abroad when there is no time to go to Congress. The changed conditions in the nuclear age may increase the number of cases when such urgency exists. However, the basic principle remains the same. When an attack on the United States has been set in motion, the President has the power to and must respond. When there is time to go to Congress for a decision on war without jeopardizing the safety of the nation or citizens subject to attack, the President is obligated to do so. Note, *Congress, The President and the Power to Commit Forces to Combat,* 81 Harv. L. Rev. 1771-1805 (1968).

No such urgency has ever existed in Vietnam or Cambodia and none is claimed by the Executive.

There is another side to the changed conditions argument. The horrors of nuclear war are so great that the safeguards to prevent it should be tightened, not relaxed. *The New York Times* editorial on May 5, 1970 is in point:

> "Until very recently in the present era Congress has generally acquiesced in a secondary, rubber-stamp role on the theory that modern warfare demands prompt, decisive action by an informed leader, unfettered by parliamentary restraints.
>
> "This theory has been profoundly shaken by the nation's recent experience in Southeast Asia, where

a series of rash actions in pursuit of dubious goals has demonstrated the fallibility of Presidential judgments and 'secret' intelligence on which they have been allegedly based. It has become clear that modern warfare, with its vast destructive power and threat of ultimate annihilation, requires more than ever the checks and balances against human error that the Founding Fathers prudently wrote into the United States Constitution."

C. *There Has Been No Ratification of The War by Appropriation.*

It is sometimes claimed that by appropriating funds for the Vietnam War, Congress clothed the President's acts with authority equivalent to that which would have resulted from a declaration of WAR.

The rule is well settled that it is possible to ratify executive actions of dubious validity by means of an appropriation act (*Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139; *Fleming* v. *Mohawk,* 331, U.S. 111), but the standards of ratification prescribed by the Supreme Court are very exacting. A landmark case in this area is *Ex parte Endo* (323 U.S. 283), decided by the Supreme Court in 1944. During World War II, the Relocation Authority had, without statutory authority, adopted a policy of detaining citizens of Japanese origin whose loyalty had been satisfactorily established in relocation centers if they refused to go to an approved place of residence upon release. Confronted with a habeas corpus action, the Relocation Authority contended that Congress had ratified this policy by appropriating funds for the continued operation of the relocation centers. Justice Douglas, writing the opinion of the Court, said:

"It is argued . . . that there has been Congressional ratification of the detention of loyal evacuees . . .

> through the appropriation of sums for the expenses of the Authority....It is pointed out that the regulations and procedures of the Authority were disclosed in reports to the Congress and in Congressional hearings.... Congress may of course do by ratification what it might have authorized.... And ratification may be effected through appropriation acts.... But the appropriation must plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump sum appropriation was made for the overall program of the Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees without ratifying every phase of the program." 323 U.S. at 303m.

Let us consider whether the military appropriation acts for the Vietnam War meet the tests laid down in *Ex parte Endo* that to constitute a ratification "the appropriation must plainly show a purpose to bestow the precise authority which is claimed."

On May 4, 1965, several months after President Johnson had initiated combat operations in Vietnam and had begun his air attacks on North Vietnam, he asked Congress for a supplementary appropriation of $700,000,000. His message mentioned that the armed forces in South Vietnam had been increased to 35,000; that marines and airborne troops had been sent into two important areas; that helicopter activity in South Vietnam had been increased; that sorties in South Vietnam had begun and had been increased as well as the number of sorties against North Vietnam. However, the President did not ask for ratification of these concrete actions:

> "I do not ask complete approval for every phase and action of your Government. I do ask for prompt

> support of our basic course; resistance to aggression, moderation in the use of power, and a constant search for peace. Nothing will do more to strengthen your country in the world than the proof of national unity which an overwhelming vote for this appropriation will clearly show. To deny and delay this means to deny and delay the fullest support of the American people and the American Congress to those brave men who are risking their lives for freedom in Vietnam. Cong. Rec., Vol. 111, Pt. 7, 89th Cong. 1st Sess. (May 4, 1965), p. 9284.

