UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION

The Constitution Project ("TCP") and Michael J. Glennon, through undersigned counsel, respectfully request permission to file, as amici curiae, the attached brief in opposition to defendant's motion to dismiss this action for want of jurisdiction. (See Exhibit A.) In support of this motion, TCP and Mr. Glennon state as follows:

1. The Constitution Project is an independent bipartisan organization that promotes and defends constitutional safeguards. TCP brings together legal and policy experts from across the political spectrum to foster consensus-based solutions to pressing constitutional challenges. Through a combination of scholarship, advocacy, policy reform, and public education initiatives, The Constitution Project seeks to protect our constitutional values and strengthen the rule of law. TCP has been in the forefront in addressing many of the constitutional and legal issues that have arisen since the attacks of September 11th.

2. Michael J. Glennon is Professor of International Law at the Fletcher School of Law and Diplomacy, Tufts University. In 1973, as an attorney in the Office of the Legislative Counsel of

the United States Senate, he served as counsel to the Senate members of the congressional conference that reconciled House and Senate versions of the War Powers Resolution and produced the conference report that was enacted into law. Afterwards he monitored compliance with the Resolution as the Legal Counsel to the Senate Foreign Relations Committee (1977-1980). He teaches constitutional law, international law, and foreign relations and national security law. He is the author of *Constitutional Diplomacy* (1990) and co-author of *United States Foreign Relations and National Security Law* (4th ed., 2011).

3. Based upon their expertise and experience, proposed amici seek to afford the Court a more complete knowledge of the background and purposes of the War Powers Resolution and pertinent aspects of the constitutional doctrine of separation of powers as they relate to resolution of defendant's motion to dismiss for lack of jurisdiction.

4. Counsel for proposed amici has contacted counsel for the parties to ascertain their respective positions with respect to this motion. Counsel for plaintiff advised that plaintiff supports granting leave to file the brief. Counsel for defendant advised that defendant takes no position with respect to the motion.

Accordingly, the Constitution Project and Mr. Glennon request the Court issue an Order granting them leave to file the brief amici curiae attached hereto as Exhibit A.

Respectfully submitted,

/s/ Eric L. Lewis_____
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Dated August 19, 2016

EXHIBIT A

UNITED STATES DISTRICT COURT
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Nathan Michael Smith,	)	
Plaintiff,	)	Civ. No. 16-843 (CKK)
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BRIEF OF AMICI CURIAE IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION

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Amici Curiae The Constitution Project and Michael J. Glennon, through undersigned counsel, submit this brief in opposition to the motion filed by the defendant to dismiss this action for want of jurisdiction.[1] For the reasons set forth below, and in the opposition filed on behalf of plaintiff Smith, the motion to dismiss should be denied.

Introduction

The Constitution gives Congress power to restrict presidential war-making. That power was recognized by the Marshall Court as early as 1804 in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), a case the United States Supreme Court reaffirmed last year. *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S.Ct. 2076, 2090 (2015). Pursuant to that power, Congress has enacted two pertinent restrictions. Both are set out in the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), codified at 50 U.S.C. § 1541 (2012). The first, sections 4(a)(1) and 5(b), is a provision limiting the use of force to 90 days without congressional authorization. The second, section 8(a)(1), is a clear statement rule, which bars inferring congressional approval from any statute that does not specifically confer it.

The defendant has violated the War Powers Resolution—and the clear constitutional division of war powers—by using force against ISIL in excess of 90 days without congressional authorization. Orders given to Captain Smith to assist in that use are therefore unlawful. Defendant seeks to evade this restriction by arguing that Congress has authorized the ISIL war. It has not. The statutes on which it relies do not authorize the introduction of the armed forces into hostilities. But even if those statutes could be read as supporting the government's claim, they are rendered inapt by the War Powers Resolution's clear statement rule. Defendant's claim can

[1] No party or party's counsel authored this brief in whole or part or contributed money that was intended to fund authoring or submitting this brief. No person other than amici curiae or counsel contributed money that was intended to fund preparing or submitting this brief.

therefore be sustained only if the clear statement rule is invalid—which is, in fact, his implicit argument—and only by defeating the purposes behind the Framers' decision to assign *Congress* the power to decide on war. No President has ever before challenged the constitutionality of the clear statement rule. Nor is there any basis for doubting its validity.

