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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY PEACE ACTION, PAULA ROGOVIN, ANNA BERLINRUT and WILLIAM JOSEPH WHEELER,	Civil Action
Plaintiffs,	Hon. Jose L. Linares
v.	2:08-cv-02315-JLL-CCC
GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, IN HIS OFFICIAL CAPACITY,	
Defendant.	Motion Date: December 15, 2008 Oral Argument Requested

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS'S MOTION TO DISMISS

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SUMMARY OF ARGUMENT

Plaintiffs seek a Declaration establishing that it is the role of Congress, not the President, to decide whether and when to take the nation to war. Plaintiffs do not ask this Court to interfere with current military activities in Iraq. A judicial declaration is especially appropriate now when spokespersons for the executive branch openly discuss the possibility of launching a military attack on the sovereign nation of Iran.[1] As this brief will demonstrate, the Framers of our Constitution were resolute that only Congress could make such a decision. And as Marbury v. Madison teaches us, it is the duty of the judicial branch to expound and interpret the law.

The resolution (AUMF) adopted by Congress in October 2002 authorizing President Bush to deploy armed forces against Iraq "as he determine[d] to be necessary and appropriate" was not in keeping with the intent of the Framers.

The history of the adoption of Article I, Section 8, Clause 11 of the United States Constitution demonstrates that the Framers intended to deny the President any authority to "make war" unless it had been declared by Congress except to "respond to sudden attacks." This decision by the Constitutional Convention rejected

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[1] See Seymour Hersh, Preparing the Battlefield: The Bush Administration steps up its secret moves against Iran, The New Yorker, July 7, 2008.

practices of the British King against whom the Colonists rebelled in 1776. The Framers meant to prevent any single person from initiating hostilities and to "slow down" a rush toward war by assuring citizen participation in decisions about their blood and treasure.

Thomas Jefferson, while serving as Ambassador to France, wrote James Madison praising the Convention for creating "an effectual check to the Dog of War by transferring the power of letting it loose from Executive to Legislative body, from those who are to spend to those who are to pay."

Opinions of federal appellate courts in cases challenging the Vietnam War and the 2003 Iraq War permitting Congress to abdicate to the President its duty to declare war never considered the Constitutional Convention debate on June 1, 1787, that established the Framers' intent that no president could take the nation to war. That discussion laid the foundation for the Convention's final decision as to Art. 1, § 8(11) on August 17. The omission of this history skewed the courts' understanding of the Constitution's "Declare War" clause.

Modern cases have also failed to recognize the distinction between "imperfect" (or quasi wars) and "perfect" wars, a distinction established by the Supreme Court in the early years of our nation's history and continuing through the Prize Cases during

the Civil War. Those cases recognized that Congress could authorize (without a formal Declaration) the President to engage in carefully limited hostilities – limited in time and place. The current war in Iraq, however, began as an offensive all-out war against a sovereign nation. The authority to launch such a war cannot be delegated by Congress. Article I, Section 5, Clause 3 provides for a public record vote so that every member may be held accountable by his or her constituents.

The Authorization for Use of Military Force of 2002 (AUMF), which was used as an excuse by President Bush to launch an offensive war against Iraq more than five months later, was not such a Declaration.

The issues in this case are not "political." No matter how much debate took place in the Congress, the result was an impermissible transfer of Congress's decision-making power to the President. Once the vote was taken not to decide on war but to allow the President to make the decision, politics ceased and the matter became just as clearly justiciable as the duty of Secretary of State Madison to deliver Marbury's Commission in Chief Justice Marshall's decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)("It is emphatically the province and the duty of the judicial department to say what the law is.") See also Boumediene v. Bush, 128 S. Ct. 2229, 2259 (2008).

Both Massachusetts v. Laird and Doe v. Bush, the major opinions on which Defendant relies, recognized that the AUMF is not immune from review as a "political question." Both opinions went beyond the procedural matters raised by defendants and addressed the merits of the contention that Congress alone had the power to declare war. However, Massachusetts v. Laird decided the merits erroneously by disregarding key matters in the record of the Constitutional Convention that we explain below. Doe v. Bush (2003) followed the precedent in Massachusetts v. Laird without reexamining the full record of the Convention, thus compounding Massachusetts v. Laird's error of law. Therefore, reconsideration of the issue on the merits is appropriate.

Ultimately, the Defendant's position is that he can conduct war without congressional authorization so long as he has a military appropriation, thus virtually reducing Art. 1 § 8(11) to a nullity. (Db at 37-38) The Constitution separates the duty to declare war from the decision to pay for it. The duty to declare war includes the judgment about whether to commit the blood and treasure of the nation in light of the risks and benefits that war may bring to the nation. Once that decision has been made, either legitimately by Congress or unconstitutionally by the President, and our forces are in harm's way, Congress has a new set of risks to take into account in subsequent appropriations decisions. Thus,

as this brief will show, appropriations are not an appropriate surrogate for the decision to engage in war.

Plaintiffs have standing to bring this case because they have suffered injury in fact, large public interests are at stake and there is no one else in a better position to vindicate those interests. Furthermore, plaintiffs seek no coercive relief and, thus, pose no threat of a confrontation between coordinate branches of government.

ARGUMENT

I. THE IRAQ WAR WAS A "WAR" WITHIN THE MEANING OF THE "DECLARE WAR" CLAUSE OF THE CONSTITUTION AS INTERPRETED BY THE SUPREME COURT IN EARLY CASES BECAUSE IT WAS AN OFFENSIVE ALL-OUT WAR ON A SOVEREIGN NATION WITH THE AIM OF DEPOSING THE SOVEREIGN AUTHORITY

Art. I, § 8(11) delegates to Congress the power to "declare war." As Plaintiffs will demonstrate infra,[2] the complete history of the Constitutional Convention of 1787, which has heretofore gone judicially unexamined, clearly reveals that the Framers were firm in their determination that the power to take the nation to war could not be lodged in a single individual, but had to be the collective, publicly recorded decision of the people's representatives. The executive's authority to institute military

[2] See Point II.

action was limited to repelling an attack.

In the years following the adoption of the Constitution, the Supreme Court issued decisions reflecting the perspective that the Framers had first adopted on June 1, 1787: that the power to commence hostilities against another nation rested with the Congress, not the President.

The first meaningful definition of the "war" powers was announced in 1800 by Justice Bushrod Washington, along with Justices William Patterson and Samuel Chase in Bas v. Tingy, 4 U.S. 37 (1800). As stated by Justice Washington, "war" was defined as "...[E]very contention by force between two nations in external matters, under the authority of their respective governments." Id. At 40. After broadly defining the concept of "war," the Justices distinguished between a "solemn" or "perfect" war and a "limited" or "imperfect" war. In a perfect war, "one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance." Id. In an imperfect war:

> [H]ostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war ... because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission.

Id. This was the first judicial recognition that the term "war" as used in the Constitution contained two subdivisions. First, was formal, perfect war involving a general authorization to engage in hostilities. Second, was informal, or imperfect war involving a limited authorization, confined by its nature and extent by Congress to allow the President to use military force in the manner it defined. Id.

This was the position of the first presidents as well as the courts.[3] Congress passed many enactments in the early years under the Constitution that not only built up military forces, but authorized the President to utilize them to carry out military actions in connection with native American resistance to civilian incursions, the Whisky rebellion of 1794, the Quasi-War with France, 1798-1800, and the Barbary Wars. Bas, 4 U.S. at 17-37. Congressional enactments from 1798 to 1800 concerning naval hostilities with France placed strict limits on the President in imperfect wars. For example, the duration of Presidential authority under the act establishing the embargo of French commerce was limited to "the end of the next session of Congress, and no further." And the President was "authorized" to seize armed

[3] Louis Fisher, Presidential War Power, 17-39 (2d Ed. Revised, University of Kansas Press 2004).

