Supreme Court, U.S.
FILED
SEP 22 1970
E. ROBERT SEAVER, CLERK

No. 42 Original

In the Supreme Court of the United States

OCTOBER TERM, 1970

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, DEFENDANT

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE DEFENDANT OPPOSING THE MOTION FOR LEAVE TO FILE COMPLAINT

ERWIN N. GRISWOLD,
Solicitor General,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

ROBERT V. ZENER,
ROBERT E. KOPP,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

CITATIONS

Cases:

Cases—Continued Page

Cases—Continued

Constitution and statutes:

Miscellaneous—Continued

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JURISDICTION

Massachusetts' motion for leave to file a complaint against the Secretary of Defense invokes the original jurisdiction of this Court for the purpose of challenging the constitutionality of the United States' present participation in military action in Vietnam. This Court's jurisdiction over the complaint is invoked under Article III, Section 2 of the Constitution, which confers original jurisdiction over controversies be-

tween a state and citizens of another state. For the reasons elaborated within, the United States denies that Massachusetts is the real party in interest in this case, pp. 9-17, *infra*, and that Massachusetts' complaint states any justiciable controversy between it and the Secretary of Defense, pp. 17-42, *infra*.

QUESTIONS PRESENTED

1. Whether Massachusetts is the real party in interest as to the matters presented in its complaint and, if not, whether it may challenge actions of the federal government as *parens patriae* for its citizens.

2. Whether an allegation that the United States' participation in combat is unconstitutional because it has not been properly authorized by Congress presents issues susceptible of judicial determination or effective judicial relief.

3. Whether a suit seeking both an adjudication of the proper division of war-making authority between the President and the Congress and a decision whether that allocation has been observed presents a non-justiciable political question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article 1, § 8:

* * * *

The Congress shall have Power * * *

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

* * * *

—And

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

United States Constitution, Article 2, § 2:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *.

* * * *

United States Constitution, Article 2, § 3:

He shall * * * take Care that the Laws be faithfully executed * * *.

United States Constitution, Article 3, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * * *

28 U.S.C. § 1251:

> (a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more States;
>
> (2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

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

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

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

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

STATEMENT

Acting in response to a recently enacted state law, Massachusetts seeks leave to file its complaint in order to obtain an adjudication of the constitutionality of the United States participation in the military action in Vietnam. As relief, it requests that the United States' participation be declared "unconstitutional in that it was not initially authorized or subsequently ratified by Congressional declaration"; also, it asks that the Secretary of Defense be enjoined "from carrying out, issuing, or causing to be issued any further orders which would increase the present level of United States troops in Indochina"; and it asks that, if appropriate congressional action is not forthcoming within 90 days of this Court's decree, the Secretary be enjoined "from carrying out, issuing, or causing to be issued any further order directing any inhabitant of the Commonwealth of Massachusetts to Indochina for the purpose of participating in combat or supporting combat troops in the Vietnam war * * *" (Complaint, p. 12).

SUMMARY OF ARGUMENT

I

This Court's original jurisdiction over cases in which "a State shall be Party," Const. Art. III, Sec. 2, covers only those cases in which the state bringing the action is the real party in interest. Although states have often been permitted to sue individuals or other states as *parens patriae*, to protect the health and comfort of their inhabitants, they are not permitted to sue the federal government or its officials on that basis. *Massachusetts* v. *Mellon*, 262 U.S. 447. A suit against federal defendants must be brought to vindicate the state's own sovereign interests.

To the extent Massachusetts' complaint seeks to vindicate alleged violations of the principle of the separation of powers, it is necessarily a suit *parens patriae*, and thus barred. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324. The other interests Massachusetts asserts in support of its suit are interests *parens patriae*. Those interests, although sufficient to invoke this Court's original jurisdiction against state or private defendants, are insufficient to confer jurisdiction in this case.

II

A. Massachusetts' action is non-justiciable. It is doubtful whether the asserted duty of Congress to participate in the war-making process can be judicially identified; in any event, a breach of that duty cannot be judicially determined, nor can protection for the asserted right be molded.

1. Congress' constitutional power "to declare war" was intended to, and does, leave in the hands of the President power to determine that a hostile attack has been made upon the United States, its citizens or their property and to repel that attack. From the beginning, it has been established that the presidential power extends to attacks occurring beyond the country's borders, and to the stationing of American troops on the open seas or in foreign countries where they are officially welcome. Consequently, the distinction between an exercise of the presidential power to repel, and the congressional power to authorize, hostilities is more complex than might at first appear. It is at least uncertain whether the maturing of the asserted congressional duty can be judicially identified.

2. Even if such identification is possible, it could not be judicially determined whether Congress has breached that duty. Because a formal structure of action could have grave consequences in the international arena, there is no particular form of authorization—such as a formal declaration of war—which Congress must follow. Here, there is substantial objective legislative involvement in the conduct and financing of the hostilities. Given the consequences to our international posture of any more particular inquiry, it can not be judicially determined whether this involvement is "enough" to meet the congressional duty. Nor can there be any inquiry into the motives or practical freedom of Congress in so participating; any such inquiry would involve an impermissible judicial affront to the dignity of a coequal and independent branch of government.

3. Effective judicial relief cannot be ordered in this case. Mandatory relief, which would involve this Court in the very conduct of the hostilities, constitutes an impermissible excursion into the "vast external realm." *United States* v. *Curtiss-Wright Corp*, 299 U.S. 304, 319. And declaratory relief is inappropriate in a case in which, unlike *Powell* v. *McCormack*, 395 U.S. 486, the rights declared could not be vindicated in further judicial proceedings. Absent that possibility, a declaratory judgment would be only a judicial announcement or advice.

B. The same considerations lead to the conclusion that Massachusetts' complaint unavoidably presents political questions under the standards enunciated by this Court in *Baker* v. *Carr*, 369 U.S. 186. The demonstration that these standards are met principally involves a reshaping of the analysis above—for example, a showing that inquiry into the motives of Congress in passing authorizing legislation, or into presidential statements upon which the Executive's conduct of the hostilities has been based, necessarily would express a lack of respect due coordinate branches of government. Moreover, this case is not one which merely "touch[es] foreign relations," *Baker* v. *Carr*, *supra*, 369 U.S. at 211; it involves a direct challenge to the manner in which those relations have been conducted. A judicial inquiry which accepted that challenge would both undetermine the credibility of the nation's promises to friendly nations and threaten severe embarrassment to those who conduct its foreign affairs.

