

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY
3 Civil No. 08-02315(JLL)

4 ----- -X
5 NEW JERSEY PEACE ACTION, et :
6 al., : TRANSCRIPT OF
7 : PROCEEDINGS
8 Plaintiff, :
9 :
10 -vs- :
11 :
12 GEORGE W. BUSH, PRESIDENT OF : April 21, 2009
13 THE UNITED STATES, IN HIS :
14 OFFICIAL CAPACITY, :
15 :
16 Defendant. : Newark, New Jersey
17 :
18 ----- -X

19 B E F O R E :

20 THE HONORABLE JOSE L. LINARES,
21 UNITED STATES DISTRICT COURT JUDGE

22 Pursuant to Section 753 Title 28 United States Code, the
23 following transcript is certified to be an accurate record
24 as taken stenographically in the above-entitled proceedings.

25 s/Phyllis T. Lewis, CCR, CRCR

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1 THE CLERK: All rise.
 2 THE COURT: Good morning.
 3 Please be seated.
 4 This is in the matter of New Jersey Peace Action,
 5 et al., versus -- now I guess it is Barack Obama, Civil
 6 Action No. 08-02315.
 7 Counsel, your appearances for the record.
 8 MR. SMITH: Jeffrey Smith from the Department of
 9 Justice for the defendant, President Obama in his official
 10 capacity.
 11 MR. ASKIN: Frank Askin, Rutgers Constitutional
 12 Litigation Clinic, co-counsel for the plaintiffs.
 13 If I might point out, your Honor, the three folks
 14 sitting behind me are Rutgers' law students who worked on
 15 this case.
 16 If I might also introduce my colleague, Professor
 17 Emeritus Alfred Blumrosen and his son Steven, who have been
 18 consultants in the case.
 19 THE COURT: Mr. Zurofsky?
 20 MR. ZUROFSKY: Good morning, your Honor.
 21 THE COURT: Good morning.
 22 MR. ZUROFSKY: Bennet Zurofsky, co-counsel for the
 23 plaintiffs.
 24 THE COURT: Good morning.
 25 All right. It is your motion. I will hear you

1 first. Please keep your voice up and make sure everyone can
 2 hear you.
 3 MR. SMITH: Thank you very much, your Honor.
 4 THE COURT: Now, Counsel, before you start, and
 5 this goes for both sides, as you know, I sent you a letter
 6 indicating that I wanted to hear oral argument. I have your
 7 papers, and I have read them. I intend to move on this
 8 rather quickly. I decided to have oral argument on the
 9 issues of standing and the political question issue, so I
 10 ask you to please limit your arguments today to that.
 11 I know I gave you more time than I think you are
 12 going to need, but I had to limit this somehow, so those are
 13 the issues that I would like to hear addressed.
 14 Having said that, you can start.
 15 MR. SMITH: Thank you, your Honor.
 16 May it please the Court, this case raises an
 17 important constitutional issue of separation of powers, but
 18 it is not between the Congress and the Executive. Rather,
 19 it is between, on the one hand, the political branches,
 20 which are entrusted with the conduct of the nation's foreign
 21 and military policy, and on the other hand, the Judiciary,
 22 which is entrusted with and limited to the important task of
 23 resolving actual cases and controversies.
 24 While all three branches of government are subject
 25 to important constitutional checks and balances, the

1 judicial branch is uniquely charged with enforcing the
 2 limits on its own constitutional power. Indeed, the Supreme
 3 Court has repeatedly emphasized that "[N]o principle is more
 4 fundamental to the judiciary's proper role in our system of
 5 government than the constitutional limitation of
 6 federal-court jurisdiction to actual cases or
 7 controversies."
 8 Abiding by these limits, it is not judicial
 9 abdication, but it is the crucial enforcement of proper
 10 separation of powers.
 11 To this end, the Supreme Court has defined several
 12 important justiciability doctrines, including the doctrine
 13 of standing and the political question doctrine, which we
 14 will be discussing today.
 15 As an initial matter, as the Court is aware, the
 16 Court is presumed to lack jurisdiction until the plaintiff
 17 establishes it, and the burden of establishing jurisdiction
 18 falls on the plaintiff.
 19 In this matter, the plaintiffs have failed their
 20 burden with regard to both standing and to the political
 21 question doctrine.
 22 First, regarding standing, plaintiffs' claims fail
 23 for multiple reasons.
 24 The constitutional standing inquiry has three
 25 elements:

1 First, plaintiff must have an injury, an injury
2 that is actual or imminent, that is concrete and is
3 particularized.

4 Second, plaintiffs must demonstrate --

5 THE COURT: Well, would you concede that at least
6 with regard to plaintiff Wheeler, that prong may have been
7 met?

8 MR. SMITH: Your Honor, as we noted in our briefs,
9 while plaintiff Wheeler might have an injury, as one would
10 normally view it, there is a similar constitutional doctrine
11 that counsel -- that courts hesitate before interfering with
12 the chain of command. In this case what plaintiff --

13 THE COURT: Well, that is different, though.

14 I was addressing the three prongs of the standing
15 that you were going to go through, you know, and I think
16 what you were just going to speak about is whether or not
17 the Court on the third prong in justiciability should get
18 involved in a military situation kind of thing. But with
19 regard to the first prong, the injury, whether it is an
20 actual limited injury or that it's something that is
21 concrete, he is actually serving, right? He is exposed to
22 potential harm --

23 MR. SMITH: I believe he is not currently serving,
24 but I believe he did serve -- according to the allegations
25 in the complaint, he did serve the nation in Iraq in the

1 actual invasion, I believe, and --

2 THE COURT: But the standing question, we look at
3 the time of the filing complaint. I don't know if he was
4 serving at that time. I thought he was.

5 MR. SMITH: I don't believe --

6 THE COURT: Okay.

7 MR. SMITH: -- I believe he had been honorably
8 discharged, and there is some allegation that he could be
9 subject to recall, but that is true of many people.

10 THE COURT: All right.

11 So injury that is actual or imminent and that is
12 concrete in nature --

13 MR. SMITH: The second element is a causal
14 connection between the injury and the challenged conduct,
15 and the third is redressability. That is, that it must be
16 likely that the injury would be redressed by a favorable
17 decision.

18 These prongs, always important, are applied
19 especially rigorously when the Court is called upon to
20 decide the constitutionality of an act of one of the other
21 branches of Government. Here the Court is being called on
22 by plaintiffs essentially to invalidate the acts of two
23 branches of government. First, directly to declare that
24 Former President Bush's order was unconstitutional, but also
25 implicitly to declare that Congress' decision to authorize

1 the war under the statute rather than a formal declaration
2 of war was unconstitutional.

3 THE COURT: Well, that is the merits part.

4 MR. SMITH: Yes, but I think it is important to
5 know whether what plaintiffs are asking for simply to --

6 THE COURT: To address the issue of redressability,
7 I agree.

8 MR. SMITH: -- and to apply the Supreme Court's
9 admonition that the courts look harder at standing, where
10 the Court is being asked to invalidate a co-equal branch of
11 government's conduct, so that is the point I was making.

12 THE COURT: What do you say about the Orlando v.
13 Laird case --

14 MR. SMITH: Hum --

15 THE COURT: -- I believe it's the Second Circuit.

16 MR. SMITH: Yes. I had something to talk about
17 that with regard to the political question.

18 Did you have a specific question about the case?

19 THE COURT: Well, with regard to standing, was he
20 found to have standing in that case?

21 MR. SMITH: Yes. The Court did find the standing
22 in that case.

23 THE COURT: You disagree with that finding, I
24 gather?

25 MR. SMITH: Well, we do disagree with that finding.

1 I actually -- yes, that case had to do with ongoing military
2 conduct that they were trying to stop.

3 Here, what the plaintiffs are challenging is a past
4 order, such that even if they were to get the relief that
5 they are asking for, a declaration that the order to invade
6 Iraq was unconstitutional, they would not redress any of the
7 injuries.

8 First of all, most of the injuries that they are
9 claiming are injuries that occurred entirely in the past,
10 that could not be redressed by declaratory relief.

11 To the extent that the injuries are ongoing because
12 of the ongoing action in Iraq, these injuries also would not
13 be redressed because as the plaintiffs concede, a
14 declaration that the invasion was illegal would not cause a
15 cessation of current activities. The current activities in
16 Iraq are not a war against a sovereign nation, but are
17 operations that are based on an agreement with a friendly
18 nation.

