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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY PEACE ACTION, *et al.* Plaintiffs,	) HONORABLE 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

REPLY MEMORANDUM IN SUPPORT OF THE
PRESIDENT OF THE UNITED STATES' MOTION TO DISMISS

In March 2003, acting pursuant to explicit Congressional authorization set forth in the Authorization for Use of Military Force Against Iraq Resolution of 2002, H.J. Res. 114, 116 Stat. 1498 (codified at 50 U.S.C. § 1541 note) ("Authorization for Use of Military Force"), the President ordered military action to remove the Saddam Hussein regime in Iraq. As Defendant's Opening Brief ("Def's Mot'n") spells out, the actions of both Congress, in passing the Authorization for Use of Military Force, and the President, in ordering military action, were entirely Constitutional. Plaintiffs' Opposition, however, betrays a more fundamental flaw in their challenge. Indeed, as discussed in more detail below, Plaintiffs effectively concede that this Court lacks jurisdiction, and instead of defending their action pursuant to applicable legal standards, they choose to attack the limitations on federal court power set forth in Article III of the Constitution and consistently applied by the Supreme Court since the beginning of the Republic. Plaintiffs assert baldly and without citation:

> 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.

Pl's Opp'n, at 43. Nothing could be further from the truth. In fact, the justiciability doctrine, which includes concepts such as standing, ripeness, and the political question doctrine, "defines with respect to the Judicial Branch the idea of

separation of powers on which the Federal Government is founded," and reflects "concern about the proper – and properly limited – role of the courts in a democratic society." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Moreover, far from being a construct of the Twentieth Century, this important principle inherent in Article III of the Constitution has been applied for over two hundred years. As the Supreme Court has stated, "[t]his Court's insistence that proper jurisdiction appear begins at least as early as 1804." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) (citing *Capron v. Van Noorden*, 2 Cranch 126 (1804)). Indeed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government that the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler v. Cuno*, 547 U.S. 332, 341 (2006) (quotation omitted).

Because Plaintiffs cannot meet the standards for justiciability (nor for that matter even seriously contend that they do) this case must be dismissed for lack of jurisdiction. Moreover, even if this Court could reach the merits, their claim would still fail.

ARGUMENT

I. Plaintiffs' Lack Article III Standing

Plaintiffs' standing discussion, tucked away at the back of their lengthy brief, effectively concedes that Plaintiffs lack Article III standing, and

consequently, that this Court has no jurisdiction over this case. As Defendant explained in his Opening Brief (Def's Mot'n, at 11), "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To meet this "irreducible constitutional minimum of standing," Plaintiffs must establish three elements: (1) an injury-in-fact that is both "(a) concrete and particularized" and "(b) actual or imminent;" (2) "a causal connection between the injury" and the challenged action; and (3) a likelihood that "the injury will be redressed by a favorable decision." *Id.* at 560. Plaintiffs' Opposition concedes that Plaintiffs have not met this burden.

First, Plaintiffs cannot dispute that any injuries they may have suffered will not be redressed by a favorable decision. *See* Def's Mot'n, at 13-17. Plaintiffs concede that they "do not ask this Court to interfere with current military activities in Iraq." Pl's Opp'n, at 1; *see also id.* at 50 (Plaintiffs "seek no coercive relief against the President or any agency of government"). Indeed, they concede that they seek nothing more than an advisory opinion that the 2003 invasion to depose Saddam Hussein was illegal. *See id.* at 52 (Plaintiffs ask "only for a declaration of the law and of the fact that they have been wronged by the violation of the law"). Such advisory opinions are clearly improper under Article III, and a plaintiff who seeks such a declaration lacks standing because he necessarily fails the

redressability prong. *E.g.*, *Steel Co.*, 523 U.S. at 101 (noting that advisory opinions have been "dissaproved by this Court from the beginning" (citing *Hayburn's Case*, 2 Dall. 409 (1792))).

