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.	)	
	)	

REPLY IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In their Opposition, plaintiffs ask this Court to break new ground in settled standing doctrines. In contravention of the D.C. Circuit's decision in *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), plaintiffs invite this Court to recognize an exception to the jurisdictional bar developed in *Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312 (1997), that would permit plaintiffs standing in their institutional capacities as legislators to challenge the proper allocation of the constitutional war powers. In the alternative, plaintiffs ask this Court to side step the separation of powers concerns that counsel against legislative standing by permitting all legislators to sue, as long as they do so in their capacities as taxpayers. Such an end run should not be permitted in light of existing D.C. Circuit and Supreme Court case law prohibiting taxpayer standing to raise challenges, unrelated to the Establishment Clause, to Executive Branch action that is allegedly in violation of legislative command.

The importance of the jurisdictional bar in the wake of *Raines* to suits such as the present is magnified by the doctrines historically recognized by courts as barring consideration of the merits of plaintiffs' claims. Plaintiffs' challenges to the allocation of the constitutional war powers have been recognized as presenting core political questions, and courts have recognized the prudential considerations counseling against review even if those claims could be held to be justiciable. Accordingly, even if this Court were to accept plaintiffs' invitation to return to an era in which the jurisdictional prohibitions on standing were not so clear, the Court nevertheless should refuse to evaluate plaintiffs' claims on their merits.

ARGUMENT[1]

I. PLAINTIFFS' ASSERTION OF STANDING TO SUE AS LEGISLATORS AND TAXPAYERS IS FORECLOSED BY BINDING PRECEDENT

A. Plaintiffs' Alleged Institutional Injury in Their Capacities as Legislators Does Not Establish Standing to Sue

In their Opposition, plaintiffs assert that they have suffered a "direct and concrete harm" sufficient to provide them with standing in the present case based upon "(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." Opp. at 13. In so asserting, plaintiffs do not point this Court to any authority that would support such an allegation of injury in this context following the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312 (1997), and the D.C. Circuit's decision in *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000). Instead, plaintiffs' Opposition focuses on the history of the case law prior to the Supreme Court's decision in *Raines* and criticizes the D.C. Circuit's decision in *Campbell*. No matter how strongly plaintiffs disagree with the current state of the law, however, this Court is not free to ignore it. Accordingly, plaintiffs' asserted injuries in their legislative capacities, "based on a loss of political power, not loss of any private right," fail to establish standing to sue

[1] In a footnote of their Opposition, plaintiffs apparently continue to maintain that they have a cause of action for monetary damages pursuant to the War Powers Resolution. *See* Opp. at 12-13 n.2. While plaintiffs no longer appear to rely on 42 U.S.C. § 1988 for the waiver of sovereign immunity that would permit such relief, they suggest that one district court has interpreted the War Powers Resolution to provide "an *implied* cause of action." *Id*. (citing *Ange v. Bush*, 752 F. Supp. 509, 512 & n.1 (D.D.C. 1990)). However, a cause of action is not equivalent to a cause of action *for monetary damages*, which the D.C. Circuit has recognized is "singularly inappropriate" in the War Powers Resolution context. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985). Indeed, "[n]either the text nor the legislative history . . . suggests an attempt to create private damage actions, which would be strange tools for resolution of inter-branch disputes or allocation of intra-branch responsibilities, particularly in the sensitive fields of military and foreign affairs." *Id.*

in the present case. *Raines*, 521 U.S. at 821, 117 S. Ct. at 2318; *see also* Mem. in Supp. of Defs.' Mot. to Dismiss at 5-9.

Plaintiffs make only two arguments that attempt to distinguish their allegations of institutional injury from those consistently rejected by the courts in the wake of *Raines*. The first argument suggests that the present case is different because "[t]his is not a case in which Plaintiffs' legislative efforts have failed and they are seeking instead to accomplish their legislative objective through the courts. 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.' 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." Opp. at 16 (internal citations omitted).

