IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DENNIS KUCINICH, et al.,	)	
	)	
Plaintiffs,	)	Case No. 1:11-cv-01096 (RBW)
	)	
v.	)	
	)	
BARACK OBAMA, et al.,	)	
	)	
Defendants.	)	
_____	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

On June 15, 2011, Republican and Democratic members of Congress joined in filing this action to challenge the unilateral decision of President Barack Obama to intervene in the Libyan Civil War and the underlying policy that the President may commit the country to war without an authorization of Congress. Defendants have responded by effectively claiming that the constitutional and statutory violations detailed in the Complaint cannot be reviewed by any court or enforced by judicial means. The result would be to convert core constitutional and treaty limitations into purely aspirational and unenforceable statements—a result that runs against the most fundamental principles of the Framers.

On March 19, 2011, President Obama ordered U.S. military forces to attack Libyan government forces, led by Muammar Gaddafi, even though the President had not sought or received a declaration of war from Congress. Further, the Obama Administration stated that, as a policy, the President did not consider himself bound to consult with Congress or receive its approval for military operations. Instead, the President submitted a consolidated report to Congress with a post hoc explanation of his unilateral actions. *See* Letter from Barack Obama, President of the United States, to John Boehner, Speaker of the House of Representatives, and Daniel Inouye, President pro tempore of the Senate (June 15, 2011). The U.S. Constitution provides that "[t]he Congress shall have power. . . [t]o declare war," U.S. Const. art. I, § 8, cl. 11, and that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by law," *id.* art. I, § 9, cl. 7.

Despite not satisfying constitutional and statutory mandates, the Obama Administration has continued to use U.S. military personnel, funding, and infrastructure in the Libyan War. U.S. operations in Libya include all the classic elements of war, including, but not limited to, close

combat support, bombing of Libya's capital and key Libyan military assets, drone aircraft, air refueling operations, and the commitment of U.S. personnel to ground operations. *See* Compl. ¶¶ 35, 68, 77-80; Lolita C. Baldor, *Navy Says Drone Lost in Libya Likely Shot Down*, Associated Press, Aug. 5, 2011; Laurent Thomet, *NATO's Airborne Fuel Stations Keep Libya Air Raid Rolling*, Agence France-Presse (July 12, 2011); Mark Mazzetti and Eric Schmidt, *C.I.A. Agents in Libya Aid Airstrikes and Meet Rebels*, N.Y. Times (Mar. 30, 2011), http://www.nytimes.com/2011/03/31/world/africa/31intel.html. Even as other countries withdraw support for the Libyan War, the United States continues to supply military resources. *See NATO's Libya campaign causes civilian deaths, Russia Warns*, CNN (July 8, 2011, 10:22 GMT), http://articles.cnn.com/2011-07-07/world/libya.russia_1_rebel-stronghold-rebel-fighters-civilians; Laurent Thomet, *NATO Fights on Through Libya Coalition Shrinks*, Agence France-Presse (July 30, 2011, 11:21 AM), http://newsinfo.inquirer.net/33383/nato-fights-on-though-libya-coalition-shrinks. The Libyan War has cost the United States an estimated $1 billion and resulted in the loss of U.S. aircraft in combat operations—with another $1 billion pledged for future operations and support. *See* Baldor, *supra*; Steven Lee Myers, *$1 Billion Is Pledged to Support Libya Rebels*, N.Y. Times, June 9, 2011, at A4.

The Libyan War has raised controversy on a host of issues, including the advisability of entering a third war as the nation faces prohibitive debt and the continuing loss of lives in Afghanistan and Iraq. President Obama has confirmed that the Libyan War is not a response to a direct threat to the United States or even an effort to combat terrorism. Rather, President Obama has stated that the war is meant to protect the "universal rights" of Libyans in their civil war—a basis for war that has generated criticism. Compl. ¶¶ 60-61. Additionally, concerns have been raised over radical Islamic elements in the rebel forces—including a current leader of the

provisional government—as well as past allegations of war crimes by the rebel forces. *Libyan Government forces and opposition committed war crimes – UN Panel*, UN News Centre (Jun. 1, 2011), http://www.un.org/apps/news/story.asp?NewsID=38578&Cr=libya&Cr1l; *Former Jihadist at the Heart of Libya's Revolution*, CNN (Sept. 2, 2011), http://edition.cnn.com/2011/WORLD/africa/09/02/libya.belhaj.profile. Finally, reports in the last week raise concerns that the United States previously assisted the Libyan Government and Gaddafi in capturing dissidents and turning them over to the regime for torture, including rendition cases. *CIA May Have Worked With Gadaffi for Torture Renditions, Documents Show*, International Business Times, Sept. 6, 2011; *Libyan Intel Docs Show Ties to CIA Renditions*, CBS News, Sept. 3, 2011. By violating the constitutional and statutory limitations on his office, President Obama avoided the open and deliberative process of debate on these and other issues before taking the country to war.

BACKGROUND

Plaintiffs have submitted the factual and legal background as part of their Complaint. The standing question is inextricably linked to the underlying constitutional and statutory claims. Article 1, Section 8 of the U.S. Constitution confers on Congress alone the power to "provide for the common Defence." Art. I, § 8, cl. 1. To that end, Congress is authorized to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, cl. 11-14. Finally, Congress is authorized to make laws "necessary and proper for carrying into Execution" its enumerated powers. Art. I, § 8, cl. 18.

Article II of the U.S. Constitution, which vests "[t]he executive Power" in the President, grants the President authority as "Commander in Chief of the Army and Navy of the United States" and confers on the President the power and duty to "take Care that the Laws be faithfully executed." Art. II, §§ 1-3. As Alexander Hamilton explained, Article II empowers the President, as Commander-in-Chief of the U.S. armed forces, to decide the "direction of war" once war has been declared by Congress. *The Federalist No. 74* (Alexander Hamilton); *see also* 1 *The Records of the Federal Convention of 1787*, at 292 (Max Farrand ed., 1911). According to Hamilton, the President's authority as Commander-in-Chief was intended to be "much inferior" to that of the British king because it "amount[s] to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy." *The Federalist No. 69* (Alexander Hamilton). By contrast, the power of the British king "extend[ed] to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature." *Id.*

Although the Framers intended that the President possess emergency powers to unilaterally engage military forces to "repel sudden attacks," 2 *The Records of the Federal Convention of 1787*, at 318 (Max Farrand ed., 1911),[1] they were clear in their conviction that the President otherwise lacked authority to initiate war absent congressional authorization. This fact is confirmed by (1) the records of the Constitutional Convention of 1787, (2) the records of various state ratification conventions, and (3) subsequent statements by the Framers, the U.S. Supreme Court, and other important authorities. Moreover, the War Powers Resolution of 1973, 50 U.S.C. §§ 1541-48, provides statutory emphasis on Congress's power to initiate war and the Framers' intention to prevent a president from unilaterally committing the country to war.

[1] Many courts, including the D.C. Circuit, have adopted this understanding of the President's emergency war powers. *See, e.g.*, *Mitchell v. Laird*, 488 F.2d 611, 613-14 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1316 (2d Cir. 1973).

I. Constitutional Convention of 1787

Under the Articles of Confederation, the Continental Congress possessed "the sole and exclusive right and power of determining on peace and war." Articles of Confederation of 1781, art. IX, para. 1; *see* Raoul Berger, *War-Making by the President*, 121 U. Pa. L. Rev. 29, 39 (1972). At the Constitutional Convention, Edmund Randolph, delegate from Virginia, enumerated the defects of the Articles of Confederation with respect to national defense, declaring "that the confederation produced no security agai[nst] foreign invasion" because "congress [was] not . . . permitted to prevent a war nor to support it by th[eir] own authority." 1 *The Records of the Federal Convention of 1787*, *supra*, at 19. Randolph therefore proposed that the Articles of Confederation be "so corrected [and] enlarged as to accomplish the objects proposed by their institution; namely, common defence, security of liberty and general welfare." *Id.* at 20.

The first draft of the Constitution conferred on Congress the power to "make war." However, to permit the President to take emergency defensive military action, James Madison and Elbridge Gerry moved to replace "make war" with "declare war," "leaving to the Executive the power to repel sudden attacks." *Id.* Gerry vehemently opposed South Carolinia delegate Pierce Butler's proposal to vest all war power in the President alone, declaring that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." *Id.* George Mason echoed Gerry's opposition to Butler's proposal by arguing that the Executive Branch was "not safely to be trusted with [the war power]." *Id.* at 319. Mason indicated that he was "for clogging rather than facilitating war"—vesting the war power in Congress would ensure that wars were infrequent. *Id.*

II. State Ratification Conventions

Participants at the Pennsylvania, Virginia and North Carolina ratification conventions repeatedly contrasted the system of war powers in Great Britain, where the king could unilaterally declare war, with the system envisioned by the proposed Constitution, where only Congress had that power. Both those in favor of and those opposed to ratification understood the proposed Constitution as an instrument that vested war powers in Congress and left little room for unilateral engagement of military forces by the President.

At the Pennsylvania ratification convention, James Wilson, delegate from Pennsylvania to the Constitutional Convention, expressed confidence that the proposed Constitution would guard against unilateral military engagement by the President:

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

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 528 (Jonathan Elliot ed., 1836) (emphasis added); *see also* James Wilson, *Lectures on Law*, *in* 1 *The Works of James Wilson* 433 (Robert Green McCloskey ed., 1967) ("The power of declaring war, and the other powers naturally connected with it, are vested in congress.").