The effect of the challenge to the rule's constitutionality is to make clear that this case does not present a political question. No case in which the Supreme Court has recognized a political question has ever stemmed from a statute. To the contrary: when an act of Congress is alleged to conflict with the Constitution, the courts have not hesitated to say what the law is. The law here is clear. The President has a constitutional obligation to take care that that law be faithfully executed. U.S. Const. art. II, § 3. This Court should therefore declare that the President is constitutionally obliged to execute the Resolution's 90-day requirement, as Captain Smith has requested.

Argument

I. The Constitution gives Congress the power to decide on war in order to ensure collective judgment, transparency, and political accountability when the government introduces the armed forces into hostilities.

From time to time a dispute arises that calls upon the courts to reaffirm the Nation's continuing commitment to the first principles that led to its founding. This is such a case. The principles in question could hardly be clearer, or more important. They concern the most fundamental question that the Nation can face: whether the peoples' elected representatives have power to restrict Executive war-making. The unequivocal answer was enunciated in American case law by no less than Chief Justice John Marshall, speaking for a unanimous United States Supreme Court only fifteen years after the Constitution took effect. The case was *Little v. Barreme*, decided in 1804. The facts of Captain Smith's case bear a remarkable parallel to those that gave rise to Marshall's decision. *See generally* Michael J. Glennon, *Two Views of*

Presidential Foreign Affairs Power: Little v. Barreme *or* Curtiss-Wright*?*, 13 Yale J. Int. L. 5 (1988); Louis Fisher, *Presidential War Power* 1-16 (3d ed. 2013).

Those facts were as follows. During the administration of President John Adams, the United States fought an undeclared naval war with France. *Little* at 173, 177. Although the war was not formally declared, Congress prohibited American vessels from sailing to French ports. Non-Intercourse Act, ch. 2, § 1, 3 Stat. 613 (1799) (expired 1800). Congress also enacted the means to carry out this restriction; it authorized the President to order United States naval officers to (a) stop any American ship if they had reason to suspect the ship bound for a French port and (b) seize the ship if, upon searching it, it appeared to be so bound. *Id*. at § 5. Congress further provided that the captured ship be condemned—auctioned or sold—and, rather generously, that half the proceeds go to the United States, the other half to the person who initiated the capture and sale, presumably the ship's captain. *Id*. at § 1.

When the Secretary of the Navy issued orders a month after the law was enacted, he included a copy of the law. One recipient of those orders was Captain George Little, commander of the United States frigate *Boston*. Unknown to Little, however, the orders departed from the law in two key respects. First, they directed the seizure not only of ships that were clearly American but also of ships that appeared to be foreign but *might* be American or merely carrying American cargo. *Little* at 171. Second, they directed the seizure not only of ships bound *to* French ports but also of ships sailing *from* French ports. *Id*. The order therefore seemingly expanded Little's authority, and the United States' risk of hostilities, significantly beyond what Congress had contemplated.

As it turned out, the Navy seized the wrong ship—a vessel with Danish papers sailing *from* a French port. Captain Little captured this ship, the *Flying-Fish*, and sought to have her

condemned. *Id*. at 176. (Little had some reason to suspect the *Flying-Fish*'s true nationality: "[D]uring the chase by the *American* frigates, the [*Flying-Fish*'s] master threw overboard the logbook, and certain other papers." *Id*. at 173 (emphasis in original).) The central issue in the condemnation proceedings was not whether the *Flying-Fish* should have been condemned; Chief Justice Marshall agreed with the courts below that the seizure of a neutral vessel was unlawful. *Id*. at 172, 175-6. The case turned on whether the Danish owners of the *Flying Fish* should be awarded damages for the injuries they suffered. *Id*. Little's defense was that he had merely followed orders and that those orders excused him from liability. *Id*. at 178-9. Because the *Flying-Fish* fell squarely within the class of ships that the President had ordered seized, the Supreme Court had to consider whether the President's instructions immunized his officer personally from an action for damages arising under the statute. *Id*.