Plaintiffs recognize, as they must, that the D.C. Circuit reached the "contrary result" in *Campbell*. Opp. at 17. And the decision in *Campbell* is not an outlier on this issue; it followed instead, and was consistent with, the numerous cases rejecting claims by legislators that their votes were nullified because they were not given the opportunity to cast a vote on a particular issue. Indeed, in *Chenoweth v. Clinton*, the D.C. Circuit rejected as sufficient for Article III standing the allegation that legislators had been "deprived . . . of their constitutionally guaranteed . . . vote on issues and legislation" as a result of the actions of the President. 181 F.3d 112, 113 (D.C. Cir. 1999). There, the plaintiff legislators had argued that their injury was more severe than the one rejected by the Supreme Court in *Raines*, as they allegedly had been "denied . . . any opportunity to vote for or against" a presidential initiative. *Id.* at 116. The D.C. Circuit held that "[t]his reasoning misperceives the theory of standing at issue in *Raines*":

> The plaintiffs in that case did not contend, as the Representatives imply, that their injury was the result of a procedural defect in the

> passage of the Line Item Veto Act. Rather, their view was that once the Act became law, it "alter[ed] the constitutional balance of powers between the Legislative and Executive Branches," to their detriment. . . . More to the point, it is exactly the position taken by the Representatives here: Their injury, they say, is the result of the President's successful effort "to usurp Congressional authority by implementing a program, for which [he] has no constitutional authority, in a manner contrary to the Constitution." Applying *Moore*, this court presumably would have found that injury sufficient to satisfy the standing requirement; after *Raines*, however, we cannot.

Id. at 116 (citation omitted). Thus, while plaintiffs' assertion of an Article III injury from their alleged inability to vote on an issue may have had some vitality prior to *Raines*, it is now clear that such injury fails to fall within the exception in *Raines* for the "nullification" of a congressional vote.[2] *See id*.; *see also Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1338 (D.C. Cir. 1999) ("What we see instead is, at most, a claim that the Lands Conservation Act . . . had the effect of rendering the Alaska Legislature unable to control hunting and fishing on

[2] It is interesting to note that, in their attempt to distinguish the present case from *Raines*, plaintiffs point to *Chenoweth* and *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002), as cases in which, assertedly unlike the present case, "legislative efforts have failed." Opp. at 16. However, the unsuccessful legislative efforts in those cases cannot be distinguished from the efforts of plaintiffs here with regard to Libya. In both *Chenoweth* and *Kucinich*, plaintiffs had attempted to overturn an action by the President that allegedly was in excess of his statutory or constitutional authority, and, in both cases, such efforts were unsuccessful. *See Chenoweth*, 181 F.3d at 113; *Kucinich*, 236 F. Supp. 2d at 6. Indeed, in *Kucinich*, "President Bush did not submit the question of treaty termination to the Senate or the House" before he gave his notice to terminate the ABM Treaty. *Kucinich*, 236 F. Supp. 2d at 3. Accordingly, the legislative effort in *Kucinich* took the form of a resolution, offered by congressman Kucinich some six months *after* the President had given notice of his intent to withdraw from the treaty, to require the President to "respect the Constitutional role of Congress and seek the approval of Congress for the withdrawal." *Id*. at 6. That Resolution parallels the effort made by congressman Kucinich here with regard to Libya, as he similarly had proffered a resolution that would "direct[] the President, pursuant to section 5(c) of the War Powers Resolution, to remove the United States Armed Forces from Libya." 157 Cong. Rec. H4021 (daily ed. June 3, 2011) (defeating H.R. Con. Res. 51). As defendants have explained, that resolution, like the resolution in *Kucinich*, was unsuccessful. *See id*. Accordingly, as in *Kucinich*, plaintiffs' allegations of injury do not constitute proof that their votes had been nullified. "Rather, '[t]hey simply lost that vote.'" *Kucinich*, 236 F. Supp. 2d at 7 (quoting *Raines*, 521 U.S. at 824, 117 S. Ct. at 2320).

federal lands within the State. If for these reasons the individual legislators cannot enact valid laws . . ., or cannot enact legislation implementing the Act . . ., their loss (or injury) is a loss of political power, a power they hold not in their personal or private capacities, but as members of the Alaska State Legislature.") (internal citation omitted); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 6 (D.D.C. 2002) ("As their complaint characterizes it, 'plaintiffs have sustained a grievous institutional injury by being deprived of their constitutional right and duty to participate in treaty termination.' This alleged injury mirrors that claimed in *Raines*, where the congressmen argued they were 'divest[ed] . . . of their constitutional role in the repeal of legislation.' It is, effectively, the same *institutional* injury as in *Raines*, where the Line Item Veto Act allegedly 'alter[ed] the constitutional balance of powers between the Legislative and Executive Branches.'") (internal citations omitted).

