No. 09-2781

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NEW JERSEY PEACE ACTION, PAULA ROGOVIN, ANNA BERLINRUT, and WILLIAM JOSEPH WHEELER,

Plaintiffs-Appellants,

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLEE

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STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 2201. The district court entered final judgment for the President on May 19, 2009. App. 4. Plaintiffs timely filed a notice of appeal on June 16, 2009. App. 1; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs New Jersey Peace Action, Paula Rogovin, Anna Berlinrut, and William Joseph Wheeler brought this action against the President of the United States, seeking a declaration that the March 2003 invasion of Iraq was unconstitutional. Their appeal presents the following issues:

1. Whether the district court correctly concluded that plaintiffs lack standing to bring this suit.

2. Whether, in the alternative, the district court correctly concluded that plaintiffs' complaint presents a non-justiciable political question.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court and government counsel is unaware of any related case or proceeding.

STATEMENT OF THE CASE

Plaintiffs sought a judgment declaring that the President's decision to send military forces into Iraq in March 2003 was unconstitutional. The district court granted the President's motion to dismiss, holding that plaintiffs lacked standing and that their complaint presented a non-justiciable political question in any event. Plaintiffs appealed.

STATEMENT OF FACTS

I. Constitutional Background

The Constitution assigns control of our nation's military to the political branches. *Doe v. Bush*, 323 F.3d 133, 137 (1st Cir. 2003). These war powers are shared; neither the Legislative nor the Executive Branch possesses exclusive authority to wage military conflict. *Massachusetts v. Laird*, 451 F.2d 26, 31-32 (1st Cir. 1971). Article I of the Constitution grants to Congress the power to "declare War," to "raise and support Armies," and to "provide and maintain a Navy." U.S. CONST., art. I, § 8, cls. 11, 12, 13. Article II makes the President the "Commander in Chief of the Army and Navy of the United States." *Id.* art. II, § 2, cl. 1. It also grants the President authority as chief executive to conduct foreign relations. *Id.* art. II, § 2, cl. 2; *see also Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (President acts "as the sole organ of the federal government in the field of international relations" (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20) (1936)). In the event of a conflict between the political branches over the appropriateness of any military action, this division of the war powers "enable[s] those branches to resolve the dispute themselves." *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990); *see also Laird*, 451 F.2d at 33 ("[T]he Constitution, in giving some essential powers to Congress and others to the

executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation.").

II. The Authorization for Use of Military Force

The President and Congress exercised these shared military powers in concert to authorize and carry out the invasion of Iraq in March 2003. In October 2002, Congress debated and passed The Authorization for Use of Military Force Against Iraq Resolution of 2002 ("AUMF"), Pub. L. No. 107-243, 116 Stat. 1498 (2002). That Resolution expressly recognizes the President's existing "authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States." AUMF Preamble. Congress further enhanced that authority by authorizing the President "to use the armed forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq." AUMF § 3(a).

On March 19, 2003, citing the authority provided by the AUMF, the President ordered military action against Iraq. App. 36-37. On May 1, 2003, following the overthrow of the Hussein regime, the President declared an end to

major combat operations against Iraq. U.S. Military forces remain in Iraq, but do so at the request of the Government of Iraq – a fact that plaintiffs do not dispute. *See* App. 13; *see also, e.g.*, U.N. S.C. Res. 1790 (Dec. 18, 2007) (noting that U.S. led multinational force in Iraq remained there "at the request of the Government of Iraq"); S.C. Res. 1723, ¶ 1 (Nov. 28, 2006) (same); S.C. Res. 1637, ¶ 1 (Nov. 8, 2005) (same).

III. Prior Proceedings

1. Plaintiffs filed this action against the President of the United States, seeking a declaration that his order to invade Iraq in 2003, without a formal declaration of war from Congress, violated the Constitution. App. 51-52.

