

The Case Against a President's War



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A summary of the basic arguments to be used by the plaintiff in the constitutional law case
Medeiros vs. United States

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Introduction

I do not talk about the policies, the substance of decisions. I talk about decision making process, democratic process. I do not attempt to speak for conservatives or liberals. I attempt to speak on behalf of my generation [1960's]. We are generally more interested in democratic process than our parent generation [as in civil rights]. And we are not chauvinistic. We are humanistic. We feel a sense of brotherhood with all the world. Our strongest ties, the brotherhood that comes from both the mind and the heart, are with persons everywhere, who, regardless of other ideas, believe democratic process to be man's [humankind's] highest political ideal and first need.

John M. Medeiros
March 15, 1968

[Commentary, September 2011: *Note that following the Vietnam War draft cases, Arthur Schlesinger Jr. wrote **The Imperial Presidency**, and many political scientists throughout the world commented that the American President is vested with more power than any king or prime minister in any other country claiming to be a democracy. Later, in Iraq and Afghanistan, using conscription to provide troops was not considered. Instead, the Executive branch used the National Guard and hired mercenaries. The idea of using conscription is still extremely unpopular when the military objective is more like a foreign policy objective than a genuine need to defend the people and property of the United States. American soldiers and generals have commented that the War in Afghanistan is about a foreign policy problem that cannot be solved by military means. Conscription will probably never be tried again, so long as Americans keep in mind that "conscription without representation" is just as bad or worse than taxation without representation. What really happened since adoption of the Constitution in 1787, especially since World War II, is the United States became an economic empire, and the Senate and the Presidency are used to maintain that empire in many situations where the people and territory of the nation are clearly not at any significant risk of harm, but the economic and political control of the empire needs to be enforced. This is why the modern United States is sometimes compared to ancient Rome. While some may argue that defending the empire still means patriotic service to the nation, as many would argue to the contrary that no citizen of the United States has an obligation, under our Constitution, to serve the purposes of an empire.*

It is relevant to comment further, that the unique world power and role of the United States arose not only from a set of real virtues in the society and culture of the United States, but also because World War II devastated Europe, Russia, China and Japan, while no destructive battles occurred on American territory. Therefore, the United States had an economic and political advantage for about sixty years. That period has passed, and today in the twenty-first century where the United States is trying to defend its leadership position, it is in fact trying to preserve an economic and political power advantage that no longer exists. The large nation cultures that were previously set back by the war -- Europe, Russia, Japan, China, are no longer in recovery from the extreme destructiveness of World War II. Other large nations, such as Brazil, India, Indonesia, Mexico and Muslim nations also have rising aspirations to wealth and influence. With its postwar advantage dissipated, the United States is one of many large nations with great economic and political influence. America must become a cooperative leader among a group of leaders, or, if America gets trapped into defending an old empire, it runs the risk of self-destruction. When I was seventeen years old, I lived in Italy for ten months and attended school as an exchange student. I have never forgotten the wisdom the Italians possessed with regard to politics and empires. I have never forgotten a lesson I personally distilled from my observations on the long and tortured history of the Italian peninsula, including being the home of the Roman Empire and the Roman Catholic Church: "Whoever invades Italy is conquered by the Italians." For about sixty years the world was conquered by the Americans, meaning by the spirit, competence and freedom of the American people. That time is passed. Americans have become an oppressive nobility on an impoverished planet. Some will argue that the richest nation has been and is the enemy of social and economic justice, the seat of an oppressive empire. To dismiss this viewpoint as simply not true will be a tragic error and self-defeating denial of the historical pattern of empires. All empires fall, but a wise empire can fall very lightly, on a cushion of genuine goodwill, a pillow of justice filled with a generous spirit. Building an empire is like taking; ending an empire gracefully is like giving.]

Chapter One: The Petition

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
CIVIL ACTION FILE NUMBER 68-239-C

JOHN M. MEDEIROS

vs.

UNITED STATES

COMPLAINT AND PETITION FOR
DECLARATORY JUDGEMENT

- 1) Allegation of jurisdiction.
Jurisdiction founded upon civil action against the United States founded upon the Constitution.
The action arises under the Constitution of the United States, Article I, Section I, as hereinafter more fully appears.
- 2) Article I, Section I of the Constitution of the United States vests the authority "to declare war" in the Congress.
- 3) The part of the Constitution referred to in paragraph 2 means that the war decision is a legislative decision.
- 4) The part of the Constitution referred to in paragraph 2 means that the Congress exclusively has the authority to authorize war.
- 5) Inherent in the Congress' exclusive authority to authorize war is the exclusive authority to do any similar or synonymous thing, such as, to initiate war, cause war, or make war.
- 6) Inherent in the Congress' exclusive authority to authorize war is the exclusive authority to withhold or deny such authorization.
- 7) The authority to authorize war, as described in paragraphs 3, 4, 5, and 6 above, is vested exclusively in the Congress by the Constitution in order to provide that the people have representation in the making of the war decision.
- 8) The Congress did not authorize war in Vietnam.
- 9) The Congress encouraged the President to make war in Vietnam, through the exercise of executive powers of his office, by passing, August 7, 1964, Public Law 88-408, 78 Statutes 384, also known as the "Tonkin Resolution," which provides that:

". . . The Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression . . . the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty [SEATO] requesting assistance in defense of its freedom."

[Commentary, September 2011: *Note that the reference to the President as "Commander in Chief" is wrong and is an action that attempts to increase executive power without a Constitutional amendment. The Constitution states that the President is "Commander in Chief of the Armed Forces." Immediately following the straight down collapse of the twin towers on September 11, 2001, and a similar straight down collapse of a neighboring building that was not hit, President George W. Bush referred to himself as the "Commander in Chief" -- once again omitting the important qualifier "of the Armed Forces."*]

10) The President, following the passage of the Tonkin Resolution, made war in Vietnam through the exercise of executive powers of his office.

11) Title 50, Appendix, United States Code, the "Military Selective Service Act," holds the plaintiff, and all male citizens of certain ages, liable generally for service in the Armed Forces of the United States.

Wherefore plaintiff demands declaratory judgment that the defendant actually denied plaintiff's right to representation in the making of the war decision, and the denial of said right is a violation of the Constitution, and liability for service to the United States wherein such violation occurs constitutes conscription without representation, and is a violation of the Constitution.

/s/John M. Medeiros
Filed March 15, 1968

When one submit's a complaint or petition to a federal court one files a series of averments in numbered paragraphs, as above. The defendant, in this case the Government, then submits his defense, challenging the averments which he believes can be refuted. The Government will submit its defense in the same form of numbered paragraphs. Every averment, on both sides, must be supported by evidence. The Court analyzes the evidence and its relation to the averments, applies its own knowledge, and from its analysis and knowledge draws the conclusions which constitute judgment.

The Government will probably have no objections to an therefore no defense against the first six averments and the eleventh. There will be objections to each of the other averments and it is my opinion that the defense will be concentrated against averment ten. I believe the Government will attempt to prove first that there was no war, because if they can do that my case will be very difficult or impossible to plead. I believe I can prove, however, that there was a war, and I take that question up first, not because it is the least important or the easiest to prove. On the contrary, it is most important and difficult to prove. If I can prove that there was a war, I believe I have won my case, because the other averments are comparatively easy to prove.

