UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS UNDER RULE 12(b)(1)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

Plaintiff's opposition to the motion to dismiss spends a remarkable amount of time addressing merits arguments that were never raised by the Government, while disregarding many of the jurisdictional arguments that were. Plaintiff devotes the bulk of his opposition brief to arguing that the President has failed to comply with the War Powers Resolution by not withdrawing troops from Operation Inherent Resolve (OIR). But while the Government repeatedly has taken the position that its military operations against ISIL are consistent with the War Powers Resolution, it has *not* asked the Court to dismiss this case on that ground. Indeed, the entire thrust of the Government's motion is that this Court lacks authority to review the President's decision to take military action against ISIL. The question raised by the motion is not whether the President has the authority to target ISIL but what role the judiciary has in reviewing the President's determination that he does. As to that question, courts faced with similar war powers claims consistently have declined to interfere with the President's exercise of his military powers, or to second-guess the judgment of Congress as to how to exercise its own constitutional authority – especially where the President and Congress have already agreed to use force abroad, and where that use of force is ongoing. The Court should reach the same outcome here.

Rather than dispelling the extraordinary justiciability concerns presented by this lawsuit, Plaintiff's opposition brief compounds them. Plaintiff now acknowledges that his operational deployment has come to an end, which means that he is no longer serving in support of a mission in purported conflict with his constitutional oath, and that his already deficient claim to standing now depends on the possibility of a future deployment in support of OIR. Not only is the Court asked to intervene in a military conflict when the political branches themselves are in accord regarding the threat facing the nation and the propriety of the military response, but it now is asked

to do so by a service member who may never again serve in the challenged operation, and thus whose only theory of standing is the possibility that he may be asked to follow orders he perceives to be illegal at some unspecified point in the future. It is difficult to imagine a setting less suitable for judicial review. Because the political question doctrine bars judicial review of Plaintiff's claims, and because Plaintiff lacks standing to seek prospective relief, the Court should grant the Government's motion to dismiss. Alternatively, the Court could also dismiss this action because there is no waiver of sovereign immunity that allows Plaintiff's claims to proceed, and because the relief he seeks—a declaratory judgment against the President—is not available.

ARGUMENT

I. The Political Question Doctrine Bars Review of Plaintiff's Claims.

The political question doctrine bars review of Plaintiff's claims for two principal reasons. First, deciding this case would require answering questions that are "textually committed" for resolution to the political branches. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). The Constitution leaves it to the political branches to decide the circumstances under which the President can use military forces overseas, and at least in the absence of an intractable conflict between Congress and the President (which indisputably does not exist here), courts should not intervene in that political process. Second, and relatedly, there are no "judicially discoverable and manageable standards" for determining whether ISIL is an authorized military target. *See id*. at 217. Far from being a "straightforward" question of statutory interpretation, as Plaintiff contends, resolving these claims would require reviewing not only the President's judgment, supported by Congress, that ISIL is an appropriate military target, but also the sensitive factual and policy decisions underlying his judgments – and all in the very midst of a live armed conflict.

Plaintiff and *amici* insist that the political question analysis should begin and end with the Supreme Court's decision in *Zivotofsky v. Clinton,* 132 S. Ct. 1421 (2012).[1] They contend that *Zivotofsky* precludes the use of the political question doctrine in cases involving the application of statutory law. *See* Opp'n Br. at 17; Amici Br. at 20. Under this reading of *Zivotofsky*, justiciability concerns disappear anytime the sensitive national security judgment the court is asked to make is made in connection with the interpretation of a statute. *Id*. Plaintiff's reliance on *Zivotofsky* is simply wrong, and no court has interpreted that decision to stand for the extraordinary proposition Plaintiff advances. Furthermore, *Zivotofsky* has nothing to do with war powers and nothing to say about the judiciary's role in adjudicating challenges to military action undertaken by the Executive Branch. *Zivotofsky* turned on the Executive Branch's defense, under a claimed right of exclusive constitutional authority, to implementing an unambiguous statute. This case presents a statutory challenge to the legality of a military operation. Not surprisingly, the application of the political question doctrine diverges widely in these two very different cases.

A. Plaintiff Dramatically Overstates The Holding in *Zivotofsky* And Its Consequences For the Political Question Doctrine.

Zivotofsky does not foreclose the application of the political question doctrine in this case merely because the national security or foreign policy question at issue "stem[s] from" a statute. *Zivotofsky* arose from a constitutional conflict between Congress and the President over the scope of the President's power to recognize a foreign sovereign. The statute at issue there directed the Secretary of State, upon request, to list "Israel" as the place of birth on the passport of an American citizen born in Jerusalem. 132 S. Ct. at 1424-25. The Secretary refused to enforce the statute,

[1] *See* Pl.'s Memo. in Opp'n to Mot. to Dismiss, Dkt. No. 10, at 17 ("Opp'n Br."); Brief of Amici Curiae in Opp'n to Def.'s Mot. to Dismiss fo Want of Jurisdiction, Dkt. No. 12, at 20 ("Amici Br.").

maintaining that it impermissibly infringed on the Executive Branch's exclusive power to recognize foreign sovereigns. *Id*. at 1423. All parties agreed about the meaning of the passport provision, and "the only real question" was whether the statute impermissibly infringed on the President's recognition power. *Id*. at 1427. This, the Court concluded, was a "familiar judicial exercise," *id.*, involving "familiar principles of constitutional interpretation." *Id*. at 1430.

Contrary to Plaintiff's argument, *Zivotofsky* did not narrow the scope of the political question doctrine, but rather held that the lower courts had improperly expanded that doctrine "by focusing on the foreign policy implications inherent in the statute, rather than . . . the legal question of whether Congress unconstitutionally encroached on the Executive Branch's [recognition power]." *He Nam You v. Japan*, 150 F. Supp. 3d 1140, 1146 (N.D. Cal. 2015). Before *Zivotofsky*, it was perfectly clear that a challenge stemming from a statutory constraint on executive conduct could present a nonjusticiable political question. *See, e.g.*, *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (declining to construe statute to require judicial review of foreign policy decisions "wholly confided by our Constitution to the political departments of the government"); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010) ("[A] statute providing for judicial review does not override Article III's requirement that federal courts refrain from deciding political questions."). That principle remains clear, and lower courts have consistently applied the political question doctrine in statutory cases since *Zivotofsky* was decided. *See, e.g.*, *Mobarez v. Kerry*, Civ. Action No. 15-CV-516 (KBJ), 2016 WL 2885871, at *9 (D.D.C. May 17, 2016) (*Zivotofsky* did not prevent court from applying political question doctrine to claim under statute governing U.S. evacuation policy); *Ali Jaber v. United States*, 155 F. Supp. 3d 70, 80 (D.D.C. 2016) (*Zivotofsky* did not require judicial review of statutory claims