The Supreme Court affirmed the circuit court's judgment awarding damages to the owners. *Id*. at 179. Marshall's first reaction, he confesses in the opinion, was that, given Little's orders, a judgment against him for damages would be improper. It is "indispensably necessary to every military system," he writes, that "implicit obedience which military men usually pay to the orders of their superiors." *Id*. at 177. Yet Marshall changed his mind when he considered the character of Captain Little's act: It directly contravened the will of Congress. "[T]he legislature seems to have prescribed that the manner in which this law shall be carried into execution," and in so doing, "exclude[d] a seizure of any vessel not bound to a French port." *Id*. at 177-8 Under the law enacted by Congress, therefore, Captain Little "would not have been authorized to detain" the *Flying-Fish*. *Id*. at 178 "[T]he instructions [from the Secretary of the Navy]," Marshall concludes, "cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id*. Marshall thus forthrightly

rejects the "good-soldier" defense: it is of no consequence that Little was merely following orders.

Little is, in all, a case of seminal significance—significant in its specific implications for soldiers such as Captain Smith, who are asked to obey unlawful orders, and significant in its unequivocal affirmation of congressional power to restrict presidential war-making. Its abiding importance was underscored only last year by the Supreme Court in *Zivotofsky II*. The Court, citing *Little*, said this:

> 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.

Zivotofsky II 135 S.Ct. at 2090. The Court then proceeded to cite Justice Jackson's concurring opinion in the Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *Id*. Captain Smith's opposition has elaborated its famous three-tiered framework, which amici do not revisit. We simply note that "the President's asserted power must be both 'exclusive' and 'conclusive'" if he is to succeed when, as here, he "'takes measures incompatible with the expressed or implied will of Congress.'" *Id*. at 2084 (quoting *Youngstown* 343 U.S. at 637-8 (Jackson, J., concurring)). The government does not argue that the President is here exercising such power.

The reasons underpinning the primacy of Congress's war powers, underscored in *Little* and *Steel Seizure*, are familiar to students of the Constitution and scarcely need recounting. The commentary has been voluminous, particularly on the Framers' intent. *See generally* Fisher at 1-12. No one summed up that intent better than Abraham Lincoln:

> The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good

> of the people was the object. This, our convention understood to be the most oppressive of all kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us.

Letter from Abraham Lincoln to William H. Herndon (Feb. 15, 1848), *in* 1 *Collected Works: The Abraham Lincoln Association, Springfield, Illinois* 451-2 (Roy P. Basler ed., 1953)(emphasis in original) (http://quod.lib.umich.edu/l/lincoln/). Chief Justice William Rehnquist, quoting Justice Jackson in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), shared Lincoln's belief that the Framers rejected the English model. He said: "'The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.'" *Dames* at 662 (quoting *Youngstown* 343 U.S. at 641 (Jackson, J., concurring)).

The Executive that the Framers did create was therefore empowered to use force only within a limited framework. The Executive was to have power to act in emergencies, situations involving threats to the nation so imminent that Congress has no time to act. In non-emergency situations, however, congressional approval would be required. This framework, the Framers believed, would advance the purposes of collective deliberation, transparency, political consensus, and political accountability while at the same time safeguarding the nation's security when prior legislative approval is not feasible. As The Constitution Project's War Powers Committee has explained:

> The best precaution against unilateral war-making by the executive was to require a collective decision to go to war. "It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large," James Wilson later explained to the Pennsylvania ratifying convention. Moreover, vesting this power in the whole Congress meant that the popularly-elected House, the body most directly responsive to the voters, had to act and so helped to assure the widest possible political consensus for war. The Senate—originally chosen by state legislatures—could not alone provide this assurance. Since the people could not be asked directly whether the nation should go to war, requiring the

> assent of the House as well as the Senate was the next best thing. If presidents bent on war could not persuade the Congress, they presumably could not persuade the people either and would therefore lack the consensus required to assume the costs and risks of war.
>
> In short, the framers insisted on a collective judgment for war because it was likely that a collective judgment would be superior to an individual judgment, would help assure that the United States would not go to war without a political consensus, and, by requiring a President to persuade Congress, would effectively make him or her explain why war was necessary to the public who would ultimately bear its cost.

