Statement Pursuant to Local Rule 35.1

"I, Frank Askin, co-counsel for Plaintiffs/Petitioners express a belief based on a reasonable and studied professional judgment, that this appeal involves a question of exceptional importance which has never been decided by the United States Supreme Court, i.e. whether the Congress, in spite of the language of Art. I, Sec. 8, Cl. 11 of the United States Constitution, may delegate to the President the power to go to war against a sovereign nation that has not attacked the United States, or any state nor attempted an invasion or encouraged insurrection or rebellion within the United States."

Petition For Rehearing En Banc

This is a petition under Rule 35 for a rehearing en banc of the decision in New Jersey Peace Action v. Obama, No. 09-2781 (May. 10, 2010). Ignoring the substance of Plaintiffs' constitutional argument, the Panel dismissed the complaint on the grounds of lack of standing, ruling that even if Plaintiffs could demonstrate injury in fact and causation, the relief sought (a Declaratory Judgment) would not redress their alleged injuries. (op. at 8)

Plaintiffs respectfully submit that the issue of redressability can be adequately addressed only through the prism of constitutional history and prior efforts to enforce Art. I, Sec. 8, Cl. 11 of the Constitution as intended by the

Founders, as reflected in the records of the Constitutional Convention of 1787, records that have never before been seriously examined by a federal court.

The Procedural History

On October 16, 2002, Congress gave President Bush the power to decide in his discretion to use military force against Iraq. Authorization for use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002). The words used – Authorization for Use of Military Force ("AUMF") -- had their origin in 1955 during the Formosa Straits incident (1955) and have been used in the Middle East (1957), Vietnam (1964), Lebanon (1983), Iraq (1991), worldwide after the 9-11 attack (2001), and Iraq (2002).[1] But never before had an AUMF been used to authorize the President to invade a sovereign nation without clear provocation. In March, 2003, the President ordered the invasion of Iraq, a nation that had not attacked the United States, or any State, nor attempted an invasion or encouraged insurrection or rebellion within the United States. Currently, 88,000 US troops remain stationed in Iraq, in harms way due to continuous hostilities. [2]

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[1] DAVID ACKERMAN & RICHARD GRIMMETT, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 9-20, (Congressional Research Service, RL 31133, updated by Jennifer K. Elsea and Richard F. Grimmett 2007) (2003).

[2] Thom Shanker, "Al Quaeda Leaders in Iraq Neutralized, U.S. Commander Says," N.Y. Times, 2010, at A5.

In 2008, Plaintiffs commenced this action seeking a Declaratory Judgment that the AUMF against Iraq violated Art. 1 §8, Cl. 11 of the U.S. Constitution. The District Court dismissed the action on two grounds: lack of standing on the part of any plaintiff, and the "political question" doctrine.[3] The May 10, 2010 Panel opinion affirmed the District Court without oral argument on the ground that none of the plaintiffs could demonstrate an injury that could be redressed by judicial action and that a Declaratory Judgment would be based on speculation and would not provide relief to Plaintiffs.

[3] The panel opinion found it unnecessary to address the issue of "political question." (Op. at 5, n.8.)

Plaintiffs' Amended Complaint set forth in great detail the record of the Constitutional Convention and the debate over the Declare War Clause and its historical background. That history showed that in June 1, 1787, the Convention determined to remove the power to take the nation to war away from the Executive and place it in the hands of Congress, the people's representatives, a decision acknowledged by the U. S. Supreme Court during the Nineteenth Century. Bas v. Tingy, 4 U.S.. 37, 43 (1800); Talbot v. Seeman, 5 U.S. 1, 34 (1801); The Prize Cases, 67 U.S. 635, 668 (1863). "By the Constitution, Congress alone has the power to declare a national or foreign war." Id. No federal court has ever examined the records if the Constitutional Convention from June 1, 1787.[4]

[4] On May 29, 1787, the first working day of the Constitutional Convention, Virginia's Governor Randolph proposed a 15 point plan that structured the early debate. Before June 1, the Convention adopted a three-part government including a two house legislature where the first branch was to be elected by the people. On June 1, delegates considered the powers of the executive branch. There was no discussion about whether the executive should have the power to "carry into execution the national laws." But the additional phrase – "it ought to enjoy the executive rights vested in Congress by the Confederation" – was immediately challenged by Charles Pinckney (South Carolina) who was afraid such "executive rights" would extend to "peace and war which would render the Executive a Monarchy of the worst kind, to wit an elective one." Pinckney was joined by three other delegates (Sherman of Connecticut, Wilson of Pennsylvania, and Rutledge of South Carolina) in criticizing the proposal.