Plaintiffs ask this Court to excuse their clear failure to establish redressability, by contending that they "could have all sought damages in this litigation." Pl's Opp'n, at 52. This is both incorrect[1] and irrelevant. Plaintiffs are not seeking damages; they are seeking declaratory relief and they must establish standing for the relief that they actually seek. Indeed, in this respect, this case is exactly like *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), where the plaintiff alleged that past unconstitutional conduct had injured him. The Supreme Court held that while he may have standing to seek damages, he did not have standing to seek declaratory or injunctive relief because the allegedly illegal conduct was past. 461 U.S. at 104; *accord Ashcroft v. Mattis*, 431 U.S. 171, 172-73 (1977) (per curiam); *Golden v. Zwickler*, 394 U.S. 103, 109-11 (1969).

In addition to conceding their failure to meet the redressability prong of the standing analysis, Plaintiffs do not dispute that Plaintiffs New Jersey Peace Action, Paula Rogovin, and Anna Berlinrut fail prong one of the standing test

[1] A damages suit against the United States for an alleged constitutional violation would be barred by sovereign immunity. Any suit against President Bush in his personal capacity (which, of course, this is not) would similarly be barred because the President has absolute immunity from civil litigation based on official acts.

because their alleged injuries are not "concrete and particularized." Defendant laid out the reasons why these alleged injuries fail in its Opening Brief (Def's Mot'n, at 17-23), and Plaintiffs' Opposition offers no response. Plaintiffs merely assert that they "have alleged [a] 'concrete and particularized' violation of the Constitution." Pl's Opp'n, at 54. This, of course, is insufficient to meet the constitutional requirement of a "concrete and particularized" ***injury***. *Lujan*, 504 U.S. at 560.

Finally, Defendant's Opening Brief demonstrated that Plaintiff William Wheeler lacks standing because a member of the military cannot bring suit to challenge the order of a superior such as the Commander in Chief. Def's Mot'n, at 23-24. Plaintiffs do not dispute this, and thus it too is conceded.

After conceding that they do not meet the Constitutional requirements for Article III standing, Plaintiffs nevertheless plead for the Court to ignore this key Constitutional limit on judicial power because, Plaintiffs contend, no one has Article III standing because "none among [the People] can ever satisfy the pinched notions of standing" required by the Constitution. Pl's Opp'n, at 58. This cry rings hollow. Even if no one else has standing, that is not sufficient to give standing to Plaintiffs. *See, e.g.*, *Lujan*, 504 U.S. at 573-74; *Lyons*, 461 U.S. at 111 ("[A] federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of [governmental] officers are unconstitutional.").

Moreover, Plaintiffs' argument ignores the fact that not every foreign policy disagreement should be settled in the courts. The framers of the Constitution carefully apportioned power among the three branches, and jurisdictional limitations such as the Article III standing doctrine are "fundamental to the judiciary's proper role in our system of government." *DaimlerChrysler v. Cuno*, 547 U.S. 332, 341 (2006) (quotation omitted). It is Congress that, unlike the judiciary, plays a significant role along with the President in conducting our Nation's foreign policy, and Congress has adequate tools to check the President if it so chooses.[2] Plaintiffs' opinion that Congress is too "timid" (Pl's Opp'n, at 33) does not entitle them to petition the judiciary to overturn Congress' judgment where no Article III case or controversy exists.

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[2] As the First Circuit has noted:

> When the executive takes a strong hand, Congress has no lack of corrective power. . . . The objective of the drafters of the Constitution was to give each branch "constitutional arms for its own defense." But the advantage was given the Congress, Hamilton noting the "superior weight and influence of the legislative body in a free government, and the hazard to the Executive in a trial of strength with that body."

Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971) (quoting The Federalist No. 23); *see also, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (holding that "policies in regard to the conduct of foreign relations [and] the war power . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").

