UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATHAN MICHAEL SMITH,	)	
Plaintiff,	)	
v.	)	Civ. No. 16-843 (CKK)
BARACK H. OBAMA,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases ..... **Pages**

Constitutional and Legislative Authorities

Other authorities

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Army Captain Nathan Michael Smith is an Army intelligence officer, deployed to Kuwait under orders to support Operation Inherent Resolve, the official name of the war against the Islamic State of Iraq and Syria (ISIS). Smith believes that the war is illegal. In his view, President Obama is conducting the war without the "specific statutory authorization" he needs from Congress under the 1973 War Powers Resolution.[1] The Government has moved to dismiss this case for want of jurisdiction on the ground that Smith lacks standing, that the case presents a non-justiciable political question, and that sovereign immunity deprives the Court of jurisdiction. The Government's contentions are wrong, and the Court should deny the motion.[2]

SUMMARY OF ARGUMENT

The Court has jurisdiction over this case. First, Smith has standing to litigate the legality of the war against ISIS. Under *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), military officers must disobey orders that are beyond their commander-in-chief's legal authority. Believing the war to illegal, Smith must therefore disobey his orders to support the war. But if Smith disobeys his orders, and the orders *are* within the commander-in-chief's legal authority, he faces severe sanctions, including dishonorable discharge. Only this Court, by deciding whether the war against ISIS violates the War Powers Resolution, can spare Smith these potential injuries.

Nor does the political question doctrine render this case non-justiciable. This is a garden-variety statutory construction case. There is no dispute that the War Powers Resolution prohibits

---

1 War Powers Resolution, § 2(c)(2), 50 U.S.C. 1541(c)(2).

2 It bears emphasis that we are not seeking to enjoin the President from fighting the war against ISIS. We are only seeking a declaration that the President has violated the War Powers Resolution by conducting the war without the authorization he needs from Congress, and that by failing to give Captain Smith the legal guidance that Supreme Court precedent requires him to give, the President has failed to "take care that the laws are faithfully executed."

the President from fighting the war against ISIS without specific statutory authorization. The question is whether Congress gave the President such authorization in the 2001 Authorization for Use of Military Force ("2001 AUMF"),[3] the 2002 Authorization for Use of Military Force Against Iraq ("2002 AUMF"),[4] or appropriations laws funding the war. Answering questions like this "is what courts do. The political question doctrine poses no bar to judicial review of this case." *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015).

Captain Smith's belief that the war against ISIS is illegal is well-founded. The War Powers Resolution requires the president, if he introduces American forces into hostilities, to withdraw them after sixty days unless Congress has declared war or given the president "specific statutory authorization" to continue. If the president does not get that authorization, he must withdraw American forces after thirty days. In the 2001 AUMF, Congress gave the president authorization to use military force to respond to the 9/11 attacks, but it refused to authorize him to fight future wars. To fight a future war, a president must get "specific statutory authorization." Yet President Obama is relying on the 2001 AUMF to fight his war against ISIS without going to Congress for the authorization the War Powers Resolution requires. Accordingly, President Obama has violated the Resolution, and the war against ISIS is illegal.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THIS CASE.

A. Captain Smith has standing.

We have been here before. In 1999, this Court decided a case raising similar issues by members of Congress. Senators and Representatives brought an action for declaratory relief, alleging that President Clinton violated the War Powers Resolution by involving the United

[3] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
[4] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2003).

States in the air bombardment of Kosovo without specific statutory authorization from Congress. *See* *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (2000).

Judge Friedman dismissed the case for want of standing. But in doing so, he noted that

> a finding that the legislative plaintiffs . . . lack standing . . . does not preclude judicial resolution of a challenge to the President's actions. Counsel for the President appears to have acknowledged that an individual alleging personal injury from the President's alleged failure to comply with the War Powers Clause or the War Powers Resolution, *as for instance a serviceperson who has been sent to carry out the air strikes against the Federal Republic of Yugoslavia, would have standing to raise these claims* . . . . The Court also notes that the political question doctrine does not apply to suits brought by individuals in their personal capacities.

See *id.* at 42 n.8 (emphasis added).

This is precisely the situation in which Captain Smith finds himself. As the Supreme Court explained in *Spokeo v. Robins*, 136 S. Ct. 1540, 1547-49 (2016), there are three "irreducible constitutional minimum" elements required for standing. The plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 1547. Smith meets them all.

First, to establish injury in fact, *Spokeo* teaches that a plaintiff must suffer "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." 136 S. Ct. at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Smith meets this requirement. As we discuss in depth below, the Supreme Court's seminal decision in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), together with Smith's oath "to support and defend the Constitution of the United States," requires Smith to refuse the military orders of his superiors if they require him to fight an illegal war. But if Smith disobeys these orders, he faces grave consequences.

Second, *Spokeo* requires an injury to be "particularized." 136 S. Ct. at 1548. It "must affect the plaintiff in a personal and individual way." *Id.* If Smith disobeys his orders, he faces the prospect of court-martial and lengthy imprisonment, as well as a dishonorable discharge, if his conscientious legal objections to the war are not upheld. The fact that other officers could face the same consequences if they disobey their orders is irrelevant.

Third, *Spokeo* requires the injury to be "concrete" in the usual meaning of the term – "real," and not "abstract." 136 S. Ct. at 1549. Again, the prospect of lengthy imprisonment is certainly "real," and not "abstract." Smith also would be burdened with the deep shame and contempt of others resulting from his dishonorable discharge. We elaborate on these points below.

1. Smith has standing under *Little v. Barreme*.

Captain Smith faces a dilemma. If he is to fulfill his duty as an officer, he must disobey his orders to support the war against ISIS and risk imprisonment and dishonorable discharge. This risk of injury gives Captain Smith standing to challenge the legality of the war.

As an intelligence officer at the headquarters of Operation Inherent Resolve, Captain Smith is under orders to fight a war that he believes violates the 1973 War Powers Resolution. If he is to uphold his oath to "support and defend the Constitution of the United States," this immediately places him in a predicament. As long ago as 1802, the Marshall Court made it clear that military officers must disobey orders that are beyond the legal authorization of their commander-in-chief. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). In modern times, the Supreme Court has cited *Little* as the foundational precedent for "the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers." *Butz v. Economou*, 438 U.S. 478, 489-90 (1978) (applying the rule to civilian, as well as military, officials). Even more recently, the Court

reasserted *Little*'s authority in *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) ("*Zivotofsky II*"), with both majority and dissenting opinions affirming its foundational character.

Smith, however, is not fully confident that the war against ISIS is illegal. He is, after all, an intelligence officer, not a lawyer. He has studied all of the materials that the Administration has made publicly available; but contrary to the President's constitutional obligation to "take Care that the Laws be faithfully executed"[5] – an obligation made absolute by *Little* – neither the Office of Legal Counsel nor the White House Counsel has issued a serious legal opinion defending the Administration's failure to obtain the "specific statutory authorization" required by the Resolution. All the public can rely on are the shifting and inconsistent rationales offered by the Administration.

Thus the dilemma that Smith faces: If he obeys his orders, and the war is illegal, he has dishonored his oath, which *Little* commands him to uphold. But if his conscientious judgment turns out to be mistaken, and the war is legal, he faces prosecution and imprisonment under the Uniform Code of Military Justice, including dishonorable discharge. *See* Uniform Code of Military Justice art. 92.[6] Absent a published legal opinion by the Administration, only this Court can resolve Smith's dilemma.

The Government entirely fails to recognize this point – neglecting even to mention *Little*, which the Complaint cites, much less explain how the Captain may escape the concrete harms that arise, once he takes the Marshall Court seriously. This is a fundamental mistake. As Professor Laurence Tribe emphasizes in a recent essay, this "court should not ignore the gravity of [Captain Smith's] individual stake—avoiding the Catch-22 of either continuing to fight a

5 U.S. Const. art. II, § 3, cl. 5.
6 10 U.S.C. 892.

possibly illegal war or disobeying orders and subjecting himself to military discipline—in deciding whether his claim is justiciable."[7]

Given the foundational character of *Little*, it is important to analyze the precise relationship between the problem the Court confronted in 1802 and the dilemma facing Captain Smith in 2016. Despite the two centuries separating the Founding Era from our own, the basic issues are identical. In each case, Congress authorized the commander-in-chief to engage in carefully limited hostilities. In each case, the commander-in-chief went well beyond these limits and issued orders requiring officers to expand the scope of military operations beyond Congress's authorization. These orders forced both Little and Smith, and similarly situated officers, to confront the same question: "Should I obey Congress or the President?" The Marshall Court's answer was clear and unequivocal: officers have an overriding obligation to follow Congress, even at the cost of disobeying their commander-in-chief.

We rely for the necessary legal context on Professor Michael Glennon's account of *Little*, which the Supreme Court singled out for special approval in *Zivotofsky II*.[8]

Little arose out of America's first limited military engagement abroad – our quasi-war with France. In 1799, Congress passed a Non-Intercourse Act authorizing President Adams to order his naval commanders to seize American merchant ships sailing to French ports. President Adams, however, went well beyond this statutory mandate. He ordered his commanders to seize American vessels coming *from* France as well, and he authorized the seizure of foreign ships which commanders believed were either American-owned or carrying American cargo. The

---

[7] Laurence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 Yale L.J. F. 86 (2016).

[8] *See Zivotofsky II*, 135 S. Ct. at 2090 (Kennedy, J.) (citing Michael Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright*?*, 13 Yale J. Int'l L. 5 (1988)).

President thereby expanded, in Glennon's words, "the United States' risk of involvement in hostilities significantly beyond what Congress had contemplated."[9]

Captain Little chose to obey his commander-in-chief's *ultra vires* order. He seized a plainly marked Danish vessel coming from France and auctioned off its contents as directed by the President. When the owners sued him for damages resulting from the sale and seizure, Little responded that he was simply following orders and was therefore excused from personal liability. The Supreme Court rejected this claim. Writing for a unanimous Court, Chief Justice Marshall held that President Adams' instructions "cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Little*, 6 U.S. (2 Cranch) at 179.

Little was a decisive reinterpretation of prevailing statutory law. The First Congress, in 1789, had invoked its power to regulate "the land and naval forces"[10] to prescribe an oath for both military officers and enlisted men. Officers were required to pledge that they "will support the constitution of the United States," but with the caveat that they would "observe and obey the orders of the President . . . and the orders of the officers appointed over [them]."[11]

Little did not directly discuss the officers' oath, but it necessarily implied that each officer must place his duty to "support the constitution" over his obligation to obey "the orders of the President." And over the centuries, Congress has revised the language of the oath to eliminate any doubt on this fundamental matter.[12] While modern officers pledge to "support and

---

9 Michael Glennon, *supra* note 8.

10 U.S. Const. art. I, § 8, cl. 14.

11 Act of Sept. 29, 1789, ch. 25, § 3, 1 Stat. 95, 96 (1789).

12 While the 1789 oath required officers to "support" the Constitution, Congress introduced the "support and defend" formula during the Civil War, in the course of a debate focusing on a very different Congressional initiative, which aimed to bar Confederate sympathizers from Union ranks. This oath required officers to pledge that they "have never borne arms against the United

defend the Constitution of the United States," their oath no longer requires them to obey their commander-in-chief.[13] By contrast, the current version of the oath for enlisted soldiers, adopted in 1962,[14] three years after the adoption of the officers' oath, retains the pledge to "obey the orders of the President of the United States and the orders of the officers appointed over me."[15] As Justice Scalia put the point in his book on canons of interpretation, "a material variation in terms suggests a variation in meaning."[16] The Supreme Court recently applied this canon in an

---

States" or provided "aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto." Act of July 2, 1862, ch.128, 12 Stat. 502 (1862). This extraordinary oath was repealed by an Act of May 13, 1884, after the end of Reconstruction. Act of May 13, 1884, ch. 46, § 2, 23 Stat. 22 (1884). While the oath endured, it was justified by an appeal to the Supremacy Clause. *See* *In re Charge to Grand Jury-Treason*, 30 F. Cas. 1049, 1049-51 (C.C.D. Mass. 1861). When Congress eliminated the oath in 1884, it retained the "support and defend" formula, which echoed the 1789 pledge to "support" the Constitution. Like the original legislation of 1789, this revised formula was based on Congress's power to regulate "the land and naval forces." U.S. Const. art. 1, § 8, cl. 14.