The Constitution Project, *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances* 10 (2005) (footnotes omitted) (http://r.search.yahoo.com/_ylt=A0LEVv1ZDLZXeTYAsFgnnIlQ;_ylu=X3oDMTEzNjdzc3M0BGNvbG8DYmYxBHBvcwMyBHZ0aWQDRkZVSUMwXzEEc2VjA3Ny/RV=2/RE=1471577306/RO=10/RU=http%3a%2f%2fwww.constitutionproject.org%2fdocuments%2fletter-urges-president-to-consider-war-powers-as-conflict-in-syria-deepens%2f/RK=0/RS=yDZV9jOdgHeL8ipkyxYB0ZJnLjY). This is the framework that led the Court, in *Zivotofsky II*, to reject the government's claim of "unbounded power," as the Court put it, *Zivotofsky II* 135 S. Ct. at 2089, a claim that relied on the discredited plenary powers case of *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (which the government cited ten times in its *Zivotofsky II* pleadings). "It is Congress that makes laws," the Court said, "and in countless ways its laws will and should shape the Nation's course." *Zivotofsky II* 135 S. Ct. at 2090. And this is the framework on which Captain Smith grounds his request to this Court to vindicate rights that rest on the War Powers Resolution's 90-day time limit and the Resolution's clear statement rule.

II. The President has violated the War Powers Resolution, which Congress enacted to fulfill the Framers' intent that the political branches make war powers decisions collectively and transparently.

The War Powers Resolution was enacted by Congress in 1973 in the aftermath of a long and bitter debate over United States military involvement in Vietnam. In it, Congress determined "to fulfill the intent of the framers of the Constitution…[by ensuring] that the collective judgment of both the Congress and the President" would apply to future decisions to go to war. Pub. L. No. 93-148, 87 Stat. 555 §2(a) (1973). Two provisions of the War Powers Resolution, directed at advancing that purpose, are pertinent to this case: the 90-day time limit, and the clear statement rule. Each is valid and controlling. The President has violated both.

These two restrictions are integrally related. The operation of the time limit rests upon the operation of the clear statement rule, for the time limit is inapplicable when Congress enacts "specific" authorization. Resolution, §5(b). Absent an effective clear statement rule, the Executive could argue that a statute authorizing or appropriating funds generally, for unrelated purposes, implicitly authorizes the introduction of the armed forces into hostilities, as it argued during the Vietnam War. To accept this argument would render the time limit meaningless; such statutes are enacted with some frequency, particularly in an era of "omnibus" legislation in which budget authority for multifarious purposes is combined in one bill. The solution, the Resolution's sponsors therefore believed, was to make clear Congress's intent that the time limits apply unless Congress explicitly provides otherwise. Given the text of the statutes on which the government relies, this Court need not apply the Resolution's clear statement rule, since the statutes in question do not authorize the introduction of the armed forces into hostilities. Captain Smith's opposition makes this plain. Pl.'s Mem. Opp'n Def.'s Mot. Dismiss. But the Court should be aware that, if it does read those statutes as the government reads them, and if the Court

accepts the government's argument that the clear statement rule is invalid, it will be effectively eviscerating the War Powers Resolution.

A. The 90-day time limit

The 90-day time limit is set out in sections 4(a)(1) and 5(b) of the Resolution. Section 4(a)(1) requires the President to submit a report to Congress within 48 hours after armed forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." *Id*. at §4(a)(1). Section 5(b) requires that that use of force be terminated 60 or 90 days thereafter unless Congress has approved. It provides:

> Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that 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.

Id. at §5(b). The War Powers Resolution thus re-categorizes covered uses of force within Justice Jackson's *Steel Seizure* triptych. Prior to the enactment of the Resolution, a use of force beyond 60 (or 90) days would have fallen into his second category, the "zone of twilight," in which "the tools belong to the man who can use them" and "the imperatives of events and contemporary imponderables" prevail. *Youngstown* 343 U.S. at 654, 637 (Jackson, J., concurring). After the enactment of the Resolution, however, such use is incompatible with Congress's will and thus falls into Justice Jackson's third *Steel Seizure* category, where the President's power is at its lowest ebb. It is into this category that the use of force described in Captain Smith's complaint falls. Because the President's power here is neither "exclusive" nor "conclusive," and because, as

the Marshall Court recognized in *Little*, Congress has power to enact restrictions on the exercise of that power, the Resolution's time limits control.