Putting the historical debate aside, however, the controlling decision on the institutional injury alleged by plaintiffs here remains *Campbell v. Clinton*. Plaintiffs acknowledge the "contrary result" in that case, and they focus instead on their disagreement with the decision.[3] *See, e.g.*, Opp. at 18-19 (disputing the D.C. Circuit's analysis of the nullification exception); *id.* at 19 (arguing that standing "should not depend on whether judges believe Congress could fight back in other ways"); *id*. at 20 (disputing the availability of appropriations remedies as an effective option for Congress); *id.* ("[T]he *Campbell* majority's interpretation of *Raines* . . . 'is tantamount to a decision abolishing legislative standing' to challenge executive intrusion on Congress's war powers."); *id*. at 21 (citing Judge Randolph's concurrence in *Campbell* for the proposition that *Campbell* is inconsistent with *Chenoweth*); *id*. (arguing that the "judges in

[3] When criticizing the panel decision, plaintiffs occasionally reference "Defendants' use of *Campbell*." *See, e.g.*, Opp. at 19. However, plaintiffs do not explain how defendants' "use of *Campbell*" differs in any manner from the reasoning of the D.C. Circuit in that case.

Campbell . . . were divided on the reasons for the lack of standing"); *id*. at 21 n.8 (noting Judge Silberman's "reli[ance] . . . on the writing of John Yoo").

Plaintiffs make only one passing attempt at distinguishing *Campbell*'s binding effect on their assertion of legislative standing, arguing that "*Campbell* . . . did not involve . . . claims ranging from treaty violations to misuse of appropriated funds[4] to the existence of a new stated and sweeping policy on interventions." Opp. at 21. But plaintiffs do not explain how the existence of additional *claims* would change this Court's analysis of their allegations of *injury*, particularly when plaintiffs expressly acknowledge that even these additional claims are based on the same asserted injury to their legislative interests. *See id*. ("By ignoring the limiting language of the treaty, the President is nullifying the votes of the legislative branch."); *see also Raines*, 521 U.S. at 820, 117 S. Ct. at 2318 ("In the light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their *claimed injury* is personal, particularized, concrete, and otherwise judicially cognizable.") (emphasis added); *Campbell*, 203 F.3d at 23 (cautioning against conflating standing with the merits of a claim). Plaintiffs in *Campbell* presented different claims and a different factual context than those presented in *Raines*, but the "wholly abstract and widely dispersed" institutional injury asserted in these, and other similar, cases remains the same—one that repeatedly has been held to be insufficient to establish standing to sue. *See Raines*, 521 U.S. at 829, 117 S. Ct. at 2322. The same result is thus

[4] The D.C. Circuit has, in fact, rejected legislative standing in a case involving a claim pursuant to the Anti-Deficiency Act, 31 U.S.C. § 1301 *et seq*. *See Chenoweth*, 181 F.3d at 113.

commanded here, where plaintiffs do not dispute that their allegations of injury track those previously foreclosed by the D.C. Circuit in *Campbell*.

B. Plaintiffs' Alleged Injury in Their Capacities as Taxpayers Does Not Establish Standing to Sue

Plaintiffs next dispute defendants' assertion that plaintiffs lack standing to sue as taxpayers. According to plaintiffs, it is "difficult to discern" the "professed clarity" in the taxpayer standing case law, in light of the fact that "the two most recent [Supreme Court] cases were decided by 5-4 decisions," and both cases turned on "small details." Opp. at 22. Nevertheless, regardless of the narrowness of the majority in the opinions, the decisions and their subsequent interpretation by the D.C. Circuit remain binding on this Court. Plaintiffs do not dispute that their taxpayer standing arguments ask this Court to be the first to recognize taxpayer standing for claims, unrelated to the Establishment Clause, against the alleged expenditure of funds by the Executive Branch in violation of legislative command. In light of the binding authority, that is not a result that this Court should permit.

As an initial matter, plaintiffs argue in their Opposition that they have satisfied the first prong of the taxpayer standing analysis in that they are entitled to challenge the actions of the Executive Branch through a taxpayer lawsuit. *See* Opp. at 23-25. In so doing, plaintiffs purport not to dispute the requirement that, for taxpayer standing, "Congress must 'expressly authorize[] or appropriate[] funds for' the action that is challenged." Opp. at 24 (citing Mem. in Supp. of Defs.' Mot. to Dismiss at 10). According to the Opposition, plaintiffs feel that this requirement is satisfied simply because "Congress has expressly provided appropriations for the President to carry out military actions through the Overseas Contingency Operations fund and other statutes." *Id*. This confusing (and apparent change in) position cannot extend, however, to an assertion by plaintiffs that there is an express authorization or appropriation for the use of these funds *in this*

particular context, as plaintiffs expressly claim in the Appropriations Clause count of their Complaint that "the Administration is barred from using the Overseas Contingency Operations (OCO) funds, which are expressly limited for use in operations directly related to the global war on terror." Compl. ¶ 201. As the D.C. Circuit held in *In re Navy Chaplaincy*[5], "that contention directly undermines any claim to taxpayer standing." 534 F.3d 756, 762 (D.C. Cir. 2008).