19 So as a result, even any injury that might occur
20 from current or future service in Iraq would not be
21 redressed by the relief that the plaintiffs seek, making it
22 different than the Orlando situation, where the plaintiffs
23 were claiming that the ongoing activity in Viet Nam was not
24 authorized by Congress, which the Court actually and
25 ultimately rejected.

1 THE COURT: So under your view, though, would
2 anyone ever have standing to challenge, if the Congress and
3 the President, albeit acting in concert, which is one of the
4 points in your brief, this is not a situation where we have
5 two branches of Government that are in disagreement with
6 their constitutional authority, right? This is a situation
7 where they actually have agreed, and they formulated some
8 pact.

9 MR. SMITH: That is actually correct.

10 THE COURT: Under that circumstance, would there be
11 a situation where --

12 MR. SMITH: I can't --

13 THE COURT: -- who would ever have standing to
14 claim that their joint action was unconstitutional?

15 MR. SMITH: -- I can't -- I don't know the answer
16 to that question.

17 I wouldn't say that no one would ever have
18 standing. Certainly with regard to redressability, which
19 was the point I was making, one could meet that prong by
20 suing in a more timely manner, and in fact, a number of
21 people did challenge this particular action in a more timely
22 manner.

23 The plaintiffs -- the reason they failed
24 redressability, the main reason is because they waited until
25 five years after the action to bring their suit, so a number

1 of people did in fact meet the redressability prong by
2 pursuing it in a timely manner.

3 Now, it is true none of those cases were
4 justiciable, but that is mainly because this case is not
5 justiciable even beyond the standing issue. That is, you
6 know, courts have held where the branches are acting in
7 concert, as you observed they are, the -- either the
8 political question doctrine or some courts say the ripeness
9 doctrine, but generally the political question doctrine bars
10 courts from addressing it.

11 So to answer your question, this particular dispute
12 I think would never be justiciable because it's simply by
13 its nature a political question. However, the
14 redressability prong could be met by a more timely filing of
15 suit.

16 The plaintiffs don't really contest the fact that
17 their injury would not be redressed. Rather, they make two
18 arguments that are without merit.

19 First, in their complaint, the plaintiffs suggest
20 that they were relying on the doctrine of capable of
21 repetition, yet evading review. They did not argue this in
22 their briefs, and that makes sense because the Supreme Court
23 made clear that this doctrine applies only in the mootness
24 context. That is, where there was standing to begin with
25 and then something changed to make it moot, and it does not

1 apply in the standing context where there was no standing to
2 begin with because of redressability or otherwise.

3 Additionally, as I noted, this dispute did not
4 evade review because of its nature, but rather because of
5 the plaintiffs' decision to file in a manner that was a
6 number of years after the action that they are complaining
7 of.

8 The plaintiffs also contend that they could have
9 sought damages in this case. That is -- and they could not
10 have properly sought damages, and that is actually
11 incorrect. But even if it were correct, it is entirely
12 irrelevant. The Supreme Court has clearly held in the City
13 of Los Angeles versus Lyons, "that standing to seek damages
14 does not give standing to seek declaratory or injunctive
15 relief," and the existence of possible damages is irrelevant
16 if the Court doesn't have it before it.

17 In our brief, we noted that the plaintiffs'
18 injuries also fail the first prong, and in the case of
19 the -- their claim about not knowing the views of the
20 representatives' claim failed the second prong as well, a
21 declaration -- I'm sorry -- there -- any lack of knowledge
22 that they have is not caused by the illegal activity that
23 they claim, which is the order to invade Iraq.

24 I don't know if the Court -- if you want me to go
25 through all of those or simply rely -- I am prepared to rely

1 on the papers, unless you want me to go through each of the
2 injury issues.

3 THE COURT: No. I read your papers on that.

4 MR. SMITH: Okay.

5 If it please the Court, I would like to move on to
6 the political question doctrine.

7 THE COURT: Okay.

8 MR. SMITH: The political question doctrine is a
9 doctrine that goes back to Chief Justice Marshall's
10 observation in Marbury versus Madison, that questions that
11 are political by nature can never be entertained by the
12 judiciary.

13 Somewhat more recently, in Baker versus Carr, the
14 Supreme Court has set out six factors from which a Court can
15 determine whether a question put before it is a political
16 question rather than a judiciously manageable question.
17 The first two of those factors have tended to become the
18 most important in subsequent case law, and those are the two
19 that I would like to discuss.

20 The first factor is where there is a texturally
21 demonstrable constitutional commitment to a coordinate
22 branch of government.

23 The second question is where the question presents
24 a lack of judicially manageable standards.

25 It is entirely clear that the foreign policy --

1 foreign affairs and war powers are committed by the
2 Constitution to the two political branches. Congress is
3 given the power to declare war. Congress has the power to
4 raise armies and the power to make appropriations and the
5 power to pass laws necessary and proper for carrying out its
6 other powers.

7 The President is the commander-in-chief. The
8 President has the general executive power.

9 So it is clear that these powers, the general
10 military and foreign affairs powers, are vested in the
11 political branches and not in the judiciary.

12 It is also clear that these powers are shared, that
13 the branches work together in the political process, and
14 case, after case, after case has found that the manner in
15 which the branches work together is not justiciable
16 certainly in the absence of an impasse between the two
17 branches.

18 Now, it should be noted -- I am not arguing the
19 merits here, but with regard to the judicially manageable
20 standards, I do need to note that a formal declaration of
21 war can have substantial domestic and international law
22 implications, and it is Congress' decision whether it wants
23 to trigger those substantial implications, or whether it
24 wants to express its concurrence with the President's use of
25 force in a manner that is less intrusive on individual

1 liberty, for example, and has less of an effect on our
2 international affairs.

3 There is simply no judicially manageable standards
4 for determining whether Congress has properly used its
5 discretion in determining whether it wants to trigger the
6 domestic and foreign legal consequences of a declaration of
7 war in order to authorize military force.

8 As I noted, I think you know, the application of
9 these two factors is rather straightforward to this case,
10 and a large number of cases have agreed, and they are listed
11 in our brief. I don't want to obviously discuss all of
12 them.

13 I would like to quickly cite a few of the cases
14 very briefly. In Ange versus Bush, for example, the Court
15 said -- the Court found:

16 "The judicial branch...is neither equipped nor
17 empowered to intrude into the realm of foreign
18 affairs where the Constitution grants operational
19 powers only to the two political branches and where
20 decisions are based on political and policy
21 considerations."

22 In the United States versus Sisson, another Viet
23 Nam case, Viet Name era case, the Court noted:

24 "[T]he distinction between a declaration of war and
25 a cooperative action by the legislative and

1 executive with respect to military activities in
2 foreign countries is the very essence of what is
3 meant by a political question."

4 And in Doe versus Bush, a more recent case, that in
5 fact dealt with this very military action, the District
6 Court noted that:

7 "The war powers are understood to be shared by
8 political branches without judicial interference,
9 even in the event of undeclared war," and the Court
10 held that "the manner and form that Congress uses
11 to ratify the President's decision to initiate
12 military action is entirely discretionary, and the
13 courts have no power to second guess the wisdom or
14 form of such approval."

15 On appeal, the First Circuit affirmed and noted
16 that:

17 "Courts are rightly hesitant to second guess the
18 form or means by which the co-equal branches choose
19 to exercise their textually committed
20 constitutional powers."

21 As we noted in our brief, the cases relied on by the
22 plaintiff are not to the contrary.

23 Orlando versus Laird, as the Court mentioned, held
24 that if there is, quote, "any action by Congress," unquote,
25 that would "authorize or ratify the military action in

1 question," the Court cannot interfere with that military
2 action. In fact, in Orlando, even the plaintiffs conceded
3 that Congress could authorize military action without a
4 formal declaration of war.

5 THE COURT: Okay.

6 Are there any circumstances under which you believe
7 that the political question would not bar a challenge like
8 this?

9 For example, what if Congress gave the President
10 carte blanche on deciding to pass another war resolution
11 that reads differently, that says that the President can
12 start a war any time he wants?

13 Notwithstanding the fact that Congress made that
14 decision, do you think the political question would still
15 call for an abstention on the part of Court, because really
16 the political question deals with whether or not the Court
17 should abstain from getting involved, notwithstanding the
18 fact that it may have jurisdiction.

