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 A COMPLAINT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMICI CURIAE

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INDEX

PAGE

Interest of Amici Curiae 1

Statement 2

ARGUMENT

I. The Commonwealth of Massachusetts has standing to bring this suit 3

II. The issue of the constitutionality of the Vietnam War does not present a non-justiciable political question 5

III. A manageable and discoverable standard exists for joint legislative-executive action to authorize various levels of military activity and such standard has been violated in the Vietnam War 10

IV. United States participation in the Vietnam War is unconstitutional 16

A. The Executive Cannot Wage War Without Congressional Authorization 16

B. The Gulf of Tonkin Resolution Is Not Equivalent to a Declaration of War 18

C. War Appropriation Measures Are Not a Constitutional Substitute for Express Congressional Authorization of the Vietnam War .. 20

CONCLUSION 26

APPENDIX A 27

APPENDIX B 35

Table of Authorities

PAGE

Cases:

Baker v. Carr, 369 U.S. 186 (1962) 5, 6
Berk v. Laird, Docket No. 35007 (2d Cir. June 19, 1970) 2, 5, 10, 16
Berk v. Laird, Civil Action No. 70C 697 (E.D.N.Y. 1970) 11, 12, 20, 25

Ex parte Endo, 323 U.S. 283 (1944) 23
Ex parte Milligan, 4 Wall. 2 (1866) 7

Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945) 3, 4
Greene v. McElroy, 360 U.S. 474 (1959) 23, 24

Orlando v. Laird, No. 70C 745 (E.D.N.Y. July 1, 1970) 17, 18, 20, 25

Pauling v. McNamara, 331 F.2d 796 (D.C. Cir. 1964) 8

United States v. Bolton, 192 F.2d 805 (2d Cir. 1951) 2

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 7, 8, 18

Constitutional Provision:

United States Constitution

Article I, Section 8, Clause 11 22

Statute:

P.L. 88-408, 78 Stat. 384 18

PAGE

Other Authorities:

115 Cong. Rec. 17243 (June 25, 1969) 25

116 Cong. Rec. S 9591 (daily ed. June 23, 1970) 19

116 Cong. Rec. S 11988 (daily ed. July 23, 1970) 25

Sen. Report No. 91-129, 91st Cong., 1st Sess. 15

Sen. Report No. 91-872, 91st Cong., 2d Sess. (1970) 19

S. Res. 85, 91st Cong., 1st Sess. (April 16, 1969) 15

2 Farrand, *Records of the Federal Convention of 1787*, p. 318 23

Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. (1967) 18

Morris, ed. *Alexander Hamilton and the Founding of the Nation*, 256 (1957) 18

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Interest of Amici Curiae*

For a half century the American Civil Liberties Union has defended the rights protected by the Bill of Rights. The ACLU has consistently sought to defend the liberties of the people in the face of the government's assertion of its war power. Indeed the ACLU was founded in the crucible of the First World War to defend the rights of conscientious objectors to that war.

It is the position of the ACLU that the Vietnam War pervasively jeopardizes the exercise of civil liberties in our

* Letters from both parties consenting to the filing of this brief have been filed with the Clerk of the Court.

country and that the war violates the people's sovereignty because their power to declare war, constitutionally delegated to the Congress, has been denigrated by presidential usurpation. For those reasons, it has supported challenges to the legality of the Executive's conduct of that war and supports the motion of the Commonwealth of Massachusetts for leave to file a complaint in the instant action.

Statement

This case is brought before the Court on the motion of the Commonwealth of Massachusetts to file a complaint in order to secure a judicial determination whether the United States participation in the Vietnam War is constitutional.* Until the summer of 1970 federal courts had universally refused to inquire into the legality of the Vietnam War on the ground that the problem was a political question not cognizable by a federal court. However, on June 19, 1970 the Second Circuit (while denying a motion for a preliminary injunction) held in *Berk* v. *Laird,* Docket No. 35007, that a soldier with orders to proceed to Vietnam could challenge those orders in a federal action. It said "this court indicated in *Bolton* [*United States* v. *Bolton,* 192 F.2d 805 (2d Cir. 1951)] that 'any question as to the legality of an order sending men to Korea to fight in an "undeclared war" should be raised by someone to whom such an order has been directed.' 192 F.2d at 806 (dictum). The rule should be the same for a soldier ordered to Vietnam under allegedly similar circumstances." (Slip opinion at 3386.) (The full text of the Second Circuit's opinion is set out in the appendix, *infra.*)

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* The Massachusetts enabling legislation is set out in the Appendix, *infra.*

The Second Circuit's opinion and subsequent proceedings in the district court (described below) show that the basic legal issues surrounding the Vietnam War are well within the judicial competence of the federal courts. They involve an interpretation of distinct constitutional language concerning which a wealth of historical material exists. They also involve an analysis of recent Congressional action in the form of treaties, resolutions and appropriations bills, the interpretation of which has always been a judicial function. In short there is no particular difficulty nor a lack of judicial tools available to determine this crucial issue which has so perplexed the nation.

ARGUMENT

I.

The Commonwealth of Massachusetts has standing to bring this suit.

Amici support the position of the Commonwealth of Massachusetts that it has standing to bring this original action. This Court held in *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945) that a State could sue alleged anti-trust co-conspirators fixing discriminatory freight rates against the State if that conspiracy had an adverse effect upon the economy of the state.