In any event, even if plaintiffs are now alleging, in contrast to their Appropriations Clause claim, that there is generally available funding for overseas operations from which the Executive Branch is entitled to draw on a discretionary basis to support operations, taxpayer standing does not "encompass discretionary Executive Branch spending." *Id.* As the D.C. Circuit has recognized, the alternative approach would remove all limitations on the taxpayer standing doctrine: "'Because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, proclamation or speech—to Establishment Clause challenge by any taxpayer in federal court.'" *Id*. (quoting *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 610, 127 S. Ct. 2553, 2569 (2007) (Alito, J.)); *see also Hein*, 551 U.S. at 607, 127 S. Ct. at 2567 (Alito, J.) (distinguishing *Bowen v. Kendrick*, 487 U.S. 589, 108 S. Ct. 2562 (1988), on the ground that the statute in *Bowen* "not only expressly authorized and appropriated specific funds for grantmaking, it also expressly contemplated that some of these moneys might go to projects involving religious groups"). Accordingly, plaintiffs

[5] Plaintiffs' attempt to distinguish *In re Navy Chaplaincy* is misguided. Plaintiffs apparently argue that the case is distinguishable because the plaintiffs there "were challenging the statute funding all chaplains while contesting the regulatory program." Opp. at 25 n.10. Even assuming that this assertion, if true, were relevant to the applicability of the decision to the present case, plaintiffs' assertion appears to misunderstand the facts of that decision. *See In re Navy Chaplaincy*, 534 F.3d at 762 ("And plaintiffs . . . obviously do not contend that congressional legislation establishing the Navy Chaplaincy itself violates the Establishment Clause; they merely want the Navy to operate the Chaplain Corps differently.").

are foreclosed from asserting taxpayer standing to challenge actions of the Executive that are not only alleged to be discretionary, but are in fact alleged in the Complaint to be contrary to the intent of Congress in appropriating such funds.

Plaintiffs' assertion of taxpayer standing fares no better under the second prong of the *Flast* inquiry, under which the Supreme Court has "'declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause.'" *Ariz. Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1445 (Apr. 4, 2011) (quoting *Hein*, 551 U.S. at 609, 127 S. Ct. at 2569 (Alito, J.)). Although plaintiffs purportedly recognize how "narrow" this exception is, they promptly invite this Court to expand it to encompass lawsuits brought by members of Congress challenging Executive Branch actions under the War Powers Clause (and, apparently by association, every other claim presented in the Complaint).

The justification for such an expansion is based on such broad reasoning that it is apparent why the Supreme Court has confined the exception to taxpayer standing to the facts of *Flast*. Plaintiffs assert that the exception should be expanded to the War Powers Clause to prevent "the government from acting against its citizens' interests and then leaving them with the bill." Opp. at 26-27. Indeed, plaintiffs suggest that the Establishment and the War Powers Clauses should be viewed similarly because "[i]n cases under both clauses, a taxpayer seeks to enforce a crucial constitutional protection by enjoining the spending of money to further an unconstitutional goal." *Id*. at 28.

It is difficult to see what limitation such an expansion would have, as a plaintiff could justify expansion of the exception simply by asserting the importance of the constitutional protection at issue. That is an expansion that is directly contrary to the warnings of the Supreme Court and the D.C. Circuit, which repeatedly have emphasized that the narrow limitations of the

taxpayer standing exception are confined to the facts of *Flast* and companion cases. *See, e.g.*, *In re Navy Chaplaincy*, 534 F.3d at 762 ("Although *Hein* did not eliminate the *Flast* exception to the bar against taxpayer standing, the case forcefully emphasized the exception's extremely limited contours: 'It is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts.'"); *cf. New Jersey Peace Action v. Obama*, 2009 WL 1416041, *4 (D.N.J. 2009) (unpublished) ("As to [plaintiffs'] desire to avoid paying taxes 'for an unconstitutional war,' that injury has been roundly dismissed by the Supreme Court."). In light of the fact that courts have so far refused to expand taxpayer standing to encompass War Powers Clause challenges for good reason, this Court should not accept plaintiffs' invitation to be the first to do so. *See Pietsch v. The President of the United States*, 434 F.2d 861, 863 (2d Cir. 1970) ("Although more than one purpose has been attributed to Congress' war power, that power has never been seen as a 'specific . . . limitation' upon the appropriation power."); *Pietsch v. Bush*, 755 F. Supp. 62, 67 (E.D.N.Y. 1991) (holding that challenge based on Article I, Section 8, clause 11 does not involve "the taxing and spending clause of the United States Constitution").