[Commentary, September 2011: *The case of Medeiros vs. United States was dismissed as a "political question," but the content of the Case Against a President's War is the accurate history of the "declaration of war" in the United States from a power vested in the Congress to a power vested in the President.*]

Chapter Two: There Was a War

What are the criteria by which we can reasonably distinguish war from other types of hostilities? I hold that there are three basic criteria: 1) Commitment, 2) Magnitude of combat, and 3) Duration of combat. And the most important of these is commitment. Commitment is the root cause of the combat, and the intensity of commitment makes into war what might otherwise terminate as hostilities. It is true that the magnitude and duration of combat are always dependent upon the capacity of the committed party; however, whatever the capacity, there will be no war without a war commitment. Also, a war commitment does not become actual war until the committed party can and does make combat. With capacity generally available, a party might make combat or hostilities in order to fulfill minor defense commitments, such as to rescue citizens from danger in foreign countries, to provide reasonable protection for economic interests, or to defend national rights vested in all nations by international law or international practice. Such commitments should be called "minor" commitments or "defense" commitments, because they are purely defensive and do not imply, so long as they are honest, any intention or desire to do injury to anyone else. Whatever injuries to others occur in such incidents are purely circumstantial and are not deliberately inflicted.

What is a war commitment? It might seem difficult to define, yet, reviewing the words of President Lyndon B. Johnson will show us clearly what a war commitment is. I will prove in this chapter that President Johnson made a war commitment, and that the war commitment was followed by combat of war magnitude. In Chapter Six I will prove that the combat was authorized by President Johnson, and therefore he made war through the exercise of executive powers of his office. The President told us, in his official news conference of July 28, 1965, what our commitment was in Vietnam. He formulated his statements as an answer to a citizen's question sent to him in a letter:

Why must young Americans born into a land exultant with hope and golden promise, toil and suffer and sometimes die in such a remote and distant place? [The President replied:]

The answer, like the war itself is not an easy one. but it echoes clearly from the painful lessons of half a century. Three times in my lifetime -- in two world wars and in Korea -- Americans have gone to far lands to fight for freedom. We have learned at a terrible and brutal cost that retreat does not bring safety, and weakness does not bring peace.

And it is this lesson that has brought us to Vietnam.

This is a different kind of war. There are no marching armies or solemn declarations. Some citizens of South Vietnam, at times with understandable grievances, have joined in the attack on their own government.

But we must not let this mask the central fact that this is really war. It is guided by North Vietnam and it is spurred by Communist China. Its goal is to conquer the South, to defeat American power and to extend the Asiatic dominion of Communism.

And there are great stakes in the balance. ¹

Also, in his State of the Union message of January 12, 1966:

How many times in my lifetime and in yours have the American people gathered -- as they do now -- to hear their President tell them of conflict and tell them of danger.

Each time they have answered with all the effort that the security and the freedom of this nation required.

And they do again tonight in Vietnam.

* * *

We could leave, abandoning South Vietnam to its attackers and to certain conquest -- or we could stay and fight beside the people of South Vietnam.

We stayed, and we will stay until aggression has stopped.

* * *

And we do not intend to abandon Asia to conquest.

* * *

Our decision to stand firm has been matched by our desire for peace.

In 1965 alone we had 300 private talks for peace in Vietnam with friends and adversaries throughout the world.

* * *

Able and experienced spokesmen have visited on behalf of America more than 40 countries. We have talked to more than a hundred Governments -- all 113 that we have relations with and some that we don't. We've talked to the United Nations and we've called upon all of its members to make any contribution that they can towards helping obtain peace.

* * *

Until peace comes, or if it does not come, our course is clear. We will act as we must to help protect the independence of the valiant people of South Vietnam . . . We will strive to limit the conflict, for we wish neither increased destruction nor do we want to invite increased danger.

But we will give our fighting men what they must have: Every gun and every dollar, and every decision -- whatever the cost or whatever the challenge. It is crime against mankind that so much courage and so much will and so many dreams must be flung on the fires of war and death.

* * *

How many men who listen to me tonight have served their nation in other wars? How very many men are not here to listen? The war in Vietnam is not like the other wars. Yet, finally, war is always the same.²

Did President Johnson describe a "minor" or "defense" commitment? Did he describe a rescue of citizens, and intervention to provide protection for economic interests, a defense of our rights as a nation? The answer to all of these questions is "No."

He compared the war in Vietnam to World Wars I and II: going to far lands to fight for freedom. He stated that it was really war, and that there were great stakes in the balance. He said that we intend to convince the Communists that we cannot be defeated by force of arms of by superior power. He said that we would stay until aggression stopped, whatever the cost. He said that more than one hundred different governments and the United Nations had been asked to help obtain peace, and peace had not been obtained. There can be no doubt that he described war and that he made a war commitment. If we are to search for a "declaration of war" by the President, it was made July 28, 1965.

Now let me prove, with the help of statistics, that the combat was of war magnitude. There are two types of statistics which together provide a valid measurement of the magnitude of combat. First, the number of armed forces personnel in service per square mile of combat area; second, the ratio of battle deaths and non-fatal wounds to the number of personnel. The first type, it is conceded, does not identify a war positively, but it serves as a first test which eliminates defense commitments.

The World War II Normandy invasion was performed by approximately 4,000,000 men.³ The area of land they were to take and occupy in the northern half of France, Belgium, and the Netherlands amounted to 132,234 square miles.⁴ The number of personnel serving per square mile was 30. In South Vietnam, in 1966, there were 384,400 United States servicemen,⁵ excluding the South Vietnamese, Korean and other personnel. As South Vietnam covers an area of 66,280 square miles,⁶ the United States alone had approximately 6 men per square mile. This statistic does not prove that there was a war. There could have been 384,40 men (6 per square mile) invading the country in a non-combatant capacity, such as a super Peace Corps, but this was not the case. A look at the number of battle deaths and non-fatal wounds will show that the combat was of war magnitude. I will show the statistics for 1964, 1965, and 1966, because a comparison of the years demonstrates that the combat grew to war magnitude in 1966.

During World War II, 16,353,659 persons served.⁷ The battle deaths numbered 291,557,⁸ which means a ratio of one battle death to every 56 persons serving. In Vietnam, in 1964, the ration was one battle death to 159 serving; in 1965, one to 142; in 1966, with 384,400 serving and 5,008 battle deaths, the ratio was one to 77.⁹ Not exactly the same as World War II, but close enough to place both in the same category.

The number of non-fatal wounds in World War II was 670,846,¹⁰ approximately one to 24 persons serving. In Vietnam, in 1966, 30,093 non-fatal wounds were suffered,¹¹ one to 13 persons serving. There are three likely explanations for the large number of non-fatal wounds in Vietnam: first, more accurate statistics; second, more accurate enemies; and third, the improvement of medicine and medical techniques has prevented more wounds from becoming deaths.

It is said that a nuclear attack might destroy a nation in 48 hours. Since this is a very short time, but definitely war, we can see that duration of combat is not always a meaningful criterion. Nuclear attack would be considered war on the basis of the commitment it represented, and no one would argue that the action did not amount to war because it did not last long enough. Duration of combat is therefore a meaningful criterion for conventional fighting only, and it serves to reaffirm the commitment. It is reasonable to say that combat of war magnitude might still not constitute war if it terminated in thirty days or less, and was made only to fulfill a defense commitment. Such

brief combat might be necessary on rare occasions. However, whenever combat of war magnitude is prolonged beyond a brief period, new issues may develop. The combatant parties grow more inflexible. Aggravation and frustration may change the original defense commitment into a war commitment. In Vietnam, the combat continued for a duration beyond that to be reasonably expected of a defense commitment action. In conclusion, the number of battle deaths and non-fatal wounds suffered in Vietnam, in 1966, indicate combat of war magnitude; the combat was prolonged; there was a war. The number of persons serving has been constantly increased, and the numbers of battle deaths and non-fatal wounds have increased proportionately. The number of battle deaths for the first quarter of 1967 was 2,126, with 439,400 men serving.¹² We can be sure that the conditions true for 1966 hold true for 1967 and 1968 thus far.

