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Robert Condlin

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CHAPTER 12

The Shea Act

ROBERT CONDLIN

§12.1. Introduction. Perhaps the most unusual bill to be enacted into law during the 1970 session of the Massachusetts legislature was House Bill 5165, now Chapter 174 of the Acts of 1970. Named the Shea Act after its sponsor,¹ the statute purports to define the rights of inhabitants of the Commonwealth inducted or serving in the military forces of the United States.² Passed in the context of continuing criticism of the United States military involvement in Vietnam, the Shea Act could not help but be a political event of some significance.³

The statute has been characterized in varying ways: (1) an attempt at interposition;⁴ (2) an attempt to overrule the case of Massachusetts.

ROBERT CONDLIN is a member of the Massachusetts Bar.

¹ House Bill 5165 was sponsored by Representative H. James Shea of Newton, now deceased.
² Acts of 1970, c. 174. The Massachusetts statute, while unusual, is not unparalleled. A New York statute enacted in 1783 provides: "No citizen of this state can be constrained to arm himself, or to go out of this state, or to find soldiers or men of arms, either horsemen or footmen, without the grant and assent of the people of this state, by their representatives in senate and assembly, except in the cases specially provided for by the constitution of the United States." N.Y. Civ. Rights Law §5 (McKinney 1948). This and other such statutes were designed to protect individuals serving in the militias of the fledgling American states. As long as a militia was allowed to operate within the boundaries of only its respective state, it was under the control of governmental leaders who were subject to close electoral check. This safeguard was not present when the distant voice of the Federal Government could decide, without restriction, whom, when and where to fight. See Friedman, Conscription and the Constitution: The Original Understanding, 67 Mich. L. Rev. 1493 (1969). The New York statute was unsuccessfully asserted in the cases of Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970), and Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970), as the alleged source of the substantive right to enjoin the plaintiffs' participation in the Vietnam War because that war had not been constitutionally authorized.
³ The first history of the political processes leading to the passage of the Shea Act is The People v. Presidential War (Wells and Wilhelm eds. 1970), which also describes many of the political ramifications of the statute.
⁴ The classic formulation of the interposition doctrine, found in Bush v. Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La. 1960), aff'd, 364 U.S. 500 (1960), defines interposition as "an amorphous concept based on the proposition that the United States is a compact of states, any one of which may interpose its sovereignty against the enforcement within its borders of any decision of the Supreme Court or act of Congress, irrespective of the fact that the constitutionality of the act has been established by decision of the Supreme Court." 188 F. Supp. at 922.
v. Mellon;\(^5\) or (3) an attempt to usurp the authority of the Federal Government to regulate and to direct the operation of the military forces of the United States. While each of these characterizations contains a grain of truth, and sometimes more, no one by itself adequately explains the enactment of Chapter 174. This SURVEY chapter will attempt such an explanation, first, by construing Chapter 174 so as to save its constitutionality; second, by examining this construction to determine whether or not it is reasonable, and therefore permissible; and third, by examining the statute and the cases brought under its mandate by the Massachusetts attorney general\(^6\) to determine

\(^5\) 262 U.S. 447 (1923). This case is often cited for the proposition that a state cannot act as parens patriae in behalf of its citizens for purposes of suing the Federal Government. The language of the Mellon decision cited in support of this proposition is as follows: "We come next to consider whether the suit may be maintained by the State as representative of its citizens. To this the answer is not doubtful. We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here . . . . [T]he citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a State, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois, 180 U.S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status." Id. at 485-486.

§12.2 THE SHEA ACT

whether there is, in fact, a necessary relationship. This chapter will conclude by suggesting that although the Massachusetts statute may be constitutional and therefore of some legal significance, its historical importance is likely to be political rather than legal.

§12.2. Legislative directive to sue. The title of Chapter 174 of the Acts of 1970 states that the chapter is an act defining the "Rights of Inhabitants [of the Commonwealth] Inducted or Serving in Military Forces of the United States." At first blush, the chapter appears to attempt interposition by placing limits on the participation of Massachusetts inhabitants in armed hostilities while serving in the military forces of the United States. Section 1 states that no inhabitant of Massachusetts "shall be required to serve" in hostilities not of the type thereafter set out, and Section 2 provides specific remedies for the violation of any of the rights granted "under section one." This language is affirmative and unambiguous, and under other circumstances would have to be considered an attempt to create new sub-mack, The Justiciability of Legal Objections to the American Military Effort in Vietnam, 46 Tex. L. Rev. 1083 (1968); Special Issue: United States Intervention in Cambodia: Legal Analyses of the Event and its Domestic Repercussions, 50 B.U.L. Rev. (1970); Standard, United States Intervention in Vietnam Is Not Legal, 52 A.B.A.J. 627 (1966); Tigar, Judicial Power, The "Political Question Doctrine", and Foreign Relations, 17 U.C.L.A.L. Rev. 1135 (1970); Velvel, The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable, 16 Kan. L. Rev. 449 (1968); Wormuth, The Vietnam War: The President Versus the Constitution (1968).