under the Torture Victim Protection Act and the Alien Tort Statute).[2] As these courts have recognized, it was not merely the existence of a statute that was relevant to the analysis in *Zivotofsky*, but the fact that the statute "set[] forth the kind of stark, obligatory action[,] *entirely* devoid of discretion" that is seldom found in national security statutes, which generally leave considerable discretion to the Executive. *See Mobarez*, No. 15-CV-516 (KBJ), 2016 WL 2885871, at *9. By contrast, the court in *Mobarez* found that the statute governing military evacuations at issue there could not be interpreted without calling into question "the Executive Branch's discretionary decision to refrain from using military force to implement an evacuation," or without requiring a court to make "its own determination about the facts alleged in the complaint regarding the dangerous conditions in Yemen." *Id*. at 6. These decisions show that the mere fact that a question of statutory authority is at issue does not foreclose the application of the political question doctrine, particularly where the statute turns on sensitive foreign policy and military judgments.

B. *Zivotofsky* Differs From This Case In Several Crucial Ways.

Beyond Plaintiff's basic misreading of *Zivotofsky*, there are several significant distinctions between that case and this one. First, *Zivotofsky* concerned a straightforward legal question well within the judicial purview: whether Congress had the power to enact the statute at issue. The parties in *Zivotofsky* were not in dispute over how to interpret the statute; the only question was whether it was unconstitutional. The Court did not need to consider whether the statute provided judicially discoverable and manageable standards, and the Court certainly did not need to second-guess the wisdom of discretionary national security judgments by the President that were bound

[2] *See also Ctr. for Biological Diversity v. Hagel*, 80 F. Supp. 3d 991, 1011 (N.D. Cal. 2015), *appeal dismissed* (May 29, 2015) (political question doctrine barred claim brought under the National Historic Preservation Act); *Alaska v. Kerry*, 972 F. Supp. 2d 1111, 1127 (D. Alaska 2013) (statutory challenge to implementation of anti-pollution treaty not justiciable).

up in the statutory analysis. *Zivotofsky* could be resolved by addressing a plain question of constitutional law concerning whether Congress had the authority to recognize the political status of Jerusalem.

Conversely, as demonstrated in Defendant's opening brief, the Court cannot resolve Plaintiff's claim under the War Powers Resolution without deciding whether ISIL is an authorized military target under the 2001 or 2002 AUMFs, and it cannot decide whether ISIL is an authorized military target under those statutes without examining the President's military determinations and the sensitive factual and policy judgments upon which they rest. The "statutory" questions at issue here are political questions because they would be effectively impossible to resolve without assessing, for example, the nature and extent of ISIL's relationship with "those nations, organizations, or persons" responsible for the September 11 attacks, 2001 AUMF, § 2, 115 Stat. at 224; the threat ISIL poses to U.S. national security interests in Iraq, 2002 AUMF, § 3, 116 Stat. 1498, 1501; and the President's continuing judgment that recent military operations are "necessary and appropriate" to "prevent any future acts of international terrorism" by the entities subject to the AUMF, 2001 AUMF, § 2, 115 Stat. at 224, and to "defend the national security of the United States against the continuing threat posed by Iraq," 2002 AUMF, § 3, 116 Stat. at 1501. The fact that these discretionary judgments are at issue in carrying out statutory authority does not render them appropriate or suitable for judicial oversight.

Rather than *Zivotofsky*, which does not even address judicially discoverable and manageable standards, the political question analysis should turn on cases in which courts were asked to decide whether a particular military operation was carried out in excess of statutory

authority.[3] As in those cases, the Court lacks access to "vital information upon which" these determinations rest, *DaCosta*, 471 F.2d at 1155, and even if it could "know[] all there is to know" about OIR and the conflict with ISIL, *Campbell v. Clinton*, 203 F.3d 19, 26 (D.C. Cir. 2000), it still would not be able to consider the question "without first fashioning out of whole cloth" some standard "by which the United States government evaluates intelligence in making a decision to commit military force" in support of its counterterrorism efforts, *El-Shifa*, 607 F.3d at 845.

A second point of distinction with *Zivotofsky* concerns the nature of the power at issue. Because *Zivotofsky* concerned the recognition power, and not the war powers, the Court there did not confront the exceptional justiciability concerns presented by challenges involving powers shared between the political branches. *See* Def.'s Motion to Dismiss, Dkt. No. 9-1 ("MTD") at 21-24 (collecting cases). The Court found there was no textual-commitment" of the question presented in *Zivotofsky* because there is "no exclusive commitment to the Executive of the power to determine the constitutionality of a statute." *Zivotofsky*, 132 S. Ct. at 1427. Here, by contrast, the authority to determine the appropriate use of military force *is* committed to the political branches. Indeed, "[t]here is an explicit textual commitment of the war powers not to *one* of the political branches, but to *both*," and it is the joint nature of this power that "enables the political branches to resolve disputes themselves." *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990); *see also Doe v. Bush*, 323 F.3d 133, 142 (1st Cir. 2003) (the Constitution "envisages the *joint*

[3] *See, e.g.*, *El-Shifa*, 607 F.3d at 841 (holding that the political question doctrine bars judicial review of the merits of an executive decision to launch an attack on a foreign terrorism target); *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973) (declining to consider whether mining harbors in Vietnam was an "escalation" of war beyond congressional authorization); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973) (declining to consider claim that bombing Cambodia was a "basic change" in the scope of war); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47 (D.D.C. 2010) (dismissing as non-justiciable claim for prospective relief prohibiting the President from using force in counterterrorism operation under 2001 AUMF).

participation of the Congress and the Executive in determining the scale and duration of hostilities"); *Crockett v. Reagan*, 558 F. Supp. 893, 898-99 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) ("[i]f Congress doubts or disagrees with the Executive's determination [that military action is consistent with the War Powers Resolution], it has the resources to investigate the matter and assert its wishes."). And also here, the political branches are in accord as to undertaking military action abroad against ISIL. Yet Plaintiff seeks a declaration that contradicts the judgment of *both* the executive and legislative branches on the legality of an active military operation – a declaration that would surely "create doubts in the international community regarding the resolve of the United States to adhere to [its] position," *Lowry v. Reagan*, 676 F. Supp. 333, 340 (D.D.C. 1987), and would unavoidably give rise to multifarious pronouncements to officials in the field with respect to the real-time use of force against ISIL. This result would "express[] [a] lack of the respect due coordinate branches of government," and underscore the "need for unquestioning adherence to a political decision already made." *See Baker*, 369 U.S. at 217. Thus, virtually all the hallmarks of the political question doctrine are present here.