> "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia had an interest apart from that of particular individuals who

> may be affected. Georgia's interest is not remote; it is immediate." 324 U.S. at 451.

It is obvious that the legality of the Vietnam War is of "grave public concern." Furthermore, there are numerous direct injuries to the Commonwealth resulting from the Vietnam War. Many of its citizens have lost their lives. Tax revenues have been depleted since Massachusetts inhabitants serve in the war at salaries greatly reduced from what they would earn as civilians. Federal programs which would directly benefit the Commonwealth have been curtailed because of the great financial drain of the Vietnam War. The Commonwealth has had to spend additional funds for police protection as a result of mass public demonstrations against the prosecution of the war. The economy of the Commonwealth has been adversely affected because of the diversion of funds caused by increased federal taxes used to prosecute the war.

The Commonwealth also seeks to represent the interests of the thousands of Massachusetts inhabitants who are serving or will serve in the Vietnam War. Many of them have been or will be wounded and disabled. Their dependents and families who are Massachusetts residents have and will suffer from casualties inflicted on their husbands, fathers or sons, or at the least as a result of the reduced salaries their breadwinners will receive as soldiers. Massachusetts asserts that its residents have also suffered from increased federal taxes, from inflation, from injuries due to anti-war demonstrations and from thousands of other ways in which this war has divided the people and threatened the shared values of this society. The Commonwealth must be permitted to defend these interests.

II.

The issue of the constitutionality of the Vietnam War does not present a non-justiciable political question.

In *Berk* v. *Laird, supra,* the government argued before the Second Circuit that the legal issues of the Vietnam War were non-justiciable because the problem was a political question. The government relied upon the six-fold test of *Baker* v. *Carr,* 369 U.S. 186, 217 (1962):

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

However, the Second Circuit rejected the notion that *Baker* v. *Carr* required a dismissal of the action. The court said:

> "the issue on this appeal is not whether the courts are empowered to 'second-guess' the President in his decision to commit the armed forces to action, but whether

> they have the power to make a particular kind of constitutional decision involving the division of powers between legislative and executive branches. . . . the power to commit American military forces under various sets of circumstances is shared by Congress and the executive. History makes clear that the congressional power 'to declare War' conferred by Article I, section 8, of the Constitution was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative which was enjoyed by the British sovereign. Although Article II specifies that the President 'shall be Commander in Chief of the Army and Navy of the United States' and also vests the 'executive power' in him and requires that he 'take Care that the Laws be faithfully executed,' these provisions must be reconciled with the congressional war power . . . Since orders to fight must be issued in accordance with proper authorization from both branches under some circumstances, executive officers are under a threshold constitutional 'duty [which] can be judicially identified and its breach judicially determined.' *Baker* v. *Carr, supra,* 369 U.S. at 198. . . . If the executive branch engaged the nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for *some* mutual participation by Congress in accordance with Article I, section 8." Slip opinion at 3382-83.

The Second Circuit's comments dispose of five of the six tests laid out in *Baker* v. *Carr*. Clearly if the Executive has exceeded his authority under the Constitution in en-

gaging and carrying on a war without required Congressional action, a court could determine that question. The issue is not whether the decision to fight in Vietnam was wise or not, but how certain powers are distributed under the Constitution—a question not committed to any other branch but the judiciary. Nor does resolution of this issue involve a policy determination of a kind clearly for non-judicial discretion. The issue concerns only the reach of executive power under the Constitution. As this Court noted in *Ex parte Milligan,* 4 Wall. 2, 139 (1866), "But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President."

A similar problem arose in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), where this Court enjoined the Secretary of Commerce from seizing and operating a number of the nation's steel mills. The President sought to sustain his power to act in that instance squarely on the war power, asserting that steel was essential to the war effort then being conducted in Korea. Nonetheless, this Court decided that under the Constitution the question of whether the steel mills should be seized was committed to Congress. This Court granted the injunction, based on its view that the Executive had exceeded its constitutional powers. The only substantial difference between that case and this one is that in *Youngstown* the Court was dealing with the use of steel, and here we are dealing with human lives. Nowhere did this Court suggest in *Youngstown* that the issues presented were non-justiciable because the President had made a non-judicial policy determination in seizing the steel mills.

This case does not involve a challenge to some aspect of national or foreign policy (such as *Pauling* v. *McNamara*, 331 F.2d 796 (D.C. Cir. 1964), a suit to enjoin the United States testing of nuclear weapons). Nor is there any secret factual information only in the hands of the Executive. The Court in *Youngstown* had no more information before it has in the instant case. It must know simply that a war exists, that it was commenced and carried on by the Executive without explicit Congressional approval.

This Court would not be expressing a lack of respect due coordinate branches of the government when it determines the kind of executive—legislative "mix" required to authorize a war on the level of the Vietnam hostilities. In point of fact, both branches of government may welcome a judicial determination of this question to guide their own actions for the future. In any event, a constitutional interpretation of the separation of powers between the executive and the legislative could not conceivably involve any "disrespect" of either branch.

This Court's decision in *Youngstown* also made clear that there is no need in the present case for unquestioning adherence to a political decision made by the President. Justice Frankfurter pointed out in his concurring opinion that "to deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power which presumably only avowed great public interest brings into action." 343 U.S. at 596. A determination that executive action alone cannot authorize the Vietnam War and that explicit Congressional approval must be forthcoming would

simply shift the responsibility back to the branch of government required to make the appropriate decision. It would be a determination that the appropriate "political decision" has not been made by the branch of the government to whom it is properly entrusted.