§12.2. 1 Acts of 1970, c. 174. The body of the statute provides:

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

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

Article I, Section 8, and Article II, Sections 1-3, of the Constitution of the United States vest in Congress and the Executive, and not in the states, sole control of the military forces of the United States. This control is exclusive and extends to all facets of the operation of a military force, including the right to order it into and direct it in battle. If Chapter 174, and particularly Section 1 of that act, is read literally, it would be in conflict with these constitutional provisions

3 U.S. Const. art. I, §8, in relevant parts, provides: "The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States;
   "[Cl. 10] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
   "[Cl. 11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
   "[Cl. 12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
   "[Cl. 13] To provide and maintain a Navy;
   "[Cl. 14] To make Rules for the Government and Regulation of the land and naval Forces;
   "[Cl. 15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
   "[Cl. 16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
   "[Cl. 17] To exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And
   "[Cl. 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

U.S. Const., art. II, §1, cl. 1, in relevant part, provides: "The executive Power shall be vested in a President of the United States of America."

U.S. Const. art. II, §2, cl. 1, in relevant part, provides: "The President shall be 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 . . . ."

U.S. Const. art. II, §3, cl. 1, in relevant part, provides: "He [the President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."

§12.2 THE SHEA ACT

and, as such, null and void. Necessity being the mother of invention, the supporters of Chapter 174 argue, therefore, that their act was not intended to create new statutory restrictions on the participation of Massachusetts inhabitants in military service because such action was impossible. They premise their argument upon the well-established principle of statutory construction that, if necessary, a statute must be construed in such a fashion as to save its constitutionality. Before examining this suggested construction of Chapter 174, however, one must be aware of another constitutional limitation on the legislative power of the Commonwealth also relevant to ascertain what the chapter intended to do.

In granting the Federal Government the authority to regulate and direct the military of the United States, the framers of the Constitution were careful to provide for safeguards to protect individual citizens against the abuse of this authority. For example, while the Executive was given unilateral authority to wage some armed hostilities, only the Congress was allowed to declare a war. Furthermore, while the Executive was given exclusive control over where and when the military was to be employed, it was required to seek biennial funding of such deployment from the Congress.

These and other such limitations on the use of the military by a

4 It has been argued that Massachusetts could and did, by the passage of Chapter 174, create new substantive rights for its citizens. The argument, briefly stated, is this: the Federal Government has no power to conscript. See Friedman, Conscription and the Constitution: The Original Understanding, 67 Mich. L. Rev. 1493 (1969). Thus, whenever the Federal Government has mobilized large armies it has not, as most people think, conscripted men into service. Rather, it has mobilized them under U.S. Const. art. I, §§8, cl. 15, authorizing the national Government to call forth the militias of the states. The distinction between a federal army of conscripts and a federal army of militiamen is unimportant when a war has been declared by Congress, since the prosecution of a war under congressional authorization is one of the grounds upon which the militia may be called forth. However, when there is no act of Congress authorizing the prosecution of a war, and no other ground for the mobilization of the militia, the militias of the several states cannot be called forth. Since Massachusetts has constitutional authority to regulate the use of its militia, it may pass a statute restricting the disbursement of that force. In the absence of any supervening federal legislation, that Massachusetts statute would control and would have to be enforced. Since there is no act of Congress authorizing the prosecution of the Vietnam War, and no other constitutional ground for calling forth the Massachusetts Militia, Chapter 174 can and does restrict the deployment of Massachusetts servicemen to Vietnam. See Brief for Lawyers' Committee on Undeclared War as Amicus Curiae at 36-37, Massachusetts v. Laird, 400 U.S. 886 (1970). Interpreted in this way, Chapter 174 is identical in purpose to Section 5 of the Civil Rights Law of New York, and presumably conveys the same substantive rights, if any.


6 See note 3 supra.

branch of the Federal Government carry with them the corollary right, in individual citizens, to have such limitations observed. The boundaries of these limitations and/or rights often overlap, however, and must be defined in the context of specific cases. The responsibility for such definition has traditionally belonged to the Supreme Court as "ultimate interpreter of the Constitution,"8 or, on occasion, to the Executive and the Congress acting jointly in a sort of "dialectical real-politik."9 In any event, it is clear that a state of the union has no jurisdiction to undertake such a definition. Therefore, the supporters of Chapter 174 presumably would say that it cannot, and therefore does not, purport to dictate in what circumstances the Constitution of the United States would either authorize or prohibit the participation of Massachusetts citizens in armed hostilities.