Historian Joseph Ellis explained the public attitude behind Pinckney's concern:

> At the very core of the revolutionary legacy...was a virulent hatred of monarchy and an inveterate suspicion of any consolidated version of

> political authority. A major tenet of the American Revolution – Jefferson had given it lyrical expression in the Declaration of Independence – was that all kings, and not just George III, were inherently evil. The very notion of a republican king was a repudiation of the spirit of '76 and a contradiction in terms."

JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 127-28 (Alfred A. Knopf, Borzoi Books, 2005) (2001).

Madison withdrew the phrase that Pinckney challenged, thus ending the prospect that the President might be able to take the nation to war. Then, Madison quickly proposed that Congress be authorized to delegate to the President "such powers, not legislative or judiciary in their nature." Pinckney opposed this proposal as superfluous. It was defeated. After the motions and votes, all that was left of the executive power was "to enforce federal laws and appoint offices in cases not otherwise provided for." The result was that Congress held the power to make war and could not assign it to the president even though Congress was authorized to empower the President to provide for defense in cases of invasion, insurrection, failure to enforce federal law, and to protect states from invasion or domestic violence.

The judgment of June 1 was supported on August 6 by a Committee on Detail that provided Congress with the power to "make war." On August 17 "Make war" was modified to "declare war" expressly to allow presidents to "repel sudden attacks." That change did not provide the president with independent authority to take the nation to war. This point was emphasized at the ratifying convention by delegate James Wilson of Pennsylvania,

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the house of representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

James Wilson, GEN. CONVENTION OF PHILA. 1787, *in* ELLIOT'S DEBATES: THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 488 (Washington 1836).

The view that Congress alone had the power to declare unlimited war or limited war -- was confirmed in judicial decisions like Bas v. Tingy, 4 US 37, 43 (1800) ("Congress is empowered to declare a general war, or congress may wage a

limited war; limited in place, objects and time."), and Talbot v. Seeman 5 US 1, 34 (1801) (Chief Justice Marshall: "The whole powers of war being by the Constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry.") as detailed in Plaintiffs' amended complaint (para. 26-40) and Plaintiffs' briefs to the District Court (at 12-24), and the panel in this case (at 18-26)

The Records of the Constitutional Convention were compiled by Prof Max Farrand 99 years ago. There was no need to discuss the Record of June 1 in the 168 years while Congress was declaring war. In the last 65 years, since Congress stopped declaring war and has been authorizing the President to make the determination to enter wars, the lower Federal Courts have upheld the AUMF, relying on the erroneous argument that the President and Congress "shared" war powers. Mass. v. Laird, 451 F. 2d 26, 33 (1st Cir. 1971); and Orlando v. Laird, 443 F.2d 1039, 1043 (2nd Cir. 1971) concerning the Vietnam War; and Doe v. Bush, 323 F. 3d 133, 137 (1rst Cir.) , concerning the Iraq War.

No opinion of any Court of Appeals has mentioned the record of June 1. As this circuit noted in U.S. v. Fuller,, "Notably, [this court's] interpretation of this statute is an issue of first impression in this, or any, circuit court of appeals." 584 F.3d 132, 137 (3rd Cir. 2009).

Reasons For Granting Rehearing En Banc

1. The Panel Erroneously Assumed that the President and Congress Would, in the Future, Ignore a Judicial Declaration Interpreting Art. I, Sec 8, Cl. 11 of the Constitution

The Panel opinion concluded that the Declaratory Judgment sought by Plaintiffs limiting the authority of the President and Congress to engage in an unprovoked full-scale war against a sovereign nation would have no effect on future actions by the other branches, asserting that "[h]ypothetical wars against possible foes are neither 'immediate' nor real." (Op. at 11). The Court ruled that "such speculation is of insufficient 'immediacy and reality' to justify a declaratory judgment." Id.

In the context of the history of the past half century in which Congress has repeatedly abdicated its responsibilities under the Declare War Clause and the Executive has claimed full authority to take the nation to war in the absence of a Congressional declaration, such judicial abdication seems questionable. There are already many members of Congress who have questioned the validity of AUMF's authority to take the nation to all-out war. Such advocates would surely be

bolstered in their position with a judicial declaration to support them.