In addition, this Court has a wide discretion to frame appropriate relief, including merely declaratory action, a conditional decree or the grant of sufficient time to permit the other branches of government to resolve the problem. Such an approach would mitigate against any conclusion that unquestioned adherence to the executive's decision is required.

Finally, there is no question of multiple pronouncements by various departments on one question. In fact, a judicial determination of this issue may resolve the executive-legislative conflict which has continued for many years as to the proper scope of executive action in Vietnam. In short, a final judicial determination by this Court may well reduce the myriad conflicting voices that have spoken on this issue for the past six years.

III.

A manageable and discoverable standard exists for joint legislative-executive action to authorize various levels of military activity and such standard has been violated in the Vietnam War.

The only question left open by the Second Circuit in *Berk* v. *Laird* with respect to the political question doctrine was whether manageable standards exist to determine what joint legislative-executive action is sufficient to authorize various levels of military activity:

> "The political question doctrine itself requires that a court decline to adjudicate an issue involving a 'lack of judicially discoverable and manageable standards for resolving it,' *Baker* v. *Carr, supra,* 369 U.S. at 217. If the executive branch engaged the nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for some mutual participation by Congress in accordance with Article I, section 8. But in this case, in which Congress definitely has acted, in part expressly through the Gulf of Tonkin Resolution and impliedly through appropriations and other acts in support of the project over a period of years, it is more difficult for Berk to suggest a set of manageable standards and escape the likelihood that his particular claim about this war at this time is a political question. It may be that he will be able to provide a method for resolving the question of when specified joint legislative-executive action is sufficient to authorize various

> levels of military activity, but no such standard has as yet been presented to us, although we do not foreclose the possibility that it can be shown at the hearing on the permanent injunction. Even if a distinction can be drawn between offensive and defensive conflicts and if some rather explicit congressional authorization is required for the former, there still remains the problem of determining whether a broad approving resolution followed by non-repeal meets the proposed criterion of 'explicit' approval. See *United States* v. *Sisson,* 294 F. Supp. 511, 515 (D. Mass. 1968)." (Slip opinion at 3383-84.)

Subsequent to the Second Circuit opinion, the government moved in the district court to dismiss the action and in the alternative for summary judgment on the ground that no manageable standard exists for resolving the issues brought before the court.* Plaintiff Berk submitted an elaborate brief and appendix and many detailed affidavits in support of his contention that an appropriate standard does exist and had been violated in the Vietnam War. (The standard is laid out below.) During the course of the oral argument on the government's motion held on July 22, 1970, the government argued that executive actions taken in the Vietnam War fit within the standard proposed. But when asked specifically whether it wished to offer any challenge to the standard, the government declined:

> "The Court: The Israel affidavit offers to produce testimony at the trial with respect to the basic historical facts upon which a manageable standard can be built.

* As of September 1, 1970 no decision has been handed down by the district court on that motion.

> "There is a standard set forth in the plaintiff's brief and you have said that you think you come within the requirements of Article III of the standards.
>
> "Is there anything else you want to submit with respect to the manageable standard?"
>
> Mr. Neaher [United States Attorney for the Eastern District of New York]: "I think not, your Honor." Record of proceedings, *Berk* v. *Laird,* Civil Action No. 70 C 697 (E.D.N.Y. 1970) p. 83.

The court also remarked to plaintiff Berk's counsel in the course of the oral argument:

> "The Court: . . . I think you set forth a standard that could be applied." (Record of proceedings, pp. 57-58.)

The standard proposed is as follows:

> I. The Executive department can commit the military forces of the nation to armed hostilities abroad without explicit Congressional approval in the following instances:
>
> A. to repel sudden attack upon the United States, its territories, possessions, military forces or vessels;
>
> B. to protect American citizens or property from temporary threat of violence or, by limited use of force, to redress maltreatment of American citizens abroad;
>
> C. to pursue politically unorganized pirates, bandits or similar groups attacking American citizens or property;

D. in an emergency to protect American interests where prior Congressional approval would not be feasible because of the need for immediate action and/or secret planning. However, ratification and further authorization by Congress of Executive action must take place as soon as possible after the need for immediate action and/or secret planning has passed.

II. A. Explicit Congressional approval either through a declaration of general war or limited war or by treaty, law or resolution explicitly authorizing the use of military forces is necessary to permit the Executive to commence armed hostilities abroad in the following instances:

(1) to attack or to commit an act of war against any organized state or the forces thereof except in the instances outlined in Section I above;

(2) to come to the aid of any sovereign nation to protect such nation from internal or external attack, except in the instances outlined in Section I;

(3) in all instances other than those outlined in Section I.

B. Congressional approval need not be prior in time to Executive action taken under this section (except as noted in Section III below) but such ratification or further authorization must take place within a reasonable time after such action is commenced.

C. In no event can appropriations or other acts in and by themselves be considered adequate Congressional approval unless they explicitly and by their own terms authorize, sanction and/or direct military action.

