No. 42, Original

In The Supreme Court of The United States

OCTOBER TERM, 1970

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 AMICUS CURIAE BRIEF ON BEHALF OF THE CONSTITUTIONAL LAWYERS' COMMITTEE ON UNDECLARED WAR

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I. THE COMMONWEALTH OF MASSACHUSETTS HAS ASSERTED UNCHALLENGED INTERESTS SUFFICIENT FOR ORIGINAL JURISDICTION.

The Commonwealth of Massachusetts has sovereign interests which are sufficient to confer standing to sue as a matter of original jurisdiction and which have not even been challenged in defendant's brief. These undisputed interests show that Massachusetts has a right, and should be permitted, to file its complaint. Among the unchallenged interests are the following:

(1) An impairment of the state's voting and electoral procedures. (Complaint, paragraph 53). This interest alone was sufficient for original jurisdiction in *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966). For a discussion, see the Constitutional Lawyers' Brief, pp. 10-11.

(2) An impairment of the effectiveness of Massachusetts' representation in Congress. This interest confers standing. See Constitutional Lawyers' Brief, p. 38.

(3) Massachusetts' contractual interest as an original contracting party to the Constitution. This basis for Massachusetts' standing has been analyzed in detail in the Constitutional Lawyers' Brief, pp. 26-36.

(4) Massachusetts' interest in preserving the integrity of its own state militia. This interest is a proper construction of Section 1 of the Massachusetts' Act of April 2, 1970, which forms a part of Massachusetts' Complaint (Complaint, paragraph 1). The defendant was fully apprised of this important interest. See Constitutional Lawyers' Brief, pp. 36-38 and 47-51; Brief for the Defendant, p. 16 n. 6.

The foregoing unchallenged interests show that Massachusetts has a right to be heard in this Court.

II. MASSACHUSETTS HAS STANDING AS *PARENS PATRIAE.*

We reiterate that Massachusetts has standing as *parens patriae* in this case. This standing should not be defeated by defendant's fear that, if the Court allows the case to be

brought as a matter of original jurisdiction, then other states may seek to invoke the Court's original jurisdiction for the purpose of challenging other federal programs. For the "federal program" in the present case—the war in Vietnam—has cost the lives of an estimated 1300 inhabitants of the Commonwealth and more young men are being killed or wounded each day (Complaint, paragraph 48). And this is in addition to the many other drastic effects which the war has had on the Commonwealth and its citizens. Other federal programs do not even begin to approach consequences of such magnitude. If a future "federal program" did have consequences of equal significance in a state, then that state too should have standing, as *parens patriae,* to challenge the constitutionality of the federal program in the original jurisdiction of this Court. Moreover, this Court will not be flooded with litigation. In the first place, few or no other federal programs will have consequences of the magnitude which exist here. Secondly, even if a state could have standing in a case where a federal program's consequences upon a state's interests are less than those which exist here, the Court would not necessarily have to exercise its original jurisdiction in the case. For in a case involving less significant consequences upon a state's interests than exist here, it may be more convenient, efficient and just to remit the state to the lower federal courts for an initial determination of its case.

Finally, we note that defendant's arguments on standing are predicated upon the dictum in *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923), that the federal government and not the state is *parens patriae* with respect to certain types of claims. We think the dictum is neither well founded in reason nor sensible when applied here, and we refer the

Court to those portions of our main brief which make this clear. Constitutional Lawyers' Brief, pp. 18-25.

III. MASSACHUSETTS HAS STANDING IN ITS SOVEREIGN CAPACITY.

Defendant's brief characterizes all of Massachusetts' interests in this case as *parens patriae* interests. However, as made clear in prior cases, such as *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 451 (1945), there is a distinction between *parens patriae* interests and sovereign interests. Massachusetts is asserting several sovereign interests which are not *parens patriae* interests. Among them are loss of tax revenues, overburdening of state police agencies, overburdening of state courts, the impairment of the state's electoral processes, the closing of state institutions, impairment of the state's representation in the Senate, the state's interest as an original contracting party to the Constitution, and others. (See Complaint, paragraphs 49-58). Some of these sovereign interests, moreover, are not even challenged in defendant's brief, as was noted above.

The history of this nation has seen a movement towards strong central government at the expense of state power. Many substantive state prerogatives have been eroded. But one right of the states must surely remain intact: the right of a state to sue in the original jurisdiction of the Supreme Court when vital sovereign interests of the state are threatened.

IV. THE CONSTITUTIONAL ISSUE IS SUITABLE FOR ADJUDICATION.

Defendant's brief argues that this case is not suitable for adjudication because of asserted difficulties in determining Congress' participatory role in the warmaking process. However, since this case involves a question of constitutionality, it is pre-eminently suitable for adjudication. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803); *Powell* v. *McCormack,* 395 U.S. 486 (1969). There is, moreover, no difficulty in discovering the judicially manageable standards which serve to define Congress' role here and which show that the Executive has usurped Congress' role. As pointed out in our main brief, the Constitution requires that a major, prolonged war such as Viet Nam must be either (1) formally declared by Congress in a declaration of limited or general war, or (2) authorized by Congress in an authorization which is specific, intentional, and discrete. What if anything the Constitution requires for military action which is not a major war is wholly irrelevant to this case.