Frensh vessels "within the jurisdictional limits of the United States" or "on the high seas," but not within French waters.[4]

Justice Washington made clear that Congress had full power to limit the President's authority in an "imperfect" war. Even the power to issue letters of Marque and Reprisal, one of the King's Prerogatives under British law, was given to Congress.

The Bas opinion created a dual track in which Congress could choose to declare war, or adopt a more specific and limited approach to hostilities.[5] If Congress specified that there should be a limited use of military force, then the President was required to abide by that limitation, and any orders that went beyond those specifications were to be disregarded by military personnel. Bas, 4 U.S. at 40. See also Little v. Bareme, 6 U.S. 170 (1804).

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[4] An Act to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof, 1 U.S. Stat. 565 (1798), available at http://avalon.law.yale.edu/18th_century/qw01.asp. An Act Further to Protect the Commerce of the United States. 1 Stat. 578 (1798), available at http://avalon.law.yale.edu/18th_century/qw04.asp.

[5] David M. Ackerman & Richard F. Grimmett, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications (Congressional Research Service, Library of Congress 2003).

The principles first enunciated in Bas v. Tingy were repeated in the Civil War Prize Cases, 67 U.S. 635 (1863). The case involved an 1861 order by President Lincoln to seize ships attempting to avoid a Union blockade of Confederate ports. Justice Greer's majority opinion addressed whether "at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force." Id. At 666. He wrote:

> By the Constitution, Congress alone has the power to declare *a national or foreign war*. . . . [The President] has no power to initiate or declare a war against a foreign nation or a domestic state. But by the [Posse Comitatus Act], he is authorized to called [sic] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, *and to suppress insurrection against the government of a state or of the United States.*

Id. at 668 (emphasis added). The five-member majority found that the President's action had been authorized by Congress by both the Posse Comitatus Act and a series of authorizing resolutions of Congress adopted in 1861 to suppress the insurrection.[6]

But those Congressional authorizations did not satisfy the four Justices who joined Justice Nelson's dissenting opinion with the following:

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[6] Defendant's brief completely misreads The Prize Cases. (Db at 25 and 35) The majority opinion distinguishes the U.S. Civil War from a war between sovereign nations, and says the President as Commander-in-Chief was authorized (later ratified by Congress) to respond to armed insurrection before Congress had opportunity to act.

> [Before an] insurrection against the established Government can be dealt with on the footing of civil war, [it] must be recognized or declared by the war-making power of the Government. [There] is no difference in this respect between a civil or a public [war]. . . . This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. Congress alone can determine whether war exists or should be declared ....

Id. at 688-93. Thus, while the dissenters thought even such limited military action as a blockade of Rebel ports required a Congressional declaration, it appears that none disputed the fact that an all-out war against a foreign nation could be declared only by Congress.

In commenting on the Prize Cases, Justice William O. Douglas suggested that the majority opinion would have come out differently “if Lincoln had had an expeditionary force fighting a ‘war’ overseas.” McArthur v. Clifford, 393 U.S. 1002 (1968) (dissent from denial of cert.).

It is true that in the post-World War II era, courts have appeared to authorize the United States to wage "wars" without a Congressional Declaration. But as Justice Scalia recently noted, analyses of the Constitution written long after its adoption “do not provide as much insight into its original meaning as earlier sources.” Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2810(June 26, 2008).

Furthermore, none of those post-World War II cases involved an unprovoked, offensive attack on a sovereign nation akin to the current War in Iraq. In both the Vietnam and Korean Wars, the U.S. intervened to aid an ally who was the victim of a military invasion and had requested American support. Neither war involved U.S. invasion of another nation. The Vietnam War was fought pursuant to the Gulf of Tonkin Resolution, passed by Congress in 1964 in response to a North Vietnam attack on American armed forces, and thus was an emergency response. Mottola v. Nixon, 318 F. Supp. 538, 543-544 (N.D. Cal. 1970), rev'd on other grounds, 464 F.2d 178 (9th Cir. 1972); Berk v. Laird, 317 F. Supp. 715, 719 (E.D.N.Y. 1970).

Indeed, U.S. involvement in Vietnam began with the dispatch of U.S. advisers and escalated slowly over time. The Korean War was, in fact, a "police action" under the aegis of the United Nations, in which the U.S. sought to "repel aggression" pursuant to specific authorization by the UN Security Council. U.S. v. Ayers, 12 C.M.R. 413, 416 (A.B.R. 1953). As such, both the Vietnam and Korean Wars were actually illustrations of "imperfect" wars as opposed to "perfect" wars.[7]

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[7] Several military courts found that the Korean War was an imperfect war since it was limited in time, place and object, and the hostilities did not include the United States. U.S. v. Ayers, 12 C.M.R. 413; U.S. v. Rowland, 14 C.M.R. 649 (A.F.B.R. 1954). See also, U.S. v. Robertson, 1 M.J. 934, 936 (C.M.R. 1975)(dissenting opinion). See also

In contrast to the limited political objectives and geographical limitations in both the Vietnam and Korean wars, the war in Iraq is an offensive, all-out war that involved invasion of a sovereign nation. Rather than obtain authorization by the UN Security Council, as the U.S. did during the Korean War, the President unilaterally engaged in a military attack on Iraq. In Vietnam, U.S. war aims were far more limited than in Iraq. In Vietnam, the U.S. sought only to defend South Vietnam, not overthrow North Vietnam, and offensive military power was limited. In Iraq, the U.S. sought, and has accomplished, full regime change. See Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2070 (2005). (Db at 8) As such, a congressional declaration of war was required by Article 1, Section 8, Clause 11.

Berk v. Laird, 317 F. Supp. at 722-727 (holding that the language used by Congress in various statutes, authorizations, and appropriations specifically related and limited to military activities in Vietnam gave express recognition by Congress that "the United States is engaged in a state of partial war in Vietnam." Contra: U.S. v. Bancroft, 3 U.S.C.M.A. 3, 5-6 (C.M.A. 1953); U.S. v. Berry, 14 C.M.R. 396, 399-400 (C.M.R. 1954).

II. THE DECLARE WAR CLAUSE REQUIRES CONGRESS TO PLACE THE NATION IN A STATE OF WAR BEFORE THE EXECUTIVE CAN COMMENCE MILITARY ACTION OTHER THAN TO REPEL SUDDEN ATTACK

A. The Founders Were Determined Not to Establish a Government in Which One Individual Could Take the Nation Into War

Our constitutional history begins after the United States fought the war for independence through the Continental Congress under the leadership of General Washington. As war fighting ended in 1781, the states adopted Articles of Confederation that gave Congress the "sole and exclusive right and power of determining on peace and war." Articles of Confederation, Art. IX. That decision, as with other important matters, required at least nine of the 13 states for its approval; amending the articles required unanimity among all the states.[8]

Under the Articles, Congress had no taxing power and no stable executive. George Washington was among those who supported calls for a constitutional convention to strengthen the federal government. Washington was a member of the Virginia delegation that prepared an agenda for the Convention called the Virginia

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[8] Amendments were subject to Article 13 ("Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.").

Plan.[9]

On May 29, 1787, the first day of substantive work of the Constitutional Convention, Governor Randolph presented the 15-point document known as the Virginia Plan that proposed a two-house Congress "empowered to enjoy all the Legislative Rights vested in the [existing] Congress by the Confederation."[10] In parallel language, it proposed a National Executive with "authority to execute the National laws ... (and) ought *to enjoy the Executive rights vested in Congress by the Confederation.*"[11]

1. The June 1 Debate

On June 1, the Convention examined whether these "executive rights"[12] included power to declare and carry on war. The Articles of Confederation had given that power to the Continental Congress. The French philosopher Montesquieu, British philosopher John Locke and Judge William Blackstone all had stated that the power to make war and peace belonged to the executive. Therefore, the Virginia

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9 Max Farrand, The Framing of the Constitution of the United States 14-18 (Yale University Press 1913)(hereinafter Farrand/Framing).