[13] Here is the modern oath for officers:

> I, _____ , having been appointed an officer in the Army of the United States, as indicated above in the grade of _____ do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter; So help me God.

5 U.S.C. 3331.

[14] *See* *U.S. Army Center of Military History, Oaths of Enlistment and Oaths of Office*, U.S. Army Center of Military History (June 14, 2011).

[15] Here is the modern oath for enlisted personnel (and draftees):

> I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; *and that I will obey the orders of the President of the United States and the orders of the officers appointed over me,* according to regulations and the Uniform Code of Military Justice. So help me God.

10 U.S.C. 502(a) (emphasis added).

[16] Antonin Scalia & Brian A. Garner, *Reading Law* 170 (2012) (print).

analogous case, giving interpretive significance to the decision of a later Congress to vary the meaning of a statute through a comparable amendment.[17]

The unconditional character of Captain Smith's oath places on him an absolute duty to follow Congress, not the President, when the President's orders violate the law, in this case, the War Powers Resolution. Unlike Little, Smith takes this duty seriously. While Little ignored Congress, and was held personally responsible for the resulting damages, Smith, taking *Little* seriously, is prepared to risk court-martial and dishonorable discharge if this Court does not extricate him from his dilemma.

2. Smith has standing under the oath of office cases.

Oath of office cases further support Smith's claim to standing. In *Board of Education of Central. School District No. 1 v. Allen*, 392 U.S. 236 (1968), the Supreme Court held that a civilian official in Captain Smith's position has standing to seek declaratory relief. Local Boards of Education in New York challenged a state law requiring school districts to provide textbooks to parochial school students as violative of the Establishment and Free Exercise Clauses. Like Captain Smith, Board members had to choose between enforcing the law and sacrificing their official positions.

The Court held that the Boards had standing:

> Appellants have taken an oath to support the United States Constitution. Believing s 701 to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with s 701—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation.

---

[17] *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772-724 (2014). The Court has also recently applied the canon in a variety of other contexts. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390-92 (2014); *Lawrence v. Florida*, 549 U. S. 327 (2007); *Lopez v. Gonzales*, 549 U.S. 47 (2006).

392 U.S. at 249 n.5 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Court upheld the law. *Id.* at 249; *see also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 545 (1986) (applying *Allen* but finding no standing).

This Court followed *Allen* in *Clarke v. United States*, 705 F. Supp. 605 (D.D.C. 1988). In *Clarke*, Judge Lamberth held that, under *Allen*, the members of the D.C. Council had standing to challenge the constitutionality of a federal law that required the Council to amend a D.C. law, on pain of losing all federal funds. Judge Lamberth stated:

> The court finds plaintiffs have oath of office standing, under the principle recognized by the Supreme Court in *Board of Education v. Allen*, 392 U.S. 236 (1998). In *Allen*, the Court found that legislators who had taken an oath to uphold the Constitution had standing to challenge the constitutionality of a law when they risked a concrete injury by refusing to enforce the law. In that case, plaintiffs faced the choice of violating their oaths by enforcing a law which they believed to be unconstitutional or risking expulsion from their jobs. Plaintiffs here are similarly placed. Because Congress has conditioned all District funds on the Council's vote, the Council members must either vote in a way which they believe violates their oaths, or face almost certain loss of their salaries and staffs as well as water, police and fire protection.

Id. at 608. Judge Lamberth struck down the law. The D.C. Circuit affirmed, 886 F.2d 404 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 161, *vacated as moot*, 915 F.2d 699 (1990).[18]

This Court was again presented with an oath of office case in *Rodearmel v. Clinton*, 666 F. Supp. 2d 123 (D.D.C. 2009). David C. Rodearmel, a Foreign Service Officer, challenged as unconstitutional then-Secretary of State Hillary Clinton's appointment and continuance in office.

[18] In support of the government's contention that Smith "has not asserted a cognizable injury in fact," Motion at 35-37, the government cites three Ninth Circuit cases rejecting oath-taker standing, *id.* at 36 & n.49. In the first, *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d. 231 (9th Cir. 1980), the Ninth Circuit rejected oath-taker standing under *Allen*, on the ground that intervening Supreme Court decisions had overtaken *Allen*. Later Ninth Circuit panels were bound by this decision. In *Clarke*, however, Judge Lamberth rejected the Ninth Circuit's reasoning, pointing out that the Supreme Court's 1986 decision in *Bender* had "subsequently reaffirmed *Allen*." 705 F. Supp. at 608 n.4. The government likewise cites *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015), but there, too, the circuit court's decision in *Finch v. Mississippi State Med. Ass'n, Inc.*, 585 F.2d 765 (5th Cir. 1978), which bound later panels, pre-dated *Bender*.

Rodearmel alleged that he had Article III standing under *Allen* and *Clarke* because he was forced to choose between serving under the Secretary and violating his commissioning oath to "support and defend the Constitution," on the one hand, and refusing to serve the Secretary and placing himself at substantial risk of sanctions, on the other. A three-judge panel of this Court, convened by the Chief Judge,[19] found Rodearmel's reliance on *Allen* and *Clarke* misplaced:

> In contrast to the plaintiffs in *Allen* and in *Clarke*, Rodearmel has not alleged that he has been required to take any action that he believes is itself unconstitutional and that would therefore lead him to violate his oath of office. In both *Allen* and *Clarke*, the plaintiffs either had to take an action that they believed violated the Constitution or risk a concrete injury. Rodearmel, on the other hand, merely alleges that "serving under, taking direction from, and reporting to" Clinton would be contrary to his oath of office without alleging the specific constitutional violation that he believes he would be committing by remaining under her supervision.

Id. at 130 (citations omitted). Captain Smith, by contrast, has alleged that he has been ordered to take action—fighting ISIS—that he believes violates the War Powers Resolution and, hence, violates "his oath of office" to fight.[20]

---

[19] *See* 28 U.S C. 2284.

[20] The government entirely fails to confront *Allen* "oath of office" standing. It instead relies on *Cole v. Richardson*, 405 U.S. 676, 684 (1972), to support its claim that "an oath to 'support' and 'defend' the Constitution" cannot support Smith's standing because it "fails to impose 'specific and positive action on oath-takers.'" *See* Motion at 40. But *Cole*, unlike *Allen*, did not actually deal with an oath "to support and defend the Constitution." It dealt with a Massachusetts law from the McCarthy era that required state employees to "oppose the overthrow of the government of the United States . . . by force, violence or by any illegal or unconstitutional method." *Cole*, 405 U.S. at 677-78. The Court upheld this oath as "constitutionally permissible." *Id.* at 679. It is unclear whether the *Cole* judgment would survive First Amendment challenge today. But the Court's views on "oath of office" standing were mere dicta *en route* to its questionable holding. It is for good reason, then, that it is *Allen*, not *Cole*, which has controlled the standing doctrines elaborated by the courts of this Circuit.

The government supplements its question-begging appeal to *Cole* with this provision from the Defense Department's Law of War Manual: "subordinates are not required to screen the orders of superiors for questionable points of legality, and may, absent specific knowledge to the contrary, presume that orders have been lawfully issued." Motion at 39 (citing Law of War Manual § 18.3.2.1. at 1058 (June 2015)). *See also* Motion at 40 n. 52. But the Defense Department, and its military tribunals, do not have the last word on the duties imposed on Captain Smith. This Court must follow the far more exigent duties first imposed by the Marshall

3. Smith has standing under the Vietnam-era cases.

Decisions in cases brought by service members challenging the Vietnam War further confirm Smith's standing. In *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970), an enlisted soldier challenged an order to report to an Army base for dispatch to South Vietnam. He claimed, in the words of the Second Circuit, that the named government officials "exceeded their constitutional authority by commanding him to participate in military activity not properly authorized by Congress." *Id.* at 304. The Circuit held that "'the legality of an order sending men . . . to fight in an 'undeclared war' [can] be raised by someone to whom such an order has been directed.'" *Id.* at 306 (citation omitted). The Court found that Berk's complaint put "in controversy his future earning capacity, which serious injury or even death might diminish by an amount exceeding $10,000." *Id.* This was sufficient to establish concrete injury to support standing under the Court's federal question jurisdiction, 28 U.S.C. 1331(a). *Id.*[21] The injuries that threaten Smith are also concrete. Similarly, the First Circuit held that service members "who are either serving in Southeast Asia or are subject to such service," *Massachusetts v. Laird*, 451 F.2d 26, 27 (1st Cir. 1971), had standing to claim "that their forced service in an undeclared war" violated their Fifth Amendment due process rights. *Id.* at 29.

Smith's claim to standing is even more compelling than those raised by the draftees of the Vietnam era. The draftees' oath required them to "obey the orders of the President of the United States and the orders of the officers appointed over [them]." Smith's oath contains no similar provision, unconditionally requiring him to heed Congress's constitutional commands when they conflict with those of the commander-in-chief.

Court in *Little*, as they were reaffirmed by Congress in the modern era when it set out the terms of the officer's oath in a fashion that set it apart from the oath of enlisted personnel.

[21] *See also* *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973) ("In *Berk v. Laird*, 429 F.2d 302, 306 (2d Cir. 1970), we held that a serviceman does have standing if he is under orders to fight in the combat to which he objects.").

B. This case will not be moot once Smith's current tour of duty ends.

Captain Smith has taken his responsibilities seriously. He arrived for duty with Operation Inherent Resolve at the end of August 2015. During his spare time, he carefully studied all the legal sources available to him, and he only gradually reached the conclusion that he had a duty to publicly challenge the legality of his orders. It took a further period of consultation to determine that his best course was to seek relief from this court – leading him to file his motion for a declaratory judgment on May 4, 2016.

Smith's year-long tour of duty come to an end on August 12th, and he is currently assigned to Fort Hood, Texas. His departure from the headquarters of Inherent Resolve, however, should not impair his standing to continue this lawsuit. Under any realistic scenario, it will take an extended period for Captain Smith's complaint to be resolved in a deliberate fashion by this Court and the appropriate appellate tribunals—far longer than the typical battlefield assignment, which varies between nine months and one year.

Smith's case therefore falls into the category of cases that are "capable of repetition and evading review," and do not become moot when the immediate controversy ends. To maintain standing under this doctrine, "the plaintiff must demonstrate that '(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000).

A decision by Judge Ruth Bader Ginsburg, when serving on the D.C. Circuit, is particularly instructive. *Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991), involved a challenge by a serviceman serving in the First Gulf War in Operation Desert Storm. It involved an FDA

regulation allowing the Defense Department to waive the agency's prohibition on the use of unapproved drugs in the case of soldiers exposed to chemical warfare during combat. By the time the appeal reached the D.C. Circuit, Desert Storm had come to an end and the plaintiff had returned home safely. Nevertheless, a unanimous Court held that it fell within the class of situations "capable of repetition and evading review."

The panel disagreed, however, when it came to determining whether there was a reasonable expectation that the plaintiff would once again be subject to the risk of problematic drugs on the field of combat. Over the dissent of (then) Circuit Judge Clarence Thomas, the majority held that, despite his departure from Iraq, and despite the end of the war, the plaintiff still ran a sufficient risk to maintain standing.

The majority's decision has been recently reaffirmed in *Ralls Corp. v. Committee on Foreign Inv. in U.S.*, 758 F.3d 296 (2014):

> Doe v. Sullivan demonstrates that a controversy is capable of repetition even if its recurrence is far from certain. … We nevertheless concluded that the challenged action was capable of repetition, i.e., there was "some likelihood" it would recur, because of the challenger's "continuing status as a member of our armed forces" and the FDA's likely retention of the regulation. We reached this conclusion notwithstanding the fact that the "next conflict [was] not yet upon us." [22]

By this standard, Captain Smith's situation presents an easy case. In contrast to the serviceman in *Doe*, Smith's war still continues. Moreover, he runs a very real risk of returning to the battlefield. Since he swore his oath in 2010, he has completed two tours of combat—nine months fighting the Taliban in Afghanistan between April and December 2012; and now, one year fighting ISIS. As a career officer, playing a key intelligence function, he is a prime candidate for another tour with Operation Inherent Resolve. He therefore has a "reasonable

[22] *Id*. at 324 (internal citations omitted).

expectation" of confronting "the same action again" and readily satisfies the governing law of this Circuit.