II. The Allocation of Foreign Affairs and Military Powers Between the President and Congress Is Non-justiciable in the Absence of an Impasse Between those Branches

In his Opening Brief, Defendant noted the overwhelming weight of authority holding that, in the absence of an impasse between the President and Congress, the allocation of foreign affairs and military powers between those branches is not justiciable, with most courts basing this finding of non-justiciability on the political question doctrine. *See* Pl's Mot'n, at 24-32 & n.12. Defendant discussed in some detail the reasoning of a subset of those cases. *Id.* Plaintiffs ignore the vast majority of these cases, conceding that "challenges to the President's use of troops without sufficient Congressional authorization have frequently been dismissed . . . as non-justiciable." Pl's Opp'n, at 44. Plaintiffs instead attempt to rely on two dissents,[3] a misreading of two cases cited first by Defendant, two additional war challenge cases, and two non-majority opinions from cases that do not deal with war challenges. All four of the relevant cases cited by Plaintiffs (*i.e.*, all of the majority opinions in cases that concerned challenges to military action) support Defendant's position here.

First, *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), rejected a war powers

[3] It is particularly telling that Plaintiffs are forced to rely on the ***dissent*** in *Atlee v. Laird*, 347 F. Supp. 689 (1972). *See* Pl's Opp'n at 45. As Defendant's Opening Brief discusses, the majority opinion in *Atlee*, which was affirmed by the Supreme Court, is one of many opinions which demonstrate that Plaintiffs' claim is not justiciable. *See* Def's Mot'n at 29.

challenge that was considerably less aggressive than the one made by Plaintiffs here. While the court did hold, contrary to the great weight of authority, that an inquiry into whether Congress has engaged in a "mutual participation in the prosecution of war" is justiciable, *id.* at 1042, it did nothing to negate the position asserted by Defendant here that the allocation of military and foreign affairs powers between the President and Congress is non-justiciable where the two political branches are in accord. Indeed, in *Orlando*, the court held that "the test is whether there is any action by the Congress sufficient to authorize or ratify the military activity in question." *Id.*[4] Here, Plaintiffs seek an inquiry not into whether Congress has authorized the military action in question – there is no question but that Congress has – but rather into whether the form of that authorization is sufficient. But where Congress and the President have acted in concert, the Constitutional allocation of power between them is not justiciable.

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[4] It is noteworthy that the plaintiffs in *Orlando* advanced a far less sweeping contention than that advanced here. The *Orlando* plaintiffs argued that offensive military action required "an express and explicit congressional authorization" but conceded that it did not have to be a formal declaration of war. 443 F.2d at 1041. In other words, the *Orlando* plaintiffs argued that what was required was a congressional authorization exactly like the one that was enacted prior to the 2003 invasion of Iraq. It is also noteworthy that even this more modest claim was roundly rejected by the court which held that appropriating money and enacting the means to secure manpower for the war was sufficient to imply authorization: "The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war." *Id.* at 1043.

Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971), also cited by Plaintiffs, directly supports Defendant on this point, holding: "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." 451 F.2d at 34. As the First Circuit later described the holding of *Massachusetts v. Laird*, there was "enough indication of congressional approval [of military action] to put the question ***beyond the reach of judicial review***." *Doe v. Bush*, 323 F.3d 133, 137 (1st Cir. 2003) (emphasis supplied). And in that same case, which concerned a challenge to the same military action that Plaintiffs challenge here (albeit a more timely one), the court held that where there is no "fully developed dispute between the two elected branches," any challenge to the President's military authority is non-justiciable. *Id.* at 137-39; *accord Doe v. Bush*, 322 F.3d 109, 110 (1st Cir. 2003) (denying rehearing). The court chose to base its finding of non-justiciability on the ripeness doctrine rather than the political question doctrine, but noted that "the classification matters less than the principle." 323 F.3d at 140.

Similarly, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990), is far from the "major step . . . in the direction of reactivating a role for the judiciary on the issue" of foreign policy. Pl's Mot'n at 46. Indeed, while the court found that the determination of whether a particular military action was a "war" in the

constitutional sense did not necessarily raise a political question, *id.* at 1145-46, the court nevertheless found that the challenge to the first Gulf War was non-justiciable, noting that "[t]he principle that the courts shall be prudent in the exercise of their authority is never more compelling than when they are called upon to adjudicate on such sensitive issues as those trenching upon military and foreign affairs," *id.* at 1149. The court held that the dispute was unripe because "the 'judicial branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.'" *Id.* at 1150 (quoting *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring)).