Plaintiff New Jersey Peace Action ("NJPA"), a non-profit membership corporation, alleged that it was "directly" injured by the President's order because "its leadership felt compelled to redirect its financial resources and staff to opposition to the war and was thereby deprived of the ability to devote its resources to such other projects as promoting nuclear disarmament, promoting a 'Peace Economy,' opposing 'Star Wars,' and conducting peacemaking education programs * * *." App. 30-31. NJPA also alleged that its members were "deprived of the opportunity to vote for or against their elected representatives based upon how their representatives voted on the issue of going to war in Iraq" and by "being

compelled to pay tax dollars for an unconstitutional war that they oppose." App. 31.

Plaintiffs Paula Rogovin and Anna Berlinrut, both of whom have sons who have served in Iraq, also claim to have been "directly" injured by the President's order. App. 32-33. Each claims to have "suffer[ed] emotional, physical and psychological injury for which she has received medical and pharmacological treatment," because of "her concern for the safety of her son, and the children of the many other families she knows," as well as "her great anger at the President's blatant violations of the Constitution," and "the stress arising therefrom." App. 32-33. Each also alleges injury because she was "deprived of the opportunity to vote for or against her elected representatives based upon how they voted on the issue of going to war in Iraq." App. 32, 34. Plaintiff Rogovin further complains that she had to abandon her activity in local politics "in order to pursue her activism in opposition to the war." App. 32. Plaintiff Berlinrut similarly claims injury because her anti-war advocacy forced her to abandon her gardening and her plans "to fix up her house in order to prepare it for sale." App. 34.

Plaintiff William Joseph Wheeler served in the Army prior to his discharge in January 2004. App. 34. He is not subject to recall into the armed forces. *Ibid.*[1] Wheeler claims to have been injured by "being compelled to obey orders that were unlawful because they were premised on the President's unconstitutional initiation of the War in Iraq without a Congressional Declaration of War." App. 36. He also claims to have suffered, and to still be suffering from, "emotional, psychological, and physical affects arising from the ordeal of combat." App. 35.

Plaintiffs allege that the President violated "Article I, Section 8 of the United States Constitution, which assigns exclusively to Congress the duty to Declare War." App. 50. They also allege that the President deprived them of their right "to know how his or her Congressional representatives [would have] voted on the issue of taking the nation to War and to cast their [Congressional] votes accordingly." App. 51. Finally, plaintiffs allege that they "have a reasonable basis to fear that they will soon suffer further injury due to a repetition of the same or similar conduct by the President in the near future" because of statements made by the former President about Iran. App. 51. To redress these claims, plaintiffs

[1] The complaint alleges that Wheeler was subject to recall until May 2009. Even assuming that Wheeler was, in fact, subject to recall until that date, it is not alleged that he is still subject to recall now.

sought a declaratory judgment holding that the war in Iraq was waged in violation of Article I, Sec. 8 of the United States Constitution.

2. The government moved to dismiss this action on the grounds that plaintiffs lacked standing; that their complaint presented non-justiciable political question; and that, in any event, the President and Congress acted lawfully. The district court dismissed plaintiffs' action without reaching the merits. App. 4-22.[2]

a. The district court first held that plaintiffs "allege too little and institute their suit too late" to meet their constitutional burden of demonstrating standing. App. 15 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

The court held that virtually all of plaintiffs' alleged injuries were insufficient to satisfy Article III's injury in fact requirement.[3] Plaintiffs' anger with the President's decision was "neither concrete nor particularized," the Court held, because "'[d]isagreement with government action or policy, however strongly felt, does not, standing alone, constitute an 'injury' in the Constitutional sense.'" App. 10 (quoting *Evans v. Lynn*, 537 F.2d 571, 598 (2d Cir. 1975)).

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[2] The district court amended its opinion on June 2, 2009 to correct the formatting of the block quote appearing on page 14. App. 5.

[3] The only exception to this holding were plaintiff Wheeler's claims about his injuries sustained while serving in Iraq, which the plaintiffs "effectively conceded" were non-justiciable for other reasons. App. 12.