III. Prior explicit Congressional approval either through a declaration of general war or limited war or treaty, law or resolution explicitly authorizing the use of military forces is necessary to permit the Executive to commence armed hostilities abroad in the following instances:

A. to initiate and carry on hostilities of the highest magnitude, involving the commitment of large numbers of troops, great amounts of military equipment, or the nation's most powerful weapons, unless emergency Executive action is necessary, in which case explicit Congressional approval must be obtained as soon as practicable;

B. in the event military hostilities commence at a low level of magnitude by Executive action alone or under limited Congressional authorization, it is necessary to obtain prior explicit Congressional approval before hostilities can be escalated into military action of the highest magnitude, unless emergency Executive action is necessary, in which case explicit Congressional approval must be obtained as soon as practicable.

In support of the standard plaintiff Berk made a detailed historical study of the framing and ratification of the war power clauses of the Constitution, a careful study of the use of the executive war power in American history with extensive citation of presidential statements and messages concerning the extent of the executive's power to initiate armed hostilities abroad. It also analyzed the current treaty commitments of the United States, and their relation to constitutional dictates on the commencement

of armed hostilities. The brief also examined all the instances of congressional authorization of executive military action since World War II. This material was designed to show how executive action in the Vietnam War has been completely unique and out of step with historic precedent and constitutional dictates. (Amici propose to submit a full-scale brief in support of the proposed standard if the Commonwealth of Massachusetts is permitted to file its complaint in the instant action.) Plaintiff Berk's analysis fully confirms the conclusion of the Senate Foreign Relations Committee which stated in its National Commitments Report (Senate Report No. 91-129 to accompany S. Res. 85, 91st Cong., 1st Sess., April 16, 1969, p. 31):

> " . . . the founders of our country intended decisions to initiate either general or limited hostilities against foreign countries to be made by the Congress, not by the executive. Far from altering the intent of the framers, as is sometimes alleged, the practice of American Presidents for over a century after independence showed scrupulous respect for the authority of the Congress except in a few instances. The only uses of military power that can be said to have legitimately accrued to the executive in the course of the nation's history have been for certain specific purposes such as suppressing piracy and the slave trade, 'hot pursuit' of fugitives, and, as we have noted, response to sudden attack. Only in the present century have Presidents used the Armed Forces of the United States against foreign governments entirely on their own authority, and only since 1950 have Presidents regarded themselves as having authority to commit the Armed Forces to full-scale and sustained warfare."

IV.

United States participation in the Vietnam War is unconstitutional.

A. *The Executive Cannot Wage War Without Congressional Authorization.*

Nothing could be clearer under the Constitution than that the President cannot initiate and carry on a war of the dimensions of the Vietnam hostilities without explicit congressional authorization. As the Second Circuit pointed out in *Berk* v. *Laird*: "If the executive branch engaged the nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for some mutual participation by Congress in accordance with Article I, section 8." Slip opinion at 3383. In another case from the Eastern District of New York which denied a preliminary injunction to keep a soldier from being sent to Vietnam, the court stated:

> "Neither the language of the Constitution nor the debates of the time leave any doubt that the power to declare and wage war was pointedly denied to the presidency. In no real sense was there even an exception for emergency action and certainly not for a self-defined emergency power in the presidency. The debates, so often strangely—to our ears—devoid of respect for and alive with fears of the presidency that the Convention was forming, are clear in the view that (as Wilson put it) the power to make war and peace are legislative (1 Farrand, Records of the Federal Convention of 1787 (Rev. Ed. 1937, Repr. 1966) 65, 73).

> The issue was where to poise it. Mason was concerned that 'The purse and the sword ought never to get into the same hands (whether Legislative or Executive).' 1 Farrand 139-140. The draft presented by the Committee of Detail on August 6, 1787, express the power as the power 'To make war' (2 Farrand 182) and on August 17th that language was amended (2 Farrand 318-319) to read 'To declare war'—Madison and Gerry so moving on the ground of its 'leaving to the Executive the power to repel sudden attacks'; Sherman thought 'make' the better word for the amenders' purposes—'The Executive shd. be able to repel and not to commence war. "Make" better than "declare" the latter narrowing the power too much'; to which Gerry answered that he 'never expected to hear in a republic a motion to empower the Executive alone to declare war'; . . . ." *Orlando* v. *Laird,* No. 70C 745 (E.D.N.Y. July 1, 1970), pp. 9-10.

Some years after the Philadelphia Convention, Alexander Hamilton explained the distinction between the Presidential and Congressional war powers:

> " 'The Congress shall have the power to declare war'; the plain meaning of which is, that it is the peculiar and inclusive duty 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." Morris, ed. *Alexander Hamilton and the Founding of the Nation,* 256 (1957).

An analysis of the framing and ratification of the Constitution referred to in the *Orlando* opinion above plus this Court's decision in *Youngstown* where the issue of the reach of the executive war power was squared faced make clear that the executive alone cannot engage the nation in a major war without congressional authorization.

B. *The Gulf of Tonkin Resolution Is Not Equivalent to a Declaration of War.*

The Gulf of Tonkin Resolution of August 10, 1964 (P.L. 88-408, 78 Stat. 384) has been cited as the functional equivalent of a declaration of war. However, there is serious question whether there is any legal viability to such a claim. President Johnson himself said in a news conference on August 18, 1967:

> "We did not think the resolution was necessary to do what we did and what we are doing. But we thought if we are going to ask them to stay the whole route, and if we expected them to be there on the landing, we ought to ask them to be there for takeoff." Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. (1967) 126 (the National Commitment Hearings).

