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.	)	
	)	

MEMORANDUM IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

On June 15, 2011, in the midst of ongoing congressional debate over United States involvement in Libya, ten members of Congress filed the present lawsuit asking this Court, through an order granting injunctive relief, to immediately "suspend military operations in Libya." As the Supreme Court and the courts of this Circuit have repeatedly held, this Court lacks jurisdiction to entertain such an extraordinary request.

In *Raines v. Byrd*, the Supreme Court flatly rejected the standing of members of Congress to sue in their legislative capacities. 521 U.S. 811, 117 S. Ct. 2312 (1997). Several years later, the D.C. Circuit applied the holding of *Raines* in the context of a war powers challenge brought by members of Congress in opposition to United States involvement in Kosovo. There the D.C. Circuit expressly rejected the argument that an alleged violation of the War Powers Resolution or the War Powers Clause of the Constitution satisfied the narrow exemption left for legislative standing following *Raines*. *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000). In light of these binding authorities, plaintiffs cannot allege a basis for standing in their capacities as legislators.

Plaintiffs also assert standing to sue as "taxpayers." While plaintiffs purport to "acknowledg[e]" decisions limiting such standing to the specific facts of prior Supreme Court opinions, the express holdings of the Supreme Court, the D.C. Circuit, and this Court foreclose taxpayer status as a basis for standing in the present case. These courts and others have definitively rejected taxpayer standing for individuals raising challenges, unrelated to the Establishment Clause, to Executive Branch action that is purportedly in violation of legislative command.

Moreover, even if this Court were to create new exceptions to either of these settled standing doctrines, plaintiffs' challenges raise issues that have been recognized by numerous

courts in this Circuit to be inappropriate for judicial resolution. Accordingly, in light of the clear lack of jurisdiction to review plaintiffs' Complaint, defendants respectfully request that this Court grant their Motion to Dismiss.

BACKGROUND

On June 15, 2011, ten members of the House of Representatives filed the present lawsuit against the President[1] and the Secretary of Defense in their official capacities, seeking "injunctive and declaratory relief to protect the Plaintiffs and the country from a stated policy . . . whereby a president may unilaterally go to war in Libya and other countries." *See* Compl. ¶¶ 1, 2. According to plaintiffs' allegations in the Complaint, "[o]n March 19, 2011, at approximately 3:00 p.m. EDT, President Obama ordered U.S. forces to attack the armed government forces of Libya." *Id.* ¶ 31. The Complaint further alleges that "U.S[.] operations in Libya now include all of the classic elements of a war," which purportedly requires "a declaration of war from Congress" and compliance with the War Powers Resolution, 50 U.S.C. §§ 1541-1548. *Id.* ¶¶ 32, 33, 35.

The Complaint raises five claims against the President and the Secretary of Defense, including claims under Article I, Section 8, Clause 11 of the Constitution ("War Powers Clause") and the War Powers Resolution. *See* Compl. at 28-35. Plaintiffs also seek an opinion from this Court as to the scope of U.N. Security Council Resolution 1973 and the North Atlantic Treaty, as well as a declaration that the use of appropriated "funds . . . in Libya" violates the Appropriation Clause of the Constitution, Article I, Section 9, Clause 7. *See id.* at 32-35. As a purported

[1] Defendants note that the President is not technically a proper defendant to this action, as this Court cannot order relief against the President in the performance of his official duties relating to the ongoing operations in Libya, and there has been no waiver of sovereign immunity to permit suit against the President pursuant to the Administrative Procedure Act. *See Franklin v. Massachusetts*, 505 U.S. 788, 112 S. Ct. 2767 (1992); *see also Swan v. Clinton*, 100 F.3d 973, 976-80 (D.C. Cir. 1996).

consequence of their claims, plaintiffs ask that this Court grant wide-ranging injunctive relief with respect to United States operations in Libya, including "an order to suspend military operations." Compl. at 36.

ARGUMENT[2]

I. PLAINTIFF MEMBERS' CHALLENGES TO THE INVOLVEMENT OF THE UNITED STATES IN LIBYA ARE NON-JUSTICIABLE

As this Court has emphasized, "[i]t is a fundamental axiom that pursuant to Article III of the Constitution, federal courts are vested with the power of judicial review extending only to 'Cases' and 'Controversies.'" *Mahorner v. Bush*, 224 F. Supp. 2d 48, 49 (D.D.C. 2002). This limitation has been given effect by the judiciary through "'a series of principles termed 'justiciability doctrines,' among which are standing[,] ripeness, mootness, and the political question doctrine.'" *Id.* (quoting *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996)). In the present case, "[a]n analysis of these 'justiciable doctrines' reveals beyond all doubt that this Court lacks subject matter jurisdiction to entertain the plaintiff[s'] complaint because [plaintiffs are] unable to satisfy at least two of them, standing and the political question doctrine." *Id.* at 49. Moreover, even if plaintiffs' claims were justiciable, this Court should refuse to exercise its declaratory and injunctive powers over the present dispute, as the relief that plaintiffs seek would upend the ongoing operations of the multilateral

