Number 18-1127

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARY MAXWELL, Plaintiff-Appellant
V.
DONALD J TRUMP, President of the United States, Defendant-Appellee

On Appeal from the United States District Court of New Hampshire

BRIEF FOR APPELLANT, PRO SE

MARY MAXWELL

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CERTIFICATES TO PARTIES, RULINGS, AND RELATED CASES

The undersigned certifies as follows:

A. Parties

Mary Maxwell was plaintiff in the district court and is appellant in this Court, Donald J. Trump, president of the United States, is appellee in this Court.

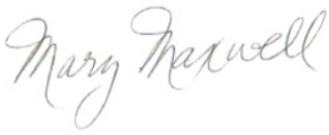
B. Rulings Under Review

Appellant appeals from the district court's order (Laplante, CJ) of January 5, 2018. There is no opinion.

C. Related Cases

This case was not previously before this court. Appellant is not aware of any other related cases.

s/



MARY MAXWELL

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The War Powers Act 1973

The Authorization for the Use of Military Force 2001

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INTRODUCTION

Plaintiff Mary Maxwell, a law researcher and writer, thinks war is being planned. Her pleadings on November 17, 2017 said: "…the president has announced he may make a military strike without Congress's say-so, and such a strike would harm many people including the plaintiff." She asked the District Court "to enjoin President Trump from making war without Congress's say-so. Plaintiff claims … she will likely suffer injury related to war. She is also entitled to live in the safety that the Constitution provides by way of its balance of powers."

STATEMENT OF JURISDICTION

Plaintiff invoked the District Court's jurisdiction under 28 U.S.C. § 1331. The district court entered a final judgment dismissing plaintiff's complaint on January 5, 2018. Plaintiff filed a timely notice of appeal on February 2, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly dismissed plaintiff's complaint for lack of Article III standing.

2. Whether the District Court correctly dismissed plaintiff's complaint on the grounds that it presents a non-justiciable political question.

3. In the alternative, whether the equities advise against challenging a president.

ITEMS IN THE ADDENDUM: PROPOSED LAWS, TESTIMONY AT HEARINGS, RECOLLECTIONS, AND A CHART OF CASES

The Addendum contains a current bill sponsored by Rep. Tulsi Gabbard, entitled The Stop Arming the Terrorists Act, a speech by Senator Rand Paul about the Kaine-Corker bill, testimony at a Congressional hearing by political scientist Louis Fisher, law professor Ralph Steinhardt's recollection of his father's work in the Manhattan Project, a reflection by Captain Nathan Smith, and a chart of war-powers cases.

STANDARD OF APPELLATE REVIEW

Dismissals for want of standing and political question grounds are reviewed de novo. *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (standing); *Lin v. United States*, 561 F.3d 502, 505 (D.C. Cir. 2009) (political question).

STATEMENT OF THE CASE

Appellant is concerned that a war, especially a pre-emptive strike, and even more especially a nuclear strike will injure her. It already injures her by apprehension, and by disappointment in the government's drift toward lawlessness. Appellant understands it is not the Judiciary's role to offer any advice about war, but it can rule on the constitutional issue.

A. Factual and Legal Background

1. Allocation of the War Power in Article I, section 8 of the Constitution

The Framers of the Constitution made a very serious effort to prevent the Executive from having the power to make war. This is evident in James Madison's notes of the Convention in 1787. Madison and colleagues were not shy about saying that human nature is such that a "king" could start a war for personal reasons or could come under pressure from many sources. The only pressure the US president should feel is from the people (via their elected representatives), as they will be paying for the war in money and in lives. Hence, the Framers granted the war-making power solely to the Congress. Article I, section 8 says "The Congress shall have Power … to declare War". The Framers understood that the President would have authority to repel sudden attacks, but that power is defensive, not offensive.

