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

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

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Introduction

Amici respectfully submit this Supplemental Memorandum in response to the Supplemental Memorandum of the Solicitor General discussing the recent decision of Judge Orrin G. Judd in *Berk* v. *Laird,* —— F. Supp. ——, 70 C 967 (September 16, 1970, E.D.N.Y.).[1]

[1] Attorneys for Amici are counsel for Pvt. Berk. *Berk* v. *Laird, supra,* has been appealed to the United States Court of Appeals for the Second Circuit where counsel plan to consolidate it with the appeal from *Orlando* v. *Laird,* —— F. Supp. —— (July 1, 1970, E.D.N.Y.).

As the judicial process has proceeded on its case by case course, the ultimate issues presented by this litigation have emerged with increasing clarity.[2] That they have so emerged is, in large part, a tribute to the conscientious delving by two distinguished District Court judges into the analytically complex issues posed by a challenge to the legality of the war in Vietnam.

The judicial explorations on the part of Judge Dooling and Judge Judd have resulted in a clarification and a sharpening of the ultimate issues which must be determined in ruling upon the legality of the Vietnam war. Such a sharpening and clarification exemplifies the operation of our judicial system at its finest.[3]

Amici believe that two basic issues have emerged from the pioneer judicial explorations carried on by the United States District Court for the Eastern District of New York.

First, a mixed question of law and fact has arisen as to whether Congress has, in fact, manifested an assent to the

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[2] Three major steps have occurred during the current judicial exploration of the legality of the war in Vietnam.

First, the United States Court of Appeals for the Second Circuit recognized in *Berk* v. *Laird,* Docket No. 35007 (June 19, 1970) that the judiciary was vested with responsibility to inquire into the constitutional sufficiency of Congressional authorization of the war in Vietnam. This recognition has subsequently been reaffirmed by both Judge Dooling in *Orlando* and Judge Judd in *Berk.* In addition, it has been recognized by Judge Sweigert in *Mottola* v. *Nixon,* —— F. Supp. ——, 70 Civ. 943 (September 9, 1970, N.D., Cal.). A copy of Judge Sweigert's opinion is annexed hereto as an appendix.

Second, Judge Dooling issued an opinion denying plaintiff's request for injunctive relief in *Orlando* v. *Laird.*

Third, Judge Judd issued an opinion granting summary judgment for the defendants in *Berk* v. *Laird.*

[3] Counsel gratefully acknowledge that the opportunity to engage in dialogue with the District Court and the opportunity to scrutinize the scholarly opinions of Judge Judd and Judge Dooling were invaluable in furthering the analysis of the issues herein.

Executive's waging of a major land war on the Asian mainland. Both Judge Judd and Judge Dooling apparently found as a fact that Congress had manifested assent to the war in Vietnam because Congress has consistently and knowingly provided the Executive with the wherewithal to carry on the war effort.[4]

Second, a pure issue of law has arisen as to whether Congressional assent to a major commitment of American troops to war must be couched in some formal, explicit manner,[5] or whether such assent may merely be implied from collateral Congressional activity, such as the passage of appropriations bills and manpower requirements. Thus, the basic legal issue which has painstakingly evolved from the District Court's efforts is the question of whether the Congressional "war power" may be deemed exercised by implication, or requires more explicit, formal Congressional action.

Amici believe that the issue of whether the Constitution permits this nation to drift deeper and deeper into war without requiring an explicit, formal manifestation of Con-

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[4] Amici do not believe that such a factual assumption on the part of the District Court was warranted. It is amici's earnest belief that, prior to making a finding on a factual issue of such importance, plaintiffs should have been permitted to adduce evidence to the contrary. In fact, the plaintiffs made an elaborate offer of proof to the Court in *Berk*. The appropriateness of making such a factual determination without a plenary hearing will, of course, be a major issue in the appeal to the Second Circuit.

[5] A formal, explicit declaration of Congressional assent to the war could, of course, take any form which Congress desires. It need not be a formal declaration of perfect war. It must, however, be a formal Congressional act, the primary purpose of which is the declaration of Congressional will with respect to the war in Vietnam.

gressional assent is among the most critical ever presented to this Court.

The constitutional imperative of formalistic explicitness in the exercise of Congressional "war power" is far more than a quaint historical anachronism. Such a requirement, procedural though it may be, guards values of infinite substantive importance, for, as Mr. Justice Frankfurter has observed, "the history of liberty has largely been the history of observance of procedural safeguards."[6]

The abandonment of our traditional assumption that explicit, formal Congressional approval, linked unequivocally to Article I, Section 8, Clause 11 of the Constitution, is required as a prerequisite to plunging the United States into military operations of the highest level, would destroy a major Constitutional check upon unbridled Executive authority.

First, the doctrine of "implied exercise" of the Congressional "war power" would render the language of Article I, Section 8, Clause 11 mere surplusage. If the act of voting appropriations under the "purse power" of Article I, Section 8, Clauses 1 and 12 automatically triggers the "war power" by implication, what is the purpose of the grant of war power to Congress at all? It can hardly be assumed that the Founding Fathers intended to effect no tangible extension of Congressional authority by virtue of the explicit grant of the power "to declare war." However, if Congress impliedly exercises its "war power" whenever it appropriates money to fund an Executive initiated military operation, have we not simply effected

[6] *McNabb* v. *United States,* 318 U.S. 332, 347 (1943).

a *de facto* repeal of Article I, Section 8, Clause 11, since, every military operation, as a matter of necessity, must be either approved or disapproved by Congress under its "purse power"?