19 MR. SMITH: Yes, that's correct.

20 THE COURT: Okay.

21 MR. SMITH: Well, I mean, it is a jurisdictional
22 issue. It is not exactly an abstention doctrine.

23 THE COURT: But you could have jurisdiction and
24 notwithstanding say this is more akin to a political
25 question, and that is left to the political branches.

1 MR. SMITH: I don't think I would agree with that
2 formulation.

3 I mean, the abstention doctrine is discretionary,
4 and it is a question where the court said, well, I could
5 decide this, but I choose not to for various prudential
6 reasons.

7 Political question is a question that as a matter
8 of constitutional law is a question that the courts cannot
9 decide because either, you know --

10 THE COURT: So I have no jurisdiction --

11 MR. SMITH: That -- yes --

12 THE COURT: -- once a political question is
13 found --

14 MR. SMITH: -- once it is found, it's a political
15 question. For example --

16 THE COURT: -- and there's my hypothetical.

17 If the Congress were to advocate it texturally, as
18 you say, give him power to declare war and say, we are
19 hereby empowering the President to declare war, if he deems
20 it necessary for the protection of the country or whatever,
21 under that situation, it is still a political question. You
22 don't think the Court would have the authority to step in at
23 that point?

24 MR. SMITH: That is a different situation. Here we
25 are not talking about a military action, where Congress has

1 participated as a co-equal, but you're talking about
2 something where Congress is essentially trying to rewrite
3 the Constitution by simply forever giving away its
4 declaration of war power.

5 So I mean, not having thought of that hypothetical
6 before, it is difficult for me to analyze it, but I
7 certainly would see it as a different situation than what we
8 have here.

9 THE COURT: I was just wondering whether
10 notwithstanding the fact that the political question may
11 exist, the Court may still have jurisdiction, and I was just
12 pondering that --

13 MR. SMITH: I don't think so. I think the Supreme
14 Court has made it, you know, clear that it's a
15 jurisdictional issue, which is why we bought it as a
16 12(b)(1) motion.

17 I mean, as an example, outside of, you know, the
18 war claim would be, for example, the Supreme Court has held
19 that courts can't decide whether the senate has properly
20 tried an impeachment, because how to try an impeachment is
21 constitutionally committed to the senate, and Justice Breyer
22 in his concurring opinion observed much like you did, that
23 well, maybe in an extreme case, where they simply flipped a
24 coin, maybe we would find that that wasn't a political
25 question and then sort of reserve that. I think --

1 THE COURT: But there still has to be a finding
2 whether or a political question is present. Then you can
3 say, this is not a political question, they just flipped the
4 coin, so therefore we have jurisdiction.

5 MR. SMITH: Right. I think that's what Justice
6 Breyer was saying -- was reserving judgment on.

7 You know, I think, you know, one could always come
8 up with sort of an absurd -- absurd in the sense that, you
9 know, Congress acts so irresponsibly, such as, you know,
10 making laws by flipping a coin, or simply saying, you know,
11 we are going to delegate all of our powers to the President
12 here and forever rather than participate, as they did here
13 in a very, you know, meaningful debate in which members of
14 Congress made it clear that they saw this as an extremely
15 important issue, that they saw it as an issue of war and
16 peace, and certain congressmen very strongly opposed it by
17 saying, you know, this is an authorization of the war, and I
18 don't think we should go to war, and other congressmen said,
19 you know, yes, this is an authorization to go to war, and I
20 don't like war, but I think that we have to, you know, deal
21 with Saddam Hussein.

22 It is clear that, you know, Congress was
23 meaningfully participating in the decision with regard to
24 this particular military action, and you know, hindsight is
25 one thing. Some congressmen may regret the votes that they

1 made at that time, but the fact is what you had was a
2 cooperative action between the two political branches
3 specific to a particular military action, and it is, you
4 know, in fact, it is precisely the type of action that
5 courts have routinely found to be non justiciable.

6 In fact, many of the cases there was -- it was much
7 less clear how Congress was supporting the executive branch.
8 In many cases the courts have found that even simply
9 appropriations supporting ongoing military actions, such as
10 Viet Nam, were sufficient to show congressional approval.

11 Here, we are not relying on that at all. Here, we
12 have the specific, you know, hotly contested debated law,
13 which specifically authorized this particular action, which
14 specifically made findings as to why Congress was
15 authorizing it, and what findings the President would need
16 to make, or what findings the President could make, if he
17 determines that war was necessary, or what facts he
18 should -- which would be present for him to authorize the
19 war.

20 So I think on the political question doctrine, I
21 would just sum up by noting that plaintiffs, you know, rely
22 heavily on the dissent in Atlee versus Laird. I think it is
23 very telling that they are relying on the dissent, which was
24 a three-judge panel District Court case out of the Eastern
25 District of Pennsylvania, because it is the majority opinion

1 that controls, of course. And the majority in a case
2 similar to this, another Viet Nam era case, the majority
3 said:

4 "Because the Constitution has given to Congress,
5 and not the courts, the initial policy
6 determinations whether to declare war formally and,
7 if not, what steps to take short of formal
8 declaration, we," the courts "are bound not to
9 enter the realm of foreign policy committed to
10 another branch of government by adjudicating this
11 question on the merits."

12 That was the majority opinion, and it was summarily affirmed
13 by the Supreme Court, and that notwithstanding, you know,
14 the disagreement of the dissenting judge is the law that has
15 been applied in case after case as set forth in our brief,
16 and I would yield, unless the Court has any further
17 questions.

18 THE COURT: No further questions.

19 MR. SMITH: Thank you.

20 MR. ASKIN: Good morning, your Honor.

21 Thank you for the opportunity to be heard in this
22 matter. I will be arguing the political question. My
23 colleague will be arguing standing.

24 First of all, your Honor, I would like to respond
25 to the question --

1 THE COURT: Well, you are going to address the
2 political question, and Mr. Zurofsky is going to address
3 standing.

4 MR. ASKIN: He will address standing, and I will
5 address the political question.

6 As I understood your question to Mr. Smith, what
7 would happen if Congress abdicated its responsibility to
8 declare war and say, we assigned that to the President and
9 let me decide whether he would declare war, because that is
10 exactly what happened in this case.

11 Congress --

12 THE COURT: Well, that's --

13 MR. ASKIN: -- Congress --

14 THE COURT: -- wait a minute. That is not what
15 happened in this case, though, is it?

16 In this case there was a political debate after
17 which the Congress passed a resolution.

18 MR. ASKIN: Correct.

19 October 2002, Congress passed the AUMF, which said
20 as follows: The President is authorized to use the armed
21 forces of the United States as he determines to be necessary
22 and appropriate in order to defend the national security of
23 the United States against the continued threat posed by
24 Iraq.

25 Six months later, the President used that

1 authorization to launch a war against a sovereign nation.
2 So in a sense, I suggest that is exactly what Congress did.
3 They delegated their Article I Section 8 power to declare
4 war to the President. You decide when you think it is
5 appropriate --

6 THE COURT: Under certain circumstances, and they
7 gave him certain circumstances under which he could use that
8 power. Isn't that something that is texturally committed to
9 the Congress to make those kinds of decisions?

10 Where do I have the power to be involved in this?

11 MR. ASKIN: First of all -- and I know the Court
12 has made clear it does not wish want to hear argument on the
13 constitutional issues today, but only on the political
14 question and standing, but the fact is that I think the
15 Government agrees, it is impossible to talk about the
16 political question doctrine without some mention of the
17 constitutional allocation of powers as Baker versus Carr, as
18 well as Youngstown Sheet & Tube make abundantly clear.

19 It was in Baker that the Supreme Court set out the
20 six conditions that would lead to the invocation of the
21 political question doctrine --

22 THE COURT: Correct, one of them was --

23 MR. ASKIN: -- and then --

24 THE COURT: -- wait, wait, Counsel, Counsel,
25 Counsel, hold on --

1 MR. ASKIN: -- yes.

2 THE COURT: -- hold on.

3 If I begin to speak, you stop. We can't both talk
4 at the same time, especially the court reporter can't take
5 us down at the same time. And if you are speaking, you
6 would not know what is important to me to understand, and
7 then it is harder for me to make at least what I will try to
8 make a correct decision here.

9 One of those things under Baker to which you just
10 referred is when addressing the political question issue is
11 whether or not something is texturally committed to a
12 coordinate branch of Government, right?

13 MR. AKSIN: Right.

14 THE COURT: Isn't the decision regarding the use of
15 armed forces and eventually the declaration of war or the
16 authorization to use those armed forces and hostility
17 something that is committed to the Congress and the
18 President under certain circumstances?