At the Virginia ratification convention, Patrick Henry, while a strong critic of the proposed Constitution, acknowledged that the document made Congress preeminent with respect to war powers. In fact, Henry decried the proposed Constitution as vesting *too much* power in Congress because "the same power that declares war has the power to carry it on." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as*

Recommended by the General Convention at Philadelphia, in 1787 (Jonathan Elliot ed., 1836). In contrast to Great Britain, where "[t]he king declares war . . . [and] the House of Commons gives the means of carrying it on," under the proposed Constitution "Congress can both declare war and carry it on, and levy your money, as long as you have a shilling to pay." *Id.* Other participants, such as George Mason, echoed this understanding of Congress's war powers. *See id.* (George Mason speaking on June 14, 1788: "How is this compared to the British constitution? Though the king may declare war, the Parliament has the means of carrying it on. It is not so here. Congress can do both."). Edmond Randolph, arguing in support of the proposed Constitution, declared that it placed "more powers in the hands of the people, and *greater checks upon the executive . . . than in England*." *Id.* (emphasis added). "In England," Randolph argued, "the king declares war. In America, Congress must be consulted. In England, Parliament gives money. In America, Congress does it." *Id.*

At the North Carolina ratification convention, James Iredell argued in support of the President as Commander-in-Chief of the armed forces:

> In almost every country, the executive has the command of the military forces. From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch [sic], and decision, which are necessary in military operations, can only be expected from one person. The President, therefore, is to command the military forces of the United States, and this power I think a proper one . . . .

4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* (Jonathan Elliot ed., 1836). Yet even Iredell noted the "very material difference" between the war powers of the king of Great Britain and that of the President, and emphasized that the President as Commander-in-Chief was not authorized to unilaterally engage in war:

> The king of Great Britain is not only the commander-in-chief of the land and naval forces, but has power, in time of war, to raise fleets and armies. He has also authority to declare war. *The President has not the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands.* The power of declaring war is expressly given to Congress, that is, to the two branches of the legislature—the Senate, composed of representatives of the state legislatures, the House of Representatives, deputed by the people at large. They have also expressly delegated to them the powers of raising and supporting armies, and of providing and maintaining a navy.

Id. (emphasis added).

III. Post-Ratification Statements and Actions on War Powers

In the decade following ratification, the Framers continued to explain the distribution of war powers under the new Constitution. For instance, during the "Pacificus-Helvidius" debates over the legality of President George Washington's Proclamation of Neutrality of 1793, Alexander Hamilton and James Madison issued competing pamphlets arguing for and against the Proclamation. Hamilton defended the Proclamation by arguing that "[i]f the Legislature have a right to make war on the one hand—it is on the other the duty of the Executive to preserve Peace till war is declared . . . ." Alexander Hamilton, *Pacificus, No. 1*, *in The Pacificus-Helvidius Debates of 1793-1794* (Morton J. Frisch ed., 2007). In response, Madison argued that the "power to judge of the causes of war," being concomitant to the power to declare war, was vested solely in Congress, and that therefore the Proclamation was invalid. James Madison, *Helvidius, No. 2*, *in The Pacificus-Helvidius Debates of 1793-1794*, *supra*. Writing to Thomas Jefferson six years later, Madison explained the basis for this divergence from the British model: "The constitution supposes, what the History of all [governments] demonstrates, that *the* [*Executive*] *is the branch of power most interested in war,* [*and*] *most prone to it*. It has accordingly with studied care, vested the question of war in the Legisl[ature]." Letter from

James Madison to Thomas Jefferson (Apr. 2, 1798), *in* 6 *The Writings of James Madison* 312, 312 (Gaillard Hunt ed., 1902) (emphasis added).

Over sixty years after the Constitutional Convention, then-Congressman Abraham Lincoln argued that the Framers, in granting the war powers solely to Congress, appreciated the potential for abuse inherent in unchecked executive power over war-making:

> The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. *This, our convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.*

Letter from Abraham Lincoln to William H. Herndon (Feb. 15, 1848), *in* 1 *The Collected Works of Abraham Lincoln* 451, 451-52 (Roy P. Basler ed., 1953) (emphasis added).

In his *Commentaries on the Constitution of the United States*, Justice Joseph Story also explained the rationale for vesting the war powers solely in Congress. Because "[w]ar, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings," the power to make war was entrusted to the branch most directly accountable to the public. 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1166 (1833). "It should therefore be difficult in a republic to declare war," Justice Story argued, "but not to make peace." *Id.* Justice Story even went so far as to declare that, given the import of a declaration of war, "there might be a propriety even in enforcing still greater restrictions, as by requiring a concurrence of two thirds of both houses." *Id.*

In the *Prize Cases*, the Supreme Court recognized that "Congress alone has the power to declare a national or foreign war." 67 U.S. (2 Black) 635, 668 (1862). The President, possessing the "whole Executive power," is "bound to take care that the laws be faithfully executed," and as

Commander-in-Chief may direct the U.S. armed forces once war has been initiated or declared. *Id.* The President, however, "has no power to initiate or declare a war either against a foreign nation or a domestic State." *Id.* Since 1862, federal courts have repeatedly recognized that the President's authority as Commander-in-Chief is limited by Congress's war powers in Article I, Section 8. *See, e.g.*, *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970) ("History makes clear that the congressional power 'to declare War' . . . was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative which was enjoyed by the British sovereign.").

The assertion of congressional control over the authorization of war ultimately found expression in the War Powers Resolution of 1973 (WPR), 50 U.S.C. §§ 1541-48, which was enacted over a presidential veto. The WPR established procedural safeguards to address the inconsistency between the text of Article I, Section 8 and its application, and to "fulfill the intent of the framers" that Congress assume a primary role in the introduction of military forces into hostilities. 50 U.S.C. § 1541(a). In the words of Senator Jacob Javits, one of the primary sponsors of the legislation, the WPR was "an effort to learn from the lessons of the last tragic decade of war in Vietnam which has cost our nation so heavily in blood, treasure, and morale." 119 Cong. Rec. 1394 (1973). The purpose of the WPR was "to give Congress both the knowledge and the mechanism needed to reclaim its constitutional power to declare war." *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982).

The legislative history of the WPR expressly rejected the notion that the President had authority under self-executing treaties to commit forces to war without congressional authority. William B. Spong, Jr., *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?*, 16 Wm. & Mary L. Rev. 823, 828-29 (1975). According to a report prepared by the

House Foreign Affairs Committee, nothing in the resolution "shall be construed to represent congressional acceptance of the proposition that Executive action alone can satisfy the constitutional process requirement contained in the provisions of mutual security treaties to which the United States is a party." H.R. Rep. No. 93-287, at 13 (1973).

On January 18, 1973, the War Powers Act was introduced in the Senate (a bill identical to the one passed by the Senate in April 1972). S. Res. 440, 93d Cong. (1973). In its report, the Senate Foreign Relations Committee wrote at length about the intent of the Framers to vest solely in Congress the power to initiate war:

> The division of authority intended by the framers was explicit: the Congress was to "declare"—*that is, to authorize the initiation of*—war. The President, as Commander-in-Chief, was to respond to sudden attacks and to conduct a war once it had started and command the armed forces once they were committed to action.

Id. at 11 (emphasis added). The Framers, according to the Committee, vested the war power in Congress "not primarily because they felt confident that the legislature would necessarily exercise it more wisely but because they expected the legislature to exercise it more *sparingly* than it had been exercised by the Crown, or would be likely to be exercised by the President as successor to the Crown." *Id.* at 19.

The Committee rejected the notion that Congress's previous acquiescence to the President's unilateral military engagement created an historical precedent justifying undeclared wars. Noting that Congress "bears a heavy responsibility for its passive acquiescence in the unwarranted expansion of Presidential power," the Committee borrowed a phrase from Professor Raoul Berger, who testified during hearings before the Committee: "Illegality is not legitimated by repetition." *Id.* at 16.

STANDARD FOR DISMISSAL UNDER RULE 12(b)(1)

In considering a motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the court must "accept all the complaint's well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in plaintiff's favor." *Gillespie v. Capital Reprographics, LLC*, 573 F. Supp. 2d 80, 83 (D.D.C. 2008); *see also Equal Rights Ctr. v. District of Columbia*, 741 F. Supp. 2d 237 (D.D.C. 2010). Rule 12(b)(1) motions are considered under the presumption that a "cause lies outside [the court's] limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). The factual assertions of the members of Congress in this action are presumed true for the purposes of this motion. Fed. R. Civ. P. 12(b)(1); *Gillespie,* 573 F. Supp. 2d at 83.

ARGUMENT

I. THE VIOLATION OF WAR POWERS BY THE PRESIDENT IS JUSTICIABLE AND SUBJECT TO JUDICIAL REVIEW.

A. The Members Have Established Injury-in-Fact As The Basis For Judicial Review.

Of all of the disputes that would divide the Legislative and Executive Branches (and justify the independence and jurisdiction given to the Judicial Branch), the unilateral commencement of war was one of the most grave and immediate concerns of the Framers. At issue in this case is the President's assertion that he is not required to obtain the consent of Congress to take the nation to war and may prosecute such a war using something akin to a war slush fund—billions of dollars that Defendants insist Congress set aside to allow such discretionary military interventions. If successful in blocking independent judicial review,[2]

[2] In a brief footnote, the Defendants also suggest that this Court lacks jurisdiction to consider Plaintiffs' claim for monetary damages. Defs.' Mem. at 3 n.2. While the court can consider the scope of damages after the merits in this case, the War Powers Resolution, while not expressly conferring a private cause of action, has been interpreted at least once (by the D.C. District Court) as providing an *implied* cause of action. *See Ange v. Bush*, 752 F. Supp. 509,

Defendants would succeed in reducing core constitutional guarantees to aspirational values and reducing the judiciary to a mere spectator in core constitutional conflicts.