All presidents through Franklin Delano Roosevelt upheld this; they sought Congress's permission if they wanted to start a war. An exception was President James Polk, who began military action against Mexico without any legislative authority. The House of Representatives censured him on the ground that the war had been "unnecessarily and unconstitutionally begun by the President of the United States." Since that time, several presidents have indulged in war-making in

violation of the Constitution. As a result it is sometimes opined that committing this violation is now acceptable: it is the new "tradition." However there is only one legal way to change the Constitution and that is by amendment.

2. Article II's Protection of the President's Commander-in-Chief Prerogatives

A president is always the civilian head of the military, per Article II, section 2 of the Constitution. He has wide discretion in battle, including the type of weapons to use, unless Congress legislates a specific limit on his battlefield endeavors. Treaties which are the law of the land, too, may preclude the use of a certain weapon, or a certain tactic in war. And the 1996 War Crimes Act has criminalized some battle activities on the part of American nationals.

The President bears the responsibility of responding to a sudden attack on the United States; Congress has passed laws about emergency powers of the executive to assist with this, for example, the *National Emergencies Act 1976*.

3. Weakness of Efforts, by Congress, to Uphold the Constitution

Congress is at fault for allowing the executive's unconstitutional encroachment on its legislative role in war-making. In a speech at the National Defense University on March 29, 2018, Senator Paul said: "For some time now, Congress has

abdicated its responsibility to declare war. The status quo is that we are at war anywhere and anytime the president says so."

(a) The War Powers Resolution

After the Vietnam War, some legislators recognized that it is not good to have a division of labor that is undefined. What exactly is the president permitted to do under the rubric of "responding to an attack on the US"?

In 1973 Congress passed the War Powers Act (also called the War Powers Resolution). It was vetoed by President Nixon but both Houses overrode the veto. The statute allows the president to take military action – in emergency -- but he must report it to Congress within 48 hours. He can remain in that war for 60 days, hoping for Congress' approval. If that is not forthcoming he has a maximum of 30 more days to get the troops out.

According to Section 2 (c) of the 1973 War Powers Act:

> "The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

(b) The "AUMF" – the Authorization for the Use of Military Force

On September 14, 2001, a mere three days after Americans were stunned by the destruction of the World Trade Center, President Bush asked for, and got, a joint resolution from Congress, enacted on September 18, as follows:

> "That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

In 2002 Congress produced a further AUMF to cover action in Iraq. President Obama used military force in Libya for more than the 90-day maximum allowed by the War Powers Resolution, and was not called to account for it.

Thus we see that even where Congress has legislated, such as in the War Powers Resolution or the 2001 Authorization for the Use of Military Force, it does not police the executive's adherence to specific provisions of those laws.

Senator Rand Paul warned against a further AUMF that has been put forward as the Kaine-Corker bill. In the aforementioned speech on March 29, 2018, he said: "Handing war-making power from Congress to the executive branch is not an exercise in congressional power. It is the final and full abandonment of that power. It is wrong, it is unconstitutional, and it should be stopped."

4. New Players, A Challenge to National Sovereignty

(a) The United Nations Organization

There had never been any instance of US troops being answerable to any superior other than the US Commander in Chief until 1945. In that year the US signed the UN Charter, which calls for collective action by member nations in certain circumstances as decided by the United Nations Security Council, UNSC.

However, our nation did control this via domestic legislation: The UN Participation Act (1945). It protects the sovereign rights of the US when we are working in a UN context by directing the President to seek statutory authority from Congress. But that does not mean that the president abides by it, or that Congress jumps in to insist on such abiding. The fact is that members of both the executive and the legislature have propagandized people with the idea that the UNSC can tell us what to do. When Secretary of State Colin Powell was seen on TV addressing the UNSC with evidence that Iraq needed to be invaded as it had "weapons of mass destruction," citizens might have assume that the UNSC is a court-like entity that reaches a fair judgment.

Presidents have used UNSC resolutions (which they themselves may have authored in the first place) to justify an action that was hard to justify to Congress and the American public.