Congress's reason for imposing these time limits is directly relevant to the instant facts. Congressional power had atrophied while the war power remained in Justice Jackson's zone of twilight; moving non-emergency uses of force into his third category, Congress believed, would ensure congressional involvement. The Senate Foreign Relations Committee, citing Jackson's opinion, explained this reasoning in its reported version of the Resolution: "Congress," it argued, "bears a heavy responsibility for its passive acquiescence in the unwarranted expansion of Presidential power…. Politics, like nature, abhors a vacuum. When Congress created a vacuum by failing to defend and exercise its powers, the President inevitably hastened to fill it." S. Rep. 93-220, at 16 (1973). The most effective and appropriate way to ensure congressional involvement, Congress concluded, was to require the President to come back to Congress for approval within 60 or 90 days after commencing any use of force that Congress had not authorized. This, it believed, would vindicate the purposes underpinning the constitutional framework described in Part I above.

The Justice Department's Office of Legal Counsel, accordingly, has had no hesitation in declaring the limit constitutional. In 1980 it wrote:

> 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.

Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 196 (1980). No Administration has ever questioned or modified the Justice

Department's 1980 position. Nor does the defendant here argue that force is not being used in the manner Captain Smith has described.

The defendant claims, instead, that there is no violation of the time limit because the use of force at issue has been statutorily authorized, which, if correct, would render the time limit inapplicable under its own terms. But this claim is belied by the plain text of the statutes on which the defendant relies. *See* Pl.'s Mem. Opp'n Def.'s Mot. Dismiss at pp. 29 - 34. The defendant's argument is, moreover, flatly inconsistent with the text of section 5(b) of the Resolution, which renders the time limit inapplicable only when *specific* authorization is enacted. Resolution, sec. 5(b). And it is flatly inconsistent with the Resolution's clear statement rule. The defendant's claim can succeed only if the clear statement rule is invalid. Its entire argument therefore assumes that Congress had no power under the Constitution, in enacting the clear statement rule, to calibrate its intent and thus to control the interpretation of its enactments. This claim is extraordinary. As discussed below, it has no support in United States constitutional law or practice.

B. <u>The clear statement rule</u>

The clear statement rule is set forth in section 8(a)(1) of the Resolution. It provides as follows:

> Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred…from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

Resolution, §8(a)(1). The import of this provision is clear: it makes unavailable the two sets of authorities on which defendant relies: (1) the authorization to use force against those responsible

for the September 11 terrorist attacks, Construction and Application of Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), and the 2002 statute authorizing the use of force against Sadaam Hussein's Iraq, Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); and (2) appropriations legislation enacted after these AUMFs. These statutes do not authorize the ISIL war for the following reasons.

First, the two AUMFs do not meet the clear statement rule's two-part *specificity* requirement: The rule requires that 1) a statute authorizing the use of force refer to the Resolution; and 2) the statute *specifically* authorize the use of force with respect to the particular hostilities in question. Captain Smith's opposition has described at length why the two AUMFs cannot be read to authorize use of force on the instant facts. Each of those AUMFs authorized use of force in different conflicts, against different enemies, under entirely different circumstances. Pl.'s Mem. Opp'n Def.'s Mot. Dismiss. This compels the conclusion that the authority conferred by these two AUMFs is not specific *with respect to the hostilities in which Captain Smith is involved*. To stretch either AUMF to the extent that the defendant attempts to do—broadening each to cover not the conflict originally envisioned but subsequent, different conflicts as well—would necessarily render each AUMF not specific but general. The clear statement rule of section 8(a)(1) prohibits inferring congressional approval from a general authorization.

Second, the subsequent appropriations legislation on which the defendant relies does not meet the clear statement rule's other requirement: reference to the Resolution. No statute enacted after the two AUMFs contains a provision "stating that it is intended to constitute specific statutory authorization within the meaning of" the War Powers Resolution. Resolution, sec.

8(a)(1). The subsequent statutes therefore cannot be interpreted in the manner the government contends, as implying authority to use force.

The defendant attempts to meet this fatal difficulty in a footnote. Def.'s Mot. Dismiss 29, n47. The defendant is unwilling to declare forthrightly that the clear statement rule is invalid; no President, even President Nixon in his veto message, has claimed this provision to be constitutionally infirm. Rather, he asserts merely that the clear statement rule "would be unconstitutional" if it "were construed to foreclose Congress from authorizing executive military activities through an appropriations statute…." *Id.* But defendant then proceeds to advance a novel argument for congressional authorization that necessarily presupposes the clear statement rule's invalidity. The Motion to Dismiss lays bare its refusal to honor the clear statement rule. It relies upon *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), for the proposition that authority to use force can be inferred from "*any* action by the Congress…." Def.'s Mot. Dismiss 22 (emphasis added). Yet *Orlando* is expressly identified in the report of the Senate Foreign Relations Committee as a case that the Resolution was directly intended to overrule. The purpose of this "important provision," the Committee noted, "is to counteract the opinion in the *Orlando v. Laird* decision of the Second Circuit Court holding that the passage of defense appropriations bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam War." S. Rep. No. 93-220, at 25 (1973). The argument that Congress has approved the use of force that Captain Smith has been ordered to advance thus cannot be sustained unless—contrary to the express will of Congress—statutes are interpreted in a way that Congress has explicitly said they cannot be.

