IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOHN DOE I, et al.,

Plaintiffs,

v.

PRESIDENT GEORGE W. BUSH, et al.,

Defendants.

Civ. No. 03-CV-10284-JLT

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION AND BACKGROUND

Following Iraq's war of aggression against and illegal occupation of Kuwait in 1990, the United States forged a coalition of nations to liberate Kuwait and its people in order to defend the national security interests of the United States and to enforce United Nations Security Council resolutions relating to Iraq. After the liberation of Kuwait in 1991, Iraq accepted United Nations Security Council-approved cease-fire terms pursuant to which Iraq unequivocally agreed, among other things, to eliminate its nuclear, biological, and chemical weapons program and the means to deliver and develop them, and to end its support for international terrorism. But Iraq has never fulfilled its obligations under the cease-fire terms. In 1998, Congress concluded that Iraq's continuing weapons of mass destruction programs threaten vital United States interests and international peace and security, and it declared Iraq to be in material and unacceptable breach of its international obligations. Since then, Congress has continued to find that Iraq is in material breach of its obligations and that it poses an unacceptable threat to peace and security.

Most recently, on October 16, 2002, declaring that "Iraq both poses a continuing threat to

the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations," H.J. Res. 114, Pub. L. 107-243, 107th Cong., 116 Stat. 1498 (Oct. 16, 2002), Congress enacted House Joint Resolution 114 ("Joint Resolution"), expressly supporting the President's use of force as he deems necessary in Iraq. Specifically, Section 3(a) authorizes the President

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

H.J. Res. 114, Pub. L. 107-243, 116 Stat. 1501, §3(a) (emphasis added).[1]

Since the enactment of the Joint Resolution, the United States has engaged in substantial diplomatic efforts to achieve Iraqi disarmament and compliance with United Nations resolutions. The United States, along with its allies throughout the world, has also begun preparations for more intensive military action against Iraq, if it is determined necessary by the President.

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[1] Although Congress has "authorized" the President to use the Armed Forces as he determines is necessary and appropriate, such congressional authorization is not necessary given the Executive's authority under the Constitution. See discussion infra at Section I.D.

Plaintiffs – a group of Members of Congress opposed to armed hostilities in Iraq, along with several anonymous military personnel and families of military personnel – seek judicial intervention into this delicate international political scenario. They request the Court to do an extraordinary thing: issue an injunction "enjoining the President of the United States and the Secretary of Defense from waging a war against Iraq by initiating a military invasion," in what they deem to be the absence of Congressional consent. Mot. for Prel. Inj. at 1. No court has ever done such a thing. Plaintiffs ask the Court to do so notwithstanding that their request raises grave constitutional concerns and notwithstanding that the Court is not in a position to reach the merits of their claim due to its numerous justiciability flaws.

Courts have repeatedly and consistently held that judicial intervention in these circumstances is highly inappropriate and have routinely dismissed such cases on the ground that claims such as plaintiffs' raise nonjusticiable political questions. Indeed, this Court, nearly thirty years ago, recognized what was to become a well-established practice and dismissed on political question grounds a challenge brought by a group of lawmakers and military personnel to military action in Cambodia. Drinan v. Nixon, 364 F. Supp. 854 (D. Mass.1973); see also Massachusetts v. Laird, 451 F. 2d 26, 30-34 (1st Cir. 1971).

Plaintiffs' action suffers from other serious Article III flaws as well. First, plaintiffs have no standing to bring this suit. The Members of Congress, who sue to vindicate their alleged institutional interest in exercising "their constitutional right on whether or not to declare war," Compl. ¶ 29, lack Article III standing under the doctrine of Raines v. Byrd, 521 U.S. 811 (1997). Nor may the individual plaintiffs seek Article III relief in these circumstances. The service-member plaintiffs lack standing because they are not under orders to report to a "theatre of

hostilities," and family members of other service members are even more removed from any injury-in-fact.

No less significant, plaintiffs' claims are not ripe for review by this Court. Despite plaintiffs' suggestions that armed hostilities are "imminent," no ground invasion of Iraq has yet taken place. A diplomatic or other non-military resolution of the Iraqi situation remains a real possibility and counsels strongly against judicial intervention at this critical juncture in international political affairs. In similar circumstances just one month prior to Operation Desert Storm, the court in Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990), concluded that a complaint challenging the military buildup in the Persian Gulf was not ripe for judicial resolution because "the Executive Branch has not shown a commitment to a definitive course of action sufficient to support ripeness." Id. at 1152. Plaintiffs' claims suffer the same flaw here.

Finally, even assuming plaintiffs could overcome these fatal justiciability flaws, their suit is meritless. Congress *has* spoken to whether the President may commit armed forces for possible military action in Iraq. Furthermore, irrespective of any Congressional assent, the President has broad powers as Commander in Chief of the Armed Forces under the Constitution that would justify the use of force in Iraq. Plaintiffs utterly ignore all controlling authority on the issue presented, treating their claim as if it were a matter of first impression. But every court to have considered a claim similar to the one plaintiffs now present has rejected it. Consequently, plaintiffs lack even a colorable claim for relief before this Court. Because plaintiffs cannot satisfy the standards for preliminary injunctive relief and cannot satisfy the rigorous standards for Article III intervention in this political dispute, their motion for a preliminary injunction must be denied and their case dismissed.