Chapter Three: Proof of Averment #7

The founders of the Constitution generally considered the formation of a constitutional federation to be the best way to avoid the development of a militarist government. In the Federalist Papers, James Madison said:

We have seen the necessity of the Union as a bulwark against foreign danger, as the conservator of peace among ourselves, as the guardian of our commerce and other common interests, as the only substitute for those military establishments which have subverted the liberties of the old world, ...¹³

A basic principle supporting the Federal Constitution as a whole is that the sovereignty, the ultimate authority, is vested in the people. The founders of the Constitution deliberately made it so, and that the Constitution is intended generally to realize this principle cannot be doubted. In Federalist Paper No. 22 Alexander Hamilton was explicit on this matter. He argued that one of the most important defects of the *Articles of Confederation* was that they were ratified by state legislatures only and not by the people. Hamilton said:

The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. the streams of national power ought to flow immediately from that pure, original fountain of all legislative authority.¹⁴

[The capitalization of "the consent of the people" is that of Hamilton.]

At the time that the Constitution was being considered for ratification by the people, there was great apprehension concerning the idea of "standing armies in time of peace." The idea has lost its meaning for us, because we have come to believe that even with the outward appearances of peace we are always exposed to extreme danger. It would seem that some power outside our own society were attempting to make us paranoiac, and perhaps succeeding. But back in 1787 military establishments at home were feared as much as foreign armies. The Constitution stood little chance of adoption if it did not explicitly vest strict authority over the military establishment in the representatives of the people. Hamilton discussed questions related to defense and the national forces, including the question of "standing armies in time of peace," in Federalist Papers 23 through 28. In No. 28 he dispels all reasonable doubt that the authority of government in general, as well as the authority over the military establishment, is vested in the representatives of the people.

Independent of all other reasonings on the subject, it is a full answer to those who required a more peremptory provision against military establishments in time of peace to say that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after all, the only efficacious security for

the rights and privileges of the people which is attainable in civil society.¹⁵

Not only did the authors of the Federalist Papers insist that authority over the military establishment was to be vested in Congress, but they also stated explicitly that it *was not* to be vested in the President. In No. 69, Hamilton discusses the authority to be vested in the President, and he makes specific reference to the President's supplemental office of Commander in Chief. In this essay Hamilton compares the authority to be vested in the President by the new constitution with that already vested in other executives by other constitutions, particularly the king of Great Britain and the governor of New York State:

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 supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy [the United States], while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies -- all which, by the Constitution under consideration, would appertain to the legislature. [Italics are Hamilton's]¹⁶

We will see in Chapter Seven that the Judiciary has reaffirmed Hamilton's definition of the office of Commander in Chief.

Chapter Four: Proof of Averment #8

The first step toward proving that Congress did not authorize war in Vietnam is to examine those instances where we know Congress did authorize war. The brief reviews of United States wars here are not intended to be histories accurate in detail: they are only background for the declarations or authorizations from Congress. We start with the War of 1812. [Commentary from 2011: The people of Canada sometimes refer to this war as "The invasion of Canada" -- a different perspective.] At that time the French and the British were at war with one another and each acted to deprive the other of trade with the United States. At first, United States shipping was subjected to harassment. Later, the British resorted to the impressment of United States sailors. Finally, when acts of harassment from the British grew to acts of war, President Madison requested of the Congress that it consider a war authorization. Madison's words were, in his official communication to Congress, June 1, 1812:

I communicate to Congress certain documents, being a continuation of those heretofore laid before them on the subject of our affairs with Great Britain.

Without going back beyond the renewal, in one thousand eight hundred and three, of the war in which Great Britain is engaged, and omitting unrepaired wrongs of inferior magnitude, the conduct of her Government presents a series of acts, hostile to the United States as an independent and neutral nation.

* * *

Whether the United States shall continue under these progressive usurpations, and their accumulating wrongs, or opposing force to force in defense of their national rights shall commit a cause into the hands of the Almighty Disposer of events, avoiding all connexions which might entangle it in the contest or views of other Powers, and preserving a constant readiness to concur in an honorable re-establishment of peace and friendship, is a solemn question, which the Constitution wisely confides to the Legislative Department of the Government. In recommending it to their early deliberation, I am happy in the assurance that the decision will be worthy the enlightened and patriotic councils of a virtuous, a free, and a powerful nation.¹⁷

War was declared June 18, 1812, after several votes on amendments to the declaration and long discussions.¹⁸ After the declaration of war the President was still not considered authorized to conduct the war as he thought best. June 19, the House of Representatives passed the following resolution:

Resolved, That the committee to whom was referred so much of the President's Message, at the commencement of the session, as relates to the Spanish American colonies, be instructed to inquire into the expediency of authorizing the President of the United States to occupy East and West Florida, without delay.¹⁹

The Mexican War

The Mexican War of 1846, originally concerning the boundary of Texas, and leading to the acquisition of Mexican Territory, including California, contains parallels to the war in Vietnam. There were debates in Congress as to whether President James K. Polk had initiated the war by his own action. And it was suspected that the administration desired the acquisition of California. The war was started by an incident blamed on the Mexicans, but there were indications, believed by many then and many today, that the United States was entirely to blame. The Mexicans said that the southwest boundary of Texas was the Nueces River. Texas and the United States said it was the Rio Grande, then called the Rio del Norte, which is much further south. The opposing claims to the territory probably could have been settled without war, but both sides were inflexible, and Mexico also claimed that the whole of Texas had actually been illegally annexed by the United States. President Polk ordered United States troops to occupy sections of the disputed territory, and the Mexicans soon did the same. Combat took place, but perhaps the United States could still have withdrawn without serious damage to its position or prestige. The United States did not withdraw, but it did declare and authorize war.

President Polk's message to the Congress, May 11, 1846, was very long, and it appears to be preoccupied with explaining and defending the administration's actions. Nevertheless, the President did request authority from Congress:

The existing state of relations between the United State and Mexico renders it proper that I should bring the subject to the consideration of Congress.

* * *

As war exists, and notwithstanding all our efforts to avoid it, exists by the act of Mexico herself, we are called upon, by every consideration of duty and patriotism, to vindicate, with decision, the honor, the rights, the interests of our country.

* * *

In further vindication of our rights and defense of our territory, I invoke the prompt action of Congress to recognize the existence of the war, and to place at the disposition of the Executive the means of prosecuting the war with vigor, and thus hastening the restoration of peace. To this end I recommend that authority should be given to call into the public service a large body of volunteers to serve for not less than six or twelve months unless sooner discharged.²⁰

[Commentary 2011: Note that President Polk is implying an estimated duration of the war - six to twelve months. Sound familiar? The duration of this war was 46 months.]

The message was debated hotly in the Senate. The major questions debated were these:

- 1) Who started the war?
- 2) How was it started? and
- 3) Did the President, in his message, request a declaration of war?