19 MR. ASKIN: Well, your Honor, I think the
20 fundamental flaw in that argument, which is what the
21 Government claims, and in regard to the political question
22 doctrine is that it conflates the foreign affairs power and
23 the war powers under the Constitution. That is not the way
24 the Constitution works.

25 Plaintiffs do not deny that the President is first

1 among equals when it comes to the conduct of foreign
2 affairs, but the Constitution clearly distinguishes between
3 foreign affairs and war declaring power and allocates the
4 latter to Congress under Article I Section 8.

5 And as Justice Brennan wrote in Baker, and I quote:
6 "Deciding whether a matter has in any measure been
7 committed by the Constitution to another branch of
8 Government, or whether the action of the branch
9 exceeds whatever authority has been committed is
10 itself a responsibility of the court as the
11 ultimate interpreter of the Constitution."

12 And the issue upon which this case revolves is precisely the
13 constitutional commitment of the power to start a war. And
14 as plaintiffs' brief lays out in great detail, that power
15 was delegated by the founders of the Congress and Congress
16 alone.

17 THE COURT: Correct. And Congress in this case,
18 after extensive debate among all of its members, some of
19 which voted for it, some of which voted against it, made a
20 decision to exercise that power in a manner less than an
21 actual declaration of war. So why is that not a political
22 issue that was left to them, or an exercise of their powers
23 as you have just stated it?

24 MR. ASKIN: Because, your Honor, what happens is
25 that the Constitution says -- if we go to war with another

1 sovereign nation, that it is up to Congress as the
2 representative of the people and beholden to the people to
3 make that choice. Not to delegate it to the President,
4 because when they delegate it to the President, it seems to
5 me what happens is exactly what happened in this case.

6 Six months later, the President goes -- uses that
7 legislative authority, invades Iraq. And when the war goes
8 bad, you have members of the senate, including Hillary
9 Clinton and Joe Beiden, now Secretary of State and Vice
10 President, saying we never authorized the President to go to
11 war, so each side points a finger at the other.

12 The President says, Congress said I should do it.
13 Congress said, we never said you should do it.

14 That is why those founders were very clear that
15 only Congress should go on the line in the face of their
16 constituents and make that choice, not abdicate its
17 responsibility --

18 THE COURT: Congress also did not say in the
19 Constitution that they don't have the power to do something
20 less than the actual declaration of war, right?

21 And, in fact, if you look at the history of this
22 country, the Congress has authorized the use of armed forces
23 more times without a declaration of war than has actually
24 issued a declaration of war, true?

25 When is the last time we had a declaration of war?

1 MR. ASKIN: How many times?

2 THE COURT: I am asking you: When was the last
3 time an actual declaration of war --

4 MR. ASKIN: Oh, World War II.

5 THE COURT: World War II.

6 We had many hostilities since then.

7 MR. ASKIN: Your Honor, I think there are several
8 answers to that question.

9 One is as Justice Warren -- Chief Justice Warren
10 said in Powell versus McCormack, the fact that a
11 constitutional provision has been violated in the past does
12 not amend the Constitution.

13 Now, whether that provision has been violated is
14 debatable. Iraq is probably distinguishable from most of
15 the other military engagements since World War II. It is
16 the only time the United States forces actually started a
17 war invading a sovereign nation. In Korea it didn't happen,
18 and in Viet Nam it didn't happen. We went to the aid of our
19 allies.

20 Now, the early 19th century cases, Bas versus
21 Tingy, and then the Prize cases during the civil war
22 distinguish between all out war, which only Congress could
23 declare and limited hostilities under congressional
24 instructions.

25 Bas versus Tingy is 1802 and, you know, Justice

1 Scalia in his recent second amendment opinion, Heller versus
2 District of Columbia, was very emphatic that those cases
3 closest to the founding of the nation, that they are much
4 more determinative of what the founders had in mind.

5 We are now talking about the original intent of the
6 framers of the Constitution. And in 1802, in Bas versus
7 Tingy, the Court said there is a big difference between an
8 all out war and limited hostilities.

9 THE COURT: Right. In an all out war, where a
10 declaration of war is issued, as counsel points out, that
11 triggers other things, right, certain civil limitations.
12 They can put troops in your house without your permission.
13 They can violate treaties. There are a lot of things that
14 can be done once there is a declaration of war.

15 Doesn't the Congress then therefore have the power
16 and wasn't that what was envisioned when you had the give
17 and take between the President and the Congress and the
18 powers that were allocated to both to say, this is a
19 situation where we are going to have, as in World War II,
20 where we are literally attacked, and we were waiting for the
21 Japanese to invade, you know, on the West Coast, and we are
22 going to trigger all of the things that go along with a
23 formal declaration of war including the ability to order
24 troops and do whatever else we have to do. Where as in a
25 situation like this it is going to be limited in nature, in

1 another part of the world we are not going to unleash that
2 power. We are going to give the President just a smaller
3 power --

4 (Cell phone rang.)

5 -- we need to shut off all cell phones, please. It
6 is not courteous to counsel who is arguing and/or the Court.

7 All right.

8 Why doesn't the Congress have the ability to do
9 that, once it is entrusted to it, to say under what
10 circumstances it would actually exercise its ultimate power
11 of the declaration of war as opposed to allowing hostilities
12 under limited circumstances, as you just indicated?

13 MR. ASKIN: Because we have to amend the
14 Constitution to do that.

15 The founders made clear, and this was the big
16 debate on June 1st, 1787 in the Constitutional Convention
17 whether the President, the new President, was going to be a
18 monarch, like the British king, with the power to take the
19 nation to war, and the founders said no, only Congress can
20 take the nation to war.

21 Once Congress declares the President is the
22 commander-in-chief, he runs the armed forces, but he cannot
23 take the nation to war, and that's where Thomas Jefferson
24 made his historic comment congratulating the founders,
25 because Jefferson wasn't at the Constitutional Convention,

1 he was in Paris, for chaining the Dog of War. Taking that
2 power out of the hands of the President and saying only the
3 people's representatives with an up or down vote in the face
4 of their constituents can make that choice.

5 Now, maybe --

6 THE COURT: Can they make that choice for limited
7 hostility, though, as opposed to a declaration of war?

8 MR. ASKIN: Yes, limited hostilities, and that is
9 what happened in Bas versus Tingy, the case with the war
10 with France.

11 Every six months Congress renewed the President's
12 authority to attack certain French ships on the seas and the
13 American waters. They couldn't attack in French waters.
14 They couldn't attack on land. Congress was very clear what
15 kind of powers the President had.

16 Even George Washington, he told Congress during his
17 administration, he could not attack Indian tribes without a
18 congressional declaration. He could only respond to attacks
19 on Americans by the Indian tribes, but he could not himself
20 attack an Indian tribe because only Congress had that power.

21 Now, that was very clear back in the 19th century.
22 I must confess, the waters have gotten a little muddy over
23 time. Maybe it is time to amend the Constitution, but we
24 have not done it.

25 As Justice Scalia made clear in Heller, maybe it

1 doesn't make any sense any more that people should have the
2 right to have guns of all kinds, but that is what the
3 founders decided, and we are stuck with that decision. That
4 is really why I suggest that under the first prong of Baker,
5 this is an issue, which is constitutionally committed to the
6 Congress and not to be shared with the President or
7 abdicated by Congress.

8 THE COURT: So you are distinguishing Iraq by
9 saying, although it is constitutionally permissible for the
10 Congress to authorize without a formal declaration of war
11 limited hostility, when that extends to the invasion of a
12 sovereign nation, that is by definition a war, and then it
13 is no longer a limited hostility, and therefore only
14 Congress can do it.

15 MR. ASKIN: That is what Bas versus Tingy and the
16 Prize cases say.

17 THE COURT: Now, of course, to get to all of that,
18 you have to have standing to begin with.

19 MR. ASKIN: Well, probably Mr. Zurofsky will talk
20 about that. I don't know how much time I used up very
21 frankly. I want to give him some time also.

22 THE COURT: He will have time --

23 MR. ASKIN: Now, a second reason announced in Baker
24 for the invocation of the political question doctrine is the
25 absence of judicially manageable standards. That should

1 certainly present no bar to the judicial determination of
2 the meaning of Article I Section 8 of the Constitution.