[2] Plaintiffs' Complaint is unclear regarding the bases for jurisdiction and the waiver of sovereign immunity for each of their claims, particularly with regard to their statutory claims. *See* Compl. ¶ 6. For example, plaintiffs apparently request an award of "damages and reasonable attorneys' fees and costs . . . pursuant to 42 U.S.C. § 1988," which is specifically limited to an award of attorney's fees for lawsuits brought pursuant to certain specified statutory provisions that are not at issue here. *See* 42 U.S.C. § 1988(b) (permitting attorney's fees in actions to enforce, among other provisions, 42 U.S.C. § 1983, which has no application here, *see Settles v. United States Parole Comm'n*, 429 F.3d 1098, 1104 (D.C. Cir. 2005)). Plaintiffs have not identified any waiver of sovereign immunity that would permit them monetary "damages" in this case. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (holding that War Powers Resolution does not imply a private damages remedy).

coalition in Libya, and thereby seriously jeopardize the credibility of the United States and the international community.

A. Plaintiffs Have Not Suffered a Cognizable Injury-in-Fact

One of the primary elements of the case-or-controversy requirement is that plaintiffs, "based on their complaint, must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 2317 (1997). To meet this requirement, plaintiffs must allege "'*personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324 (1984)). Such injury must be "'concrete and particularized'" and the dispute at issue must be one "'traditionally thought to be capable of resolution through the judicial process.'" *Id.* at 819, 2317 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992) and *Flast v. Cohen*, 392 U.S. 83, 97, 88 S. Ct. 1942, 1951 (1968)). As the Supreme Court has emphasized, the standing inquiry "has been especially rigorous" in cases such as the present, "when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* at 819-20, 2317-18.

This "especially rigorous" standing inquiry cannot be satisfied by plaintiffs in the present case, where their standing has been repeatedly and expressly rejected by the Supreme Court and the courts of this Circuit. Plaintiffs do not identify any particularized or concrete injury that they have suffered as individuals. Instead, plaintiffs resort to two generalized, and almost completely foreclosed, standing doctrines: (1) legislative standing and (2) taxpayer standing. *See* Compl. ¶¶ 164-166.

1. Plaintiffs' Standing to Sue as Legislators Has Been Foreclosed by the Supreme Court and the D.C. Circuit

With respect to legislative standing, plaintiffs assert that, "[a]s members of Congress," they have a "right to challenge a per se violation of Article I of the Constitution as well as the violation of statutory laws governing the commencement and funding of any undeclared war." Compl. ¶ 164; *see also id.* at 2 ("Plaintiffs . . . bring this Complaint *in their official capacities* . . . .") (emphasis added); *id.* ¶ 2 (This action further seeks injunctive and declaratory relief to protect the Plaintiffs *and the country* . . . .") (emphasis added). However, that assertion is expressly foreclosed by the Supreme Court's holding in *Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312 (1997), and its progeny. As the Supreme Court explained in *Raines*, legislators do not have standing to complain about a generalized or institutional injury "which necessarily damages all Members of Congress and both Houses of Congress equally," as such an injury does not single out any particular member for "specially unfavorable treatment as opposed to other Members of their respective bodies." *Id.* at 821, 2318. Moreover, since the assertion of a "per se violation of Article I" and other "statutory laws" does not constitute a claim for deprivation of something to which plaintiffs are "*personally* . . . entitled," such as their seats in Congress, the allegation does not constitute an injury sufficient for Article III standing. *Id.* Indeed, as the Supreme Court recognized:

> If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.

Id. Accordingly, as with the appellees in *Raines*, plaintiffs here "have alleged no injury to themselves as individuals . . ., the institutional injury they allege is wholly abstract and widely

dispersed . . ., and their attempt to litigate this dispute at this time and in this form is contrary to historical experience." *Id.* at 829, 2322. That conclusion is only bolstered by the fact that the ten congressmen who sue in the present case "have not been authorized to represent" the House, let alone the Senate (of which there are no plaintiff members), "in this action." *Id.*

In the wake of *Raines*, the D.C. Circuit has rejected any notion that legislators have a "per se" right to raise, in their official capacities, generalized institutional grievances against the Executive Branch. *See, e.g., Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1337 (D.C. Cir. 1999) ("The bottom line is that the claimed injuries of the individual Alaskan legislators and the Council are not legally or judicially cognizable."); *Chenoweth v. Clinton*, 181 F.3d 112, 115 (D.C. Cir. 1999) ("Against the backdrop of *Raines* and our own decisions after *Goldwater*, the futility of the present Representatives' claim is apparent."); *see also, e.g., Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002); *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002). Plaintiffs give this line of binding precedent passing recognition, "acknowledg[ing]" only that "standing of members has been curtailed in prior judicial opinions," while continuing to "believe that these decisions allow for an exception for these claims . . . ." Compl. ¶ 165.