Keeping in mind that Chapter 174 can neither create new rights nor define the boundaries of those already provided for in the Constitution, the supporters of the act nonetheless argue that it is capable of constitutional construction. They suggest that Section 1 of the statute should be construed as a reference to the aforementioned rights provided to both the Commonwealth and its inhabitants by Articles I and II of the Constitution, and Section 2 as a legislative and gubernatorial directive to the Commonwealth's attorney general to take steps to protect the rights referred to in Section 1.10 In other words, the proponents of Chapter 174 read Section 1 of the act to state:

No inhabitant of the Commonwealth inducted or serving in the military forces of the United States shall be required to serve in the conduct of armed hostilities not authorized according to the Constitution of the United States.

The genesis and rationale for this construction of Section 1 should now be obvious. This is not a creation of rights, but a statement of pre-existing rights. It is necessary to say a few additional explanatory words, however, about the suggested construction of Section 2.

At first glance, Section 2 appears to state that whenever a Massachusetts inhabitant is required to participate in armed hostilities not authorized in accordance with the Constitution, the Commonwealth itself is harmed and thereby has jurisdiction to redress that harm in the Supreme Court, or in some other court of the United States. Once again, however, the language of Chapter 174 is misleading. It is clear that a state cannot, by legislative fiat, declare itself to be a proper party in interest to bring a lawsuit before a court of the United

9 The best explication of this more pragmatic method of ascertaining the limits of the war powers is Justice Jackson's famous "twilight zone" concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952).
10 The source of this legislative and/or gubernatorial power to direct the attorney general to sue is G.L., c. 12, §3. See §12.5 infra.
States. Legal interest sufficient to constitute standing can be held to exist only by a court to whom a lawsuit is presented. Therefore, Section 2 of Chapter 174 must be construed otherwise if it is to be compatible with the Constitution.

Supporters of Chapter 174 suggest that Section 2 declares, not that Massachusetts has standing to bring a legal action, but only that upon the occurrence of certain conditions the attorney general of the Commonwealth is directed to argue the resultant action. In any lawsuit initiated pursuant to Chapter 174, it is thus contended that the attorney general must satisfy the court from evidence and argument that Massachusetts is harmed in its capacity as a sovereign state. In support of this interpretation, the act's proponents point to the language of Section 2, which states that "if it shall be finally determined that such action is not one of which the Supreme Court of the United States has original jurisdiction, then he shall bring another such action in an appropriate inferior federal court." It is argued that this language indicates that the drafters of Chapter 174 acknowledged that they must leave the determination of jurisdiction with the judiciary, to which it constitutionally belongs.

Construed in this narrower fashion, Chapter 174 is less susceptible to constitutional attack on the grounds noted at the outset. It does not interpose the sovereignty of the Commonwealth between the latter's citizens and any law of the United States. On the contrary, it may very well insure that the Massachusetts citizens are afforded the full protection of the supreme law of the United States, the Constitution.

Nor does the act subvert the holding of Massachusetts v. Mellon, but instead specifically recognizes that any action brought by the Commonwealth will have to comply with not only the requirements of the Mellon decision but with all of the other requirements of standing to sue. Finally, construed as a legislative directive to the attorney general, Chapter 174 does not usurp the federal authority to regulate the military forces of the United States, but rather acknowledges that authority to be supreme, answerable only to the Constitution. If Chapter 174 means what its proponents suggest that it does, then there is little doubt that it is constitutional. Before reaching such a conclusion, however, a closer look at the language of the act is warranted.

§12.3. Section 1 — reference or definition? Section 1 of the Shea Act lists the various sections of the Constitution under which the Federal Government may initiate armed hostilities, suggesting by implication that all constitutional articles, clauses, and sections not listed cannot so authorize. If, however, it was intended that Section 1 be referential rather than definitive, a specific listing of all the constitutional sources of the war powers would have been unnecessary.

12 262 U.S. 447 (1923); see §12.1 supra, n.5.
general statement would have sufficed. Specificity is essential only if the section was intended as a definition and/or interpretation of the constitutional provisions in question.

It is possible, of course, that the Massachusetts legislature intended to both define and refer to the war power rights at the same time. A definition which is both exhaustive and accurate can also serve as a specific or precise reference. There are dangers in trying to refer with such absolute precision, however, and Chapter 174 of the Acts of 1970 may not have avoided them.