On March 12, 1970, in response to his letter to the State Department about the Senate Joint Resolution 166 to repeal the Gulf of Tonkin Resolution, Senator Fulbright received a letter from H. G. Torbert, Jr., on behalf of the State Department, which stated:

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

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

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

It is one thing for spokesmen of the Executive Department to claim in a political speech that the Gulf of Tonkin Resolution is not authority for continued actions in Vietnam. It is quite another for the Administration to represent to Congress in an official comment on proposed legislation that the Resolution is not being relied upon. Such an official representation might well lead Congress to forego legislative action which it would otherwise take. Thus, the executive department cannot rely in court on a position it has disclaimed to Congress.

Furthermore, the legislative history relating to passage of the Gulf of Tonkin Resolution is so murky and so many conflicting statements were made concerning its effect that any reliance on it as a declaration of war is extremely dubious. See *Brief for the Commonwealth of Massachusetts in Support of Its Motion for Leave to File Complaint,* pp. 71-84. *Amicus Curiae Brief on Behalf of the Constitutional Lawyers' Committee on Undeclared War,* pp. 80-87. See also *Orlando* v. *Laird*:

> "The place of the controversial Tonkin Gulf Resolution (Public Law 88—408, 78 Stat. 384) in the whole of Congressional action is unclear; its importance no doubt lay in its practical effect on the presidential initiative rather than its constitutional meaning, but it has not the compelling significance of the steady legislative support of the prosecution of the war" (p. 18).

C. *War Appropriation Measures Are Not a Constitutional Substitute for Express Congressional Authorization of the Vietnam War.*

The chief reliance of the government in both *Berk* v. *Laird* and *Orlando* v. *Laird* was on the fact that Congress has continued to appropriate funds to support the executive's conduct of the war in Vietnam. However, as a matter of law and as a matter of legislative history such appropriations bills cannot supply the lack of an explicit congressional ratification or authorization of the Vietnam hostilities. (The major portion of plaintiff Berk's papers in the district court were devoted to this issue, including a detailed factual affidavit analyzing each and every authorization or appropriations bill allocating funds for the

Vietnam War. Amici can only briefly allude to this analysis but is prepared to offer a complete examination of congressional action if Massachusetts' motion is granted herein.)

For the following reasons appropriations bills cannot as a matter of law be considered the functional equivalent of a declaration of war.

1. The Constitution itself imposes a duty upon Congress "to declare war." This flat constitutional requirement cannot be delegated away or subsumed in the exercise of any other congressional power.

2. The framers of the Constitution intended that, except for repelling attacks, this nation would not go to war unless the Congress first decided that we should. However, if the President can take the nation into war without a Congressional authorization, and if the war is legal merely if Congress appropriates money, then the President, not the Congress, will have the power to make the initial decision on war, and the Congress will be reduced to merely having a veto power involving the cutting off of the appropriations necessary to prevent men from dying in battle. Moreover, since appropriations for the armed forces are normally made for a period of one year, and army appropriations can be made for up to two years, the President will be able to fight a war for a very long period of time, on the basis of pre-existing appropriations, before new funds are refused by the Congress. Since the Congress' role will be reduced to merely vetoing a war it doesn't like, the constitutional scheme by which the Congress has the lawmaking power and

the President the veto power is turned around, so that the President has the lawmaking power and the Congress has the veto power. All of this would mean that it was a useless and nonsensical act for the framers, in Article I, Section 8, Clause 11, to give Congress the power to initially decide whether this country shall fight a war.

3. Under the normal constitutional legislative process, those who wish to pass a new law have the burden of obtaining a majority in each house to vote in favor of the new law. Securing such a majority can be a difficult burden indeed, since, in addition to any other problems, there are always many legislators who reasonably desire to be very slow and careful and deliberate when it comes to changing the existing situation by passing a new law. Under the appropriations argument, however, the burden of securing a legislative majority is reversed. If the President wishes to change the existing situation by obtaining a new law, he will simply decree that whatever change he wants is now the law; and then the burden will be on those who oppose the President's change to secure a majority of legislators willing to vote in favor of withholding appropriations in order to countermand the President's edict. Thus, those who oppose the change in the law, instead of those who favor it, will have the burden of securing a majority, and they will have to secure a majority willing to overturn a presidential *fait accompli.*

4. It is very clear that the framers wished to make it difficult to have the nation enter into a war. Oliver Ellsworth commented during the Philadelphia Con-

stitutional Convention that he thought the cases of "making war" and "making peace" materially different.

"It shd. be more easy to get out of war, than into it. War also is a simple and overt declaration, peace attended with intricate and secret negotiations." (2 Farrand, *Records of the Federal Convention of 1787,* pp. 318-319.)

George Mason also commented: "He was for clogging rather than for facilitating war, but for facilitating peace" (2 Farrand 319). If subsequent appropriations bills can be considered the functional equivalent of a declaration of war, then this aim of the framers is completely vitiated. For the President on his own initiative can then initiate a war and hope to get Congressional funds to support it at some time in the future. At that time the practical political pressures on Congress to "support our boys" may be irresistible. Such an approach would facilitate war far beyond the aim of the Constitution-makers. Indeed, allowing the President to proceed in this manner makes it far easier for him to initiate a large war rather than a small one. The greater the step taken by the President, the more troops he commits to combat, the stronger is the pressure on Congress to vote weapons and support of the men in the field.