1. Plaintiffs, as Legislators, Have Standing To Seek Judicial Review Over Violations of War Powers By The President.

Plaintiffs neither assert "abstract injury" to their generalized interest in having the Government act in accordance with law, *cf. Allen v. Wright*, 468 U.S. 737, 754 (1984), nor "abstract dilution of [their] institutional legislative power," *cf. Raines v. Byrd*, 521 U.S. 811, 826 (1997). Rather, they allege direct and concrete harm as a result of President Obama's continuing unilateral commitment of U.S. military forces in Libya. Specifically, they allege (1) the deprivation of their constitutionally prescribed role in voting to initiate war, and (2) the effective nullification of their votes against authorizing a continuation of hostilities in Libya. Plaintiffs have thus suffered a "complete nullification or withdrawal of a voting opportunity" concerning the initiation of hostilities, *see Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979), and their votes against authorizing continued U.S. military involvement in Libya have been ignored and "virtually held for naught," *see Coleman v. Miller*, 307 U.S. 433, 438 (1939). This type of injury is sufficiently concrete and particularized for Article III standing.

Although the Supreme Court in *Raines* stated that a plaintiff must allege "personal" injury to meet the standing requirements of Article III, *see Raines*, 521 U.S. at 818-19, it left

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512 & n.1 (D.D.C. 1990) ("The War Powers Resolution permits a private cause of action under *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)."). The Plaintiffs have brought this action pursuant to 28 U.S.C. § 1331 (1996), 50 U.S.C. §§ 1541-48, 28 U.S.C. §§ 1361 and 1651, and Article I, Section 8, Clause 11 of the Constitution. Defendants offer only one line questioning the waiver of sovereign immunity and only specifically contest the jurisdiction necessary to award monetary damages and attorneys fees. However, courts have previously recognized jurisdiction for relevant statutory claims, despite arguments of sovereign immunity. *E.g.*, *Reisman v. Caplin*, 317 F.2d 123 (D.C. Cir. 1963), *cert. granted*, 83 S. Ct. 1873 (1963) (concerning appeal of district court case for declaratory and injunctive relief, against arguments of sovereign immunity); *Dorsey v. U.S. Dep't of Labor*, 41 F.3d 1551 (D.C. Cir. 1994) (concerning appeal of district court case for monetary damages, against arguments of sovereign immunity); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (concerning appeal of district court case for monetary damages and discretionary, nonmonetary relief, against arguments of sovereign immunity).

intact its previous decision in *Coleman v. Miller*, 307 U.S. 433 (1939), which recognized that certain "institutional" or "official" injuries were sufficiently concrete and particularized for Article III standing, *see Raines*, 521 U.S. at 821-23; *Coleman*, 307 U.S. at 438; *accord Raines*, 521 U.S. at 831 (Souter, J., concurring) ("[I]t is at least arguable that the official nature of the harm here does not preclude standing."); *id.* at 841 (Breyer, J., dissenting) ("[T]he Constitution does not draw an absolute line between disputes involving a 'personal' harm and those involving an 'official' harm.").

In *Coleman*, twenty state senators, each of whom had voted against the proposed Child Labor Amendment to the Constitution, sued to challenge the ratification of the amendment on the ground that the state's lieutenant governor had illegally cast the deciding vote in favor of ratification. The Court found that the plaintiffs had established a "plain, direct and adequate interest in maintaining the effectiveness of their votes" and that their legislative voting power had been "overridden and virtually held for naught" because their votes would otherwise have been sufficient to defeat ratification. *Coleman*, 307 U.S. at 438. The Court concluded that the alleged infringement of the senators' "right and privilege under the Constitution to have their votes [be] given effect" was sufficient to create an Article III injury-in-fact and thereby conferred standing to the legislators. *Id.*

On several occasions prior to *Raines*, the D.C. Circuit, applying *Coleman*, found that legislators have standing to "seek judicial relief from allegedly illegal executive actions that impaired the exercise of their power as legislators." *Chenoweth v. Clinton*, 181 F.3d 112, 114 (D.C. Cir. 1999); *see Laroque v. Holder*, 755 F. Supp. 2d 156, 170-71 (D.D.C. 2010) (describing cases). In *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), *abrogated by Chenoweth*, 181 F.3d 112, the D.C. Circuit concluded that an individual U.S. senator had standing to challenge

the President's purported pocket veto of the Family Practice of Medicine Act. The court held that Senator Kennedy, who was among the sixty-four senators who voted in favor of the Act, had an "essential interest" in maintaining "the effectiveness of his vote" in favor of the Act, and also concluded that "the purposes of the standing doctrine [would be] fully served" by allowing Senator Kennedy to challenge "conduct by officials of the executive branch [that allegedly] amounted to an illegal nullification . . . of [his] exercise of his power." 511 F.2d 430, 436.[3]

Similarly, in *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979), the D.C. Circuit found that a small group of U.S. senators had standing to challenge the President's unilateral termination of a mutual defense treaty with the Republic of China because that action "deprived the Senate of the opportunity . . . to vote whether to prevent the termination of this treaty"—a right to which the senators claimed they were constitutionally entitled. *See also Moore v. U.S. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984) (holding that members had stated a "specific and concrete" injury when denied "an opportunity to debate and vote on" the origination of the Tax Equity and Fiscal Responsibility Act "in a manner defined by [the Origination Clause of the Constitution]").

In *Raines*, the plaintiffs (four U.S. senators and two members of the U.S. House of Representatives) had voted against the eventual passage of the Line Item Veto Act, but had lost the vote. *Raines*, 521 U.S. at 811. Distinguishing *Coleman*, the Supreme Court held that the plaintiffs did not have a sufficient "personal stake" in the dispute and could not rely on *Coleman* because they did not allege that their voting power was completely nullified—rather, "their votes were given full effect . . . [and] [t]hey simply lost that vote." *Id.* at 824.

[3] In *Kennedy*, the D.C. Circuit rejected the argument that "plaintiff legislators had standing only as a group" to protect the "collective effectiveness of their votes." The court concluded that "an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority" so long as he or she is "among the injured" whose votes were nullified by executive action. *Id.* (citations and internal quotation marks omitted).

Here, unlike in *Raines*, Plaintiffs' asserted injury is not simply an alteration of the "constitutional balance of powers between the between the Legislative and Executive Branches" to their detriment. *See id.* at 816. This is not a case in which Plaintiffs' legislative efforts have failed and they are seeking instead to accomplish their legislative objective through the courts. *Cf. id.* at 824; *Chenoweth*, 181 F.3d at 117 ("Unlike the plaintiffs in *Kennedy* and *Coleman* . . . [plaintiffs] cannot claim their votes were effectively nullified by the machinations of the Executive."); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 6 (D.D.C. 2002) ("[H]ere the congressmen voted on a resolution against President Bush's termination of the Treaty, and lost."). Nor do the Plaintiffs assert that the President's actions have altered prospectively the "meaning" and "integrity" of their votes such that their future votes will be "less effective than before." *Cf. Raines*, 521 U.S. at 825. Rather, the President's unilateral commitment of U.S. military forces in Libya has deprived Plaintiffs of an opportunity to exercise their constitutionally prescribed role in initiating war. Moreover, as in *Kennedy*, Plaintiffs' votes with respect to the Libyan conflict have been effectively nullified "by the machinations of the Executive." *Chenoweth*, 181 F.3d at 117; *see Kennedy*, 511 F.2d at 434-35.[4] The President's commitment of U.S. military forces in Libya has denied Plaintiffs the effectiveness of their votes to limit the scope of U.S. military actions in Libya and to reject authorization of continued hostilities.[5]

[4] Although the D.C. Circuit "has expressed some uncertainty as to the precise effect of *Raines*" on previous D.C. Circuit decisions upholding legislative standing, it has determined that at least one such decision, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), "may survive as a peculiar application of the narrow [vote nullification] rule announced in [*Coleman]*." *Chenoweth*, 181 F.3d at 117. In *Chenoweth*, the D.C. Circuit noted that even under *Raines*' interpretation of *Coleman*, "one could argue that the plaintiff in *Kennedy* had standing." *Id.* at 116. The court reasoned that "[b]ecause it was the President's veto—not a lack of legislative support—that prevented the [Family Practice of Medicine Act] from becoming law . . . those in the majority could plausibly describe the President's action as a complete nullification of their votes." *Id.* at 117.

[5] The plaintiffs have voted with the majority of House members on at least two occasions to limit the scope of U.S. military actions in Libya. On May 26, 2011, each of the plaintiffs voted in favor of an amendment to the National Defense Authorization Act for Fiscal Year 2012—adopted in the House by a vote of 416 to 5—whose purpose is to "prevent funds authorized in the Act from being used to deploy, establish, or maintain the presence of Members of the Armed Forces or private security contractors on the ground in Libya" except to "rescue a Member of the Armed

The President's unilateral commitment of U.S. military forces in Libya also continues in the absence of any congressional declaration or authorization of war. Neither the House nor the Senate has voted to authorize continued U.S. military involvement in Libya. In fact, the House has expressly rejected such authorization—on June 24, 2011, each of the plaintiffs voted with the overwhelming majority of members against House Resolution 68, which would have authorized the "limited use" of U.S. military forces "in support of the NATO mission in Libya." 157 Cong. Rec. H4549 (daily ed. June 24, 2011) (defeating H.R. Res. 68).

Despite such legislative measures, the President continued military operations in Libya, including "close combat support, bombing of Libya's capital and key Libyan military assets, and commitment of U.S. personnel to ground operations to assist the rebel forces in the Libyan civil war." *See* Compl. ¶ 35. Defendants further insist that the unilateral power used in Libya is inherent to the presidency and can be repeated at the President's sole election. As in *Coleman*, this policy specifically negates Congress's legislative authority under the Constitution by circumventing voting entirely. Indeed, the injury suffered by Plaintiffs is even greater than that in *Coleman*, in which at least some legislative process occurred.