It is also important to be mindful of the context in which plaintiffs seek such an expansion to the historical application of the *Flast* exception. In *Raines*, the Supreme Court recognized that the plaintiff members' attempt to assert standing to challenge the actions of the Executive "at this time and in this form [wa]s contrary to historical experience." 521 U.S. at 829, 117 S. Ct. at 2232. And the D.C. Circuit has "emphasiz[ed] the separation-of-powers problems inherent in legislative standing." *Campbell*, 203 F.3d at 21. Plaintiffs would have this Court ignore these concerns, effectively mooting *Raines* and its progeny, by permitting congressional plaintiffs to have taxpayer standing to litigate their disputes with the Executive in

federal court. After all, one would assume that every member of Congress is also a taxpayer. Such an end run around the Supreme Court's opinion in *Raines* should not be contemplated.

II. PLAINTIFFS' WAR POWERS CHALLENGES PRESENT NON-JUSTICIABLE POLITICAL QUESTIONS

Plaintiffs' war powers challenges ask this Court to define the limits of the President's discretionary war powers authority, decide whether this authority is impacted by two international instruments, and, as a consequence, order the United States to withdraw immediately from any involvement in multilateral operations in Libya in contravention of the President's past statements in support of the operations. The scope of these issues, and the relief requested, is striking in its implications for the balancing of constitutional war powers that, as plaintiffs do not seriously dispute, are committed to the political branches. Nevertheless, relying on the D.C. Circuit's decision in *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (2010) (en banc), plaintiffs assert that these challenges present a "'purely legal issue' that is not barred by the political question doctrine" and therefore do not require this court to "'reconsider[] the wisdom of discretionary decisions made by the political branches.'"[6] Opp. at 30 (quoting *El-Shifa*, 607 F.3d at 842).

The difficulty with plaintiffs' analysis is that it simply assumes that their war powers challenges fall on the "purely legal" side of the scale identified by the Court in *El-Shifa*. *See, e.g.*, Opp. at 35 ("[T]his case presents only the legal question of 'whether the government had the legal authority to act.'"). However, as the D.C. Circuit has recognized, the issue is not so simple.

[6] To the extent plaintiffs are suggesting that *El-Shifa* purported to overturn or ignore the factors that have traditionally been applied by courts to determine the existence of a political question, that assertion is mistaken. Indeed, the court in *El-Shifa* cited the factors from *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 891 (1962), and applied them in holding that a political question existed in that case. 607 F.3d at 841, 845.

The balancing of the constitutional war powers is not transformed into a "purely legal" issue simply because Congress has attempted to capture the balance in statutory form. Indeed, as the D.C. Circuit recognized in *El-Shifa*, the mere fact that political judgments are captured in statutory form do not remove such judgments from the category of "'decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'"[7] *El-Shifa*, 607 F.3d at 843 (quoting *People's Mojahedin Org. of Iran v. United States Dep't of State ("PMOI")*, 182 F.3d 17, 23 (D.C. Cir. 1999)); *see also Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1233 (D.C. Cir. 2009) ("That Congress took a position on the status of Jerusalem and gave Zivotofsky a statutory cause of action in an effort to make good on its pronouncement is of no moment to whether the judiciary has authority to resolve this dispute between the political branches."), *cert. granted*, 131 S. Ct. 2897 (May 2, 2011).