Nowhere in their Complaint do plaintiffs identify the exception under which they are alleging standing, nor do they provide any allegation explaining how their alleged injury fits within such an exception. Indeed, while the Court's decision in *Raines* did not completely foreclose the possibility of legislator standing, the only exception that has been recognized is when the vote of a congressman has been completely "nullified" by Executive action. *Raines*, 521 U.S. at 823-24, 117 S. Ct. at 2319-20. However, while this exception may have continued, albeit limited, viability in other contexts, the D.C. Circuit already has held that it has no application to the present case.

In *Campbell v. Clinton*, thirty-one congressmen filed suit against President Clinton "seeking a declaratory judgment that the President's use of American forces against Yugoslavia was unlawful under both the War Powers Clause of the Constitution and the War Powers Resolution." 203 F.3d 19, 20 (D.C. Cir. 2000). All three members of the court found that the congressmen lacked standing to challenge the lawfulness of the actions of the Executive in such a context. In so ruling, Judge Silberman's majority opinion[3] rejected the claims of the congressmen that their votes had been "nullified" because the House had voted against an "authorization" of air strikes by a tie vote and had also rejected a declaration of war. *Id.* at 20. As the court explained:

> The Court did not suggest in *Raines* that the President "nullifies" a congressional vote and thus legislators have standing whenever the government does something Congress voted against, still less that congressmen would have standing anytime a President allegedly acts in excess of statutory authority. As the government correctly observes, appellants' statutory argument, although cast in terms of the nullification of a recent vote, essentially is that the President violated the quarter-century old War Powers Resolution. Similarly, their constitutional argument is that the President has acted illegally – in excess of his statutory authority – because he waged war in the constitutional sense without a congressional delegation. Neither claim is analogous to a . . . nullification.

Id. at 22. The court reached this result based on its view that a "nullification" implies the absence of a legislative remedy. *Id.* at 23. And, at least in the context of a dispute over the war powers, Congress "continued, after the votes, to enjoy ample legislative power to have stopped prosecution of the 'war.'" *Id.* As identified by the court, those options included passing "a law forbidding the use of U.S. forces in the Yugoslav campaign" and using "appropriations authority" to "cut off funds for the American role in the conflict." *Id.*; *see also id.* ("Appellants'

[3] Judge Tatel's concurring opinion stated his "agree[ment] with Judge Silberman that *Raines v. Byrd*, as interpreted by this court in *Chenoweth v. Clinton*, deprives plaintiffs of standing to bring this action." *Campbell*, 203 F.3d at 37 (citations omitted).

constitutional claim stands on no firmer footing."); *Kucinich v. Bush*, 236 F. Supp. 2d at 10 ("Like the congressmen in *Raines*, *Goldwater*, and *Campbell*, plaintiffs here had extensive 'self-help' remedies available . . . ."), *Walker*, 230 F. Supp. 2d at 68 (" . . . Congress retains alternate means to seek the information . . . .").

The allegations of plaintiffs' Complaint cannot, and do not, except them from the binding force of *Raines* as interpreted by the D.C. Circuit in *Campbell*. As in *Campbell*, plaintiff legislators have numerous legislative options at their disposal regarding the ongoing operations in Libya. As in *Campbell*, plaintiff legislators and their colleagues continue to debate these legislative options and have already voted on numerous bills that would impact operations in Libya. "Unfortunately, however, for those congressmen who, like appellants, desired an end to U.S. involvement" in Libya, the House has at least twice rejected proposals (including one sponsored by plaintiff Kucinich) to defund United States military operations in Libya and has voted down a resolution sponsored by plaintiff Kucinich directing immediate withdrawal of United States armed forces pursuant to the War Powers Resolution. *Campbell*, 203 F.3d at 23; *see* 157 Cong. Rec. H4769 (daily ed. July 8, 2011) (defeating Kucinich amendment to H.R. Res. 2219); 157 Cong. Rec. H4563 (daily ed. June 24, 2011) (defeating H.R. Res. 2278); 157 Cong. Rec. H4021 (daily ed. June 3, 2011) (defeating H.R. Con. Res. 51). Moreover, the full Senate unanimously passed a resolution supporting a no-fly zone, and the Senate Foreign Relations Committee has approved a resolution in support of the ongoing operations. *See* 157 Cong. Rec. S1075 (daily ed. Mar. 1, 2011) (unanimously agreeing to S. Res. 85); S. REP. NO. 112-27 (June 29, 2011) (noting the reporting by Senate Foreign Relations Committee of resolution authorizing the limited use of United States Armed Forces in support of the NATO mission in Libya). Plaintiffs are fully able, in their legislative capacities, to seek their desired goal. A decade of

binding precedent, however, squarely forecloses their standing to seek this goal through the judicial system when their legislative efforts have failed in Congress.

2. Plaintiffs' Assertion that They Have Standing as Taxpayers to Challenge the Actions of the Executive on Grounds Other than the Establishment Clause Is Meritless

Plaintiffs' next asserted injury-in-fact is grounded in a status shared with millions of fellow taxpayers. Plaintiffs state in the Complaint that they "believe that they have standing as taxpayers given the use of hundreds of millions of dollars in federal funds without authorization of Congress to support a war in violation of a specific constitutional limitation in Article I." Compl. ¶ 166.