Similarly, the Court rejected plaintiffs' contention that they were injured by being deprived of the opportunity to know how their representative would have voted on a war resolution; that this is "the very epitome of general," and therefore fails to allege a harm cognizable under Article III. App. 11. The court also held that plaintiffs' attempt to establish standing based upon their status as taxpayers and citizens had been "roundly dismissed" by the Supreme Court. *Ibid.* (citing, *inter alia*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613-14 (1989)). Finally, the court noted that plaintiffs' alleged future injuries based on a hypothetical undeclared war with Iran were "purely speculative." App. 12.

The court further held that "*none* of Plaintiffs' injuries would be redressed" even if it declared that the invasion of Iraq was unconstitutional. App. 13 (emphasis added). Plaintiffs Rogovin and Berlinrut would neither gain the ability to vote for their representatives based on their views, nor be refunded any taxes. *Ibid.* Similarly, a declaration would not compensate Wheeler for injuries he suffered in Iraq or otherwise change the fact that he obeyed his deployment orders. Moreover, the Court noted, declaratory relief would not require the troops currently serving in Iraq to be brought home; those troops remain there not to wage war, but to assist an ally at its request. *Ibid.* "A judicial declaration of unconstitutionality would be, at best, an advisory opinion." *Ibid.* As the court

observed, principles of standing are not altered by plaintiffs' invocation of the Declaratory Judgment Act. App. 15.

b. In the alternative, the court held that the political question doctrine would bar adjudication of plaintiffs' claims. App. 16-22. The court found that "at least" two of the factors identified by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), counsel against adjudication of plaintiffs' claims – "the textual commitment of the issue to a coordinate political department and the lack of judicially discoverable standards for resolving it." App. 18.

The court reasoned that in light of the division of war powers between Article I and II of the Constitution, "[t]he two branches share the broad array of war powers, and the Constitution allows them to work out disputes themselves." App. 19. Because Congress deliberated and passed the AUMF, and the President acted pursuant to that authority when ordering the invasion of Iraq, this case falls within the "zone of twilight" where the President and Congress have concurrent authority with respect to war powers. *Ibid.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). "In the absence of any alleged dispute between [the branches]," the court held that it "must stand down." *Ibid.*

The district court found unavailing plaintiffs' argument that it could

properly adjudicate their claims because the power to declare war is committed to Congress and not the President. App. 19. The court explained that "the power to conduct undeclared hostilities beyond emergency defense * * * [was] committed to both branches, whose joint concord precludes the judiciary from measuring a specific action against any specific clause in isolation." App. 20 (quoting *Laird*, 451 F.2d at 33). It noted the important distinction between a declaration of war – which "triggers 'treaty obligations and domestic emergency powers,'" App. 20 (quoting *Laird*, 451 F.2d at 32) – and a cooperative military action executed by the legislative and executive branches, and held that the choice between these courses "is the very essence of what is meant by a political question." *Ibid.* (quoting *United States v. Sisson*, 294 F. Supp 511, 515 (D. Mass. 1968)). "[T]he very act of second-guessing Congress's decision not to declare war is outside of the judiciary's sphere of competence," the Court concluded. *Ibid.*

Finally, the district court also explained that it had been presented with no set of judicially manageable standards that might allow it to determine whether the United States was at war. App. 21. The court found that Congress would be better-equipped to make that decision, and that such a determination would be inherently fraught with a lack of judicially applicable standards. *Ibid.* In the end, the court determined that "[t]he simple fact of the matter" is that the issue

presented was one textually committed to both Congress and the President. App. 22. Without "an actual dispute between the political branches," the court refused to intervene. *Ibid.*

SUMMARY OF ARGUMENT

The district court's opinion should be summarily affirmed. Plaintiffs cannot satisfy the requirements of Article III standing. As the district court correctly held, plaintiffs' claimed injuries are too generalized or too inchoate to give rise to a federal case. In any event, none of plaintiffs' alleged injuries would be redressed by the relief that they seek – a declaration that the President violated the Constitution by ordering the invasion of Iraq.

Plaintiffs' claims are also barred by the political question doctrine. The war powers are textually committed to both Congress and the President through Articles I and II of the Constitution. Those political branches acted in concert to send American troops to Iraq. In such circumstances, the judiciary may not intervene to determine whether that military action was constitutional. This question also lacks judicially manageable standards – a default not remedied by plaintiffs' citation to the proceedings of the June 1, 1787, Constitutional Convention.