Plaintiffs acknowledge the contrary result in the D.C. Circuit's decision in *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), which they believe runs contrary to both the constitutional text and existing precedent. In *Campbell*, the D.C. Circuit considered a challenge by members of Congress to President Clinton's commitment of U.S. armed forces to the NATO operation in Kosovo. Concluding that the *Coleman* "nullification" rule did not apply to the plaintiffs in light

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Forces from imminent danger." *See* 157 Cong. Rec. H3730 (daily ed. May 26, 2011) (adopting amendment to H.R. 1540). On June 3, 2011, six of the plaintiffs voted in favor of House Resolution 292—adopted in the House by a vote of 268 to 145—which provides that the President "shall not deploy, establish, or maintain the presence of units and members of the Armed Forces on the ground in Libya unless the purpose of the presence is to rescue a member of the Armed Forces from imminent danger." *See* H.R. Res. 292, 112th Cong. (2011) (finding that the President "has not sought, and Congress has not provided, authorization for the introduction or continued involvement of the United States Armed Forces in Libya"); 157 Cong. Rec. H4020 (daily ed. June 3, 2011) (adopting H.R. Res. 292).

of *Raines*, the court reasoned that the plaintiffs' legislative voting power had not been completely nullified because President Clinton "did not claim to be acting pursuant to the defeated declaration of war or a statutory authorization, but instead 'pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive.'" *Campbell*, 203 F.3d at 22.

As in *Campbell*, President Obama claims to be acting pursuant to his constitutional authority as Commander-in-Chief. Letter from Barack Obama, President of the United States, to John Boehner, Speaker of the House of Representatives, and Daniel Inouye, President Pro Tempore of Senate (Mar. 21, 2011). However, in this case, President Obama has asserted that he alone defines what a war is for constitutional purposes—allowing a president to simply avoid Article I, Section 8 with a rhetorical flourish. While the bombing in Kosovo was designed to stop the ethnic cleansing that had already claimed thousands of lives, the intervention in Libya actively supported one side in a civil war and involved support for tactical ground operations for the rebel army. In many ways, the instant case shows the inevitable result of the *Campbell* decision, if read as broadly as Defendants suggest. It allows the President unlimited authority to do exactly what the Framers sought to prevent—unilaterally decide to take the nation into a foreign war.

In determining the applicability of *Coleman*, there should be no distinction between an executive official illegally voting to ratify an otherwise defeated constitutional amendment and a president simply not submitting a matter for a required vote. In both instances, plaintiff legislators' votes are completely "overridden and virtually held for naught." *Raines*, 521 U.S. at 822 (quoting *Coleman*, 307 U.S. at 438). Likewise, the *Campbell* court reasoned that "the key to understanding the [Supreme Court's] treatment of *Coleman* and its use of the word nullification"

was its recognition that the *Coleman* senators had no legislative remedy to rescind ratification of the constitutional amendment that they claimed had been defeated. *Id.* at 22-23. In the instant case, the Obama Administration has shown that it will use billions of dollars of previously appropriated funds to prosecute a war for months, including attacks on the capital of a foreign nation and close combat support of a rebel army—all without a trace of congressional support or authorization.

What is most striking about Defendants' use of *Campbell* is the suggestion that members of Congress are precluded from accessing the courts for independent review if they have other means to respond to a constitutional violation.[6] The existence of the violation (and the right to independent review) should not depend on whether judges believe Congress could fight back in other ways. Many constitutional rights could be defended in other ways, but courts still grant review to declare acts or policies unconstitutional. Moreover, this reliance on alternative avenues of relief ignores the possibility that Congress could be entirely passive in the face of presidential abuses—leaving only the judiciary as a check on presidential violations. The mere fact that the majority of members of Congress may prefer to avoid their responsibility under Article I is of no import. Defendants' approach would make the Constitution less protective in cases of one-party control or even tyranny—the opposite of the Framers' intent. Even if a president entirely cowed Congress into submission, that would not convert a constitutional violation into a constitutional prerogative.[7]

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[6] Notably, the Supreme Court in *Raines* made only passing reference to this factor in deciding that the plaintiffs there lacked standing. *See Raines*, 521 U.S. at 829-30 (emphasis added) ("We also note that our conclusion neither deprives Members of Congress of an adequate remedy . . . nor forecloses the Act from constitutional challenge . . . . *Whether the case would be different if any of these circumstances were different we need not now decide.*").

[7] As Judge Randolph noted in his concurring opinion in *Campbell*, "[t]o say that your vote was not nullified because you can vote for other legislation in the future is like saying you did not lose yesterday's battle because you can fight again tomorrow. The Supreme Court did not engage in such illogic. When the Court in *Raines* mentioned the possibility of future legislation, it was addressing the argument that 'the [Line Item Veto] Act will nullify the [Congressmen's] votes in the future . . . .' This part of the Court's opinion, which the majority adopts here, is quite

Defendants rely on the fact that the House twice rejected proposals to defund the military operations in Libya. *See Campbell*, 203 F.3d at 23; Defs.' Mot. at 8. Yet, "as 'every schoolboy knows,' Congress may pass such legislation, not because it is in favor of continuing the hostilities, but because it does not want to endanger soldiers in the field." *Campbell*, 203 F.3d at 31 n.10 (Randolph, J., concurring) (quoting *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973)). The fact that a president can force the country into this kind of quagmire is the very reason that the Framers insisted on a vote *before* taking the country to war. After committing the nation to war, Congress will often continue appropriations not to ratify (post hoc) the unilateral decision of a President but merely to protect and support servicemembers. As Judge Randolph explained, "[t]he War Powers Resolution itself makes the same point" by stating that "'[a]uthority to introduce United States Armed Forces into hostilities . . . shall not be inferred . . . from any provision of law . . . , *including any provision contained in any appropriation Act.*'" *Id.* (quoting 50 U.S.C. § 1547(a)(1)) (emphasis added).

Finally, and perhaps most significantly, the *Campbell* majority's interpretation of *Raines*, particularly its overemphasis on the existence of political remedies, "is tantamount to a decision abolishing legislative standing" to challenge executive intrusion on Congress's war powers. *See id.* at 32 (Randolph, J., concurring). As Judge Randolph aptly observed in *Campbell*, "as long as Congress and the Constitution exist, Members will always be able to vote for legislation" and thus always—at least in theory—retain legislative remedies. *See id.* "If the Supreme Court [in *Raines*] had meant to do away with legislative standing, it would have said so and it would have given reasons for taking that step." *Id.*

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beside the point to our case. No one is claiming that their votes on future legislation will be impaired or nullified or rendered ineffective." *Id.*

Despite the admittedly contrary language in *Campbell*, it is not true that *Campbell* prevents this Court from recognizing standing. Putting aside the taxpayer standing asserted, *Campbell* was a conceptually divided panel in a case that did not involve, as the present case does, claims ranging from treaty violations to misuse of appropriated funds to the existence of a new stated and sweeping policy on interventions. For example, the Plaintiffs assert that the President is violating the terms of the NATO treaty, which expressly confined its application in future conflicts. By ignoring the limiting language of the treaty, the President is nullifying the votes of the legislative branch. Moreover, the panel decision in *Campbell* did not overrule *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). As Judge Randolph noted, *Chenoweth* directly contradicts the premise that the ability to respond in other ways (other than a lawsuit) negates standing:

> "If *Chenoweth* is correct, the majority opinion in this case must be wrong. If *Chenoweth* is correct, it is no answer to say—as the majority says in this case—that standing is lacking because, despite the pocket veto, Congress could pass the same law again, or it could retaliate by cutting off appropriations for the White House or it could impeach the President."

Campbell, 203 F.3d at 32-33 32 (Randolph, J., concurring). While the judges in *Campbell* agreed that the members did not have standing, they were divided on the reasons for the lack of standing—from mootness to alternative means to lack of nullification. More importantly, events since 2000 have shown the implications of denying judicial review of these conflicts.[8] In this case, President Obama has claimed the right to intervene in a civil war whenever he considers the universal rights of foreign citizens to be threatened—even when there is no threat to the

[8] Notably, Judge Silberman relied heavily on the writing of John Yoo to support his theory that judicial review can be barred when Congress has other means to respond to an unconstitutional act. *Id.* at 23. Yoo's extreme view of presidential powers has long been placed into question, including his view that inherent presidential powers allowed for the creation of what has been widely condemned as a torture program using waterboarding of suspects.

United States. As demonstrated by the Libyan War, the sweep of such an assertion of power is breathtaking.

2. Plaintiffs, as Taxpayers, Have Standing To Seek Judicial Review Over Violations of War Powers By The President.

Defendants argue that Plaintiffs' "assertion of taxpayer standing is squarely foreclosed by binding precedent," Defs.' Mot. at 9, and that these arguments relate to "settled issues of standing," *id.* at 12. This professed clarity is difficult to discern. The Supreme Court itself continues to struggle with drawing lines on such standing questions; the two most recent cases were decided by 5-4 decisions, one of which achieved only a three-justice plurality. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007). Both cases turned on small details, with the Court eschewing both broad acceptance and outright rejection of taxpayer standing doctrine. Defendants consistently oversimplify past decisions and overlook important details in the present case that suggest Plaintiffs should have standing as taxpayers.

i. Legal Standards Governing Taxpayer Standing

In *Flast v. Cohen*, 392 U.S. 83 (1968), the Supreme Court held that federal taxpayer status can be sufficient to create standing to sue to challenge unconstitutional acts of the federal government. While it is true that the Supreme Court has repeatedly expressed caution in applying this doctrine, it is equally important that the Court has never overruled *Flast*, despite having many opportunities to do so. Instead, as Defendants admit, the Court continues to apply "a two-part test to determine whether a taxpayer has standing." Defs.' Mot. at 9. A plaintiff must (1) "establish a logical link between" his status as a taxpayer and the governmental action being challenged, and (2) "establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Flast*, 392 U.S. at 102.

ii. *Flast*'s First Prong is Met Because the Libyan War Is Funded By Appropriations Made by Congress Pursuant to its Taxing and Spending Powers.