Within a few days Congress adopted a joint resolution which authorized the Secretary of Defense "upon determination by the President that such action is necessary in connection with military activities in Southeast Asia" to transfer $700,000,000 from unappropriated funds to any existing military account. There was not the slightest intimation in the joint resolution that it was intended in any manner whatsoever to offer a legal status for any prior event. This coupled with the expressed denial of President Johnson that he was asking for "complete approval for every phase and action of your government" dissipates any claim that the appropriation constitutes a ratification of any particular action. It had the legal effect of an appropriation measure—no more, no less.

In passing the Supplementary Defense Appropriations Bill which the Congress considered in 1967, the following amendment was passed by both houses on March 8, 1967:

> "The Congress hereby declares:
>
> (1) Its firm intentions to provide all necessary support for members of the armed forces of the United States fighting in Viet Nam;
>
> (2) Its support of efforts being made by the President of the United States and other men of good will throughout the world to prevent an expansion of the war in Viet Nam and to bring that conflict to an end

through a negotiated settlement which will preserve the honor of the United States, protect the vital interests of this country, and allow the people of South Viet Nam to determine the affairs of that nation in their own way; and

(3) Its support for the convening of the nations that participated in the Geneva Conferences or any other meeting of nations similarly involved and interested as soon as possible for the purpose of pursuing the general principles of the Geneva accords of 1954 and 1962 and for formulating plans for bringing the conflict to an honorable conclusion." Congressional Quarterly Weekly Report, Vol. 25, No. 10 (March 10, 1967), p. 337.

The first paragraph of the Congressional declaration is merely a statement of Congress's intention to pass other appropriation acts. The other two merely endorse the general principles of bringing an end to the war through negotiations on the basis of the Geneva Accords. Hence the amendment adopted by the Congress can in no way be considered a ratification of the presidential war initiated by the President. We know of no other appropriation acts which contain any language that could properly be regarded as a ratification of the war.

D. *The President, as Commander-in-Chief of the armed forces, has no power to cause the United States to take action in violation of the Charter of the United Nations.*

The Charter of the United Nations (59 Stat. 1031) was ratified as a treaty by the United States on August 8, 1945, and entered into force on October 24, 1945. Article VI, Clause 2, of the Constitution provides that treaties so made, together with the Constitution and the laws of the United States made pursuant thereto, are "the Supreme Law of the Land." *Missouri* v. *Holland,* 252 U. S. 416, 432-434; *Hines* v.

Davidowitz, 312 U. S. 52, 62-63; *United States* v. *Pink,* 315 U. S. 203, 230-231; *Clark* v. *Allen,* 331 U. S. 503-508. Therefore, any violation of the provisions of the Charter by the United States necessarily constitutes not only a breach of International Law but of the United States Constitution itself.

Chapter I, Article II, Subd. (4) of the Charter of the United Nations specifically provides:

> "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations."

This provision must necessarily be read in conjunction with Chapter VII, Section 39 of the Charter, which provides as follows:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations or shall decide what measures shall be taken . . . to maintain or restore international peace and security."

It is therefore clear that a member of the United Nations is prohibited from using force unilaterally against any state under the first foregoing paragraph and that only the Security Council is authorized to decide what measures shall be taken to "maintain or restore international peace or security."

It can hardly be denied that the actions of the military forces of the United States in Vietnam constitute the "use of force" proscribed by Chapter I, Article II, Subd. (4) of the Charter—in the face of a military commitment involving at times, more than 550,000 men, in which more than 42,000 Americans have been killed and over 281,000 maimed and

wounded, where the bomb tonnage has exceeded that dropped in World War II.

It is also true beyond any doubt that the Security Council of the United Nations has not authorized the United States to take any such action for any purpose whatsoever.

The only occasion in which force may be employed by one nation in its relations with others is in the event of "armed attack" within the purview of the provisions of Chapter 7, Article 51 of the Charter, which specifically provides as follows:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security."

The existence of an "armed attack" has not been established* (see *Vietnam and International Law,* op. cit. pp. 25-31).