ARGUMENT

I. This Suit Does Not Fall Within the Original Jurisdiction of This Court Because Massachusetts Has No Sovereign Interest in the Matters Alleged and May Not Challenge Actions of the Federal Government as *Parens Patriae* for Its Citizens.

A. Under Article III, Section 2, this Court has original jurisdiction in cases in which "a State shall be Party." However, in order to prevent excessive or improper use of this provision, the Court has consistently declined jurisdiction of cases brought in its original jurisdiction merely because a State "elects to make itself * * * a party plaintiff." *Oklahoma* v. *Atchison, T.&Santa Fe Ry.*, 220 U.S. 277, 289. See also, *e.g.*, *Kansas* v. *United States*, 204 U.S. 331; *Massachusetts* v. *Missouri*, 308 U.S. 1, 18-19; *Oklahoma* v. *Cook*, 304 U.S. 387. Mindful that that jurisdiction should be exercised sparingly, *Missouri* v. *Illinois*, 200 U.S. 496, 520; *Alabama* v. *Arizona*, 291 U.S. 286, 291; *Utah* v. *United States*, 394 U.S. 89, 95; *Louisiana* v. *Texas*, 176 U.S. 1, 15; cf. *Texas* v. *Interstate Commerce Commission*, 258 U.S. 158, it has insisted on "strict adherence to the governing principle that the state must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interests." *Oklahoma* v. *Cook*, *supra*, 304 U.S. at 396. See also, *e.g.*, *Kansas* v. *United States*, *supra*; *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439; *Arkansas* v. *Texas*, 346 U.S. 368. The necessity for such a rule is obvious; otherwise, a state, merely by passing a law undertaking to advance the claims of certain of its citizens, could make

it possible for virtually any private suit to fall within this Court's original jurisdiction.

The requirement that a state show that it is the real party in interest has two aspects. In ordinary litigation, as between two states or a state and private persons, it permits the states to bring suit either to protect its own sovereign interests or to vindicate the interests of its citizens as a whole, as *parens patriae*. *E.g.*, *Georgia* v. *Pennsylvania R. Co.*, *supra*; *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230.[1] Thus, as Massachusetts points out (Br., p. 13), states have often been permitted to sue to protect the health and comfort of their inhabitants (*Missouri* v. *Illinois*, *supra*; *Kansas* v. *Colorado*, 185 U.S. 125; *Georgia v. Tennessee Copper Co.*, *supra*; *North Dakota* v. *Minnesota*, 263 U.S. 365; *Pennsylvania* v. *West Virginia*, 262 U.S. 553) and even to protect the economic well-being of their citizens (*Georgia* v. *Pennsylvania R. Co.*, *supra*).

The second aspect of the real-party-in-interest rule, however, is that a state may *not* challenge actions of the federal government as *parens patriae*. In actions brought against government officials, it must demonstrate it is suing in its own sovereign capacity. Thus, in *Massachusetts* v. *Mellon*, 262 U.S. 447, Massachusetts was not permitted to challenge as *parens patriae* a federal grant-in-aid statute by which the federal

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[1] The action *parens patriae* is often referred to as a suit by the state for injury in its capacity of *"quasi-sovereign," e.g.*, *Oklahoma* v. *Cook*, *supra*, 304 U.S. at 393; *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237; *Georgia* v. *Pennsylvania R. Co.*, *supra*; *North Dakota* v. *Minnesota supra*.

government allegedly usurped powers reserved to the states. The Court stated (262 U.S. at 485):

> We come next to consider whether the suit may be maintained by the State as the representative of its citizens. To this the answer is not doubtful. 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.

The reason why the Court was "clear" that the right did not arise was that Massachusetts had no duty or power to enforce the rights of its citizens in respect of their relations with the federal government (*id.* at 485-486):

> [T]he 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. [Emphasis added.] [2]

[2] This reasoning is not based on the fact that a federal statute, as distinct from federal executive action, was being

See also *Florida* v. *Mellon*, 273 U.S. 12, 18; *Georgia* v. *Pennsylvania R. Co.*, *supra*, 324 U.S. at 446.

The distinction between a suit brought by a state to vindicate its sovereign interest and a suit *parens patriae* was central to *South Carolina* v. *Katzenbach*, 383 U.S. 301, another suit brought by a state against a federal official. This Court permitted South Carolina to challenge in this Court's original jurisdiction a federal law which had the effect of suspending or invalidating important provisions of the state's voting laws which, it was conceded, were otherwise valid. But South Carolina also sought to assert as a basis for its suit that the federal law violated the principle of separation of powers, by conferring judicial functions on the Attorney General. The Court held that this claim had no relation to South Carolina's own sovereign interests but, rather, was bought as *parens patriae*. Jurisdiction over that claim was thus rejected. South Carolina had no "standing as the parent of its citizens to invoke those constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen," 383 U.S. at 324.

Consequently, while a state may have a sufficient interest as *parens patriae* to bring a suit to protect its citizens against injury, and meet the ordinary tests of standing (*e.g.*, *Flast* v. *Cohen*, 392 U.S. 83; *Association of Data Processing Service Organization* v. *Camp*, 397 U.S. 150; *Barlow* v. *Collins*, 397 U.S. 159),

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challenged; the crux of the matter is that it is no part of a State's "duty or power" to enforce its citizens' rights "in respect of their relations with the Federal Government." In any event, the action challenged here is not wholly executive. *Infra*, pp. 26-28.

the identical interest will not be sufficient to entitle the state to challenge actions of the federal government in the original jurisdiction of this Court. To bring such a suit the state must allege some injury to its own unique sovereign interest. *E.g.*, *South Carolina* v. *Katzenbach*, *supra*, (challenge under Fifteenth Amendment to federal laws suspending or invalidating the State's otherwise valid voting laws); *California* v. *Latimer*, 305 U.S. 255 (suit to enjoin taxation of state-owned railroad); *Ohio* v. *Helvering*, 292 U.S. 360 (suit contesting taxation of state-owned liquor stores); *Wisconsin* v. *Lane*, 245 U.S. 427 (suit to establish state's title to lands).

The application of this doctrine is particularly important here, since the gist of Massachusetts' complaint is that the President has been unconstitutionally exercising a power—the power to declare war—entrusted by the Constitution to Congress. For what is at stake is the allocation of power between two coordinate branches of the federal government elected by the citizens of the United States. This is the special concern of the citizens of the United States, and of their elected representatives in Congress and the Presidency—but not of the states. "[C]ourts have consistently regarded * * * the principle of the separation of powers *only as protections for individual persons and private groups* * * *." (Emphasis added.) *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 324. And, of course, a state's sovereign concern is even less when, as here, the power involved relates to foreign policy. *Cf. United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 316-317.