Like plaintiffs' theory of legislative standing, their assertion of taxpayer standing is squarely foreclosed by binding precedent. As this Court has explained in the context of a taxpayer challenge to military action in Iraq and foreign aid to Israel, the Supreme Court has established a two-part test to determine whether a taxpayer has standing: "First, . . . 'a taxpayer will be a proper party to allege the unconstitutionality *only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution*'"; "Second, . . . the taxpayer must 'show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.'" *Mahorner*, 224 F. Supp. 2d at 50-51 (quoting *Flast*, 392 U.S. at 102-03, 88 S. Ct. at 1954), *aff'd*, 2003 WL 349713 (D.C. Cir. 2003) (per curiam). Both prongs of the taxpayer standing inquiry have been interpreted to foreclose plaintiffs' standing in the present case.

As this Court previously held in *Mahorner*, 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." *Id*. Such holdings include those of the D.C. Circuit, which this Court noted has "repeatedly held that 'challenges to actions of the executive branch are not cognizable in a federal taxpayer action . . .'" *Id.* (quoting *Swomley v. Watt*, 526 F. Supp. 1271, 1274 (D.D.C.1981) (citing *Am. Jewish Congress v. Vance*, 575 F.2d 939, 944 (D.C.Cir.1978); *Pub. Citizen, Inc. v. Simon*, 539 F.2d 211, 216-17 (D.C. Cir.1976))).

This limitation to the first prong of the *Flast* inquiry was recently reaffirmed by the D.C. Circuit in *In re Navy Chaplaincy*, 534 F.3d 756, 762 (D.C. Cir. 2008), where the court explained that, while the participation of Executive Branch officials in an action challenged by taxpayers may not by itself defeat taxpayer standing, Congress must "expressly authorize[] or appropriate[] funds for" the action that is challenged. *Id.*; *see also Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 608-09, 127 S. Ct. 2553, 2568 (2007) (Alito, J.) ("Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment, respondents' lawsuit is not directed at an exercise of congressional power, and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'") (internal citation omitted) (quoting *Flast*, 392 U.S. at 102, 88 S. Ct. at 1953). Like plaintiffs in *Mahorner* and *In re Navy Chaplaincy*, plaintiffs here do not purport to challenge any action expressly authorized by the legislative branch. To the contrary, as legislators themselves, plaintiffs seek to uphold the primacy of legislative appropriations against their alleged abuse by the Executive Branch. *See* Compl. ¶ 200 ("While Congress has allowed the Department of Defense discretion in the use of some funds to handle emergencies, these funds cannot be used for a facially unconstitutional purpose or to circumvent express

legislative powers."). "Under the Supreme Court's precedents, that contention directly undermines any claim to taxpayer standing." *In re Navy Chaplaincy*, 534 F.3d at 762.

Plaintiffs' assertion of "taxpayer standing" fares no better under the second prong of the *Flast* inquiry. In April of this year, the Supreme Court reiterated that the *Flast* exception permitting taxpayer standing "turned on the unique features of Establishment Clause violations" and noted that, as a consequence, "this 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); *see also Hein*, 551 U.S. at 609, 127 S. Ct. at 2569 (Alito, J.) ("We have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause."); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347, 126 S. Ct. 1854, 1864 (2006) ("[A]s plaintiffs candidly concede, 'only the Establishment Clause' has supported federal taxpayer suits since *Flast*."); *Am. Jewish Congress v. Corp. for Nat'l & Cmty. Serv.*, 399 F.3d 351, 355 (D.C. Cir. 2005) ("The exception is for taxpayer suits claiming that Congress exercised its Article I, § 8, taxing and spending power in violation of the Establishment Clause."); *Newdow v. Eagen*, 309 F. Supp. 2d 29, 37 (D.D.C. 2004) ("Although in general, an individual lacks standing based on federal taxpayer status, a 'narrow exception' to the general rule against federal taxpayer standing exists in certain actions bringing Establishment Clause challenges.") (internal citation omitted).

Plaintiffs again purport to "acknowledg[e] past decisions limiting [taxpayer] standing to Establishment Clause challenges under the First Amendment, and rejecting some challenges to Executive Branch actions," but they "believe that the violations asserted herein fall within a narrow exception allowing judicial review." Compl. ¶ 166. There is no such exception.

Defendants are aware of no case that has extended the *Flast* exception beyond Establishment Clause challenges to actions of, or actions at least authorized by, Congress. Creating such an exception would be directly contrary to the admonitions 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 fact, plaintiffs' purported exception not only would expand the *Flast* exception, it would render the limitations on legislative standing meaningless, as any member of Congress is presumably a taxpayer who therefore would be able to challenge the Executive's purported misuse of congressional appropriations in violation of congressional war powers.

Plaintiffs' Complaint ultimately seeks reconsideration of the binding precedent precluding their standing to sue. *See* Compl. ¶ 167 ("To the extent that prior cases are viewed as barring judicial review, the Plaintiffs believe those cases were wrongly decided and wish to seek reconsideration of the question in this context."). While plaintiffs theoretically may seek reconsideration of such opinions on appeal, this is not the forum in which to create new law on settled issues of standing.