Indeed, plaintiffs do not dispute that the President has some degree of independent constitutional authority in the context of the war powers, as is similarly true with Congress. *See Campbell*, 203 F.3d at 27 (Silberman, J., concurring). Thus, in presenting their dispute over the proper allocation of these powers, plaintiffs do not simply ask this Court to decide the meaning of statutory terms; rather, plaintiffs "would substitute [this Court's] judgment for the President's as to the point at which" his powers should be exercised. *See id*. at 27. Indeed, rather than "[a] simple reading of the constitutional text," this Court would be required to balance the President's

[7] Plaintiffs point to *Kucinich v. Bush*, 236 F. Supp. 2d 1, as an example of a case involving a challenge "to policy choices rather than legal authority." Opp. at 38. But it is entirely unclear why plaintiffs' opposition to the President's withdrawal from a treaty in *Kucinich* is any more policy-oriented than plaintiffs' opposition to the President's decision to support multilateral operations in Libya. After all, plaintiffs in both cases assert that the Constitution specifically requires consultation with Congress before such action may be valid. Plaintiffs cannot seriously contend than one case involves "policy" while the other is purely "legal" in light of the similarity of the claims in each.

authority with that of the legislature in "a structural analysis of the political branches' respective roles." *Ange v. Bush*, 752 F. Supp. at 513 n.2, 514 n.4. That analysis thus necessarily would limit the respective discretion of one of the branches in an area "where decisions are made based on political and policy considerations" in times when circumstances frequently require immediate action. *See id*. at 513.

Plaintiffs' argument also ignores the broad scope of their requested remedy. *Cf. Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47-48 (D.D.C. 2010). Plaintiffs do not ask this Court to merely define "hostilities" or "war" within their statutory and constitutional contexts. They also request that, as a result of such a holding, the Court issue an order "to suspend military operations in Libya absent a declaration of war from Congress." Compl. at 36. Thus, in addition to construing the proper allocation of the war powers, the Court would then need to determine what aspects of United States involvement in Libya fall within plaintiffs' request for an end to "military operations," and would command that all such "operations" immediately end. In light of the damage to foreign relations that would result from such an order, as well as the fact that it is entirely uncertain and unknowable whether Congress as a whole actually would desire such a remedy (particularly in light of the fact that Congress has so far refused to pass any of the proposed legislation that would defund the war or otherwise require withdrawal), it is apparent that any decision as to the proper remedy would involve a political issue that should be left to the political branches for resolution. *Cf. Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982).

This conclusion is magnified by the lack of judicially manageable standards to evaluate plaintiffs' claims and the "underlying policies" that they purportedly challenge. *See* Compl. ¶ 178. Indeed, this Court "could not decide this question without first fashioning out of whole cloth some standard for when military action is justified." *El-Shifa*, 607 F.3d at 845. Contrary to

the conclusion of the majority of courts in this district that have considered the issue[8], plaintiffs argue that this Court is equipped to decide the meaning of "war" and "hostilities" in the context of the war powers. *See* Opp. at 32-34. However, as Judge Silberman noted in *Campbell*, the cases that plaintiffs cite for this proposition did not directly decide, as necessary to their holdings, "whether there was a war as the Constitution uses that word, but only whether a particular statutory or contractual provision was triggered by some instance of fighting." 203 F.3d at 26 (Silberman, J., concurring) (citing *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 1 L. Ed. 731 (1800)); *see also id*. at 27 n.2 ("Judge Tatel's reliance on the *Prize Cases* as an example of the Court concluding a war exists is misplaced because the Court itself did not label the Civil War such, but instead deferred to the President's determination that the country was at war."); *id*. at 25, 25 n.1 (noting that in *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C. Cir. 1973), the language discussing whether the court could determine that a war existed was dicta as the court ultimately held the issue to be a political question and deferred to the president's discretionary authority over such issues). Indeed, plaintiffs do not point to any case where a court has rendered a decision on the merits as to the precise allocation of the war powers, as defined by the Constitution and construed by the War Powers Resolution, in order to overturn the actions of the

[8] Ultimately, plaintiffs would have this Court ignore the historical precedent on the political question doctrine in this context based upon their belief that the D.C. Circuit in *El-Shifa* overruled such precedent *sub silentio*. *See* Opp. at 35-37. Such a conclusion is not one that is typically adopted by the courts. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18, 120 S. Ct. 1084, 1096 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."). Contrary to plaintiffs' assertion, the D.C. Circuit did not address whether Judge Silberman's or Judge Tatel's concurrence should be binding on the applicability of the political question doctrine in this context. Instead, the majority opinion cited language from Judge Tatel's concurrence to support the standard of review that would govern. *See El-Shifa*, 607 F.3d at 842. It certainly would be unusual for the D.C. Circuit to have held, *sub silentio*, all war powers challenges justiciable in the standard of review discussion of a decision that did not itself involve the war powers and ultimately found the claims presented in that case to be unreviewable. Plaintiffs' focus on the standard of review in *El-Shifa*, rather than the holding, is notable.