10 The Records of the Federal Convention of 1787, 21 (Max Farrand, ed., Yale University, Vol. 1, 1966)(hereinafter 1 Farrand/Records).

11 Id.

12 Id.at 64-66.

Plan appeared to give the newly created president the power both to declare and conduct war.

Charles Pinckney of South Carolina immediately objected to this prospect. Pinckney "was for a vigorous Executive but was afraid the Executive powers of the existing Congress might extend to peace & war &c., which would render the Executive a monarchy, of the worst kind, to wit an elective one."[13]

John Rutledge of South Carolina ". . . said he was for vesting the Executive power in a single person*, tho' he was not for giving him the power of war and peace . . . .*"[14]

Roger Sherman of Connecticut agreed with Rutledge: "he *considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect... which was the depositary of the supreme will of the Society. . .*"[15]

James Wilson of Pennsylvania:

> did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers. . . (emphasis added)[16]

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[13] Id.

[14] Id. (emphasis added).

[15] Id. (emphasis added).

[16] Id.

James Madison agreed with Wilson that:"*executive powers [by their terms] do not include the Rights of war & peace, etc but its powers should be confined and defined---if large we shall have the evils of elected monarchies. . . "* [17] Every delegate who spoke to the issue agreed that the President should not be given the powers of "war and peace." The members of the Convention were well aware that public sentiment had turned against the concept of a hereditary king with the prerogatives held by the British monarch and were determined to keep the president's hands off the powers of war.[18] That awareness also led to a decision to have the new Constitution adopted by conventions in each state, rather than by state legislatures.

2. The June 1 debate has not been considered by Federal Courts reviewing the war power in modern times

The discussion of June 1 between leading members of the Constitutional Convention, all of whom agreed that the president was not to have the power to make war, has been ignored by federal courts faced with arguments that the Vietnam War in the 1960s and 70s and the 2003 war against Iraq were unconstitutional because Congress had abdicated its power to declare war to the

[17] Id. at 70.

[18] David McCullough, 1776, 10-12 (Simon & Schuster 2005).

President.[19] Their failure to find and consider the June 1, 1787 debate skewed their perception of the only other debate held in the Convention on the power to declare war, that of August 17.

3. The Committee report of August 6 and the debate on August 17 confirmed Congressional power to declare war and allowed the president to repel sudden attacks and conduct war, but not declare it

Toward the end of July, 1787, the Constitutional Convention created a Committee on Detail to organize the tentative decisions of the Convention. The Committee report on August 6 adopted the position taken by all speakers in the discussion on June 1 by assigning to Congress the power "to make war." This position echoed the judgments expressed by Pinckney, Sherman, Rutledge, Wilson and Madison. The report became the framework for the only other discussion of war powers by the Convention.

The Convention considered the "make war" clause late in the day on August 17.[20] The phrase giving Congress the power to "make war" troubled Charles Pinckney. He had earlier objected to giving

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[19] See e.g., Doe v. Bush, 323 F.3d 133 (1st Cir. 2003); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971). The discussion on June 1, 1787 was highlighted in Chapter 2 of Francis D. Wormuth & Edwin B. Firmage, To Chain the Dogs of War; The War Powers of Congress in History and Law 17-33 (Southern University Press 1989).

[20] James H. Hutson, Supplement to Max Farrand's The Records of the Federal Convention of 1787 325-passim (Yale University Press 1987).

that power to the President on June 1. Now he objected to giving it to Congress because:

> Its proceedings were too slow. It would meet but once a year. The House of Representatives would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions.[21]

Pierce Butler of South Carolina said that the same objections would apply to the Senate. He proposed vesting the power to make war in the President, "who will have all the requisite qualities, and will not make war but when the nation will support it."[22] Butler was alone among the 55 delegates in suggesting that presidents be given the power to make war.

Pinckney's comments produced two responses. James Madison and Elbridge Gerry agreed that Pinckney's objection was sound and they proposed an alternative. They moved to replace the words "make war" with "declare war." This change, they said, would allow the executive to "repel sudden attacks."[23] Roger Sherman agreed with Madison and Gerry: "The executive shd. [sic] be able to repel

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[21] The Records of the Federal Constitutional Convention of 1787, 318 (Max Farrand, ed., Yale University, Vol. II, 1966)(hereinafter 2 Farrand/Records).

[22] Id.

[23] Id.

and not to commence war."[24]

In response to Butler, Gerry added: "I never expected to hear in a republic a motion to empower the executive alone to declare war."[25] Oliver Ellsworth of Connecticut found a "material difference between the cases of making war and making peace. It should be more easy to get out of war than into it. War also is a simple and overt declaration. Peace attend[s] with intricate and secret negotiations."[26]

George Mason, wealthy Virginia planter, friend, neighbor and advisor to Washington, did not want to give the power to make war to the president because "he is not safely to be trusted with it, or to the Senate because it is not so constructed as to be entitled to it."[27] His preference was for "clogging, rather than facilitating war, but for facilitating peace." He preferred "declare" to "make." That is substantially the recorded debate.[28]

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[24] Id.

[25] Id. at 319.

[26] Id.

[27] Id.

[28] 2 Farrand/Records at 318-319. This sparse history, read without considering the discussion on June 1, has generated alternative interpretations. See Charles A. Lofgren, War-Making Under The Constitution: The Original Understanding, 81 Yale L.J. 672, 699 (1972) (concluding that "Since the old Congress held blanket power to 'determine' on war, and since

“Declare” prevailed by an 8-1 vote.[29]

Just as in the June 1 discussion, there was virtual unanimity that Congress was to have the power to declare war. The new power given to the president on August 17 was only to repel sudden attacks. Otherwise, the decision to use military force against another nation belonged to Congress.

Thus, Article 1, Section 8, Clause 11 of the Constitution reads, “Congress shall have “the power...to declare war.” Congress included the House of Representatives, the only body created in the Constitution elected directly by the people.[30] The requirement that Congress “declare” war also addressed the risk that the President might secretly take the country to war.[31]

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undeclared war was hardly unknown in fact and theory in the late eighteenth century, it therefore seems a reasonable conclusion that the new Congress’ power ‘to declare war’ was not understood in a narrow technical sense but rather as meaning the power to commence war, whether declared or not.” See also Arthur M. Schlessenger, Jr., The Imperial Presidency 1-12 (Houghton Mifflin Co. 2004).

[29] Id at 319.

[30] The Senators were selected by State Legislatures, the President by the Electoral College. Direct election of Senators was first mandated in Article XVII, May 31, 1913.

[31] There was no third category of “undeclared hostilities” such as the First Circuit found in Massachusetts v. Laird, 451 F. 2d at 33. Any such category would have been unthinkable to the Framers, as discussed above, and fodder for the anti-federalists who sought reasons to reject the constitution and would not have been silent about such a “loophole.”

From the Framers' perspective, there must be a vote by the Congress on taking the Country to war - not on allowing the President to make the decision whether we go to war. That was made clear by the June 1 debate and must be addressed now because it was not addressed by previous courts.

4. President as Commander-in-Chief

To the framers, there was no overlap – and no confusion – between "declaring war," which was the responsibility of Congress, and acting as "Commander in Chief" of the military, which was the President's job.[32] The framers had earlier made the President "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."[33] This assured that the principle of civilian control of the military enunciated by the Massachusetts Provincial Council in 1775 would continue under the Constitution.

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[32] Leonard W. Levy, Original Intent and the Framers' Constitution 30-53 (Ivan R. Dee 1988) (concluding his chapter on "Foreign Policy And War Powers" with the following: "Nowadays, leading supporters of a constitutional jurisprudence of original intent are advocates of inherent presidential powers in the field of foreign relations, a stance that sheds light on either their ignorance or their hypocrisy.").

[33] U.S. Const. art. II, §2.

As Alexander Hamilton explained in Federalist Paper No. 69, the president's authority:

> 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; 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.