B. As Numerous Courts of This Circuit Have Recognized, Plaintiffs' War Powers Claims Present Non-Justiciable Political Questions

These obvious standing deficiencies take on added importance in the present case, where plaintiffs ask this Court to define the scope of the military authority possessed by the political branches, decide whether this authority is affected by a U.N. Security Council resolution and the North Atlantic Treaty, and command the Executive to immediately withdraw U.S. assistance for the ongoing multilateral operations in Libya. Plaintiffs' war powers claims (Counts I through IV of the Complaint) and their requested relief raise fundamentally political questions that have been held non-justiciable by numerous courts and judges of this Circuit. *See, e.g.*, *Campbell*, 203 F.3d 19 (Silberman, J., concurring); *Sadowski v. Bush*, 293 F. Supp. 2d 15 (D.D.C. 2003); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam); *see also, e.g.*, *New Jersey Peace Action*, 2009 WL 1416041. In accordance with these decisions, this Court should dismiss plaintiffs' war powers claims and deny the requested relief.

"The political question doctrine is a natural outgrowth of fidelity to the concept of separation of powers." *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 111 (D.D.C. 2005); *accord Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691, 706 (1962). The doctrine is "based upon respect for the pronouncements of coordinate branches of government that are better equipped and properly intended to consider issues of a distinctly political nature," *Doe I*, 400 F. Supp. 2d at 111, and "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of

Congress or the confines of the Executive Branch," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S. Ct. 2860, 2866 (1986).

In *Baker*, the Supreme Court "enumerated six situations that constitute political questions, over which there is no jurisdiction to proceed." *Doe I*, 400 F. Supp. 2d at 111.

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217, 82 S. Ct. at 710.

As this Court has recognized, the *Baker* factors have particular application to decisions in the foreign policy and military arenas, as "[c]ourts have developed through a long line of cases that matters involving foreign policy and military decisions are political in nature, and not within the province of the judicial branch." *Mahorner*, 224 F. Supp. 2d at 52; *see also El-Shifa Pharm. Indus. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) (en banc); *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006). Because such cases raise issues that "frequently turn on standards that defy judicial application" or "involve the exercise of a discretion demonstrably committed to the executive or legislature," *Baker*, 369 U.S. at 211, 82 S. Ct. at 707, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292, 101 S. Ct. 2766, 2774 (1981); *see also Mahorner*, 224 F. Supp. 2d at 52 ("The conducting of military operations is considered to be 'so exclusively entrusted to the political branches of government as to be largely immune from

judicial inquiry or interference.'") (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589, 72 S. Ct. 512, 519 (1952)).

Of course, "[not] every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211, 82 S. Ct. at 707. Instead, courts must conduct "a discriminating analysis of the particular question posed" in the "specific case," rather than focusing on the "nature of the government conduct under review." *El-Shifa*, 607 F.3d at 841, 842 (internal quotations omitted). Here, that analysis, based on the factors enunciated by the Supreme Court in *Baker*, leads inescapably to the conclusion that plaintiffs' war powers claims raise non-justiciable political questions.

1. The Constitution Commits the War Powers to the Political Branches

The first four claims of plaintiffs' Complaint challenge the President's authority to initiate "military actions" in the absence of the consent of Congress. *E.g.* Compl. ¶ 170. In so doing, plaintiffs would have this Court hold that the current involvement of the United States in Libya constitutes "a 'war' for purposes of Article I" and that "the Executive Branch is . . . required to seek congressional approval for such military operations." *Id.* ¶¶ 169, 170, at 35. The relief plaintiffs request as a result of such a finding includes "an order to suspend military operations in Libya absent a declaration of war from Congress." *Id.* at 36.

Thus, all of plaintiffs' war powers claims "share one common denominator: the Constitution's allocation of war powers among the executive and legislative branches":

> If the court were to determine whether the President's deployment to date violates the War Powers Clause . . . or whether the President's deployment order violates the War Powers Resolution, the court would have to determine precisely what allocation of war power the text of the Constitution makes to the executive and legislative branches.

Ange, 752 F. Supp. at 512. The resolution of such questions directly impacts powers that are textually committed to the political branches, as plaintiffs would have this Court define the outer limits of the President's authority as Commander-in-Chief and Chief Executive and of the Legislature's power to constrain such authority through its ability to declare "war." *See id.* at 514 ("In the present case, there is an explicit textual commitment of the war powers not to *one* of the political branches, but to *both*."); *see also New Jersey Peace Action*, 2009 WL 1416041, *8 ("[T]he Constitution commits the entire foreign policy power of this country to the executive and legislative branches.") (internal quotation omitted).