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* Secretary of State Rusk in his testimony before the Senate Foreign Relations Committee's hearings on Vietnam in January and February 1966 maintained that the movement of the 325th Division (about 8,000-10,000 men) of the regular North Vietnamese Army from North Vietnam to South Vietnam over the turn of the year 1964-65 was the causative factor in the massive increase of American military forces which began in February 1965. However, on April 27, 1965, three months *after* the alleged appearance of the 325th Division, Secretary of Defense Mc Namara had officially stated that "evidence accumulated within the last month" (to wit, since late March 1965) had confirmed the presence in the northwest sector of South Vietnam "of the 2nd Battalion of the 325th Division of the regular North Vietnamese Army" and went on to estimate the size of the batallion "on the order of 400 to 500 men." *Department of State Bulletin,* May 17, 1965, pp. 750 and 753. On May 17, 1966, Secretary Rusk repeated his charge, telling a press conference: "The 325th North Vietnamese Division came from North Vietnam into South Vietnam before we started the bombing of North Vietnam." *Department of State Bulletin,* June 6, 1966, p. 886. To keep the record straight on this crucial element, Senator Mike Mansfield, in an address delivered at Yeshiva University on June 16, 1966, observed: "When the sharp increase in the American

"Individual self-defense and, *a fortiori,* collective self-defense is not a lawful response to the commission of action unilaterally described as 'indirect aggression,' but only in the event that the victim state experiences an 'armed attack,' that is, if military forces cross an international boundary in visible, massive and sustained form. The objective of Article 51 was to confine the discretion of a state to claim self-defense to those instances 'when the necessity for action' is 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation.' In explaining Article 51, legal authorities usually invoke the classical definition of self-defense given by Secretary of State Daniel Webster in *The Caroline.* Mr. Webster's description of the permissible basis for self-defense was relied upon in the Nuremberg Judgment in the case against major German war criminals. This judgment was, of course, based upon pre-United Nations law and, in turn, was affirmed unanimously by the United Nations General Assembly at its first Session [Res. 95(I)]." (at p. 27)

As declared by Professor Philip C. Jessup in his work, *A Modern Law of Nations,* published in 1947 (at pp. 165-166):

"Article 51 of the Charter suggests a further limitation on the right of self-defense: it may be exercised

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military effort began in early 1965, it was estimated that only about 400 North Vietnamese soldiers were among the enemy forces in the South which totalled 140,000 at that time." See Cong. Rec., Senate, June 16, 1966, pp. 12856-8. Senator Mansfield's estimate corresponded with Secretary McNamara's figures. A newspaper man, startled by Senator Mansfield's low figure, made inquiry at the Department of Defense, and reported: "An official in the office of Defense Secretary Robert McNamara confirmed giving it to Mansfield's office and said it is 'essentially correct.'" The Defense Department spokesman added that "he is aware of the wide difference between the Pentagon's 'confirmed' figures and others' estimates." *Washington Daily News,* June 23, 1966.

only 'if an armed attack occurs' . . . This restriction in Article 51 very definitely narrows the freedom of action which states had under traditional law. A case could be made out for self-defense under the traditional law where the injury was threatened but no attack had yet taken place. Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened."

E. *Under no circumstances do the powers granted to the President as Commander-in-Chief under Article 2, Section 2 of the Constitution authorize him to initiate or conduct armed hostilities in contravention of international treaties, which are deemed to be the supreme law of the land under Article VI of the Constitution.*

The United States is at present a signatory of a series of international treaties governing the conduct of war; e.g., Hague Convention No. IV of 18 October 1907, Respecting the Laws and Customs of War on Land (36 Stat. 2277; Treaty Series 539); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (T.I.A.S. 3365); Hague Convention No. IX of 18 October 1907, Concerning Bombardment by Naval Forces in Time of War (36 Stat. 2351; Treaty Series 542); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field of 27 July 1929 (47 Stat. 2074; Treaty Series 847).

