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April 5, 2010

Marcia M. Waldron, Clerk
United States Court of Appeals for the Third Circuit
22614 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

**RE: New Jersey Peace Action v. Barack Obama, President, 09-2781
Citation of Supplemental Authority Pursuant to F.R.A.P. 28(j)**

To The Honorable Judges of the Third Circuit:

The eminent philosopher/historian Gary Wills' newly published book "Bomb Power" (Penguin Press, 2010) provides strong support for Plaintiffs' arguments that the modern Presidency has usurped the exclusive constitutional authority of Congress to Declare War under Article I, §8, Cl. 11. (App's' Brf. at 215-17). Wills substantiates Plaintiffs' argument that President George W. Bush violated the clear intent of the Founders when he authorized the invasion in 2003 of the sovereign nation of Iraq. (Wills at 4, 189-191)

Wills shares Plaintiffs' position that the "war making power" was never designed to be plural, but was lodged by the Framers in the exclusive jurisdiction of Congress in Article I. (App's' Reply Brief at 4; Wills at 189) The President's designation as commander-in-chief in Article II was designed to kick in only after Congress declared war in order to avoid conflicting chains of command on the battlefield. It was not intended to provide authority over civilians or civil affairs much less an authority to take the nation to war. (Wills at 47-49)

Marcia M. Waldron, Clerk
April 5, 2010
Page 2

Wills faults the War Powers Resolution (WPR) for allowing a construction that Congress shares its war-making power with a President who must only “consult” with Congress whenever “possible” - flaunting the Framers’ firm intent to separate the decision to declare war from subsequent military activities (Wills at 191). “War power” is not in the Constitution, much less “war powers” as something to be divided between President and Congress. (Wills at 189).

Wills cites James Madison for the proposition that declaring war was a legislative not an executive function, so that it is expressly vested in Congress, quoting him as follows: “Those who are to conduct a war cannot in the nature of things be proper or safe judges whether a war ought to be commended, continued, or concluded.” (Wills at 189).

Wills’ over-all theme echoes Plaintiffs’ argument that the Executive has usurped dominance over war-making as commander-in-chief, despite the purposeful, textual, exclusive grant to Congress, and has resulted in a concentration of power in the presidency far outside the design of the Framers. This is an issue never examined by a modern court.

Respectfully submitted,

/s/ Frank Askin
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Co-Counsel for Plaintiffs/Appellants

cc: Michael Abate, Esq.