(b) NATO

Besides our joining the UN we have also joined NATO, by way of the 1949 North Atlantic Treaty. There is currently a proposed lawsuit by a group in Serbia, demanding a payout for damages done by "thousands of tons of depleted uranium" (DU) spread by NATO in the former Yugoslavia, allegedly causing cancer in children. Had American citizens opposed the use of DU, how would they have got access to the decision makers, a rather amorphous group of military men known as NATO?

Appellant notes another factor of our membership in NATO: it is hard for anyone to calculate how the commitments would turn out. Article 5 of the NATO agreement says:

> "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence … will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force…."

What if we go to the aid of A, but A has a non-NATO alliance with B? What if the whole thing devolves into world war? Who is in charge? General Stanley McChrystal was "commander of NATO operations" in Afghanistan. Did "NATO" then have authority over him? We US citizens have no idea about such things.

5. Nuclear Weapons

Appellant does not advocate a renunciation of nuclear weapons. She asks for constitutional control over a pre-emptive strike, (and it is not up to her to create such a policy). As for the use of DU, this is constitutionally in the legislature's bailiwick. As Professor Louis Fisher said at a Senate hearing:

> "The Constitution not only gives Congress the authority but the duty and the responsibility to decide national policy, domestic policy, foreign policy, national security policy. …That is why you are elected."

While it is still true that only one nation has ever made a nuclear attack on another, the US on Japan in 1945, there are now many countries capable of dropping nuclear bombs and launching nuclear missiles, including Russia, China, and North Korea. Iran is in the process of becoming a member of the nuclear club. There are nuclear submarines in many seas, and there is even a personal nuclear gun called the Davy Crockett.

The amount of damage inflicted by an atomic bomb is vast. People near the explosion would die from the heat or the blast, and others would get sick years later from the radiation. In Hawaii on January 13, 2018, the state accidentally sent an alert to the population's cell phones at 8:07 am. It said: "BALLISTIC MISSILE THREAT INBOUND TO HAWAII. SEEK IMMEDIATE SHELTER. THIS IS NOT A DRILL." The message caused panic and was not corrected until 38 minutes later.

President Trump castigates Iran and North Korea over their nuclear programs. He has made clear threats about bombing them. And a former secretary of defense, William J. Perry, tweeted on 4 January 2018: "We are at greater risk of nuclear catastrophe now than we were during the Cold War."

The Appellant grew up in the Cold War generation. On the day of the Cuban Missile Crisis in 1962, her class was sent home from school without a homework assignment as the teacher assumed there wouldn't be a "next day."

6. Terrorism, Empire, and the Loss of Republicanism

The present unconstitutional Executive arrogation of the war power occurs against a particular background – and to some extent has created that background. We now have what has been called the National Security State. Particularly since the 9-11 attacks, the Executive has laid claim to ever-increasing powers and these have changed the functioning of the Bill of Rights' 4th, 5th, and 8th Amendments. The dignity of the citizen is no longer talked up. The scourge of "terrorism" is talked up all the time. Many Americans accept that torture is "necessary."

Around the world the United States is seen to be an imperial force. Our military pushes the local population aside and builds military bases. By the count of historian Chalmers Johnson, we have over 800 of them. Also, the Defense

Department with its huge budget is able to control universities in the US, especially science departments, by way of grants. Not surprisingly there is a new quietness of academic criticism of governmental power.

This transfer of the Academy's loyalty has left a serious gap in American culture. Persons who once debated such things as "conflict of interest" are scared of being charged with some newly minted crime. The constant mention of "enemy attack" or "terrorism" is enough to make the population prefer the safety of weaponry over the safety of critical reasoning. Appellant contends that one good schoolin' from the Supreme Court could well set things on a different course.

B. Prior Proceedings

1. War Powers Cases – Judicial Response

At least 27 war-powers cases have come to US District Courts since 1967. Twelve were filed by or on behalf of soldiers, nine by members of Congress, and six by citizens, such as the present case. These 27 plaintiffs could see that something dreadful is occurring with regard to the Constitution; most also felt that a particular war was wrong. Yet none of their cases have ever been looked at on the merits. All were dismissed as non-justiciable.