John C. Calhoun, from South Carolina, argued that war is to be made by Congress only:

I distinguish between hostilities and war, and God forbid that, acting under the Constitution, we should ever confound one with the other. There may be invasion without war, and the President is authorized to repel invasion without war. But it is *our* sacred duty to make war, and it is for *us* to determine whether war shall be declared or not.²¹

Senator Archer agreed and added:

... the President does not affirm that we are in a state of war. He cannot affirm it; for if he did, he would affirm that which, in a legal and constitutional acceptance, could not be true. If true, what would be the result? The officers and men on the Rio Grande might involve the country in war at their pleasure.²²

On May 12, 1846, the Congress authorized the President to prosecute the war:

Whereas, by the act of the Republic of Mexico, a state of war exists between that Government and the United States:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purpose of enabling the Government of the United States to prosecute said war to a speedy and successful termination, the President be, and he is hereby, authorized to employ the militia, naval, and military forces of the United States, and to call for and accept the services of any number of volunteers, not exceeding fifty thousand, who may offer their services, either as cavalry, artillery, or riflemen, to serve twelve months after they shall have arrived at the place of rendezvous, or to the end of the war, unless sooner discharged; and that the sum of ten millions of dollars out of any moneys in the Treasury, or to come into the Treasury, not otherwise appropriated, for the purpose of carrying the provisions of this act into effect.²³

Spanish American War

For the prosecution of the Spanish America War the Congress passed two resolutions authorizing the President to use armed forces. The first was not a declaration of war. The second was a retroactive declaration. Cuban revolutionaries were attempting to overthrow the Spanish colonial government. The Spanish government was oppressive, and its way of suppressing the insurrection was brutal. The Spanish could control Cuba by military force, but were very weak compared to the United States at that time. At first

the United States expressed a desire only to have the Spanish authorities stop suppressing the insurrection. On April 11, 1898, President McKinley asked Congress for authority to:

... secure a full and final termination of hostilities between the Government of Spain and the people of Cuba, ... and to use the military and naval forces of the United States as may be necessary for these purposes.²⁴

On April 18 the House passed a resolution, in concurrence with the Senate, in response to the President's request. It became law April 20:

A joint resolution for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

Resolved, etc., First. That the people of the Island of Cuba are, and of right ought to be, free and independent.

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people.²⁵

This was not a declaration of war. On April 22, the President used the authority granted by this resolution: he proclaimed a blockade.²⁶ On the same day of the blockade, Congress passed a law which provided for the organization of a volunteer army.²⁷ The law stipulated that the volunteer army shall have been maintained only during war or when war was imminent, and:

That when it becomes necessary to raise a volunteer army the President shall issue his proclamation stating the number of men desired, within such limits as may be fixed by law, ...²⁸

The above was also not a declaration of war. On April 23, the President called for volunteers in an official proclamation, and on April 25, he sent a message to Congress recommending a declaration of war. The recommendation said:

In view of measures so taken [blockade and call for volunteers], and with a view to the adoption of such other measures as may be necessary to enable me to carry out the expressed will of the Congress of the United States in the premises, I now recommend to your honorable body the adoption of a joint resolution declaring that a state of war exists between the United States of America and the Kingdom of Spain, and I urge speedy action there on to the end that the definition of the international status of the United States as a belligerent power may be made known, and the assertion of all its rights and the maintenance of all its duties in the conduct of a public war may be assured.²⁹

Congress made its retroactive declaration of war that same day:

Be it enacted etc., First, That war be, and the same is hereby declared to exist, and that war has existed since the 21st day of April, A.D. 1898, including said day, between the United States of America and the Kingdom of Spain.

Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States, the militia of the several States, to such extent as may be necessary to carry this act into effect.³⁰

Neither the Spanish American War nor any United States war has come about suddenly, though it might appear so from my narration. I am presenting only the last few days of "legal peace" prior to the declarations.

World War I

War had been wrecking Europe for nearly three years before the United States entered. In March, 1917, President Woodrow Wilson issued a proclamation calling for a special session of Congress to be convened April 2.³¹ At that session President Wilson advised the Congress to accept the war that had been thrust upon it:

Gentlemen of the Congress: I have called the Congress into extraordinary session because there are serious, very serious, choices of policy to be made, and made immediately, which it was neither right nor constitutionally permissible that I should assume the responsibility of making.

When I addressed the Congress on the twenty-sixth of February last I thought that it would suffice to assert our neutral rights with arms, our right to use the seas against unlawful interference, our right to keep our people safe against unlawful violence. But armed neutrality, it now appears, is impracticable.

* * *

With a profound sense of the solemn and even tragical character of the step I am taking and of the grave responsibilities which it involves, but in unhesitating obedience to what I deem my constitutional duty, I advise that

the declare the recent course of the Imperial German Government to be in fact nothing less than war against the government and people of the United States; that it formally accept the status of belligerent which has thus been thrust upon it; and that it take immediate steps not only to put the country in a more thorough state of defense but also to exert all its power and employ all its resources to bring the Government of the German Empire to terms and end the war.³²

On April 5, the House passed, concurring with the Senate, Senate Joint Resolution No. 1:

Whereas the Imperial German Government has committed repeated acts of war against the Government and people of the United States of America: Therefore be it

Resolved, etc., That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.³³

By now we have seen what constitutes a declaration of war, or an authorization to prosecute war. We have seen what is said, the types of phrases used. The President is not delegated the authority to decide whether war should be prosecuted. He is authorized, directed, or empowered [by the Congress] to use the military forces to prosecute a particular war against a particular enemy. Such was the case also in World War II.

World War II

On December 8, 1941, President Franklin D. Roosevelt asked the Congress to declare that a state of war between the United States and the Japanese Empire existed as of December 7.³⁴ The declaration of war with Japan was made the day of the President's request. Later, Congress passed declarations of war with Germany, Italy and other European nations. All of the declarations were worded almost exactly the same except for the enemy named. The declaration with regard to Japan appears below:

Joint resolution declaring that a state of war exists between the Imperial Government of Japan and the Government and the people of the United States and making provision to prosecute the same.

Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it

Resolved, etc., That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized

and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.³⁵

Other Wars

The Civil War, or the War Between the States, was an insurrection, and is discussed in Chapter Seven. The Korean War was between the Democratic People's Republic of (North) Korea and the United Nations. The relation of the United States to that war is discussed in Chapter Ten. The intentions of this chapter were to prove that Congress did not declare or authorize war in Vietnam. It is clear that Congress made no declaration or authorization even remotely similar to the known authorizations listed above. Many people have believed that the Tonkin Resolution was an authorization to make war, but it was not. A close examination of its wording shows it to be an attempt, deliberate or accidental, to delegate to the President the authority to make the war decision. The Constitution limit's the Government's war authority by vesting it in the Congress only. The Tonkin Resolution violates that Constitutional limitation. In proving averment #9, I want to prove that the Tonkin Resolution, though not an authorization, was an encouragement to the President to use executive powers of his office to do whatever he deemed necessary, including the making of war. That the Tonkin Resolution was not a declaration of war was known by Congress before it was passed.

Chapter Five: Proof of Averment #9

The Representative who proposed the Tonkin Resolution, Representative Morgan from Pennsylvania, said of it: "This is definitely not an advance declaration of war."³⁶ The House discussed the resolution and most believed it to be necessary and proper. Many insisted that it was not a declaration of war and none said that it was. Others were concerned that it might impair Congressional "prerogatives."³⁷ The "prerogatives" the Representatives referred to meant Congress' exclusive authority to authorize war. But the resolution does not authorize anything. All that was resolved was that the United States "approves and supports" the President's determination, and "is prepared" to take steps. It must have been clear to the House that, because the Tonkin Resolution expressed only support and approval for the President's determination "to take all necessary measures ... to prevent further aggression," it therefore expressed the wish that the President exercise the prerogative in question.³⁸ The statements of members of the House, and a comparison of the Tonkin Resolution itself to known declarations and authorizations of war, prove averment #9.

Chapter Six: Proof of Averment #10

Chapter Two presented the evidence that there was a war. And Chapters Four and Five presented the evidence that Congress did not authorize war. It remains in this chapter to prove that the President himself made war through the exercise of executive powers of his office. All that need be proven is that the decisions were his, and the evidence for this is adequate. The first important step following passage of the Tonkin Resolution took place on July 28, 1965, when the President announced his decision to increase United States troop strength in Vietnam from 75,000 to 125,000. The announcement to the people was delivered by the President himself and was televised. Parts of the announcement which described the commitment made by the President were cited in Chapter Two. The following parts of the announcement describe the decisions made by the President authorizing combat:

I have asked the commanding general, General Westmoreland, what more he needs to meet the mounting aggression. He has told me. And we will meet his needs.