5. Hamilton had warned that: "Men love power"

Experience with the failed Articles of Confederation taught the Framers that "men loved power," as Alexander Hamilton told the Convention on June 18.[34] Thus, they adopted Montesquieu's analysis that power must be checked by other power.

The framers knew personal ambition animated people to become political figures and to exercise power of their positions. Fear that presidential ambition would shape national policy permeated the Constitutional Convention.[35] Alexander Hamilton was especially concerned about presidential power. An intensely ambitious man himself, he understood how ambitious leaders created wars. Some

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[34] 1 Farrand/Records, at 282-284.

[35] "The founders of our republics . . . seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority." The Federalist No. 48 (James Madison).

causes of wars among nations, he wrote in the Federalist Papers,

> . . .take their origin entirely in private passions; in the attachments, enmities, interests, hopes, and fears of leading individuals. . . . Men of this class . . . assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquility to personal advantage or personal gratification.[36]

Hamilton believed in a strong executive, but he, like all but one of the delegates, did not trust future presidents with power to take the nation to war. In his June 18 speech to the Constitutional Convention, he had proposed that the Senate, not the President, have the "sole power" of declaring war.[37]

Thomas Jefferson had sounded a similar note in his letter to Madison, while serving as Ambassador to France, extolling the Convention for creating "an effectual check to the Dog of War by transferring the power of letting him loose from Executive to Legislative body, from those who are to spend to those who are to pay."[38]

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[36] The Federalist No. 6 (Alexander Hamilton).

[37] The Avalon Project at the Yale Law School, http://www.yale.edu/lawweb/avalon/debates/618.htm; see also "IV. . . . The authorities & functions of the Executive to be as follows: ... to have the direction of war when authorized or begun; . . . VI. The Senate to have the sole power of declaring war, the power of advising and approving all Treaties,..." Id.

[38] Julius P. Boyd, ed., The Papers of Thomas Jefferson, (1955) at 397.

B. Article I, Section 5 of the Constitution Requires That Members of Congress be Publicly Accountable for the Decision to Go to War

Article I, § 5 of the Constitution provides:

> Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

This provision was added on August 11, only a week before the discussion of war on August 17.[39] The "declare war" clause falls within the general principle of the Framers that the proceedings of Congress be available to the public. The public record of legislators' votes, the keystone holding legislators accountable, allows citizens to know how their representatives voted and to judge them accordingly. Representatives are well aware that this public process assures their responsiveness to constituents despite blandishments of money and power from other sources.

The principle of public participation, written into the Constitution on August 11, 1787, by James Madison and John Rutledge, made clear that the issue of war was a public matter to be debated by the nation, not decided in executive chambers.[40]

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39 2 Farrand/Records, 257-260.

40 2 Farrand/Records, 257-260. Their motion was modified and adopted. See U.S. Constitution, Art. 1, § 5(3). The secrecy exception can have no application to "Declarations of war" because "declarations" are by nature public documents. The principle had been included in the Articles of Confederation.

James Wilson of Pennsylvania summed up the brief debate at the Convention that led to this requirement of transparency:

> The people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings.[41]

The public interest in representatives' actions on military matters was emphasized by Alexander Hamilton in The Federalist Papers No. 26. He explained that members of Congress would be required "*to declare their sense of the matter [of a standing army], by a formal vote in the face of their constituents . . .* "[42]

[41] 2 Farrand/Records, 260. Wilson added that, "as this is a clause in the existing confederation, the not retaining it would furnish the adversaries of the reform with a pretext by which weak & suspicious minds may be easily mislead." George Mason of Virginia "thought it would give a just alarm to the people, to make a conclave of their Legislature." Id. The Famers were familiar with the way secrecy concealed compromises and difficulties. They had written the Declaration of Independence, the Articles of Confederation and the Constitution in the deepest of secrecy. No such procedure was followed in connection with the 2002 AUMF authorizing the President to attack Iraq at his discretion. Rather, the President called the leaders of both parties to the White House, where, on October 11, 2002, before debate in Congress bagan, they openly agreed to the President's proposed Resolution. (White House press release, Oct. 11, 2002)

[42] The Federalist No. 26 (Alexander Hamilton).

Thus, Hamilton expected the citizenry, the political process in congress and the states to assure that congress would function as a guardian of citizens' rights under the constitution to be free from presidential misuse of the military as long as each legislator must act "in the face of their constituents." The 2002 AUMF violates citizens' rights to know how their representatives voted on the issue of taking the nation to war, just as surely as if their individual decisions had been made in secret. The Framers knew the only way Congress could bind the nation was by passing a statute. They meant the Declaration to become a law.[43]

[43] On this point, the Constitution is crystal clear. The last Paragraph in Article 1 section 8 requires "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary," [including a "declaration of war"] must go through the same process as a bill that is moving toward becoming law. Thus it would be referred to Committees in each house which might hold hearings, collect information and evidence, prepare a report and recommendation to the House and Senate. Each branch would consider and vote separately. When they agreed on language, the bill would be presented to the President, and would become law when signed.

C. Neither the President Nor Members of Congress Can Be Held Democratically Accountable If Congress Delegates to the President the Question of Whether to Launch a Full-Scale War Against a Sovereign Power

The 2002 AUMF was signed into law by President Bush on October 16, 2002. Pursuant to the "Authorization" section of the 2002 AUMF, "The President is authorized to use the Armed Forces of the United States *as he determines to be necessary and appropriate* in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq." Public Law 107-243, § 3(a).

It is hard to imagine a more glaring example of why the Founders insisted that before the nation can go to War, there must be a clear, public Declaration by the members of Congress to which they can be held accountable by their constituents. They are not allowed to pass the buck to the President.

The consequence is vividly demonstrated by the current presidential campaign in which candidates vigorously debated the meaning and consequence of the AUMF, and often hid behind its ambiguity. In the January 31 Democratic debate, Senator Hillary Clinton insistently denied that her vote in favor of the AUMF was a vote to authorize the War in Iraq:

> He [President Bush] abused his authority; he misused

> that authority. I warned at the time that it was not authority for a preemptive war. . . . Nevertheless, he went ahead and waged one ...[44]

Meanwhile, President Bush insists that the attack on Iraq was fully authorized by Congress.

But Congress may not delegate its war-making power to the President in ways that conflict with the basic structure of the Constitution.[45] The concern for voters being able to hold officials accountable is crucial with respect to federalism and separation of powers issues. See New York v. United States, 505 U.S. 144 (1992).

With respect to both federalism and separation of powers, the Constitution is designed so that voters can hold elected officials accountable. In New York, the Court considered the constitutionality of several provisions of the Low-Level Radioactive Waste Policy Act. Id. at 168. The Court found

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[44] Clinton, Obama debate with less finger-pointing, CNNPolitics.com, Feb. 1, 2008, http://www.cnn.com/2008/POLITICS/01/31/debate.main/index.html .

[45] While Defendant maintains that Congress did not delegate its power to declare war to the President, but rather delegated the power to commence undeclared hostilities (Db at 35), for reasons explained above in Section I, the Iraq War was in fact a war within the meaning of the "declare war" clause and Congress delegated the power to declare this war to the President.

constitutional provisions of the Act that gave monetary and access incentives to the states to comply with the Act. However, the Court found unconstitutional the Act's "take title" provision, which required states to accept ownership of waste or regulate according to the instruction of Congress. The Court reasoned that "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." Id. Since the State can choose whether or not to conform to the Act, the residents of the state ultimately make the decision as to whether or not the state will comply. However, when the Federal Government requires States to regulate, the accountability of federal as well as state officials is diminished. The Court explained that where the Federal Government compels states to take certain actions, the state officials would face public disapproval, while the federal officials who compelled the actions would be shielded from "electoral ramifications." Id. The Court concluded that accountability is diminished when officials are not responsible to their constituents.