The gist of the argument is that Congress, in enacting the clear statement rule, attempted to "'abridge the powers of a succeeding legislature'" by enacting into law a clear statement rule

that is somehow unrepealable. Def.'s Mot. Dismiss 29, n47 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810)). But obviously it did not. Congress can repeal section 8(a)(1) any time it wishes to do so. It can do so using precisely the same procedure applicable to the repeal of any other statute. The Congress that enacted section 8(a)(1) did not "bind" later Congresses, for later Congresses retain full discretion to alter that section if and when they choose to alter it. Any Congress wishing to authorize use of force implicitly can easily do so: it can either repeal section 8(a)(1) at the same time it enacts such implicit authorization, or it can simply provide by law that section 8(a)(1) does not apply to the legislation in question. (In this case, Congress has in fact done the opposite—explicitly disclaiming any intent, as Captain Smith has pointed out, to violate the Resolution in a subsequent enactment. *See* Pl.'s Mem. Opp'n Def.'s Mot. Dismiss.)

The effect of the clear statement rule is simply to set aside the otherwise-applicable default canon of construction, the so-called "last-in-time doctrine." The last-in-time doctrine is not mandated or created by the Constitution. The doctrine is merely a judicially-invented guideline for "finding" the will of Congress where that will is in doubt, i.e., in the event two statutes conflict. The courts simply assume, quite reasonably, that Congress probably intended the latter. But that assumption is always rebuttable. If the evidence is clear that Congress intended the former, the first in time will prevail—the judicial object being, in all matters of statutory construction, merely "to give effect to the intent of Congress." *Flora v. United States*, 357 U.S. 63, 65 (1958). Such canons, as the Supreme Court put it, "are not mandatory rules. They are guides that 'need not be conclusive.' They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). The War

Powers Resolution's clear statement rule unambiguously evidences Congress's intent to overcome the last-in-time doctrine with respect to what constitutes authority to use force.

Like other canons of construction, the last-in-time doctrine can thus be countermanded by Congress, which may wish that its intent be gleaned using a different canon of construction. Legislatures regularly adopt their own canons of construction that supplant judge-made canons. State statutes commonly "prevent the courts of the jurisdiction from using rules that the legislature considers undesirable." F. Reed Dickerson, *The Interpretation and Application of Statutes* 269 (1975). Examples include provisions of Iowa law that set aside the canon that statutes in derogation of the common law are to be strictly construed, Iowa Code § 64 (1939); provisions of South Dakota law that set aside the canon that penal statutes are to be strictly construed, S.D.C.L. § 22-1-1 (2016); and provisions of California law that do the same, Cal. Penal Code § 4 (1872). Section 8(a)(1) simply sets forth a similar, legislatively-prescribed canon of construction. That canon provides that, in these specific circumstances, the intent of Congress should be gleaned not through application of the last-in-time doctrine, but through application of a first-in-time principle. No constitutional requirement compels application of the last in time if Congress indicates in a legislatively-prescribed non-supersession canon that it does not apply, nor is there any reason why Congress must leave its intent to be guessed at by the Executive or the courts.

Nor has Congress somehow disabled itself, as the defendant contends, from exercising its right to authorize hostilities through the enactment of appropriations legislation should it wish to do so. Indeed, section 8(a)(1) places appropriations laws on the same footing as general legislation. Either method may be used if Congress chooses. Each, however, is subject to the canon of construction set out in section 8(a)(1). If Congress wishes to use appropriations