The hostilities in Vietnam affect the lives of all of the citizens of the United States, not merely the citizens of Massachusetts. No issue has been more debated and subjected to scrutiny by their representatives. Elections are constantly being fought over this issue. The citizens of the United States have it in their political power, if our participation in the war is unauthorized, to require the government either to authorize or to terminate that participation.[3] The United States, not the states, represents its citizens as *parens patriae* in their relations with the federal government; the officials of the United States are elected by the citizens of the United States and are responsible to them, not to the states.[4]

B. Massachusetts presents no claim in its sovereign capacity. For example, although the statute authorizing the Commonwealth to file this suit purports to create a right in Massachusetts citizens not to be forced to serve in the military forces of the nation in

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[3] In considering whether exercise of its original jurisdiction is warranted, this Court has recognized that it is appropriate to look to the possibility of congressional legislation as an alternative source of relief. *Missouri* v. *Illinois, supra,* 200 U.S. at 519; cf. *New York* v. *New Jersey,* 256 U.S. 296, 313.

[4] *Massachusetts* v. *Mellon, supra, Florida* v. *Mellon, supra,* and *South Carolina* v. *Katzenbach, supra,* were all suits against federal officials. In all these cases, as the Massachusetts brief points out is true in this case (Br., p. 14), it could not be expected that the United States would bring suit to test the legality of the actions of these officials. However, in all of these cases, including the instant one, it was open to the citizens of the United States, through *political* means, to control the acts of those officials.

unauthorized wars, the "conflict" with federal law thus created is fundamentally different from that which the Court found sufficient to establish a sovereign interest in *South Carolina* v. *Katzenbach.* South Carolina relied on statutes which would have been valid in the absence of federal legislation on the subject and thus would have continued in effect were the federal enactment invalid. The Massachusetts statute, on the other hand, may be found invalid without any need ever to reach the question whether American participation in particular hostilities is constitutional. For the power to control the disposition of the nation's armed forces and its foreign policy is vested entirely in the national government. *E.g.*, Constitution, Art. I, Section 10, para. 3; *United States* v. *Curtiss-Wright Corp., supra.*

The provision of the Massachusetts statute authorizing the filing of this suit characterizes it as an action to "defin[e] the rights of inhabitants of the Commonwealth inducted or serving in the military forces of the United States" (Complaint, p. 14)—that is, as an action to be brought *parens patriae*, to aid its citizens in their individual capacities. *In re Debs*, 158 U.S. 564, 584-586. While Massachusetts asserts that, apart from the harm to its individual citizens, the Commonwealth is being harmed in its "sovereign capacity" by the continuation of the war, the allegations of harm to the Commonwealth are no different from general allegations which it could make concerning many federal programs. Thus Massachusetts complains that as a consequence of the war, it suffers

loss of the services of its citizens in state government, loss of tax revenues,[5] loss of funds due to inadequately funded federal grant-in-aid programs, and adverse effects on the state's economy[6] (Br., pp. 11-12). But a federal agricultural program, highway program, anti-pollution program, birth control program, or any other important federal programs could produce the same consequences in varying degree. If Massachusetts were able to invoke the original jurisdiction of this Court through these general allegations of indirect harm, then many important federal programs could be challenged by the states under the original jurisdiction of this Court. This Court has refused—and should here continue to refuse—to allow its original jurisdiction to be used for this purpose. *Massachusetts* v. *Mellon, supra*; *Florida* v. *Mellon, supra*; *Georgia* v. *Pennsylvania R. Co., supra*; *South Carolina* v. *Katzenbach, supra.*

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[5] This Court remarked on a similar allegation concerning loss of tax revenues in *Florida* v. *Mellon, supra*: "If, as alleged, the supposed withdrawal of property will diminish the revenues of the state, *non constat* that the deficiency cannot readily be made up by an increased rate of taxation." 273 U.S. at 18.

[6] The Lawyers' Committee on Undeclared War, although not Massachusetts, asserts that Massachusetts has an interest in protecting its own militia (Lawyers' Committee Br., p. 36). However, Massachusetts makes no contention that its ability to control its militia is impaired. It confines its interest to representing *parens patriae* those of its inhabitants serving in Vietnam (Br., p. 12). See, also, *Johnson* v. *Powell*, 414 F. 2d 1060 (C.A. 5).

Thus, Massachusetts' general allegations merely confirm the fact that it is suing *parens patriae*—for all of these allegedly adverse consequences of the hostilities are borne primarily by its citizens, and only indirectly by the state. Such an indirect interest of the state may be sufficient to give this Court original jurisdiction in a suit against a private party or another party (*e.g.*, *Georgia* v. *Pennsylvania R. Co.*, *supra*), but is insufficient in a suit against the federal government or its officers.

II. Original Jurisdiction Should Be Declined Because the Issue Presented Is Non-Justiciable

This Court should decline to accept jurisdiction for the additional reason that the issue sought to be raised in this case is a non-justiciable political question, *Baker* v. *Carr*, 369 U.S. 186; *Powell* v. *McCormack*, *supra*; *Georgia* v. *Stanton*, 6 Wall. 50; *Luther* v. *Borden*, 7 How. 1, and fails to meet the general criterion of justiciability stated in *Powell* v. *McCormack*, 395 U.S. 486, 516-517.

A. *General Considerations of Justiciability*

This Court has recently stated that the general test of justiciability is whether " 'the duty asserted can be judicially identified and its breach judicially determined,' and whether protection for the right asserted can be judicially molded." *Powell* v. *McCormack*, *supra*, 395 U.S. at 517; *Baker* v. *Carr*, *supra*, 369 U.S. at 198. In the instant case, it is doubtful whether the asserted duty of Congress to participate in the war-making process can be judicially identified; if it

can be identified, nonetheless a breach of that duty cannot be judicially determined; nor can protection for Massachusetts' asserted right be judicially molded.

1. *It is at least uncertain whether the asserted duty of Congress to participate in the war-making process can be judicially identified.*

Massachusetts' initial contention is that the commitment of American troops to hostilities must be authorized by Congress. The Constitution confers the power "[t]o declare War" on Congress, Art. I, Sec. 8, para. 11, and this Court early referred to the power to make war as legislative in character. *E.g.*, *Bas* v. *Tingy*, 4 Dall. 37, 38; *Talbot* v. *Seeman*, 1 Cranch 1; but see *Little* v. *Barreme*, 2 Cranch 170, 177. Those cases, however, also recognized that not all hostilities need be formally declared. "[H]ostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission." 4 Dall. at 40 (Washington, J.).