The very first of the 27 cases was that of *Luftig v. McNamara* in 1967, which claimed that the Vietnam War was unconstitutional, on grounds of Article I, section 8. The District of Columbia Circuit Court affirmed the District Court's judgment that that the plaintiff's allegation was not justiciable. Moreover its wording seems intended to discourage others from coming forward:

> "[This] proposition [is] so clear that no discussion or citation of authority is needed. The only purpose to be accomplished by saying this much on the subject is to make it clear to others comparably situated and similarly inclined that resort to the courts is futile, in addition to being wasteful of judicial time, for which there are urgent legitimate demands."

Two of the 27 cases were found non-justiciable for ripeness, two for mootness, and the other 23 for lack of standing and/or the political question. Of the 27 dismissals by a district court, twenty (not counting the pending cases of Smith and Maxwell) were appealed. Each time, the appellate court reaffirmed the dismissal.

For one case, *Massachusetts v. Laird,* the US Supreme Court had original jurisdiction since one of the parties was a state. Even there, the case got dismissed on non-justiciability. The Supreme Court had a chance to look at the merits of this important constitutional challenge, regarding Article I, section 8, but it did not do so.

2. Precedents To Be Applied to This Case

(a) The Main Precedent: *Youngstown v. Sawyer* (U.S. 1952)

As there have thus been no rulings on war powers since 1952, that 1952 case is the authority. It did not come about by a citizen complaining that President Truman's war-making violated the Constitution. It came about when a business, Youngstown Iron Sheet and Tube Company, objected to Truman's emergency takeover of the steel industry. That company said, in effect, "You can't do this. The Korean War is not a declared war." The US Supreme Court agreed, by referring to Article I, section 8. This is solid jurisprudence.

(b) Recent Diminution of Judicial Deference -- *Hamdan v. Rumsfeld* (2007)

There is also a precedent in the 21st century that will have an effect on Appellant's case, but it is not about war-making as such. It is about the treatment of enemy combatants, such as at Guantanamo. There are four such Supreme Court decisions: *Rasul, Hamdi, Boumediene,* and *Hamdan.* The essential point is that the Supreme Court defended legislative involvement in a national security case, eschewing the notion of exclusive presidential authority.

Hamdan v. Rumsfeld (2006) contains this language from *ex parte Milligan* (1866):

> "Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians …."

The relevance of *Hamdan* to the Appellant's case is that the US Supreme Court, in 2006, began to give up its practice of refusing to touch matters involving national

security. It restored legislative control over matters of the rights of persons in war situations.

(c) Precedents on citizens' standing: *Friends of the Earth, Spokeo,* and dissents in *Sierra Club.*

Since *Fairchild v. Hughes* in 1922, citizens have been deprived of their natural right to sue for the public good, possibly for reason of "floodgates." However, a 2000 environmental case, *Friends of the Earth v. Laidlaw,* has broadened the notion of standing where a person shows how damage to the environment injures the public. In *Sierra Club v. Morton*, the dissent of Justice Douglas (quoted below) provides exhilarating language as to a potential new opening of standing. A 2017 case, *Spokeo v. Robins* is very relevant to the Appellant's case.

SUMMARY OF ARGUMENT

The District Court erred in dismissing this case as non-justiciable both on the grounds of Plaintiff's lack of standing – that she supposedly failed to show an "injury in fact" -- and on the presence of a political question. The dismissal quoted a D.C. Circuit ruling in *Mahorner v. Bush,* saying: "It is difficult to think of an area less suited for judicial action…. These matters [including foreign policy] are plainly the exclusive province of Congress and the Executive."

The Appellant does have standing; her injury meets the criteria of "injury in fact."

And although military matters are indeed the exclusive province of the political branches, the judiciary is still duty bound to address unconstitutionality, which upsets the balance of powers. *Youngstown* is binding.

