

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

MOTION OF JOHN M. WELLS ET AL FOR LEAVE
TO BE ADMITTED AS AMICUS CURIAE
TO FILE REPLY BRIEF
OR IN THE ALTERNATIVE TO BE ADMITTED
AS INTERESTED PARTIES,
and BRIEF

Jack H. Backman,
Attorney for John M. Wells et al

2 Center Plaza
Boston, Massachusetts 02108

October, 1970

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No. 42, Original

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff

v.

MELVIN R. LAIRD,
As He Is Secretary of Defense,
Defendant

MOTION OF JOHN M. WELLS ET AL FOR
LEAVE TO BE ADMITTED AS AMICUS CURIAE
TO FILE REPLY BRIEF
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AS INTERESTED PARTIES

Respectfully represents John M. Wells
and other people of the United States of
America who petition to be admitted as
amicus curiae or in the alternative as
parties in interest before this Honorable
Court in accordance with petitions signed
and transmitted herewith by thousands of
people of these United States pursuant to

the First Amendment to the Constitution of the United States of America.

Said applicant John M. Wells is a party of prime interest, in so far as he is the original petitioner and author of the legislation enacted by the Commonwealth of Massachusetts under which this action has been filed, namely Chapter 174 of the Acts of 1970 of the Commonwealth of Massachusetts. The other people represented herein are citizens of these United States in like manner affected by the conduct of armed hostilities in which the United States of America is now engaged upon the Asian continent, which hostilities are alleged to have never been authorized or subsequently ratified by a congressional declaration of war according to the constitutionally established procedures of Article I, Section 8 of the Constitution of the United States, and which hostilities constitute a war of the United States of America.

The action before the Court does not fully represent therein the harmful impact upon the relationship of the people to law and the Constitution as a result of the prolonged actions of the President and Congress pursuing a war upon the Asian continent without a constitutional declaration of such war.

The people's brief makes the plea that the prolonged and purposeful ignoring by the highest echelons of government of law

and order of our constitution will adversely effect all law and respect for law.

Further stating under the First Amendment to the Constitution of the United States of America, in the exercise of their right to petition the government for redress of grievances, applicants respectfully petition the Honorable Justices of the Supreme Court of the United States to exercise jurisdiction over the subject action.

Said petitioners respectfully request that they be allowed to file for the record of this action the petitions of thousands of people of these United States of America for redress of their grievances before the government pursuant to the First Amendment to the Constitution of the United States of America.

They petition that they be allowed to file a reply brief as amicus curiae. They respectfully request opportunity for oral argument as this Court shall determine. As parties in interest they are prepared to file such supplemental briefs or documentary data as may be suggested by this Court.

Respectfully submitted,

John M. Wells

John M. Wells,

Petitioner

Jack H. Backman

Jack H. Backman,

Attorney for Applicants

Two Center Plaza
Boston, Massachusetts 02108

In the
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No. 42, Original

COMMONWEALTH OF MASSACHUSETTS,
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MELVIN R. LAIRD,
As He Is Secretary of Defense,
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REPLY BRIEF OF JOHN M. WELLS, ET AL
AMICUS CURIAE

The key to the success of the United States system of constitutional government is the fundamental and pervading notion from its beginnings that we are a nation of laws and not of men.

Marbury v. Madison, 5 U.S.(1 Cranch)137

It might be appropriately mentioned that the basic theme of the cry for law and order is that there must be a basic respect and submission to law -- if our society is to survive or progress. Yet how can this basic respect and reverence for law be established in a society where such large numbers believe that the chief executive has himself gone beyond the powers of the constitution in pursuing an illegal war.

A government of laws and not of men means that no man, in whatever office, shall, for indefinite periods of time, suspend, cancel, or nullify the law of this great land. It is in this approach that we should now examine the problem of the Vietnam war.