The United States is, furthermore, a signatory to the Principles of International Law recognized in the Charter of the Nuremburg Tribunal and in the judgment of the

tribunal. Principle VI, thereof specifically provides as follows:

> "b. War crimes:
>
> Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
>
> "c. Crimes against humanity:
>
> Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."

In regard to armed forces in the field, the constitutional practice and doctrine concerning the command power of the President has been authoritatively stated in the following words:

> "As against an enemy in the field the President possesses all the powers which are accorded by International Law to any supreme commander." Sen. Doc. No. 39; 88th Cong., 1st Sess. 452 (1964)

Since the substance and the contents of the powers of the President as Commander-in-Chief of the armed forces in the field are determined by international law, the President is under a constitutional obligation to see to it that international law is faithfully executed because the "take care" clause of Article II, Section 3 of the Constitution does not

only apply to municipal but also to international law. In this connection, Alexander Hamilton stated the well-established doctrine when he said:

> "The Executive is charged with the execution of all laws, the law of nations, as well as the municipal, by which the former are recognized and adopted.
>
> "The President is the constitutional Executor of the laws. Our treaties and the laws of nations form a part of the law of the land." *7 Works of Alexander Hamilton* 84 (J. C. Hamilton, ed., 1851)

Detailed presentation of the acts of war in relation to the laws of war which have been violated has been compiled in the volume, *In the Name of America,* published by the Clergy and Laymen Concerned about Vietnam (Jan. 1968); viz., the attack or bombardment of "towns, villages, dwellings, or buildings which are undefended," *Article 25, Hague Convention No. IV 18 October 1907;* and of the *Hague Convention No. IX,* Chapter One, Article One governing "the bombardment by Naval forces of undefended forts, towns, villages, dwellings, or buildings."

Other violations include *inter alia,* forcible transfers of many persons from their homes and their evacuation into large camps in violation of the Geneva Convention dated 12 August 1949 referred to above (Article 49); the large scale destruction of property of individuals [Geneva Convention of 12 August 1949, Article 53]; indiscriminate attacks upon members of the civilian population in violation of Article 147 of the same Treaty, as exemplified by the so-called "free bomb zones" and the use of such weapons as napalm, C.B.U.'s (cluster bomb units), and other so-called anti-personnel weapons, in violation of Article 23 of Hague Convention No. IV dated 18 October 1907; treaty violations involving the use of prohibited

agents of chemical warfare; the systematic use of torture and assassination of enemy prisoners of war and enemy civilians (as exemplified in "Operation Phoenix"); the employment of "body counts" and "kill ratios" by the highest military authorities as a measure of military efficiency, resulting in the indiscriminate use of force against members of the civilian population.

Documentation of the facts underlying the aforesaid violations is to be found in the following books and studies:

1. Hersh, Seymour, *My Lai 4*, New York, Random House, 1970.

2. Lang, Daniel, *Casualties of War*, New York, McGraw Hill, 1969.

3. Hersh, Seymour, *Chemical and Biological Warfare, America's Hidden Arsenal,* Doubleday, 1969.

4. Schell, Jonathan, *The Military Half*, New York, Random House, 1968.

5. *In the Name of America* (a study commissioned by Clergy and Laymen Concerned About Vietnam; January, 1968).

6. "War Crimes and Vietnam: 'The Nuremberg Defense' and the Military Service Register," *California Law Review*, Vol. 57 No. 5, Nov. 1969 pp. 1055-1105.

   Anthony A. D'Amato; Harvey L. Gould; Larry D. Woods.

7. *Conference Mondiale de Juristes Pour le Vietnam,* Grenoble, 6-10 July, 1968.
   Bruxelles, Edition de l'Association International des Juristes Democrates.

8. Hammer, Richard *One Morning in the War,* New York, Coward-McCann, Inc. 1970.

Conclusion

For the reasons set forth in the Brief for the Commonwealth of Massachusetts and the reasons herein stated, we pray that—

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph H. Crown, an attorney for and secretary of the Lawyers Committee on American Policy Towards Vietnam, the amicus curiae in the above captioned case, hereby certify that the foregoing brief has 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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