These are not questions that the judiciary is equipped to resolve. Rather, "[t]he powers granted to both branches . . . enable those branches to resolve the dispute themselves." *Ange*, 752 F. Supp. at 514; *see also New Jersey Peace Action*, 2009 WL 1416041, *8 ("The two branches share the broad array of war powers, and the Constitution allows them to work out disputes themselves."). "Meddling by the judicial branch in determining the allocation of constitutional powers where the text of the Constitution appears ambiguous as to the allocation of those powers 'extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power.'" *Ange*, 752 F. Supp. at 514 (quoting *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981)); *see also New Jersey Peace Action*, 2009 WL 1416041, *8 ("[T]he distinction between a declaration of war and a cooperative action by the legislative and executive with respect to military activities in foreign countries is the very essence of what is meant by a political question.") (internal quotation omitted).

Moreover, plaintiffs' war powers claims do not limit themselves simply to requesting a judicial definition of the scope of the war powers of the political branches. Indeed, they also request an advisory opinion as to how these powers relate to, or are affected by, a United Nations

Security Council resolution and the North Atlantic Treaty. *See* Compl. ¶ 184 ("Despite membership in the United Nations and its Security Council, neither U.N. resolutions nor treaties can relieve the President of constitutional obligations under Article I on congressional authorizations of war."); ¶ 195 ("The use of the North Atlantic Treaty in this undeclared war violates the express ratified language of the Treaty and thus exceeds the President's authority under Article II of the Constitution."). Questions such as these, concerning a purported dispute between members of Congress and the President over international instruments, have been "repeatedly held" by courts to be "largely political questions best left to the political branches of the government, not the courts, for resolution." *Kucinich v. Bush*, 236 F. Supp. 2d at 16; *see also Goldwater v. Carter*, 444 U.S. 996, 1003, 100 S. Ct. 553, 537 (1979) (Rehnquist, J., concurring) (finding a dispute between members of Congress and the President over treaty termination to be "a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government").

That result is not commanded simply by the fact that plaintiffs' claims relate to an international instrument, as "in general 'the courts have the authority to construe treaties and executive agreements.'" *Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) (quoting *Japan Whaling*, 478 U.S. at 230, 106 S. Ct. at 2866). However, plaintiffs' third and fourth claims, assuming that these claims are in fact independent from plaintiffs' war power claims,[4] do not depend for their resolution on any "particular interpretation of th[e]" international instruments purportedly at issue in this case. *Id*. Plaintiffs instead argue that the President is not "relieve[d]" of "his obligation to seek congressional approval of combat operations" as a result of such instruments. Compl. ¶¶ 185, 194. Thus, regardless of the particular interpretation of

[4] *See infra* at 22-23.

U.N. Security Council Resolution 1973 and the North Atlantic Treaty that would be adopted by this Court, plaintiffs' claim would still be that neither could absolve the President of the need to seek a declaration of war or comply with the War Powers Resolution. *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"[5]). Thus, the only effect of examining the instruments referenced by plaintiffs would be to decide, as a purely advisory matter, the interplay between the war powers possessed by the political branches and these instruments. A judicial determination of such an inherently political question would have wide-ranging impacts on the foreign relations of the United States.[6]

2. Plaintiffs' War Powers Claims Lack Judicially Manageable or Discoverable Standards for Resolution

Plaintiffs' war powers claims would require this Court to make several underlying determinations about United States operations in Libya that have repeatedly been held to be unsuited for judicial resolution. With regard to their constitutional claim, plaintiffs ask this Court to hold that "military actions involving combat operations over an indefinite period of time" constitute "'war' for the purposes of Article I." Compl. ¶ 170. Their statutory claim is similar, arguing that "[t]he Libyan War, *as well as its underlying policies*, has been maintained in violation of the War Powers Resolution," as the operations in Libya constitute "hostilities"

[5] The wide-ranging advisory opinion that plaintiffs seek is, in fact, not limited to the context of Libya, as the Complaint expressly indicates that the Court's decision as to the scope of these international instruments would have equal application to "countries like Libya." *E.g.* Compl. ¶ 185.

[6] *See infra* at 20-22.

within the meaning of the War Powers Resolution. *Id.* ¶¶ 174, 178 (emphasis added). Such "underlying policies" apparently include the President's purported interpretation of a United Nations Security Council resolution and the North Atlantic Treaty. *See id.* at 32-34.

However, these statutory and constitutional claims, which "too obviously call[] for a political judgment," do not provide a "standard . . . precise enough" to permit judicial resolution. *Campbell*, 203 F.3d at 25 (Silberman, J., concurring); *see also id.* at 28 ("In sum, there are no standards to determine either the statutory or constitutional questions raised in this case . . . ."); *but see id.* at 37-41 (Tatel, J., concurring) (arguing that such claims are justiciable). Accordingly, "[t]ime and again courts have refused to exercise jurisdiction in such cases and undertake such determinations because courts are ill-equipped to do so." *Ange*, 752 F. Supp. at 514; *see also, e.g.*, *Schneider v. Kissinger*, 412 F.3d 190, 196-97 (D.C. Cir. 2005); *New Jersey Peace Action*, 2009 WL 1416041, *9; *Sadowski*, 293 F. Supp. 2d at 21; *Lowry*, 676 F. Supp. at 340 n.53; *Sanchez-Espinoza*, 568 F. Supp. at 600; *Crockett*, 558 F. Supp. at 898; *but see Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