For example, Section 1 limits the application of Chapter 174 to only those hostilities which occur "outside the territorial limits of the United States." By implication, then, the statute declares that a Massachusetts inhabitant has no constitutional right to avoid armed hostilities, no matter how commenced, inside those territorial limits. As a proposition of constitutional law the foregoing is almost certainly erroneous. The limitations placed upon the coordinate branches of the Federal Government by the war power clauses of the Constitution apply to intraterritorial as well as to extraterritorial wars. Nowhere was the foregoing more evident than during the American Civil War, when President Lincoln's entry into and conduct of the war were both subjected to constitutional scrutiny. By implying that a Massachusetts inhabitant must participate in any intraterritorial hostilities, no matter how commenced, Chapter 174 may enlarge upon the war-making powers of the Federal Government and simultaneously restrict the constitutional right of Massachusetts citizens.

Section 1 also exempts from its purview hostilities which are "emergencies" or "otherwise authorized" by the Commander-in-Chief clause of the constitution. If by this language Chapter 174 meant to state that the source of all executive authority to commence armed hostilities is Article II, Section 2, of the Constitution, which designates the President as Commander-in-Chief, it is wrong. The Commander-in-Chief clause has been rather uniformly defined to do no more than to place the Executive at the apex of the pyramid of military command, making him "first general and admiral." While the clause gives the President authority to direct and command the military of the United States once the latter has been otherwise committed to battle, it

has never been held to include the power to initiate the conduct of such hostilities.

If, on the other hand, this language meant to state that the source of executive authority to commence armed hostilities is contained either within the Commander-in-Chief clause or within independent "emergency" war powers of the President, or both, it is less susceptible to constitutional attack. There is no doubt that the executive has constitutional power to deal with military emergencies independent of the Commander-in-Chief clause. It is not at all clear, however, that this power is limited to only emergency situations. By using the word

5 Chapter 174 does not define the word emergency. Therefore it is assumed that the drafters of the statute intended the word to be used in its commonly accepted meaning of "an unforeseen combination of circumstances or the resulting state that calls for immediate action." Webster's Third New International Dictionary 741 (1966). It may later become necessary, in attempting to construe Chapter 174 constitutionally, to enlarge slightly upon this definition.

6 The debates of the Constitutional Convention of 1787 indicate that the grant to the Congress in art. I, §8, cl. 11, of the power "to declare war" also included a grant of emergency war powers to the Executive.

At the convention, the original draft by the Committee of Detail gave the Congress the power "[t]o make war." Some delegates believed that this wording of the clause would prevent the President from responding to an emergency situation before the Congress could assemble and act. The debates reveal that declare was substituted for make to insure that the President could act in emergency situations until such time as the Congress could convene to consider the matter. Madison, The Debates in the Federal Convention of 1787, at 318-319 (Hunt and Scott eds. 1920). See also 2 Farrand, The Records of the Federal Convention of 1787, at 318-319 (1911); 2 Story, Commentaries on the Constitution of the United States, 92-93 (5th ed. 1891); 54 Dept. State Bull. 474, 484 (1966). It is also possible, though as yet unclear, that the "chief executive" and "take care that the laws be faithfully executed" clauses of the Constitution (Art. II, §1, cl. I; Art. II, §3, cl. I) confer limited war powers on the President. See Ex parte Quirin, 317 U.S. 1, 26 (1942).

7 The best indicator of the limits of presidential power to commit American military forces abroad is the history of its use. One commentator has classified all uses of the war power according to the following formula:

"(1) Lives and property refers to landings conducted for the purpose of protecting American lives and property in foreign nations during periods of internal turmoil, consistent with the international legal right to protect lives and property and not involving any known purpose of political interference in the affairs of the foreign country.

"(2) Disavowed refers to military action taken by a military officer or other government official acting without or contrary to his instructions, when such actions were later specifically disavowed by the United States government.

"(3) Punitive refers to military expeditions which punished weakly organized societies for crimes which ordinarily would have called for diplomatic protest, but due to the nature of the societies, force was a customary way to deal with them.

"(4) Reprisal refers to military reprisals taken against a nation for military offenses against the United States or its citizens, when such reprisals did not have congressional authorization.

"(5) Crime refers to actions taken to suppress an international crime as commonly recognized, such as piracy, the slave trade, or pelagic sealing. The reference is used regardless of whether Congress specifically authorized the action, since
emergency, Chapter 174 may have unnecessarily limited itself and made a constitutional construction of the statute impossible.

The Shea Act also exempts any hostilities “initially authorized or subsequently ratified by a congressional declaration of war” according to “the constitutionally established procedures in Article I, Section 8, of the Constitution of the United States.” This exemption is questionable not so much for its lack of accuracy as for its needless specificity.

The President is assumed to possess general authority in this area to use military force.

“(6) Hot pursuit refers to military invasion of the territory of a foreign nation in the pursuit of criminals or other public enemies regardless of whether the foreign nation whose territory is invaded agrees to or protests the invasion.