STANDARD OF REVIEW

This Court exercises plenary review of a district court's dismissal of an action based on standing or the political question doctrine. *See Stehney v. Perry*, 101 F.3d 925, 929 (3d Cir. 1996).

ARGUMENT

I. The District Court Correctly Held that Plaintiffs Lack Article III Standing.

The "bedrock requirement" that a plaintiff present a justiciable case or controversy defines "the judiciary's proper role in our system of government." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). To satisfy the "irreducible constitutional minimum" requirements of standing, a plaintiff must demonstrate that he has suffered an injury in fact, that the injury was caused by the conduct complained of, and that the injury likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The standing inquiry is "especially rigorous" when – as in this case – plaintiffs ask a court to decide "whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819-20. The "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere" is primary, and must be made to hold strong against "the

natural urge to proceed directly to the merits." *Id.* at 820. As the district court concluded, plaintiffs' claimed injuries are not of the type required to establish standing and, in any event, would not be redressed by a judicial order.

A. Plaintiffs' "core claim" is that they have been injured by the President's alleged failure to abide by the Constitution. Brief for Appellant at 45. It is settled, however, that standing to sue may not be predicated upon such an abstract and generalized injury, "which is held in common by all members of the public." *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217, 220 (1974); *see also ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989) (collecting authorities). Article III prevents federal courts from being used for "citizen suits," the sole aim of which is to "vindicate the public's nonconcrete interest in the proper administration of the laws." *Massachusetts*, 549 U.S. at 517 (citing *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in judgment)).

Plaintiffs do not dispute the that their "core" injury is a generalized one. To the contrary, they declare that they have suffered this injury in the name of "'the People of the United States, [who] in Order to form a more perfect Union' established a constitution and imposed explicit procedural requirements that must be followed before the Nation's lives and treasure are expended to attack a sovereign foreign power." Brief for Appellant at 45; *see also id.* at 13.

Plaintiffs' claim of injury based on their taxpayer status is likewise foreclosed. "[S]uits premised on federal taxpayer status *are not cognizable in the federal courts* because a taxpayer's 'interest in the moneys of the Treasury * * * is shared with millions of others, is comparatively minute and indeterminable.'" *ASARCO*, 490 U.S. at 613 (emphasis added) (quoting *Frothingham v. Mellon*, 262 U.S. 447 (1923)); *see also Schlesinger*, 418 U.S. at 227-28 (rejecting citizen and taxpayer standing to challenge a military personnel policy that allegedly violated the Constitution).

Plaintiffs note the Supreme Court's decision in *Flast v. Cohen*, 392 U.S. 83 (1968), which recognized a "narrow exception" to the general rule against taxpayer standing in cases alleging Establishment Clause violations. *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988). In the "four decades since its creation, the *Flast* exception has largely been confined to its facts," and the Supreme Court has "declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause." *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 609 (2007) (plurality). That exception has no applicability here.

Plaintiffs are equally wide of the mark in seeking to base their controversy on an asserted "right to know how his or her Congressional representatives voted

on the issue of taking the nation to War and to cast their votes accordingly." App. 51. As the district court correctly concluded, it is "the very epitome of general." App. 11. Article III can provide no redress where a plaintiff does not show a "'personal stake' in the alleged dispute." *Raines*, 521 U.S. at 819; *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975) (Article III judicial power "exists only to redress or otherwise to protect against injury to the complaining party"). [4]

If possible, the allegations of New Jersey Peace Action fail even more signally to state Article III injury: it claims to have been injured when it had to redirect resources away from other peace advocacy efforts to oppose the war in Iraq. Rogovin and Berlinrut similarly claim that they had to abandon hobbies and/or local political activity to engage in antiwar protests.