If despite *Sullivan* and *Ralls*, Smith's case were dismissed as moot, only one path would remain open to him upon his second tour of duty with Operation Inherent Resolve. He could remain faithful to his oath to "protect and defend the Constitution" only by disobeying the orders of his commander-in-chief on the ground that they violate the War Powers Resolution—even at the risk of dishonor and imprisonment if a court-martial does not agree.[23]

The time, then, to take his case seriously is now.

II. THE POLITICAL QUESTION DOCTRINE DOES NOT APPLY TO THIS CASE

The government argues that this Court is precluded from considering the merits of Captain Smith's claims by the "political question" doctrine. Its motion relies on a host of decisions handed down before the Supreme Court landmark judgment in *Zivotofsky v. Clinton* (*Zivotofsky I*), 132 S. Ct. 1421(2012) – the most important statement on the question since *Baker v. Carr*, 369 U.S. 186 (1962). Remarkably, the Motion does not cite this recent decision – failing to realize that the Court has repudiated its central contentions.

Zivotofsky I is directly on point. Like Captain Smith, Zivotofsky had a personal stake in enforcing a Congressional statute – in his case, a provision requiring his passport to identify his

---

[23] The government's claim that this case is barred by sovereign immunity, Motion at 42, is without merit. As this Circuit's Court of Appeals has explained:

> [S]overeign immunity does not apply as a bar to suits alleging that an officer's actions were unconstitutional or beyond statutory authority, on the grounds that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *see also Dugan v. Rank*, 372 U.S. 609, 621–23 (1963).

Swan v. Clinton, 100 F.3d 973, 981 (D.C. Cir. 1996) (footnote omitted).

place of birth as Jerusalem, Israel. In rejecting the government's contention that the "political question" doctrine barred consideration of the merits, the Court emphasized that *Zivitofsky I* was not asking the judiciary "to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be." *Id.* at 1427. Instead, "the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise." *Id.* Smith finds himself in the same position. He has a profound personal stake in determining whether the President is acting lawlessly in continuing his ISIS campaign without the "explicit" Congressional authorization required by the WPR. Just as in *Zivotofsky I*, there is no need to indulge in "unmoored" foreign policy judgments. This Court must simply engage in well-established traditions of statutory interpretation.

Indeed, in one important respect, Smith's claims raise a far easier "political question" problem. In *Zivotofsky I*, the government was attacking the constitutionality of the central statutory provision involved in the dispute. This is not true in the present case. The government cites only singles one sub-section of the WPR – Section 8(a)(1) – and suggests that it "would be unconstitutional" to construe it in a manner that "foreclose[d] Congress from authorizing executive military activities through an appropriations statute." Motion at 29 n.47. But as we will show, there is no need to adopt the government's construction of this sub-section to find that the relevant appropriations statutes fail to satisfy the WPR's key requirement of an "explicit" Congressional authorization.

It follows that *all* the critical issues in this case involve straightforward problems of statutory interpretation. While *Zivotofsky I* dealt with the "hard case" in which the government challenged the constitutional authority of Congress to regulate foreign affairs, it only served to

reinforce the Court's long-standing practice in "easy cases" involving statutes of *undisputed* constitutionality. The Court has *never* recognized a political question when dealing with such a case.[24] There is no reason for this Court to take such an unprecedented step here. To the contrary, this route was emphatically closed off when Zivotofsky returned to the Supreme Court for a final decision on his statutory claim. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076 (*Zivotofsky II*). Once again, the government fails to cite, much less confront, the implications of this ground-breaking decision – which serve to vindicate the central contention of Captain Smith's challenge to the legality of the war.

To see this point, we must follow Justice Kennedy, speaking for the Court, as he confronted one of the government's large claims in making its case. In Justice Kennedy's words, this involved the president's assertion of "broad, undefined powers over foreign affairs" based "on *United States v. Curtiss–Wright Export Corp.*, which described the President as "the sole organ of the federal government in the field of international relations.'"[25]

Justice Kennedy's next sentence reads: "This Court declines to acknowledge that unbounded power." He goes on to elaborate:

> In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. See, e.g., *Medellín v. Texas*, 552 U.S. 491, 523–532(2008); *Youngstown*, 343 U.S. at 589; *Little v. Barreme*, 2 Cranch 170, 177–179.[26]

---

[24] Chris Michel, Comment, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of* Zivotofsky v. Clinton, 123 Yale L. J. 253, 255 (2013).

[25] *Zivotofsky II*, 135 S. Ct at 2089 (quoting *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

[26] *Id*. at 2090.

Little v. Barreme– precisely the decision that imposes upon Smith his fundamental obligation to obey Congress when the president chooses to fight an illegal war.

Justice Kennedy's appeal to *Youngstown* is equally significant. As we have seen, Congress's overriding aim in enacting the WPR was to follow Justice Jackson's canonical *Steel Seizure* concurrence, and impose a Category Two legal framework on war-making authority to replace the ambiguities of the Category Three system that had been discredited during the Vietnam War.

It this Court's task to follow *Zivotofsky II* and redeem the *Youngstown* foundational principle*:* "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[27]

III. SMITH'S BELIEF THAT THE BATTLE AGAINST ISIS VIOLATES THE WAR POWERS RESOLUTION IS WELL-FOUNDED.

Justice Jackson's canonical concurring opinion in the *Steel Seizure Case* framed the historic Congressional debate on the War Powers Resolution. In offering the bill which set the basic terms for the Resolution's passage, the Senate Foreign Relations Committee explained:

> As the late Supreme Court Justice H. Robert Jackson pointed out in his concurring opinion in *Youngstown Steel Corp. v. Sawyer*, there is a discrete "zone of twilight" between the discrete areas of Presidential and Congressional power. Politics, like nature, abhors a vacuum. When Congress created a vacuum by failing to defend and exercise its powers, the President hastened to fill it. As Justice Jackson commented, "Congressional inertia, indifference or quiescence, may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility…." [citing *Youngstown*, 343 U.S. 579 (1952)].
>
> To assert power is not, however, to legitimize it. As a Supreme Court Justice of the last century commented: "An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as though it had never been passed." [citing Justice Field in

[27] This passage from *Youngstown* can be found in the final paragraph of Justice Black's opinion of the Court, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

> *Norton v. Shelby County*, 118 U.S. 425 (1886).] The same principle must apply to actions by the executive.[28]

In Justice Jackson's terms, the War Powers Resolution's aim was to shift the constitutional terrain from the "twilight zone" of Justice Jackson's Category Two to a regime governed by Category Three: where the president's authority operates "at its lowest ebb" in exercising his powers as commander-in-chief in a manner "incompatible with the…. will of Congress." Such claims, Justice Jackson famously insisted, "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[29]

The Committee's bill aimed precisely to achieve Justice Jackson's objective: the restoration of "the equilibrium established by our constitutional system." Its Report put this point in the words of the Resolution's principal sponsor, Senator Jacob Javits:

> My cosponsors and I regard this bill as basic national security legislation . . . .We live in an age of undeclared war, which has meant Presidential war. Prolonged engagement in an undeclared Presidential war has created a most dangerous imbalance in our Constitutional system of checks and balances. . . . [The bill] is rooted in the words and the spirit of the Constitution. It uses the clause of Article I, Section eight to restore the balance which has been upset by the historical enthronement of that power over which the framers of the Constitution regarded as the keystone of the whole Article of Congressional power – the exclusive authority of Congress to declare war; the power to change the nation from a state of peace to a state of war.[30]

The broader public's understanding of the WPR's aim was heightened by the consistent opposition of the Nixon Administration. Presidential opposition required Congressional proponents to engage in a sustained effort to win broad public support for their constitutional position, ultimately allowing them to override President Nixon's Veto Message, which denied

---

[28] S. Rep. No. 93-220 (93d Cong., 1st Sess.) at 15 (June 14, 1973).

[29] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson J., concurring).

[30] S. Rep. No. 93-220 (93d Cong., 1st Sess.) at 2. This theme is repeated in the parallel House committee report H.R. Rep. No. 93-287 at 4 (1973); H.R. Rep. No. 92-1302 at 3 (1972); S. Rep. No. 92-606 at 3 (1972).

the constitutionality of the Congressional effort to impose strict limits on the exercise of the war-making powers of the commander-in-chief.[31]

The Resolution's express purpose, as stated in Section Two, is "to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities." [32] Its "heart and core"[33] is Section Five's requirement that the president obtain the express consent of Congress within sixty days of the introduction of American armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[34] If Congress fails to "enact[] a specific authorization for such use of United States Armed Forces," Section 5(b) allows the president to keep the troops fighting for only thirty more days, "if . . . unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces *in the course of bringing about a prompt removal of such forces* (emphasis supplied)." [35]As the Senate Committee Report emphasized, "the burden for obtaining an extension under Section 5 rests on the President. He must obtain specific, affirmative, statutory action by the Congress in this respect."[36]

Despite Nixon's emphatic objections to the 60/30 day deadline,[37] the constitutionality of this key provision was expressly approved by President Carter's Office of Legal Counsel, and

---

31 *See* 119 Cong. Rec. 36,175 (1973).
32 War Powers Resolution, § 2(a), 50 U.S.C. 1542.
33 S. Rep. No. 93-220 (93rd Cong., 1st Sess.) at 4 (June 14, 1973).
34 War Powers Resolution, § 4(a), 50 U.S.C. 1543(a).
35 War Powers Resolution, § 5(b)(3), 50 U.S.C. 1544(b)(3).
36 S. Rep. No. 93-220 (93rd Cong., 1st Sess.) at 28 (June 14, 1973).
37 *See* 119 Cong. Rec. 36,175 (1973).

the Obama Administration has explicitly reaffirmed the continuing validity of this early OLC pronouncement. [38]

Nevertheless, the Administration has failed to provide Captain Smith with grounds to believe that it has complied with these mandatory provisions.

A. The Core Violation

On August 31, 2010, President Obama addressed the nation to announce "the end of our combat mission in Iraq."[39] Five years later, the situation had evolved to the point where National Security Advisor Susan Rice wrote to the Speaker of the House that "the Iraq AUMF is no longer used for any U.S. government activities and the Administration fully supports its repeal."[40] Rice sent this letter on July 25, 2014 – in full recognition of the fact that President Obama had already, on June 26, informed Congress, "consistent with the War Powers Resolution," that he had "ordered increased intelligence, surveillance, and reconnaissance that is

---

[38] Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Opinions of the Attorney General 185, 196 (1980):

> We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of § 1544(b) of the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of "unavoidable military necessity." This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his constitutional function as Commander-in-Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.

In 2011, Senator Richard Lugar asked Harold Koh, then Legal Adviser of the State Department, whether this opinion continued to represent the Administration's views. Koh replied: "Yes, the opinion continues to reflect the views of the executive branch." *See* Libya and War Powers, Hearing Before the Sen. Comm. on Foreign Relations, 112th Cong. 53 (2011).

[39] Press Release, Office of the Press Sec'y, *Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq*, The White House (Aug. 31, 2010).

[40] Rice Letter.

focused on the threat posed by the Islamic State of Iraq and the Levant (ISIL) [and] also ordered up to approximately 300 additional U.S. Armed Forces personnel to… train, advise, and support Iraqi security … to confront the threat posed by ISIL."[41] By August 8, however, it was plain to the President that this modest mission would not suffice. He informed the leaders of the House and Senate he had "commenc[ed]…military operations in Iraq," including "targeted airstrikes." Nevertheless, he sought to reassure Congress that this intervention would "be limited in their scope and duration as necessary to protect American personnel in Iraq by stopping the current advance on Erbil by the terrorist group [ISIL]."[42] He failed to explain, however, how this assertion of power against ISIL was consistent with Ms. Rice's explicit repudiation of the 2002 AUMF two weeks earlier.