“(7) Treaty refers to uses of force under specific terms of a treaty agreement with a foreign nation.

“(8) Authorized refers to uses of force approved by Congress through legislative action.

“(9) Insignificant is self-explanatory.”

Of these categories, only numbers one, two (to a limited extent), six, and seven (to a limited extent) involve widespread presidential use of force for the purpose of dealing with emergencies. The remaining categories, with the obvious exception of number eight, consist of presidential commitment of troops in non-emergency situations. A statistical analysis of this compilation shows that a significant percentage of past examples of presidential use of military force involved nonemergency situations. Presumably, then, the executive has power to initiate military hostilities in nonemergency situations. R. Russell, note 4 supra, at 485-496. But see a rejection of a similar argument in Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp 569, 575 (D.D.C. 1952).

On at least one of the nonemergency occasions referred to in the aforementioned compilation (the reprisal bombardment of Greytown, Nicaragua, in 1854), the power of the President to take such action was upheld by a Justice of the Supreme Court sitting on circuit. Durand v. Hollins, 8 F. Cas. 111, 112 (No. 4187) (S.D.N.Y. 1852). For a critical analysis of the Greytown incident, see Wormuth, The Vietnam War: The President Versus the Constitution 22-24, 31-32 (1968).

A common misconception is that a declaration of war must be a formal document entitled “Declaration of War.” Such has never been the case. The legislative notion of a declaration of war has been a flexible one, susceptible of different interpretations depending upon the circumstances in which it arose. Perhaps the best example of a “declaration” which does not look like a “declaration” is the set of statutes which combined to involve this nation in a naval war with France in 1798-1801. See 1 Stat. 547 (Mar. 27, 1798); 1 Stat. 549 (Apr. 7, 1798); 1 Stat. 552 (Apr. 27, 1798); 1 Stat. 553 (Apr. 27, 1798); 1 Stat. 554 (May 3, 1798); 1 Stat. 555 (May 4, 1798); 1 Stat. 556 (May 4, 1798); 1 Stat. 558 (May 28, 1798); 1 Stat. 565 (June 13, 1798); 1 Stat. 569 (June 22, 1798); 1 Stat. 572, extended 2 Stat. 39 (Apr. 22, 1800); 1 Stat. 576 (July 6, 1798); 1 Stat. 578 (July 7, 1798); 1 Stat. 594 (July 11, 1798); 1 Stat. 595 (July 11, 1798); 1 Stat. 604 (July 16, 1798); 1 Stat. 618 (Feb. 9, 1799); 1 Stat. 621 (Feb. 25, 1799); 1 Stat. 709 (Mar. 2, 1799); 1 Stat. 729 (Mar. 2, 1799). See also Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Bas v. Tingey, 4 U.S. (4 Dall.) 37 (1800).

Acts of 1790, c. 174. By referring to Article I, Section 8, generally, rather than specifically to the “declare war” clause, Chapter 174 avoided the constitutional pitfall of defining too narrowly the congressional power to authorize war. It is arguable that Congress can declare war, not only expressly by formal statement pursuant to art. I, §§, cl. 11, but also implicitly by raising and supporting an army and navy pursuant to art. I, §§, cl. 15-15, or by calling forth the militia pursuant to art. I, §§, cl. 15-16. See §12.2 supra, note 3.
By designating Article I, Section 8, as the sole repository of congressional war power, Chapter 174 has foreclosed all unorthodox or unusual congressional ratification of war under other sections of the Constitution.\(^{10}\) While there may never have been or may never be such unorthodox or unusual ratification, it strikes one as being the role of the Supreme Court and not the Commonwealth of Massachusetts to foreclose such a possibility.

Taken as a whole, Section 1 appears to be sound in theory, but less so in execution. The avowed purpose of the section, to refer to specific independent constitutional rights, is a simple one capable of simple expression. The Massachusetts legislature, by cluttering this expression with unneeded specificity, has added to the already substantial burden of the supporters of Chapter 174.

\section*{\subsection*{12.4. Section 2 — clarity of purpose.} Whether Section 1 of the Shea Act stands or falls, the constitutional rights to which it alludes do exist and will continue to do so. Therefore, if Section 2 is a legislative directive to the Commonwealth's attorney general to sue to protect those rights, Chapter 174 of the Acts of 1970 is not only viable but important.\(^{1}\) This section is both contradictory and ambiguous, however, and thus presents problems of statutory construction equal to those presented by Section 1, if not greater.