Although this Court has noted that appropriations bills can serve as ratification for executive action, it is clear that "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." *Ex parte Endo,* 323 U.S. 283, 303 (1944). However, in *Greene* v. *McElroy,* 360 U.S. 474 (1959) this Court refused to hold

that appropriations bills could be construed to deny employment opportunities to citizens in a manner which did not comport with fair procedures. The Court feared that, if appropriations legalized the Executive actions, then decisions of import to a man's employment opportunities and to his procedural rights might be made by unauthorized administrators rather than by authorized legislators.

> "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." 360 U.S. at 507-508.

Clearly the decision to initiate a war is of greater constitutional dimension than the decision to establish a security program for national defense plants. Yet this Court in *Greene* refused to allow an appropriations bill for such a program to be considered the equivalent of congressional authorization. A similar conclusion is required in the instant case.

As for the actual legislative history of the various authorization and appropriations bills for the war in Vietnam, amici refer this Court to the collection of statements contained in the appendix of the *Amicus Curiae Brief on Behalf of the Constitutional Lawyers' Committee on Undeclared War* and to two more recent statements on this issue. Senator Joseph Tydings said on the floor of the Senate on June 25, 1969:

> "It might be suggested that Congress has the opportunity to make the resource-allocation choice when it passes on defense appropriations. It is true that, in many areas, national priorities are established through

> the appropriations process. But once our military might has been committed to action, we cannot undercut our fighting men. The issue on a single defense appropriation bill becomes couched in terms of whether we can afford to give our boys less than maximum protection. Congress never has the opportunity to decide if we can afford to have them risking their lives at all—in other words, whether our priorities permit allocating a significant portion of our manpower and economic resources to certain military objectives." 115 *Cong. Rec.* 17243-44.

More recently, Senator George McGovern commented specifically on the court's holding in *Berk* v. *Laird* and *Orlando* v. *Laird*:

> "Mr. President, I have voted for most of the military appropriations bills which have been used for the war in Vietnam. At the same time, going back to 1963, I have firmly opposed our escalating involvement in that conflict. There has been no period of time in which I would have supported a declaration of war in Vietnam. I am sure I have not been unique in the Senate in feeling an obligation to provide full support to the young Americans who have been dispatched to Vietnam, while at the same time believing that they should be brought home." 116 *Cong. Rec.*, S11988 (daily ed. July 23, 1970).

These comments and hundreds of others made by numerous Congressmen and Senators over the past six years make it abundantly clear that they did not intend to ratify or authorize executive action in Vietnam merely by appropriating funds for our armed forces. Considerations of

common humanity, of procedural appropriateness, of general military preparedness may have dictated an affirmative vote on this legislation. (Here also amici will offer detailed analysis of each and every Congressional action to support these contentions in the event Massachusetts' motion is granted.)

CONCLUSION

For the reasons stated above, the Commonwealth of Massachusetts should be granted leave to file its complaint against Melvin R. Laird as he is Secretary of Defense.

Respectfully submitted,

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September 17, 1970

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 900—September Term, 1969.

(Argued June 17, 1970 Decided June 19, 1970.)

Docket No. 35007

MALCOLM A. BERK,

Plaintiff-Appellant,

—v.—

MELVIN LAIRD, individually, and as Secretary of Defense of the United States, STANLEY S. RESOR, individually, and as Secretary of the Army of the United States, and COL. T. F. SPENCER, individually, and as Chief of Staff, United States Army Engineers Center, Fort Belvoir,

Defendants-Appellees.

Before:

ANDERSON and FEINBERG, *Circuit Judges,* and MACMAHON, *District Judge.**

Appeal from denial by the United States District Court, Eastern District of New York, Orrin G. Judd, *Judge,* of a motion for a preliminary injunction restraining military superiors from ordering appellant dispatched to South Vietnam. Affirmed and remanded for further proceedings.

* Of the Southern District of New York, sitting by designation.

THEODORE C. SORENSEN, Esq., New York, N. Y. (Peter P. Smith, Esq., New York, N. Y., on the brief); and

LEON FRIEDMAN, Esq., New York, N. Y. (Burt Neuborne, Esq., New York Civil Liberties Union, New York, N. Y., on the brief), *for Plaintiff-Appellant.*

NORMAN DORSEN, Esq., New York, N. Y., *for Amici Curiae.*

EDWARD R. NEAHER, United States Attorney, Eastern District of New York (Robert A. Morse, Chief Assistant U. S. Att'y, James D. Porter, Jr., Chief, Civil Division, Assistant U. S. Att'y, Cyril Hyman and Robert Rosenthal, Assistant U. S. Att'ys, Eastern District of New York, on the brief), *for Appellees.*

ANDERSON, *Circuit Judge*:

Malcolm A. Berk, a private first class enlisted in the United States Army, received orders on April 29, 1970, requiring him to report to Fort Dix, New Jersey, for dispatch to South Vietnam. On June 3, he commenced an action against the Secretary of Defense, Secretary of the Army, and the officer who signed his orders, contending that these executive officials of the United States Government have exceeded their constitutional autthority by commanding him to participate in military activity not properly authorized by Congress. His complaint alleges that these orders violate rights protected by the Fifth, Ninth, Tenth and Fourteenth Amendments to the Constitution, as

well as §5 of the New York Civil Rights Law,[1] and that jurisdiction is appropriate under 28 U.S.C. §1331(a).[2] Berk seeks a judgment declaring that his superiors are without authority to order him to South Vietnam or Cambodia,[3] and he also demands a permanent injunction forbidding them to do so.