Third, the plaintiff in *Zivotofsky* had far more than a "personal stake" in the enforcement of a statute; he had a statutory right to specific, non-discretionary relief and a judicial remedy to enforce it. It was the "existence of a statutory *right*," and not merely the plaintiff's reliance on a statute, that the Court found "relevant to the Judiciary's power to decide Zivotofsky's claim," *id*. at 1427; *Alaska*, 972 F. Supp. 2d at 1127 ("*Zivotofsky* involved a private individual's statutory right, and thus it presents no clear parallels or precedent helpful to this case."); *see also Doe v. Bush*, 323 F.3d 133, 142 (1st Cir. 2003) ("There was less danger of courts invading the province of these other branches, because specific statutory authority directed them to consider the case."). Here, by contrast, the War Powers Resolution provides neither a statutory right nor a cause of

action by which such a right (even if it did exist) could be enforced by a private party. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985). The Resolution does not "identify any 'special class to be benefited,'" but rather "divide[s] responsibility between the executive and legislative branches of government . . . in order to secure sound and efficient conduct of military and foreign affairs." *Id.*; *Ange*, 752 F. Supp. at 512 (the Resolution is a mechanism to enforce the congressional war-making power).[4] To the extent Plaintiff has a "personal stake" in the Resolution's enforcement, it bears little resemblance to the one at issue in *Zivotofsky*.

Finally, *Zivotofsky* involved the very type of constitutional deadlock the Supreme Court envisioned when it cautioned against "decid[ing] issues affecting the allocation of power between Congress and the President until the political branches reach a constitutional impasse." *Goldwater v. Carter*, 444 U.S. 996, 997 (1979). Unlike this case, where the challenged military operation enjoys the mutual support of both political branches, the statute at issue in *Zivotofsky* was the source of an actual confrontation between Congress and the President, which culminated with the Secretary of State's refusal to enforce an act of Congress. *See* 132 S. Ct. at 1425. By the time the dispute reached the Supreme Court, there was no realistic possibility that the political branches would reconcile it, and the core question was whether Congress had overreached and intruded on the President's powers. In concurring with the Court's conclusion that the case presented a justiciable controversy, Justice Sotomayor distinguished *Zivotofsky* from cases where the political branches are not in conflict, recognizing that "it may be appropriate for courts to stay their hand

[4] *Sanchez-Espinoza*, 770 F.2d at 209 ("Neither the text nor the legislative history of [the WPR] suggests an attempt to create private damages actions, which would be strange tools for resolution of inter-branch disputes or allocation of intra-branch responsibilities, particularly in the sensitive fields of military and foreign affairs."); *Lowry v. Reagan*, 676 F. Supp. 333, 339 n.42 (D.D.C. 1987) ("this Court believes that the sponsors of the Resolution did not contemplate a private right of action to enforce section 4(a)(1)").

in cases implicating delicate questions concerning the distribution of political authority between coordinate branches until a dispute is ripe, and incapable of resolution by the political process." *Id*. at 1433 (Sotomayor, J., concurring).

This is precisely such a case. As detailed in the opening brief, the President has determined that he has authority to take military action against ISIL, and Congress has expressed approval of that determination, including by appropriating billions of dollars in support of the military operation. *See* MTD at 3-17. Congress has made these funds available over the course of two annual budget cycles, following close congressional oversight of the status and scope of the operation, and in connection with specific authorizations for the Administration to provide security assistance to various groups fighting ISIL in Iraq and Syria. *Id*. At the same time, Congress has not enacted legislation opposing the President's military activities: Congress has not terminated or modified the 2001 or 2002 authorizations; it has not denied funds to the President; and it has not passed a concurrent resolution purporting to direct the removal of forces under Section 5(c) of the War Powers Resolution. In these circumstances, where Congress plainly has ratified the challenged military action, the case for judicial intervention is at its weakest, *see* MTD at 21-25, and arguments about unbounded executive power in war-making ring hollow.

Plaintiff and *amici* insist, however, that congressional appropriations cannot constitute authorization for the purposes of the War Powers Resolution. They contend that the point of the Resolution's clear-statement rule is to foreclose Congress and the President from construing appropriations as authorizing the introduction of forces into hostilities. This argument conflates justiciability with a potential merits question. Congress's extensive support for OIR demonstrates the type of mutual participation that courts have looked to in dismissing war powers cases on political question grounds. *See, e.g.*, *Massachusetts v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971) ("the

Constitution, in giving some essential powers to Congress and others to the Executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific [constitutional] clause in isolation"). While the Government noted that Congress's unbroken stream of congressional funding could amount to additional authorization of the President's military actions, whether Congress's support constitutes authorization is of no consequence to the political question doctrine.[5] *See* MTD at 28. Rather, in considering Congress's extensive involvement in funding and planning OIR, the question is whether Congress has expressed approval for the President's actions, either through mutual participation or some other means. Beyond a threshold determination that there has been "*some* mutual participation by Congress," *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970) (emphasis added), the adequacy of the means by which Congress chooses to "give its consent" to executive military action is itself a political question, *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973).[6]

[5] As the Government's opening brief made clear, the Court has no reason to decide whether Section 8(a) of the Resolution, which purports to bar Congress from authorizing military operations through an appropriations measure unless that measure "states that it is intended to constitute specific statutory authorization," MTD at 29 (quoting 50 U.S.C. § 1544(b)), can be permissibly construed to foreclose Congress from authorizing executive military action. While the Government maintains that interpreting the provision to strip Congress of a permissible method of authorizing the use of military force would run contrary to the principle that one Congress cannot bind a later Congress, *see, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810), that issue would be relevant only if the Court were in a position to reach whether Congress's appropriations in support of Operation Inherent Resolve constitute *authorization* – a question for the merits.