"The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." 505 U.S. at 182 (citing Buckley v. Valeo,424 U.S.1, 118-137 (1976)). The Court reasoned that State officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. 505 U.S. at 182. The Court noted that, "it is likely to be in the political interest of each individual official to avoid being held accountable to the voters the choice of location [of low-grade waste]." Id. If a federal official was able to force state officials to decide where to dump

waste, they would do so to shift the responsibility for the decision. Id. at 183.

In Printz v. United States, 521 U.S. 898 (1997), the Court followed the reasoning in New York that delegations of power that blur the lines of accountability are unconstitutional. In Printz, the Court invalidated provisions of the Brady Handgun Violence Prevention Act requiring state and local law enforcement officers to perform background checks on prospective handgun purchasers. Id. at 902-03. The Court concluded that accountability is diminished when officials are not responsible to their constituents. Id. at 933. The Court rejected the Government's argument that this case was distinguishable from New York because it involved merely enforcing the law, as opposed to the making-law requirement in the Act in New York. Id. at 927.

The Court reasoned that by requiring states to absorb the financial costs of implementing a federal regulatory program, "members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." Id. at 930. Additionally, even if the States did not have to pay, they would be blamed for the defects and the burdensomeness of the requirements. Id. As Justice Antonin Scalia noted in a recent law review commentary:

> [The Brady Act] would allow Congress and the President to evade apparent responsibility for (not to mention the cost of) enforcing unpopular federal mandates. As a matter of separation of powers, commandeering state law enforcement officers would enable Congress to avoid the essential check that the laws it enacts depend for their execution upon the competing political branch of the presidency.

Antonin Scalia, Symposium: Separation of Powers as a Safeguard of Federalism: The Importance of Structure in Constitutional Interpretation, 83 Notre Dame L. Rev. 1419, 1419-1420 (2008).

Here, Congress' delegation to the President of its power to declare war blurred the lines of accountability. As Senator Clinton noted, the President's actions went beyond what she thought she authorized under the AUMF. Meanwhile, the President maintains that all of his actions with respect to Iraq were authorized by Congress. As the Court reasoned in Printz and New York that delegations of power that blur the lines of accountability are impermissible, this Court too should reason that Congress' delegation of power to the President blurred the lines of accountability and was, thus, impermissible. Similar to New York, where the Court reasoned that officials would want to pass on the responsibility for decisions to shield themselves from accountability from the electorate, here, both members of Congress and the President are trying to argue that the other was responsible for the war to shield themselves from accountability.

As the Supreme Court held this term in Boumediene v. Bush, discussing the Suspension Clause and separation of powers, "[t]he test for determining the scope of [a provision] must not be subject to manipulation by those whose power it is designed to restrain." 128 S. Ct. at 2259.

If Congress had been required to expressly decide on whether to declare war, "[t]hat deliberation might have revealed Iraq's lack of complicity with Al Quaeda and the nonexistence of the country's alleged cache of nuclear weapons. The members of Congress would have had to vote specifically on going to war, which would have assured closer scrutiny than they actually gave the question." Mario Cuomo, How Congress Forgot Its Own Strength, New York Times, Oct. 7, 2007.

D. If Congress Intended to Delegate to the President the Power to Take the Nation to War in Iraq, It Was an Impermissible Delegation

While the non-delegation doctrine has been sharply limited in modern times, where the Constitution clearly delegates a power exclusively to one branch, that power may not be shared or re-delegated to another branch. For example, in Clinton v. New York, the Court found that the President's exercise of power under the Line Item Veto Act violated the Presentment Clause, by departing from "finely wrought" constitutional procedure for the enactment of a law. Clinton v. City of New York, 524 U.S. 417, 439-40 (1998). The Supreme Court required Congress and the President to follow strictly the language of the Constitution concerning the passage of a law.[46]

The President and Congress had agreed to allow the President to veto individual budget items after budget legislation had been passed. But the Court held the line item veto act invalid because it was inconsistent with the method in the Constitution for Congress and the President to adopt a law. Justice Stevens wrote for the majority:

> The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes

[46] Nowhere in its brief does the government dispute that fact that Congress may not delegate its power to Declare War.

> may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'

524 U.S. at 439-40.

If the October AUMF is read as entrusting to the President alone the authority to perform the policy-determination and the moral decision-making that the Framers intended the full Congress to accomplish, the resolution will clearly involve "encroachment," an unrecoverable surrender of congressional power, and will also involve enormous "aggrandizement" of presidential power. Entrusting such decision-making power to the President in the context of the present case – where the President is asserting determination to use that power in an unprecedented fashion, for offensive war of an extraordinary kind – would profoundly alter the Constitutional structure. The disastrous consequences cannot be overstated. "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." Id. at 450 (Kennedy, concurring). Never could liberty be more threatened than when the President, or Congress, or both together would alter the separation governing the most momentous and dangerous of the Constitutional powers.

The Constitution cannot be amended by persistent evasion. Thus, the mandate that only Congress has the power to declare war was neither erased nor modified by the actions or inactions of timid congresses that allowed overeager presidents to engage in

wars in Vietnam and elsewhere without making declaration. Mario Cuomo, supra, New York Times, Oct. 7, 2007.

The Framers' rationale for separating the power to declare war, vested in Congress, from the power to wage a declared war, given to the President as commander-in-chief, remains compelling today. See generally John Hart Ely, "War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath," at 3-4 (Princeton University Press 1995). First, war was not to be entered into lightly, and thus required "the utmost deliberation, and the successive review of all the councils of the nation." 2 Justice Story, "Commentaries of the Constitution of the United States," at 1166 (1833). Second, the inclusion of both houses (usually only the Senate participates in foreign affairs decisions) would slow down, by design, the decision-making process. As James Wilson said: "This system will not hurry us into war; it is calculated to guard against it."[47] Third, the inclusion of the House ["the people's house"] ensured that the war would have the support of the public at large. Ely, supra, at 3-4.

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47 Debates in the Several State Conventions on the Adoption of the Federal Constitution, at 528 (J. Elliott ed., Vol. II, 1863).

E. Congressional Funding Does Not Demonstrate Congressional Authorization for War

Defendants rely on the fact of Congressional funding of military operations in Iraq as proof that Congress had authorized the war. (Db at 37-38) But the claim that Congressional appropriations equals Congressional approval of war was sharply repudiated by two eminent Federal Judges, Charles Wyzanski and David Bazelon, in Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973) as follows:

> This Court cannot be unmindful of what every school boy knows: that in voting to appropriate money . . . a Congressman is not necessarily approving of the continuation of war no matter how specifically the appropriation . . . refers to that war.A Congressman wholly opposed to that war's commencement and continuation might vote for the military appropriations . . . because he was unwilling to abandon without support men already fighting. An honorably, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture. We should not construe votes cast in pity and piety as though they were votes freely given to express consent.

F. The President Has No Inherent Power to Take the Nation to War

Because of Article 1, § 8(11), supported by Article 1, § 7(3), the decision to take the nation to war can only be made by Congress adopting legislation declaring war.[48] Presidential powers

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[48] Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be re-passed by two-thirds of the

described in Article II do not include the power to legislate. Youngstown Sheet & Tube v. Sawyer, 343 U.S 579 (1952). They are limited to implementing Congressional decisions. Id. At 579. The AUMF is not a decision to go to war. There is no inherent or "unilateral" power in the President to take the nation to war as claimed by Defendant. (Db at 42) 343 U.S. at 650-655 (concurring opinion of Justice Jackson).