Under what circumstances congressional authority is required for such "limited" wars is open to debate. On the whole, the early cases might appear to state that such authority was required. But subsequent opinions, dealing with hostilities initiated by the opposing party, either assumed or held that such authority was *not* required. Thus, in *Montoya* v. *United States*, 180 U.S. 261, this Court characterized Indian

Wars, fought so far as appears entirely on executive authority, as a type of limited war for which a declaration of war was not required; the question of congressional authorization was never examined. And in the *Prize Cases*, 2 Black 635, 668, this Court specifically held that no congressional action was required to authorize the blockades proclaimed by President Lincoln at the outset of the Civil War:

> If a war be made by invasion of a foreign nation, the President is not only authorized [7] 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. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral.*" * * * "* * * A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other." [Emphasis in original.]

The Court specifically held that the question in that case, whether the insurrection had advanced to a state of civil war, was one to be decided *by the President*, and that the Court was bound by his decision. While noting that congressional authority was not wanting if it were required, the Court specifically refused to reach that issue. *Id.* at 670-671.

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[7] The Court was referring to Acts of Congress of February 28, 1795, and March 3, 1807, authorizing the President to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a state or of the United States. 2, Black at 668. These statutes constituted neither a declaration of war nor an authorization of specific, limited hostilities.

Recognition of executive power to ~~repeal~~ repel attacks without specific congressional authorization directly influenced the wording of the war power clause. See 2 Farrand, *Records of the Federal Convention*, pp. 318-319. The draft Constitution first submitted to the delegates gave Congress the power "[t]o make war." Mr. Pinkney objected to vesting this power in the whole Congress on the grounds its proceedings were "too slow". He urged that the power to make war be vested in the Senate. Mr. Butler, on the other hand, said that the same objections to vesting the power in the legislature would also apply against vesting it in the Senate; he was for vesting the power in the President, "who will have all the requisite qualities, and will not make war but when the Nation will support it." Responding to these objections to vesting the power "to make war" in Congress, Mr. Madison and Mr. Gerry moved to insert the word "declare" instead of "make" in the draft, "leaving to the Executive the power to repel sudden attacks." The amendment was adopted by the Convention, and "to make war" was replaced by "to declare war".

It soon became apparent that the President's power to repel sudden attacks was not confined to the territory of the United States. In 1801 President Jefferson, who supported a restricted view of the powers of the Presidency, on his own authority sent the American fleet into the Mediterranean, where it engaged in a naval battle with the Tripolitan fleet. In a message to Congress Jefferson construed his authority under the Constitution as permitting him to engage in defensive—but not offensive—operations without Congressional authorization. 11 Annals of Cong. 12

(1801).[8] He had taken the action, he said, because Tripoli "had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war, on our failure to comply before a given day." The style of the demands "admitted but one answer", and so Jefferson had sent American vessels of war into the Mediterranean "with orders to protect our commerce against the threatened attack." A Tripolitan cruiser engaged in battle an American ship, and was captured "after a heavy slaughter of her men." However, "[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defence, the vessel, being disabled from committing further hostilities, was liberated with its crew." Jefferson then asked that Congress authorize future "measures of offence" so as to "place our force on an equal footing with that of its adversaries". (*Id.* emphasis added).

Others took a less restrictive view. Alexander Hamilton, while agreeing that no congressional sanction was necessary for defensive operations even beyond the territory of the United States, believed that the President's power to act under the Constitution without Congressional authority extended to an action to repel agression from another nation, because a state of war "is completely produced by the act of one [nation]—it requires no concurrent act of the other." 7 Works of Alexander Hamilton 746 (J.

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[8] See also *Youngstown Co.* v. *Sawyer,* 343 U.S. 579, 642, n. 10 (Jackson, J., concurring); Note, *Congress, The President, and the Power to Commit Forces to Combat,* 81 Harv. L. Rev. 1771, 1772-1782 (1968).

Hamilton ed. 1851). The "plain meaning" of the Constitutional grant of power to Congress to declare war, according to Hamilton, was that:

> it is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received: in other words, it belongs to Congress only, *to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary. * * * [*Id.* at 746-747; emphasis in original.]

Both sides of the debate recognize a dividing line between the authority of the President, acting alone, and the authority of Congress. Ordinarily, one might believe that the judicial function permitted both resolution of the debate—that is, a determination how extensive a conduct of hostilities the authority to repel permits—and a decision into which category a particular conflict falls. There are, however, substantial reasons to doubt whether that is a judicially manageable task.

As is well enough known, the doctrine of executive response has been extended well beyond this country's borders, to protect American persons and property wherever found. *E.g.*, *Durand* v. *Hollins*, 8 Fed. Cas. 111 (CC S.D.N.Y.); Memorandum of the Legal Advisor of the Department of State, 75 Yale L. J. 1085 (1966); *Amicus Curiae* Brief on Behalf of the Lawyers Committee on American Policy Toward Vietnam. The determination to station troops in South Vietnam,

a friendly nation, was as much a matter for executive judgment as was Jefferson's decision to send the fleet into the international waters of the Mediterranean.[9] The troops and American property being there, it is at least proper to defend them against attack (Jefferson) if not to take all expedient measures to deal with the aggressor (Hamilton). That in turn calls for decision whether the executive actions taken were strictly "defensive" measures, or whether the opposing forces were properly identified as "the aggressor." [10] In the one case, the Court would have to develop standards which are simply unreal in the face of the exigencies of battle; in the other, it would be delving into questions which—like the recognition of a foreign state, p. 39 *infra*—are suitable only to political decision.

What looks at the outset to be a typical issue suitable for judicial resolution thus appears on closer inspection to be doubtful in the extreme. The recent magnitude of the hostilities cannot be the test; they did not attain that magnitude overnight. The question of executive against congressional authority would have to be resolved at each stage of its devel-

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[9] "Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." *Johnson* v. *Eisentrager*, 339 U.S. 763, 789.

[10] Cf. Stone, *Aggression and World Order* (Berkeley, 1958). This Court would not be called upon to decide who is "the aggressor" in the sense an international tribunal might be asked to resolve that issue. The question here is whether, as a matter of domestic legality, the Court can question the characterization of that issue already made by another branch of government. Cf. pp. 30, 38 *infra*.

opment in the light of the circumstances existing at that stage. At that level, we submit, it is at least uncertain whether the maturing of the asserted congressional duty to participate in authorizing the hostilities can be judicially identified.