In sum, there is a large body of authority that holds that, in the absence of an actual conflict between the President and Congress, a claim seeking a judicial determination of the allocation of war powers between those two branches is barred by the political question doctrine, while a somewhat smaller body of case law holds that the adjudication of such cases is barred by the ripeness doctrine, the unripeness coming from the fact that no impasse between Congress and the President has occurred. But, whether one calls it a political question or finds that no dispute has sufficiently ripened, it is clear that cases such as the one currently before the Court are not justiciable.

III. Plaintiffs' Claim Lacks Merit

It is crystal clear that this Court lacks jurisdiction over this case, and therefore the Court has no occasion to reach the merits of Plaintiffs' claim. Nevertheless, Defendant notes once again that Plaintiffs' claim, which relies on the extraordinary contention that Congress may not authorize military force without a formal declaration of war, is utterly without merit. *See* Def's Mot'n, at 33-42. Indeed, the flaws in Plaintiffs' claim are evident from the arguments they are forced to resort to in their Opposition.

As an initial matter, it is noteworthy that Plaintiffs rely heavily on a mischaracterization of Defendant's argument. Plaintiffs assert: "Ultimately, the Defendant's position is that he can conduct war without congressional authorization so long as he has a military appropriation." Pl's Opp'n, at 4. While previous cases have found Congressional appropriations to be a Constitutionally sufficient form of authorization, in this case Defendant does not rely on any appropriation legislation at all. Rather, the 2003 Iraq invasion was authorized by a specific and explicit resolution, passed by Congress and signed by the President. *See* Def's Mot'n, at 6-7.

Plaintiffs spend more than twenty pages discussing little more than the unremarkable proposition that the Constitution grants the power to declare war to Congress. Pl's Opp'n, at 5-26. This belabored point is, of course, both obvious

and undisputed. Indeed, Defendant's Opening Brief both explicitly notes that Congress has this power and describes the substantial importance of this power and the dramatic expansion of governmental power that is triggered by a Congressional declaration of war. Def's Mot'n, at 38-39. But this does nothing to advance the remarkable argument that Plaintiffs would need to make in order to prevail here: that the Constitution forbids Congress from authorizing military force without triggering the various treaty obligations and restrictions on personal freedom that result from a formal declaration.

It is particularly noteworthy that all of the policy rationales that Plaintiffs assert in defense of their position, actually counsel in favor of Defendant's position in this case. Plaintiffs contend that "the power to take the nation to war [sh]ould not be lodged in a single individual." Pl's Opp'n, at 5. Here, there was a vigorous Congressional debate followed by a vote (with large majorities in each House voting in favor) authorizing the military action at issue. Def's Mot'n, at 3-7. Plaintiffs express concern "that the President might secretly take the country to war." Pl's Opp'n, at 20. Here, no such thing occurred. Plaintiffs assert that members of Congress should be held accountable for their actions. Pl's Opp'n, at 24. Here, the positions of legislators were made quite clear and their constituents can adequately judge them. *See* Def's Mot'n, at 4-6. Plaintiffs assert that war should be authorized by "a law." Pl's Opp'n, at 26. Here, it was.