These decisions have been based on the fundamental ambiguities in the questions that plaintiffs' claims present. Plaintiffs "cannot point to any constitutional test" for judges to apply to determine "what is war," *Campbell*, 203 F.3d at 25 (Silberman, J., concurring); *New Jersey Peace Action*, 2009 WL 1416041, *8, just as they are unable to define judicially manageable criteria to determine what constitutes "hostilities" within the meaning of the War Powers Resolution, which lacks a "definitional section" and was accompanied by "debate suggesting that determinations of 'hostilities' were intended to be political decisions made by the President and Congress," *Lowry*, 676 F. Supp. at 340 n.53. After all, "[i]f this Court accepted Plaintiffs' invitation to make" such a determination, "it would have to be prepared to fully measure every

future instance of hostilities against the Constitution's 'declare war' clause." *New Jersey Peace Action*, 2009 WL 1416041, *8.

The difficulty in evaluating such a question is magnified by considerations about what such an analysis would entail in the context of litigation over sensitive military operations. As several courts have noted, "[t]he Court lacks the resources and expertise . . . to resolve disputed questions of fact concerning the military situation" in a particular country or region. *Crockett*, 558 F. Supp. at 898; *see also Campbell*, 203 F.3d at 27 (Silberman, J., concurring); *Sanchez-Espinoza*, 568 F. Supp. at 600. The Court should not risk entering into such a sensitive inquiry, particularly when plaintiffs here are endowed by the Constitution with remedies of their own should they disagree with the Executive's decision. *See, e.g.*, *Crockett*, 558 F. Supp. at 899 ("If Congress doubts or disagrees with the Executive's determination that U.S. forces . . . have not been introduced into hostilities or imminent hostilities, it has the resources to investigate the matter and assert its wishes.").

3. A Great Potential for Damage to Our Foreign Relations Exists from Multifarious Pronouncements Contradicting the Executive Branch's Decision to Support Multilateral Operations in Libya

Through the relief that they seek in this lawsuit, plaintiffs would have this Court order the political branches to "suspend military operations in Libya." Compl. at 36. In seeking to obtain such a result, plaintiffs would also have this Court opine on the ability of the United States to participate in multilateral operations in conjunction with our partners in the international community pursuant to a United Nations Security Council resolution and the North Atlantic Treaty. *See id.* at 32-34.

It is obvious that these are issues "of the greatest sensitivity for our foreign relations." *Campbell*, 203 F.3d at 27 (Silberman, J., concurring). The President has explained that

"Qadhafi's defiance of the Arab League, as well as the broader international community . . ., represents a lawless challenge to the authority of the Security Council and its efforts to preserve stability in the region." Letter from President Obama to the Hon. John Boehner, Speaker, U.S. H. of Rep. (Mar. 21, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya. Indeed, had the United States failed to act, "[t]he writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution's future credibility to uphold global peace and security." President Barack Obama, Address to the Nation on Libya (Mar. 28, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya.

Plaintiffs would have this Court order the President to renege on the prior commitment of the United States to support the international coalition in Libya. Such an order would cause tremendous harm to our foreign relations. *Cf. Campbell*, 203 F.3d at 28 (Silberman, J., concurring) ("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."); *Lowry*, 676 F. Supp. at 340 (recognizing that a "declaration of 'hostilities' by this Court . . . might create doubts in the international community regarding the resolve of the United States to adhere to [its] position"); *Sanchez-Espinoza*, 568 F. Supp. at 600 ("Congressional debate is ongoing . . . . Judicial resolution of the Congressional plaintiffs' claims unnecessarily might provide yet a third view on U.S. activities in Central America."). In light of the widespread international

consequences that would flow from such a pronouncement, that is not a request that this Court should, or can, entertain.[7]

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

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. Plaintiffs are not arguing that either of these international instruments is the source of their injury, or that their injuries would be redressed by any particular judicial relief with respect to these treaties. Rather, plaintiffs' "claims" are predicated on injury purportedly occurring as a result of the President's alleged decision not to consult with Congress prior to engaging in 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"). It is the purported failure to obtain authorization from Congress that is therefore the cause of, and the source of their requested remedy for, the injuries that they allege.

As such, these "claims" are, in reality, plaintiffs' premature attempt to rebut what they perceive as "defenses" to their war powers claims. As such, they do not operate as independent claims for relief. At most, these claims are requests for an advisory opinion from the Court as to the operation and scope of two international instruments in the absence of a case or controversy created by the instruments themselves, a fact demonstrated by plaintiffs' acknowledgement that

[7] Moreover, at least one court in this Circuit has recognized that, even if war powers claims were justiciable, it would still not consider immediate United States withdrawal as a proper remedy for a war powers violation. *See Crockett*, 558 F. Supp. at 899.