Plaintiff Wheeler's injuries, in contrast to other alleged harms, are real and serious. That they resulted from Congress's decision to pass an Authorization of Military Force rather than to declare war is, however, conjectural. Moreover, as

[4] Plaintiffs do not identify the constitutional basis of this right. Moreover, Rogovin and Berlinrut's representatives made their views about military action in Iraq clear during the three-day debate preceding passage of the AUMF. Rep. Payne – Berlinrut's Congressman – was a leading opponent of the AUMF who nevertheless offered praise to the Resolution's sponsors for allowing such extended debate. *See* 148 Cong. Rec. H7725 (2002). Rep. Rothman – Rogovin's Congressman – stated that after careful consideration he concluded that the United States must join forces with its allies to use force against Saddam Hussein. *Id.* at H7418.

the district court noted, App. 12, plaintiffs "effectively conceded" that a soldier may not use federal courts to bring constitutional claims against their commanding officers, *Chappell v. Wallace*, 462 U.S. 296, 300, 304 (1983), even where they have suffered an injury incident to their military service, *United States v. Stanley*, 483 U.S. 669, 682-83 (1987) (precluding *Bivens* claims for such injuries).

B. Even more clearly, Wheeler's injuries, like all injuries alleged by plaintiffs, cannot be redressed by a judicial order. An order would not reddress the harm claimed by New Jersey Peace Action from redirecting its resources to oppose the Iraq conflict, or the claimed injuries of Rogovin and Berlinrut regarding diversion of their time, payment of taxes, and uncertainty regarding the votes of their representatives in a vote that was not taken.

Nor would an order redress imminent future harms. Wheeler is not subject to recall into military service, *see* App. 34 (alleging that Wheeler was subject to recall until May 2009), and, in any event, it is wholly speculative whether and when Congress may enact an authorization for use of military force in future circumstances that, in plaintiffs' view, would require a declaration of war.

Plaintiffs cannot establish standing by arguing that a declaratory judgment would provide them "with redress for the injury they have suffered through vindicating the Fundamental Constitutional Right that they claim." Brief for

Appellants at 49. The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74. And it has refused requests, like plaintiffs', to "transform the federal courts into * * * a vehicle for the vindication of the value interests of concerned bystanders." *Allen v. Wright*, 468 U.S. 737, 756 (1984) (internal quotation marks omitted). *See also St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Government of U.S. Virgin Islands*, 218 F.3d 232, 240 (3d Cir. 2000) ("[a] declaratory judgment or injunction can issue only when the constitutional standing requirements of a 'case' or 'controversy' are met.").

Plaintiffs are equally mistaken in claiming that they need not satisfy the redressability prong of the Article III standing analysis because they seek to enforce "the procedural requirements of the Constitution." Brief for Appellant at 49. *Massachusetts v. EPA*, 549 U.S. 497 (2007), relied on by plaintiffs, merely reaffirmed the principle, recognized in *Lujan,* that where Congress creates an express, statutory "procedural right to protect * * * concrete interests," parties may bring suit to enforce that right "if there is some possibility that the requested

relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts*, 549 U.S. at 517-18 (citing *Lujan*, 504 U.S. at 572 n.7). The Court did not suggest that the constitutional requirements for standing are relaxed in the absence of an express statutory right like the one at issue in that case. On the contrary, the Court reaffirmed the long-standing principle that it will "not * * * 'entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws,'" *id.* at 516-17 – exactly the type of suit that plaintiffs have filed.

II. Plaintiffs' Complaint Raises a Non-Justiciable Political Question

Even if plaintiffs could satisfy Article III's standing requirements, suit would be barred by the political question doctrine. Where, as here, the political branches work in concert to authorize and execute a military invasion, their "joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation." *Laird*, 451 F.2d at 33; *see also Youngstown*, 343 U.S. at 635 ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess in his own right plus all that Congress can delegate." (Jackson, J., concurring)); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (policies regarding the conduct of foreign relations and the war powers "are so exclusively

entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"). [5]

Similarly, plaintiffs' argument that the political question doctrine does not bar adjudication of this claim because Congress improperly delegated its clearly-defined Article I powers to the President, *see* Brief for Appellants at 40-43, misses the point. As noted above, courts have consistently held that Article III tribunals are ill-equipped to second-guess the way in which the political branches jointly exercise their war powers. This "delegation" argument is, in reality, a thinly-veiled attempt to circumvent the political question doctrine and argue the merits of plaintiffs' case. It is, moreover, an argument that has been roundly rejected. In *Doe*, 323 F.3d 141-44, the First Circuit found that *Clinton v. City of New York*, 524 U.S. 417 (1998), the case on which plaintiffs principally rely, provides no basis for a court to intrude into to the way in which the political branches carry out