3 Without going beyond the contours of today's
4 agenda, I just point out again, and plaintiffs' brief
5 recounts that in the cases brought to the Supreme Court in
6 the 19th century, the Court had no trouble delineating the
7 roles of Congress and the President in initiating military
8 action.

9 As I said, I already mentioned what Justice Scalia
10 has to say about that question of the early opinions -- of
11 the early court, those closest to the founding of the
12 nation.

13 Baker's third criteria, great political question,
14 was the impossibility of deciding without an initial policy
15 determination of a kind clearly for non judicial discretion.

16 It is plaintiffs' contention that the only relevant
17 policy decision was made by the founders when they rejected
18 the British model of a monarch who could take the nation to
19 war on his own say-so.

20 Baker's fourth reason for avoiding jurisdiction was
21 the impossibility of a court's undertaking independent
22 resolution without expressing lack of respect due coordinate
23 branches of government.

24 I admit, I am familiar with no cases in which this
25 principle has been invoked to dismiss a case, but it seems

1 to me that it is true, as plaintiffs contend, that if the
 2 President has usurped powers lodged in a different branch, a
 3 Court cannot rubber stamp such an invocation. It would
 4 disrespect the Constitution to do likewise, and it seems to
 5 me going back to Marbury versus Madison, as Chief Justice
 6 Marshall said, it is emphatically the duty of the Court to
 7 declare what the law is, and where the law as set forth by
 8 the founders in the Constitution, that is clearly an
 9 appropriate activity for judicial decision.

10 Number five on the Baker short list was, quote, an
 11 unusual need for unquestioning decision to a political
 12 decision already made.

13 Now, I confess this would be a real problem if
 14 plaintiffs were seeking coercive relief against the
 15 President --

16 THE COURT: See, let me --

17 MR. ASKIN: Yes.

18 THE COURT: -- because you just said something that
 19 triggered another question in my mind.

20 How would I make a decision on this without
 21 necessarily making some kind of a policy decision as to
 22 whether or not the limited power given to the President was
 23 appropriate or not appropriate in getting involved in that
 24 thought process that the Congress went through?

25 MR. ASKIN: Well, your Honor --

1 THE COURT: It implicates some undertaking of
 2 policy determination as to the extent to which the President
 3 should be authorized to use force in a situation, where at
 4 the time that it was being argued that there was a threat to
 5 the United States and weapons and mass destruction and all
 6 of the other stuff that was being debated, there was a
 7 policy decision being made by the representatives of the
 8 people as to the extent of the authorization that they would
 9 give to the President, and they made that decision.

10 For me to now go into that under the guise that,
 11 well, the Constitution says declaration of war, so therefore
 12 anything less is not constitutional, isn't that injecting
 13 the Court system into the political debate, which is
 14 something I shouldn't go into?

15 MR. ASKIN: Your Honor, plaintiffs do not argue the
 16 question of whether or not the invasion of Iraq was good or
 17 bad policy.

18 We question only the procedure by which that choice
 19 was made. We said the Constitution doesn't allow that
 20 procedure, and I think that is my response to your question.

21 It is not whether it was a good or bad policy.
 22 Maybe it was a good policy, but that was Congress' choice to
 23 make, not to say, Mr. President, you go do something, and
 24 six months later --

25 THE COURT: So in your view you could have never

1 limited hostilities constitutionally permitted against a
 2 sovereign nation --

3 MR. ASKIN: Limited --

4 THE COURT: -- without declaration of war.

5 MR. ASKIN: -- but not a total invasion.

6 For example, Congress says, Alkeida is -- we have
 7 to stop Alkeida, and they are holed up in the hills of
 8 Pakistan.

9 I think Congress could authorize limited bombing of
 10 the Alkeida network without a full scale invasion of a
 11 nation of Pakistan. That would be limited hostility. We
 12 have done that many times, because that is frankly what Bas
 13 versus Tingy was about, but it was under careful
 14 congressional instruction with very limited authorization to
 15 the President how far he could go.

16 Again, maybe -- you know, of course, the President
 17 can also respond to sudden attack. He certainly has that
 18 power. That was never -- there was no question about that.

19 He certainly could respond to the attack on Pearl
 20 Harbor without -- without a congressional declaration. He
 21 could have gone after the Japanese fleet or the Japanese Air
 22 Force, but once we are talking about actual invasion of a
 23 sovereign nation, that is Congress' job. Even the first
 24 Iraq war, we didn't go into Iraq. We helped an ally,
 25 Kuwait, expel invading Iraqi troops, and we stopped there.

1 We fired some, you know, missiles at them as they
 2 were retreating, but the first President Bush, for whatever
 3 reason, maybe he really decided he didn't have the authority
 4 to go into Iraq without a full scale congressional
 5 declaration, but that is the distinction. That seems to me
 6 a full scale invasion of a sovereign nation without
 7 immediate provocation and limited hostilities, which
 8 Congress can authorize the President to do.

9 Finally, Baker warns against the potentiality of
 10 embarrassment from multifarious pronouncements by various
 11 departments on one question.

12 I believe this just returns us to the basic
 13 principle of Marbury, that it is the duty and province of
 14 the judicial department to say what the law is.

15 Such declaration would once and for all clear up
 16 what has heretofore been multifarious pronouncements of the
 17 law in this area. The truth is, as the Government notes,
 18 there are a number of cases dealing over the last 60 years
 19 with this issue, and they are all over the place. They are
 20 totally inconsistent.

21 A lot of it is based on Massachusetts versus Laird,
 22 which in fact the Court got the history wrong. It is very
 23 interesting to go back to Massachusetts versus Laird because
 24 the first thing Judge Coffin says is that the plaintiffs in
 25 this case devote only one paragraph of their brief to the

1 founding of the Constitution and the meaning of Article I
2 Section 8, so he said he was going to do his own historical
3 research.

4 What did he do?

5 He went to August 17th, 1787. He went to Volume 2
6 of Farrand's. He never looked at Volume 1, and Volume 1 is
7 when the crucial decisions were made. That was June 1st,
8 1787.

9 No court has ever examined the debates of the
10 Constitutional Convention on that day, and that is where the
11 founders made very clear what this country was all about,
12 and what was the division of responsibility between the
13 President and Congress in regard to going to war. And
14 unfortunately, a lot of cases following Massachusetts versus
15 Laird just automatically picked up on Massachusetts versus
16 Laird and said, well, this is a shared power between
17 Congress and the President. But going back to the founders,
18 it was not, the decision to declare war was not a shared
19 power.

20 THE COURT: But the decision whether to declare war
21 or to declare something less than war given the
22 circumstances and the information that the Congress had is
23 the form or means by which they chose to exercise their
24 power, isn't it? You are asking me to then second guess
25 that.

1 I guess you are saying, we got to draw the line on
2 invasion, right?

3 MR. ASKIN: Right.

4 THE COURT: You are focusing on invasion. When
5 there is --

6 MR. ASKIN: Sovereign nation -- I think it --

7 THE COURT: -- that is where you want to have your
8 red line.

9 MR. ASKIN: Absolutely, your Honor.

10 THE COURT: All right.

11 Thank you.

12 MR. ASKIN: Okay. Let me turn it over to Mr.
13 Zurofsky.

14 MR. ZUROFSKY: Thank you very much.

15 I hope you will forgive us if perhaps we go a
16 little bit over 45 minutes, but I will try to be brief.

17 THE COURT: Well, I would like to keep it at 45
18 minutes. Why don't you address for the Court the
19 redressability first.

20 What is there that you can possibly do here that is
21 going to be able to redress your clients' alleged injury?

22 MR. ZUROFSKY: You can declare what the
23 Constitution means and whether or not the Constitution has
24 been violated thereby causing my clients to be injured.

25 Now, many clients are satisfied --

1 THE COURT: Well, how does that redress it --

2 MR. ZUROFSKY: -- many clients --

3 THE COURT: -- listen, Counsel, the same thing.
4 We can't talk over each other.

5 MR. ZUROFSKY: -- my -- my --

6 THE COURT: Where is there --

7 MR. ZUROFSKY: Right.

8 THE COURT: -- the issue of redressability has to
9 be addressed by this Court. Other than just giving you an
10 advisory opinion here and say, you know, if in the future
11 this were to happen again, this Court would believe it would
12 be unconstitutional to do it that way, right? That is
13 really what you are asking me to do, and how is that
14 anything more than an advisory opinion?