At a hearing on June 5, the district court denied a preliminary injunction on the grounds that the balance of equities inclined toward the Government because, among other reasons, if Berk succeeded in obtaining a preliminary injunction, there would be a flood of similar applications which would have to be granted, thereby causing "a drastic interference with the war effort" by a decision on a preliminary motion. The court also felt that there was "less

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1 This section provides that:

> "No citizen of this state can be constrained to arm himself, or to go out of this state, or to find soldiers or men of arms, either horsemen or footmen, without the grant and assent of the people of this state, by their representatives in senate and assembly, except in the cases specially provided for by the constitution of the United States."

The present statute is based upon the New York Bill of Rights of 1787 (1 N.Y. Laws, 1801 Revision at 48-49) and is identical to Chapter IV, §4 of the New York Revised Statutes of 1829 (1 N.Y. Rev. Stat. of 1829 at 92). The original derivation of the provision dates to the Petition of Rights (1628 ¶1) and the Declaration of Rights, 2 Wm. & Mary c. 2 art. 4 (1689).

2 The complaint also alleges that jurisdiction may be based on 28 U.S.C. §1332(a) and "5 U.S.C. §1009(a)" (apparently referring to the provision recently recodified as 5 U.S.C. §702).

3 Appellant's counsel vigorously argued before the district court that there was a possibility Berk would receive additional orders in the future to take part in military activities in Cambodia, and that the court therefore should give separate consideration to the legality of such orders. The district court properly held this contingency unlikely in view of presidential declarations that American military forces will be removed from Cambodia by June 30, 1970; and the appellant has treated the issues as virtually indistinguishable on this appeal.

than an even chance for the plaintiff to succeed even in establishing the right to review in this case."

As the appellant correctly points out, the issue on this appeal is not whether the courts are empowered to "second-guess" the President in his decision to commit the armed forces to action, but whether they have the power to make a particular kind of constitutional decision involving the division of powers between legislative and executive branches. See, e.g., *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). The appellees' position is essentially that the President's authority as Commander in Chief, in the absence of a declared war, is co-extensive with his broad and unitary power in the field of foreign affairs. See *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936); cf. *Johnson* v. *Eisentrager,* 339 U.S. 763, 789 (1950) (dictum). If this were the case, Berk's claim would not be justiciable because the congressional power to "declare" a war would be reduced to an antique formality, leaving no executive "duty" to follow constitutional steps which can be judicially identified. See *Powell* v. *McCormack,* 395 U.S. 486, 516-18 (1969); *Baker* v. *Carr,* 369 U.S. 186, 198 (1962). However, the power to commit American military forces under various sets of circumstances is shared by Congress and the executive. History makes clear that the congressional power "to declare War" conferred by Article I, section 8, of the Constitution was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative which was enjoyed by the British sovereign. Although Article II specifies that the President "shall be Commander in Chief of the Army and Navy of the United States" and also vests the "executive power" in him and requires that he "take Care that the Laws be faithfully executed," these provisions

must be reconciled with the congressional war power. See generally Note, *Congress, the President, and the Power to Commit Forces to Combat,* 81 Harv. L. Rev. 1771 (1968); Velvel, *The Vietnam War: Unconstitutional, Justiciable and Jurisdictionally Attackable,* 16 Kan. L. Rev. 449 (1968). Since orders to fight must be issued in accordance with proper authorization from both branches under some circumstances, executive officers are under a threshold constitutional "duty [which] can be judicially identified and its breach judicially determined." *Baker* v. *Carr, supra,* 369 U.S. at 198.

Even if it possesses this general attribute of justiciability, however, a claim still may not be decided if it involves a political question, as that term is defined in *Baker* v. *Carr, supra,* at 217. The challenge framed at this point by the appellant—"which branch has the power to decide if an order has been issued in violation of the Constitution" —may not be answered by stating that courts alone inevitably pass upon allegations of constitutional violations, as Berk seems to suppose. If the issue involved in this case is "political," Congress and the executive will "decide" whether there has been a usurpation of authority by the latter, through political means.

The political question doctrine itself requires that a court decline to adjudicate an issue involving "a lack of judicially discoverable and manageable standards for resolving it," *Baker* v. *Carr, supra,* 369 U.S. at 217. If the executive branch engaged the nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for *some* mutual participation by Congress in accordance with Article I, section 8. But in this case, in which Congress

definitely has acted, in part expressly through the Gulf of Tonkin Resolution and impliedly through appropriations and other acts in support of the project over a period of years, it is more difficult for Berk to suggest a set of manageable standards and escape the likelihood that his particular claim about this war at this time is a political question. It may be that he will be able to provide a method for resolving the question of when specified joint legislative-executive action is sufficient to authorize various levels of military activity, but no such standard has as yet been presented to us, although we do not foreclose the possibility that it can be shown at the hearing on the permanent injunction. Even if a distinction can be drawn between offensive and defensive conflicts and if some rather explicit congressional authorization is required for the former, there still remains the problem of determining whether a broad approving resolution followed by non-repeal meets the proposed criterion of "explicit" approval. See *United States* v. *Sisson,* 294 F. Supp. 511, 515 (D. Mass. 1968).