legislation to authorize use of force, nothing stops it from doing that. The effect of section 8(a)(1) is simply to make clear that Congress intends that such authority not be inferred unless Congress unmistakably conferred it. There is nothing innovative in such a canon, which has, in fact, been used by Congress in other contexts, including foreign relations. *See, e.g.*, State Dept. Basic Authorities Act of 1956 § 15, Pub. L. No. 84–885, 70 Stat. 890, codified as amended at 22 U.S.C. § 2680(a)(1)(b), which prohibits appropriations not authorized by law to be made to the Department of State and precludes nonspecific supersession of that prohibition; 10 U.S.C. § 401, stating that other laws providing certain assistance to foreign countries for landmine clearing may be construed as superseding applicable restrictions "only if, and to the extent that, such provision specifically refers to this section and specifically identifies the provision of this section that is to be considered superseded or otherwise inapplicable"; 5 U.S.C. § 559, providing that a subsequent statute cannot supersede or modify the Administrative Procedure Act "except to the extent that it does so expressly."

Defendant's objections proceed from the assumption that the War Powers Resolution's interpretative rule cannot simply be stated once, in the clear statement rule, but must be reiterated in every future piece of legislation from which authority might conceivably be inferred, such as the appropriations legislation he relies upon. Yet Congress, in enacting legislation, is always deemed to be on notice as to what laws already exist. *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (noting the "well-settled presumption that Congress understands the state of existing law when it legislates"). Section 8(a)(1) is merely a statement by Congress that it intends that the non-supersession canon apply to every piece of authorizing and appropriating legislation insofar as that legislation might be read as approving the introduction of the armed forces into hostilities. If defendant's contention were correct, Congress, in enacting the War Powers Resolution, wrote

empty words: whatever the constitutional validity of the 60-day time limit, that requirement will virtually never apply because Congress will almost always be deemed to have enacted some general authorization that implicitly nullifies the Resolution's time limits. This position would set the congressional war power to naught. Its argument rests upon general inferences from these statutes that are at odds with the express and specific language in War Powers Resolution. This argument disregards the settled rule that a specific and "carefully drawn" statute prevails over a general statute in the event of a conflict between the two. *Morales v. TWA, Inc.*, 504 U.S. 374, 384-5 (1992) (quoting *International Paper Co. v. Ouelette*, 479 U.S. 481, 494 (1987)). In the Resolution, Congress has carefully drawn a law that speaks directly to the question of what can constitute authority to use force. Congress could scarcely have been clearer. Defendant's argument cannot be accepted, as Justice Frankfurter wrote in *Youngstown*, without "disrespecting the whole constitutional division of authority between President and Congress:"

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem…to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is…to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

Youngstown 343 U.S. at 609 (Frankfurter, J., concurring).

None of the cases on which the defendant relies has the slightest application to section 8(a)(1). *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), of course, involved no congressional enactment that prescribed a canon of construction. The *Marbury* Court's dictum, that legislative acts are "alterable when the legislature shall please to alter [them]," *Marbury* at 177, is irrelevant to this case since any provision of the War Powers Resolution can, again, be altered at any time. For the same reason, the Court's dictum in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), that a "succeeding legislature" must be competent to repeal any law that a "former legislature was

competent to pass," *Fletcher* at 135, is inapposite; the Resolution can be repealed at any time. Neither is *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947) on point; nothing in the Resolution precludes Congress from authorizing use of force through an appropriations act, provided the act meets the requirements of the clear statement rule. The stark irrelevance of these cases is telling: There is not the thinnest support in federal case law for the contention that the Resolution's clear statement rule is unconstitutional.

The Court might usefully measure the defendant's argument against the foundational constitutional purposes outlined in Part I above. Collective deliberation has been altogether absent. ISIL, indeed, did not even exist when the 2001 and 2002 AUMFs were enacted. No meaningful debate has occurred on whether to approve war against ISIL during the consideration of subsequent appropriations bills. Transparency, such as it is, has consisted of a handful of speeches by Administration officials and unsigned, cursory papers sent privately to hand-picked members of Congress. *See* Marisa Taylor & Jonathan S. Landay, *Obama's Legal Rationale for War Against Islamic State Secret and 'Very Thin,'* McClatchy DC (June 12, 2015, 6:00 AM), http://www.mcclatchydc.com/news/nation-world/national/national-security/article24785632.html ("The only document the White House has provided to a few key lawmakers comprises four pages of what are essentially talking points, described by those who've read them as shallow and based on disputed assertions of presidential authority."). (The McClatchy report links to the White House document, available at http://media.mcclatchydc.com/smedia/2015/06/12/11/24/ke9ks.So.91.pdf.) No member is politically accountable, since no member has been required to vote on an ISIL-specific AUMF. For the Court to permit the President to make war on the basis of the specious authority he now

claims would wholly defeat the purposes animating the constitutional division of war powers and Congress's intent in enacting the War Powers Resolution.