ARGUMENT

I. PLAINTIFFS' CLAIM SHOULD BE DISMISSED

A. Plaintiffs' Claim Presents A Nonjusticiable Political Question

Plaintiffs' claims would require this Court to make determinations that are committed to the political branches of the government. As such, adjudication of those claims is barred by the political question doctrine. See, e.g., Massachusetts v. Laird, 451 F. 2d 26, 30-34 (1st Cir. 1971) (dismissing as nonjusticiable a challenge to the Executive's continued commitment of troops to Vietnam in the absence of a congressional declaration of war); Drinan v. Nixon, 364 F. Supp. at 856. That doctrine, the roots of which go back even as far as Marbury v. Madison, 1 Cranch (5 U.S.) 137, 165-66 (1803), counsels courts to abstain from passing on questions more properly reserved to the political branches of government.

The Supreme Court has set forth the following formulation for determining whether an issue constitutes a political question:

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

Baker v. Carr, 369 U.S. 186, 217 (1962). Application of this formulation to the claim plaintiffs have presented here leads to the inescapable conclusion that this case is nonjusticiable under the political question doctrine. See Massachusetts v. Laird, 451 F.2d at 31-34 (claim that the President cannot continue to commit troops to hostilities when there has been no congressional

declaration of war is, in the absence of any conflicting congressional claim of authority, a nonjusticiable political question).

Thus, in Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990), the court found nonjusticiable a challenge to the President's deployment orders and activities in the Persian Gulf in the absence of a congressional declaration of war. In so concluding, the Ange court noted that "[p]rimary among the conditions [set forth in the Baker v. Carr formulation] is 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 this long-standing dispute over the war powers by exercising their constitutionally conferred powers." 752 F. Supp at 512.[2]

Adjudicating plaintiffs' claim seeking to prevent the President and Secretary of Defense "from waging war or military invasion of Iraq without a Congressional declaration of war," Compl. at ¶ 2, would thrust this Court into the midst of sensitive ongoing activities involving the political branches and their decision-making with respect to United States policy regarding Iraq. Such an intrusion could embolden Iraq and thus reduce the chances of a peaceful resolution. Moreover, it would require the Court to gauge the President's (and prior presidents') and

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[2] American diplomatic and foreign affairs – including the use of the Armed Forces to defend the United States' interests abroad – is invariably deemed one of the items relegated to the province of the political branches and not the judicial branch. See, e.g., Haig v. Agee, 453 U.S. 280 (1981); Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); United States v. Pink, 315 U.S. 203, 222-23 (1942); Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Thus, courts routinely find a "textually demonstrable constitutional commitment" of United States diplomacy and foreign policy to the political branches of government. Baker, 369 U.S. at 217; see also Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) ("policies in regard to the conduct of foreign relations [and] the war power . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); Aktepe v. United States, 105 F.3d 1400, 1403 (11th Cir. 1997) ("the political branches of government are accorded a particularly high degree of deference in the area of military affairs").

Congress' efforts (both diplomatic and through various military actions) with regard to Iraq over the course of a number of years. It would, as well, require this Court to decide the imminence of potential further military action in Iraq. But these types of judgments are quintessentially political questions that are more appropriately entrusted to the political branches. "The judicial branch is neither equipped nor empowered to intrude into the realm of foreign affairs where the Constitution grants operational powers only to the two political branches and where decisions are based on political and policy considerations." Ange, 752 F. Supp. at 513. These judgments are, in the words of the court in Ange:

> delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. at 513.

Applying similar reasoning, numerous courts have recognized the applicability of the doctrine of nonjusticiability in cases such as this and have properly yielded to the prerogatives committed to the political branches under the Constitution.[3] This Court is one of them. See

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[3] Mahorner v. Bush, 224 F. Supp. 2d 48 (D.D.C. 2002) (dismissing *sua sponte* action seeking injunction against President's Middle East policies, including commitment of troops there), aff'd, __ F.3d __ (D.C. Cir. Feb. 12, 2003); Campbell v. Clinton, 203 F.3d 19, 25 (D.C. Cir. 2000) (Silberman, J., concurring) ("We lack 'judicially discoverable and manageable standards' for addressing [plaintiffs' claims], and the War Powers Clause claim implicates the political question doctrine"); Ange, 752 F. Supp. 509 (rejecting challenge to deployment of troops for Persian Gulf War); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (dismissing action by members of Congress to declare that events in Persian Gulf triggered reporting requirements of War Powers Resolution), appeal dismissed, No. 87-5426 (D.C. Cir. Oct. 17, 1988); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (affirming dismissal of challenge to aid to Nicaraguan contras); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C 1984) (dismissing challenge to invasion of Grenada), appeal dismissed, 765 F.2d 1124 (D.C. Cir.

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Drinan v. Nixon, 364 F. Supp. at 856. In Drinan, plaintiffs – four members of Congress and one Air Force airman – sought a declaratory judgment (and injunctive relief) that ongoing aerial combat operations in Cambodia were unlawful. Addressing only a threshold issue – "does plaintiffs' challenge to the military activity in Cambodia constitute a nonjusticiable 'political question'" – the Court found the claims "beyond the authority of a federal court to hear or determine" and dismissed the suit. 364 F. Supp. at 856 (citing Baker). On the "necessity for judicial restraint in this area," the Court wrote:

> Courts have neither inherent expertise nor ready access to the type of current information necessary to render informed and valid judgments as to the wisdom of executive and congressional actions involving this country's relations with other sovereigns.

Id.