Neither the President nor Congress have untrammelled authority over citizens in time of peace or in time of war. There have been cases delineating and defining the limits of authority of both the executive and the legislative branches of our government. This has been done, always with great reluctance and with reserve by the United States Supreme Court, the third branch of our government. The very

fundamental case of law in this nation which had no parallel in any other nation in the world up to that time was the case of Marbury v. Madison, supra, when Chief Justice Marshall of a Supreme Court that was less than 30 years old, had the temerity, perhaps the gall, but without doubt the inspired vision and foresight to make a declaration in the name of the seven member United States Supreme Court that the legislature of the United States, duly elected by the people of this nation that had just fought a revolution to elect them, had in fact acted beyond the powers of the Constitution. An act of the elected national legislature of the people had gone beyond its powers! Could the Supreme Court tell the Congress that it was acting beyond its powers? It did, and since that time we have attempted to carry out a system of rule of law and not of men - even Congressional men or Presidential men.

Now, what are the laws and what are the men? In this case, the law is our Constitution. It gives the power to command our armed forces to the President. It gives the power of foreign policy to the President in conjunction with Congress. It gives broad implied powers to the President to act in cases of emergency. By acts of Congress of February 28, 1795 and March 3, 1807, the President is authorized to call out the militia and use the militia and naval forces of the United States in case of invasion by foreign nat-

ions, and to suppress insurrection against the government. It gives the responsibility to every citizen of this great nation to obey the mandate of Congress and of the lawful orders of the President in order to protect and preserve this nation, to give one's very life for our nation. These are broad powers and responsibilities, but there are indeed limits to their scope.

In Article 1, section 8, the Constitution also clearly gives Congress the power and responsibility to declare war, when that sad but terrible occasion might present itself.

We can read from the Federalist Papers by Hamilton, Madison and John Jay, in which they examine the powers of the President and Congress and compare the President's powers with that of the British King. Hamilton herein points out that the "President is to be Commander-in-Chief of the Army and Navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the command and direction of the military and naval forces...while that of the British King extends to the declaring of war and to the raising and regulation of fleets and armies, all of which by the Constitution under consideration would appertain to the legislature." (Emphasis Hamilton) The Federalist, No. 69 (Benjamin

F. Wright Ed. 1961) 446

Later Hamilton repeats the difference between the President on the one hand and the King of England on the other. "The one (The President) would have a right to command the military and naval forces of the nation; the other (the King) in addition to this right, possesses that of declaring war and of raising and regulating fleets and armies by his own authority." The Federalist, supra, 450

For over a decade we have been engaged in a great and dangerous war. Over 40,000 American soldiers have been killed and over a quarter of a million wounded. It is estimated that if the war were to end today, the total cost of the war including pensions and other benefits yet to be paid would exceed 350 billion dollars. Our young men and women of this nation, and many citizens mature in age, abhor this war and question the initial judgment which has led to this war. Many who wish to remain in Vietnam do so because they say our national prestige is involved, but that we should never have been there in the first place. This is a shaky basis upon which to continue to lead men to battle and our nation to war.

There are thousands of citizens who assert: "No war has been declared by Congress" as the Constitution provides, that under these circumstances, an agent of the President, however well meaning, however sincere his actions and motivations, is

exceeding his power under the Constitution. They say the Tonkin Gulf resolution of 1964 is not a declaration of war.

The Massachusetts statute attempts to curtail no power of Congress, of the President, of the Army or the Navy guaranteed or authorized by the Constitution. It seeks to have a judicial determination by the United States Supreme Court as to the scope and breadth of the presidential and congressional powers.

What this action does do is seek by our constitutional judicial process a judicial determination of whether agents of the President or Congress are acting beyond their powers, because no war has been declared. Under this bill the Commonwealth of Massachusetts mandates our chief lawyer, the Attorney General, the lawyer for the people, to join in a judicial inquiry before the United States Supreme Court in the great constitutional tradition of our nation to determine the limits to the war making authority of our executive and legislative branches of government.

We as a nation can neither retain nor regain among either our youth or the nations as a whole a spirit of respect for law, reverence and compassion for humanity upon which this nation was founded, unless the unconstitutional Asian hostilities are now judicially terminated.

Respectfully submitted,

Jack H Backman
Jack H. Backman,

Attorney for Applicants

Two Center Plaza
Boston, Massachusetts 02108