President Obama then escalated the battle further in his televised address to the nation of September 10th: the campaign against the Islamic State in Iraq and Lebanon (ISIL) would no longer be "limited…in duration." Instead, "it will take time to eradicate a cancer like ISIL. And any time we take military action, there are risks involved — especially to the servicemen and women who carry out these missions." He also claimed "authority to address the threat from ISIL," but once again, the President did not advance any legal justification for his assertion of power.[43]

A couple of days later, however, an anonymous "senior administration official" tried to fill this gap with an e-mail to the *New York Times*. In four summary paragraphs, the anonymous source explained that a presidential decision "to continue these operations beyond 60 days [was]

---

41 Letter to Congressional Leaders on the Deployment of United States Armed Forces Personnel to Iraq, 2014 Daily Comp. Pres. Doc. 497 (June 26, 2014).

42 Letter to Congressional Leaders Reporting on the Commencement of Military Operations in Iraq, 2014 Daily Comp. Pres. Doc. 604 (Aug. 8, 2014).

43 Press Release, Office of the Press Sec'y, Statement by the President on ISIL, The White House (Sept. 10, 2014).

consistent with the War Powers Resolution because the operations are authorized by" Congressional AUMFs passed by Congress in 2001 and 2002.[44]

We will critique these claims later. The crucial point is that the Administration failed to move beyond such casual pronouncements. The authoritative legal spokesmen for the executive branch in such matters are the Office of Legal Counsel and the White House Counsel. Neither has ever published a serious legal opinion that explained to Captain Smith, or the rest of us, why the President was not required to withdraw his forces within ninety days if he could not obtain the specific consent of Congress during the first two months of "hostilities."

This represents a sharp break from prior practice. Since 1973, there have been a number of presidentially initiated military engagements that triggered Section 5(b). But, all of them came to an end before they reached the ninety-day limit until the coming of the Obama Administration. It was the Libyan bombing campaign of 2011 that first broke the ninety-day barrier, and the Administration's response at that time serves as a sharp contrast to the ISIS scenario. As the ninety-day deadline approached in the Libyan campaign, the Office of Legal Counsel published an elaborate opinion explaining why the military operation could lawfully continue.[45] In the present case, however, Captain Smith has been left in the dark. As he considered his obligations under *Little v. Barreme*, the Administration failed to provide him with an authoritative explanation for why Operation Inherent Resolve is operating within the statutory framework established by Congress in 1973. Instead, Captain Smith was left to his own resources to determine the meaning of Ms. Rice's official repudiation of the 2002 AUMF on July 25th and its unofficial embrace on September 12th, which was followed up by a summary assertion in

---

[44] Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says, N.Y. Times (Sept. 13, 2014). The full email can be found at: IS War Powers Theory Background Statement, Document Cloud, (Sept. 12, 2014.

[45] Auth. to Use Military Force in Libya, 2011 WL 1459998 at *1 (O.L.C. Apr. 1, 2011).

President Obama's next report, "consistent with the War Powers Resolution," on September 23, that the 2002 AUMF, as well as the 2001 AUMF authorizing the attack on Al Qaeda in Afghanistan, supported the current assault on ISIS.[46]

The anonymous email of September 12th was only the first in a shifting series of irregular assertions by Administration officials which fail to satisfy the rule of law. Captain Smith is therefore required to confront the legal complexities on his own – unless this Court intervenes to resolve his predicament.

A special complexity requires attention. As we shall show, the Administration's arguments are especially weak when it comes to its decision to extend the battle beyond Iraq to Syria. Since the President's reports to Congress in August describe a campaign against the Islamic State in Iraq and Lebanon (ISIL), they do not clearly address this issue, which was only first confronted in the President's speech of September 10th:

> Across the border in Syria, we have ramped up our military assistance to the Syrian opposition. Tonight, I again call on Congress, again, to give us additional authorities and resources to train and equip these fighters. In the fight against ISIL, we cannot rely on an Assad regime that terrorizes its own people — a regime that will never regain the legitimacy it has lost. Instead, we must strengthen the opposition as the best counterweight to extremists like ISIL, while pursuing the political solution necessary to solve Syria's crisis once and for all.[47]

"We have ramped up…": the President is speaking in the past tense, but it remains unclear precisely when the cross-border campaign was initiated. Nevertheless, we shall show that, even if one assumes that the Syrian campaign began on September 10th, the Administration's subsequent actions fail to satisfy the 60/30 mandatory requirements of the WPR.

---

[46] *See* Letter to Congressional Leaders Reporting on the Deployment of United States Armed Forces Personnel to Iraq and the Authorization of Military Operations in Syria, 2014 Daily Comp. Pres. Doc. 697 (Sept. 23, 2014).

[47] Press Release, Office of the Press Sec'y, Statement by the President on ISIL, The White House (Sept. 10, 2014).

Only one point remains to set up the basic problem posed by this case. In his speech from the Oval Office, the President assured the nation that his intervention "would not involve American combat troops fighting on foreign soil." But direct combat by American troops is not required to trigger the sixty-day clock under the WPR. Instead, Section 8(a)(c) states that a triggering event occurs whenever the president orders the "introduction of United States Armed Forces," which is defined to include:

> the assignment of member[s] of such armed forces to command, coordinate, *participate* in the movement of, or *accompany* the regular or *irregular* military forces of any *foreign country or government* when such military forces are engaged, or there exists *an imminent threat* that such forces will become engaged, in hostilities.[48] (emphasis supplied).

Given these exceptionally broad terms, the initiatives announced by the President plainly qualify, since they involve the use of combat-ready air and ground forces to "accompany" the "regular" or "irregular" forces of the Iraqi army or Syrian opposition in ways that assist their "engagement" in "hostilities." Indeed, apart from the ambiguity involving Syria, the President's report to Congressional leaders of August 8th had already operated to trigger the 60 day time-clock – since it initiated "targeted airstrikes" to protect "American personnel" engaged in assisting the Iraqi army's effort to stop "the current advance on Erbil by the terrorist group [ISIL]."[49] It is for good reason, then, that August 8th is generally understood as the beginning of the current war against the Islamic State.[50] This implies that the sixty-day deadline for Congress's "explicit authorization" lapsed on October 7th, and in the absence of such a mandate, the required moment for withdrawal was November 6th.

---

48 War Powers Resolution, § 8(a)(c), 50 U.S.C. 1547(c).

49 Letter to Congressional Leaders Reporting on the Commencement of Military Operations in Iraq, 2014 Daily Comp. Pres. Doc. 604 (Aug. 8, 2014).

50 *See, e.g.*, Steve Nelson, Obama's ISIS War Enters Year 3 as Court Fight Over Its Legality Heats Up, U.S. News & World Report (August 6, 2016).

But the President failed, during this critical period, to gain a new Authorization for the Use of Force. This remains true, even if the Syrian campaign is deemed to have begun on September 10th, since nothing was done to obtain an "explicit authorization" before November 9th. These undisputed facts suffice to establish a prima facie violation of the War Powers Resolution.

B. The Government's Justifications for Violating the WPR Are Unpersuasive.

Section 5(b)(3) puts the burden on the president to obtain an "explicit authorization" from Congress or cease "hostilities" within ninety days of their initiation.[51] The government argues that President Obama has discharged this burden in three different ways. First, it asserts that a series of appropriations acts funding the military campaign are sufficiently "specific" to satisfy the requirement. Second, it asserts that, despite the passage of fourteen years, the 2002 AUMF "against the continuing threat posed" by Saddam Hussein should be reinterpreted to provide the requisite "specific" endorsement. Third, it reinterprets the 2001 AUMF's support of hostilities against Al Qaeda and other "nations, organizations, and persons" involved in 9/11 to provide "specific" authorization of the on-going war against ISIS.

The Government fails on all three counts. In each case, it misreads the applicable legal texts in its effort to legalize the President's breach of the ninety-day limit. The WPR, moreover, requires this Court to test the government's "interpretations" by an exacting standard. Under Section 5(b)(3), the decisive question is whether the relevant statutes provide "*specific* authorization[s]" (emphasis supplied) for the President's ISIS campaign. The Government's claims fall far short of this standard. We consider each of its arguments in turn.

---

[51] War Powers Resolution § 5(b)(3), 50 U.S.C. § 1544(b)(3).

1. Congressional Appropriations Do Not Satisfy the War Powers Resolution.

The Government argues that a series of Congressional appropriations bills funding the ISIS campaign suffice to vindicate the legality of Operation Inherent Resolve. In making this claim, it also emphasizes the significant ways in which the Administration is engaged in on-going consultation with the House and Senate over the character of its military engagement.

We begin by establishing that inter-branch consultation is not nearly enough to comply with the requirements of the WPR. We then proceed to the main point: we show that the Government's appeal to appropriations bills flies in the face of the WPR's express command that Congressional approval shall not "be inferred from any provision…contained in any appropriation Act, *unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities*."[52] Since nothing resembling an "explicit" authorization appears in any of the relevant appropriations acts, it suffices to require rejection of the Government's claim.

There is a special feature of these acts that makes this conclusion even more compelling. They are not merely silent or ambiguous on their relationship to the War Powers Resolution's requirements. They *explicitly* declare that their funding decisions should *not* be construed as supplying the "specific" authorization required by the WPR. As a consequence, there is absolutely no basis for the Government's claim that these appropriations acts satisfy the WPR's requirement of "explicit authorization" in the face of their express denial of any such intention.

2. Consultation is Not Enough.

The Government fails to note that the War Powers Resolution explicitly rejects the idea that elaborate consultation procedures are sufficient to restore Congress's constitutional role as the ultimate arbiter on matters of war and peace.

---

[52] War Powers Resolution, § 8(a)(1), 50 U.S.C. 1547(a)(1) (emphasis added).

As deliberations in the House and Senate went into high gear in 1972, it was precisely this issue which divided the House and Senate. On April 13, the Senate passed S. 2596, which already contained a mandatory timetable requiring the president to obtain a "specific statutory authorization" within thirty days of his unilateral military initiative.[53] But the House refused to agree. Instead, it passed a sweeping amendment to the Senate bill which eliminated the Senate's timetable and simply required the president to engage in sustained consultation with Congress. This sharp disagreement propelled the debate forward to a House-Senate conference committee – which failed to reconcile the two measures during the closing months of the 92nd Congress.[54]

This war powers issue then became part of a larger debate during the 1972 elections on the lessons to be learned from the Vietnam War. When the matter returned for legislative consideration at the beginning of the 93rd Congress, the House reconsidered its position– passing a bill requiring the president to gain the approval of the House and Senate within 120 days of the initiation of hostilities.[55] This opened the way for the conference committee to agree to the 60/30 day timetable that now appears in the Resolution.[56] Echoing similar floor presentations by other members of the conference committee, Senator Javits made the key point: "consultation is not a substitute for specific statutory authorization."[57]

It follows that the pattern of presidential consultation described by the Government cannot, by itself, satisfy the Resolution.

---

53 S. 2956, 92d Cong. §§ 3, 5.
54 H.R. Rep. No. 93-287 at 2 (1973).
55 H.R.J. Res. 542, 93d Cong. § 4(b) (as introduced in the House, May 3, 1973).
56 119 Cong. Rec. 33,550 (1973).
57 *Id*.

3. Section 8(a)(1) Bars Recognition of Appropriation Bills As "Specific Authorization."

We turn, then, to the government's central claim that the "specific authorization" required by Section 5(b)(3) can be established by the Congressional of appropriations bills funding the campaign against ISIS.