As another court in this district said, when facing a challenge to a plaintiff's draft into the Vietnam war because it had not been declared by Congress:

> [T]he distinction between a declaration of war and a cooperative action by the legislative and executive with respect to military activities in foreign countries is the very essence of what is meant by a political question. It involves just the sort of evidence, policy considerations, and constitutional principles which elude the normal processes of the judiciary and which are more suitable for determination

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[3](...continued)
1985); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982) (rejecting challenge to provision of aid to El Salvador), aff'd, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam); DaCosta v. Laird, 471 F.2d 1146, 1157 (2d Cir. 1973) (dismissing action challenging air and naval strikes in North Vietnam as nonjusticiable political question); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973) (rejecting challenge to Vietnam war); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973) (same); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972) (three-judge court) (same), aff'd, 411 U.S. 911 (1973); Sarnoff v. Connally, 457 F.2d 809 (9th Cir. 1972) (same); Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968) (same); United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968) (same); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967) (same). Indeed, defendants are aware of no federal court that has ever issued an order directing the President not to initiate hostilities or otherwise use military force.

> by coordinate branches of government. It is not an act of abdication when a court says that political questions of this sort are not within its jurisdiction. It is a recognition that the tools with which a court can work, the data which it can fairly appraise, the conclusions which it can reach as a basis for entering judgments, have limits.

Sisson, 294 F. Supp. at 515.

Furthermore, although plaintiffs claim that "[n]o Congressional statute, action, or combination of statutes or actions has commenced war with Iraq or given the President the authority to commence such a war," Pl. Memo at 6, nothing could be further from the truth. Congress has, in fact, ratified what these plaintiffs now challenge: the authority of the President to commit troops to, among other things, protect the vital national security interests of the United States. Congress has on more than one occasion supported the President's exercise of his Constitutional prerogative to use Armed Forces with respect to Iraq. See Pub. L. No. 102-1, "Authorization for Use of Military Force Against Iraq Resolution," 105 Stat. 3, § 2(a) (authorizing the President "to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677");[4] Pub. L. 105-235

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[4] Subsequent congressional legislation and action demonstrate that the authorization in Pub. L. No. 102-1 remains in effect. Following Iraq's withdrawal from Kuwait, the same Congress that enacted Pub. L. No. 102-1 appropriated funds upon a congressional finding that Iraq continued to violate Security Council Resolution 678's requirements concerning its weapons of mass destruction program and its sense that "the Congress supports the use of all necessary means to achieve the goals of Security Council Resolution 687 as being consistent with the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1)." Pub. L. No. 102-190, § 1095, 105 Stat. 1290, 1488 (1991) ("1992-1993 Defense Authorization Act"). The same Defense Authorization Act expresses the sense that "Iraq's noncompliance with United Nations Security Council Resolution 688 constitutes a continuing threat to the peace, security, and stability of the Persian Gulf Region . . . and [that] the Congress supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688." Id. § (continued...)

(August 14, 1998) (Congress urges President to "take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations."); Pub. L. No. 107-40, "Authorization for Use of Military Force," 115 Stat. 224 (authorizing the President to use "all necessary and appropriate force" against those nations, organizations or persons whom he determines "planned, authorized, committed, or aided the [September 11th] terrorist attacks . . . or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.").

Most recently, recognizing, inter alia, Iraq's support for international terrorism, stockpiling of weapons of mass destruction, efforts to obtain nuclear weapons, and continued brutal repression of its own population, Congress again authorized the President to use force by enacting House Joint Resolution 114.[5] The Joint Resolution – titled "**Authorization for Use of**

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[4](...continued)
1096, 105 Stat. 1489. In 1999, Congress amended Pub. L. 102-1 to extend reporting requirements from every 60 to 90 days, further indicating that the law continues in effect following Iraq's withdrawal from Kuwait. See Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, Div. B, § 1000(a)(7), 113 Stat. 1501, 1536 (1999). President Bush and his two predecessors have written to Congress at regular intervals to report on the status of efforts to secure Iraqi compliance with the applicable UN Security Council Resolutions, and this practice has gone unchallenged by Congress. Perhaps most significantly, both President George H.W. Bush and President William J. Clinton authorized the use of force against Iraq on several occasions under Pub. L. 102-1 after the successful completion of Operation Desert Storm and the withdrawal of Iraq from Kuwait.

[5] In pages of rhetoric devoid of legal citation, plaintiffs also attack the constitutionality of the Joint Resolution itself. Those attempts are meritless and should be ignored. See Drinan, 364 F. Supp. at 862 (citing Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936)) ("when fairly possible such enactments should be construed as so to avoid a declaration of unconstitutionality"). Not only have plaintiffs conceded the fact of "statutorily authorized" undeclared wars, Mot. Prel. Inj. at 3, but for the reasons discussed infra, Section I(D), both political branches' actions regarding Iraq are constitutional.

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Military Force Against Iraq Resolution of 2002" – authorizes the President to use the Armed Forces "as he determines necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."[6] H.J. Res. 114, Pub. L. 107-243, 116 Stat. 1501, §3(a) (emphasis added). Furthermore, Section 3(c) identifies the Joint Resolution as "specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." Id. at §3(c). The political branches, therefore, are in harmony with respect to this issue.[7] Unequivocally, the political branches have resolved the political question, and there is no

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[5](...continued)

[6] Plaintiffs argue that the use of "and" in Section 3(a) was intended by Congress to limit the President's authorized use of force to "defend[ing] the national security of the United States" only with a United Nations coalition. Pl. Memo. at 7. Not only does the Joint Resolution fail to say that when it plainly could have, but the full resolution supports a contrary view. Pursuant to the next section, 3(b), the President, upon using force or deciding to use force under Section 3(a), must provide Congress his determination that:

> (1) reliance by the United States on further diplomatic or other peaceful means alone *either* (A) will not adequately protect the national security of the United States against the continuing threat posed by Iraq, *or* (B) is not likely to lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq . . . .

H.J. Res. 114, §3(b) (emphasis added). This shows that Congress's use of "and" in Section 3(a) was not meant to convey a requirement that both U.S. security be threatened and that there be international accord; in the President's "determination," *either* is sufficient to warrant force against Iraq. Id.

[7] As with most congressional enactments, there was debate over the Joint Resolution, and it passed ultimately with 296 Representatives voting in favor (the six plaintiffs voted against). See 107 CONG. REC. H7739-H7799 (October 10, 2002). Interestingly, two plaintiffs (plus two non-plaintiff Representatives) since have introduced legislation to repeal the Joint Resolution, see H. CON. RES. 2 (January 7, 2003), in which they recognize that the Joint Resolution "on October 16, 2002, authorizes the President to use United States Armed Forces (continued...)

justiciable issue for this Court to address.[8]

Ignoring years of precedent, and citing almost no supporting authority, plaintiffs ask the Court to assess the strategic, military, and diplomatic situation in Iraq and, on the basis of this review, substitute its judgment not only for that of the President, but also Congress. The Court should decline, and the case should be dismissed.

B. Plaintiffs Lack Standing

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Raines v. Byrd, 521 U.S. 811, 818 (1997) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976)). One core element of Article III's case-or-controversy requirement is that a plaintiff must establish that he or she has standing to sue. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); see also Benjamin v. Aroostook Med. Ctr.,

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[7](...continued)
against Iraq to defend the national security of the United States . . . ." H. CON. RES. 2 at ¶ 2. The resolution has been referred to the Committee on International Relations, and no further action has occurred with respect to it. The congressional plaintiffs here, unhappy with Congress' actions, ask the Court to intervene and question an overwhelming majority of Congress. And at least two plaintiffs want it both ways – they want the Court to get involved, while they still avail themselves of the legislative process.

[8] This Court stated in dicta in Drinan that should the political branches be "clearly and resolutely in opposition as to the military policy to be followed by the United States," the issue before the Court would no longer be regarded as a political question. 364 F. Supp. at 858; see also Massachusetts v. Laird, 451 F.2d at 34. The Court in Drinan, however, concluded that the President and Congress were, in fact, in agreement and that judicial intervention would be inappropriate. While Defendants do not concede that the political question doctrine would not be implicated were there clear and resolute disagreement between the political branches, see Ange, 752 F. Supp. at 514 ("the Constitution leaves resolution of the war powers dispute to the political branches"), the Court need not reach that issue here because Congress has repeatedly expressed its support of the President's use of force in Iraq, should he determine it to be necessary, with even greater clarity than was the case in Drinan.

Inc., 57 F.3d 101, 104 (1st Cir. 1995) ("The burden of alleging facts necessary to establish standing falls upon the party seeking to invoke the jurisdiction of the federal court."). To satisfy this burden of establishing standing, "[a] plaintiff must allege a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984). The Supreme Court has "consistently stressed that a plaintiff's complaint must establish that he has a '*personal* stake' in the alleged dispute, and that the alleged injury is *particularized* as to him." Raines, 521 U.S. at 819 (emphasis added). None of the plaintiffs here can satisfy this constitutional prerequisite.

1. The Congressional Plaintiffs Lack Standing

The individual members of Congress – seeking to vindicate the institutional interests of Congress – lack Article III standing. In Raines, the defining case on the issue of legislative standing, the Supreme Court applied a rigorous standing analysis to hold that individual Congressmen did not have standing to challenge the constitutionality of the Line Item Veto Act of 1996. The Supreme Court has explained that Article III's standing doctrine stems from a concern for preventing courts from wading into disputes that are better resolved by the political branches of government. "[T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers." Allen, 468 U.S. at 752; see also Chenoweth v. Clinton, 181 F.3d 112, 114 (D.C. Cir. 1999). The "standing inquiry [is] especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Raines, 521 U.S. at 819-20 (citations omitted).

Applying these principles, Raines held that a party suing in its legislative capacity must assert an injury that is "personal, particularized, concrete, and otherwise judicially cognizable"

and that allegations merely that his or her legislative authority has been diminished do not constitute a particularized injury that can confer standing. 521 U.S. at 820. Thus, congressional plaintiffs alleging a "diminution of [their] legislative power," id. at 821, lacked a "personal stake" in the outcome of the case and failed to allege a sufficiently concrete injury to establish Article III standing. Id. at 830. The plaintiffs in Raines did not claim

> that they ha[d] been deprived of something to which they *personally* are entitled . . . . Rather, [plaintiffs'] claim of standing [was] based on a loss of political power, not loss of any private right, which would make the injury more concrete. . . . [T]he injury claimed by the Members of Congress [was] not claimed in any private capacity but solely because they [were] members of Congress. . . . [and] thus [ran] (in a sense) with the Member's seat . . . .

Id. at 821 (emphasis in original). Such "institutional injury . . . necessarily damages all Members of Congress and both Houses of Congress equally." Id.[9] The Supreme Court thus concluded that, because plaintiffs "have alleged no injury to themselves as individuals . . . [and] the institutional injury they allege is wholly abstract and widely dispersed," the congressional plaintiffs lacked standing. Raines, 521 U.S. at 829. In reaching this conclusion, the Court also noted that it "attach[ed] some importance to the fact that [plaintiffs] have not been authorized to represent their respective Houses of Congress in this action . . . ." Id. at 829.