Second, the doctrine of implied exercise of the "war power" would dilute, and perhaps destroy, the responsibility which the Founding Fathers laid upon Congress to be the ultimate arbiters of war and peace.

It was, obviously, uppermost in the minds of the Founding Fathers to erect safeguards against military operations initiated by the Executive. In order to erect such a safeguard, they explicitly committed the "war power" to Congress.[7] Any rule of constitutional law which places extraneous pressures, either practical or political, upon the unfettered Congressional exercise of the war power, would, therefore, run directly counter to the wishes of the Founding Fathers. Yet the effect of permitting Congressional action taken pursuant to its "purse power" to impliedly discharge its "war power" function would have precisely the effect of placing enormous practical and political pressures upon Congress' discharge of that singularly critical responsibility.

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[7] It has been contended that the Constitution vests the Executive with, at least, some "war power" because it designates the President as Commander in Chief. However, rather than acting to disperse the "war power," Article II, Section 2 is an attempt to regulate military operations even more closely. The Founding Fathers possessed a healthy fear of professional armies and the true purpose of explicitly naming the President as Commander-in-Chief was to insure complete civilian control over the military. Thus, the provision is designed to make it more difficult, rather than easier for the nation to embark upon a war.

It is a fact that once the Executive has committed the nation to a major military undertaking, extraneous considerations render it extremely difficult to refuse to grant unstinting appropriations to support the war effort. Once the Executive has placed large numbers of American troops in a combat situation, is Congress to deny them bullets, advanced weapons, logistical support, air cover, medical care, housing, veteran's benefits, life insurance, hazard pay or the innumerable other expensive emoluments of war? Are they to be denied speedy replacements because Congress refuses to extend the draft? The answers to such questions are, of course, in the negative. Once the military die has been cast by the Executive, Congress must pay the bill, or risk the wholesale slaughter of innocent Americans.

The type of *fait accompli* presented to Congress by an appropriations bill or a manpower provision cannot, in any realistic and meaningful manner, provide the unfettered, clear cut, Congressional exercise of the "war power" which the Founding Fathers erected as a critical safeguard against unnecessary military involvement.

Third, the doctrine of "implied exercise" of Congressional "war power" renders it virtually impossible for the electorate to pass judgment upon the performance of their representatives.

In addition to attempting to provide for an unfettered Congressional determination as to the advisability of embarking upon a given major military operation, the Founding Fathers attempted to provide a procedure whereby the electorate would possess a speedy method of reviewing the determination of their representatives. Since the entire House of Representatives and one-third of the Senate must

stand for re-election every two years, an electoral check upon any Congressional war authorization could never be more than two years away. Thus, any rule which would permit Congress to exercise its "war power" in a manner not capable of ready public understanding as to the respective position of each legislator, would frustrate the Constitutional scheme.

It is, of course, absolutely impossible to discern from the voting patterns of individual legislators on appropriations bills or draft extensions their individual positions on the war. The most vociferous critics of the war have consistently voted for appropriations and draft extension. How then, under a doctrine of implied exercise is a constituent to know his Congressman's position?

Fourth, the doctrine of "implied exercise" of the "war power" flies in the face of actual Congressional practice in connection with every major commitment of American military resources abroad, up to and including the Second World War.

Prior to the Korean conflict, every major commitment of American military resources to a combat situation was authorized by a formal, explicit manifestation of Congressional assent. Thus, the War of 1812; the Mexican War of 1846-1848; the Civil War; the Spanish-American War; World War I and World War II were each authorized by formal, explicit Congressional action. Prior to Korea, even second echelon military operations involving the possibility of significant bloodshed received explicit, formal Congressional assent. Thus, the French Naval War of 1798-1801, the Naval War with Tripoli (1802); the Naval War with Algiers (1815) and the punitive expedi-

tion into Mexico in 1914, each were authorized by an explicit, formal Congressional action.

Apart from Korea and Vietnam, no Executive has led this nation into prolonged and bloody armed conflict without the formal, explicit authorization of Congress. If that formal, explicit authorization is to be dispensed with, are we not simply inviting a recurrence of the national tragedy that is the "war" in Vietnam?

CONCLUSION

Amici contend that, in the absence of an emergency situation, nothing short of an explicit, formal manifestation of Congressional assent can constitutionally justify the sending of American men to war.

The dualism inherent in "formalism" versus "implication" is, of course, not confined to the awful realm of war and peace. It is a dichotomy that exists in every branch of the law. In fact, much of our law is explicable in terms of the tension existing between those polar concepts.

Whenever decisions of the first magnitude have been involved, our law has tended to sacrifice the convenience of implication to the certainty of formalism. Whether it be embodied in the Statute of Wills, or in the Statute of Frauds or in the Parol Evidence Rule or in the Doctrine of Consideration or in the Doctrine of Implied Agency, our law has recognized the salutary effect of a formalistic check upon decisions of great importance. In the area of war

and peace, where the very existence of man as a species may hang in the balance, can we tolerate the Congressional abdication of that formalistic check?

Respectfully submitted,

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