Appellant claims, in the tradition of other war powers cases, that the Executive lacks a constitutional basis for war-making. If President Trump is proceeding in that area unrestrained, it is high time to restrain him. Could Congress do that? Yes, by threat of impeachment. But if Congress is blind to the problem, or acts in bad faith, the people must turn to the courts for help. This is a dire emergency.

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY DISMISSED PLAINTIFF'S COMPLAINT ON THE GROUNDS OF STANDING.

It appears that if the appellant can prove she has standing and that her request does not ask the court to deal with a political question, her case can be heard on the merits. What must she present in order to have standing? The most recent authority is from *Spokeo v. Robins*, 136 S. Ct. 1540, 1553, 194 L. Ed. 2d 635 (2016).

From the majority opinion:

> "Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements. *Lujan,* 504 U.S., at 560, 112 S.Ct. 2130. The plaintiff must have:
> (1) suffered an injury in fact,
> (2) that is fairly traceable to the challenged conduct of the defendant, and
> (3) that is likely to be redressed by a favorable judicial decision. *Id.,* at 560–561, 112 S.Ct. 2130; *Friends of the Earth, Inc.,* 528 U.S., at 180–181, 120 S.Ct. 693."

"…at the pleading stage, the plaintiff must "clearly ... allege facts demonstrating" each element (*Warth, supra,* at 518, 95 S.Ct. 2197.613).

Appellant did so. In her pleadings she said:

1. She is injured by imminent war.

2. The injury is traceable to President Trump's saying explicitly that he can start a war if he decides to do so. [He has said he might unleash "fire and fury like the world has never seen." Appellant recalls how the US boasted in 1991 that the attack on Baghdad would begin with "shock and awe" – and that did happen.]

3. A favorable decision – a restraint on the president – would redress the injury, at least as much as can be done legally.

Granted there is no magic wand. Restoring the President to the position of having to ask Congress's permission to start a war will not necessarily result in a lack of war. The members of Congress might explicitly permit him to start a war. And it is always the case – and Americans can't control it – that another country may war on

us. But Appellant does not ask for a magic wand; she wants rule of law to be restored.

A court case that goes against Appellant's prevailing in this suit is *Lujan v. Defenders of Wildlife* (1992). Plaintiffs said their injury was that the loss of endangered species, although far away, would be a loss to them. Justice Scalia, writing for the majority, said

> "This Court has consistently held that a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state an Article III case or controversy. *See, e.g., Fairchild v. Hughes,* 258 U.S. 126, 129-130. Vindicating the public interest is the function of the Congress and the Chief Executive. … permitting all citizens to sue, regardless of whether they suffered any concrete injury, would authorize Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"

Appellant, however, does claim a concrete injury.

The District Court held, citing *Mahorner v. Bush* (2002), that a plaintiff must establish that he has suffered

> (1) "an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural or hypothetical' – and which is 'fairly traceable' to the challenged act, and 'likely' to be 'redressed by a favourable decision.'"

Plaintiff James Mahorner alleged that he will suffer an increased chance of losing his life if the President initiates a military conflict. Granted, every person will have an increase of that sort once a war is on. Appellant, however, does meets

jurisprudential tests for her injury being concrete, particularized, and actual or imminent.

Robins v. Spokeo discusses the meaning of 'concrete' and 'particularized':

Particularized – at 1415:

> For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." [This does not mean that many others are not suffering similarly] 742 F.3d, at 413. ... the court wrote that "Robins's personal interests in the handling of his credit information are *individualized rather than collective*." *Ibid*.

Concrete – at 1548:

> A "concrete" injury must be "de facto "; that is, it must actually exist... When we have used the adjective "concrete," we have meant to convey the usual meaning of the term—"real," and not "abstract."...
>
> at 1549 – "Concrete" is not, however, necessarily synonymous with "tangible." Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that **intangible injuries can nevertheless be concrete**. See, e.g., Pleasant Grove City v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (free speech); … This does not mean, however, that the **risk** of real harm cannot satisfy the requirement of concreteness." [i.e., a risk of real harm **can** satisfy the requirement of concreteness.]