[6] In support for his contention that Section 8(a)(1) of the War Powers Resolution bars recognition of appropriations bills as authorization for military activity, Plaintiff notes that Section 8(a)(1) was enacted in part to counteract the Second Circuit's suggestion in *Orlando v. Laird* that "passage of defense appropriations bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam War." Op. Br. at 29 (quoting S. Rep. No. 93-220 at 25 (1973)). Regardless of whether this reading of the legislative history is correct, nothing in the War Powers Resolution or any case interpreting it has countermanded the *justiciability* holding in *Orlando*, which focuses on congressional participation and assent, rather than authorization. 443 F.2d 1039, 1042 (2d Cir. 1971). As the war powers cases show, that principle survived the War Powers Resolution, and courts continue to cite *Orlando* (and numerous other

Once it is determined that the political branches have exercised their respective constitutional roles and responsibilities, and that Congress has assented to the use of force, there is "no necessity of determining boundaries" between the coordinate branches, and no jurisdiction over the dispute. *Massachusetts v. Laird*, 451 F.2d at 34.

Further, contrary to Plaintiff's suggestion, the War Powers Resolution does not alter this justiciability analysis. *See Rappenecker v. United States*, 509 F. Supp. 1024, 1030 n.7 (N.D. Cal. 1980) (concluding that the War Powers Resolution "does not affect the [political question] doctrine or diminish the authority of the [Supreme Court's textual-commitment decisions]"). The Resolution "sets forth procedures intended to guarantee Congress, in the absence of a declaration of war, an active role in decisions concerning the deployment of United States Armed Forces into hostilities abroad." *Lowry*, 676 F. Supp. at 334. The Resolution was not an invitation to the courts to decide when the use of force is necessary and appropriate, and, without exception, the same justiciability principles that governed war powers cases before the Resolution have applied with equal force after its enactment. *See, e.g.*, *id*. at 339 (dismissing challenge under the Resolution and distinguishing it from a "true confrontation between the Executive and a unified Congress, as evidenced by its passage of legislation to enforce the Resolution"); *Sanchez-Espinoza*, 770 F.2d at 211 (where Congress had "expressly allowed the President to spend federal funds to support paramilitary operations in Nicaragua," a challenge to the President's military actions under the Resolution was not justiciable); *Ange*, 752 F. Supp. at 512 (deciding whether deployment order violates the Resolution would require determining "precisely what allocation of war power the text of the Constitution makes to the executive and legislative branches").

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cases) for it today. *See, e.g.*, *Doe v. Bush*, 323 F.3d 133, 144 (1st Cir. 2003) (citing *Orlando* for the proposition that "courts are rightly hesitant to second-guess the form or means by which the coequal political branches choose to exercise their textually committed constitutional powers").

* * *

For the foregoing reasons, Plaintiff's repeated contention that the President is waging war against ISIL in violation of the War Powers Resolution should not be resolved by the Court. Plaintiff does not explain why judicial intervention is appropriate to decide these issues, nor does he address the four decades' worth of war powers precedent that cautions against intervening in these very circumstances. Plaintiff is also wrong to suggest that adhering to the political question doctrine is tantamount to sanctioning the executive's usurpation of congressional war powers. When courts refuse to adjudicate a war powers dispute, they do not invite the Executive Branch to make war at its pleasure. Rather, they recognize the "'textually demonstrable constitutional commitment' of the war powers to both political branches and the 'respect due' the political branches in allowing them to resolve . . . dispute[s] over the war powers by exercising their constitutionally conferred powers." *Ange*, 752 F. Supp. at 512. Judicial avoidance "by no means permits the President to interpret the executive's powers as he sees fit, nor does it mean that the legislative branch is helpless without the assistance of the judicial branch." *Id*. at 514. Rather, "[t]he objective of the drafters of the Constitution was to give each branch "constitutional arms for its own defense"; "[w]hen the executive takes a strong hand, Congress has no lack of corrective power." *Massachusetts v. Laird*, 451 F.2d at 34. It does not denigrate the War Powers Resolution to say that the law's restrictions should be enforced first and foremost by the branch of government it was designed to protect. Indeed, judicial enforcement of the War Powers Resolution "would only exacerbate the existing legislative-executive schism," *Ange*, 752 F. Supp. at 518 (internal citation omitted), while interjecting the courts into decisions whose "far-reaching ramifications . . . should fall upon the shoulders of those elected by the people to make those decisions," *id*. at 513. For these reasons, the political question doctrine bars review of Plaintiff's claims.

II. Plaintiff Lacks Standing To Seek Prospective Relief.

As the Government previously explained, Plaintiff cannot base standing on his assertion that participating in a military operation he perceives to be unlawful would violate the oath he took to support and defend the Constitution. Plaintiff's disagreement with the President's decision to take military action against ISIL does not constitute a concrete injury merely because, like all government employees, Plaintiff has taken an oath to support and defend the Constitution. A constitutional oath cannot reasonably be construed to require its adherent to personally vindicate every perceived Constitutional wrong in the government. *See, e.g.*, *Cole v. Richardson*, 405 U.S. 676, 684 (1972). And Plaintiff's effort to elevate the oath into a legal obligation to police the boundary between congressional and executive authority is unpersuasive. *See* MTD at 34-41.

But Plaintiff's claimed basis for standing is now even more tenuous. Plaintiff acknowledges that his tour of duty in OIR has come to an end, which means that his already implausible theory of standing now rests on a series of future contingencies: (i) *if* Plaintiff is deployed in a combat role at some unspecified time in the future, and (ii) *if*, in connection with that deployment, Plaintiff is ordered to take action in support of OIR, and (iii) *if*, at the time of his future deployment, Plaintiff is still uncertain as to whether the President's actions are consistent with the War Powers Resolution, *then* Plaintiff would be forced to choose between disobeying orders or violating his oath to support and defend the Constitution. This sequence of speculative future events cannot support Plaintiff's standing.

A. Plaintiff Can No Longer Claim To Suffer An Ongoing Or Imminent Injury.

First, in order to properly plead standing, Plaintiff must allege clear and sufficient facts establishing that he has personally suffered an actual or "certainly impending" future injury, meaning one that is actual or imminent, not conjectural, speculative or hypothetical. *Clapper v.*

Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). Where, as here, a plaintiff seeks "forward-looking injunctive . . . relief, past injuries alone are insufficient to establish standing." *NB ex rel. Peacock v. District of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012) (internal quotation marks omitted). The risk of possible harm in the future is particularly speculative where its occurrence depends entirely on the possible decisions and actions of a third party. *Lujan*, 504 U.S. at 564.

