[ORAL ARGUMENT NOT YET SCHEDULED]

No. 16-5377

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATHAN MICHAEL SMITH,

Appellant,

v.

DONALD J. TRUMP,

Appellee.

On Appeal from the
United States District Court
for the District of Columbia
1:16-cv-00843 (CKK)

BRIEF OF AMICI CURIAE THE CONSTITUTION PROJECT, MICKEY EDWARDS, MICHAEL J. GLENNON AND DAVID SKAGGS IN SUPPORT OF APPELLANT SEEKING REVERSAL

Eric L. Lewis
Jeffrey D. Robinson
LEWIS BAACH KAUFMANN
MIDDLEMISS PLLC
1899 Pennsylvania Avenue, NW, Suite 600
Washington, DC 20006
Telephone: 202-833-8900
Counsel for Amici Curiae

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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.

Mickey Edwards was a member of Congress for 16 years, serving on the House Budget and Appropriations Committees and as a Chairman of the House Republican Policy Committee. After leaving Congress he taught for 11 years at Harvard's Kennedy School of Government before moving to Princeton's Woodrow Wilson School of Public and International Affairs and then to Washington, DC, as vice president of the Aspen Institute, where he directs a bipartisan fellowship for elected public officials. He is a co-chair of the Constitution Project's War Powers Committee.

Michael J. Glennon is Professor of International Law at the Fletcher School of Law and Diplomacy, Tufts University. In 1973, 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, and is the author of *Constitutional Diplomacy* (1990) and co-author of *United States Foreign Relations and National Security Law* (4th ed., 2011). He is a member of the Constitution Project's War Powers Committee.

David Skaggs is co-chairman of the Board of the Office of Congressional Ethics and a Senior Advisor with Dentons US, LLP. He previously was an Adjunct Professor at the University of Colorado School of Law. He served twelve years as U.S. Representative from the 2nd Congressional District of Colorado, where he was on the House Appropriations Committee and the House Permanent Select Committee on Intelligence and sought to enforce Congress' Article I war powers responsibilities. He served on active duty in the U.S. Marine Corps from 1968 to 1971, and until 1978 was in the Marine Reserves attaining the rank of Major. He is a co-chair of the Constitution Project's War Powers Committee.

Based upon their expertise and experience, *amici* seek to afford the Court a more complete knowledge of the background and purposes of the War Powers Resolution and the constitutional doctrine of separation of powers.[1]

Introduction

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, and whether the courts will stand behind them when the executive flouts such restrictions. The unequivocal answer was given by 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*, 6 U.S. (2 Cranch) 170 (1804). That case, discussed below, lays out what remain today the clear limits of presidential power to wage war.

The Constitution gives Congress power to restrict presidential war-making. The reasons scarcely need recounting. The commentary has been voluminous,

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or party's counsel made a monetary contribution funding the preparation or submission of this brief.

particularly concerning the Framers' intent. No one summed it up 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 of Abraham Lincoln* 451-52 (Roy P. Basler ed., 1953). 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 Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 641 (1952) (Jackson, J., concurring)).

The executive that the Framers did create was therefore empowered to use force only within a limited framework. The commander-in-chief was to have power to act in emergencies, situations involving threats to the nation so imminent that Congress has no time to act; otherwise 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. 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 . . . . 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). This is the framework that led the Court, in *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) ("*Zivotofsky II*"), to reject the government's claim of "unbounded power," as the Court put it, *Zivotofsky II* 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). "[I]t is Congress that makes laws," the Court said, "and in countless ways its laws will and should shape the Nation's course." *Zivotofsky II* at 2090. And this is the framework

on which Captain Smith grounds his request to this Court to vindicate rights that rest on two restrictions imposed by Congress in the War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548) ("Resolution"). 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 executive has violated the Resolution by using force against ISIL in excess of 90 days without congressional authorization. It ordered Captain Smith to assist in that use of force, and Captain Smith brought an action in the District Court seeking a declaratory judgment that those orders are unlawful. The District Court dismissed Captain Smith's claims, holding that he lacks standing and that his claims raise political questions.

Amici submit that, insofar as the District Court's dismissal relies upon the political question doctrine, it should be reversed. The District Court necessarily found that congressional budget activities have implicitly authorized the ISIL war. They did not. The budget activities on which the District Court relies are rendered inapt by the Resolution's clear statement rule. The District Court's finding that Captain Smith's claim represents a political question therefore can be sustained only if the clear statement rule is invalid—which is, in fact, the District Court's

second implicit conclusion—and only by defeating the purposes underpinning 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.

Indeed, the District Court's challenge to the statute's constitutionality makes 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

The District Court found that Captain Smith's action presents a political question for three reasons: first, it presented questions committed to the political branches of government; second, the courts are ill-equipped to resolve those questions; and third, there is no conflict between Congress and the President regarding the lawfulness of the war against ISIS.