2. *Breach of the duty asserted cannot be determined by this Court.*

Assuming it could be decided that a congressional duty to authorize the hostilities has matured, it could not be judicially determined whether Congress has breached that duty. For Massachusetts quite properly does not assert that in order to fulfill its constitutional obligation Congress must pass a formal declaration of war. Instead Massachusetts' brief seems to recognize that the power to "declare War" conferred upon Congress by Article I, Sec. 8 of the Constitution, contains within it the power to determine when and how to declare war. See Br. p. 70.

Indeed, the Constitution does not require Congress to authorize American participation in hostilities only through a formal declaration. *Bas* v. *Tingy*, *supra*, 4 Dall. 39-40, 43-45. Any such requirement would impose unworkable limitations on the nation's conduct of its foreign affairs. As Judge Wyzanski noted in *United States* v. *Sisson*, 294 F.Supp. 511, 515 (D. Mass.), one reason why a formal declaration of war in Indochina might not have been sought is that "[a] declaration of war expresses in the most formidable and unlimited terms a belligerent posture against an enemy." Another reason may be that a declaration of war in Vietnam would have "international implication of vast dimensions," and would "produce consequences

which no court can fully anticipate." *Ibid.*[11] Whatever the reasons, it would be very undesirable for Congress to be limited to authorizing a war effort through formal declaration, and it is not so limited.[12]

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[11] A contrary conclusion has been reached, erroneously in our view, by Judge Sweigert in the Northern District of California. *Mottola* v. *Nixon,* Civ. No. 70-943, decided September 9, 1970. Compare *Berk* v. *Laird,* Civ. No. 70-C-697 (on remand), E.D. N.Y., decided September 16, 1970; the government is having the *Berk* opinion printed and will submit it shortly as a supplement to this brief.

[12] The brief of Massachusetts and the amicus Constitutional Lawyers' Committee on Undeclared War urge that the constitutional vesting of the power to declare war in Congress was designed to give Congress, not the President, the power to initiate combat hostilities, and that Congress should not be placed in the position of having to approve military hostilities which have already been begun. However, in only two wars in American history, at most, has Congress been able to authorize war prior to the commencement of actual hostilities. The Mexican war was begun by executive action in April, 1846 (See President Polk's Message to Congress of May 11, 1846, 15 Cong. Globe, 29th Cong., 1st Sess. 783 (1846)), which Congress ratified on May 13, 1846 (9 Stat. 9-10). See the *Prize Cases,* 2 Black 635, 668. In the Civil War, the South had occupied Fort Sumter, and President Lincoln in April, 1861, had instituted military activities in response, all prior to Congressional authorization of the war in August, 1861 (12 Stat. 326). See the *Prize Cases, supra.* American participation in World War I began with a Congressional declaration that Germany, through "repeated acts of war," had "thrust" a state of war upon the United States, which Congress formally recognized (40 Stat. 1). And in World War II, the Congressional declaration of war (55 Stat. 795-797) followed the Japanese attack on Pearl Harbor. Thus, of the six declared wars in American history (War of 1812, Mexican War, Civil War, Spanish-American War, World War I, and World War II), in only the War of 1812 and the Spanish-American War can it be said that Congress was not faced with recognizing the *fait accompli* of actual hostilities. When one adds the many military actions involving Ameri-

It hardly needs belaboring that Congress has acted consistently, from the beginning of hostilities in 1965 and in very substantial ways, in support of the American effort in Indochina.[13] As Massachusetts' complaint points out, the annual direct cost of that effort increased from $1,700,000,000 for fiscal year 1965 (Complaint, p. 5), to over $19,000,000,000 for fiscal year 1967 (*id.*, p. 6) and over $30,000,000,000 is now being spent annually (*id.*, p. 3). According to the complaint the United States has currently spent a total of over $110,000,000,000 (*id.*, p. 3). The number of American troops in Vietnam has increased from 23,000 at close of 1964 (*id.*, p. 4), to over 500,000 in 1968, and approximately 400,000 are still there (*id.*, pp. 7-8). The funds used to conduct the hostilities were appropriated by Congress, frequently with specific reference to Vietnam,[14] and the manpower used

can troops which were never declared as war, or otherwise preceded by specific congressional directive, it becomes apparent that Congress has almost invariably been in the approving rather than the initiating role. See *Background Information on the Use of United States Armed Forces in Foreign Countries,* Committee Print for the House Committee on Foreign Affairs, 91st Cong., 2d Sess.

[13] *E.g.*, The Southeast Asia Resolution (Gulf of Tonkin), P.L. 88-408, 78 Stat. 384; see Berk v. Laird, *supra,* n. 11.

[14] These funds were not simply provided from general appropriations; Congress explicitly and frequently legislated with particular reference to Vietnam. *E.g.*, an "emergency" supplemental appropriation act of May 7, 1965, appropriated $700,000,000 for use "upon determination by the President that such action is necessary in connection with military activities in southeast Asia," P.L. 89-18, 79 Stat. 109. See also P.L. 89-213, 79 Stat. 863, appropriating 1966 funds for the Department of Defense, with specific reference to Vietnam in a $1,700,000,000 emergency fund in Title V. P.L. 89-367, 80 Stat. 36, authorizing Armed Forces expenditures for

in combat was made available by Congress' extension

FY 1966, stated in Title IV: "Funds * * * under this or any other Act are authorized to be made available for their stated purposes in connection with support of Vietnamese and other free world forces in Vietnam, * * *." A supplemental 1966 appropriation act, P.L. 89-374, 80 Stat. 79, contained similar language in Sec. 102(a). See also Sec. 640(a) of the 1967 appropriation act for the Department of Defense, P.L. 89-687, 80 Stat. 980.