Here, the relevant harm is the "dilemma" Plaintiff claims he would face if he is ordered to participate in OIR. Plaintiff concedes that he is not now subject to such an order, and the likelihood that he will be in the future is remote and uncertain. Plaintiff does not know whether he will be redeployed in a combat role, much less when such a deployment would occur. Under current policy, unless Plaintiff volunteers, he is unlikely to be redeployed for at least two years (twice the length of his last deployment) after his return, and the Secretary of Defense would have to personally approve any redeployment within a year of his return.[7] Further, Plaintiff does not and cannot know whether his future deployment, if it does occur, would involve action in support of OIR, and if so, what the status of the operation will be at that time and whether he will still harbor doubts about its legality under then-existing circumstances. Thus, while a future deployment in support of OIR is possible, even an "objectively reasonable likelihood" of harm is not sufficient to create standing, *see Clapper*, 133 S. Ct. at 1147-48, particularly where future harm rests on

[7]Under the Department of Defense's current "deployment-to-dwell" policy," the Secretary's goal is a deployment-to-dwell ratio of 1:2 or greater. That means an active component service member who, like Plaintiff, completes a one-year operational deployment can expect to remain at home station for at least two years. Further, unless the service member volunteers and obtains a waiver from the first general or flag officer in the chain of command, the Secretary of Defense must personally approve any operational re-deployment that would result in a deployment-to-dwell ratio of 1:1 or less. *See* Exhibit 1 (Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff, November 1, 2013).

"speculation about the decisions of independent actors," *see id.*, 133 S. Ct. at 1150. Given these contingencies, Plaintiff cannot show that his alleged injury is "imminent," as required to establish standing to seek prospective relief.[8]

B. An Alleged Violation of the War Powers Resolution Does Not Harm Plaintiff.

Even if Plaintiff could show that his alleged harm was "certainly impending," he still could not show that an order to take action in support of OIR would constitute a cognizable injury. Plaintiff's injury is not "concrete" because Plaintiff has not suffered a personal injury as a consequence of the alleged unlawful action, other than an abstract disagreement with the President over the legality of a policy decision. *See, e.g.*, *Rodearmel v. Clinton*, 666 F. Supp. 2d 123, 131 (D.D.C. 2009). Plaintiff's injury is not "particularized" because he attempts to litigate a general grievance about the operation of government, a grievance he shares in more or less equal measure with "a subclass of citizens who suffer no distinctive concrete harm." *Lujan*, 504 U.S. at 576-77. And even if the injury were cognizable, Plaintiff cannot show, as a factual matter, that mere support for a military operation he perceives to be unlawful conflicts with his constitutional oath.

[8] *Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991), a mootness case, is not to the contrary. The Court held only that the end of a military operation did not moot the case, because the controversy could be capable of repetition "even if its recurrence is far from certain." *See Ralls Corp. v. Comm. on Foreign Inv. In U.S.*, 758 F.3d 296, 324 (D.C. Cir. 2014) (describing the Court's rationale in *Doe*). The *Doe* panel did not consider whether the changed circumstances deprived the plaintiffs of standing, and its mootness holding sheds little light on what a standing analysis would have looked like had the court undertaken it. The standing and mootness inquiries "differ in crucial respects," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 168 (2000), and "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness," *id*. at 170. Indeed, challenges akin to the one presented in *Doe* have since been dismissed on standing grounds. *See, e.g.*, *Bates v. Rumsfeld*, 271 F. Supp. 2d 54, 61 (D.D.C. 2002) (Air Force Reserve member's claim that he was likely to be subject to military's involuntary vaccination policy was speculative and insufficient to support standing).

Plaintiff has raised three primary responses to these points, none of which has merit. First, he relies on the Supreme Court's decision in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), for the extraordinary proposition that a military officer is legally obligated to disobey orders to support a military action he perceives to be unlawful. *See* Opp'n Br. at 7. Second, he claims that a public official has standing to sue based solely on the rationale that taking action in connection with a law or policy he believes to be illegal violates his oath of office. *Id*. at 9. Third, he claims standing based on a series of decisions arising from Vietnam-era challenges brought by enlisted soldiers. None of these arguments is persuasive. *Id*. at 12.

i. *Plaintiff Cannot Establish Standing Under Little.*

To the extent Plaintiff relies on *Little* for the proposition that participating in OIR could expose him to civil liability, his argument is wrong and irrelevant to the question of standing. To the extent he relies on *Little* for the proposition that he is required to refuse to participate in a military operation he perceives to be unauthorized, his argument is radically in error.

First, *Little* has nothing to do with the officer's oath, and the decision does not impose or even purport to impose any duties on military officers, let alone a duty to disobey certain commanding orders. *Little* is a case about tort immunity. There, the Supreme Court upheld an award of damages for a "plain trespass" that occurred when a U.S. naval officer seized a neutral vessel. *Little*, 6 U.S. at 179. The officer raised as a defense a Presidential order authorizing the seizure, but the Supreme Court concluded that the President's order was not authorized by the relevant statute and therefore could not "legalize" the otherwise unlawful seizure. *Id*. at 178. That holding is of little relevance today, at least insofar as it concerns a military officer's exposure to civil liability for acts plainly within the scope of his duties. *Little* was decided at a time when the law of tort immunity was in its infancy, and service members still faced personal liability for torts

committed in the course of their duties. *See* Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 66, 73 (2012). The outcome in *Little* would be different if a similar action were filed today,[9] and any suggestion that *Little* can be read as supporting civil liability for an officer in Plaintiff's position (along with any inference that might be drawn from that suggestion) is highly questionable at best.

But even taking *Little* at face value, the decision at most establishes that following orders may not be a defense in a suit against a federal officer alleging the invasion of protected common law rights. It does not follow that an officer who may be exposed to civil damages because he followed an order was legally bound to *disobey* the order in the first place. Nothing in *Little* suggests as much; if anything, the decision confirms that the opposite is true. In arriving at his holding in *Little*, Chief Justice Marshall remarked that the outcome in the case seemed difficult to square with the "the implicit obedience which military men usually pay to the orders of their superiors," which he describes as "indispensably necessary to every military system." *Id*. at 178. That reservation weighs strongly against reading *Little* to support a duty to disobey orders from the President. In more than two centuries, no court—federal, state, or military—has ever recognized Plaintiff's novel reading of *Little*. To do so here would not only misread *Little*, but would mark a sharp departure from the very military authorities that govern an officer's

[9] The Westfall Act accords federal employees (including service members) absolute immunity from common-law tort claims arising out of acts they take in the course of their official duties. 28 U.S.C. § 2679(b)(1). When a federal employee is sued in tort, the Act authorizes the Attorney General to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." § 2679(d)(1), (2). If the Attorney General so certifies, the employee is dismissed from the action, and the United States is substituted as a defendant in the employee's place. The litigation is then governed by the Federal Tort Claims Act (FTCA), under which the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Notably, an exception in the FTCA immunizes the United States for any claim "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." § 2680(j).