Raines is fatal to the congressional plaintiffs' standing in this case. As in Raines, the plaintiff Representatives in this case are suing in their official capacities and attempting to vindicate their rights qua Representatives. Id. at 821; see Compl. ¶¶ 25, 29. The Congressional plaintiffs' claim is not made "in any private capacity but solely because they are Members of

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[9] The Court thus contrasted Raines with Powell v. McCormack, 395 U.S. 486 (1969), in which it recognized the standing of an individual congressman to challenge his *individual* exclusion by the House. There, the injury to the individual Representative related to his personal entitlement to a seat, not to his institutional right to any power or privilege incident to the office. Raines, 521 U.S. at 820-21.

Congress." Raines, 521 U.S. at 821. Their alleged injury, the deprivation of their right to "vote on whether or not to declare war," Compl., ¶ 25, would "damage[] all Members of Congress and both Houses of Congress equally," Raines, 521 U.S. at 821, and therefore "is wholly abstract and widely dispersed." Id. at 829. And, as in Raines, the Congressional plaintiffs have not been authorized to represent Congress. Id. at 829.[10] Indeed, Congress has expressly voted to authorize the use of force these six Representatives oppose, and, as discussed above, the congressional plaintiffs' efforts to repeal such authorization has not passed either house of Congress.[11]

In this respect, plaintiffs' complaint is not with the Executive, but with their colleagues in Congress who voted to authorize the use of force. See Raines, 521 U.S. at 830 n.11 ("alleged cause of [plaintiffs'] injury is . . . the actions of their own colleagues in Congress in passing the Act"). Plaintiffs "simply lost that vote," id. at 824, and now ask this Court to intervene. But plaintiffs' remedy lies with Congress – where they can attempt to convince their colleagues to act differently – and not with this Court. Id. at 829. Accordingly, like Raines, the claim of the congressional plaintiffs must be dismissed for lack of standing. This was the very result reached by the District of Columbia Court of Appeals, which held that members of Congress lacked standing to challenge the President's decision to direct the United States armed forces' participation in airstrikes in Yugoslavia and that "congressmen may not challenge the President's

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[10] Plaintiffs are a very small minority of House members who have not been authorized to act for the entire House, as they must be to sue on the House's behalf. See, e.g., Reed v. County Commissioners, 277 U.S. 376, 388 (1928) (holding that a committee (or subcommittee) must have specific authority from the appropriate House in order to undertake any court action); Dellums, 752 F. Supp. at 1151 ("it is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it"); cf. Newdow v. United States Congress, 313 F.3d 495 (9th Cir. 2002) (discussing limits on Senate's standing).

[11] See supra note 7.

war-making powers in federal court." Campbell v. Clinton, 203 F.3d 19, 23 (D.C. Cir.); see also Chenoweth, 181 F.3d 112 (individual members of Congress lacked standing to challenge Executive Order when claimed injury was that the Order denied Congress the opportunity to vote on the Order's subject matter); Kucinich v. Bush, 236 F. Supp.2d 1 (D.D.C. 2002) (individual members of Congress, including Plaintiff Kucinich, lacked standing to challenge President's decision to withdraw from the ABM Treaty).

2. Plaintiffs John Doe I, II & III Lack Standing

Nor can the service-member plaintiffs – John Does I, II & III – establish standing. Courts have held that "only those under military orders to report to a theatre of hostilities have the requisite standing to challenge the legality of military operations in such a theatre. . . . The legality of an order sending men to participate in an 'undeclared war' should be raised by someone to whom such an order has been directed." Mottola v. Nixon, 464 F.2d 178, 179 (9th Cir. 1972) (service members who have not been activated "for service in ... Cambodia" lack standing to challenge legality of military operations in Cambodia); see Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (2d Cir. 1973) (service members without "orders to fight," and Congressional Representative, lack standing to challenge legality of military activities in Cambodia); see also Massachusetts v. Laird, 451 F.2d at 29 (individual plaintiffs serving in Southeast Asia have standing).

With respect to plaintiffs John Doe I and John Doe III, the Complaint alleges solely that they have been placed on active duty in the United States. Compl., ¶¶ 5, 7. The Complaint contains no allegations, and plaintiffs have provided no evidence, that they are under orders to engage in a "theatre of hostilities." Plaintiffs' active military status, without more, is insufficient to establish standing. Mottola, 464 F.2d at 181 ("appellees do not contend that they have been or

will be activated for service in Indochina, much less in Cambodia"); Holtzman, 484 F.2d at 1315 ("none of the servicemen plaintiffs are presently under orders to fight in Cambodia"). Accordingly, their claims must be dismissed.

While the Complaint alleges that plaintiff John Doe II "is currently stationed in the Persian Gulf area," Compl., ¶ 6, it contains no additional allegations regarding his location, unit, or specific assignment. Nor can Defendants verify any such information, in light of John Doe II's decision to proceed pseudonymously.[12] In any event, it is abundantly clear that John Doe II – like all of the other plaintiffs – has failed to present any admissible evidence in support of his allegations, and thus fails to satisfy the requirements for the issuance of a preliminary injunction.[13]

Moreover, in any event it would be inappropriate for this Court to entertain the service members' challenge to the President's possible use of force in Iraq. No court has ever granted an individual service member such relief against his Commander-in-Chief, and any attempt to do so would raise grave separation-of-powers concerns "about keeping the Judiciary's power within its proper constitutional sphere." Raines v. Byrd, 521 U.S. at 819-20. Indeed, entertaining such a suit would inject the court directly into the chain of command that is so critical to the proper

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[12] Plaintiffs' claim may be dismissed at this stage without need to decide their motion to proceed pseudonymously. Specific facts may be required for purposes of establishing standing, however, and defendants thus reserve the right to oppose plaintiffs' motion to so proceed in the future.