P.L. 90-5, 81 Stat. 5, authorizing Armed Forces expenditures for 1967, contained a statement of policy in Sec. 401, declaring Congress' "firm intentions to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam", and supporting the "efforts being made by the President of the United States * * * to prevent an expansion of the war in Vietnam 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 Vietnam to determine the affairs of that nation in their own way." P.L. 90-22, 81 Stat. 52, authorizing Armed Forces procurement for 1968, specified in Sec. 301 that funds authorized for the use of the Armed Forces "under this or any other Act are authorized to be made available for their stated purposes to support * * * Vietnamese and other free world forces in Vietnam." The 1968 Department of Defense appropriation act, P.L. 90-96, 81 Stat. 231, in Sec. 639(a)(1) contains similar language. P.L. 90-392, 82 Stat. 307, contained in Chapter II an additional supplemental appropriation for 1968 for "Vietnam costs". P.L. 90-500, 82 Stat. 849, authorizing Armed Forces expenditures for 1969, in Sec. 401 authorized the use of funds "to support * * * Vietnamese and other Free World Forces in Vietnam". The 1969 Department of Defense appropriation act, P.L. 90-580, 82 Stat. 1120, Title V, contains similar language in Sec. 537(a)(1). Authorization for Armed Forces expenditures for 1970 is made in P.L. 91-121, 83 Stat. 204, which explicitly authorizes in Sec. 401(a)(1) $2,500,000,000 for use to support "Vietnamese and other Free World Forces in Vietnam". The 1970 Department of Defense appropriation act, P.L. 91-171, 83 Stat. 469, Title VI, Sec. 638(a)(1) provides that appropriations shall be available to support "Vietnamese and other free world forces in Vietnam".

of the draft.[15] In sum, as Judge Wyzanski remarked in *Sisson, supra*, 294 F. Supp. at 514, "What the court thus faces is a situation in which there has been joint action by the President and Congress, even if the joint action has not taken the form of a declaration of war."

The question then becomes whether this observable congressional involvement is sufficient to meet any constitutional requirement of legislative concurrence. While if put to the issue we would argue that it is sufficient,[16] here we suggest that the question cannot be judicially determined. We propose two bases for that conclusion.

First, the same considerations which make plain that Congress is not limited to a formal declaration of war as its sole means of authorizing American par-

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[15] The Military Selective Service Act of 1967, P.L. 90-40, 81 Stat. 100, 50 U.S.C. (App. Supp. V) 451, *et seq.* Until June 1969, Congress also authorized the President to call up the reserves for use in the war. P.L. 89-687, Title I, 80 Stat. 981; P.L. 90-500, Title III, 82 Stat. 850.

[16] Cf. *Brooks* v. *Dewar*, 313 U.S. 354; *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 147; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116; *Ludecke* v. *Watkins*, 335 U.S. 160, 173, n. 19, recognizing the well-established principle that Congress through appropriation acts may ratify actions taken by the executive department. Such a ratification occurs if the appropriation "plainly show[s] a purpose to bestow the precise authority which is claimed", *Ex Parte Endo*, 323 U.S. 283, 303, n. 24. The series of statutes appropriating funds for use of the armed forces in Vietnam (see fn. 7, p. 19, *supra*), clearly bestow such authority for American military participation in Vietnam, as Congress time and again in these statutes specified that the funds were to be used by the armed forces for "support [of] Vietnamese and other free world forces in Vietnam" (*supra*, p. 27, fn. 14). Compare the *Prize Cases*, 2 Black 635, 670.

ticipation in combat, also lead to the conclusion that no particular form of authorization is necessary. Like the decision to declare war, decisions regarding the form and substance of congressional enactments authorizing hostilities are determined by highly complex considerations of diplomacy, foreign policy and military strategy inappropriate to judicial inquiry. For this Court to impose formal requisites of action would be to straitjacket the nation in "this vast external realm," *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319, in which flexibility of action in dealing with other sovereigns is essential.

Given that in this respect the Congress shares power with the Executive in directing state affairs, their mutual action ought not to be hindered by judicial inquiry or intrusion.[17] See *Chicago & Southern Air Lines* v. *Waterman SS. Corp.*, 333 U.S. 103, 111; *Coleman* v. *Miller*, 307 U.S. 433, 454; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302; *Pauling* v. *McNamara*, 331 F.2d 796 (C.A.D.C.), certiorari denied, 377 U.S. 933; See also *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 635-637. That is, the question how, or in what form, to authorize hostilities is an essentially political one. Unless in some extreme case—unlike this one—Congress has done nothing whatever which could be interpreted as authorizing a war, or has explicitly placed itself in conflict with the Execu-

[17] The scope of possible intrusion is revealed by the three-page proposed "manageable standard" suggested by the American Civil Liberties Union and the Civil Liberties Union of Massachusetts, *amici curiae*, Br. pp. 12-14. That standard was properly rejected as unmanageable, for the reasons given above, in *Berk* v. *Laird*, *supra*, n. 11.

tive, the judicial branch cannot determine whether or not its actions satisfactorily demonstrate that "this nation has 'made up its mind in an adequate way.'" (Mass. Br. p. 70).

Second, any inquiry into the motives or practical freedom of Congress in enacting apparently authorizing legislation is also foreclosed. Massachusetts' case rests on the proposition that all present legislative expressions of support for American participation in the hostilities can be dismissed as coerced on the ground that "as a practical matter, Congressmen have no alternative but to support our fighting men." (Br. p. 84).

> But it is idle to suggest that the Congress is so little ingenious or so inappreciative of its powers, including the power of impeachment, that it cannot seize policy and action initiatives at will, and halt courses of action from which it wishes the national power to be withdrawn. * * * [Evidence of] a charge of Congressional pusillanimity * * * and its extent and validity are not to be supposed, could only disclose the motive and could not disprove the fact of authorization. The Constitution presents the Congress with the opportunity for it, but it cannot compel the making of unpopular decisions by the members of Congress. * * *

Orlando v. *Laird*, Civ. No. 70 C 745, E.D.N.Y., decided July 1, 1970, slip op., pp. 16-18; see also Jones, *The President, Congress and Foreign Relations*, 29 Cal. L. Rev. 565, 577 (1941); Corwin, *The President: Office and Powers*, 210-211 (1941). The inquiry which Massachusetts proposes—and which would be required to impugn the statements repeatedly made by Congress

in the cited legislation, n. 14 *supra.*—is in itself as assault upon the dignity of a coequal and independent branch, and for that reason should not be undertaken. See *Field* v. *Clark*, 143 U.S. 649, 672-673; *Baker* v. *Carr*, 369 U.S. 186, 214-215.

In this respect the issue here is quite different from that in *Greene* v. *McElroy*, 360 U.S. 474, on which Massachusetts relies. There, the Court was concerned whether Congress had authorized executive action—the establishment of an industrial security program—which omitted "traditional safeguards of due process" in its dealings with individuals. 360 U.S. at 506-508. Such a program raised serious constitutional doubts, which the Court was unwilling to face in the absence of a clear congressional judgment that that particular feature was essential. But there is no doubt here that Congress has used language authorizing American participation in the hostilities; the issue is whether, in view of supposed influences on its freedom of action, that language should be given operative force. The question of authorizing that participation is not one which it could rationally be believed Congress overlooked; it is the subject of daily debate, and a pivotal issue in election campaigns.