The first problem occurs in the first sentence of the Section 2, where the attorney general is directed to bring "an appropriate action in the Supreme Court of the United States" "in the name and on behalf of the commonwealth and on behalf of any inhabitants thereof."\(^{2}\) While the Supreme Court has original jurisdiction to hear suits in which states are plaintiffs,\(^{3}\) its jurisdiction over suits by individuals is

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\(^{10}\) Ratification, which is approval after the fact, should be distinguished from authorization, which either precedes or is contemporaneous with the act in question. Article I, §8, cl. 11, may very well be the only source of congressional power to authorize war, because it is the only clause which provides for congressional action prior to or contemporaneous with the outbreak of hostilities. The other clauses of Article I, Section 8, which allow Congress to approve of a war implicitly by fighting it, provide for ratification. Congress may, of course, ratify what it might have authorized. Swayne & Hoyt Ltd. v. United States, 300 U.S. 297, 301-302 (1937). See also Ex parte Endo, 323 U.S. 283, 303 n.24 (1944).

\(^{1}\) While Chapter 174 does not contain a severability clause, Section 2, read as a legislative directive, is by nature separable from Section 1. That being the case, it is to be presumed that the legislature would have enacted Section 2 if presented alone and intended that, if valid, the section be allowed to stand. See Dorchy v. Kansas, 264 U.S. 286, 289-290 (1924); Krupp v. Building Commr. of Newton, 325 Mass. 686, 691 (1950); Commonwealth v. Petranich, 183 Mass. 217, 220 (1903).

\(^{2}\) The attorney general is ordered to protect the rights of the Commonwealth and its inhabitants existing "under section one." We have seen that Section 1 does not create new rights for Massachusetts or its inhabitants, but only refers to pre-existing rights. If this construction is to be carried throughout Chapter 174, as it must, Section 2 must be read as directing the attorney general to protect the constitutional rights of the Commonwealth and its inhabitants referred to in Section 1.

very limited and does not include any action by or on behalf of a Massachusetts serviceman or servicemen. Therefore, unless the phrase “on behalf of any inhabitants thereof” can be interpreted to mean: (1) without naming such inhabitants; (2) without making them parties to the action; (3) without listing the particular ways in which they have been harmed; and (4) without asking for specific relief on their behalf, the legislative directive is self-contradictory.

The Section 2 directive is made more confusing by the following ambiguous language: “but if it shall be finally determined that such action is not one of which the Supreme Court . . . has original jurisdiction, then he [the attorney general] shall bring another such action in an appropriate inferior federal court.” Because a joint suit by both the Commonwealth and “inhabitants thereof” is a jurisdictional impossibility, the language quoted could mean that, if the attorney general shall “finally determine” that the Supreme Court is not the court of original jurisdiction, he shall immediately go to the “appropriate inferior federal court.” On the other hand, this language may mean that the attorney general has no alternative but to ask the Supreme Court to make the decision with respect to jurisdiction.

4 U.S. Const. art. III, §2, cl. 1; 28 U.S.C. §§1251(a)(2), 1251(b)(1) (1964). The original jurisdiction of the Supreme Court over suits brought by individuals is limited to those suits brought by or against ambassadors, or other public ministers of foreign states, or to which consuls or vice-consuls of foreign states are parties.

5 It is conceptually possible, though unlikely, that an ambassador or public minister of a foreign state could, as a Massachusetts inhabitant and a member of the military forces of the United States, bring an original action in the Supreme Court of the United States. For that strange event to occur, however, there would have to be a great deal of cooperation on the part of the foreign state and perhaps even a greater amount of carelessness on the part of the Department of State. It should also be pointed out that there is no jurisdictional doctrine, including both the doctrines of pendant and ancillary jurisdiction, which would allow individual plaintiffs to be brought into an original action on the jurisdictional coattails of the Commonwealth.

6 It is arguable that this language of Section 2 can be so interpreted. The phrase specifies that the suit must be brought in the name as well as on behalf of Massachusetts inhabitants. A suit in the name of only the Commonwealth challenging the Federal Government’s power to conduct the Vietnam War, if successful, would be of indirect benefit to and therefore on behalf of Massachusetts inhabitants, whether they were parties to the action or not.

7 The latter conclusion is more likely. The use of the word finally seems to indicate that the legislature intended that the Supreme Court, a more “final” tribunal than the attorney general, decide whether or not it has jurisdiction. The reference shortly thereafter in the same sentence to “another” action in an “inferior federal court” also indicates that the legislature envisioned any lower court action as being in addition to rather than in lieu of an action in the Supreme Court. One thing which the language “finally determined” makes clear, however, is the fact that the legislature was aware of and acknowledged the possibility that the Commonwealth may not be a proper party in interest to bring a Chapter 174 litigation. This is strong evidence of the fact that the statute is not a declaration of interest, and thereby an unconstitutional attempt to confer jurisdiction on the Supreme Court. There are additional problems, rooted in the doctrine of separa-
Given the contradictory and ambiguous nature of the foregoing provisions, a court can look behind the plain words of the statute in an effort to ascertain its intent. While ordinarily of little use in a state where most of the legislative process, including all debate, is not recorded, this principle may very well rescue Chapter 174.