III. THE 2002 CONGRESSIONAL AUTHORIZATION TO USE MILITARY FORCE IN IRAQ (AUMF) WAS NOT A DECLARATION OF WAR BECAUSE IT DELEGATED TO THE PRESIDENT THE DECISION WHETHER TO INITIATE HOSTILITIES

A. The Term "Declaration" Had a Specialized Meaning in the Revolutionary Era

When the Constitutional Convention assigned to Congress the power to "declare" war, it invoked a term that had developed a specific meaning in revolutionary times. As historian Pauline Maier explained,

> A declaration was a particularly emphatic pronouncement or proclamation that was often explanatory: from the fourteenth century "declaration" implied "making clear" or "telling.".... But the word "declaration" also referred to a legal instrument, a written statement of claims served on the defendant at the *commencement* of a civil action.[49]

A declaration makes clear to the public that Congress is not

Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

[49] Pauline Maier, American Scripture: Making the Declaration of Independence, 50-51 (Alfred A. Knopf 1997).

merely planning for war, or giving the President leverage in negotiating with other powers, but actually commencing a war.[50] If war was in the offing, voters would consider the war's impact on their lives, fortunes, and the future of the nation. They would use their influence with their representatives to support or defeat the measure.

B. The 2002 AUMF Also Violated the War Powers Resolution Because It Does Not Meet the Requirement of Specificity

The 2002 AUMF was not a specific authorization of military action because it did not satisfy the specificity requirement of the War Powers Resolution of 1973. 50 U.S.C. §§ 1541, et seq., which requires "specific statutory authorization" in the absence of a Congressional Declaration of War or "a national emergency by attack upon the United States. Id. at § 1541.

The 2002 AUMF was signed into law by President Bush on October 16, 2002. Pursuant to the "Authorization" section of the 2002 AUMF:

> [t]he President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq. (Public L. No. 107-243, 116 Stat. 1498 (2002).)

The 2002 AUMF does not satisfy the specificity requirement of

[50] A "genuine" Declaration of War would, of course, give the President a major negotiating edge, far more useful than the AUMF.

the War Powers Resolution because it is so overly broad that it goes so far as to delegate to the President the authority to use military force under nearly any circumstance without further review by Congress and during any period of time. Id.

The War Powers Resolution was adopted by Congress in 1973 to further define the roles and responsibilities of Congress and the Executive with regard to war powers. It states:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

50 U.S.C. § 1541(c). Section 8(a) of the War Powers Resolution also provides that the, "[a]uthority to introduce United States Armed Forces into hostilities . . . shall not be inferred," unless the provision "*specifically*" authorizes the use of force. 50 U.S.C. § 1547(a)(1). Additionally, the Act directs that "[t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances . . . ." 50 U.S.C. § 1542.

The House Report on the War Powers Resolution states that the use of the word "every" in § 1542 was meant to include almost all circumstances including "extraordinary and emergency

circumstances." H.R. Rep. No. 93-287 at 2350 (1973). The use of the word "possible" was meant to provide some flexibility and allow for presidential action without prior consultation with Congress when "instantaneous action" is required, "e.g. hostile missile attack underway." Id. at 2350-51. It was clearly the intent of Congress that the War Powers Resolution be strictly adhered to.[51] The hostilities in Iraq in 2002 did not meet the exception for cases where "instantaneous action" was required, as it was not analogous to a situation like a "hostile missile attack underway." Thus, President Bush was required to seek and obtain "specific statutory authorization" from Congress prior to committing military forces. Moreover, the "specific authorization" language in the War Powers Resolution must be read in conjunction with the requirement that the President provide specific information, including the following:

> . . . a report in writing, setting forth (A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement.

50 U.S.C. § 1543. The President did not meet this reporting

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[51] "[i]t is therefore the sense of the Congress that the provisions of the War Powers Resolution be strictly adhered to and that the congressional consultation process specified by such Resolution be utilized strictly according to the terms of the War Powers Resolution." Department of Defense Authorization Act of 1981, Pub. L. No. 96-342, Stat. 1077(1980).

requirement as he failed to set forth the “scope and duration of the hostilities or involvement.”

Due to the vague and over-broad language of the AUMF, the President, at his sole discretion, was authorized to use force in Iraq under essentially any circumstance and at any time. As a result, the President authorized the use of military force on March 19, 2003, nearly five months after the resolution passed in Congress, and after Iraq had made progress to comply with the Security Council Resolutions to disarm. The President’s actions on March 19, 2003 came without further consultation, consideration, or approval by Congress.

Because the 2002 AUMF lacks the requisite specificity, it does not comply with the War Powers Resolution. In addition, the vague authorizations strip Congress of its prescribed constitutional power *and obligation* to “declare war.” Vague authorizations also deny the people their ability to hold their elected representatives accountable for their decisions, as the Framers of the Constitution envisioned.[52] As a consequence of its broad and overreaching nature, the 2002 AUMF was not a proper authorization to go to war.

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[52] The House Report on the War Powers Resolution noted that, “each Member of Congress should declare his views – through a “yes” or “no” vote – when the President commits our Armed Forces to combat or substantially enlarges our military presence abroad.” H. R. Rep. No. 93-287 at 2360.

Even if previous presidents did not comply with the War Powers Resolution, this does not mean that the 2002 AUMF was a proper authorization to use military force. "Illegality is not legitimated by repetition." Raoul Berger, War-Making by the President, 121 U. Pa. L. Rev. 29 (1972). As Supreme Court Justice Field once noted, "[an] unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Norton v. Shelby County, 118 U.S. 425 (1886). Prior presidential action with regard to the War Powers Resolution has not set the bar; the bar was set when the Resolution was enacted and the 2002 AUMF does not meet its requirements.

IV. THIS CASE DOES NOT RAISE A POLITICAL QUESTION OUTSIDE THE JURISDICTION OF THE COURTS

The question of the constitutionality of an executive war is justiciable. The leading cases concerning the failure of Congress to declare war in recent years, Massachusetts v. Laird and Doe v. Bush, were decided on their merits. Plaintiffs disagree with the substance of those decisions, while recognizing that both decisions hold on the merits that the AUMF was constitutional.

As Chief Justice Marshall declared in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), "[it] is emphatically the

province and duty of the judicial department to say what the law is." See also Boumediene v. Bush, 128 S. Ct. 2229, 2236 (2008)("[t]o hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say what the law is.").

Courts, not legislatures or executives, set out principles.

> [C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess . . . . This is crucial in sorting out the enduring values of a society . . . .
>
> Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry.

Alexander M. Bickel, The Least Dangerous Branch 25-26 (2d ed. 1986) (citing H.F. Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 25 (1936)).

For courts to give meaning to an underlying principle of the Constitution they may "have to intervene in determining where authority lies as between the democratic forces in our scheme of government." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 598 (1962) (Frankfurter, J., concurring). While appreciating the need for caution in addressing an issue of separation of powers, the Youngstown Court proceeded to the merits, notwithstanding the implication for foreign affairs, the high stakes involved, or the fact of interbranch disagreement.

Justiciability doctrines are largely a creation not of the founding period, but of the Twentieth Century. Thus, those who argue non-justiciability in the present case betray the original intent of the Framers, undermine the principle of separation of powers, and advance judicial abdication. If ours is to be a "system [that] will not hurry us into war...," as James Wilson argued before the Pennsylvania ratifying convention, the judiciary cannot exempt the President from the normal judicial umpiring process that checks his actions at home.[53] As has been aptly stated, "[a] foreign policy exempt from judicial review is tantamount to governance by men and women emancipated from the bonds of law." Thomas M. Franck, Political Question/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs? 8 (1992).

Defendant relies heavily on Baker v. Carr, 369 U.S. 186, (1962), to argue that this case represents a non-justiciable political question. (Db at 26, 27). It is true that Baker found that judicial inquiry is not warranted when a political department acts pursuant to a "textually demonstrable" constitutional commitment of power. Id. at 217. In the present case, however, the Declare War power is expressly committed by the text of the

[53] Jonathan Elliot, The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, *in 1787* 488 (2d. ed. 1836).

Constitution to Congress, not the Executive. Therefore, judicial abdication is unwarranted. "The courts cannot reject as 'no law suit' a bonafide controversy as to whether some action denominated 'political' exceeds constitutional authority." Id.