Flast's first prong, requiring a "logical link between" taxpayer status and the challenged government action, simply means that a taxpayer only has standing when he challenges the constitutionality of an exercise of power under the taxing and spending clause. *See id.* In this case, substantial federal tax dollars, collected and appropriated for military operations by Congress under the Taxing and Spending Clause, are being used to prosecute an unconstitutional war. While the War Powers Clause at issue in this case does not specifically mention taxation or the spending of money, neither does the Establishment Clause at issue in *Flast*.

Defendants assert that this simple analysis cannot apply because "a plaintiff 'fails to meet the first prong of the *Flast* standing test' when 'he does not challenge any act of Congress, but expenditures by the executive branch . . . because courts have consistently held that challenges to actions by members of the Executive Branch by citizens solely on the basis of their status as taxpayers are not cognizable in the federal courts.'" Defs.' Mot. at 9-10 (quoting *Mahorner v. Bush*, 224 F. Supp. 2d 48, 50-51 (D.D.C. 2002)). This is simply not true. The Supreme Court has specifically held that taxpayer standing can apply in suits against an Executive Branch officer. *See Bowen v. Kendrick*, 487 U.S. 589, 619 (1988) ("We do not think, however, that appellees' claim . . . is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary. Indeed, *Flast* itself was a suit against the Secretary of HEW, who had been given the authority under the challenged statute to administer the spending program that Congress had created."). The D.C. Circuit has noted that, based on *Bowen*, "it is now clear that the [*Flast*] exception includes more than just taxpayer suits, based on the Establishment Clause, attacking

taxing-and-spending statutes on their face. Also within the exception are taxpayer actions claiming a violation of that constitutional provision because of the manner in which the Executive Branch is administering the statute." *Am. Jewish Cong. v. Corp. for Nat'l. & Cmty. Serv.*, 399 F.3d 351, 355 (D.C. Cir. 2005). Suits against the Executive Branch are barred only when they "allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Flast*, 392 U.S. at 102.

Defendants appear to concede this point in their next paragraph, admitting that "the participation of Executive Branch officials in an action challenged by taxpayers may not by itself defeat taxpayer standing." Defs.' Mot. at 10. However, Defendants assert, for taxpayer standing to apply in these kinds of cases, "Congress must 'expressly authorize[] or appropriate[] funds for' the action that is challenged." *Id.* (quoting *In re Navy Chaplaincy*, 534 F.3d 756, 762 (D.C. Cir. 2008)). Plaintiffs do not dispute this requirement but feel that it is clearly satisfied in the present case. Congress has expressly provided appropriations for the President to carry out military actions through the Overseas Contingency Operations fund and other statutes. *See, e.g.*, Compl. ¶¶ 86, 92. These funds are now being used to violate the Constitution because they are being used to prosecute an undeclared war. Compl. ¶ 203. Plaintiffs thus claim, not that all of these appropriations are facially unconstitutional, but that they are unconstitutional "as applied"—a claim specifically allowed under taxpayer standing by the *Bowen* court. 487 U.S. at 619.[9]

[9] Central to the *Bowen* court's holding is an analysis of the statute underlying the action. *Bowen*, 487 at 619-20. In the present case, Plaintiffs have expressed deep frustration that the President has refused to disclose the exact funding source for action in Libya. Compl. ¶ 103. They are thus unable to describe that statute as part of their taxpayer standing argument. If taxpayer standing is defeated for this reason, the President will have used one constitutional violation to bar several others from judicial review.

Defendants further argue that Plaintiffs cannot claim to challenge these appropriations because, "as legislators themselves, plaintiffs seek to uphold the primacy of legislative appropriations." Defs.' Mot. at 10. But Plaintiffs' status as members of Congress is irrelevant to taxpayer standing. Taxpayer standing and legislator standing (discussed in detail above) are distinct inquiries and Plaintiffs claim taxpayer standing in their personal capacities. Plaintiffs, like those in *Bowen*, challenge the legislative appropriations only as they are being used in the present case, not as being facially unconstitutional.[10]

iii. *Flast*'s Second Prong is Met Because the Delegation of War Powers to Congress is Closely Linked with the Taxation Power and is Intended as a Limit on Taxing and Spending.

Flast's second prong requires "a nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged." *Flast*, 392 U.S. at 102. The *Flast* court further explained that the constitutional provision at issue must be at least partially intended as a limit on government taxing and spending. *Id.* at 103. This requirement was met in *Flast* because the drafters of the Establishment Clause, particularly James Madison, were specifically concerned that the government would spend federal taxpayer dollars to establish a national religion. *Id.* ("Our history vividly illustrates that one of the specific evils feared by those who drafted the

[10] Defendants rely heavily on *Mahorner v. Bush*, 224 F. Supp. 2d 48, 50 (D.D.C. 2002), a case in which the plaintiff advanced such frivolous claims as standing to oppose a President's war powers based on "a major threat that as a citizen he could 'suffer loss of life in the response forthcoming from the country attacked' . . . [and] that such military action initiated by President Bush 'has created a substantial threat to Plaintiff and others in Plaintiff's class of being vaporized by nuclear war . . .'" In the instant case, Plaintiffs allege that the President has used appropriated funds for purposes barred by both the Constitution and federal law, including the laws under which the money was committed by Congress for other purposes. The reliance of the Defendants on *In re Navy Chaplaincy*, 534 F.3d 756, 762 (D.C. Cir. 2008) is equally distinguishable. In that case, the plaintiffs were challenging a federal regulation that favored one faith over another. Yet, they were challenging the statute funding all chaplains while contesting the regulatory program. In the instant case, the Administration (while declining to be specific on the sources of the appropriations) insists that Congress created funds for the use in such wars—an act that would effectively negate congressional authority over declaring and funding wars under the constitutional system created by the Framers.

Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.").

Plaintiffs' claims are directly tied to taxpayer status to the same, if not a greater extent, than the nexus in *Flast*. For example, the fifth claim for relief is based on the constitutional requirement that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. This claim is based on the taxing and spending power, requiring that the government only spend tax dollars with the approval of Congress. Defendants, however, seek to have it both ways. They first insist that Congress gave the Administration these funds to allow for such interventions as the one in the Libyan Civil War while then claiming that there are no specific appropriations at issue to justify standing.

Likewise, the War Powers Clause represents an important limit on taxation. Article I of the Constitution grants Congress the taxing and spending power, the power to declare war, and the power to "raise and support Armies." U.S. Const. art. I, § 8, cls. 1, 7; U.S. Const. art. I, § 9, cl. 11. These powers overlap and together create a unified congressional war power. James Madison wrote that the "power of levying and borrowing money, being the sinew of that which is to be exerted in the national defense, is properly thrown into the same class with" Congress's war powers. The Federalist No. 41 (James Madison). Alexander Hamilton further stressed "that the whole power of raising armies was lodged in the *legislature*, not in the *executive*; that this legislature was to be a popular body, consisting of the representatives of the people periodically elected." The Federalist No. 24 (Alexander Hamilton). The War Powers Clause thus creates the same limit as does the Use of Federal Monies power. By requiring costly government actions like wars to go through the people's elected representatives in Congress, the Constitution

prevents the government from acting against its citizens' interests and then leaving them with the bill.

The analogy between the War Powers and Establishment Clauses has been articulated in the past by individual justices. For example, in a dissent from a denial of a writ of certiorari, Justices Brennan and Douglas explained that suits under the War Powers Clause are closely analogous to the suit in *Flast* under the Establishment Clause:

> In *Flast* the challenged expenditures were said to have violated the Establishment and Free Exercise Clauses of the First Amendment. Here they are said to contravene the provision in Art. I, § 8, cl. 11, which gives Congress the power to "declare war." No declaration of war has been made respecting Vietnam. Hence the question can be phrased in terms of the constitutionality of the use of funds to pursue a "Presidential war."
>
> The action here, as in *Flast*, is a challenge by federal taxpayers of a violation of a specific constitutional provision. Actions of the Congress and of the Executive Branch are involved here as in *Flast*. The question is therefore no more "political" in this case than in *Flast*.

Sarnoff v. Schultz, 409 U.S. 929, 930-31(1972) (Brennan, J. and Douglas, J., dissenting).

Similarly, in vacating a stay of a district court opinion, Justice Douglas (acting as Circuit Justice) explained:

> In *Flast v. Cohen*, the Court held that a taxpayer could invoke "federal judicial power" when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. That case involved alleged violations of the Establishment Clause of the First Amendment. The present case involves Art. I, s 8, cl. 11, which gives Congress and not the President the power to "declare War."
>
> If applicants are correct on the merits they have standing as taxpayers. The case in that posture is in the class of those where standing and the merits are inextricably intertwined. I see no difference, constitutionally speaking, between the standing in *Flast* and the standing in the present case for our Cambodian caper contested as an unconstitutional exercise of presidential power.

Holtzman v. Schlesinger, 414 U.S. 1315, 1318-19 (1973) (Douglas, Circuit Justice).