We have already cited the express language of Sec. 8(a)(1) of the WPR, which requires an appropriations bill to "specifically authorize the introduction of United States Armed Forces into hostilities."[58] The Senate Committee Report discussion of this provision casts light on its basic purposes. It explains that Section 8(a)(1) was intended "to counteract the opinion in the *Orlando v. Laird* decision of the Second Circuit Court holding that passage of defense appropriations bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam war."[59]

Remarkably, the Government supposes that *Orlando* remains good law today. It relies on the *Orlando* court's belief that the decisive legal question is "whether there is *any* action by Congress sufficient to authorize or ratify the military activity in question" (emphasis supplied by the Government).[60] But, for the Congress of 1973, decisions like *Orlando* were part of the problem, not part of the solution. It reflected the difficulty courts had in adjudicating war power disputes between the branches operating in the "twilight zone" of Category Two. It was precisely the WPR's aim to provide clear rules, like those in Section 8(a)(1), that would create a Category Three regime that would enable judges to restrict presidential war-making within a legal framework enabling Congress to exercise its ultimate control over the question of war and peace.

---

58 War Powers Resolution, § 8(a)(1), 50 U.S.C. 1547(a)(1).
59 S. Rep. No. 93-220 at 25 (1973).
60 Motion at 22 (quoting *Orlando v. Laird*, 443 F2d 1039, 1042 (2d. Cir. 1971)).

The Government cautions that it "would be unconstitutional" to construe Section 8(a)(1) in a manner that "foreclose[d] Congress from authorizing executive military activities through an appropriations statute."[61] As an abstract matter, this is surely correct: a later Congress undoubtedly has the constitutional authority to repeal Section 8(a)(1) or the WPR in its entirety. But Section 8(a)(1) does indeed permit a later Congress to declare that an appropriations measure should count as "explicit authorization." In providing this option, the WPR is enhancing the range of legislative choice – enabling later Congresses to provide the requisite approval either through general legislation or acts of appropriation. In either case, however, the authorization must be "explicit." As we have seen, this requirement was central to the WPR's effort to restore the constitutional equilibrium, and enable Congress to reassert its control over the question of war and peace.

What is more, the facts of this case make the Government's claims particularly untenable. The relevant appropriations statutes leave no doubt about their relationship to the WPR. They explicitly deny that they constitute the "specific authorization" required by to allow the President to continue his ISIS campaign beyond the 90-day limit.

Congress's strategy of *specific disclaimer* was initiated the very first time it decided to fund the ISIS war. On September 19th, Congress amended the Continuing Appropriations Resolution of 2015 to allow the transfer of already appropriated funds to support the on-going campaign. In approving this transfer, however, it stipulated that "[n]othing in this section shall be construed to constitute a specific statutory authorization for the introduction of United States Armed Forces into hostilities or into situations wherein hostilities are clearly indicated by the

[61] *Id*. at 29 n. 47.

circumstances."[62] As Representative Howard McKeon, the primary sponsor of the amendment, explained to the House, "There may be a time when we need to have an AUMF debate, but this is not it. The President has not asked for such an authority."[63]

Call this an *explicit* disclaimer, the provision is expressly targeted at the ISIS campaign. But Rep. McKeon's statutory intervention was made within the framework of an omnibus appropriations act containing a *general disclaimer*: "[n]one of the funds made available by this Act may be used in contravention of the War Powers Resolution."[64]

Despite this double-disclaimer, the President failed to make any such request for an "explicit" authorization required by the WPR for on-going military action beyond ninety days. Instead his September 23rd letter, sent to Congress "consistent[ly] with the War Powers Resolution," took a radically different approach. It claimed that his new military campaign "was supported by" the 2001 and 2002 AUMFs, without providing *any* reasoned justification for this bald assertion of legal authority.[65]

Congress's original stop-gap funding measure expired in December. It was replaced on December 16th by a new appropriations act for the rest of the fiscal year. This legislation, passed

---

62 Continuing Appropriations Resolution, 2015, § 149(i), Pub. L. No. 113-164, 128 Stat. 1867, 1876 (2014).

63 160 Cong. Rec., H 7,557 (daily ed. Sept. 16, 2014) (statement of Representative McKeon).

64 *See* Consolidated Appropriations Act, 2014, § 9015, Pub. L. No. 113-76, 128 Stat. 5, 150 (2014).

65 Here is the crucial paragraph:

> I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107–40 and Public Law 107–243) [i.e., the AUMFs of 2001 and 2002] and as Chief Executive, as well as my constitutional and statutory authority to conduct the foreign relations of the United States.

Letter to Congressional Leaders Reporting on the Deployment of United States Armed Forces Personnel to Iraq and the Authorization of Military Operations in Syria, 2014 Daily Comp. Pres. Doc. 697 (Sept. 23, 2014).

after the mandatory 60/30 day deadline expired, continued to adopt the "double disclaimer" strategy. This time, it contained specific provisions declaring that funding for the Syrian campaign did not constitute the "specific authorization" required by the WPR,[66] as well as a general prohibition against the use of funds "in contravention of the War Powers Resolution."[67]

These early disclaimers are important.[68] The basic aim of the WPR is to require explicit Congressional approval *before* a military intervention generates overwhelming political momentum. As Senator Javits explained, the Vietnam experience had taught Congress that, once the troops were engaged in long-term combat, it was virtually impossible to cut off funds, since it involved "leaving our men stranded in the field without the means to fight a war…."[69]

These statutory commands have a different status from judge-made canons of statutory interpretation. When courts create "clear statement" rules, judges remain free to adapt and revise them when it seems appropriate. But judges have no similar freedom when Congress imposes such rules by express command. Yet the Government would have this Court ignore the WPR's "clear statement" rule in the face of repeated disclaimers of any such intention by recent Congresses.

---

66 *See* Consolidated and Continuing Appropriations Act, 2015, § 9014, Pub. L. No. 113-235, 128 Stat. 2130, 2300 (2014) ("None of the funds made available by this Act may be used with respect to Syria in contravention of the War Powers Resolution (50 U.S.C. 1541 et seq.), including for the introduction of United States armed or military forces into hostilities in Syria, into situations in Syria where imminent involvement in hostilities is clearly indicated.").

67 *Id*. § 8116.

68 The National Defense Authorization Act (NDAA) for 2015, which lays the foundation for the relevant appropriation acts for the fiscal year, also contains a specific proviso attached to the funding for the Syrian opposition, stating that "[n]othing in this section shall be construed to constitute a specific statutory authorization for the introduction of United States Armed Forces into hostilities or into situations wherein hostilities are clearly indicated by the circumstances." Carl Levin and Howard "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, § 1209 (h),(i), Pub. L. No. 113-291, 128 Stat. 3292, 3541 (2014).

69 *See* War Powers: Hearings Before the Subcomm. on Nat'l Security Pol'y & Scientific Developments of the H. Comm. on Foreign Affairs, 93d Cong. 5 (1973) (statement of Sen. Javits, testifying before the House committee).

This cavalier dismissal of statutory command is especially inappropriate when the WPR's "clear statement" rule serves a key role in the entire statutory framework. As Senator Eagleton, a co-sponsor of the WPR, explained:

> We have also categorically stated that appropriations measures cannot simply imply congressional authorization to conduct war. If this principle were accepted, the President could theoretically wage war with impunity while confidently challenging each House to attempt to muster a two-thirds majority to stop him. Such a situation is not only extremely dangerous but, in effect, it turns our carefully devised system of checks and balances on its head.[70]

It is the Court's high responsibility to uphold, not undermine, Congress's on-going effort to restore "our carefully devised system of checks and balances."

4. The Problem with Omnibus Appropriations

The Senate Committee emphasizes that Section 8(a)(1) is particularly important "to avoid any ambiguities such as possible efforts to construe general appropriations or other such measures as constituting the necessary authorization for 'continued use.'"[71] This is precisely the situation obtaining in this case. During 2014 through 2016, the National Defense Appropriation Acts (NDAA) provided about $70 billion a year to the Departments of Defense and State for programs ranging from Migration and Refugee Assistance (State) to the Afghan Security Forces Fund (Defense). During the fiscal year 2014, the omnibus provided less than one billion dollars for the President's military intervention. During each of the next two years, ISIS-related expenditures annually accounted for less than four percent of the total omnibus amount.[72]

Within this context, the WPR's "clear statement" rule simply represents the exercise of Congressional common sense. For a House or Senate vote to count as "specific" authorization,

---

[70] War Powers Legislation, 1973: Hearings on S. 440 Before the S. Comm. on Foreign Relations, 93d Cong. 115 (1973) (statement of Sen. Eagleton).

[71] S. Rep. No. 93-220 at 29 (1973).

[72] Appendix A: ISIS-Related Share of Omnibus Appropriations Acts provides the supporting analysis of the data and analysis which supports this conclusion.

the members' attention should be narrowly focused on the critical issue of war and peace. But this is simply not the situation in which members find themselves when confronting omnibus appropriations bills. Suppose, for example, that a Senator believed that the war against ISIS was misconceived, but also believed that the Afghan government deserved our continued support or that refugee assistance was a moral imperative. Given the need to cast a single up-or-down vote on the floor, our not-so-hypothetical Senator might well support the omnibus measure despite his objections to the war against ISIS.

For all these reasons, the Court should reject the Government's effort to claim that Congress's funding decisions represent "specific" authorization for the undeclared war that is now continuing into its third year.

C. Captain Smith was justified in concluding that the 2001 AUMF and the 2002 AUMF do not authorize the war against ISIS.

1. The 2002 AUMF does not authorize the war against ISIS.

Section 3(a) of the 2002 Iraq AMUF authorizes the President:

> to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—
>
> (1) defend the national security of the United States against the continuing threat posed by Iraq; and
>
> (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

The government claims that this language authorizes the President "to use military force against ISIL," Motion at 7, drawing on a speech by Stephen Preston, the general counsel of the Department of Defense, at an annual meeting of the Association of International Law Scholars in April 2015. Preston stated:

> The President's authority to fight ISIL is further reinforced by the 2002 authorization for the use of military force against Iraq (referred to as the 2002 AUMF). That AUMF authorized the use of force to, among other things, "defend the national security of the United States against the continuing threat posed by

> Iraq." Although the threat posed by Saddam Hussein's regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals, has always been understood to authorize the use of force for the related purposes of helping to establish a stable, democratic Iraq and addressing terrorist threats emanating from Iraq. After Saddam Hussein's regime fell in 2003, the United States, with its coalition partners, continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against AQI, which then, as now, posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Accordingly, the 2002 AUMF authorizes military operations against ISIL in Iraq and, to the extent necessary to achieve these purposes, in Syria.

Preston concedes that "the threat posed by Saddam Hussein's regime in Iraq was the primary focus of the 2002 AUMF." This concession suffices to establish that the 2002 AUMF cannot resolve Captain Smith's dilemma under *Little*.

So far as Smith is concerned, the decisive question is whether his participation in Operation Inherent Resolve is legal under the WPR. Since this AUMF's "primary focus" was Saddam, it cannot qualify as the requisite form of Congressional authorization required by the WPR. As we have seen, Section 5(b)(3) of the statute requires the President to obtain the "specific authorization" from Congress or cease hostilities against ISIS within 90 days. This requirement of specificity was central to the WPR's entire effort to shift war-making authority from *Steel Seizure* Category Two to Category Three. Once Preston recognized that the campaign against ISIS is not merely a continuation of the initial intervention against Saddam, it follows that the burden remained on the President to persuade Congress to grant an additional authorization that *specifically* approved his initiation of a new round of "hostilities."

Captain Smith's dilemma was further exacerbated by Preston's claim that the 2002 AUMF "has always been understood" to "address terrorist threats stemming from Iraq." This assertion is flatly inconsistent with the letter submitted by National Security Advisor Susan Rice to Congress in July 2014, which asserted that the Administration no longer relied on the 2002 AUMF as authority for "any U.S. government activities" in Iraq. Since the President had

previously informed Congress that he had "ordered increased intelligence, surveillance, and reconnaissance … focused on the threat posed by the Islamic State of Iraq and the Levant (ISIL)."[73]

It was nearly three months after the President began his war against ISIS that the Administration began relying on the 2002 AUMF. This turnaround was in stark contrast to Rice's official statement to Congress in July. Instead, it took the form of an anonymous email from a "senior administration official" to however, this turnaround took the form of an anonymous email provided to *The New York Times* asserting that the 2002 AUMF provided a "statutory authority basis [sic] on which the President may rely for military action in Iraq."