relationship with his commanding officers. As previously explained, *see* MTD at 39, the law distinguishes between the policy decision to go to war, for which individual service members are not responsible, and the conduct of war, for which they are. Military personnel are "duty-bound to implement whatever policy decisions the civilian leadership may make." *United States v. New*, 55 M.J. 95, 110 (C.A.A.F 2001) (Effron, J., concurring).[10]

Further, Plaintiff's analogy to *Little* presupposes that he, like the naval officer in *Little,* has been ordered to do something illegal. The officer in *Little* was not merely carrying out an unauthorized order; he was trespassing, having seized a neutral vessel on the high seas without proper authorization. It was the trespass, not the fact that he was proceeding under an unlawful order, that exposed the officer to civil liability. And it is the absence of a similar unlawful action that makes this case quite different from *Little*. Plaintiff cannot identify an unlawful action he could be forced to take as the result of his participation in OIR. The most he can say is that he "has been ordered to take action—fighting ISIS—that he believes violates the War Powers Resolution." Opp'n Br. at 11. To the extent Plaintiff is suggesting that any action he may *personally* take (providing intelligence services, for example) in connection with OIR violates the War Powers Resolution, he misunderstands the purpose and scope of that statute. The War Powers Resolution restricts the *President's* power to introduce U.S. forces into hostilities without prior authorization. *See* 50 U.S.C. § 1544(b) ("the President shall terminate any use of United States Armed Forces . . . ."). The Resolution does not govern the conduct of the individual officers and

[10] Plaintiff argues that the current version of the officer's oath reflects a legal principle, not stated but "necessarily implied" in *Little*, that "each officer must place his duty to 'support the Constitution' over his obligation to obey 'the orders of the President.'" Opp'n Br. at 7. There is simply no support for this novel interpretation of the officer's oath, but even if there were, it would not change the fact that an oath to support and defend the Constitution does not "impose obligations of specific, positive action on oath takers," but simply assures that they are "willing to commit themselves to live by the constitutional processes of our system." *Cole*, 405 U.S. at 684.

soldiers charged with carrying out the President's orders, regardless whether such orders are given in connection with a military operation that violates the War Powers Resolution.

If the law were otherwise, service members would be acting unlawfully each time they followed any order in support of a military operation they perceive to be unlawful. Such a system would eviscerate the principles of discipline and obedience Chief Justice Marshall extolled in *Little*, effectively leaving individual service members to decide which orders to follow based on their individual assessments of the order's legality. *See New*, 55 M.J. at 108 ("[A]llowing private judgments by a soldier as to which orders to obey would be 'unthinkable and unworkable,' and would mean that the 'military need for his services must be compromised.'"). This is precisely why in the view of the Department of Defense "subordinates are not required to screen the orders of superiors for questionable points of legality. . . ." Department of Defense, Law of War Manual § 18.3.2.1., at 1049 (May 2016).

ii. Plaintiff Cannot Establish Standing Under The Oath-Taker Cases.

Plaintiff's contention that being forced to violate his oath provides an independent basis for standing also remains meritless. As Defendant's opening brief shows, courts generally have been unreceptive to this argument, concluding time after time that swearing an oath does not convert an abstract policy disagreement into a concrete, particularized harm.[11] A three-judge panel of this court reached the same conclusion in *Rodearmel v. Clinton*, holding that "oath-based"

[11] *See* MTD at 36 (citing *Drake v. Obama*, 664 F.3d 774, 780 (9th Cir. 2011) (active-duty military officer seeking to challenge President Obama's qualifications as Commander in Chief could not base standing on his assertion that obeying the orders of a purportedly ineligible President would violate his oath to uphold the Constitution); *Crane v. Johnson*, 783 F. 244, 253 (5th Cir. 2015) (immigration agent lacked standing to challenge Department of Homeland Security directive based on "subjective belief that complying with the Directive will require him to violate his oath")).

standing could not salvage a foreign-service officer's lawsuit challenging the appointment of the Secretary of State. 666 F. Supp. 2d 123, 131 (D.D.C. 2009).

Plaintiff's reliance on *Board of Education of Central School District No. 1 v. Allen,* 392 U.S. 236 (1968), is misplaced. In *Allen*, the Court determined that school board members had a "personal stake in the outcome" of their challenge to a state law requiring them to take a specific action. *Id.* at 241 n.5 (citation omitted). The Court explained that if the plaintiffs, "in reliance on their interpretation of the Constitution, failed to lend books to parochial school students," they would be removed from office. *Id.* at 240. "[T]o prevent this, [plaintiffs] were complying with the law." *Id*. Likewise, in *Clarke v. United States*, the district court case that Plaintiff cites, Congress required the plaintiff councilmen to adopt specific legislation, allegedly in violation of the Free Speech Clause of the First Amendment. *See* 705 F. Supp. 605, 606-07 (D.D.C. 1988).[12]

By contrast, the Government has not imposed an unconstitutional or illegal mandate on Plaintiff, and Plaintiff has no credible argument that he would be breaking the law by merely following orders in support of OIR. In particular, Plaintiff's assertion that he would be personally violating the War Powers Resolution by following orders to "fight[] ISIS" is unfounded. And apart from the War Powers Resolution, Plaintiff has not identified, and cannot identify any law that he could conceivably violate by merely following the orders of his superiors. Indeed, the *Rodearmel* panel distinguished *Allen* and *Clarke* on precisely this ground. *See Rodearmel*, 666 F. Supp. 2d at 130. In *Rodearmel*, however, the plaintiff had alleged only that "serving under, taking

[12] A number of courts have declined to follow *Allen*, concluding that its oath-taker standing holding has been eroded by a series of intervening Supreme Court precedents that collectively have reshaped the landscape of Article III standing. *See, e.g.*, *City of S. Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231, 236 (9th Cir. 1980); *Finch v. Mississippi State Medical Ass'n, Inc.*, 585 F.2d 765, 773 (5th Cir. 1978).

direction from, and reporting to" the Secretary was inconsistent with his oath, "without alleging the specific constitutional violation that he believes he would be committing by remaining under her supervision." *Id*. at 130. That was insufficient to confer standing under the limited holding in *Allen*, and the outcome here should be no different.