This Court should therefore honor the Resolution's clear statement rule. The rule embodies those vital purposes. It ensures that legislation that may or may not authorize use of force—the most important legislation Congress can enact—will not be misinterpreted. It provides a basis for holding Congress publicly accountable. It ensures that Congress's decision to authorize force will be made deliberately, with full awareness of the consequences. It promotes decisional transparency and clarity. It permits soldiers such as Captain Smith to assess the lawfulness of their orders and to honor their oath to uphold the Constitution. Its 1973 enactment represented a triumph of congressional responsibility, and its validity ought not be doubted by this Court or by the Executive.

III. This case does not present a political question.

Defendant relies upon a number of outdated war powers cases decided by lower courts to support the claim that Captain Smith's action represents a political question. It does not. The cases on which this argument rests are no longer pertinent because they were decided before the Supreme Court's landmark 2012 decision in *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 132 S.Ct. 1421 (2012) (*Zivotofsky I*), where it found the doctrine to be inapplicable when, as here, the constitutionality of a statutory entitlement is challenged.

Zivotofsky I (which, amazingly, is not even mentioned in the government's 46-page Motion to Dismiss) is the Supreme Court's most important political question decision since *Baker v. Carr*, 369 U.S. 186 (1962). It is directly on point. In *Zivotofsky I*, the plaintiff claimed a statutory right to choose to have Israel recorded on his passport as his place of birth. The government contended the law was unconstitutional. But the government also claimed the law's

validity constituted a political question, requiring the case's dismissal. The Supreme Court disagreed. "The existence of a statutory right…is certainly relevant to the Judiciary's power to decide Zivotofsky's claim," the Court found. *Zivotofsky I* at 1427. It continued:

> The federal courts are not being asked 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. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, 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. If the Court were to abdicate its responsibility to determine the constitutionality of statutes, the Court noted, it would transfer that function to the Executive—traducing the judiciary's historic role in the federal system of separated powers and aggrandizing Executive power. "At least since *Marbury v. Madison*," it said, "we have recognized that when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Id*. at 1427-8 (quoting *Marbury* at 177). It quoted *INS v. Chadha*, 462 U.S. 919, 941-2 (1983): "No policy underlying the political question doctrine suggests that Congress or the Executive…can decide the constitutionality of a statute; that is a decision for the courts." *Zivotofsky I* at 1428.

The same logic applies here. Captain Smith claims a statutory right to a clear statement that Congress has authorized war. Clarity is required to know whether his orders, like Captain Little's, are unlawful. He does not ask this Court "to supplant a foreign policy decision of the political branches." *Id*. at 1427. Captain Smith asks the Court merely to enforce his statutory right not to be ordered into these hostilities absent a clear statement by Congress authorizing the introduction of the United States armed forces into these specific hostilities. This is a familiar judicial exercise. *Zivotofsky I* recognized the Supreme Court's uniform, long-standing practice: No case in which the Court has recognized a political question has ever stemmed from a statute.

Chris Michel, Comment, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton*. This Court cannot depart from the Supreme Court's precedents. It should reject the government's claim that the case presents a political question.

Conclusion

The Framers knew well the risks in placing the decision to go to war in the hands of the peoples' elected representatives. But they knew too that an Executive able to make war free of legal constraints was riskier still. They therefore permitted Congress to restrict Executive war-making, as it did in *Little v. Barreme*.

Captain Smith has come before this Court to ask that it enforce the War Powers Resolution. He asks the Court to declare that Congress has not authorized the introduction of armed forces into the hostilities in which he is ordered to participate, and that the Resolution's time limits therefore apply. Captain Smith asks the Court to do no more than what the Marshall Court did with respect to Captain Little: to say that laws that provide no authority for his orders cannot be read to do so, and to say that an order incompatible with Congress's will cannot stand. He asks the Court, in short, merely to say what the law is, and to say that the Executive is obliged to faithfully execute it.

For the reasons set forth above and in plaintiff's opposition, this Court should deny defendant's motion to dismiss and do what Captain Smith asks.

Respectfully submitted,

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