The clarity of the applicable standards cannot be clouded over by assertions that the President can repel an attack in an emergency, which he obviously has the power to do, or by assertions that prior Presidents have taken certain military actions. For the question here is not whether the President can repel an immediate attack when there is no time to consult Congress, nor is it whether Presidents have acted legally in decades past. Rather, the question here is whether, subsequent to repelling an immediate attack in emergency circumstances where there is no time to consult Congress, the President can then go on to assert legislative power by determining to fight a major, prolonged war without specific Congressional authorization. We assert that he cannot do so if the declaration of war clause is not to

become a dead letter. Rather, he must obtain either a declaration of limited or general war, or a specific, intentional and discrete congressional authorization of hostilities.

V. THIS COURT SHOULD REJECT DEFENDANTS' REASONS OF EXPEDIENCY.

The defendant has offered a variety of reasons why a ruling which upholds the position of Massachusetts should be avoided. However, as Judge Sweigert has held in the case of *Mottola* v. *Nixon,* No. C 70943, decided September 10, 1970: "It will be noted that none of the foregoing arguments make any pretense that Article I Section 8 (11) has been complied with in the case of Viet Nam; they merely purport to explain why, for various reasons of expediency, the Constiution has *not* been complied with. They are therefore of doubtful relevancy in a court whose duty is to see to it that the Constitution *is* complied with." [Original emphasis].

The force and wisdom of Judge Sweigert's observation is enhanced by the fact that this Court has acted in other critically important cases where it was strenuously asserted that incredible disasters would occur if executive or legislative action was ruled illegal. The steel seizure and reapportionment cases are two examples. It is relevant that judicial action in those cases did not in fact bring on the disasters which assertedly were going to occur. Rather, the cases show the necessity of judicial review in maintaining our constitutional system.

VI. IF THE CONSTITUTION HAS BEEN VIOLATED, THIS COURT WILL BE ABLE TO FASHION APPROPRIATE RELIEF.

If the Court determines that the Constitution has been violated, appropriate relief can be fashioned. The Court could grant declaratory relief. Or it could grant injunctive relief. The latter would present no serious problems. In accordance with Massachusetts' request, an injunction should not take effect for 90 days or for such other period as the Court thinks necessary in order to give Congress sufficient time to decide whether and on what terms the war should either be continued or terminated. In making this decision, Congress would certainly consider the relevant international and domestic repercussions, a fact which completely undermines many of the defendant's arguments that untoward consequences would result from a judicial decision favorable to Massachusetts. If Congress decides not to act, or if it refuses to authorize a continuation of the war, the injunctive relief will take effect. It can be flexibly molded, with consideration given to suggestions made by the parties. The defendant would have to disengage from the military hostilities within a reasonable period but the manner in which the disengagement is accomplished would be entirely up to the defendant. Because the method of disengagement would be entirely up to defendant, this Court would in no way have to get involved in supervising the details of the disengagement. Still less would there by a need for recourse to such incredible suggestions as that this Court might have to "set up its own office of military affairs" or "supervise the . . . process of military disengagement" or "provide officials to carry on diplomatic discussions with the North Vietnamese and other govern-

ments." (Defendant's Brief, pp. 32-33).

VII. THE RULE OF LAW IN THIS NATION REQUIRES THAT THE CONSTITUTIONALITY OF A MAJOR WAR BE TESTED IN COURT.

The defendant's brief raises a basic challenge to the rule of law in this country, a challenge which cannot be ignored if we are to be a nation under law. The defendant has argued that the present case is nonjusticiable. To test this argument, let us suppose that a President, asserting that in troublous times the following activities are within his foreign affairs, war, or other powers, were to someday decide to seize industry, as the steel mills were seized in *Youngstown Sheet and Tube* v. *Sawyer,* 343 U.S. 579 (1952), or to impose martial law, as occurred in *Duncan* v. *Kahanamoku,* 327 U.S. 304 (1946), or to lay and collect duties and tariffs, or to regulate commerce with foreign nations. Suppose further that Congress does not stop the President from taking over these functions. Should the courts then refuse to hear a case testing the validity of the President's acts?

If not, why should the powers expressed in clauses 11 and 15 of Article I Section 8 be any different from the other Sections 8 powers such as regulating commerce or collecting taxes and duties? Merely to ask these questions is to demonstrate the implications of the defendant's position. Courts can no less refuse to inquire whether this nation has become engaged in Viet Nam in violation of the procedures set forth in the Constitution than they can refuse to adjudicate these other questions involving an alleged usurpation of the powers of Congress by the Presi-

dent. The rule of law requires that the judiciary exercise its constitutional function of determining whether the Constitution is being followed.

Respectfully submitted,

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Professors Brodie, Dorsen and Culp, who have just become members of the Committee, also wish to join in its main brief.