Finally, even if Berk is able to show that his claim does not raise an unmanageable political question, he will be required to show the district court that congressional debates and actions, from the Gulf of Tonkin Resolution through the events of the subsequent six years, fall short of whatever "explicit approval" standard he propounds. This will involve a multitude of considerations concerning which neither the district court nor this court has been adequately informed, and we cannot, in good conscience, now say that the appellant has shown probability of success on the merits if this stage is reached, although once again we do not foreclose the appellant from seeking to establish his claims.

In summary, the appellant raises a claim which meets the general standard of justiciability set out in *Powell* v.

McCormack, supra, and *Baker* v. *Carr, supra,* but must still be shown to escape the political question doctrine. Even though he has perhaps raised substantial questions going to the merits, neither the likelihood of success nor the balance of equities inclines so strongly in his favor that a preliminary injunction is required. *Checker Motors Corp.* v. *Chrysler Corp.,* 405 F.2d 319 (2 Cir. 1969). As to the latter, we add to the considerations mentioned by the district court the fact that Berk did enlist a year ago presumably fully aware of the Vietnam conflict. The parties have expressed their readiness to proceed immediately, so that additional risks to which Berk might be subjected during the very brief interval before the district court acts are highly speculative. Nor do we see any necessity for Berk's physical presence at or in preparation for the district court proceedings. Berk's absence would not moot the underlying action. The facts concerning Berk on which the action is predicated are undisputed and there remain only the basic legal and constitutional issues and facts relevant thereto.

Berk's jurisdictional allegation relying on 28 U.S.C. §1331(a) has been challenged; but the complaint can be construed as putting in controversy his future earning capacity, which serious injury or even death might diminish by an amount exceeding $10,000. See *Friedman* v. *International Ass'n of Machinists,* 220 F.2d 808, 810 (D.C. Cir.), *cert. denied,* 350 U.S. 824 (1955); *Walsh* v. *Local Bd. No. 10,* 305 F. Supp. 1274, 1275-76 (S.D.N.Y. 1969); cf. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.,* 303 U.S. 283, 289 (1938); *Eisen* v. *Eastman,* 421 F.2d 560, 566-67 (2 Cir. 1969). Sovereign immunity is no bar to this action, since the complaint alleges that agents of the Government have exceeded their constitutional authority while purporting to act in the name of the sovereign. *Larson* v. *Domestic &*

Foreign Commerce Corp., 337 U.S. 682, 689-91 (1949). The requested relief does not require affirmative governmental action, but only that the agent involved cease certain allegedly improper conduct. *Id.* at 691, n. 11; cf. *State of Washington* v. *Udall,* 417 F.2d 1310, 1317-18 (9 Cir. 1969). Although the rule has long been that the alleged "illegality" of a war may not be raised as a defense to prosecution for refusal to submit to induction into the armed forces, *United States* v. *Mitchell,* 369 F.2d 323 (2 Cir. 1966), *cert. denied,* 386 U.S. 972 (1967); *United States* v. *Bolton,* 192 F.2d 805 (2 Cir. 1951), this court indicated in *Bolton* that "any question as to the legality of an order sending men to Korea to fight in an 'undeclared war' should be raised by someone to whom such an order has been directed." 192 F.2d at 806 (dictum). The rule should be the same for a soldier ordered to Vietnam under allegedly similar circumstances.

The denial of a preliminary injunction is affirmed and the case is remanded to the district court for further proceedings consistent with this opinion. The current stay of the military orders detaching appellant to South Vietnam shall expire and the mandate shall issue seven days from the date hereof to allow appellant to seek further relief in the Supreme Court. It is also suggested that the proceedings in the district court on the underlying action proceed with expedition.

So ordered.

APPENDIX B

Chapter 174

THE COMMONWEALTH OF MASSACHUSETTS

IN THE YEAR ONE THOUSAND NINE HUNDRED AND SEVENTY

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

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

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

SECTION 2. The attorney general shall, in the name and on behalf of the commonwealth and on behalf of any inhabitants thereof who are required to serve in the armed forces of the United States in violation of section one of

this act, bring an appropriate action in the Supreme Court of the United States as the court having original jurisdiction thereof under clause two of section 2 of Article III of the Constitution of the United States to defend and enforce the rights of such inhabitants and of the commonwealth under section one; but if it shall be finally determined that such action is not one of which the Supreme Court of the United States has original jurisdiction, then he shall bring another such action in an appropriate inferior federal court. Any inhabitant of the commonwealth who is required to serve in the armed forces of the United States in violation of section one of this act may notify the attorney general thereof, and all such inhabitants so notifying the attorney general shall be joined as parties in such action. If such action shall be commenced hereunder in an inferior federal court, the attorney general shall take all steps necessary and within his power to obtain favorable action thereon, including a decision by the Supreme Court of the United States.

House of Representatives, April 1, 1970.
Passed to be enacted, DAVID M. BARTLEY, Speaker.

In Senate, April 1, 1970.
Passed to be enacted, MAURICE A. DONAHUE, President.
April 2, 1970.

Approved,

(s) FRANCIS W. SARGENT
Acting Governor

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