Executive in this context. That is a critical distinction, as the political question here is presented not by the relevant language standing alone in a vacuum but by the difficulty presented when the judiciary enters into the political debate and attempts to construe those terms within their present constitutional and statutory contexts.

Plaintiffs do not contest defendants' assertion about the tremendous harm to foreign relations that would be posed by multifarious pronouncements on the commitment of the United States in support of multilateral operations in Libya. *See* Mem. in Supp. of Defs.' Mot. to Dismiss at 20-22. Instead, they assert that these consequences should be irrelevant because "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 mission," as the court will not be considering whether the involvement of the United States in Libya "is wise American policy."[9] Opp. at 34-35. Of course, as Judge Silberman recognized in *Campbell*, that purported distinction would be lost on allies should this Court rule that United States participation in multilateral operations in Libya is "illegal" and order the immediate withdrawal of United States support. *See Campbell*, 203 F.3d at 28 ("A pronouncement by another branch of the U.S. government that U.S. participation in Kosovo was 'unjustified' would no doubt cause strains within NATO."). This Court should not risk such a result in light of the political nature of

[9] Plaintiffs' contention that they do not contest the underlying policy decision to support multilateral operations in Libya is also belied by plaintiffs' Opposition, the introduction to which contains policy arguments in opposition to United States involvement. *See* Opp. at 2-3 ("[C]oncerns have been raised over radical Islamic elements in the rebel forces . . . ."), 3 ("[R]eports 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."). These arguments demonstrate the lack of clarity in plaintiffs' assertion that they are not raising policy disagreements but are instead simply seeking a legal determination.

plaintiffs' request, as well as their abilities as legislators to take action without this Court's involvement in this inherently political dispute.

III. PLAINTIFFS' THIRD AND FOURTH CLAIMS DO NOT PRESENT AN ARTICLE III CASE OR CONTROVERSY

As defendants have explained, plaintiffs' third and fourth claims, entitled "U.N. Security Council Resolution" and "North Atlantic Treaty," do not present an independent case or controversy that is suitable for resolution by this Court. In their Opposition, plaintiffs appear to misunderstand the basis for defendants' argument. Defendants do not dispute the fact that, in their Complaint, plaintiffs claim that, if interpreted in the manner that they propose, U.N. Security Council Resolution 1973 and the North Atlantic Treaty would not provide the Executive with independent authority to support multilateral operations in Libya. *See* Compl. at 35-36 (requesting that the Court enter an order "declaring unconstitutional the policy that the President may unilaterally extend the North Atlantic Treaty . . . without satisfying the constitutional process of the United States" or that "a U.N. resolution can negate the obligation of the President to seek approval of a war or military operations in countries like Libya").

The injury that plaintiffs allege in their Complaint, however, is not a result of any particular interpretation of these instruments. Instead, plaintiffs continue to allege that they were injured when their "vote was nullified" by the President's purported failure to consult with Congress pursuant to the War Powers Resolution or seek a declaration of war from Congress pursuant to the War Powers Clause. *See* Opp. at 40 ("By violating the U.S. Constitution in not seeking or obtaining Congress's approval prior to committing [the] U.S. military to a foreign war, Defendants have completely nullified the value of Plaintiffs' voting power."); *see also id*. at 41 (arguing that the injury would be redressed by a declaration that there was an engagement of military forces "without congressional authorization"). Indeed, plaintiffs do not assert that these

international instruments require congressional authorization independent of their constitutional and statutory claims, such that a decision in their favor would remedy their institutional injury.[10] As such, the instruments remain entirely irrelevant to the harm alleged unless and until defendants were to assert them as some sort of justification that permits the challenged action in the absence of congressional authorization, *i.e.* until defendants were to assert these claims as an affirmative defense to plaintiffs' claims regarding the authorities that purportedly mandate consultation.

If defendants were not to assert these instruments as some sort of independent basis for executive authority, then plaintiffs' request for a decision as to their scope would be a request for a purely advisory opinion. If defendants do assert the instruments as defenses to plaintiffs' war powers challenges, then their proper interpretation would then be at issue in this case in deciding the validity of the defenses. *See* Mem. in Supp. of Defs.' Mot. to Dismiss at 23 (citing cases). Accordingly, the instruments are not properly asserted as causes of action separate and apart from plaintiffs' remaining claims.