15 MR. ZUROFSKY: It is not an advisory opinion --

16 THE COURT: Why?

17 MR. ZUROFSKY: -- because for many people, just to
18 be -- to have it publicly acknowledged that they were
19 wronged is a sufficient remedy. It is like the libel or
20 slander case, where the jury says, you were awarded -- you
21 were libeled and slandered. You are not the no good wife
22 beater that he said that you were, but you really weren't
23 damaged by it, so we'll give you a dollar.

24 The fact to have a public acknowledgement that what
25 happened to you was wrong, was unconstitutional, my clients

1 believe is enough, and I would also say that it would be
2 anomalous indeed --

3 THE COURT: No, no. We have to focus on what you
4 claim was the damage to your clients, and then say by you
5 doing this, it is going to redress that injury.

6 The injuries that you have claimed are the
7 inability to vote for their representative, the fact that
8 the person was deployed, right?

9 These injuries have already occurred. A finding at
10 this point of unconstitutionality of something that already
11 occurred five years ago doesn't redress those injuries.
12 Those injuries have occurred.

13 MR. ZUROFSKY: Well, I believe it does.

14 How does it differ from the slander case, where the
15 person spreads the word that you beat your wife, and you say
16 "I do not."

17 And he says, ", you do," and you go to court --

18 THE COURT: Because the essence of that claim,
19 Counsel, is that the lies being perpetrated about you in the
20 present, in the past and in futuro, and by having a decision
21 made that lie is no longer perpetrated. You have been
22 exonerated from that attack on your reputation. This is
23 totally different.

24 MR. ZUROFSKY: I was wrongfully placed in harm's
25 way, and I said it was wrong at the time, I said you don't

1 have a right to do it to me, you did it to me. I want to
2 show that I was right in that dispute, where I didn't have
3 the power to refuse an order to take the example of Mr.
4 Wheeler. I want to show that I was right.

5 I also think it would be anomalous indeed if you
6 were to dismiss on that basis, and we asked to file a new
7 amended complaint simply seeking damages, which we chose not
8 to seek.

9 I mean, these are the types of damages, you know,
10 it is all well and good to say that we didn't plead it. But
11 if what we are going to do is go back and submit a new
12 complaint saying, well, the judge said the problem is we
13 didn't ask for new damages, let's now ask for damages, I
14 mean, we have pled that the damages exist.

15 For purposes of a motion to dismiss, you need to
16 accept our pleadings as being true, that we could show that
17 we have the damages. The types of damages we allege are
18 types that the Court recognized --

19 THE COURT: But then you are still --

20 MR. ZUROFSKY: -- the --

21 THE COURT: --- just because you have damages,
22 Counsel, doesn't mean you have redressability. Just the
23 awarding of damages doesn't cure the issue on standing if
24 the decision that you seek from the Court doesn't redress
25 the injury that you claim exists.

1 We need to talk about injury, too, because here you
2 have different types of plaintiffs. Some of the plaintiffs
3 are suing on behalf of their adult children or their --

4 MR. ZUROFSKY: No, they are not. We withdrew that
5 claim. That was in the first complaint. It is not in the
6 amended complaint.

7 THE COURT: So we don't have to worry about that.

8 MR. ZUROFSKY: Right.

9 The two mothers that are plaintiffs are not
10 asserting rights of their children who are full age.

11 THE COURT: Talk to me about the injury that you
12 claim because I had a little problem getting my head around
13 the argument of you affected my ability to vote for my
14 representative somehow.

15 MR. ZUROFSKY: Well, that -- that is impaired in
16 the sense that if you go back to the Federalist papers, for
17 example, Alexander Hamilton wrote in Federalist No. 26, that
18 the legislature is obliged to deliberate upon the propriety
19 of using the military force to come to a new resolution on
20 the point, he wrote, and to declare their sense of the
21 matter by a formal vote in the face of their constituents.

22 In other words, according to Hamilton's view of the
23 Constitution, this type of vote was so important, that the
24 constituents were entitled to a formal vote on it, so that
25 it could fully evaluate exactly where the representatives

1 stood, and so they couldn't dilly-dally and play -- make the
2 types of arguments that Hillary Clinton made when she was
3 trying to seek the presidency, which is, oh, she didn't
4 realize that what she was voting for would lead to this war.
5 It has to be a clear up and down choice because in matters
6 of such gravity, there shouldn't be room for the political
7 games that exist.

8 Now, if you go to Marbury versus Madison, it seems
9 to me that this is exactly the type of matter that Justice
10 Marshall was talking about when he wrote, when there is a
11 specific duty assigned by law, individual rights depend upon
12 the performance of that duty. It seems equally clear that
13 the individual who considers himself injured has a right to
14 resort to the laws of this country for a remedy.

15 In some cases then the Constitution must be looked
16 into by judges, and if they can open it at all, what part of
17 it are they forbidden to read or to obey?

18 In other words, those are the questions that we are
19 asking you to answer. A lot of what you were asking in the
20 preceding argument were essentially the questions that we
21 are asking you to address on the merits, and to predetermine
22 them is saying that they are off limits.

23 You are essentially saying or the Government is
24 essentially saying that it is off limits for you to decide
25 whether the authorization for use of military force is the

1 functional equivalent of declaration of war in the
2 constitutional sense that they are arguing.

3 THE COURT: Because you have to have a case in
4 context. You have to have standing. You have to establish
5 standing, and then you have to establish that the Court has
6 the ability to deal with it, is it a political question or
7 not, and then you get to your merits of whether or not the
8 Congress can constitutionally do something less than a
9 formal declaration of war when it involves an invasion to
10 the professor's argument --

11 MR. ZUROFSKY: I don't think standing in a strict
12 sense should involve that. I mean, every time a federal
13 policy or a federal statute comes before this Court with an
14 allegation that is unconstitutional, you have the
15 legislature and the executive branch acting in concert to
16 make that law --

17 THE COURT: Right, but --

18 MR. ZUROFSKY: -- the President signed it --

19 THE COURT: -- but, Mr. Zurofsky, the plaintiff
20 that is bringing that action still has to have standing to
21 do it.

22 MR. ZUROFSKY: Right, to present the question.

23 And what are the tests for that?

24 THE COURT: You have to have concrete or actual
25 injury.

1 Tell me what is your concrete or actual or imminent
2 injury that you are claiming is involved here for your
3 clients.

4 MR. ZUROFSKY: Well, first, the primary injury, as
5 your Honor noted in questioning the defense, is Mr.
6 Wheeler's injury as the soldier who was sent there, who
7 served there in the initial invasion, who was in fact
8 wounded there and suffers continuing injuries to answer your
9 question. He was honorably discharged due in part to his
10 injuries, but he remains subject to the stop-loss provisions
11 and recall, which were frequently invoked during the Bush
12 administration to bring soldiers who have been honorably
13 discharged back into service, and he remains subject to them
14 as we stand here today. And he lost a good fair amount of
15 his life and was certainly placed in the way of great
16 danger. He saw colleagues near him who suffered much worse
17 than he did, so he certainly has an injury, and we know that
18 in the decisions of Massachusetts versus Laird, the First
19 Circuit found that service people had standing --

20 THE COURT: Well --

21 MR. ZUROFSKY: -- the Second Circuit found
22 standing -- found the same thing --

23 THE COURT: -- you can also look at Belleville v.
24 Nixon, which is in the Tenth Circuit. That was the Viet Nam
25 case, where they said that the enlisted men lacked standing

1 to declare the conflict illegal.

2 MR. ZUROFSKY: Well, we -- there is certainly a
3 split in the circuits, but we would say that the cases
4 are -- once they find standing, because they make the most
5 sense with the doctrines enunciated in cases such as Lujan,
6 which we don't dispute from the plaintiffs -- I mean the
7 defendants. We both cite the same three prongs for the
8 normal determination of what constitutional standing is.

9 The issue is why is this case different from any
10 other constitutional case. And what it comes down to is not
11 the different nature of the injuries. My clients have the
12 same nature of injuries. It is just the different
13 constitutional violation that we allege and the types of
14 questions that the Court has to address in order to do that
15 which they say takes it out.

16 They are trying to conflate this whole political
17 question idea into the standing idea. We meet all of the
18 three elements of theirs. We assert that there is a
19 constitutional right. We assert -- which comes from the
20 declaration of war provisions, that we assert that there was
21 a breach of that right, that this was not done in the manner
22 that the Constitution requires, and that is the key question
23 we are asking you to address.