[13] "[M]ere allegations will not support standing at the preliminary injunction stage." Doe v. National Bd. of Medical Examiners, 199 F.3d 146, 152 (3d Cir. 1999); see also National Wildlife Fed. v. Burford, 878 F.2d 422, 432 (D.C. Cir. 1989) (burden of establishing standing at preliminary injunction stage is no less than at summary judgment stage), rev'd on other grounds sub nom. Lujan v. National Wildlife Fed., 497 U.S. 871 (1996); see also id. at 907 n.8 (Blackmun, J., dissenting). Rather, plaintiffs must provide an evidentiary basis for their standing. The hearsay affidavit of plaintiffs' counsel simply does not suffice in this regard.

functioning of the armed forces. See, e.g., Chappell v. Wallace, 462 U.S. 296, 300 (1983) ("Civilian courts must . . . hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment."); see also United States v. Stanley, 483 U.S. 669, 681-84 (1987) (holding Bivens remedy unavailable for injuries arising out of or in the course of activity incident to service). At a minimum, these considerations support the exercise of equitable discretion in cases such as this. See, e.g., Wilton v. Seven Falls Co., 515 U.S. 277, 282, 287 (1995) ("district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites. . . . the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power.").[14]

For all of these reasons, the service members are not proper plaintiffs and their claims should be dismissed.

3. The Family Member Plaintiffs Lack Standing

The remaining plaintiffs – who allege to be the parents and step-parents of service members, see Compl., ¶¶ 8-11 – similarly lack standing. As just discussed, the service member plaintiffs themselves lack standing. *A fortiori*, the parents of other service members – who themselves would lack standing for the reasons set forth above – lack standing to assert such claims on behalf of their adult children. See Warth v. Seldin, 422 U.S. 490, 499-500 (plaintiff

[14] Massachusetts v. Laird is not to the contrary, as the court there ultimately dismissed the case on justiciability grounds. 451 F.2d at 34.

must assert his own legal interests, and not those of third parties); Benjamin, 57 F.3d at 106 (third party standing requires, inter alia, some hindrance to injured party's ability to protect his or her own interests) (citing Powers v. Ohio, 499 U.S. 400, 410-11 (1991)).

Nor can the family members bring such claims on their own behalf, see Compl., ¶ 28 (alleging harm consisting, inter alia, of "loss of family members"). It indeed would be anomalous if the law were to provide service members' family members with standing for their own asserted injuries arising from possible war, while denying such standing to the service members themselves. No such result obtains, however, because the family members lack the "personal stake," Raines, 521 U.S. at 819, necessary to establish "a sufficiently immediate adversary context" to warrant relief. Mottola, 464 F.2d at 181; cf. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 673-74 (1977) (third-party indemnity claim based on service member's injury barred where underlying claim disallowed under Feres); Skees v. United States, 107 F.3d 421, 425-426 (6th Cir. 1997) (widow's loss of consortium claim is derivative of service member's claim and thus barred by Feres doctrine); In re "Agent Orange" Product Liability Litigation, 818 F.2d 201, 202-04 (2d Cir. 1987) (family members' claims relating to service members' exposure to Agent Orange barred) (citing cases). Accordingly, the family members of service members who themselves have not chosen to file suit lack standing.[15]

C. The Dispute Is Not Ripe

A related element of Article III's "case" or "controversy" requirement is that a dispute

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[15] The family member plaintiffs certainly cannot satisfy standing merely by virtue of their taxpayer status. See, e.g., Curtis v. Bush, No. 2:03CV32DS (D. Utah Jan.16, 2003) (*sua sponte* dismissing challenge to President's commitment of troops to war with Iraq without congressional war declaration) (Ex. A), appeal filed (10th Cir. Feb.14, 2003); Mahorner, 224 F. Supp. 2d at 49-51.

must be ripe for judicial consideration – that is, a controversy must have "matured sufficiently to warrant judicial intervention." Warth, 422 U.S. at 499 n.10; see also McInnis-Misenor v. Maine Med. Ctr., __ F.3d __, 2003 WL 282402, at *4 (1st Cir. 2003) ("ripeness doctrine seeks 'to prevent the courts, through

avoidance of premature adjudication, from entangling themselves in abstract disagreements'") (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967)). In order to be ripe, a plaintiff's alleged injury must be "actual or *imminent*." Lujan, 504 U.S. at 560 (emphasis added) (internal quotations and citations omitted).

With respect to claims of future injury, such as those at issue here, "the injury alleged cannot be 'conjectural' or 'hypothetical,' City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983), 'remote,' Warth, 422 U.S. at 507, 'speculative,' Simon, 426 U.S. at 42-46, or 'abstract,' O'Shea v. Littleton, 414 U.S. 488, 494 (1974)." National Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996). Rather, a plaintiff must establish that "the injury is '*certainly* impending.'" Lujan, 504 U.S. at 564 n.2 (emphasis in original); Whitmore v. Arkansas, 495 U.S. 149, 158 (1990); Lyons, 461 U.S. at 101-02 ; McInnis-Misenor, 2003 WL 282402, at *5.