the opinion they seek would extend beyond the present factual context to any country "like" Libya, *see* Compl. at 36. This court lacks jurisdiction to engage in such an academic exercise over a "policy" with which plaintiffs purportedly disagree, as the "policy" would be unnecessary to resolve until and unless it is advanced as a defense to plaintiffs' war powers claims (at which point it would be litigated as *part of* plaintiffs' claims, not as a separate cause of action). *See Calderon v. Ashmus*, 523 U.S. 740, 748, 118 S. Ct. 1694, 1699 (1998) ("If the class members file habeas petitions, *and the State asserts Chapter 154*, the members obviously can litigate California's compliance with Chapter 154 at that time.") (emphasis added); *Coffman v. Breeze Corp.*, 323 U.S. 316, 324, 65 S. Ct. 298, 302 (1945) ("In the circumstances disclosed by the record and for purposes of the present suit, the constitutionality of the Act is without legal significance and can involve no justiciable question unless and until appellant seeks recovery of the royalties, and then only if appellee relies on the Act as a defense.").

II. EVEN ASSUMING THAT THIS CASE WERE JUSTICIABLE UNDER ARTICLE III, PRUDENTIAL CONSIDERATIONS COUNSEL AGAINST THE EXERCISE OF JURISDICTION OVER PLAINTIFFS' CLAIMS

Even if plaintiffs' Complaint were justiciable under Article III, courts routinely have refused to grant relief to legislative plaintiffs raising similar political challenges due to the prudential considerations counseling against such a remedy. These decisions have been based on varying rationales, including the need to wait for a ripe dispute between the executive and legislative branches, *Goldwater*, 444 U.S. at 996, 100 S. Ct. at 534 (Powell, J., concurring); *Doe v. Bush*, 323 F.3d 133, 137 (1st Cir. 2003); *Dellums*, 752 F. Supp. 1141, as well as the doctrine

of remedial discretion,[8] *Chenoweth*, 181 F.3d at 116; *Ange*, 752 F. Supp. at 513; *Lowry*, 676 F. Supp. 333; *Conyers v. Reagan*, 578 F. Supp. 324, 326 (D.D.C. 1984).

These doctrines recognize that 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." *Conyers*, 578 F. Supp. at 326. Here, as in prior cases, "plaintiffs' dispute is 'primarily with [their] fellow legislators,'" as these are the individuals who have refused to vote in favor of certain legislative measures introduced in Congress with regard to Libya. *Lowry*, 676 F. Supp. at 339 (quoting *Riegle*, 656 F.2d at 881); *Conyers*, 578 F. Supp. at 327 ("It must be noted that two of the plaintiff legislators attempted to initiate congressional action condemning the President's decision . . . . Those efforts were for naught . . . ."); *see also* 157 Cong. Rec. H4769 (daily ed. July 8, 2011) (defeating Kucinich amendment to H.R. Res. 2219); 157 Cong. Rec. H4563 (daily ed. June 24, 2011) (defeating H.R. Res. 2278); 157 Cong. Rec. H4021 (daily ed. June 3, 2011) (defeating H.R. Con. Res. 51). It must be remembered that the ten plaintiffs before the Court represent less than three percent of the House, let alone the

[8] Prior to the Supreme Court's decision in *Raines*, the courts of this Circuit frequently relied on the doctrine of remedial, or equitable, discretion as a means of disposing of lawsuits such as the present one. *See, e.g.*, *Chenoweth*, 181 F.3d at 114. In an attempt to reconcile D.C. Circuit case law on legislative standing, courts would often grant standing to legislators but then refuse to provide the relief sought. *See, e.g.*, *id*. Following the Court's decision in *Raines*, and the clear lesson of that decision for the standing of legislators, this Circuit has questioned whether the doctrine of remedial discretion retains independent vitality apart from the legislative standing analysis. *See id.* at 116 ("*Raines*, therefore, may not overrule *Moore* so much as require us to merge our separation of powers and standing analyses."); *Walker*, 230 F. Supp. 2d at 62 n.8 ("Although in theory the 'equitable discretion' doctrine offers a compelling basis for a court to stay its hand in the face of serious separation of powers concerns, the scope of the doctrine remains unsettled in the aftermath of *Raines*."). Defendants believe that the *Raines* analysis clearly demonstrates that this Court lacks jurisdiction over this matter and that the prudential analysis is therefore unnecessary. However, should the Court reach the prudential analysis, it would similarly command dismissal of this action. *Cf. Chenoweth*, 181 F.3d at 116 ("Whatever *Moore* gives the Representatives under the rubric of standing, it takes away as a matter of equitable discretion.").

entire Congress, and thus their request for extraordinary relief asks this Court to substitute the views of these ten legislators for the position of Congress as a whole. *See Dellums*, 752 F. Supp. at 1150-51 ("It would hardly do to have the Court, in effect, force a choice upon the Congress by a blunt injunctive decision, called for by only about ten percent of its membership, to the effect that, unless the rest of the Congress votes in favor of a declaration of war, the President, and the several hundred thousand troops he has dispatched to the Saudi Arabian desert, must be immobilized."). Accordingly, even putting the obvious jurisdictional flaws in plaintiffs' Complaint to the side, there is no necessity for this Court to entertain the extraordinary relief that plaintiffs now request.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this action be dismissed.

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