Indeed, in Baker, at 211-212, the Court rejected the notion that issues involving foreign relations should be presumed non-justiciable:

> [I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Id. at 211-12.

Defendants also rely on cases in which courts have found a question to be "political," and therefore nonjusticiable, because of the lack of "judicially cognizable standards" by which to assess the claim of unconstitutionality. Plaintiffs do not deny that since the Vietnam War, challenges to the President's use of troops without sufficient Congressional authorization have frequently been dismissed in the lower federal courts as non-justiciable by virtue of their raising "political questions." However, the Supreme Court has not decided a case involving the division of power between Congress and the President in regard to

initiation of war. And dissenting from the denial of certiorari in Mora et al. v. McNamara, 389 U.S. 934, 935 (1967), Justice Stewart rejected the invocation of "political question" doctrine in terms that highlighted its troubling features: "These are large and deeply troubling questions . . . . We cannot make these problems go away simply by refusing to hear the case of three obscure Army privates . . . . I think the court should squarely face them . . . ."

Similarly, some federal judges have been persuaded that there are entirely manageable standards for deciding the "legality" of a war. Writing for the majority in Orlando v. Laird, 443 F.2d 1039, 1041 (2d Cir. 1971), Judge Anderson noted,

> [T]he constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine. (citing Baker v. Carr, 369 U.S. 186 (1962) and Powell v. McCormack, 395 U.S. 486 (1969)).

See also Atlee v. Laird, 347 F. Supp. 689 (1972) (Judge Lord dissenting, "[t]he Executive has a constitutional 'duty' [that] can be judicially identified and its breach judicially determined").

Describing the doctrine as "murky," the First Circuit did not see "political question" a bar to litigating the constitutionality of the war in Iraq in Doe v. Bush, 323 F.3d 133, 140 (2003)

(affirming the District Court's dismissal of plaintiff' claim on other grounds). Disavowing "political question," the Court followed the lead of the earlier Circuit opinion in Massachusetts v. Laird, 451 F. 2d 26, 34 (1st Cir. 1971), and dismissed on the merits. Id. at 137. In Laird, the Circuit had held:

> The war in Vietnam is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view.

Thus, the First Circuit did decide the question of the constitutionality of presidential authority. The decision was based on the presumed complicity of Congress in funding hostilities. However, the invalidity of that rationale was exposed by Judges Wyzanski and Bazelon in the majority opinion for an *en banc* court in Mitchell v. Laird, 488 F. 2d 611, 615 (D.C. Cir. 1973), quoted supra, page 35.

Recently, a major step has been taken in the direction of reactivating a role for the judiciary on the issue. On the eve of the Persian Gulf War, in 1990, the court in Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990), addressed the question of the constitutionality of former President Bush's going to war against Iraq without first securing authorization from Congress. The Dellums court found the issue to be justiciable: "the court is not

prepared to read out of the Constitution the clause granting to the Congress, and to it alone, the authority 'to declare war.'" Id. at 1146. Dellums can be read as a major step out of that darkness into a daylight in which the judiciary fulfills its intended public function.

In Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), the plurality, in distinguishing its rationale and holding from that of Youngstown, noted the reality of a "profound and demonstrable domestic impact" of the seizure of the steel mills, distinguishable from the relatively minor domestic impact of the President's unilateral termination of a treaty. See Francis D. Wormuth and Edwin B. Firmage, To Chain the Dog of War 244-245 (1986). This focus suggests that in an assessment of a claim of presidential power, significant weight must be given to the impact of the presidential policy on American people. In the present case, with a war that has lasted over five years and with an all time high number of troops deployed in Iraq since the summer of 2007, we see the President's claiming an unauthorized power with indubitably profound and demonstrable domestic impact. The Dellums analysis offers the possibility of relief from the harmful effects of presidential overreaching. Evolved out of an unsettled jurisprudence that discouraged courts from exercising their proper Article III powers, the Dellums approach honors the constitutional

allocation and reclaims for the judiciary its proper role relative to the political branches.

While the judiciary cannot assume full responsibility for maintaining structural boundaries, the political processes will be inadequate to protect structural constraints if there is a complete abdication of a judicial role. As Justice Kennedy, joined by Justice O'Connor, noted in his concurrence in United States v. Lopez, 514 U.S. 549, 577-78(1995):

> [I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance . . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.
>
> At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design [citations omitted], the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

In this case, where it appears that arrogation by the President is effecting a drastic structural alteration, contradicting the Framers' clear intent with regard to the allocation of war-related powers, it becomes urgent that the

judiciary not refrain from fulfilling its Article III obligation to protect the separation of powers. In Marbury, Chief Justice Marshall wrote that "the President is invested with certain important political powers in which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." 5 U.S. (1 Cranch) at 165-66. However, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who consider himself injured, has a right to resort to the laws of this country for a remedy." Id. at 166.

Plaintiffs have established that the Constitution by law gives Congress power to declare war, thereby denying that power to the President. The duty of Congress to declare war being "specific," it must be applied by courts else persons affected have a right without a remedy -- which Marshall viewed as inconsistent with our form of government.

Especially with new threats of attack on the sovereign nation of Iran coming from high Administration officials (See Seymour Hersh, Preparing the Battlefield: The Bush Administration steps up its moves against Iran," The New Yorker, July 7, 2008), the exercise of judicial authority is necessary here in order to

protect liberty, not only for the present plaintiffs, but for future generations of Americans.

The plaintiffs do not ask for judicial assessment of the wisdom or soundness of a war against Iraq. They do not ask the Court to act beyond its proper powers. But they do respectfully ask that the Court ensure that decisions about whether there should be war will be made, after full deliberation, by the entire Congress and not by the President. The exercise of judicial power in this case would not involve the Court's deciding the question whether the U. S. should have attacked Iraq. The Constitution does not assign to the judicial branch, any more than it does to the President, the power to answer that question. Plaintiffs simply urge the Court to declare that Congress alone has authority to answer that question, because that is what the Constitution requires.

V. PLAINTIFFS HAVE SUFFERED INJURY IN FACT AND HAVE STANDING TO SUE FOR A DECLARATORY JUDGMENT

Plaintiffs sue under the Declaratory Judgment Act, 28 U.S.C. 2201, which provides that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . ." They seek no coercive relief against the President or any agency of government, and a judicial declaration

would not, therefore, generate any confrontation with a coordinate branch of government.

In his landmark work, Declaratory Judgments, Professor Borchard, the acknowledged father of the Declaratory Judgment Act, observed that: "[A] court exerts a certain amount of judgment or discretion in determining whether a plaintiff or defendant has a legal interest in contesting the validity of a statute or administrative ruling. . . . [S]uch an interest . . . will be more readily perceived when large public interests are at stake." Id. at 32 (Banks-Baldwin Law Publishing Co., 2d ed. 1941). It is hard to perceive an issue of larger public interest than the legality of a war.

Although these plaintiffs do not seek an award of damages, they nevertheless have suffered the types of damages that courts will compensate: economic harm is pled by New Jersey Peace Action (NJPA), which had to redirect its scarce resources and its focus from important projects relating to nuclear disarmament and peaceful coexistence in order to address the many issues raised by the invasion of Iraq and its *sequelae* (Amended Complaint ¶ 8); Paula Rogovin and Anna Berlinrut have each suffered emotional, physical and psychological injury for which they have sought and received medical and pharmacological treatment (Amended Complaint ¶¶ 8 & 10); each has also suffered economic harm similar to that

suffered by NJPA, insofar as they have been forced to devote their time and their money to endeavors that are completely different from what those resources would have been devoted to in the absence of President Bush’s unconstitutional conduct (Amended Complaint ¶¶ 8 & 10); and William Joseph Wheeler has suffered the clearest injury of all - a physical condition sufficiently severe to cause his honorable discharge from active duty that was caused by his brave service in Iraq, along with the many emotional, physical and psychological effects arising from the ordeal of combat in Iraq, the continuing effects of which still plague him today (Amended Complaint ¶ 14). Mr. Wheeler also presents the clearest case of the practical utility of a Declaratory Judgment, the possibility that President Bush might order his return to active duty as a result of his unilateral initiation of another unconstitutional war against Iran or some other nation. (Amended Complaint ¶ 15).