The District Court erred in each of those findings. First, the Supreme Court has previously reached the merits to decide two seminal cases that are directly on point—*Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), and *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952)—without even considering the possibility that either presented a political question. Second, judicial fact-finding incapacities present an evidentiary hurdle that a plaintiff can overcome by meeting the applicable burden of persuasion, not an insurmountable justiciability barrier that prevents a plaintiff from even attempting to do so. And third, the District Court could conclude that no conflict exists between Congress and the president only by holding *sub silentio* that the War Powers Resolution's clear statement rule is unconstitutional—thus creating an issue of statutory validity that the Supreme Court has emphasized does not present a political question.

I. The questions presented by this case are no more committed to the political branches than were the questions presented in *Little v. Barreme* or the *Steel Seizure Case*, which the Supreme Court held to be justiciable.

The facts of Captain Smith's case parallel those that gave rise to Marshall's decision in *Little v. Barreme*. *See generally* Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright*?*, 13 Yale J. Int'l L. 5 (1988); Louis Fisher, *Presidential War Power* 1-16 (3d ed. 2013). In *Little*, as here, the executive gave an order to an officer of the United States

military that was at odds with an act of Congress. And in *Little*, as here, the courts were called upon to interpret the statute to assess the lawfulness of the order.

The facts of *Little* 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 by law prohibited American vessels from sailing to French ports. Non-Intercourse Act, ch. 2, § 1, 1 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, 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 because pertinent papers had been thrown overboard. *Id*. at 173.) 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, 175-76. 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 178-79. 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 "military men usually pay" "implicit obedience . . . to the orders of their superiors." *Id*. 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 . . . 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 177-78. Under the law enacted by Congress, therefore, Captain Little "would not have been authorized to detain" the *Flying Fish*. *Id*. "[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*. at 179. 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. It holds obedient soldiers, like Captain Smith, liable when their orders violate Congress's statutes. It upholds congressional power to impose restrictions on presidential war-making, such as the 90-day time limit. It affirms the Court's role in interpreting those statutory restrictions. And it confirms that disputes about war-making restrictions do not present a political question.

Chief Justice Marshall well knew that such questions existed, having written less than a year before, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the "President is invested with certain important political powers" with respect to which "the decision of the executive is conclusive" and which therefore "can never be examin[ed] by the Courts." *Id.* at 165-66. Eighty-nine years later, the Supreme Court cited *Little* for *declining* to find a political question in *In re Cooper*, 143 U.S. 472 (1892). The right of the executive to deal with persons and property, the Court held, can never, under the Constitution of the United States, be a political question. *Id.* at 499-501.

Little's abiding importance was recently underscored 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 at 2090. The Court then proceeded to cite Justice Jackson's concurring opinion in the Steel Seizure Case, *Youngstown*, 343 U.S. 579. Captain Smith's brief has elaborated its famous three-tiered framework, which we need not revisit. We simply note that the District Court declined to perform the very function that that framework requires—namely, interpreting the meaning of Congress's enactments so as to determine its posture.

Other courts have not hesitated to do so in similar situations, most notably with respect to whether certain laws fell within the "necessary and appropriate" test of the 2001 AUMF. In *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 143 (2014), the Court had no hesitation in determining whether using lethal force to kill a citizen could be considered "necessary and appropriate." Nor did the Supreme Court have any trouble deciding, elsewhere, whether detaining a citizen as an enemy combatant was "necessary and appropriate." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004). Had the Supreme Court, in *Steel Seizure* or in *Little v. Barreme*, adopted the deferential position of the District Court in this case, neither of those landmark opinions would exist. The District Court's rule, were it allowed to stand, would carve out a gaping exception in separation of powers jurisprudence, an exception devoid of any limiting principle, a repudiation of the courts' high duty to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Supreme Court did not hesitate to say what the law was in *Little* or *Steel Seizure*. This Court should not hesitate to do so in this case.

II. Fact-finding incapacities present an evidentiary hurdle that a plaintiff can overcome in meeting the applicable burden of persuasion, not a justiciable barrier that prevents a plaintiff from attempting to do so.

A political question also exists in this case, the District Court held, because it is ill-equipped to resolve factual questions presented. It lacks the resources and

expertise to resolve the disputed questions here at issue, it found, which involve "sensitive military determinations" involving events "thousands of miles" away.