Given that the 2002 AUMF does not state or imply that it authorizes President Obama's war against ISIS, and that the Administration itself disclaimed reliance on the 2002 AUMF even as the war was beginning, and that the Administration three months later reversed course and claimed reliance on the 2002 AUMF, and that neither White House nor the Office of Legal Counsel has published an opinion explaining why the Administration now believes that the 2002 AUMF provides legal authorization for the war, Captain Smith was fully justified in drawing his own conclusion that supporting Operation Inherent Resolve violated the War Powers Resolution, and that *Little* and his oath as an officer required him to disobey his orders.

2. The 2001 AUMF does not authorize the war against ISIS.

With America in shock and reeling in the immediate aftermath of September 11th, President George Bush sent to Capital Hill an AUMF, which, if it had been adopted, would have indeed authorized President Obama's current assertion of power. Not only did it provide, as in the version actually enacted, that "the President is authorized to use all necessary and appropriate

[73] Letter to Congressional Leaders on the Deployment of United States Armed Forces Personnel to Iraq, 2014 Daily Comp. Pres. Doc. 497 (June 26, 2014).

force against those nations, organizations or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001." But it would have also granted him authority "to *deter* and *pre-empt* any future acts of terrorism or aggression against the United States." (Emphasis supplied) [74]

But even at this moment of crisis, Congressional leaders refused to cede their chambers' ultimate control over the future of warmaking, forcing the President to retreat.[75] The AUMF the leadership finally presented to the members of their respective chambers did not simply eliminate the "deter and preempt" provision that the White House originally proposed; it also reaffirmed the continuing centrality of the AUMF:

> Section 2.(b) War Powers Resolution Requirements.--
>
> (1) Specific statutory authorization.--Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.
>
> (2) Applicability of other requirements.--Nothing in this resolution supersedes any requirement of the War Powers Resolution.[76]

Both of these provisions are important. Section 2(b)(1) signifies that, at this defining moment, Congress was determined to comply with the key provision of the WPR, which insists on a "specific statutory authorization" for the use of force. Section 2(b)(2) then looks to the future and insists that "nothing" in the AUMF "supersedes any requirement" of the WPR –

---

[74] For the text of President Bush's proposal, see 147 Cong. Rec. S9949 (daily ed. Oct. 1, 2001) (statement of Sen. Byrd).

[75] *See* David Abramovitz, "The President, the Congress and the Use of Force," 43 Harv. Intl. L. J. 71, 73 (2002) (emphasis added) (Chief Counsel, House Committee on International Relations, House of Representatives, reporting on initial White House proposal).

[76] 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

including the "specific statutory authorization" provision which it had so clearly affirmed in the preceding section.

It is precisely this requirement, however, that the president seeks to avoid by asserting the continuing vitality of the AUMF. If this remarkable assertion is allowed to stand, the Administration will have successfully converted the AUMF that Congress enacted into the AUMF that its leadership consciously rejected in 2001. The illegitimacy of the assertion is reinforced by Congress' treatment of the issue on the only occasion it has since considered it seriously. In 2011, proponents of an all-out "war on terror" made a powerful effort to expand the president's unilateral war-making power under the 2001 AUMF.

The bill to enact the National Defense Authorization Act for Fiscal Year 2012("NDAA") provided the vehicle for this enterprise. Hundreds of pages long, it contains a head-spinning number of provisions addressing an astonishing number of issues.

As the NDAA was considered in Committee, advocates for a "war on terror" added a provision that expanded the 2001 AUMF to authorize the president to intervene militarily against "associated forces" of Al Qaeda or the Taliban "that are engaged in hostilities against the United States or its coalition partners" or ... have engaged in hostilities or have directly supported hostilities in aid of" the original September 11th attackers.[77] The Committee's dramatic expansion of the scope of the AUMF was approved by the House, but it was rejected by the Senate. In its final form, the NDAA passed both chambers with an amendment that granted presidential power to detain members of "associated forces." But there was absolutely no enlargement of presidential war-making powers granted by the original AUMF.

[77] *See* H.R. 1540, Section 1034, 3(A) and 3(B).

President Obama signed the omnibus legislation. He signed the legislation "despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists."[78] He did not complain about Congress' refusal to expand his warmaking powers under the AUMF.

Yet everything changed after the President announced his unlimited war against ISIS on September 10, 2014.[79] Two days later, the White House emailed a statement to New York Times. attributed to a "senior administration official." In an extraordinary turnaround, the statement announced that "the Administration has interpreted the 2001 AUMF to authorize the use of force against AQ [Al Qaeda], the Taliban, and associated forces."[80]

The Government's motion, however, relies on a different statement – one presented by DOD General Counsel Stephen Preston at a speech to the Association of International Law Scholars in April 2015. This is certainly an improvement over the "anonymous" White House source, but the fact remains that the DOD General Counsel has never been considered an authoritative legal spokesman for the executive branch – on a par with the Office of Legal Counsel or White House Counsel. Moreover, the government relies on his speech to a group of legal scholars, not even on the testimony he has given before Congress. In any event, the speech represents a stage in the on-going evolution of positions attributed to the Administration. Preston entirely evades the fundamental problem under the 2001 AUMF: Given its emphatic reaffirmation of the WPR's requirement of "express authorization" by Congress of new acts of warmaking, how can it justify the President's end-run around this requirement?

---

78 Statement of the President on H.R. 1540 (Dec. 31, 2011).

79 *See generally*, Curtis Bradley & Jack Goldsmith, Obama's AUMF Legacy, at 3 (August 15, 2016) ("In a real sense, then, the 2001 AUMF is Obama's AUMF").

80 The full email can be found at: IS War Powers Theory Background Statement (Sept. 12, 2014).

The term "associated forces" appears nowhere in the 2001 AUMF, which only authorizes the use of force against "those nations, organizations, or persons" involved in the September 11th attacks. The label was instead created by the government to expand the range of the AUMF"s application beyond the initial battleground with Al Qaeda in Afghanistan and Pakistan. In attempting to use the doctrine to treat ISIS as a force "associated" with the original group, the government fails to confront two key facts.

First, when Congress attempted to define the idea of "associated forces" in the National Defense Authorization Act of 2012,[81] it deliberately refused to endorse the notion as it applied to the use of force, expanding only the President's authorization to detain terrorists who had no clear relationship to Al Qaeda central command.

Second, even if one accepted the Administration's criteria of "association," ISIS fails to qualify. It came into being in 2004, three years *after* the September 11, 2011 attacks, and broke with al-Qaeda not in the summer of 2013, as the Administration maintains,[82] but in early 2007 at the latest, about eight years *before* the President began his war against ISIS, a short-lived attachment. No matter when ISIS broke with Al Qaeda, the President is not authorized to conduct war against it, because it broke with Al Qaeda before the war began.

The government makes a strained argument that ISIS is not an "associated force," *i.e.*, group that fights the same fight as Al Qaeda, but is a rather an offshoot of Al Qaeda. Whether ISIS is a distinct group or a faction Al Qaeda matters, because if ISIS is merely a faction of Al Qaeda that has broken with Al Qaeda's leadership, the government claims that it has the same authorization to conduct war against ISIS as it has against Al Qaeda. But if ISIS is merely an

---

[81] National Defense Authorization Act for Fiscal Year 2012, § 1021(b), Pub. L. No. 112-81, 125 Stat. 1298, 1562 (2011).

[82] *E.g.*, Preston speech.

"associated force," the President's authority is quite limited unless, of course, he obtains "specific statutory authorization" from Congress to fight them, as the War Powers Resolution requires. We are attaching an affidavit of eminent Scholars of Islamic Law and Jihadi Movements, who explain why, in their view, ISIS and Al Qaeda have long been and are properly considered distinct entities, and that their separation from Al-Qaeda has roots going back years.

Section 2 of the 2001 AUMF provides:

> SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.
>
> (a) IN GENERAL. —That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.(b) War Powers Resolution Requirements.
>
> (1) Specific statutory authorization. Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) the War Powers Resolution.
>
> (2) Applicability of other requirements. - Nothing in this resolution supersedes any requirement of the War Powers Resolution.

The Administration is clearly right in noting that the 2001 AUMF "aimed to give the President all the statutory authority he needed to fight back against bin Laden and his organization" But the "associated forces" doctrine evolved for a different purpose. The term is a gloss that the government put on the 2001 AUMF in a filing in one of the Guantanamo habeas corpus cases, defining the President's detention authority.[83]

In 2011, Congress codified that detention authority in the National Defense Authorization for Fiscal Year 2012 ("NDAA').

---

[83] Respondents' Memorandum Regarding the government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, In re Guantanamo Bay Detainee Litigation, Misc. No. 08–442 (TFH) (D.D.C. Mar 13, 2009).

> Sec. 1021. Affirmation of authority of the Armed Forces of the United States to detain covered persons pursuant to the Authorization for Use of Military Force.
>
> (a) IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.
>
> (b) COVERED PERSONS.—A covered person under this section is any person as follows:
>
> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.[84]

In its motion, the government elides the fact that Section 1021 refers to "associated forces" only in connection with the President's detention authority. *See* Motion at 6. The legislative history of the NDAA, which authorizes all defense spending for the fiscal year, shows that Congress consciously limited the President's authority with respect to "associated forces" to his detention authority.

H.R. 1540,[85] the House NDAA bill, contained several detainee-related provisions, among them Section 1034, which stated:

> (1) the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad;
>
> (2) the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note);

---

[84] National Defense Authorization Act for Fiscal Year 2012, § 1021(b), Pub. L. No. 112-81, 125 Stat. 1298, 1562 (2011).

[85] National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. (2011).

> (3) the current armed conflict includes nations, organization, and persons who-
>
> (A) are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or (B) have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A); and
>
> (4) the President's authority pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note) includes the authority to detain belligerents, including persons described in paragraph (3), until the termination of hostilities.

The Committee reported the NDAA.[86] There was clear and focused deliberation on "associated forces" in the House. Democrats objected to Section 1034 as an unacceptable expansion of Presidential authority, making specific reference to "associated forces."[87] Their objections were unavailing. On May 26, 2011, the House passed the NDAA. The H.R. 1540 then went over to the Senate. The Senate's version of the NDAA (S. 1253[88]) included several detainee provisions, among them Section 1031, the counterpart of Section 1034 in H.R. 1540. Section 1031 limited the President's authorization to issues of detention. The Senate Armed Services Committee reported S. 1253 as S. 1867. When the Senate took up H.R. 1540, it struck all but the enacting clause and substituted the text of S. 1867 and passed H.R. 1540 as amended. The President signed the bill "despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists."[89]

In short, the legislative history of the NDAA clearly shows that Congress consciously refused to authorize the President to conduct new wars against "associated forces," such as ISIS. Since the NDAA represents the only occasion on which the House and Senate have ever

---

86 157 Cong. Rec. H3341 (daily ed. May 23, 2011).

87 *See* 157 Cong. Rec. H3424 (daily ed. May 25, 2011) (statement of Rep. Garamendi).

88 S. 1253, 112th Cong. § 1031 (as reported by S. Armed Serv. Comm., July 13, 2011).

89 Statement of the President on H.R. 1540 (Dec. 31, 2011).

addressed this doctrine, it is plain that Congress has never provided an *explicit* authorization for the use of force against "associated" groups like ISIS.

This is particularly critical in light of the AUMF clear statement that "[n]othing in this resolution supersedes any requirement of the War Powers Resolution" – including, crucially, Section 5(b)(3), requiring "express" Congressional authorization of the initiation of "hostilities" within sixty days. The President's failure to comply with this requirement is only compounded by Congress' refusal to endorse the use of force against "associated forces" on the only occasion upon which it was seriously considered.

DECLARATORY RELIEF

The Government finally urges the Court to deny declaratory relief on the ground that it "entails judicial intrusion into the Executive's ability to conduct military operations abroad." Motion at 45 (internal quotation marks omitted). But this lawsuit has no such effect. To the contrary, it will enable Smith, and others similarly situated, to continue fighting without confronting the dilemma imposed upon them by *Little* and their oath of office while this Court, and appellate tribunals, deliberate on the legal merits of Smith's claims.