As Justices Douglas and Brennan recognized, there is no principled reason to permit taxpayer standing in the Establishment Clause context but deny it in the War Power Clause context. In cases under both clauses, a taxpayer seeks to enforce a crucial constitutional protection by enjoining the spending of money to further an unconstitutional goal. In cases under both clauses, the failure to recognize taxpayer standing could potentially render crucial constitutional mandates unenforceable. Because Plaintiffs seek to enjoin the spending of taxpayer money in furtherance of an unconstitutional undeclared war and because the War Power Clause acts as a specific constitutional limitation on the power of the government to spend money, Plaintiffs have standing as taxpayers to bring this action.

While Defendants argue that taxpayer standing can exist only in cases involving the Establishment Clause, *see* Defs.' Mot. at 11-12, the Supreme Court's analysis of this issue has been more deliberative and nuanced. In *Arizona Christian School Tuition Organization v. Winn*, for example, the Court noted that it had not "lower[ed] the taxpayer standing bar" in cases involving other constitutional provisions, but did not say that it had raised the bar in those cases by forbidding taxpayer standing entirely. 131 S. Ct. at 1445. Furthermore, the Court said only that it "has declined" to apply *Flast* elsewhere to this point, not that it will always do so.[11] *Id.* The *Winn* decision's citations directly following the sentence quoted by the government support this interpretation: they provide that the Statement and Account Clause and the Incompatibility Clause have

[11] Clearly, the *Winn* case was an Establishment Clause case, and taxpayer standing was ultimately denied in it because the plaintiffs challenged a tax credit. *Id.* at 1447. The sentence quoted by Defendants is dicta from a general discussion of taxpayer standing early on in the opinion, and is not binding on this Court. Furthermore, the quoted sentence comes originally from the three-justice plurality opinion of *Hein*, 551 U.S. at 609. *Hein* was also an Establishment Clause case and thus additionally presents the same dicta issue as *Winn*. *Id.*

specifically been found not to meet *Flast*'s second prong but say nothing about other constitutional provisions. *Id.*

Defendants' other authorities are also taken out of context. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347 (2006), says that "'only the Establishment Clause' *has* supported federal taxpayer suits" but not that only the Establishment Clause *can* support federal taxpayer suits. (emphasis added). The two D.C. Circuit decisions cited by Defendants refer to the *Flast* exception as an Establishment Clause exception but do so only because they evaluate Establishment Clause claims. *Am. Jewish Cong*,, 399 F.3d at 355; *Newdow v. Eagen*, 309 F. Supp. 2d 29, 37 (D.D.C. 2004). Neither includes any discussion of other constitutional provisions. *Id.*

Plaintiffs do not contest that the *Flast* exception is narrow, but that does not mean the *Flast* exception should never be applied. As illustrated above, the constitutional provisions at issue in this case are perfectly suited to the *Flast* exception because the Framers drafted the provisions in part as limits on the government's power to tax and spend.

As the Court noted in *Flast*, the issue of standing in such cases has "an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." *Flast*, 392 U.S. 83, 94 (1968). In this case, the Administration is claiming that Congress can create an effective slush fund for undeclared wars, insisting that it has the authority from Congress to spend over $1 billion to prosecute wars without any express congressional authorization of war. In *Flast*, taxpayers sued the Secretary of Health, Education, and Welfare over the use of funds to support a prohibited purpose: the funding of religious schools. The Supreme Court noted that such an act is prohibited by the Constitution and reversed the District Court which, on the basis of *Frothingham* v. *Mellon*, 262

U.S. 447 (1923), had denied taxpayer standing. Because "the challenged program involve[d] a substantial expenditure of federal tax funds," the Court found that the taxpayers had a right to judicial review on whether the Constitution barred such funding of an expressly unconstitutional purpose. *Id.* at 103. The Court based this decision on the fact that "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* Likewise, one of the Framers' chief concerns was the use of federal funds to support an undeclared war. It is counterintuitive to elevate one protection (religious freedom) over another (war powers) when both rights were given equal attention by the Framers.

B. The Underlying Claims In This Challenge Are Not Political Questions.

Defendants' effort to frame this dispute as a non-justiciable political question captures the radical view of presidential power underlying the instant motion. After first ignoring express limitations in the text of the Constitution, Defendants proceed to belittle the matter further by characterizing it as a simple political dispute. As the D.C. Circuit sitting *en banc* recently explained, the political question doctrine bars only those claims that would require a court to "reconsider[] the wisdom of discretionary decisions made by the political branches." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F. 3d 836, 842 (D.C. Cir. 2010) (en banc). But Plaintiffs do not attack the wisdom of Defendants' policies in Libya. Instead, they allege that Defendants lack the legal authority to prosecute a war without congressional authorization. "[W]hether the government had legal authority to act" is a "purely legal issue" that is not barred by the political question doctrine. *Id.* This is true even if the legal authority is a matter of political dispute. "Resolution of litigation challenging the constitutional authority of one of the three branches

cannot be evaded by courts because the issues have political implications . . . ." *I.N.S. v. Chadha*, 462 U.S. 919, 943 (1983); *accord Baker v. Carr*, 469 U.S. 186, 217 (1962) ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action, denominated 'political', exceeds constitutional authority."). This lawsuit challenges Defendants' constitutional and statutory authority to prosecute a war without congressional authorization. As such, it does not present a political question.

Defendants argue that this case is barred by the political question doctrine because it relates to the "foreign policy and military arenas." Defs.' Mot. at 14. But the Supreme Court in *Baker v. Carr* explicitly rejected this categorical approach to the doctrine. 369 U.S. at 213-17. As the D.C. Circuit explained in *El-Shifa*, "the presence of a political question . . . turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action." *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 842.

The distinction is clearly delineated in past cases. If a claim requires the court "to decide whether taking military action was 'wise'—a 'policy choice[] and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch,'" then the political question doctrine bars review. *Id.* (quoting *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring) (alterations in original)). In contrast, claims "'[p]resenting purely legal issues' such as whether the government had legal authority to act" are not barred by the doctrine. *Id.* (alteration in original).

The application of this approach to a war powers challenge was illustrated by Judge Tatel's concurring opinion in *Campbell v. Clinton*, 203 F.3d at 37-41. In a discussion that has since been adopted by the D.C. Circuit *en banc*, *see El-Shifa Pharm. Indus. Co.*, 607 F.3d at 842, Judge Tatel concluded that the members' claims were not barred by the political question

doctrine. *Campbell*, 203 F.3d at 40. The claims, Judge Tatel explained, did not call for a policy judgment but a legal one: "whether the President possessed legal authority to conduct the military operation." *Id.* Judge Tatel continued:

> Did the President exceed his constitutional authority as Commander in Chief? Did he intrude on Congress's power to declare war? Did he violate the War Powers Resolution? Presenting purely legal issues, these questions call on us to perform on the most important functions of Article III courts: determining the proper constitutional allocation of power among the branches of government.

Id. at 40-41. Thus, although the subject matter of the members' claims related to foreign and military affairs, the claims presented a classic legal issue fit for judicial resolution rather than a political question. *Id.; see also Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.D.C. 1990) ("While the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation's foreign affairs, it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs."). Plaintiffs challenge not the wisdom of Defendants' Libya policies but their legality. Their claims do not require the court to set or second-guess foreign policy. They require only that the court "perform one of the most important functions of Article III Courts": interpret the Constitution and the War Powers Resolution to determine the extent of governmental power. *Campbell*, 203 F.3d at 40.[12]

Defendants also argue that Plaintiffs' claims "lack judicially manageable standards." Defs.' Mot. at 18. To be sure, "war" is not precisely defined in the Constitution. But nor are "unreasonable search and seizure," "probable cause," "freedom of speech," or "establishment of

[12] This is particularly the case because, unlike in past war powers challenges, there has been no congressional authorization whatsoever for the war in Libya. The Plaintiffs' challenge thus cannot be recast as a challenge to Congress's policy choice to authorize a war in one way rather than another. *See Orlando v. Laird*, 443 F.2d 1039, 1043 (2nd Cir. 1971) (holding that "[t]he choice, for example, between an explicit declaration on one hand and a resolution and war-implementing legislation, on the other, as the medium for expression of congressional consent" presents a political question).

religion," to name just a few constitutional terms that have been given precise content through judicial decisions. As Judge Tatel explained in *Campbell*,

> Whether the military activity in Yugoslavia amounted to "war" within the meaning of the Declare War Clause, U.S. Const. art. I, § 8, cl. 11, is no more standardless than any other question regarding the constitutionality of government action. Precisely what police conduct violates the Fourth Amendment guarantee "against unreasonable searches and seizures?" When does government action amount to "an establishment of religion" prohibited by the First Amendment? When is an election district so bizarrely shaped as to violate the Fourteenth Amendment guarantee of "equal protection of the laws?" Because such constitutional terms are not self-defining, standards for answering these questions have evolved, as legal standards always do, through years of judicial decisionmaking.

Campbell, 203 F.3d at 37. The Constitution is a document devoid of precise definitions; if such definitions were a prerequisite for constitutional claims, the judiciary would be impotent indeed.

Furthermore, federal courts have historically been capable of deciding whether a particular military action constitutes a war. In *Bas v. Tingey*, the Supreme Court was faced with a statutory provision that applied only if war was ongoing. 4 U.S. (4 Dall.) 37 (1800). The Court examined the nature of naval confrontations between the United States and France and concluded that "in fact and in law we are at war." *Id.* at 42 (Washington, J.). Similarly, the Supreme Court in *The Prize Cases* had to "enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force." 67 U.S. (2 Black) 635, 666 (1862).