* * *

I have today ordered to Vietnam the Airmobile Division and certain other forces which will raise our fighting strength from 75,000 to 125,000 men almost immediately. Additional forces will be needed later and they will be sent as requested.³⁹

We must note that the President gave the orders and made a commitment for the future. This reinforces the averment that the President authorized war. A defense commitment does not require or entail such commitments for the future. The President himself said he gave the orders and Congressmen emphasized the fact that the authorization was the President's. Passages from Congressional debate concerning the announcement of July 28, 1965 appear below:

House, Mr. Albert.

Mr. Speaker, The President of the United States has considered every possible course of action in reaching the conclusions which he has announced to the American people. ...

I am sure, Mr. Speaker, that an overwhelming majority of Americans support President Johnson in his conduct of American forces and policies in Vietnam.⁴⁰

House, Mr. Mahon.

The President is weighted down with a very heavy burden as a result of Communist aggression in southeast Asia. He is doing everything in his power to follow the safest course, the best course, for the people of the United States and for the people of the world. I think it is wise that he has assumed a policy of firmness rather than a policy of vacillation and appeasement.⁴¹

House, Mr. Edmondson.

Our best road to peace and freedom in Asia is being followed resolutely by the President, and his fellow Americans can best advance the cause of peace and freedom by giving our forces in Vietnam, and their Commander in Chief in Washington, their resolute united support.⁴²

House, Mr. Huchler.

Mr. Speaker, the president has made an historic pronouncement and has taken actions in Vietnam which will further mark him as one of the truly great Chief Executives in American history⁴³.

House, Mr. Foley.

Thousands of American fighting men are in Vietnam today. Thousands more will be in Vietnam in the coming months. We know that many American lives may be lost, but our commitment has been given and it will be met. The President has again made clear to friend and foe alike.⁴⁴

House, Mr. Rivers.

Mr. Speaker, the Nation and its chosen representatives will rally behind the President in this period of crisis in South Vietnam. ...

Stephen Decatur -- one of America's greatest heroes of another day -- said that in her dealings with other nations:

'My country, may she always be in the right, but right or wrong, my country.'

Mr. Speaker, our country is right, and this is not the time to debate the wisdom of the President's most recent decision. This is the time for every American to give him his sympathy, understanding, and support.⁴⁵

House, Mr. Hebert.

Mr. Speaker, I was privileged to be one of those invited to the White House this morning to hear the course of action which he [President Johnson] planned in Vietnam and which he broadcast to the American people and to the world a few hours later.⁴⁶

Several other Representatives made similar statements. Considering what was said in the House, about the President's announcement to the country, there can be no doubt that the decision was the President's and the House knew it. Below are related statements made by United States Senators, in the Senate, on July 29, 1965:

Senate, Mr. Mansfield.

The decision which the President arrived at was not an easy one, but was one of five options which he gave consideration to and on which he did not make up his mind until almost the last moment.⁴⁷

Senate, Mr. Lausche.

I have the deepest compassion for the President with respect to the decision he had to make.⁴⁸

Senator Clark expressed the opinion that there was a war and a commitment for the future. He asked that a newspaper editorial be printed in the Congressional Record as part of his remarks. The editorial was from the New York Times.

Senate, Mr. Clark.

The United States is now fighting a land war in Asia -- a limited one so far but nevertheless a war on the Asiatic Continent. It is a war to which more men, materiel, and money must daily be committed -- not to achieve an evanescent victory but to prevent further deterioration in the American position.

* * *

Mr. President, I hope that in the conduct of the war in the months ahead every effort will be made to minimize American casualties without in any way weakening our position in defending those parts of Vietnam which are controlled by ourselves and our allies in Saigon.⁴⁹

What was said in the Senate, on July 29, 1965, leaves no doubt that the Senate knew the President had made the decision. The Senate should have perceived, under the circumstances, and considering the President's words, that the decision was the war decision which the Constitution vests exclusively in Congress.

Chapter Seven: Insurrection -- The Civil War

Although insurrection can be considered a type of war, and involve combat of war magnitude, the commitment to suppress an insurrection is entirely different from a war commitment, and there are justifiable provisions, in both the Constitution and United States Statutes, which make the suppression of insurrection and the making of war different and separate acts. There are also judicial precedents reaffirming these provisions.

Insurrection, by definition, is an active opposition to the laws of a government that has just claims to jurisdiction over the opposing parties. This is its essential difference from war, and the President's authority with regard to insurrection is entirely different from that with regard to war. Article II, Section 3 of the Constitution states that the President "shall take care that the laws be faithfully executed." This is a general provision, but there has also been in force, usually if not always, a United States law specifically authorizing the President to call forth the militia (National Guard) in order to suppress insurrection. The first such law was passed during the first term of President George Washington, and he relied upon it to suppress the Whisky Rebellion in 1794. Groups of distillers in Western Pennsylvania were opposing with serious violence the taxes levied on their spirits by the Federal Government. President Washington issued his proclamation, September 25, 1794, "Warning the Insurgents in the Western Parts of Pennsylvania to Desist from Their Opposition to the Laws."⁵⁰ Similarly, President Abraham Lincoln, on April 15, 1861, issued his proclamation calling for militia forces and convening Congress:

Whereas the laws of the United States have been for some time past, and now are opposed, and the execution thereof obstructed, in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshals by law.

Now therefore, I, Abraham Lincoln, President of the United States, in virtue of the power in me vested by the Constitution, and the laws, have thought fit to call forth, and hereby do call forth, the militia of the several States of the Union, to the aggregate number of seventy-five thousand, in order to suppress said combinations, and to cause the laws to be duly executed.⁵¹

A series of constitutional law cases grew out of the Civil War known as the *Prize Cases*. The name refers to the fact that enemy ships and goods captured by civilians were called "prize," in which the captors had a share. These cases brought up the question of the President's authority with regard to war. The Supreme Court gave its ruling in 1863, which stated, in part:

By the Constitution, Congress alone has the power to declare a national or a foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take

care that the laws be faithfully executed. He is Commander in Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State.⁵²

That there is a vital difference between the President's authority over internal affairs and his authority to act with regard to external affairs was reaffirmed by the Supreme Court in more modern times. In 1936, the Court heard the case of *United States vs. Curtiss-Wright Export Corp. et al.*, which raised issues concerning the President's authority to manage foreign relations. The Court stated in its decision:

It will contribute too the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.⁵³

The contemporary authorization for the President to act to suppress insurrection is contained in Section 13 of Title 50 of the United States Code. My petition has nothing to do with this authority. The President's authority with regard to foreign relations is discussed in the next chapter.

Chapter Eight: Foreign Relations

This chapter treats only the President's statutory authority to enforce the nation's foreign policy. Other related questions are discussed in the chapters immediately following, and these final chapters are all closely related in that they aim to refute various defensive arguments which the Government might advance. The first of such defensive arguments is that the authority to authorize war combat is inherent in the President's authority to enforce or manage United States foreign policy. This argument is refuted by the law. Most federal law with regard to foreign relations is organized under Title 22 of the United States Code. In this title the President is authorized to negotiate a special agreement with the Security Council of the United Nations with regard armed forces to be made available to the United Nations.⁵⁴ This section of the Code, because of its importance, appears in full in the appendix of this book. It was made law because the United States is required by the United Nations Charter to make armed forces available to the United Nations on certain occasions. The significance of this requirement will be discussed later. The President is also authorized to protect United States citizens abroad,⁵⁵ and to provide military assistance of a non-combatant nature.⁵⁶

The Government might also argue that the President had to authorize combat in order to enforce a "solemn" treaty. Many people believe that treaties are equal to the Constitution, but this is not true. Treaties are equal to laws only, and they can be made absolutely void by legislative action at any time. The President was bound by a treaty in only a very loose sense, which will be shown in the next chapter. Congress may enforce a treaty or refrain from enforcement as it deems necessary or desirable.