3. *Effective judicial relief cannot be ordered in this case.*

Even assuming that this Court could find a congressional duty to authorize American participation in Vietnam and determine its breach, the Court could not mold effective "protection" for the right Massachusetts asserts. Massachusetts seeks (1) a declaration that the United States' present participation in

the Vietnam hostilities is unconstitutional, and (2) an injunction enjoining the Secretary of Defense from (a) increasing the present level of the United States troops in Indochina and (b) from ordering any inhabitant of Massachusetts to Vietnam absent effective congressional action (Complaint, p. 12).

At the outset, it is clear that injunctive relief could not properly be granted. If the Secretary of Defense were enjoined from sending Massachusetts citizens to Vietnam, the result would be to place an additional burden on citizens of other states. Even if it were otherwise appropriate to broaden the requested injunction to cover citizens of all states, such an injunction would, in effect, mandate the withdrawal of all United States forces from Vietnam within a one-year period, the standard tour of duty of an American soldier in Vietnam. As the President has repeatedly emphasized in his ongoing dialogue with Congress, announcement of a total withdrawal within a short, definite period of time could entail disastrous diplomatic, political and military consequences for the United States.

Even assuming an injunctive remedy could be devised with sufficient flexibility to prevent military and political disaster (in plaintiff's words, within a "reasonable time," see Br., p. 34), this Court would face insurmountable enforcement difficulties. Judicial supervision of a withdrawal from Vietnam would entail unthinkable complexities and a possible confrontation of massive scope. The Court might have to set up its own office of military affairs and supervise the vast and intricate process of military disengagement. It might have to provide officials to carry on diplomatic

discussions with the North Vietnamese and other governments. Entirely aside from practical difficulties, any such steps would constitute a serious breach of the "fundamental division of authority and power established by the Constitution * * *" which "precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power * * *" *Luftig* v. *McNamara*, 373 F.2d 664, 665-666 (C.A. D.C.).[18] See also *Velvel* v. *Johnson*, 287 F.Supp. 846 (D. Kans.), affirmed, 415 F.2d 236 (C.A. 10), certiorari denied, 396 U.S. 1042; *Simmons* v. *United States*, 406 F.2d 456, 460 (C.A. 5), certiorari denied, 395 U.S. 982; *Ashton* v. *United States*, 404 F.2d 95 (C.A. 8), certiorari denied, 394 U.S. 960; *United States* v. *Sisson*, *supra*; compare *Berk* v. *Laird*, C.A. 2, No. 35,007, decided June 19, 1970 (on preliminary injunction) with *Berk* v. *Laird*, *supra* n. 11 (on remand).

The possibility that Congress would remedy any deficiency in authorization by further acts presents questions equally unsuitable for judicial consideration. One may readily suppose that Congress would continue to act in conjunction with the Executive, through the appropriation of funds, the authorization of manpower and other cooperative measures. On the basis

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[18] The President has already embarked on a course of action designed to terminate our involvement in Vietnam combat. Over 100,000 United States troops have been withdrawn and the President has announced his intent to withdraw an additional 150,000 troops by April 20, 1971. The President's Interim Report to the Nation, June 3, 1970, Weekly Compilation of Presidential Documents, Vol. 6, No. 23, p. 721, June 8, 1970. The President has pledged "to end the war in a way that will promote peace rather than conflict throughout the world." *Id.*, p. 724.

of such congressional action, taken after the Court's decree that American participation in the hostilities is unconstitutional, it might well be contended that Congress has ratified the combat effort. If the government were then to bring an action to modify a declaratory judgment or to dissolve an injunction ordered by this Court, or if the government were to raise the subsequent congressional authorization as a defense to an enforcement action for violation of the Court's decree, this Court would once again confront the non-justiciable questions of foreign policy and congressional motive involved in an evaluation of congressional expressions concerning American participation with hostilities. See pp. 24-31, *supra*.

In these circumstances, a declaratory judgment would be inappropriate. In *Powell* v. *McCormack*, *supra*, this Court spoke in broad terms about the availability of a declaratory judgment in the absence of other relief and regardless "of whether other forms of relief are appropriate." 395 U.S. at 518. In *Powell*, however, the Court was adjudicating the well-defined rights of one man in a situation in which it was by no means certain that those rights could not be vindicated in further judicial proceedings as a result of the declaratory judgment. In the instant case, Massachusetts asserts a right claimed in behalf of millions of its citizens to end the American presence in Vietnam. The judiciary could do no more than to announce the right. "[N]o principle of constitutional law has been more firmly established or constantly adhered to, than * * * that this Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legis-

lature to carry its opinion into effect or not, at the pleasure of Congress." *Gordon* v. *United States*, 117 U.S. 697, 704. Compare Jaffe, *Judicial Control of Administrative Action* 490-494 (1965).

B. *Massachusetts' Complaint Requires This Court to Decide Non-Justiciable Political Questions*

We believe it clear on the above analysis that the claims Massachusetts presents and the relief it seeks are not of the type which admit of judicial resolution. That analysis can be restated in terms of the six standards which this Court stated in *Baker* v. *Carr*, 369 U.S. 186, 217, denote the presence of a non-justiciable political question:

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

Each of the six is "inextricable from the case at bar." *Ibid.*[19]

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[19] Compare Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338 (1924); Weston, *Political Questions*, 38 Harv. L.

1. *A textually demonstrable constitutional commitment of the issue to a coordinate political department.*

As shown above, pp. 24-32 the power of Congress "To declare War" includes a power to determine, free of judicial interference, the form which its authorization of hostilities will take. The power of the President, pp. 18-24, includes the power to repel attacks on American citizens and property, wherever located, and to determine when such attacks have occurred.[20] And Congress and the President, together, control the nation's conduct in "the vast external realm" in which this Court repeatedly has stated it cannot interfere. *Curtiss-Wright Corp., supra,* 299 U.S. at 319; cases cited, p. 29 *supra.* Acceptance of any one of these propositions indicates a "textually demonstrable constitutional commitment of the issue to a coordinate

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Rev. 296 (1925); Finkelstein, *Further Notes on Judicial Self-Limitation,* 39 Harv. L. Rev. 221 (1925).

[20] See *Martin* v. *Mott,* 12 Wheat. 19, 29-30:

> If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge * * * or is it to be considered as an open question * * *? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. * * *

See also *Johnson* v. *Eisentrager,* 339 U.S. 763, 789.

political department." Certainly, this Court should not undertake to decide when and how war should be declared, or that more limited steps cannot first be taken without such a declaration.