Plaintiff's theory of standing differs from *Allen* in another important respect. Whereas the school board members in *Allen* were firm in their conviction that they were being forced to take unconstitutional action, Plaintiff admits that he "is not fully confident that the war against ISIS is illegal," Opp'n Br. at 5. Rather than asking the Court to relieve him from an illegal mandate, Plaintiff is asking the Court to tell him whether carrying out orders in connection with OIR would be consistent with his oath, so that he can "continue fighting without confronting the dilemma [described in the complaint]." Opp'n Br. at 14. In other words, Plaintiff's "real interest is in having the question of the legality of [OIR] decided one way or the other." *Harrington v. Bush*, 553 F.2d 190, 209 (D.C. Cir. 1977). That interest in obtaining the assurance of a judicial advisory opinion is insufficient to confer standing, which demands that the "complaining party have such a strong connection to the controversy that its outcome will demonstrably cause him to win or lose in some measure." *Id*. at 206. If standing were granted here, then the use of force by the United States going forward would be subject to judicial review whenever a service member wanted reassurance that the use of force was legal. *Cf. City of S. Lake Tahoe*, 625 F.2d at 237 (granting oath-taker standing would "convert all officials charged with executing statutes into potential litigants, or attorneys general, as to laws within their charge").

iii. The Vietnam-Era Standing Decisions Are Inapposite.

Plaintiff also claims standing under two cases brought by service members challenging the legality of the Vietnam War. Opp'n Br. at 12 (citing *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970)

and *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971)). Both cases are readily distinguishable. In *Berk* and *Massachusetts*, the legal claims and alleged injuries stemmed primarily from forced service in a theater of combat. The plaintiff in *Berk* claimed violations of rights protected by the Fifth, Ninth, Tenth, and Fourteenth Amendments to the Constitution, as well as the New York Civil Rights Law. *Berk*, 429 F.2d at 304. Further, the Court construed the plaintiff's complaint "as putting in controversy his future earning capacity, which serious injury or even death might diminish by an amount exceeding $10,000." *Id*. at 306. Similarly, the plaintiffs in *Massachusetts* alleged that "their forced service in an undeclared war is a deprivation of liberty in violation of the due process clause of the Fifth Amendment." *Massachusetts v. Laird*, 451 F.2d at 28.

Here, unlike the service members who sued in *Berk v. Laird* and *Massachusetts v. Laird*, Plaintiff has never sought to base his standing on forced service or the harms generally associated with a combat deployment. Plaintiff does not assert that serving in OIR has jeopardized his life or livelihood, nor does he claim that he has been or may be ordered to serve in violation of his constitutional liberties. Instead, Plaintiff alleges that OIR is a "good war" that is "justified both militarily and morally," an effort he would gladly join if it were not for his concerns about its legality. *See* Compl. Ex. A ¶ 5. Plaintiff's sole basis for standing is that supporting a military operation he perceives to be illegal requires him to violate the oath he took to support and defend the Constitution, and neither *Berk* nor *Massachusetts* provide support for such a theory.

Further, unlike Plaintiff, the service members in *Berk* and *Massachusetts* could reasonably argue that their alleged injuries were actual or imminent. The plaintiff in *Berk* had already received dispatch orders, *Berk*, 429 F.2d at 304, and the plaintiffs in *Massachusetts* were "either serving in Southeast Asia or . . . subject to such service." *Massachusetts*, 451 F.2d at 28. The court did not clarify what it meant by "subject to such service," *id*., but the district court opinion described the

individual plaintiffs as "members of the armed forces of the United States [who] are now being or will be required to serve in the conduct of armed hostilities in Southeast Asia." *Com. of Mass. v. Laird*, 327 F. Supp. 378, 379 (D. Mass. 1971). Plaintiff has not claimed a comparable injury, and particularly where he no longer serves in OIR, cannot claim an imminent threat of future injury.

III. Sovereign Immunity Bars Plaintiff's Claims, and Plaintiff Cannot Seek Declaratory Relief Against the President.

Plaintiff's opposition also fails to establish a waiver of sovereign immunity in order for his claims to proceed. He concedes that neither the APA nor the Declaratory Judgment Act supplies such a waiver. Rather, Plaintiff's only argument is that no waiver of sovereign immunity is required under the *ultra vires* exception in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949), and its progeny.

As the Government explained in the opening brief, *Larson* is no help to Plaintiff. The *Larson* decision actually upheld a claim of sovereign immunity, but in dicta the Court said, "where [a federal] officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." 337 U.S. at 689. The *Larson* Court itself stressed the narrow confines of this exception, noting that a plaintiff must show a "lack of delegated power," and that "[a] claim of error in the exercise of that power is . . . not sufficient." *Id*. at 690. Later decisions have emphasized the limited nature of the *Larson* exception, and the "modern cases make clear" that an officer may be said to act ultra vires "only when he acts 'without any authority whatever."' *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 n.11 (1984). And in *Dugan v. Rank*, 372 U.S. 609 (1963), the Supreme Court explained that "if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act," the suit is against the United States and a waiver of sovereign immunity is required. *Id*. at 620.

There is no *Larson-Dugan* exception to sovereign immunity in this case. As in *Dugan*, the relief the Plaintiffs request would operate against the United States in its sovereign capacity. In addition, Plaintiff is not challenging "action by officers beyond their statutory powers." *Id*. at 621. It is not sufficient to allege that the President acted illegally. Rather, the suit must allege that the officer is "not doing the business which the sovereign has empowered him to do." *Larson*, 337 U.S. at 689. Plaintiff is not challenging the "power of the [President], under the [relevant statutes], to make a decision at all," but rather "the correctness or incorrectness" of the decisions made. *Id*. at 691 n.12. A challenge of that nature requires a waiver of sovereign immunity.

Finally, as also shown in Defendant's opening brief, the declaratory relief Plaintiff seeks against the President is not available. The Supreme Court has recognized that an action against the President for injunctive relief could lie only in extraordinary circumstances, *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), and that same principle applies to actions for declaratory relief, *Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010).

Seeking to minimize the consequences of the relief sought, Plaintiff clarifies that a declaratory judgment in Plaintiff's favor "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' authorization for the war that has thus far been absent." Opp'n Br. at 44-45. This argument has no bearing on the principle set forth in *Franklin* and its progeny, which concerns the nature of the relief sought against the Executive, not the scope of the relief. And the very nature of the relief Plaintiff proposes—that a court tell troops to "keep fighting" overseas while directing the President to "make a sustained effort" to obtain further authorization and, if that fails, to withdraw troops within 30 days, *see id*. at 44-45—only underscores the nonjusticiability of this case.