24 Is what happened here satisfied by what the
25 Constitution requires?

1 Do -- for example, does Congress have the right to
2 do less than a full declaration of war?

3 I guess the first question is: What kind of war
4 was Congress talking about when it said you have to have a
5 declaration of war.

6 So the first question is: Is what happened in Iraq
7 a war within the meaning of this.

8 If so, then the next question is one you also
9 raised or that was raised here, even though it is a war,
10 does Congress have a right to authorize it in some manner
11 less than a formal declaration of war because they don't
12 want to invoke those international consequences.

13 We argue that they don't, but that is a question on
14 the merits.

15 Then you have another question on the merits:

16 Is the authorization for use of military force the
17 functional equivalent of what the constitutional framers
18 meant when they said there has to be a declaration of war?

19 Those are the questions that we are asking this
20 Court to answer, and those questions don't go to whether the
21 decisions made were right or wrong in terms of some outside
22 set of values. It is a question of what did the founders
23 say, how did it have to be, and what did they mean.

24 I don't want to get too dramatic about it, but when
25 you read Alexander Hamilton, and you read what the other

1 founders said at the June 1st convention, it is clear that
2 they had a concern for the right of the people, the people.
3 Our Constitution doesn't come from God. It doesn't come
4 from on high. It is creation of the people.

5 Our clients, all of them, are part of the people as
6 the founders understood it, and they want to enforce this
7 limitation that they placed in writing the Constitution upon
8 the branches of Government. They want them to adhere to the
9 limits that the people defined when they wrote the
10 instrument. We say they are not, that they did not, and we
11 fear that it will continue in the future.

12 I mean, I am not even sure that I am in agreement
13 with Professor Askin on the Pakistan situation. To me,
14 Pakistan presents an imminent threat, where the same thing
15 might happen again, because I don't know whether we are
16 going to invade those provinces with the full scale force
17 and try and change the sitting government now that the
18 government of Pakistan just yielded power to the Taliban and
19 a part of Northern Pakistan, and I am not sure that would
20 also be a war.

21 We are saying that this is where you need to begin,
22 and we are hearkened by the way the Supreme Court has
23 decided recent cases.

24 THE COURT: Counsel, you are going to be going into
25 the merits of this. I have read about the merits. I

1 understand the argument on the merits clearly, and that has
2 to do with whether or not, and it is a very finite question
3 there, whether or not the Congress has the ability when they
4 are going to invade another country or part thereof, if you
5 are taking the argument there, to do anything less than a
6 formal declaration of war, period. That goes --

7 MR. ZUROFSKY: I don't want to --

8 THE COURT: -- to the merits. I don't need oral
9 argument on that. It is either yes or no. It's either up
10 or down, right?

11 MR. ZUROFSKY: -- I don't want to argue the merits.

12 What I want to argue is that all of these things
13 that the United States is saying are reasons for you to
14 dismiss the case are the merits --

15 THE COURT: Counsel --

16 MR. ZUROFSKY: -- and that is to pre decide it --

17 THE COURT: -- Counsel, Mr. Zurofsky, please.

18 It is not the same because there still has to be a
19 case in controversy, which goes back to the issue of
20 standing, which is I have to look at the time of the filing
21 of the complaint, and at that time did you in fact have an
22 injury that was actual, right, imminent, concrete. Is what
23 you are asking me to do going to redress those injuries.

24 That is what makes the case in controversy a live
25 thing that I can then delve into all of these other issues,

1 right?

2 MR. ZUROFSKY: My short answer, and then I will sit
3 down, is that we the people set limits which we thought
4 could be enforced. Congress and the President breached
5 those limits. They injured us, and we have these injuries.
6 Mr. Wheeler served. We had to devote resources that we
7 intended to devote elsewhere to this. As a result, we have
8 suffered emotional damages, all pled in there.

9 We chose not --

10 THE COURT: Let me ask you --

11 MR. ZUROFSKY: -- we chose not to seek damages, but
12 if your Honor decides to dismiss on that basis, we would ask
13 leave to amend our complaint --

14 THE COURT: I don't know that that would cure
15 anything. The fact that you seek damages does not
16 automatically cure a deficiency, if you have one, which I
17 have to decide. That is why I wanted oral argument. It
18 doesn't cure a deficiency if you don't have a redressable
19 injury that existed at the time of the filing of the
20 complaint --

21 MR. ZUROFSKY: The damages --

22 THE COURT: -- monetary damages doesn't cure it --

23 MR. ZUROFSKY: -- damages are the classic redress
24 provided by the Court. If I was in an automobile accident
25 and I lose my leg --

1 THE COURT: Counsel, Counsel, again, let's not talk
2 over each other.

3 That is money because compensatory damages in that
4 scenario is aimed to use and equate the value of money to
5 compensate you for something that you lost in that
6 scenario --

7 MR. ZUROFSKY: Right. That is what we would be
8 asking for, the value to compensate us for what we lost.

9 THE COURT: No. Here you are asking me to declare
10 the war unconstitutional or not the -- the resolution or
11 whatever it was that the Congress passed as the
12 authorization, I should say, unconstitutional. That is
13 really what you are asking me to do.

14 MR. ZUROFSKY: That is to establish the violation.

15 In an automobile accident, I -- going through a red
16 light, you have to declare negligence, and then you find
17 that I'm damaged, and the damage is what flowed from the
18 injury.

19 Our damages flowed from that that constitutional
20 violation. They were proximally caused by that
21 constitutional violation. There was a chain of causation,
22 which we believe we can prove, and for purposes of the
23 motion to dismiss, have to be accepted as true on facts I
24 don't know, but I believe we can prove them, or we wouldn't
25 have pled them.

1 We believe we can prove them. We say they were
2 proximally caused by the violation that you identified.
3 That is a fact problem.

4 THE COURT: How about the timing of this filing?
5 Doesn't that create a problem for you as well? Waiting five
6 years to do this as opposed to filing the suit at the time
7 the debate was going on, and at the time before your client
8 was deployed when the authorization occurred?

9 MR. ZUROFSKY: Your Honor, this is not one of the
10 arguments that we were asked to address this morning, but
11 that is where you get into the capable repetition, but
12 evading review. We believe that there is imminent threat
13 and further damage.

14 I don't know that there is a statute of limitations
15 on this sort of cause. The hostilities are still in
16 progress. Lives are still being lost as a result of this
17 conduct, so I don't think that it should be viewed, but I
18 think that that would be a formal mootness question.

19 THE COURT: That doctrine has to do with mootness.

20 MR. ZUROFSKY: Right. And I think the question you
21 are asking is mootness or the laches or something along
22 those lines.

23 THE COURT: No. It goes to the causal connection
24 of whether the injury was caused, right --

25 MR. ZUROFSKY: No. The injury --

1 THE COURT: -- by the violation or by --
 2 MR. ZUROFSKY: -- Mr. Wheeler was in the initial
 3 invasion. His injury was caused when he went there. Maybe
 4 he took too long to come here, but he suffered the injury at
 5 that point to put it in the clearest example.

6 THE COURT: Okay.

7 Let me see if I have any other questions.

8 MR. ZUROFSKY: Yes.

9 Thank you very much.

10 THE COURT: Do you want to reply?

11 MR. SMITH: Yes, briefly, your Honor.

12 THE COURT: Let's focus a little bit on his
 13 argument on the political question, where he says the reason
 14 that this is different from the regular political question
 15 where a myriad of courts, and I agree with you, there have
 16 been many, many courts that have said when something is
 17 texturally committed to a branch of government as to the use
 18 and operation of armed forces, the courts should not get
 19 involved it. It is a political question, and it involves a
 20 certain amount of expertise and a certain amount of
 21 political policy making decisions and foreign affairs and so
 22 forth.

23 If that is true, as the argument goes, that this is
 24 not a political question, it is a constitutional question
 25 because the founders chose to give that power specifically,

1 very important power, to Congress to declare war, and
 2 although the constitutional provisions limited uses of
 3 military power to defend or protect our nation, it does not
 4 envision the use of an invasion, all of that invasion, all
 5 of that war without a formal declaration, and if that
 6 happens, it is not a political question, it's a
 7 constitutional question.

8 MR. SMITH: Well, your Honor, as I think the
 9 plaintiffs concede, and as you just stated, Congress has the
 10 power to declare war. Congress also has the power to
 11 declare more limited actions.