Applying these standards to the claim before the Court, it is clear that it is not yet ripe for review. Although the Complaint alleges "on information and belief" that "Defendants are preparing for an imminent military invasion of Iraq," Compl., ¶ 20, it contains no factual allegations demonstrating that a ground invasion of Iraq is, in fact, imminent. To date, a ground invasion has not begun. The question before the Court, therefore, is "whether the Executive Branch of government is *so clearly committed to immediate military operations* that may be equated with a 'war' within the meaning of Article I, Section 8 . . . that a judicial decision may properly be rendered . . . ." Dellums, 752 F. Supp. at 1151. Courts faced with such challenges in

similar circumstances have consistently recognized that absent actual hostilities, the answer to this question is no, as any other result would require the judiciary to devine the intent of the President and the potential enemy in the complex and unpredictable field of foreign relations. Ange, 752 F. Supp. at 515. Plaintiffs' "claimed threat of harm . . . is simply too speculative" to allow for judicial review at this time. Id. (claim challenging President's authority to invade Iraq not ripe for review in December 1991); Dellums, 752 F. Supp. at 1151-52 (same); Farsaci v. Bush, 755 F. Supp. 22, 24-25 (D. Me. 1991) (same, January 1991).

The Congressional plaintiffs' claims are also not ripe for separate and additional reasons from those discussed above. Namely,

> [t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the branches reach a constitutional impasse. Otherwise, we would encourage small groups of even individual members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.

Goldwater v. Carter, 444 U.S. 996, 996 (Powell, J., concurring) (concluding that complaint should be dismissed "as not ripe for judicial review").[16] As discussed above, there is no "constitutional impasse" between the Legislative and Executive branches in this case. Notwithstanding the congressional plaintiffs' wishes to the contrary, Congress has specifically supported the President's authority to use force in Iraq. Thus, the congressional plaintiffs' claims are not ripe for this reason as well.

D. The President's Actions Regarding Iraq are Constitutional

Because plaintiffs' case fails to surpass these three threshold issues, the Court should not

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[16] Other courts have since adopted Justice Powell's formulation and similarly dismissed claims such as those of the Congressional plaintiffs on ripeness grounds. See, e.g., Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34, 37 (2nd Cir. 1985); Spence v. Clinton, 942 F. Supp. 32, 39 (D.D.C. 1996).

reach the merits. Steel Co. v. Citizens For A Better Environment, 523 U.S. 83, 93-102 (1998) (A court cannot "decide the cause of action before resolving Article III jurisdiction.")[17]; see also Drinan, 364 F. Supp. at 856 (because "the issues raised involve political questions, in the legal sense of the term . . . [w]e do not . . . reach the other grounds for dismissal asserted by defendants). This is particularly true in these circumstances, in which the plaintiffs have asked the Court to do something so extraordinary and grave as to enjoin the President's commitment of United States Armed Forces abroad.[18]

Should the Court address the merits of plaintiffs' claim, nonetheless, the Constitution and hundreds of years of Congressional action – including the Joint Resolution – support the President's unilateral war-making powers – with or without a Congressional declaration of war. The Constitution vests the President with full "executive Power," see U.S. Const. art. II, §1, cl. 1, and designates him "Commander in Chief" of the Armed Forces, see U.S. Const. art. II, §2, cl. 1. Together, these provisions are a substantive grant of broad war power that authorizes the President to unilaterally use military force in defense of the United States's national security

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[17] In Steel Co., the Supreme Court stated, in this regard:

> The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

523 U.S. at 101-02 (citations omitted).

[18] The Supreme Court has long recognized that the federal courts "'ha[ve] no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" Franklin v. Massachusetts, 505 U.S. 788, 803 (1992) (plurality opinion), quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1867).

interests.[19]

Indeed, the Supreme Court has recognized that the Commander-in-Chief clause "vest[s] in the President the supreme command over all the military forces – such supreme and undivided command as would be necessary to the prosecution of a successful war." United States v. Sweeny, 157 U.S. 281, 284 (1895); see also Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) (the President "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy"). Pursuant to his Commander-in-Chief authority, for example, President George H.W. Bush launched Operation Desert Storm, see Letter to Congressional Leaders on the Persian Gulf Conflict, 1 Pub. Papers of George Bush 52 (1991), and in 1992, he involved the United States in the enforcement of the southern no-fly zone pursuant to that same authority, see Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 Pub. Papers of George Bush 1574, 1575 (1992-93). When President William J. Clinton ordered the 1993, 1996 and 1998 missile strikes against Iraq, he likewise pointed to his constitutional authority as Commander in Chief and Chief Executive. See Letter to Congressional Leaders on Military Strikes Against Iraq, 2 Pub. Papers of William Jefferson Clinton 2195, 2196 (1998); Letter from President

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[19] Indeed, the Joint Resolution acknowledges as much: "the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States." H.J. Res. 114, Pub. L. 107-243, 116 Stat. 1501, §22; see also id., Whereas clause (citing Pub. L. 105-235 (August 14, 1998)) ("Congress concluded that Iraq's continuing weapons of mass destruction programs threatened vital United States interests and international peace and security, declared Iraq to be in 'material and unacceptable breach of its international obligations' and urged the President 'to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations.'").

William J. Clinton, to the Honorable Newt Gingrich, Speaker of the House of Representatives at 2 (Sept. 5, 1996); Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 1 Pub. Papers of William Jefferson Clinton 940 (1993).[20] In these and other instances, Congress did not interfere with or regulate the President's exercise of his Commander-in-Chief powers in any way.