Plaintiffs next attempt to rely on federalism cases which deal with lines of authority between the federal government and the States. *See* Pl's Opp'n, at 27-31. But doctrines dealing with the relationship between separate sovereigns have no application here, where the Constitution provides that President and Congress work together in the conduct of war and foreign affairs. *See* Def's Mot'n, at 40. The applicable doctrine is the non-delegation doctrine, and as Defendant's Opening Brief discussed, the authorization easily passes muster under this doctrine. Def's Mot'n, at 39-42. Indeed, the only case Plaintiffs cite for their non-delegation doctrine argument, *Clinton v. City of New York*, 524 U.S. 417 (1998), provides Plaintiffs with no support. In *Clinton*, the Court disclaimed any reliance on the non-delegation doctrine. 524 U.S. at 447-48. Instead it found the Line Item Veto Act unconstitutional on "the narrow ground" that it allowed lawmaking without the three step process (House passage, Senate passage, and presentment to the President) set forth in the Constitution for law making. *Id.* at 448. Here, of course, the Authorization for Use of Military Force was passed according to this Constitutional process, and is a valid law.[5]

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[5] Plaintiffs' assertion that the Authorization for Use of Military Force violated the War Powers Resolution is simply meritless. First, as a matter of law, a statute cannot be invalid because it violates a previous statute. Where there is an unreconcilable conflict, the latter statute controls. *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). Second, the Authorization for Use of Military Force states that "the Congress declares that this section is intended to constitute ***specific statutory authorization*** within the meaning of section 5(b) of the War

Finally, it is interesting that Plaintiffs' brief provides dueling views on the military actions in Vietnam and Korea, at one point suggesting that these were far more limited actions that the Iraq invasion and therefore constitutional, Pl's Opp'n, at 11, while at other points implying that these actions were unconstitutional, *see* Pl's Opp'n, at 33-34. What is clear is that these military actions do not meet Plaintiffs' propounded standard of a "limited war," *i.e.*, one with "a clearly understandable limit on the time, place, and manner." Amen. Compl. ¶ 46. Nor, for that matter, do the more recent military actions in Grenada, Panama, Haiti, Somalia, Kosovo, Afghanistan, or the first Persian Gulf conflict, none of which were taken pursuant to a Congressional declaration of war. *See* Def's Mot'n, at 34-36.[6] Indeed, the only reason that the war with France meets Plaintiff's standard of a "limited war" is because Plaintiff's standard is an *ad hoc* rule that was made up to attempt exclude the undeclared war with France and thereby elide the fact that from the beginning of the Republic, it has always been the understanding and practice that Congress could, if it chose, authorize military

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Powers Resolution." 50 U.S.C. § 1541 note § 2(c)(1) (emphasis supplied).

[6] Plaintiffs assert that "none of those post-World War II cases involved an unprovoked, offensive attack on a sovereign nation akin to the current War in Iraq." Pl's Opp'n, at 11. Of course, none of these military actions was "unprovoked," and neither was the invasion to remove the Saddam Hussein regime. *See* 116 Stat. 1498, 1498-50 (listing provocations). The actions in Grenada, Panama, Haiti, and Afghanistan did involve offensive military action that resulted in the removal of *de facto* and/or *de jure* governments.

action without formally declaring war and triggering the various treaty obligations and restrictions on personal freedom that result from a formal declaration. As recently held by the First Circuit, "the formalistic notion that Congress only authorizes military deployments if it states, 'We declare war' . . . has never been the practice and it was not the understanding of the founders." *Doe v. Bush*, 323 F.3d 133, 141 n.10 (1st Cir. 2003). Indeed, one of the cases heavily relied on by Plaintiffs, *see* Pl's Opp'n, at 35, also makes this point, noting:

> We are unanimously agreed that it is constitutionally permissible for Congress to use another means than a formal declaration of war to give its approval to a war. Any attempt to require a declaration of war as the only permissible form of assent might involve unforeseen domestic and international consequences, without any obvious compensating advantages other than that a formal declaration of war does have special solemnity and does present to the legislature an unambiguous choice. While those advantages are not negligible, we deem it a political question, or, to phrase it more accurately, a discretionary matter for Congress to decide which form, if any, it will give its consent . . . .

Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973) (citations omitted).

It is thus clear that both the President and the Congress acted well within their Constitutional powers.

CONCLUSION

For the reasons stated above and in Defendant's Opening Brief, Plaintiffs' action should be dismissed.

Dated: December 8, 2008

Respectfully submitted,

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