Because Chapter 174 was the focus of much public attention, its defense before the Joint Judiciary Committee of the Massachusetts legislature was taped for television. An attempt is now being made to reconstruct from this tape a quasi-official transcript of that hearing. While not as much weight as an official legislative record, such a document would serve as some evidence of legislative intent. In addition, some of the legislators who participated in the passage of Chapter 174 have expressed their purposes for such action in a book about the statute. While after the fact and somewhat unusual as a source of legislative history, this latter document is nevertheless more than has been available to many courts inquiring into legislative intent in the past.

There is another possibility which should also be considered. The problem with which Chapter 174 concerns itself—the need for adherence to the Constitution in the conduct of a war—is a unique one with which state legislatures infrequently deal. Presumably, only very unusual circumstances could make the consideration of such a statute, let alone its passage, a possibility. A court might very well take judicial notice of such circumstances and conclude that the Massachusetts legislature, in enacting Chapter 174, could have intended only one thing, namely, to direct the Commonwealth's attorney general to challenge the constitutionality of the Vietnam War.

All of these possibilities are no doubt unorthodox and somewhat lacking in precedent, but then again, so is the very statute in question. On balance, however, it would not seem unreasonable for a court to conclude that Section 2, notwithstanding its contradictory and ambiguous language, was intended to be, and in fact is, an exercise of the legislative power to direct the attorney general to sue.

Two additional aspects of the directive of Section 2, relating to
substance rather than form of enactment, also warrant brief consideration. The first is the legislative standard upon which initiation of suit by the attorney general is conditioned. Under the terms of the act, the attorney general may question the constitutionality of only those armed hostilities in which Massachusetts inhabitants are compelled to participate. This presumably includes hostilities involving as few as one Massachusetts inhabitant. By implication, this precondition to suit also means that an unconstitutional war, fought within the borders of the Commonwealth but not involving Massachusetts inhabitants, could not be challenged under the act. Given the foregoing possibilities, the question arises whether the section’s standard for suit is reasonably related to the statutory purpose of protecting the Commonwealth from unconstitutional wars. A court must be able to find such a relationship before it can sustain Chapter 174 as a proper delegation of legislative power.

This task may not be as difficult as may at first appear. Certainly it is the rare case in which a war, fought within the boundaries of a particular state, does not involve the inhabitants of that state. Equally rare is the war, no matter where fought, in which only one inhabitant of any single state is compelled to participate. It is more likely, and the Massachusetts legislature appears reasonable in relying upon this, that when one inhabitant of the Commonwealth is required to participate in a war, many thousands are. It also appears reasonable for the legislature to conclude, although this is a closer question, that the compelled participation of thousands of Commonwealth inhabitants in an unconstitutional war may harm the state as a sovereign entity.

The remaining portion of Section 2 which merits brief mention is that part which states: “[a]ny inhabitant of the commonwealth . . . required to serve . . . in violation of section one . . . may notify the attorney general thereof, and all such inhabitants so notifying . . . shall be joined as parties” in any action to be brought. This requirement is one of the restrictions imposed by Chapter 174 upon litigation commenced by the attorney general under the mandate of that act. While it is not unusual for one branch of the government to direct a coordinate branch to take a designated course of action, it

10 Because Chapter 174 is an open-ended directive to sue, capable of being acted upon whenever enumerated conditions occur, it is a delegation of legislative power. It is an axiom of administrative law that such a delegation must be accompanied by an adequate standard for the exercise of the power delegated, Burnham v. Board of Appeals of Gloucester, 353 Mass. 114, 118, 128 N.E.2d 772, 775 (1955); Butler v. Town of East Bridgewater, 330 Mass. 33, 335-37, 110 N.E.2d 922, 924-925 (1953); 1 Davis, Administrative Law §2.07, at 101-104 (1958).

11 This requirement can be applicable to only a suit filed in an “inferior federal court.”

12 The statute also specifies the court in which the attorney general must commence his initial action; alternative courts, should that action fail; what course to follow should the second proceeding in the inferior court also fail; and whom to name as party plaintiff in all actions.
§12.5 THE SHEA ACT

is somewhat irregular for it to do so with such particularity. Whether these restrictions of Chapter 174 on what would ordinarily be discretionary and tactical decisions of the attorney general amount to a violation of the doctrine of separation of powers is questionable. Most probably they do not. That question exists, however, and constitutes one more obstacle on an already perilous road to constitutionality.