As an initial matter this Court will recall that the *Steel Seizure* Court was called upon to assess a factual claim at least as sensitive as any made in this case—President Truman's assertion that "the proposed work stoppage would immediately jeopardize our national defense and that government seizure of the steel mills was necessary to assure the continued availability of steel." *Youngstown*, 343 U.S. 579, 583 (1952). Even though claimed defensive activities were occurring thousands of miles away in Korea, not one member of the *Steel Seizure* Court believed it necessary to dismiss the case. Nor did the Court find it too difficult to assess the sensitive military question about how large a supply of steel was either necessary or available to prosecute the war successfully. Surely Courts able to handle these momentous issues are capable of resolving the much narrower question whether Congress has, in a clear statement, approved the war against ISIS.

The District Court's concerns about its fact-finding ability are, in any event, doctrinally misplaced. Claims of judicial fact-finding incapacity do not implicate the political question doctrine—they raise an evidentiary question. The political question doctrine, clarified in the criteria spelled out by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), forecloses judges from resolving disputes characterized by separation-of-powers concerns flowing, among other things, from

indeterminate *legal* standards, not fact-finding difficulties. Nowhere has the Court intimated otherwise. Fact-finding in a case such as this can be carried out, as it always is, through the use of interrogatories, depositions, testimony, affidavits and other traditional methods by which parties gather evidence. Using such means, Captain Smith may or may not succeed in establishing his claim by a preponderance of the evidence, *in camera* if necessary. But the opportunity to meet that burden is one that the law accords him. The political question doctrine does not deny him his day in court, and this Court ought not allow a distorted version of that doctrine stand in his way.

III. The District Court erred in finding that this case presents no conflict between Congress and the President, and erred further in grounding that finding on its *sub silentio* invalidation of the War Powers Resolution's clear statement rule—which removes the case from the ambit of the political question doctrine.

The District Court found that it was "not presented with a dispute between the two political branches regarding the challenged action. In fact, Congress has repeatedly provided funding for the effort against ISIL." Dist. Ct. Op. at 29 (App. 91). The District Court acknowledged that it "relied on" this "congressional budget activity" to find "no impasse or conflict between the political branches"—and thus to hold that use of force against ISIL is lawful. *Id*. at 30-31 (App. 92-93).

The District Court erred in finding that no impasse or conflict exists. Congress has limited the use of force to 90 days absent statutory authorization. By

using force against ISIL for more than 90 days, the President has violated the statute. That violation brings Congress and the President into conflict. To find that there is no conflict, the District Court held that Congress has implicitly authorized the war through subsequent budget activity. Yet, in the War Powers Resolution, Congress expressly prohibited inferring such authority from budget activity absent a clear statement of authorization. The budget activity that the District Court relied upon contains no such clear statement. The District Court could thus have relied upon this budget activity only by finding implicitly that Congress lacked constitutional power to enact the clear statement rule. But the validity of a law, the Supreme Court held recently, does not present a political question.

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. Resolution, § 2(a). 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.

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 government 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; authorization and appropriation statutes are enacted with great frequency in this era of "omnibus" legislation in which budget authority for multifarious purposes is combined in one bill. The solution, the Resolution's sponsors believed, was to make clear Congress's intent that the time limits apply unless Congress explicitly provides otherwise.

As Captain Smith's brief makes plain, the text of the relevant appropriations statutes does not authorize the introduction of the armed forces into hostilities. But this Court should be aware that, if it does read those statutes as the government reads them, and if the Court accepts the District Court's implicit finding that the clear statement rule is invalid, it will effectively eviscerate 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." Section 5(b) requires that that use of force be terminated 60 or 90 days thereafter unless Congress has approved.

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. *Steel Seizure* at 654, 637 (Jackson, J., concurring). After enactment of the Resolution, such use became incompatible with Congress's will and thus now 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. While the war power remained in Justice Jackson's zone of twilight, congressional power atrophied; Congress in 1973 concluded that moving non-emergency uses of force into his third category was necessary to 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. No. 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 days after commencing "hostilities"; if Congress failed to authorize the use of force, the president had 30 days to withdraw the forces. These deadlines, it believed, would vindicate the purposes underpinning the constitutional framework described above.

The Justice Department's Office of Legal Counsel has had no hesitation in declaring the limit constitutional. *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 government here argue that it is not using force in the manner Captain Smith has described.

The District Court finds, instead, that the government is not in violation of the time limit because "budget activity" on which the Court relies somehow

renders the time limit inapplicable. Yet this theory is belied by the plain text of section 5(b) of the Resolution, which renders the time limit inapplicable only when *specific* authorization is enacted. Resolution, § 5(b). And it is flatly inconsistent with the Resolution's clear statement rule, section 8(a)(1). The District Court's analysis can stand only if the clear statement rule is invalid. The District Court's reasoning 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 view has no support in United States constitutional law or practice, which we will now address.

b. The Clear Statement Rule

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: to have the effect that the District Court would give it, budget activity must meet two requirements. First, budget authority must be *specific* in authorizing use of force. Second, it must refer

expressly to the War Powers Resolution in conferring that authority. The budget activity that the District Court relies upon does neither. It therefore cannot be interpreted in the manner the District Court contends, as removing the conflict between Congress and the president created by the Resolution's 90-day time limit.