[10] The only suggestion of an affirmative claim for congressional consultation under either one of these instruments is plaintiffs' argument that Article 11 of the North Atlantic Treaty states that the Treaty "shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes." Opp. at 39. As is apparent from this language, however, this "claim" would be entirely derivative of plaintiffs' claim pursuant to the War Powers Clause because this Court would first have to find that the Constitution mandates congressional authorization for involvement in Libya. Of course, in the event of such a holding, it would be unnecessary for the Court to opine on the scope of the North Atlantic Treaty unless it were asserted as an independent basis for the Executive to act regardless of the constitutional requirements. Thus, in the absence of the Treaty being asserted as a defense to such a holding, the "claim" would remain a request for an advisory opinion.

IV. SHOULD THIS COURT REEXAMINE LEGISLATIVE STANDING PRECEDENT, PRUDENTIAL CONSIDERATIONS WOULD STILL COUNSEL AGAINST RESOLVING PLAINTIFFS' CLAIMS ON THEIR MERITS

Whether styled as remedial discretion or ripeness, courts traditionally have refused to provide relief in cases such as this one due to the prudential considerations counseling against such a remedy. *See* Mem. in Supp. of Defs.' Mot. to Dismiss at 23-25. Typically, as defendants have explained, this Circuit has not needed to rely on such considerations following *Raines* because the Supreme Court's decision generally foreclosed legislative standing such that the separation of powers concerns presented by legislator lawsuits were not at issue. However, as plaintiffs' standing discussion attempts to return to the era prior to *Raines* in arguing that this Court should find standing in the present case, it is important to note that such a reversal would, in any event, not lead to the consideration of their claims on the merits. As the D.C. Circuit has explained, "[w]hatever [past caselaw] gives the Representatives under the rubric of standing, it takes away as a matter of equitable discretion." *Chenoweth*, 181 F.3d at 116. Plaintiffs may wish to reenter an age in which legislative plaintiffs were able to establish standing to sue in this Circuit, but that was not an age that would have provided them with a successful outcome in light of the prudential considerations counseling against the consideration of plaintiff members' claims.[11]

Plaintiffs raise several objections to the argument that this Court, if it were for some reason to find plaintiffs' claims justiciable, should still dismiss the lawsuit. None of these arguments has merit. As an initial matter, plaintiffs suggest that "it is not clear that the

[11] Plaintiffs suggest that they do not request a "blunt injunctive decision" because "[o]f Plaintiffs' requested relief, only one claim is for an injunction . . . ." Opp. at 42. It is unclear why the number of paragraphs describing plaintiffs' requested relief matters as long as plaintiffs are, in fact, requesting such relief. *See* Compl. at 36 ("Order all injunctive relief to end the violations alleged above, including but not limited to an order to suspend military operations in Libya . . . .").

Administration would accept the right of Congress to order a halt to operations," and that the existence of a potential legislative remedy is irrelevant because "[o]nce engaged in a war, there are a host of reasons why Congress may not wish to cut off funds." Opp. at 42. However, the speculative possibility that a presidential administration may refuse to comply with a congressional command did not preclude past courts from refusing to exercise discretion, particularly when such an eventuality, if it came to pass, may pose different prudential considerations. *See, e.g.*, *Lowry v. Reagan*, 676 F. Supp. 333, 340-41 (D.D.C. 1987). And that is not the case here, in any event, where Congress as a whole has not passed legislation that could encounter the hypothetical opposition posed by plaintiffs. Moreover, the assertion that Congress may not "wish to cut off funds" for reasons other than opposing United States involvement in Libya is not determinative of the prudential considerations counseling against judicial intervention. Indeed, the remedies available may not be "politically popular for legislators." *Ange*, 752 F. Supp. at 514. Nevertheless, that assertion does not demonstrate that the remedies are unavailable. *See id.*

Finally, plaintiffs assert that "nobody stands to suffer a more concrete injury than Plaintiffs" in the present case and that consideration of the merits of their claims is therefore necessary. Opp. at 43. Such has never been the standard of judicial review of the merits of one's claims, however. Indeed, when applying the remedial discretion doctrine in the past, the D.C. Circuit has recognized that "the separation-of-powers concerns informing the doctrine . . . are, upon reflection, entirely unaffected by the ability of a private plaintiff to bring suit." *Melcher v. Fed. Open Mkt. Comm.*, 836 F.2d 561, 564 (D.C. Cir. 1987); *see also Ange*, 752 F. Supp. at 518 n.8.

CONCLUSION

For the foregoing reasons, defendants respectfully request dismissal of this action.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2011, I caused a true and correct copy of the foregoing Reply to be served on plaintiffs' counsel electronically by means of the Court's ECF system.

/s/ Eric Womack
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