Plaintiffs contend that the President, in order to commit troops to hostilities, needs not only congressional authorization (which is plainly present here) but also a formal declaration of war. No authority supports that proposition. Indeed, plaintiffs themselves recognize the commonality of "statutorily authorized" wars, Pl. Memo. at 3. See Drinan 364 F. Supp. at 860 ("The manner and form of ratification is exclusively within the discretion of Congress"); see also The Prize Cases, 67 U.S. (2 Black) 635 (1862). Moreover, although Presidents have deployed United States Armed Forces more than one hundred times in our nation's history, see, e.g., Congressional Research Service, Library of Congress, *Instances of Use of United States Armed Forces Abroad, 1798-1999* (1999) – most recently in Kosovo, Somalia, Haiti, Panama, Grenada and Korea – Congress has issued formal declarations of war in only five wars. See Act of June18, 1812, 2 Stat. 755 (1812) (War of 1812); Act of May 13, 1846, 9 Stat. 9 (Mexican-American War); Act of Apr. 25, 1898, 30 Stat. 364 (Spanish-American War); Joint Resolution of Apr. 6, 1917, 40 Stat. 1 (World War I: Germany); Joint Resolution of Dec. 7, 1917, 40 Stat. 429 (World War I: Austria-Hungary); Joint Resolution of Dec. 8, 1941, 55 Stat. 795 (World War II: Japan); Joint Resolution of Dec. 8, 1941, 55 Stat. 797 (World War II: Italy); Joint Resolution of

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[20] Thus, it has been the consistent policy of the Executive Branch for the past twelve years that Iraq, under the leadership of Saddam Hussein, presents a threat to the United States, our allies, and to international peace and security.

June 5, 1942, 56 Stat. 307 (World War II: Hungary); Joint Resolution of June 5, 1942, 56 Stat. 307 (World War II: Rumania). In this case, as explained above in Section I.A, Congress has expressly and unambiguously consented to the use of Armed Forces in an international conflict. Whatever constitutional issues might arise in these circumstances, such consent is plainly dispositive here. See Massachusetts v. Laird, 451 F.2d at 34 ("All we hold here is that in a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached.").

It is quite clear that were the President to undertake military operations in Iraq here, he would be acting pursuant to the Constitution, Supreme Court precedent, a history of Executive and Legislative Branch practice[21], and the express approval of the 107th Congress by Joint Resolution.[22] According to the analysis set forth by Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring), and later followed and interpreted by the Supreme Court in Dames & Moore v. Regan, 453 U.S. 654 (1981), the President's power under these circumstances is at its apex, using "all that he possesses in his own right plus all that Congress can delegate." Plaintiffs' attempt to challenge this authority is baseless.

II. PLAINTIFFS ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

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[21] The Supreme Court has held that the way the government has operated over the years can supply meaning to constitutional terms themselves. See Mistretta v. United States, 488 U.S. 361, 401 (1988) ("traditional ways of conducting government . . . give meaning to the constitution").

[22] Even prior to the Joint Resolution, however, there were other Congressional enactments that would affirm military action against Iraq in 2003, with or without the Joint Resolution. See, discussion supra at pp. 9-10.

In order to obtain preliminary injunctive relief, a party must demonstrate that (1) it is likely to succeed on the merits of its claim, (2) it will suffer irreparable harm in the absence of an injunction, (3) the balance of the equities favors the grant of an injunction, and (4) the public interest would be served by an injunction. Cablevision, Inc. v. Public Improvement Comm'n of Boston, 184 F.3d 88, 95 (1st Cir. 1999). But when requested immediate injunctive relief deeply intrudes into the core concerns of the Executive Branch, a court is "'quite wrong in routinely applying to this case the traditional standards governing more orthodox stays.'" Adams v. Vance, 570 F.2d 950, 954 (D.C. Cir. 1978) (quoting Sampson v. Murray, 415 U.S. 61, 83-84 (1974)). A request for an order directing the President in foreign affairs plainly constitutes such an intrusion. See Adams, 579 F. Supp. at 954; see also Barr v. United States Department of Justice, 645 F. Supp. 235, 238 (E.D.N.Y. 1986), aff'd on other grds., 819 F.2d 25 (2d Cir. 1987).

As explained above, plaintiffs have not demonstrated that they are likely to succeed on the merits of their claims. Indeed, to the contrary, this action should be dismissed for all of the reasons previously stated. Nor have plaintiffs demonstrated any irreparable harm; rather, the harm they allege is speculative at this juncture. Finally, the balance of the equities and public's interest both support denial of the requested injunctive relief. The Congress has expressly supported the President's authority to undertake the prospective actions challenged here. An injunction not only would interfere with the ability of the political branches to continue formulating and implementing policy to deal with the ongoing challenge that Iraq poses, but it would undermine the decisions already made by those elected by the American public to address such challenges by force, if necessary. Farsaci, 755 F. Supp. at 24-25 (denying preliminary injunction to halt military offensive against Iraq without congressional approval because judicial "interference in the political process would not serve the public interest"). Preliminary relief is

entirely inappropriate under these circumstances.

CONCLUSION

For all of these reasons, the Court should deny plaintiffs' request for injunctive relief and dismiss plaintiffs' suit.

Dated: February 20, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document is being served upon the attorneys of record for plaintiffs by email, as requested, and by Federal Express, on February 20, 2003.

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