Concerns that a judicial declaration of the rights of prisoners at Guantanamo Bay would be ignored by the President were brushed aside by the Supreme Court in Boumedienne v.George W. Bush::

> *We have no reason to believe an order from a federal court would be disobeyed at Guantanamo.* No Cuban court has jurisdiction to hear these petitioners' claims, and no laws other than the laws of the united states applies at naval stations . . . . Thus appellees will be given substantial and meaningful relief by a favorable decision of this Court.

128 S. Ct. 2229, 2251 n.15 (2008) (emphasis added). To imply that the President and Congress would pay no heed to such a Declaration is, at the least, unrealistic. A Declaratory Judgment need only state the principle that Congress, not the President, must make decisions for war. Details of how to adopt such a decision can be left to the other branches, much as the methods of desegregation were left initially to the states in Brown v. Board of Education, 399 U.S. 294 (1955).

Point 2. A Declaratory Judgment Will Provide Sufficient Redress for Plaintiffs

Part IV of the panel opinion assumes that "injury in fact" and "causation" may exist, but finds that the "proposed declaration" would not redress Plaintiffs' alleged injuries. (Op. at 8)

To reach this conclusion, the panel appeared to assume that the AUMF concerning Iraq was a unique document not used by presidents in previous situations

of hostile military action. But, as noted above, the use of the AUMF in seven situations over 65 years by presidents of both political parties has made the AUMF the standard operating procedure to take the nation to war. During that 65 year period, Congress never declared war. It does not take "judicial guesswork" to conclude that the AUMF has become the preferred way of taking the nation to war.[5]

[5] Congress has not adopted a Declaration of War since World War II.

The AUMF procedure differs from a Declaration of War in one crucial respect. A Declaration of War is enacted by Congress as a statute in which Congress decides that the country will go to war. It is then executed by the President. An AUMF enables the President to decide if and when to undertake military hostilities. This difference shifts the decision making power concerning the start of war from Congress to the President – from the legislative branch to the executive. The AUMF insulates legislators from responsibility to their constituents for war, because they do not decide on war. They decide to let the President decide.

Both the language of the Constitution and the records of the Constitutional Convention make clear that the decision for war was vested in Congress, not the President. The reason for this decision was to hold legislators responsible for war because they are closer to their constituents, who could vote them out of office in two years or less if the voters did not approve their position on war. This judgment was calculated by the framers to counter fears that future presidents – after George Washington, who was presiding over the Constitutional Convention – might use a war to satisfy their personal ambitions. The People's representatives in the House of Representatives – the only branch then elected by the People – were the primary barrier against such risks. This structure of government was adopted on May 31 and June 1, 1787, and confirmed several times during the Convention.

An AUMF is patently in conflict with the Constitution.[6]

With the world in turmoil from terrorists and other countries, it is highly likely that presidents and congresses will continue to use the AUMF because it is more convenient for them to have the president make the decision, and relieve legislators of the responsibility. The AUMF has become the usual method of entering a war and there is no reason to think that will change, without judicial intervention.

A Declaratory Judgment will affect how the President and Congress "do business" with respect to wars. This form of relief will satisfy the Plaintiffs' concern for following the Constitutional requirements of Art. I, Sec. 8, Cl. 1. Such Judgment will restore to voters their right to influence and, if necessary, vote out their representatives. This was exactly what the framers of the Constitution proposed, voted for, and expected.[7]

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[6] "(A)ll those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This … [is] to be considered, by this court, as one of the fundamental principles of our society." John Marshall, Marbury v. Madison, 5 US 137, 177 (1803).

[7] When Anti-federalists worried that presidents might create and use a standing army for their own purposes Hamilton, in Federalist 26, responded that the Congress would check any abuses because of the provision that appropriations for the army were limited to two years. Hamilton wrote: "The legislature ...will be *obliged* ... to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a

formal vote in the face of their constituents." Alexander Hamilton, The Federalist. No. 26, *reprinted in* THE FEDERALIST: A COMMENTARY ON THE CONSTIUTION OF THE UNITED STATES 174 (1937) (emphasis added).

Conclusion

For the foregoing reasons, Rehearing en banc should be granted

Respectfully submitted,

/s/Frank Askin
Frank Askin

/s/Bennet D. Zurofsky
Bennet D. Zurofsky

Dated: June 24, 2010