Dated: September 16, 2016

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

EXHIBIT 1

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND
READINESS

NOV 1 2013

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Under Secretary of Defense (Personnel & Readiness) Deployment-to-Dwell, Mobilization-to-Dwell Policy Revision

References:
(a) Under Secretary of Defense (Personnel &Readiness) Memorandum, *Boots on the Ground (BOG)*, 30 March 2005
(b) Secretary of Defense Memorandum, *Force Allocation and Reserve Component Alert/Mobilization Decision Process*, 3 May 2007
(c) Department of Defense Instruction 8260.03 *Organizational and Force Structure Construct for Global Force Management*, 23 August 2006
(d) Department of Defense Directive 1235.10 *Activation, Mobilization, and Demobilization of the Ready Reserve*, 26 November 2008, incorporating change 1, 21 September 2011
(e) Department of Defense Instruction 1235.12 *Accessing the Reserve Component*, 4 February 2010, incorporating Change 1, 4 April 2012
(f) Department of Defense Instruction 1336.07, *Reporting of Personnel Tempo (PERSTEMPO) Events*

This memorandum supersedes Under Secretary of Defense (Personnel & Readiness) (USD(P&R) Memorandum "Boots on the Ground (BOG)" dated 30 March 2005. The purpose of this policy is to establish a consistent set of standards to characterize and manage the employment of the total military force in order to preclude the over-exposure of personnel to combat and operational deployments. To clearly understand the employment of the total military force, Combatant Commanders must register use of assigned forces. The intent is for commanders at every level to ensure individual service members, regardless of unit assignment, are not repeatedly exposed to combat, do not experience disproportionate deployments, and do not spend extended periods of time away from their homeport/station/base unless required by operational necessity. This memorandum is not intended to be utilized as a force shaping tool.

This policy defines Deployment-to-Dwell ratio, Mobilization-to-Dwell ratio, and establishes a single common standard to define Operational Deployment. The following definitions will be used.

Operational Deployment. An operational deployment begins when the majority of a unit or detachment, or an individual not attached to a unit or detachment, departs homeport/station/base or departs from an enroute training location to meet a Secretary of Defense-approved operational requirement. An event is an operational deployment if it is recorded in the Joint Capabilities Requirement Manager (JCRM) or Fourth Estate Manpower Tracking System (FMTS) and is contained in the annual Global Force Management Data

Initiative (GFM DI) compliant tool under the GFM DI reporting structure specified in Department of Defense (DoD) Instruction (DoDI) 8260.03. Forces deployed in support of Execute Orders (EXORDs), Operational Plans (OPLANs), or Concept Plans (CONPLANs) approved by the Secretary of Defense are also considered operationally deployed. An operational deployment ends when the majority of the unit or detachment, or an individual not attached to a unit or detachment, arrives back at their homeport/station/base. Forces operationally employed by Secretary of Defense orders at their home station or in "prepare-to-deploy order" (PTDO) status at home station are not operationally deployed.

Dwell. Dwell is defined as the period of time a unit or individual is not on an operational deployment. Dwell begins when the majority of a unit or detachment, or an individual not attached to a unit or detachment, arrives at their homeport/station/base from an operational deployment. Dwell ends when the unit or individual departs on an operational deployment. A unit is either on operational deployment or in dwell. For the Reserve Component, dwell is defined as the period of time an individual is not mobilized.

Deployment-to-Dwell Ratio for Active Component (AC). The ratio of time a unit, detachment, or individual is operationally deployed to the time the unit, detachment, or individual is in dwell is the Deployment-Dwell ratio. For example, a unit that operationally deployed for seven months and was in dwell for 14 months would have an operational Deployment-to-Dwell ratio of 1:2. The Secretary of Defense's goal for operational Deployment-to-Dwell ratio is 1:2 or greater. The operational Deployment-to-Dwell ratio threshold is 1:1. Secretary of Defense approval is required to deploy a unit, detachment, or individual with a 1:1 ratio or less, except that an individual may request a waiver of the Deployment-to-Dwell threshold by volunteering in writing to the first general/flag officer in the chain of command of the parent organization, who may approve the waiver request.

Mobilization-to-Dwell Ratio for Reserve Component (RC). For reserve units, detachments or individuals, Mobilization-Dwell ratio will be measured in accordance with DoD Directive 1235.10 and DoDI 1235.12. The mobilization period is calculated from the date of mobilization to the date of demobilization. The Secretary of Defense's goal is a 1:5 or greater ratio. The Mobilization-to-Dwell ratio threshold is 1:4. Secretary of Defense's approval is required to mobilize a unit, detachment or individuals with a 1:4 ratio or less, except that an individual may request a waiver of the Mobilization-to-Dwell threshold by volunteering in writing to the first general/flag officer in the chain of command of the parent organization, who may approve the waiver request.

The maximum involuntary mobilization period for RC forces or individuals is 365 days. At Service discretion, this period may exclude both individual skills training required for deployment and post-deployment leave.

The period of time members of the RC are voluntarily ordered to action under 10 U.S.C 12301(d) is not considered mobilization and shall not be counted as mobilization time; however, to clearly understand the employment of the total military force, operational deployments of RC personnel under 10 U.S.C 12301(d) will continue to be recorded.

Extensions, Waivers, and Service Rotation. Only the Secretary of Defense may authorize involuntary extension of personnel 14 days or more beyond Secretary of Defense-approved deployment duration. Only the Secretary of Defense may involuntarily authorize or extend a unit's or individual's operational deployment beyond 365 days. Individuals may request a waiver of the 365-day restriction and/or 14-day maximum extension by volunteering in writing. Waiver approval authority is the first General/Flag Officer in the chain of command of the parent organization with Service notification. Service rotations within the secretary of Defense's approved deployment duration do not require Secretary of Defense's approval for extension. For example, if a service chooses to split a 365-day duration mission between two units, extending the first unit more than 14 days would not require Secretary of Defense approval.

When a service member is under investigation with a view toward prosecution or other adverse administrative action, or when court-martial charges or adverse administrative action has been initiated, extensions beyond 365 days may be approved by the appropriate general court-martial convening authority.

Individual Tempo. Individual tempo is measured to a common standard as defined in DoD Instruction 1336.07, *Reporting of Personnel Tempo (PERSTEMPO) Events*. Services must register PERSTEMPO events to manage personnel properly and ensure individual service members do not experience disproportionate deployments, or spend extended periods of time away from their homeport/station/base unless required by operational necessity.

Jessica L. Wright
Acting