This same process of deliberation will also be proceeding in Congress, where Senator Tim Kaine, and many others have protested that "neither the Congress nor the President feels obliged to follow the 1973 War Powers Resolution which would cause the President to cease any unilateral military action within 90 days unless Congress votes to approve it."[90]

If this Court, and appellate tribunals, ultimately vindicate Smith's views of the WPR, it should make it plain that the troops should keep on fighting while the sitting president takes his or her statutory responsibility seriously and makes a sustained effort to gain the "specific"

[90] Press Release, As Congress Adjourns, Kaine Decries Year of Inaction on Authorization for Use of Military Force, (Aug. 5, 2015).

authorization for the war that has thus far been absent. It is only if he or she fails to fulfill this obligation, that the next president, in pursuance to his duty "to take care that the laws be faithfully executed," to withdraw the troops from battle within the next thirty days.

CONCLUSION

For the foregoing reasons, the Court should deny the government's motion to dismiss.

Respectfully submitted

/s/ David H. Remes

David H. Remes
Bar No. 370372
Appeal for Justice
1106 Noyes Drive
Silver Spring, MD 20910
202-669-65098
remesdh@gmail.com*

* Professor Bruce Ackerman of Yale Law School has written about many of the issues in this case. He has contributed substantially to this memorandum.

Appendix A: ISIS-Related Share of Omnibus Appropriations Acts

This Appendix calculates the share of ISIS-related expenditures funded during the two budget cycles of 2015 and 2016 by the Appropriations Acts for the fiscal year in question. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2016); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2015). We find that ISIS-related expenditures for Fiscal Year 2015 amounted to 3.9% of the total funding in the omnibus appropriations act; for Fiscal Year 2016, ISIS-related expenditures amounted to 2.7% of the total. As we explain, these percentages overestimate the share that is earmarked for ISIS.

We derive our estimates from the Overseas Contingency Operations ("OCO") account established under each of the relevant statutes. The accounts for 2015 and 2016 each contain approximately $70 billion, which is distributed into to a variety of subaccounts for the use by the Departments of Defense, State, and the Office of the President. We include all OCO accounts that explicitly refer to "Islamic State of Iraq and Levant," or "Syria" or "Iraq," including "Operation and Maintenance - Iraq Train and Equip Fund" – even though some of funds may not directly support the military operation against ISIS. We also include the portion of "Operation and Maintenance - Defense-Wide" which is explicitly dedicated to *both* ISIS-related and Afghanistan-related military operations. Since no further breakdown is provided, we have assumed (contrary to fact) that the entire sum supports the ISIS campaign – since the point of this exercise is to show that, even under conservative assumptions, the omnibus acts devote very small proportions of their funds to the undeclared war.

2015 OCO Appropriations[91] **Total Appropriations: $73,849,575,000**				
ISIS-Related Appropriations				
DoD (Division C, Title IX)	Operation and Maintenance	Defense-Wide	$6,211,025,000[92]	
		Iraq Train and Equip Fund	$1,618,000,000	
ISIS-Related Appropriations			$2,878,000,000	3.90%
Non-ISIS-Related Appropriations				
DoD (Division C, Title IX)	Military Personnel	Military - Army	$3,259,970,000	
		Military - Navy	$332,166,000	
		Military - Marine Corps	$403,311,000	
		Military - Air Force	$728,334,000	
		Reserve - Army	$24,990,000	
		Reserve - Navy	$13,953,000	
		Reserve - Marine Corps	$5,069,000	
		Reserve - Air Force	$19,175,000	
		National Guard - Army	$174,778,000	
		National Guard - Air Force	$4,894,000	
	Operation and Maintenance	Army	$18,108,656,000	
		Navy	$6,253,819,000	
		Marine Corps	$1,850,984,000	
		Air Force	$10,076,383,000	
		Army Reserve	$41,532,000	
		Navy Reserve	$45,876,000	
		Marine Corps Reserve	$10,540,000	
		Air Force Reserve	$77,794,000	
		Army National Guard	$77,761,000	
		Air National Guard	$22,600,000	
		Afghanistan Security Forces Fund	$4,109,333,000	

[91] All figures are derived from Consolidated Appropriations Act, 2015, Pub. L. No. 113-235, div. c, tit. ix & div. j, tit. viii, 129 Stat. 2130, 2285-96, 2687-91 (2015).

[92] Note that of the entire $6,211,025,000, "not to exceed $1,260,000,000 . . . shall be for payments to reimburse key cooperating nations for logistical, military, and other support, including access, provided to United States military and stability operations in Afghanistan and *Iraq*." Consolidated Appropriations Act, 2015, Pub. L. No. 113-235, div. c, tit. ix, 129 Stat. 2130, 2287 (2015) (emphasis added). Therefore, in calculating the ISIS-related expenditure, the Appendix will only treat $1,260,000,000 as related to the military action against ISIS. This is an overestimate, since some of these funds support Afghanistan-related military activities.

		Counterterrorism Partnership Fund	$1,300,000,000
		European Reassurance Initiative	$175,000,000
	Procurement	Army - Aircraft Procurement	$196,200,000
		Army - Missile Procurement	$32,136,000
		Army - Weapons and Tracked Combat Vehicles	$5,000,000
		Army - Ammunition	$140,905,000
		Army - Other	$773,583,000
		Navy - Aircraft Procurement	$243,359,000
		Navy - Weapons Procurement	$66,785,000
		Navy & Marine Corps - Ammunition	$154,519,000
		Navy - Other	$123,710,000
		Marine Corps	$65,589,000
		Air Force - Aircraft	$481,019,000
		Air Force - Missile	$136,189,000
		Air Force - Ammunition	$219,785,000
		Air Force - Other	$3,607,526,000
		Defense-Wide	$250,386,000
		National Guard & Reserve	$1,200,000,000
	Research, Development, Test and Evaluation	Army	$2,000,000
		Navy	$36,020,000
		Air Force	$14,706,000
		Defense-Wide	$174,647,000
	Revolving & Management	Defense Working Capital Funds	$91,350,000
	Other	Defense Health Program	$300,531,000
		Drug Interdiction and Counter-Drug Activities	$205,000,000
		Joint Improvised Explosive Device Defeat Fund	$444,464,000
		Office of the Inspector General	$10,623,000
DoS, Foreign Operations, and Related Programs (Division J,	DOS: Administration of Foreign Affairs	Diplomatic and Consular Programs	$1,350,803,000

Title VIII)			
		Conflict Stabilization Operations	$15,000,000
		Office of Inspector General	$56,900,000
		Embassy Security, Construction, and Maintenance	$260,800,000
	DOS: International Organization	Contributions to International Organizations	$744,000,000
	Related Agency	Broadcasting Board of Governors: International Broadcasting Operations	$10,700,000
	United States Agency for International Development	Operating Expenses	$125,464,000
	Bilateral Economic Assistance	President: International Disaster Assistance	$1,335,000,000
		President: Transition Initiatives	$20,000,000
		President: Complex Crises Fund	$30,000,000
		President: Economic Support Fund	$2,114,266,000
		DOS: Migration and Refugee Assistance	$2,127,114,000
	International Security Assistance	DOS: International Narcotics Control and Law Enforcement	$443,195,000
		DOS: Nonproliferation, Anti-Terrorism, Demining and Related Programs	$99,240,000
		DOS: Peacekeeping Operations	$328,698,000
		President: Foreign Military Financing Program	$866,420,000

2016 OCO Appropriations[93] **Total Appropriations: $69,719,499,000**				
ISIS-Related Appropriations				
DoD (Division C, Title IX)	Operation and Maintenance	Defense-Wide	$5,665,633,000[94]	
		Iraq Train and Equip Fund	$715,000,000	
ISIS-Related Appropriations			$1,875,000,000	2.69%
Non-ISIS-Related Appropriations				
DoD (Division C, Title IX)	Military Personnel	Military - Army	$1,846,356,000	
		Military - Navy	$251,011,000	
		Military - Marine Corps	$171,079,000	
		Military - Air Force	$726,126,000	
		Reserve - Army	$24,462,000	
		Reserve - Navy	$12,693,000	
		Reserve - Marine Corps	$3,393,000	
		Reserve - Air Force	$18,710,000	
		National Guard - Army	$166,015,000	
		National Guard - Air Force	$2,828,000	
	Operation and Maintenance	Army	$14,994,833,000	
		Navy	$7,169,611,000	
		Marine Corps	$1,372,534,000	
		Air Force	$11,128,813,000	
		Army Reserve	$99,559,000	
		Navy Reserve	$31,643,000	
		Marine Corps Reserve	$3,455,000	
		Air Force Reserve	$58,106,000	
		Army National Guard	$135,845,000	

[93] All figures are derived from Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. c, tit. ix & div. k, tit. viii, 129 Stat. 2242, 2381-92, 2823-27 (2016).

[94] Note that of the entire $5,665,633,000, "not to exceed $1,160,000,000 . . . shall be for payments to reimburse key cooperating nations for logistical, military, and other support, including access, provided to United States military and stability operations in Afghanistan and to counter the *Islamic State of Iraq and the Levant*." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. c, tit. ix, 129 Stat. 2242, 2383 (2016) (emphasis added). Therefore, in calculating the ISIS-related expenditure, the Appendix will only treat $1,160,000,000 as related to the military action against ISIS. This is an overestimate, since some of these funds support Afghanistan-related military activities.

		Air National Guard	$19,900,000
		Counterterrorism Partnership Fund	$1,100,000,000
		Afghanistan Security Forces Fund	$3,652,257,000
	Procurement	Army - Aircraft Procurement	$161,987,000
		Army - Missile Procurement	$37,260,000
		Army - Weapons and Tracked Combat Vehicles	$486,630,000
		Army - Ammunition	$222,040,000
		Army - Other	$1,175,596,000
		Navy - Aircraft Procurement	$210,990,000
		Navy & Marine Corps - Ammunition	$117,966,000
		Navy - Other	$12,186,000
		Marine Corps	$56,934,000
		Air Force - Aircraft	$128,900,000
		Air Force - Missile	$289,142,000
		Air Force - Ammunition	$228,874,000
		Defense-Wide	$173,918,000
		National Guard & Reserve	$1,000,000,000
	Research, Development, Test and Evaluation	Army	$15,000,000
		Navy	$35,747,000
		Air Force	$17,100,000
		Defense-Wide	$177,087,000
	Revolving & Management	Defense Working Capital Funds	$88,850,000
	Other	Defense Health Program	$272,704,000
		Drug Interdiction and Counter-Drug Activities	$186,000,000
		Joint Improvised Explosive Device Defeat Fund	$349,464,000
		Office of the Inspector General	$10,262,000
DoS, Foreign Operations, and Related Programs (Division K, Title VIII)	DOS: Administration of Foreign Affairs	Diplomatic and Consular Programs	$2,561,808,000
		Office of Inspector	$66,600,000

		General Embassy Security, Construction, and Maintenance	$747,851,000
	DOS: International Organization	Contributions to International Organizations	$101,728,000
		Contributions for International Peacekeeping Activities	$1,794,088,000
	Related Agency	Broadcasting Board of Governors: International Broadcasting Operations	$10,700,000
	United States Agency for International Development	Operating Expenses	$139,262,000
	Bilateral Economic Assistance	President: International Disaster Assistance	$1,919,421,000
		President: Transition Initiatives	$37,000,000
		President: Complex Crises Fund	$20,000,000
		President: Economic Support Fund	$2,422,673,000
		President: Assistance for Europe, Eurasia and Central Asia	$438,569,000
		DOS: Migration and Refugee Assistance	$2,127,114,000
	International Security Assistance	DOS: International Narcotics Control and Law Enforcement	$371,650,000
		DOS: Nonproliferation, Anti-Terrorism, Demining and Related Programs	$379,091,000
		DOS: Peacekeeping Operations	$469,269,000
		President: Foreign Military Financing Program	$1,288,176,000

AFFIDAVIT OF SCHOLARS OF ISLAMIC LAW AND JIHADI MOVEMENTS

We are scholars of Islamic law and Jihadi movements. We have all published on a wide range of topics in Islamic jurisprudence and the ideology of modern radical jihadi movements. Our names, affiliations, and work are included at the end of this affidavit.