[5] Plaintiffs rely on *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.D.C. 1990), for the proposition that a court can adjudicate whether a state of war exists. *See* Brief for Appellants at 16-17. As Judge Silberman explained in his concurrence in *Campbell v. Clinton,* 203 F.3d 19, 25 (D.C. Cir. 2000), however, any such suggestion in *Dellums* "is only dicta"; *Dellums* itself rejected a Congressman's request for a preliminary injunction forbidding the President from ordering military action against Iraq without a declaration of war on ripeness grounds. *See Dellums*, 752 F. Supp. 1149-52 (finding that the dispute was not ripe). In *Campbell*, the D.C. Circuit similarly concluded that a congressman lacked standing to challenge the President's use of force as violative of the War Powers clause and the War Powers Resolution. *Campbell*, 203 F.3d at 24.

their unique, shared war powers. And it further found – contrary to plaintiffs' argument in this case – that Congress did not impermissibly delegate its authority to declare war to the President. "To the contrary, Congress has been deeply involved in significant debate, activity, and authorization connected to our relations with Iraq for over a decade, under three different presidents of both major political parties, and during periods when each party has controlled Congress." *Id.* at 144.

Finally, even if the judiciary was empowered to second-guess the decisions made jointly by Congress and the President with regard to military matters, the political question doctrine would still bar adjudication of such claims because the Constitution provides no meaningful standards by which to judge those actions. *Baker*, 369 U.S. at 217. The Constitution does not define limits on the political branches' joint "power to conduct undeclared hostilities beyond emergency defense." *Laird*, 451 F.2d at 33. Nor do plaintiffs claim that it does. Rather, they assert that the June 1, 1787 "proceedings" of the Constitutional Convention provide this Court with all the clarity it needs to evaluate the President's action.

To articulate this claim is to refute it. Such deliberative proceedings are not reducible to a set of easily-applied principles. *See, e.g.*, *Youngstown Sheet & Tube*, 343 U.S. at 634-35 (Jackson, J., concurring) ("A century and a half of

partisan debate and scholarly speculation [as to the forefathers' views on the limits of executive power] yields no net result but only supplies ore or less apt quotations from respected sources on each side of any question. They largely cancel each other."). Nor are these proceedings in any way binding; ultimately, it is the Constitution's text—not its historical context—that controls.

And, in any event, plaintiffs' historical analysis yields only the unremarkable conclusion that the framers intended for Congress, rather than the President, to have the power to declare war. That observation adds nothing to the explicit text of Articles I and II of the Constitution. Courts have repeatedly held that this text provides no meaningful way to delineate and disaggregate the political branches' shared war powers. *Doe*, 323 F.3d at 143-44; *Laird*, 451 F.2d at 31-32; *Atlee v. Laird*, 347 F. Supp. 689, 705 (E.D. Pa. 1972). "Meddling by the judicial branch in determining the allocation of constitutional powers where the text of the Constitution appears ambiguous as to the allocation of those powers 'extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power.'" *Ange*, 752 F. Supp. at 514.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

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DECEMBER 2009

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), this brief uses proportionately spaced font and contains 4,801 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify, pursuant to Third Circuit Rule 31.1(c) that the text of the electronic brief submitted to the Court is identical to the text in the paper copies. I further certify that I ran the Microsoft Forefront v.1.71.614.0 virus detection program on the electronic file and the program detected no viruses.

/s/ Michael P. Abate
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Date: December 9, 2009

CERTIFICATE OF SERVICE

I certify that on this 9th day of December 2009, I caused the foregoing Brief for Appellee to be filed with the Court and served on counsel by filing it through the Court's CM/ECF system and by causing 10 copies to be delivered by OVERNIGHT DELIVERY to:

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