The D.C. Circuit has indicated a willingness to face this question head on in a case factually similar to this one. *See Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973).[13] *Mitchell v. Laird* was a suit by members of Congress seeking a ruling that the Vietnam War was unconstitutional. In considering a motion to dismiss, the D.C. Circuit noted that "the critical

[13] The D.C. Circuit called *Mitchell*'s standing holding into doubt in *Harrington v. Bush*, 553 F.2d 190 (1977), but the case's discussion of the political question doctrine remains valid law.

question to be initially decided is whether the hostilities in Indo-China constitute in the Constitutional sense a 'war.'" *Id.* The Court noted that the plaintiffs had alleged specific facts regarding the magnitude and duration of the conflict, and wrote that "[t]here would be no insuperable difficulty in a court determining whether such allegations are substantially true." *Id.* And once that determination was made, the court wrote that it did not "see any difficulty in a court facing up to the question as to whether because of the war's duration and magnitude the President is or was without power to continue the war without Congressional approval."[14] *Id.*

Defendants next argue that this case presents a political question because of the risk of damage to foreign relations due to "multifarious pronouncements" from the branches regarding the war in Libya. Defs.' Mot. at 20. This argument misconstrues the relief sought. Plaintiffs acknowledge the D.C. Circuit's holding in *El-Shifa* that "courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security." *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 842. The President's decision that prosecution of a war in Libya is wise American policy is indeed a political one that Plaintiffs do not and could not challenge before this Court.[15] Thus, contrary to Defendants' claims, this case will not require the Court to contradict the President's pronouncements regarding the impact of Gaddafi's behavior on the region or the importance of the American

[14] The Second Circuit reached the same conclusion in *Berk v. Laird*, 429 F.2d 302 (2nd Cir. 1971). There, the court rejected the government's argument that there was no justiciable standard by which a court could decide if an undeclared war was ongoing. *Id.* The court explained that "[s]ince orders to fight must be issued in accordance with proper authorization from both branches under some circumstances, executive officers are under a threshold constitutional 'duty *(which) [sic] can be judicially identified and its breach judicially determined*.'" *Id.* (quoting *Baker*, 369 U.S. at 198) (emphasis added). The court therefore explained that, "[i]f the executive branch engaged the nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for some mutual participation by Congress in accordance with Article I, section 8." *Id.* That hypothetical case from *Berk* is the case before this Court.

[15] That is not to say that Plaintiffs agree with the President's policy, only that they concede that the wisdom of that policy is not subject to judicial challenge.

mission. Instead, this case presents only the legal question of "whether the government had the legal authority to act." *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 842. Whatever the wisdom of the Libyan War, it is beyond dispute that Defendants were required to follow the Constitution and statutory law in pursuing it.

Because Plaintiffs have limited their case to challenge only the legal authority for the Libyan policy and not the wisdom of that policy, there is no danger of multifarious pronouncements in this case. Each branch's pronouncements will be restricted to its area of authority, and the Executive Branch's proclamations regarding American foreign policy interests will remain untrammeled. But "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Thus, "since the constitutionality of [Defendants' actions] is for this Court to resolve, there is no possibility of 'multifarious pronouncements' on this question." *Chadha*, 462 U.S. at 942. At most, a holding by this court would contradict Defendants' claims to have acted legally. If that should occur, it is Defendants who are to blame for pronouncing beyond their constitutional bailiwick. "Any short-term confusion that judicial action might instill . . . is but a small price to pay for preserving the constitutional separation of powers . . . ." *Campbell*, 203 F.3d at 41 (Tatel, J., concurring).

The cases that Defendants cite do not contradict this analysis. Many of their cases are no longer good law. Defendants rely heavily on Judge Silberman's concurring opinion in *Campbell*, 203 F.3d at 24-28. But in *Campbell*, the three-judge panel splintered on the political question issue, leaving no controlling opinion. Judge Tatel found the case justiciable. *Id.* at 37-41 (Tatel, J., concurring). Judge Silberman found the case non-justiciable. *Id.* at 24-28 (Silberman, J., concurring). Judge Randolph did not address justiciablility. *Id.* at 28-34

(Randolph, J., concurring in the judgment). *Campbell* itself thus did nothing to change D.C. Circuit law regarding the political question doctrine. The D.C. Circuit sitting *en banc*, however, subsequently adopted Judge Tatel's concurring opinion as the correct analysis of the political question doctrine as it relates to war powers and foreign affairs. *See El-Shifa Pharma. Indus. Co.*, 607 F.3d at 842. Quoting extensively from Judge Tatel's *Campbell* concurrence in describing the political question doctrine, the *El-Shifa* court explained that the Circuit had distinguished between claims challenging the wisdom of government action and claims challenging the legal authority for government action. *El-Shifa Pharma. Indus. Co.*, 607 F.3d at 842 (citing *Campbell*, 203 F.3d at 40 (Tatel, J., concurring)).

Furthermore, the *El-Shifa* court implicitly rejected Judge Silberman's categorical conclusion that war powers lacked sufficient standards to be justiciable, explaining that "despite some sweeping assertions to the contrary, the presence of a political question in these cases turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action." *Id.* at 842 (citing *Campbell*, 203 F.3d at 40 (Tatel, J., concurring)) (citations omitted). After *El-Shifa*, Defendants' reliance on Judge Silberman's concurrence is misplaced; it is Judge Tatel's concurrence that represents current law. And, as discussed above, Judge Tatel's approach requires a finding that Plaintiffs' claims are justiciable.

Defendants' reliance on *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990), and *Mahroner v. Bush*, 224 F. Supp. 2d 48 (D.D.C. 2002), fares no better. Both district court cases precede the Circuit's decision in *El-Shifa*, so they are invalid to the extent that they are inconsistent with that decision. And inconsistent they are. In *Ange*, the district court balked at deciding "precisely what allocation of war power the text of the Constitution makes to the executive and legislative branches." *Ange*, 752 F. Supp. at 512. That question, however, presents "purely legal issues

such as whether the government had legal authority to act." *El-Shifa Pharma. Indus. Co.*, 607 F.3d at 842 (internal quotation marks omitted). And it manifestly does *not* require a court to "decide whether taking military action was 'wise,'" which is how the Circuit described the scope of the political question doctrine in *El-Shifa*. *Id.* The district court's opinion in *Ange* is thus based on reasoning that does not survive *El-Shifa*.[16]

The *Mahroner* decision faces similar problems. The *Mahroner* court did not evaluate the specific questions raised by the plaintiffs; it merely cited a list of cases involving war powers in which the political question doctrine was found to apply. *See Mahroner*, 224 F. Supp. 2d at 52-53. In doing so, the court proceeded categorically and failed to examine "precisely the question the plaintiff raise[d] about the challenged action." *El-Shifa Pharma. Indus. Co.*, 607 F.3d at 842. It thus represents one of the "sweeping statements to the contrary" that the D.C. Circuit abrogated in *El-Shifa*. *El-Shifa Pharma. Indus. Co.*, 607 F.3d at 842 ("Despite some sweeping statements to the contrary . . . the presence of a political question in these cases turns not on the nature of government conduct under review but more precisely on the question the plaintiff raises about the challenged action.").

Others of Defendants' cases turned on protracted factual disputes not present here. In both *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600 (D.D.C. 1983), and *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982), the court invoked the political question doctrine due to the difficulty of factfinding that the cases would require. As the *Crockett* court explained, "the factfinding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture non-

[16] Furthermore, even if its reasoning were still valid, *Ange* never represented the consensus on the D.C. District Court. The same day that *Ange* was issued, another judge on the court issued *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990), holding that "courts do not lack the power and the ability to make the factual and legal determination of whether this nation's military actions constitute war for purposes of the constitutional War Clause." 752 F. Supp. 1141, 1146.

justiciable." *Crockett*, 558 F. Supp. at 898; *accord Sanchez-Espinoza*, 568 F. Supp. at 600 ("[T]he covert activities of CIA operatives . . . are perforce even less judicially discoverable than the level of participation of U.S. military personnel in hostilities in El Salvador."). The *Crockett* court was clear that it was this factual difficulty, and not the legal question, that led to dismissal:

> The Court disagrees with defendants that this is the type of political question which involves potential judicial interference with executive discretion in the foreign affairs field. Plaintiffs do not seek relief that would dictate foreign policy but rather to enforce existing law concerning the procedures for decision-making. Moreover, the issue here is not a political question merely because it involves the apportionment of power between the executive and legislative branches. The duty of courts to decide such questions has been repeatedly reaffirmed by the Supreme Court.

Crockett, 558 F. Supp. at 898. This factual difficulty is not present in the case before this Court. Contrary to the situation in Central America in the 1980s, the government has been open about American involvement in Libya. Plaintiffs' allegations regarding the level of U.S. involvement are based primarily on reports from Executive Branch officials themselves, and Defendants have provided no evidence disputing those reports. The concern that led to dismissal in those cases simply does not apply in this case.[17]

Finally, other of Defendants' cases involve challenges to policy choices rather than legal authority and are thus entirely consistent with this Court's retaining jurisdiction over this case. *See Doe I v. State of Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005) (lawsuit would require court to condemn foreign government's actions despite decision of political branches not to do so); *Sadowski v. Bush*, 293 F. Supp. 2d 15 (D.D.C. 2003) (challenge to executive's exercise of prosecutorial discretion in not prosecuting all immigration violations); *Kucinich v. Bush*, 236 F. Supp. 2d. 1 (D.D.C. 2002) (challenge to President's decision to withdraw from a foreign treaty).

[17] As an additional reason for caution in relying on the district court opinion from *Sanchez-Espinoza* in this case, it should be noted that on appeal the D.C. Circuit expressly declined to rely on the political question doctrine, affirming on other grounds. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985) (Scalia, J.) ("Without *necessarily* disapproving the District Court's conclusion that all aspects of the present case present a nonjusticeable political question, we choose not to resort to that doctrine for most of the claims." (emphasis added)).