In this affidavit, we explain that the relationship between the organization that was to become the Islamic State in Iraq and the Levant (ISIL) and al Qaeda was always tense and ambiguous, particularly after the death of the founder of al Qaeda in Iraq, Abu Musʿab al-Zarqawi. The true origins of the split between ISIL and Al Qaeda are not merely the recent tension over Syria, but go back to the declaration of the "Islamic State of Iraq." While both ISI and AQ had reasons to remain friendly and the question of ISI's formal affiliation with al Qaeda is murky, ISI began the process of establishing itself as a distinct organization with its own chain of command and decision-making from late 2006. Their relations were fractious in the years that followed. In the spring of 2013, ISI moved into Syria and declared itself the Islamic State in Iraq and the Levant (ISIL). The previous al Qaeda branch in Syria, Jabhat al-Nusra (the Nusra Front) rebuked ISIL's efforts to incorporate it and publicly proclaimed its affiliation with al Qaeda and its leader Ayman al-Zawahiri. In the summer and fall 2013, the two groups fought over control of territory in Syria. After all attempts to mediate failed, Al Qaeda itself publicly disclaimed any affiliation with ISIL in February 2014. Since early 2014, the two entities have been at war.

1. Within Islamic law, hierarchical political relationships of loyalty and obedience are formed by the offer and receipt of a formal oath of loyalty known as the *bayʿa*. This practice goes back to the time of the Prophet Muhammad and is preserved today not only by militant

Islamic groups but by some modern states, particularly monarchies.[1] Militant Islamists regard themselves as affiliated with a group and its leader only if they have officially given the *bayʿa* to that group and its leader. Militant Islamist groups will often publicly declare their disaffiliation from one group or leader, and their re-affiliation with a new group or leader, by publicly announcing the withdrawal of their *bayʿa* from the former leader.

2. The *bayʿa* is a form of contract. As such, it is regulated by certain general legal stipulations, but it is also subject to negotiated terms. In Islamic law, a *bayʿa* can be general or specific. A general *bayʿa* is an open-ended promise to obey in all matters permissible within Islamic law. A specific *bayʿa* is a promise to obey only within a set field of shared activity. The *bayʿa* may also be limited in geography and duration. Under Islamic law, the only way to determine whether two groups are associated with each other is by tracking the giving and revoking of the *bayʿa*. ISIS and its membership are no different in this regard.[2] They associate and disassociate themselves with other groups through formal declarations of *bayʿa*.

3. In 2002, Abu Musʿab al-Zarqawi moved to Iraq and formed a group called Jamaʿat al-Tawhid wa'l-Jihad ("the Group of Monotheism and Jihad"). After a period of uneasy relations between his group and the AQ leadership, Zarqawi gave *bayʿa* to Usama Bin Laden in October 2004. He renamed his group "al-Qaeda in Iraq."[3] Zarqawi was killed by US forces in Iraq on June 7, 2006. Thus, we agree with the statement that Stephen Preston, the general counsel of the Department of Defense, made at an Annual Meeting of the Association of Scholar, that "in 2004,

[1] Podeh, Elie. "The bayʿa: Modern Political Uses of Islamic Ritual in the Arab World." *Die Welt des Islams* 50.1 (2010): 117-152.
[2] Wagemakers, Joas. "The Concept of Bayʿa in the Islamic State's Ideology." *Perspectives on Terrorism* 9.4 (2015).
[3] Bunzel, Cole. From Paper State to Caliphate: The Ideology of the Islamic State. *The Brookings Project on U.S. Relations with the Islamic World Analysis Paper,* No. 19, March 2015.

al-Zarqawi publicly pledged his group's allegiance to bin Laden, and bin Laden publicly endorsed al-Zarqawi as al-Qa'ida's leader in Iraq."[4]

4. However, the following statement by Preston is inaccurate: "The recent split between ISIL and current al-Qa'ida leadership does not remove ISIL from coverage under the 2001 AUMF, because ISIL continues to wage the conflict against the United States that it entered into when, in 2004, it joined bin Laden's al-Qa'ida organization in its conflict against the United States." In fact, the path from Zarqawi's AQI to today's ISIL involved many substantial changes to the group's goals, composition, and loyalties.

5. After his death, former Zarqawi's successors regrouped. On October 15, 2006, they declared "The Islamic State in Iraq," under the leadership of Abu 'Umar al-Baghdadi. Their declaration made no mention of AQ or previous oaths of loyalty (*bayʿa*s) to Bin Ladin. In fact, Bin Ladin and AQ famously opposed the establishment of an Islamic state before the Muslim world was united enough around this goal to repel foreign aggression. Moreover, AQ regarded defending a territorial state as a distraction of energy and resources from the paramount goal of fighting the United States and its allies.

6. In January 2007, the Islamic State's Shari'a Council issued a treatise providing a lengthy scholarly justification of its statehood claim, called "Informing Mankind of the Birth of the Islamic State." The treatise stated that the Islamic State was legitimate because it was formed by the legitimate representatives of the entire Muslim community (the *ahl al-hall wa'l-ʿaqd* or, the people who loose and bind). All Muslims were called upon to give the exclusive *bayʿa* to the leader in Iraq, Abu ʿUmar al-Baghdadi, as the "commander of the faithful," not to Bin Ladin or

[4] "The Legal Framework for the United States' Use of Military Force Since 9/11," Stephen W. Preston, Annual Meeting of the American Society of International Law, Washington, DC, April 10, 2015.

to AQ central. Importantly, these developments occurred while Bin Ladin was still alive, and Preston's statement that "as AQI, ISIL had a direct relationship with bin Laden himself and waged that conflict in allegiance to him while he was alive" therefore misses the mark. ISIL is not the same organization as AQI and it underwent many transformations of leadership, membership, purposes and grounds of legitimacy beginning with the declaration of the Islamic State of Iraq in 2006.

7. Thus, at least from 2007, the group that was to become ISIS saw itself as distinct and independent of Al Qaeda; its very claim to legitimacy being based on its own followers' pledge of loyalty to Bagdhadi directly. Indeed, the leaders in Iraq at the time of the Islamic State's founding did not consult Al-Qaeda beforehand, and the precise relationship between the two organizations created much confusion. Bin Laden and AQ chief Ayman al-Zawahiri had been caught by surprise. "The decision to announce the State was taken without consulting the leadership of al-Qaeda," American al-Qaeda spokesman Adam Gadahn confided in a private letter.[5] Zawahiri would later recall that "the general command of [al-Qaeda] and its emir Shaykh Osama bin Laden (God bless him) were not asked for permission, consulted, or even warned just prior to the announcement of the establishment of the Islamic State of Iraq."[6]

8. The relationship between al Qaeda and the Islamic State was unclear to outsiders in the 2007-2010 period. According to a widely read and discussed Brookings Institution report,

> the exact nature of the relationship between al-Qaeda and the Islamic State was not revealed to the public at that time, and the nature of the relationship between them continues to be debated. In 2014, Zawahiri would claim that Abu Hamza al-

[5] Adam Gadahn, "Letter from Adam Gadahn [English translation]," personal correspondence to unknown recipient, Harmony Program, Combating Terrorism Center at West Point, January 2011, https://www.ctc.usma.edu/v2/wp-content/uploads/2013/10/Letter-from-Adam-Gadahn-Translation.pdf. Original Arabic version available at https://www.ctc.usma.edu/v2/wp-content/uploads/2013/10/Letter-from-Adam-Gadahn-Original.pdf.

[6] McCants, *The ISIS Apocalypse*.

> Muhajir had conveyed in secret the Islamic State's 'loyalty' (*walaʾ*) to the al-Qaeda leadership. It appears, however, that the group did not give *bayʿa*, the oath of fealty, to al-Qaeda's leader, which was the standard practice for al-Qaeda affiliates.

This was, at most, a marriage of convenience.

9. In 2011, al-Qaʿida leaders were still complaining that the Islamic State paid them little heed. The behavior of the Islamic State was not regulated by any orders from AQ central. In the words of the Brookings report, "the 'ties' between the two groups had been 'effectively cut for a number of years,' and [in the view of both parties] the state of affairs ought to be made official." As a 2015 article in *Foreign Affairs* pointed out, by 2013 "their split had been nearly ten years in the making."[7] While the formal, public break between the two groups did not occur until the summer of 2013, relations had been fractious from the beginning, precisely because of conflicts over authority and command.

10. The break did not represent, in Preston's words, a new "split between ISIL and current al-Qa'ida leadership" a "rift between ISIL and parts of the network bin Laden assembled," or a "splintering into rival factions." Thus, we find no basis for Preston's claim that "the name may have changed, but the group we call ISIL today has been an enemy of the United States within the scope of the 2001 AUMF continuously since at least 2004." The changes in name were not mere superficial acts of rebranding. They reflected substantive transformations dating back nearly a decade, leading to organizational and ideological disaffiliation from AQ in Afghanistan and Pakistan.

11. In late 2011, the Islamic State (in Iraq) dispatched a group to Syria on the order of Zawahiri. The group that was established in Syria as a result of this (Jabhat al-Nusra, or JN) soon

[7] Clint Watts, "ISIS and al Qaeda Race to the Bottom," *Foreign Affairs* https://www.foreignaffairs.com/articles/2015-11-23/isis-and-al-qaeda-race-bottom November 23, 2015.

developed a command structure and strategic orientation independent from the IS leadership in Iraq. In short, not only had the Islamic State detached itself from al-Qaeda by early 2007, at the latest; its Syrian contingent detached itself from the Islamic State by the end of 2011.

12. On April 9, 2013, al-Baghdadi proclaimed Jabhat al-Nusra as a branch of the Islamic State, and he announced that it would be absorbed into a new entity, the Islamic State of Iraq and al-Sham (the Levant) (ISIL). Baghdadi stated that the Islamic State gave JN its orders, paid its salaries, and supplied it with men. JN leader al-Jawlani responded the next day by declaring JN's independence from the Islamic State and by pledging *bayʿa* directly to Zawahiri as leader of al-Qaeda. AQ leader Zawahiri attempted to arbitrate between the two groups, but the IS leadership rebuffed any attempt by AQ central to assert authority.

13. On February 2, 2014, Zawahiri despairing of reconciling the various jihadi, issued a statement unequivocally declaring that ISIL "is not a branch of the al-Qaeda group … does not have an organizational relationship with it and [al-Qaeda] is not the group responsible for their actions." Rarely are public declarations of organizational disaffiliation so clear.

14. Since early 2014, ISIL and AQ have been military enemies, fighting over territory in Syria, as well as other jihadi battlegrounds. They have also been in a zero-sum competition for support, loyalty and resources, particularly since the ISIL declared itself to be the "Caliphate" for all Muslims around the globe.

Signatories

Professor Bernard Haykel
Professor of Near Eastern Studies
Director of the Institute for Transregional Study of the Contemporary Middle East, North Africa and Central Asia
Princeton University

Professor Jonathan A.C. Brown
Alwaleed bin Talal Chair of Islamic Civilization

School of Foreign Service
Director, Alwaleed bin Talal Center for Muslim Christian Understanding
Georgetown University

Professor Mohammad Fadel
Associate Professor
Canada Research Chair for the Law and Economics of Islamic Law
University of Toronto

Professor Andrew F. March
Associate Professor of Political Science
Yale University

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Nathan Michael Smith,	)	
Plaintiff,	)	
v.	)	Civ. No. 16-843 (CKK)
Barack H. Obama,	)	
Defendant.	)	

[PROPOSED] ORDER

Upon considering Defendant's Motion to Dismiss, Plaintiff's Opposition, and Defendant's Reply, it is hereby ORDERED that Defendant's motion is DENIED.

SO ORDERED.

_____
UNITED STATES DISTRICT COURT

DATED: _____