Chapter Nine: Treaties

In the 1800's many a Chinese worked United States mines and built railroads, as well as laundered numberless shirts. The United States had made treaties with the Government of China which allowed the emigration of Chinese Laborers to the United States without limitation. The western states, especially California, gradually became fearful that the emigration would develop into an act of colonization. It was in the Chinese character, it seems to enjoy democracy as much as Europeans. But the competition from the cheap Chinese labor was putting American citizens out of work. [How familiar this situation is, with regard to Mexican emigration, in our times.] The complaints of the Government of California were probably justified. Many of the Chinese did not become United States citizens, and they frequently returned to China, with United States money, and then came back to the United States for more United States money.

To solve the problem, the Federal Government added supplements to the treaty to limit Chinese emigration, and finally, October 1, 1888, Congress excluded Chinese laborers entirely. Almost immediately, a Chinese who held a certificate which, under prior law, would permit him to re-enter the United States, brought his case to the Supreme Court. His argument was that the law of October 1, 1888, violated a prior treaty with the Government of China and therefore was void. His case was called, appropriately, the *Chinese Exclusion* case, and the judgment of the Supreme Court stated in part:

... It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868 and the supplemental treaty of 1880, but it is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject with the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control.

* * *

It will not be presumed that the legislative department of the government will lightly pass laws which are in conflict with the treaties of the country; but that circumstances may arise which would not only justify the government in disregarding their stipulations, but demand in the interests of the country that it would do so, there can be no question. Unexpected events may call for a change in the policy of the country.⁵⁷

The decision has never been reversed or challenged. Congress can change or void a

treaty, but the President cannot. He is obligated by his office to enforce treaties because they are the law of the land. But the treaty with regard to Vietnam, the Southeast Asia Collective Defense Treaty, did not and does not bind the United States in any way that could interfere with United States Constitutional processes. The treaty, which was ratified by the Senate early in 1955, provides that each party to the treaty will, ". . . meet the common danger in accordance with its constitutional processes."⁵⁸ The relevant sections of the treaty appear in the appendix. It is clear that the President was not obligated to take any action of doubtful constitutionality. The treaty guarded against all conflict which might otherwise develop between treaty obligations and the requirements of constitutional processes. If this is so, and President Johnson's authorization was made in violation of the Constitution, as I contend, was not President Truman's provision of troops to the United Nations a similar violation? The answer is "No." The United Nations is not a treaty. It is an organization and is known throughout most of the world as the United Nations Organization. Also, it is a unique organization; it has unique purposes; it has authority of its own; it has more than 100 members [1968]; and Congress passed a special law to provide specifically for United States participation in the United Nations. All this makes the relationship of the United States to the United Nations, and the obligations of the United States to the United Nations, an entirely different and separate matter from obligations under regular treaties.

Chapter Ten: Provision of Combatant Personnel to the United Nations Organization

December 20, 1945 the Congress passed the act which contains a specific provision that it may be cited as the "United Nations Participation Act of 1945."⁵⁹ It contains detailed provisions for the United States participation in that organization, including one part, Section 6 of the Act, which is substantially the same as Section 287d of Title 22 of the United States Code (see appendix). There is no other act similar to this one providing for participation in a specific organization. And, the United Nations is without doubt a unique organization with authority of its own. What treaty has a General Assembly? The relevant articles of the United Nations Charter appear below:

Chapter I Purpose and Principles Article I

The purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Article II

The organization and its Members, in pursuit of the Purposes stated in Article I, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

* * *

Chapter VII Action With Respect to Threats to the Peace, Breaches of the Peace, and acts of Aggression.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their constitutional processes.⁶⁰

On June 25, 1950, the North Korean army attacked South Korea, and on the same day, the United Nations Security Council passed a resolution which requested withdrawal of the North Korean forces, but which did not yet provide for armed enforcement:

The Security Council -

Noting with grave concern the armed the armed invasion of the Republic of Korea by armed forces from North Korea,

Determines that this action constitutes a breach of the peace;

1. Calls for the immediate cessation of hostilities and calls upon the authorities

in North Korea to withdraw forthwith their armed forces to the thirty-eight parallel.

2. Requests the United Nations Commission on Korea (a) to communicate its fully considered recommendations on the situation with the least possible delay; (b) to observe the withdrawal of the North Korean forces to the thirty-eighth parallel; and (c) to keep the Security Council informed on the execution of this resolution.

3. Calls upon all members to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities.⁶¹

June 27, 1950, when it was perceived that the North Korean forces would continue the invasion, the Security Council requested military assistance:

Having called for an immediate cessation of hostilities, and

Having called upon the authorities of North Korea to withdraw forthwith their armed forces to the thirty-eighth parallel, and

Having noted from the report of the United Nations Commission for Korea that the authorities in North Korea have neither ceased hostilities nor withdrawn their armed forces to the thirty-eighth parallel, and that urgent military measures are required to restore international peace and security, and

Having noted the appeal from the Republic of Korea to the United Nations for immediate and effective steps to secure peace and security,

Recommends that the members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.⁶²

July 7, 1950, the Security Council recommended that all members providing military forces make them available to a unified command under the United States, and authorized the unified command to use the United Nations flag.⁶³

The United State Senate debated the constitutionality of President Truman's authorizing United States armed forces to support South Korean troops.⁶⁴ There was no United Nations force in existence at the time.⁶⁵ The special agreement between the United States and the United Nations, stipulating the limitations on assistance that the President himself could authorize, was not yet made. However, the United Nations Charter, and the "United Nations Participation Act of 1945," provided that the President was to be authorized to provide armed forces, limited by the special agreement, without any other specific authorization from Congress. The only thing that was lacking, by circumstance, to complete the definition of the President's authority in this matter, was the special agreement. Considering all the circumstances, the absence of the special agreement should not work to make President Truman's authorizations unconstitutional. President Truman's authorizations, and their legal justification, bear little resemblance to the authorizations of President Johnson, for which the only possible legal justification is the Tonkin Resolution. I do not necessarily prove that President Truman's authorizations were constitutional. I have attempted to prove that President Truman's authorizations were entirely different from President Johnson's, and that provision of combatant

personnel to the United Nations is an issue different and separate from that which I have brought to the court, the authorization of war.

The Government may say that the Korean War and many other incidents, including the War in Vietnam, are all basically the same. The Congress has, on numerous occasions, delegated the same authority to the President as it did in the Tonkin Resolution, and this fact, therefore, established or vested the authority in the President by way of "custom" or "tradition." This is refuted by the Constitution itself, and by judicial precedent.