12 Basically what they are asking you to do is set the
 13 legal definition of when Congress should do one, and when
 14 Congress should do the other, and they are saying --

15 THE COURT: Use that definition as the invasion of
 16 a sovereign nation --

17 MR. SMITH: That's one --

18 THE COURT: -- they say choose that definition, and
 19 they said --

20 MR. SMITH: -- that is one of the --

21 THE COURT: -- wait, wait, Counsel, don't talk over
 22 me.

23 And they say further that is the only definition
 24 you could accept because otherwise to give them the power to
 25 declare war is meaningless. When do they declare war? What

1 is a war then, if it's not the invasion of another nation?

2 MR. SMITH: They declare war when they want to put
 3 the entire nation on a war footing, which is what happened
 4 in World War II.

5 In World War II Hawaii was under marshal law, you
 6 know, and this is a shame in our past, but people were
 7 locked up because of their national origin.

8 This was the kind of thing -- the kind of thing
 9 where the Constitution, you know, the Bill of Rights
 10 suddenly is diminished because we are -- and I know the
 11 Japanese term would never be repeated, but it is just an
 12 example of the way in which the entire country is affected.
 13 Civilians are affected. Their rights are affected when the
 14 entire country is put on a war footing, as in the war
 15 against Japan and Germany in World War II. That is when
 16 Congress does it.

17 It is not when Congress -- I mean, they say that
 18 Iraq is a unique thing because we invaded a sovereign
 19 nation. The United States invaded a sovereign nation in
 20 Panama, in Grenada, in Afganistan, in Nicaragua. The United
 21 States has -- and I mean, this is not a unique thing.

22 What is a unique thing is something like World War
 23 I or World War II, where the entire country is put on a war
 24 footing, where, you know, cars aren't made, tanks are made.
 25 You know, that is the decision that Congress makes, you

1 know.

2 You know, the seizure of the steel mills during
 3 Korea was declared unconstitutional in part because Congress
 4 had not, while authorizing the hostilities in Korea, had not
 5 created a situation where the President was the
 6 commander-in-chief on the home front, so that -- I mean that
 7 is the major decision that Congress is making when Congress
 8 decides how are we going to conduct our foreign policy or
 9 our war policy as they say.

10 Are we going to, you know, have an all out
 11 declaration of war, or are we going to have a more limited
 12 authorization of war.

13 And the fact that this is a political question is
 14 made clear I think by their arguments. I mean, counsel
 15 says, well, bombing Pakistan is okay, and his co-counsel
 16 said, no, I don't think bombing Pakistan is okay. The first
 17 Iraq war was okay, but the second Iraq war is not okay.

18 I mean, they are drawing these lines. These lines
 19 are not in the Constitution. These lines are not in Bas
 20 versus Tingy. Bas versus Tingy says that there is such a
 21 thing as a limited war and that certain of the laws of war
 22 applied during -- even though there is not a declaration of
 23 war. That is all it says. It doesn't say when you could
 24 have a limited war. It doesn't say what the limits of a
 25 limited war are. It simply says that you can have an

1 undeclared war, but that even when there is an undeclared
2 war, certain of the laws of the war apply.

3 The same is true in the Prize cases, where there is
4 an undeclared war, the Civil War, which couldn't be
5 declared, but the law of war still applied.

6 THE COURT: Let me ask you a question. Just
7 because, and I have made a note to say something to the
8 professor before about Grenada and Panama and all of that.
9 In Panama we went to take a bath, but I mean, if in fact the
10 definition of a war is the invasion of another country, and
11 if in fact those things were done without the approval of
12 Congress just because it was done unconstitutional before
13 doesn't make it right now, does it?

14 MR. SMITH: Well, I mean, I don't agree with the
15 premises, but to answer your question, the fact that
16 something --

17 THE COURT: I didn't say it was unconstitutional.
18 I said if in fact they were, then --

19 MR. SMITH: -- oh, okay.

20 I agree that the fact that something was done does
21 not automatically mean that it is unconstitutional.
22 However, the Supreme Court has noted in *Isretta* that the
23 history of constitutional operations by the political
24 branches, quote, gives meaning to the Constitution.

25 So the fact that it was done is not ipso facto

1 necessarily illegal, but the fact that it has been done
2 over, and over, and over again, and the political branches
3 have operated this way is strong evidence that it is
4 constitutional, so I think that is the answer to that
5 question.

6 THE COURT: Okay.

7 MR. SMITH: I would also like to briefly address
8 standing, if I could.

9 THE COURT: Sure.

10 MR. SMITH: Mr. Zurofsky essentially says that
11 public acknowledgement is enough, and that that is enough to
12 satisfy the redressability prong, and that is completely
13 incorrect.

14 At most, public acknowledgement could remedy a
15 psychic injury, but the Supreme Court has been clear that
16 psychic injuries are not, quote, unquote, injuries for
17 Article III purposes, no matter how strongly you feel, no
18 matter how, you know, hurt you may be, and even if there are
19 physical consequences from your psychological injuries, such
20 as sleeplessness or depression, it is simply not sufficient
21 to be a concrete injury as the Constitution defines it, and
22 thus redressing those types of injuries cannot be
23 redressability as -- because it is not redressing a
24 constitutional injury.

25 The issue of damages is really a red herring.

1 There is no claim here -- there could be no claim here
2 because of sovereign immunity. There is a waiver of
3 sovereign immunity for injunctive and declaratory relief,
4 not for monetary relief, and President Bush, if he were sued
5 in his personal capacity, which he has not been and has not
6 been served as such, would nevertheless be absolutely immune
7 because the President has absolute immunity, so there was no
8 possibility of damages. But *Lyons versus Los Angeles* makes
9 it clear that the Court doesn't look to the possibility of
10 damages. The Court only looks to the relief sought in the
11 case before it.

12 And finally, on standing, I would just note that
13 the Viet Nam era cases, while very pertinent on political
14 question, are not on point with the standing argument in
15 this particular case, because those were cases that claim
16 that the ongoing hostilities in Viet Nam, that is the
17 ongoing war against North Viet Nam and the United States'
18 participation was unconstitutional, so there was a
19 redressability there because had the Court, you know,
20 enjoined the war in Viet Nam, the injuries would have been
21 redressed.

22 Here the claim is that the invasion was illegal,
23 but the invasion and the war against Saddam Hussain and Iraq
24 was only a few days. It's over, and the plaintiffs
25 acknowledge that there's nothing that the Court would do

1 here that would change the military action presently or in
2 the future. They just want an advisory opinion, so that
3 presidents will act differently in future cases, such as
4 maybe Pakistan, so, you know, this is a different situation.

5 The redressability prong wasn't there in *Orlando*
6 versus *Laird* and *Mitchell versus Laird* -- excuse me -- or
7 *Massachusetts versus Laird*, so, you know, this is a
8 different situation with regard to standing.

9 THE COURT: All right.

10 Thank you.

11 Do you have anything else that you want to say
12 before we close?

13 MR. ASKIN: Your Honor, just a couple of comments.

14 Now, on the issue of, you know, past possible
15 violations of Article I Section 8, let me quote very
16 carefully from Chief Justice Warren in *Powell versus*
17 *McCormack*:

18 "That an unconstitutional action has been taken
19 before, surely does not render that same action any
20 less unconstitutional at a later date."

21 So whether the Constitution had been violated by past
22 presidents, Article I Section 8 still stands.

23 I want to just in conclusion quote from Justice
24 Jackson in his famous opinion in *Youngstown Sheet & Tube*,
25 which says:

1 "Nothing in our Constitution is plainer than the
2 declaration of war is entrusted only to
3 Congress...[N]o doctrine that the Court could
4 promulgate would seem to be more sinister and
5 alarming than the President whose conduct of
6 foreign affairs is so largely uncontrolled...can
7 vastly enlarge his mastery over the internal
8 affairs of the country by his own commitment of the
9 nation's armed forces to some foreign venture."

10 And finally, just last June in the Boumediene
11 case, the habeas corpus case, the Court said:

12 "[T]o hold that the political branches may switch
13 the Constitution on and off at will would lead to a
14 regime in which they, not the court, could say what
15 the law is."

16 Thank you.

17 THE COURT: Thank you.

18 All right. Counsel, I want to thank you and
19 counsel for the Department of Justice for giving me the
20 opportunity to hear your arguments in this case. I will
21 take it under advisement, and I will render a decision.

22 MR. ZUROFSKY: Thank you, your Honor.

23 MR. SMITH: Thank you, your Honor.

24 THE CLERK: All rise.

25 (Court adjourned.)

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