The cases cited by Defendants thus do not support the invocation of the political question doctrine in this case.

C. Plaintiffs' Third and Fourth Claims Present a Case or Controversy Under Article III.

The third and fourth claims, based on the "U.N. Security Council Resolution" and "North Atlantic Treaty," respectively, each constitute an independent case or controversy under Article I. Defendants wrongly characterize these claims as a request for an advisory opinion. Defs.' Mot. at 22-23. This conclusory argument is maintained only by ignoring the express language of the Complaint. Plaintiffs are challenging Defendants' assertion, exercised in Libva and capable of repetition anywhere in the world, that both of these treaties allow the President to engage in war without a congressional declaration. This policy effectively nullifies the role (and vote) of the legislative branch in accepting such international obligations.

For example, the North Atlantic Treaty expressly states under Article 5 that the treaty was to protect against an armed attack against "one or more" of the signatory nations in Europe or North America. North Atlantic Treaty art. 5 (emphasis added). Defendants simply ignore assertions that this conflict falls outside of the Treaty as approved by Congress.[18] They do not address such facts as (1) Libya is not a signatory or participating member of NATO; (2) Libya did not attack the United States or any NATO member; or (3) Libya has not been cited as a threat to the United States or any NATO member. Likewise, Defendants ignore that fact that Article 11 of the North Atlantic Treaty requires that it "shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes." North Atlantic Treaty art. 11. This was not done in the Libyan conflict and Defendants maintain that it does not have to be

[18] Putting aside the standard that all factual assertions must be read in favor of the non-moving party in a motion to dismiss, Defendants should not be allowed to introduce new arguments in reply—thereby denying Plaintiffs an opportunity to respond.

done in future conflicts. President Obama maintains that, once a treaty is approved, he can simply exceed the authority and limits of the treaty while opposing any access to judicial review, as in this case.

As a result of Defendants' actions pertaining to U.N. Security Council Resolution 1973, Plaintiffs suffered a cognizable and individualized injury because the effect of Plaintiffs' congressional vote was nullified. Under the guise of U.N. Security Council Resolution 1973, Defendants committed the U.S. military to a foreign war without constitutionally mandated congressional approval. U.S. Const. art. I, § 8, cl. 11. U.N. Security Council Resolution 1973 does not supersede or invalidate constitutional requirements. By violating the U.S. Constitution in not seeking or obtaining Congress's approval prior to committing U.S. military to a foreign war, Defendants have completely nullified the value of Plaintiffs' voting power. The injury suffered by Plaintiffs can be redressed by the Court's declaration that the U.N. Security Council Resolution does not give the President independent authority to commit forces to war without an authorization from Congress. Otherwise, any time the Administration can secure U.N. support for a war, it can avoid the requirements of Article I, Section 8.

Similarly, Defendants' unconstitutional violation of the North Atlantic Treaty caused Plaintiffs to suffer cognizable and individualized injury because the value of Plaintiffs' congressional vote was again completely nullified. Plaintiffs' injury is traceable to Defendants' violation of the language of the North Atlantic Treaty. Under the North Atlantic Treaty, military assistance is to be provided for defense of a member nation under threat or attack. However, Defendants violated the language of the Treaty by engaging in the Libyan War, in which no member nations required defense or were under threat or attack, because Libya is not a member nation. By violating the language of the North Atlantic Treaty and engaging in foreign war

without the congressional approval, the U.S. Constitution was also violated, and Defendants nullified Congress's voting power. The value of Plaintiffs' nullified vote can be restored by this Court. The injury is redressable through the Court's declaration that (1) Defendants violated the language of the North Atlantic Treaty by engaging in war under the treaty despite no member nations being threatened or attacked, and (2) this violation resulted in an unconstitutional engagement of U.S. military forces without congressional authorization. Under *Coleman* and *Goldwater*, such injury provides grounds for congressional standing. *Coleman v. Miller*, 307 U.S. 433 (1939); *Goldwater*, 617 F.2d at 702. These injuries are redressable by this Court in the form of a declaration that Defendants engaged in illegal and unconstitutional acts.

II. PRUDENTIAL CONSIDERATIONS WEIGH IN FAVOR OF, NOT AGAINST, EXERCISING JURISDICTION OVER PLAINTIFFS' CLAIMS

Defendants conclude briefly by claiming that, issues of standing aside, "plaintiff legislators 'who have collegial or in-house remedies available to them,' should not be permitted to come to court to 'assert[] their constitutional or legislative claims.'" Defs.' Mot. at 24 (quoting from *Conyers v. Reagan*, 578 F. Supp. 324, 326 (D.D.C. 1984)). This argument largely repeats the earlier claim of alternative remedies used to oppose legislative standing. As Defendants admit, it is not clear whether this doctrine, called equitable discretion, continues to exist after *Raines* because *Raines* merges separation of powers and Article III inquiries. *Id.* at 24 n.8. If a plaintiff satisfies the legislative standing test, a rejection as a matter of discretion by the court would raise a host of additional constitutional concerns. Defendants argue that, even if the Plaintiffs have a right to seek judicial review on one of the most fundamental questions under the Constitution, this Court should simply refuse to consider the question as a matter of discretion.

This equitable discretion argument rests on the mistaken view that Plaintiffs have in-house remedies available to them. Defendants maintain that they can use previously

appropriated funds to conduct an undeclared war like the one in Libya. Even if Congress could move with considerable speed, it is not clear that the Administration would accept the right of Congress to order a halt to operations, particularly given the arguments in this motion concerning the President's inherent authority as Commander and Chief. Moreover, Defendants' claim that "[P]laintiffs' dispute is 'primarily with [their] fellow legislators,'" is not true. *Id.* at 24 (quoting from *Lowry v. Reagan*, 676 F. Supp. 333, 339 (D.D.C. 1987)). This argument turns the question—and reality—on its head. Defendants first refuse to seek congressional authority to intervene in a foreign civil war and then suggest, in this action, that the failure of Congress to somehow stop them is evidence of support or acquiescence. Once engaged in a war, there are a host of reasons why Congress may not wish to cut off funds. This does not mean that Congress supports the war or desires the war to continue. It certainly does not mean that Congress agrees with the unconstitutional assertion of executive power that led to the intervention in Libya. This lawsuit is not about whether the United States should be involved in Libya; it is about whether the Executive Branch or the Legislative Branch should make that decision.

Plaintiffs do not demand the "blunt injunctive decision" that Defendants fear. *Id.* at 24 (quoting from *Dellums v. Bush*, 752 F. Supp. 1141, 1150-51 (D.D.C. 1990)). Of Plaintiffs' requested relief, only one claim is for an injunction (and even that demands the cessation of military action that is much more limited in scale than the actions in the cases cited by Defendants), while six are for declaratory relief. In fact, since the primary objective of the Libyan War (protection of civilians from the Gaddafi regime) has already been met, this case presents an ideal opportunity for the Court to clarify the Constitution's division of war powers for future conflicts without interfering with sensitive, high stakes military operations.

Not only are Defendants' prudential concerns not applicable to the current case, but other prudential concerns weigh in favor of exercising jurisdiction. In many similar past cases, courts declined jurisdiction essentially because a better solution was available. The *Raines* court, for example, correctly predicted that the statute in question would eventually cause a more traditionally cognizable injury and a plaintiff better suited to challenge the statute would emerge. *Raines*, 521 U.S. at 834 (Souter, J., concurring); *see also Clinton v. City of New York*, 524 U.S. 417 (1998) (overturning the line-item veto act at question in *Raines*). In the present case, nobody stands to suffer a more concrete injury than Plaintiffs, and it is not clear that this issue will ever be resolved if this case is dismissed. Under Defendants' interpretation, the Framers strongly insisted on congressional authorization of war, but then created a judicial system that prevents that guarantee from being enforced in the courts.

Even if it were true that Congress acquiesced to the usurpation of its war-making authority, the constitutional violation remains. The Framers were exceptionally pragmatic men. They foresaw and feared times when Congress might become the passive instrument of an abusive president. For that reason, they created an independent judiciary to maintain the structural protections of the system, including the requirement of a vote of Congress as a precondition for war. Under Defendants' theory, any structural constitutional guarantee would not be enforceable as a matter of equitable discretion so long as Congress failed to act in other ways to protect legislative authority. Thus, if Congress were composed entirely of one party or simply of political cowards, there would not be any check and balance exercised through the third remaining branch. This argument reduces federal courts to a mere spectator in moments of constitutional crisis; a branch that is not as much independent as it is impotent to deal with one of the most dangerous forms of the intrusion into legislative authority. For men who feared all

forms of tyranny, this result would make a mockery of the tripartite system. Just as the Framers created protections of minority views and groups that could be enforced in the courts, they did not make the structural guarantees of the Constitution dependent on majoritarian support. The placement of the war powers in Article I was done deliberately as a guarantee that this nation could not go to war without a vote of Congress—even when Congress might wish to avoid such a vote. Without the courts, what is left (in the name of judicial "discretion") is to leave war as a discretionary matter of a president—the raw, unchecked power that the Framers spoke so fervently to condemn.

CONCLUSION

In light of the foregoing, Plaintiffs respectfully ask the Court to deny Defendants' Motion to Dismiss the Complaint filed by these members of Congress.

Respectfully submitted,

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September 9, 2011

CERTIFICATE OF SERVICE

Pursuant to LCvR 5.3, I hereby certify that, on September 9, 2011, I electronically filed with the Clerk of the Court the foregoing Proof of Service of Plaintiffs' Opposition Memorandum to Defendants' Motion to Dismiss using the CM/ECF system, and service was effected electronically pursuant to LCvR 5.4(d) on the following party:

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