Chapter Eleven: Minor Incidents and Custom

There are numerous instances, perhaps, wherein the Congress delegated authority to the President to use the armed forces as he deemed necessary, similar to the delegation attempted by the Tonkin Resolution.⁶⁶ Repetition, however, does not necessarily establish custom, and custom does not necessarily establish constitutionality. The Constitution, where it is explicit, cannot be changed by custom. The Supreme Court has rendered judgment on this principle. In 1896, the Court heard the case of *Plessy vs. Ferguson*. The issue was segregation of public facilities, separate but equal facilities for Negro citizens. The Court's decision upheld the famous "separate but equal" doctrine:

The object of the amendment [14th] was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been, generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.⁶⁷

Fifty-eight years later, the Supreme Court heard a case in which the issue was the same, segregation. The case was *Brown vs. Board of Education of Topeka et als.* The decision was:

The effect of this separation on their [plaintiffs'] educational opportunities was well stated by a finding in the Kansas case by a court which never the less felt compelled to rule against the Negro plaintiffs:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

Whatever may have been the extent of psychological knowledge at the time of *Plessy vs. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy vs. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of

"separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws, guaranteed by the Fourteenth Amendment.⁶⁸

The Supreme Court, therefore, reversed its own decision. Why? The Fourteenth Amendment did not change between 1896 and 1954. We can find the explanation in the 1954 decision. The Court refers to the "psychological knowledge" at the time of the *Plessy vs. Ferguson* decision. What changed between 1896 and 1954 was the understanding, on the part of the Justices, of facts relevant to the issue. Segregation in public schools was not only established by "custom," it was supported by judicial precedent, but not even both together could void the Constitution where it is explicit. The provision in Article I, Section 8 of the Constitution, which vests the authority to make the war decision in Congress, is as explicit as the Fourteenth Amendment. The Government will not find effective defense in contending that the President's authority has been established by "custom."

Chapter Twelve: The Most Dangerous Precedent in United States History

We have allowed our President [L. B. Johnson 1965, G. W. Bush 2003] to authorize war. Why? The founders of the Constitution were rare geniuses. The Constitution of the United States is perhaps the greatest masterpiece of applied political science in the world. Alexander Hamilton was its best explicator and defender. But Hamilton was not a man of law alone. The true study of politics is the study of people. The true politician knows man, not to manipulate men, but to solve man's problems and provide for all of man's needs, not just economic needs. Hamilton answers our question, in Federalist Paper No 8:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty, will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.⁶⁹

Have we become willing to run the risk of being less free? Who, or what, is frightening us so much that we should lose our interest and our faith in democratic process? It cannot be said too many times: our first need, our only true protection from all enemies, is democratic process. There are those who speak of losing territories or areas, but what profit will it be to us if we gain the whole world and lose our own freedom? Is it communism that threatens democratic process? No. The threat is our own ignorance. Communism is a theory of social change. It proposes that there is a superior form of social organization in which all men will come to live through natural social evolution. It is not a system for making decisions. Communists, as well as other persons proposing to form a government, must adopt a decision making process. The democratic process is the decision making process that civilization needs. With it, individuals and societies find their best selves; societies cure their own neuroses before they become psychoses. If we are to unify and master our planet, if we are to discover the universe as Man [Humankind], rather than as detachments of technological nationalists, we must adopt democracy in our social relationships and in our formal government. Whatever the superior form of social organization, be it communism, or another form, it cannot be achieved by any means other than democratic process. Dictatorships and other non-democratic forms, including dictatorship by a proletariat, are devices whereby the persons in office attempt to preclude themselves and their policies from criticism and change. They are unavoidably government without the consent of the governed. And they are unavoidably contrary to natural social evolution. Vesting all authority in one party is, after all, the same thing no matter what the party. We could find ourselves, in the United States, vesting all authority in one party, if we do not settle the question of war authorization right now. The treaty which President Johnson relies upon as the law he was obligated to execute states that the United States will act to meet the common danger *in accordance with its constitutional processes*. The Tonkin Resolution states that the United States is prepared to take all necessary steps,

consonant with the Constitution of the United States. If the constitutionality of the process by which the war decision was made is left in doubt, it will be the most dangerous precedent in United States history. It will imply strongly that the process was in fact consonant with the Constitution. It will be much more difficult, perhaps impossible, to make the case against a President's war next time, if the case is not won right now [1968].

Chapter Thirteen: Conscription Without Representation

Whenever the Constitution and the laws in pursuance thereof vest authority exclusively in the Congress, and when the Executive usurps that authority, the decisions made therein cannot be held binding on the people by the Congress. To hold such decisions binding would empower the President to enforce his own violations of the Constitution, and would absolutely defeat the intent of representative government. Liability for service to the United States can only mean liability for service to the true sovereign: to the people and their representatives in Congress; although it may mean liability for service *under* the Executive [as Commander in Chief of the Armed Forces], it cannot possibly mean liability for service *to* the Executive.

Appendix (The Case Against a President's War)

United States Code. Title 22, Section 287d. (1964)
Use of Armed Forces; limitations.

The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to approval of the Congress by appropriate act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with Article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under Article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: *Provided*, That, except as authorized in Section 287d-1 of this title, nothing contained in this section shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities and assistance provided for in such special agreement or agreements.

Section 287d-1 provides for non-combatant personnel only.

Southeast Asia Collective Defense Treaty Article IV Paragraph 1

Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.

Article IX Paragraph 2

The Treaty shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes.

Signed for the United States, September 8, 1954, by:

John Foster Dulles
H. Alexander Smith
Michael J. Mansfield

The other signatories were:

| | |
|--|-----------------------------|
| Australia | Republic of the Philippines |
| France | Kingdom of Thailand |
| New Zealand | Pakistan |
| United Kingdom of Great Britain and Northern Ireland | |

The Tonkin Resolution

Whereas naval units of the Communist regime in Vietnam, in violation of principles of the Charter of the United Nations and of international law, have deliberately and repeatedly attacked United States naval vessels lawfully present in international waters, and have thereby created a serious threat to international peace; and

Whereas these attacks are part of a deliberate and systematic campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors and the nations joined with them in the collective defense of their freedom; and

Whereas the United States is assisting the people of Southeast Asia to protect their freedom and has no territorial, military, or political ambitions in that area, but desires only that these people should be left in peace to work out their own destinies in their own way; Now therefore, be it

Resolved, etc., That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Section 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Section 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

Passed by House and Senate
August 7, 1964

The Case Against a President's War

A summary of the basic arguments to be used by the plaintiff in the constitutional law case
Medeiros vs. United States

Footnotes:

- 1 *Congressional Record* (Washington, D.C., Government Printing Office, 1965)
vol. 111, p. 18661-18662.
- 2 *Congressional Record* (Washington, D.C., Government Printing Office, 1966)
vol. 112, p. 142-145.
- 3 "World War II," *Encyclopedia Britannica* (1966 ed.) vol. 23, P. 792K.
- 4 "Area and Population," in Geographical Summaries of the World Atlas, *Encyclopedia
Britannica* (1966 ed.) p. 199.
- 5 *Statistical Abstract of the United States* (United States Department of Commerce,
Washington, D.C., Government Printing Office, 1967) p. 264, Table No. 372.
- 6 *Encyclopedia Britannica*, World Atlas, p. 199.
- 7 *Statistical Abstract of the United States*, 1967, p. 262, Table No. 370.
- 8 *Statistical Abstract of the United States*, 1967, p. 262, Table No. 370.
- 9 *Statistical Abstract of the United States*, 1967, p. 264, Table No. 372.
- 10 *Statistical Abstract of the United States*, 1967, p. 262, Table No. 370.
- 11 *Statistical Abstract of the United States*, 1967, p. 264, Table No. 372.
- 12 *Statistical Abstract of the United States*, 1967, p. 264, Table No. 372.
- 13 Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, with
introduction by Clinton Rossiter (New York, NY., New American Library of
World Literature, Inc., 1961) p. 99; No. 14, first sentence.
- 14 *Federalist Papers*, p. 152; No. 22 last two sentences.
- 15 *Federalist Papers*, p. 179-180; No. 28, par. 5.
- 16 *Federalist Papers*, p. 417-418; No. 69, par. 6.