'actual or imminent' is discussed in *City of Los Angeles v Lyons*, which is cited in *Lujan*:

> To satisfy the "case or controversy" requirement of Art. III, a plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct, and the injury or threat of injury must be "real and immediate," not "conjectural" or "hypothetical.

II. THE DISTRICT COURT INCORRECTLY DISMISSED PLAINTIFF'S COMPLAINT AS A NON-JUSTICIABLE POLITICAL QUESTION.

Appellant asks that the President be restrained from doing something illegal. A president's job is about as political as you can get. Negotiation with other countries about war (or trade or anything) is, too, essentially political. The Framers already took care of the war issue for us, however. They designed a constitution with bad human nature in mind at all times – unabashedly so.

Madison and colleagues knew it would be folly to entrust the war power to an individual. Historian Max Farrand, in his 1996 4-volume set, *The Records of the Federal Convention of 1787*, quotes Eldridge Gerry of Massachusetts that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." None of us did either, as we were taught that such a thing was dumped out with full vigor during that hot summer in Philadelphia.

Today, 231 years later, Appellant relies on the two controlling authorities, *Youngstown v Sawyer,* and the Constitution itself.

Urgency

The situation in 2018 is very threatening. Here are five examples of the reigning confusion:

(1) During the Obama presidency, Trump criticized the bombing of Syria, yet in 2017 he bombed Syria. And on April 11, 2018 a tweet went out to the whole world as follows, from Donald J. Trump @realDonaldTrump:

> "Russia vows to shoot down any and all missiles fired at Syria. Get ready Russia, because they will be coming, nice and new and 'smart!' You shouldn't be partners with a Gas Killing Animal who kills his people and enjoys it!".

Yet there is no reliable evidence that Syria's leader Bashar al-Assad is a "gas-killing animal." He is accused of hurting his own people, but the same was said of Saddam Hussein gassing the Kurds at Halabja; it was later proven to be incorrect.

(2) Obama also used an atrocity story to justify the bombing of Libya, and said we had to do it because of "who we are":

> "To brush aside America's responsibility as a leader and -- more profoundly -- our responsibilities to our fellow human beings under such circumstances would have been a betrayal of who we are…. Some nations may be able to turn a blind eye to atrocities in other countries. The United States of America is different. And as president, I refused to wait for the images of slaughter and mass graves before taking action."

Needless to say there is nothing in the Constitution, or in any AUMF or other legislation, to make the US the world's humanitarian policeman.

(3) As for the identification of the terrorists in the Middle East, the matter is so ambiguous that Rep Tulsi Gabbard (herself a veteran, with two tours in Iraq) is sponsoring a bill entitled Stop Arming the Terrorists Act. It is mirrored by a bill in the Senate. The complaint is that the US supports ISIL.

(4) Senator Lindsey Graham, who has been in Congress for twenty years, and before that was an Air Force colonel, is paving the way for war, completely unmindful of the Constitution. He told *The Atlantic* of December 2017:

> "I would say there's a three in 10 chance we use the military option…. If the North Koreans conduct an additional test of a nuclear bomb—their seventh—I would say 70 percent…. War with North Korea is an all-out war against the regime…. There is no surgical strike option. Their [nuclear-weapons] program is too redundant, it's too hardened, and you gotta assume the worst, not the best."

(5) Wars do not just happen. There is now enough revisionist history of World War I, such as that written by Gerry Docherty and Jim MacGregor, to prove that its origin had nothing to do with the assassination of Duke Ferdinand. It usually takes interested individuals to make wars happen. At present, the campus of the Pentagon, which is presumably owned by the people, is mainly occupied not by

our military but by the offices of private defense contractors. Inevitably their interest in weaponry influences war.