§12.5. Chapter 174 litigation. The aspect of Chapter 174 of the Acts of 1970 which the popular media have represented most inaccurately to date is the relationship between the statute and the Vietnam War litigation commenced under its mandate. It has been rather uniformly reported that that litigation has involved "the constitutionality of a Massachusetts statute prohibiting the participation of Massachusetts inhabitants in the Vietnam War." Such a characterization is not now and has never been accurate.

We have seen earlier that Section 1 of the statute creates no new rights, but instead refers to existing rights provided by the Constitution of the United States. As a result, all Chapter 174 court tests of the Vietnam War, along with all other such tests, have been based upon those provisions of the Constitution and not upon any statutory reference to them. We have also seen that Section 2 of the Shea Act

13 At the heart of the doctrine of separation of powers is the belief that a coordinate branch of government should be free to exercise authority in areas where it has particular expertise. The validity of that belief is amply demonstrated by the sentence of Section 2 now in question. The legislature, in requiring that all persons giving notice be joined as parties, was presumably unaware that in many instances this would be jurisdictionally impossible or impracticable. Just as an individual cannot be joined in an original action in the Supreme Court, so too a person who has refused to obey an order to Vietnam cannot be joined as plaintiff in an action on behalf of one who has obeyed such an order. A person refusing orders would most likely raise his constitutional argument in a habeas corpus proceeding, while a person obeying orders would bring an equity suit for declaratory and injunctive relief. Another problem with the mandatory joinder provisions of Section 2 is the practical burden it imposes upon the Department of the Attorney General. If 200 Massachusetts inhabitants give notice under Chapter 174, the attorney general might spend his next few months preparing the service of process and for the complaint. For every serviceman joined as a plaintiff, the military chain of command ordering him to Vietnam would also have to be joined as a defendant. For the potential Massachusetts constitutional complications in such restrictions, see 2 Mass. Op. Atty. Gen. 405, 406-407 (1903).

§12.5. 1 The most obvious error in such a characterization is the fact that Chapter 174 does not mention by name, and presumably is not limited to, the Vietnam War.


3 The briefs in Massachusetts v. Laird, 400 U.S. 886 (1970), are perhaps the best evidence of this fact. Chapter 174 is infrequently mentioned, let alone discussed,
cannot be the basis of Massachusetts' standing to question the constitutionality of the Vietnam War. Again, as a result, in all Chapter 174 litigation the attorney general has argued that Massachusetts is a proper party in interest because it has been harmed as a sovereign state by the Vietnam War, and not because it has passed Chapter 174.4

The only possible necessary relationship between the Massachusetts statute and its resulting litigation arises out of another section of the Massachusetts General Laws. Chapter 12, Section 3, provides that:

The attorney general shall appear for the commonwealth . . . in all suits . . . in which the commonwealth is a party . . . in all courts of the commonwealth . . . and in such suits . . . before any other tribunal . . . when requested by the governor or by the general court or either branch thereof. [Emphasis added.]

If this is interpreted to mean that the attorney general may appear before "any other tribunal," including all federal courts, only when directed or requested to by the legislature or governor, then the Shea Act is unquestionably essential to the litigation brought under its mandate. Whether the foregoing is a necessary reading of this statute, however, is open to dispute.

It is clear that the attorney general has common law power to initiate suit when and wherever necessary to protect the public interest of the Commonwealth.5 While the limits of this power are uncertain, it is not unreasonable to expect that they are broad enough to authorize the type of action contemplated by the proponents of Chapter 174. If this is so, a legislative directive to commence the same litigation was and is unnecessary.

In sum, there is small likelihood that Chapter 174 is essential to the Vietnam litigation most people believe to have been commenced to sustain that very statute's constitutionality. In fact, there is the very real possibility that it matters not whether Chapter 174 is unconstitutional, since it may be unnecessary.

§12.6. Conclusion. The constitutional hurdles which the Shea Act must overcome are substantial, due in large measure to poor legislative draftsmanship. The picture is not entirely bleak, however, as

by all parties to the action, and then only as part of the statement of facts. See also the briefs for all parties and the opinion of the court in Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970), and Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970), where the analogous statutory basis for suit, Section 5 of the Civil Rights Law of New York, was neither argued by the parties nor relied upon by the court in the constitutional analysis of the Vietnam War.


§12.6. The Supreme Judicial Court, as the highest court of the Commonwealth, has the responsibility to definitively construe Chapter 174. Louisiana P. & L. Co. v. Thibodaux City, 360 U.S. 25, 29-30 (1959). This is true whether the constitutionality of the statute is put in issue in a state or federal court. England v. Medical Examiners, 375 U.S. 411 (1964).

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