2. *A lack of judicially discoverable and manageable standards for resolving the issue.*

For the reasons shown above, pp. 24-32, it is clear that judicial standards do not exist for determining whether Congress has done "enough" to authorize American participation in hostilities for which its authorization might be required; and, pp. 18-24 *supra*, it is at least doubtful whether such standards exist for determining whether congressional authorization is required for hostilities which begin by attacks on American citizens or property. The search for such standards would involve the Court in inquiries which, in themselves, are inappropriate for the judicial branch by requiring it to question the judgment, honesty, or motives of a coordinate branch. The question is one as to which only Congress can effectively determine whether power was delegated or not, or necessary or not.

3. *The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.*

Characterizing the issue as "simply whether the executive has the constitutional authority to send inhabitants of Massachusetts to participate in the Vietnam war" (Br. 31), Massachusetts insists that this implicates no policy determinations but only questions of law. Behind that apparently straightforward issue, however, lie others, necessary to its decision, which

would involve the judiciary in matters of policy. Thus, assuming it was the executive only that acted, it would be necessary to decide whether the American participation in the hostilities is "defensive" or not, whether the opposing forces are "the aggressor," and other issues of like import. *Supra*, p. 23. These are issues the President may decide in committing American troops to battle; they are matters of transparent importance to our posture in foreign affairs. To permit the President's decision to be subject to judicial review could prejudice the most important matters of state. *Martin* v. *Mott, supra*; *Durand* v. *Hollins, supra.*

In addition, as we have seen, there has in fact been affirmative congressional involvement at all stages of the hostilities. How Congress couches the authorization which it confers is itself, for the reasons already set out, pp. 24-32 *supra*, a policy determination of a kind not meet for judicial reexamination. This is archetypally a decision "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility * * *." *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111.

4. *The impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government.*

We have already shown how the inquiry Massachusetts proposes into the effectiveness of the congressional authorizing statutes would, necessarily, entail great disrespect to that branch. *Supra*, p. 30. It should be apparent that the same disrespect would be inherent in any attempt to go behind the various statements of the Executive which bear both on its au-

thority to act and the nation's posture in world affairs—for example, whether North Vietnam has been the aggressor, or whether there have been sudden attacks, in the various situations which have led to the further involvement of American troops. *Field* v. *Clark, supra*; *Luther* v. *Borden, supra,* 7 How. at 43.

5. *Unusual need for unquestioning adherence to a political decision already made.*

This suit challenging the legality of the use of American troops in Vietnam is not a case that merely "touch[es] foreign relations," *Baker* v. *Carr, supra,* 369 U.S. at 211; it involves a direct challenge to the Executive's conduct of those relations. An analogy may be found in the cases which refuse to examine the decision of the executive as to recognition of a foreign state. *E.g., Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 410; *National City Bank* v. *Republic of China,* 348 U.S. 356, 358; *Ricaud* v. *American Metal Co.,* 246 U.S. 304; *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 137-138; *United States* v. *Pink,* 315 U.S. 203. This matter of recognition of foreign governments "strongly defies judicial treatment". *Baker* v. *Carr, supra,* 369 U.S. at 212. Irreparable damage in the conduct of American foreign policy would obviously be caused if the Executive recognized one foreign government, and the Judiciary another.

Similarly, here, the adverse consequences upon this nation's foreign relations would be immense if the decision to commit troops in support of the government in South Vietnam were to be subject to judicial challenge. No friendly nation could remain assured of

American military assistance in the case of aggression until there had been a judicial test in this country of the legality of American assistance. The credibility of American promises to its allies through the world would be debased. Surely, therefore, our presence in Vietnam is a matter which presents the strongest kind of situation of "unusual need for unquestioning adherence to a political decision already made." *Baker* v. *Carr*, *supra*, 369 U.S. at 217.

6. *The potentiality of embarrassment from multifarious pronouncements by various departments on one question.*

In no field more than foreign affairs have the courts exhibited a strong concern for avoidance of determinations which will cause embarrassment to the Executive. *E.g.*, *Ex Parte Peru*, 318 U.S. 578 (judicial inquiry into claim of sovereign immunity concerning Peruvian vessel precluded by position of State Department); *Mexico* v. *Hoffman*, 324 U.S. 30 (judicial inquiry into claim of sovereign immunity concerning Mexican vessel permissible where does not conflict with State Department position); *Banco Nacional de Cuba* v. *Sabbatino*, *supra* (court will not inquire into validity of internal act of foreign state). In *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, discussing issues of international law, this Court observed that "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." 376 U.S. at 428. Conversely the more important the implications of an issue are for our foreign relations, the stronger the justification for judicial abstinence. There are few present issues

with more important implications for American foreign policy than our efforts in Vietnam. Any conclusion by this Court questioning the legality of this government's action in Vietnam—particularly if, as appears necessary, it entailed the reexamination of official statements and acts—could only cause the most extreme embarrassment to this nation in its present and future conduct of foreign affairs. It would, as well, be an unprecedented instance of judicial action in a field far removed from the area of special judicial competence.

CONCLUSION

In sum, we submit that the constitutionality of the American military presence in Vietnam is a non-justiciable issue which cannot be decided by this Court. This conclusion follows from each one of the six tests of whether an issue presents a non-justiciable political question, and from the general test of justiciability. *Baker* v. *Carr*, *supra*; *Powell* v. *McCormack*, *supra*. This in no way means, however, as Massachusetts would have this Court believe, that the grant of power to Congress in Article I, Sec. 8 "To declare War" is thereby rendered meaningless. As this Court has recognized, there are certain provisions of the Constitution which are to be enforced exclusively by the political departments of the Government. *Baker* v. *Carr*, *supra*; *Luther* v. *Borden*, *supra*. This does not mean that they are unenforceable; simply that they are unenforceable through judicial means.

The Congressional power "To declare War" is virtually a self-enforcing provision of the Constitution. For Congress possesses the "constitutional arms

for its own defense" from executive encroachment. Federalist No. LXXIII, Vol. 2, p. 71 (1914 ed.). A President has great responsibilities, and many instances in our history show that these responsibilities are supported by adequate powers. Within the very widest limits, the President should not be hemmed in by the prospect of judicial supervision in the exercise of these powers. Indeed, this is the essence of Executive authority, exercised by one of the three great and coordinate branches of the government. Despite his considerable powers, however, no President has the ability to engage this country in prolonged hostilities without the support of Congress. A President violates the constitutional powers of Congress in this area at his peril—and Congress is the best judge of whether there has been a violation. This is an issue that should be resolved by the Congress and the Executive, and not by the Judiciary.

The motion for leave to file the complaint should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ROBERT V. ZENER,
ROBERT E. KOPP,
Attorneys.

SEPTEMBER 1970.

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