- 17 *Annals of Congress, 12th Congress, 1st Session* (Washington, D. C., Gales and Seaton, 1853) p. 1624-1629.
- 18 *Annals of Congress*, 1853, p. 1679-1683.
- 19 *Annals of Congress*, 1853, p. 1683.
- 20 *The Congressional Globe, 29th Congress, 1st Session* (Washington, D. C., Blair and Rives, 1846) vol. 15, p. 782-783.
- 21 *The Congressional Globe*, 1846, p. 784.
- 22 *The Congressional Globe*, 1846, p. 784.
- 23 *The Congressional Globe*, 1846, p. 795 and 802.
- 24 *Congressional Record, 55th Congress, 2nd Session* (Washington, D. C., GPO, 1898) vol. 31, p. 3700-3702.
- 25 *Congressional Record*, 1898, p. 4002 and 4112.
- 26 *Congressional Record*, 1898, p. 4228-4229.
- 27 *Congressional Record*, 1898, p. 4154.
- 28 *Congressional Record*, 1898, p. 4229.
- 29 *Congressional Record*, 1898, p. 4229.
See also, Henry Cabot Lodge, *The War With Spain* (New York and London, Harper and Brothers, 1899) Appendix, p. 240-243.
- 30 *Congressional Record*, 1898, p. 4244.
- 31 *Congressional Record, 65th Congress, 1st Session and Special Session of the Senate* (Washington, D. C., GPO, 1917) vol. 55, p. 101.
- 32 *Congressional Record*, 1917, p. 102-103.
- 33 *Congressional Record*, 1917, p. 102-103.
- 34 *Congressional Record, 77th Congress, 1st Session* (Washington, D. C., GPO, 1941) vol. 87, p. 9504-9505.
- 35 *Congressional Record*, 1941, p. 9505 and 9537. Votes, p. 9506 and 9537.
See also p. 9652 and 9653 for declarations concerning Germany and Italy.

- 36 *Congressional Record*, (Washington, D. C., GPO, 1954) vol. 110 p. 18538.
See appendix here for complete text.
- 37 *Congressional Record*, 1964, p. 18543 and 18549.
For complete debate see p. 18538-18554.
- 38 See Petition, Chapter One, and the appendix here.
- 39 *Congressional Record*, 1965, p. 18661-18662.
- 40 *Congressional Record*, 1965, p. 18661.
- 41 *Congressional Record*, 1965, p. 18662.
- 42 *Congressional Record*, 1965, p. 18663.
- 43 *Congressional Record*, 1965, p. 18663.
- 44 *Congressional Record*, 1965, p. 18663.
- 45 *Congressional Record*, 1965, p. 18663.
- 46 *Congressional Record*, 1965, p. 18664.
- 47 *Congressional Record*, 1965, p. 18812.
- 48 *Congressional Record*, 1965, p. 18815.
- 49 *Congressional Record*, 1965, p. 18818.
- 50 Jared Sparks, *The Writings of George Washington* (Boston: Little, Brown and Company, 1858) vol. 12, p. 125-129.
- 51 Ray P. Basler and others, ed., *The Collected Works of Abraham Lincoln* (New Brunswick, N.J., Rutgers University Press, 1953) vol. 4, p. 331.
- 52 2 (Black) 67 U.S. 635. Volume 2 of Black's Reports, or Volume 67 of U.S. Reports, p. 635.
- 53 299 U.S. 304, See p. 315.
- 54 United States Code (1964 ed.), Title 22, Sec. 287d.
- 55 United States Code (1964 ed.), Title 22, Sec. 1731 and 1732.

- 56 United States Code (1964 ed.), Title 22, Sec. 2311.
- 57 130 U. S. 581.
- 58 *Congressional Record* (Washington, D. C., GPO, 1955) vol. 101, p. 1049-1050.
- 59 59 Stat. 619.
- 60 "United Nations" *Encyclopedia Britannica* (1966 ed.) vol.22, p. 708 and following.
- 61 *Congressional Record* (Washington, D. C., GPO, 1950) vol. 96, p. 9333-9334.
- 62 *Congressional Record*, 1950, p. 9334.
- 63 *Congressional Record*, 1950, p. 12520.
- 64 *Congressional Record*, 1950, p. 9228.
- 65 *Congressional Record*, 1950, p. 9230.
- 66 *Congressional Record*, 1950, p. 9647-9648, a good summary by Senator Douglas.
- 67 163 U. S. 537, See p. 544.
- 68 347 U. S. 483. See p. 494.
- 69 *Federalist Papers*, p. 67, as in footnote 13.

Bibliography:

1. *Annals of Congress, 12th Congress, 1st Session*, Washington, D. C., Gales and Seaton, 1853, pp. 1624-1683.
2. "Area and Population," in Geographical Summaries of the World Atlas, *Encyclopedia Britannica* (1966 ed.), p. 199.
3. Basler, Ray P. and others, *The Collected Works of Abraham Lincoln*, New Brunswick, Rutgers University Press, 1953, vol. 4, p. 331.
4. Black, Charles, *Perspectives in Constitutional Law*, Englewood Cliffs, Prentice-Hall, Inc., 1963.
5. *Congressional Globe, 29th Congress, 1st Session*, Washington, D. C., Blair and Rives, 1846, vol. 15, pp. 782-802.
6. *Congressional Record*, Washington, D. C., Government Printing Office, 1898, vol. 31, pp. 3700-3702, 4062, 4244.
7. *Congressional Record*, 1917, vol. 55, pp. 101-103.
8. *Congressional Record*, 1941, vol. 87, 9504-9506, 9537, 9652-9653.
9. *Congressional Record*, 1950, vol. 96, pp. 9228-9230, 9333-9334, 9647-9648.
10. *Congressional Record*, 1955, vol. 101, pp. 1049-1050.
11. *Congressional Record*, 1964, vol. 110, pp. 18538-18554.
12. *Congressional Record*, 1965, vol. 111, pp. 18661-18664, 18812-18818.
13. *Congressional Record*, 1966, vol. 112, pp. 142-145.
14. Hamilton, Alexander; Madison, James; and Jay, John, *The Federalist Papers*, with an introduction by Clinton Rossiter, New York, New American Library of World Literature, Inc., 1961.
15. Lodge, Henry Cabot, *The War With Spain*, New York and London, Harper and Brothers, 1899, pp. 240-243.
16. Roche, John P., *Courts and Rights*, New York, Random House, Inc., 1961.
17. Roche, John P., and Levy, Leonard W., *The Presidency* (Documents in American Government Series), New York, Harcourt, Brace and World, Inc., 1964.

18. Sparks, Jared, *The Writings of George Washington*, Boston, Little, Brown and Company, 1858, vol. 12, 125-129.
19. *Statistical Abstract of the United States*, U.S. Dept. of Commerce, Washington, D.C., Government Printing Office, 1967, pp. 262, 264.
20. "United Nations," *Encyclopedia Britannica* (1966 ed.), vol. 22, pp. 708-710.
21. United States Code (1964 ed.), Title 22.
22. United States Reports (67 U.S. 635).
23. United States Reports (130 U.S. 581).
24. United States Reports (163 U.S. 537), p. 544.
25. United States Reports (299 U.S. 304), p. 315.
26. United States Reports (347 U.S. 483), p. 494.
27. United States Statutes (59 Stat. 619).
28. Westin, Alan F., *The Anatomy of a Constitutional Law Case*, New York, The Macmillan Company, 1958.
29. "World War II," *Encyclopedia Britannica* (1966 ed.), vol. 23, p. 792K.

[Any errors in spelling, grammar, punctuation or usage are the author's or printer's and are retained from the 1968 edition.]