Plaintiffs could have all sought damages in this litigation, but they chose not to do so, asking instead only for a declaration of the law and of the fact that they have been wronged by the violation of the law. Plaintiffs believe that such a declaration will be honored by President Bush and by future Presidents and that harms similar to theirs can thereby be avoided by the entire nation in the future. Despite their decision to forego damages,

these plaintiffs jointly and severally present all of the classic elements of a constitutional tort claim: *a constitutional duty* not to launch a war against a foreign sovereign state in the absence of a formal Congressional Declaration of War, *a breach of that duty* insofar as Iraq was invaded without such a Declaration of War, and *injuries proximately caused by that breach* that are of types that are cognizable and redressable by the court.

These plaintiffs have refrained from seeking personal recoveries for their damages, which are real but minor in comparison with the totality of the damage proximately caused by President Bush's unconstitutional invasion of Iraq, in order to focus their case upon seeking the more important relief for the entire nation - an adjudication that the Constitution has been violated and that the People and, indeed, our Nation as a whole, have all been damaged as a result. It will be sufficient remedy for these plaintiffs if this Court rules directly upon the plain language and the original intention of the Constitution and thereby fulfills the Court's primary responsibility, first articulated by Chief Justice Marshall, "to say what the law is." Marbury v. Madison, supra, 5 U.S. (1 Cranch) at 177.

Although the plaintiffs seek no personal recompense, it is the existence of their actual injuries that gives them the standing to proceed and which saves this case from being a merely

abstract debate. The plaintiffs' injuries demonstrate that there are actual, real world consequences arising from President Bush's unconstitutional conduct. More importantly for present purposes, plaintiffs' allegations are more than sufficient to satisfy the three elements of standing set forth in defendant's motion brief. Thus, the plaintiffs have alleged (1) injuries-in-fact that are (2) causally connected to the allegedly unconstitutional conduct of the President and that are (3) capable of being redressed by a court. See Db at pp. 11-12, *citing, inter alia,* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

Of these three elements, the motion to dismiss essentially argues that only one is lacking - the possibility of judicial redress.[54] The motion does not deny that plaintiffs have alleged a theory of constitutional law that, if accepted by this Court, has been violated in a "concrete and particularized" manner. Neither does the motion deny that plaintiffs have alleged that this "concrete and particularized" violation of the Constitution is the cause of the injuries that they have alleged. The only element of

[54] The motion never argues that plaintiffs' core damages allegations of economic, emotional, physical and psychological injury are insufficiently concrete to support standing. Instead, the motion argues against the sufficiency of the more abstract harms that plaintiffs have also suffered, but for which they seek no direct remedy.

standing that the motion claims is lacking, therefore, is the ability of this court to provide redress for those injuries.

Thus, the core of President Bush's motion argument is its complete refusal to acknowledge that these plaintiffs have in fact alleged the same types of mundane injuries that courts deal with every day - physical, psychological, emotional and economic injuries. The motion argument also ignores the fact that Mr. Wheeler's case calls for a perfectly ordinary type of Declaratory Judgment, one which will tell him whether an Order that he reasonably believes he may soon receive, will be a lawful one that he must obey if its purpose is to support an undeclared war against Iran or some other nation. He wants the Court to tell him whether his understanding that such an Order would be unlawful is a correct understanding of the law or not.

Courts ordinarily offer redress for injuries of the type alleged herein to plaintiffs who succeed by providing an adjudication that the plaintiff has been wronged along with an award of damages. Here, plaintiffs have chosen to seek the former form of redress without the latter. Plaintiffs simply seek an adjudication that they have been wronged, *i.e.*, a clear declaration of "what the law is."

The fact that these plaintiffs have only asked for some, but not all, of the redress that this court is capable of providing to

them, does not deprive them of standing. For some people, including the plaintiffs herein, money is not the point. The point for these plaintiffs is re-establishing the original intention of the Constitution for the benefit of all. However, if the lack of a demand for damages is the bar to their proceeding, then plaintiffs ask the court for leave to file a Second Amended Complaint, completely unchanged from the one presently before the court except for an added demand for damages.

The Motion to Dismiss not only ignores the fact that the relief sought in the Complaint is itself a form of redress that this court is fully capable of providing, it also ignores the possibility of a money damage award as a possible form of redress for these plaintiffs and instead concentrates all of its fire attacking phantom remedies which plaintiffs do not seek. Obviously, it is beyond the powers given to Man or to this Honorable Court to undo the invasion of Iraq. That is why these plaintiffs do not seek such a remedy. However, a clear Declaratory Judgment, sustained on appeal, would likely prevent a recurrence of the same unconstitutional conduct and would thereby provide these plaintiffs with a great deal of redress for the injury they have suffered. No court can order the military home. But no such remedy has been sought. Plaintiffs, however, are confident that the United States government will do what it can to

comply with a final decree, sustained on appeal, and will thereby undo as much of the damage arising from President Bush's unconstitutional conduct as is feasible.

Admittedly, the redress that plaintiffs are capable of obtaining in court is limited and imperfect. The same is true, however, for the vast majority of cases. Money damages cannot bring back a lost limb or a dead child. Money damages cannot undo the injury to a community when a business is ruined and forced to close due to the anti-competitive conduct of another concern. Perfect justice is unobtainable in this quotidian existence.

Constitutional standing doctrines, however, do not require perfect redress. It is sufficient that there is *some* redress that a court can provide - something that is certainly possible in the present case. A Declaratory Judgment in favor of plaintiffs can return our nation to the original intention of Article I, Section 8, Clause 11. That Constitutional Clause will thereby serve its original intent, which Thomas Jefferson described upon learning of its incorporation into the Constitution, as "an effectual check to the Dog of War by transferring the power of letting it loose from Executive to Legislative body, from those who are to spend to those who are to pay."[55] Such a return to the original intention of the Constitution would greatly democratize the war-making power

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[55] See Boyd, fn. 38, supra.

and would, in every respect, provide great redress to the plaintiffs.

Unstated in President Bush's Motion to Dismiss, but implied in every sentence, is the radical proposition that absolutely no one has the ability to bring the question raised by plaintiffs before the court at any time. Implicit in the entire motion argument is the proposition that only Congress can enforce its own Article I duties and that if Congress chooses to abdicate those duties then the People have no recourse, since none among them can ever satisfy the pinched notions of standing that the motion advocates.

The power to launch a war upon a foreign sovereign nation is the most fearsome power held by the United States. The Founders plainly feared that power, and with good reason. War sets aside all ordinary notions of law and instead unleashes death and destruction upon every nation and person involved on a scale that is said to be unimaginable to those who have not directly experienced it. The Founders, "We, the people of the United States" in trying to "form a more perfect union, establish Justice, insure domestic tranquility . . . and secure the Blessings of Liberty to ourselves and to our posterity" surely meant it when they wrote that *only Congress* has the power "To declare War." Accordingly, they could never have intended to

deprive the Courts of the power to declare the meaning of that clause due to a twisted theory of adjudication that makes it impossible for anybody to have standing to prosecute a judicial challenge to that fearsome power. This Court can redress that injury to the Founders' intention by recognizing plaintiffs' standing and by hearing and deciding this case on its merits.

Our Constitution was drafted by and for the People. Ordinary people like the plaintiffs must, therefore, have standing to enforce its terms.

CONCLUSION

For the foregoing reasons, the Defendant's motion to dismiss the complaint should be denied.

Respectfully submitted,

/s/ Frank Askin
Frank Askin, Esq.

--and—

/s/ Bennet D. Zurofsky
Bennet D Zurofsky, Esq.

Date: December 1, 2008