The District Court says it did not reach the defendant's argument that section 8(a)(1) is unconstitutional, Dist. Ct. Op. at 30 App. 92). But in fact the District Court not only reached the argument but accepted it, explicitly relying on budget activity for purposes that Congress flatly ruled out. Yet the District Court presented no reason for doubting the scope or validity of the clear statement rule. No President, even President Nixon in his veto message, has claimed this provision to be constitutionally infirm. The purpose of this "important provision," the Senate Foreign Relations Committee noted in its report on the Resolution, "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 Court's finding that no impasse exists between Congress and the president cannot be sustained unless the budget activity on which the District Court relies is interpreted in a way that Congress has explicitly said it cannot be.

The gist of the government's argument in the District Court was 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. The Congress that enacted section 8(a)(1) did not "bind" later Congresses, for later Congresses retain full discretion to repeal or alter that section if and when they choose, using the normal procedures for repealing or altering any statute. Any Congress wishing to authorize the use of force implicitly can readily 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.

The effect of the clear statement rule, as *amici* pointed out to the District Court, is simply to set aside the otherwise-applicable default canon of construction, the so-called "last-in-time doctrine." This doctrine is not mandated or created by the Constitution. It 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 (2001) (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 the presidential use of force.

This Court might usefully measure the government's argument against the foundational constitutional purposes outlined in Part I. Collective congressional deliberation has been altogether absent. No meaningful debate has occurred on whether to approve war against ISIL during the budget activity that the District Court relies upon. 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, 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."). No member of Congress is politically accountable, since no member has been required to vote on an ISIL-specific AUMF. For this 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 the most important legislation that Congress can enact—whether to authorize acts of war—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 should not be undermined by this Court or by the Executive.

c. The Statutory Exception to the Political Question Doctrine

The District Court looks to a number of outdated war powers cases decided by District Courts to support its holding that Captain Smith's action represents a

political question. These cases 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*"), 566 U.S. 189 (2012), where the Court found the doctrine to be inapplicable when, as here, the constitutionality of a statutory entitlement is challenged.

Zivotofsky I is the Supreme Court's most important political question decision since *Baker*. 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 196. 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—betraying the judiciary's historic role in the federal system of separated powers and aggrandizing Executive power. "At least since *Marbury v. Madison*," the Court in *Zivotofsky* 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.* (quoting *Marbury* at 177). It quoted *INS v. Chadha*, 462 U.S. 919, 941-42 (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 196-97.

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 196. Captain Smith simply asks the Court to enforce his statutory right to fight only in those hostilities specifically authorized Congress. This is a familiar judicial exercise. It is no response for the District Court merely to repeat, as it does, its earlier concerns about the difficulties of judicial fact-finding incapacities. As we have pointed out before, these practical evidentiary problems do not present any justiciability concerns. *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, 123 Yale L. J. 253, 255 (2013). The Supreme Court's precedents require overruling the District Court's holding that Smith's case presents a political question.

Conclusion

The Framers well knew the risks involved in confiding ultimate war-making authority in the hands of the peoples' elected representatives. But they knew too that unilateral presidential war-making was riskier still. They therefore authorized Congress to restrict executive war-making, as it did in *Little v. Barreme*.

Captain Smith asks that the courts enforce the War Powers Resolution. He seeks a declaration 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 courts to do no more than what the Marshall Court did with respect to Captain Little: to say that the laws mean what they say, and that an order incompatible with Congress's will cannot stand. He asks, in short, merely that the courts say what the law is, and to require the executive to "faithfully execute" the will of Congress.

Dated this 10th day of April, 2017

/s/ Eric. L. Lewis
Eric L. Lewis
Jeffrey D. Robinson
LEWIS BAACH KAUFMANN
MIDDLEMISS PLLC
1899 Pennsylvania Ave. NW,
Suite 600
Washington, D.C. 20006
202-833-8900
eric.lewis@lbkmlaw.com
jeffrey.robinson@lbkmlaw.com

Counsel for Amici Curiae

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Dated: April 10, 2017

/s/ Eric L. Lewis
Eric L. Lewis
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2017, I filed and served the foregoing Brief of Amici Curiae The Constitution Project, Michael J. Glennon, and David Skaggs in Support of Appellant Seeking Reversal through this Court's ECF system.

/s/ Eric L. Lewis
Eric L. Lewis
Counsel for *Amici Curiae*