(6) The appointing of decision makers is a secret. According to BusinessInsider.com of May 24, 2017:

> "Defense Secretary James Mattis was taken by surprise when the US Air Force dropped a Massive Ordnance Air Blast bomb, on Islamic State targets in Afghanistan in April…. The decision to use the largest nonnuclear bomb in the US' arsenal was made by General John Nicholson, the Army general commanding forces in Afghanistan, and was not discussed with Mattis, which reportedly upset him. President Donald Trump would not reveal whether he authorised the plan to drop the massive bomb, which had never before been used in combat, instead stating that he had given the military "total authorization."

Appellant asks: Who, then, will drop nuclear bombs? Has President Trump already subcontracted the nuclear football to someone? And if the Hawaiian panic was started because of human error, is there also room for an "error" by a nameless Pentagon person?

After physicist Robert Oppenheimer had, with his team at Los Alamos, constructed and successfully tested the first atomic bomb, he quoted Hindu Scripture: "I am become death, the destroyer of worlds." If Appellant is to become a destroyer of the world she wants to have a say in it.

All of this is very urgent, and damage will be irrevocable.

Remand

Is it within the power of this court to remand the present case back to the District Court for a hearing? Yes. The District judge could rule in Plaintiff's favour (as he should have originally). Then the government would probably appeal, and if Appellant lost she could seek leave to take it to the Supreme Court.

Not only could the Supreme Court reaffirm the aging *Youngstown* precedent, that war without Congress's say-so is illegal, it could inspire all Americans. Parchment mania could ensue. The following is from a dissent by Justice Douglas in which Justice Blackmun joined, in *Sierra Club v. Morton* (1992) :

> "The critical question of 'standing' would be … put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated … in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. … A ship has a legal personality. … The corporation sole − a creature of ecclesiastical law – is an acceptable adversary …
>
> So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries … or even air that feels the destructive pressures of modern technology …. The river, for example, is the living symbol of all the life it sustains or nourishes - fish, aquatic insects, otter, deer … and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life….. Those people who have a meaningful relation to that body of water – whether it be a fisherman, a canoeist, a zoologist, or a logger – must be able to speak for the values which the river represents and which are threatened with destruction....."

That, as Appellant sees it, is the issue of "standing" in the present case and controversy. If the Douglas idea materialized she would be allowed to speak for an ecological unit, the Great Republic, or simply the US Constitution. The balance of powers in the Constitution controls the balance between the weak and powerful in our society -- an almost miraculous feat.

The Sovereign and the Equities

What is the Judiciary? It is the third branch of government. But what is government? In the United States, the government is the people. They, collectively, are the sovereign.

In the pending appeal case filed by Nathan Smith, who is an active-duty Captain in the US Army, we see the counsel for Appellee Trump (US Attorney H. Thomas Byron, III) responding to Smith's appeal by raising the spectre of presidential immunity. This seems odd as Smith's District Court filing was dismissed on other grounds – standing and the political question.

Trump wants the case dismissal affirmed. Smith's plaint was that as an officer he had taken an oath to defend the Constitution and in his judgment that the war he was waging (enthusiastically) against ISIL was unconstitutional. He asks for declaratory relief. The appeal is being heard in the DC Circuit Court. The Appellee

claims: “The Plaintiff cannot obtain equitable relief against the president….” In support of that, the following 5 points are offered by appellee:

> 1. Plaintiff’s request for a declaratory judgment against the President is improper. Ordinarily, injunctive relief is not available against the President. *Franklin v. Massachusetts*, 505 U.S. at 802-03; id. at 826 (Scalia, J., concurring) “[N]o court has authority to direct the President to take an official act.”

Note: The Defendant was the Secretary of Commerce, not the president.

> 2. Here [in Smith’s case] the equities counsel against entering relief that would entail “judicial intrusion into the Executive’s ability to conduct military operations abroad.” *Munaf v. Geren*, 553 U.S. 674, 700 (2008).

Note: If Smith won the case about the unconstitutionality of war, that would indeed intrude into the Executive’s ability to conduct war. The president should have thought of that before.

> 3. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) “The President’s unique status under the Constitution distinguishes him from other executive officials.”

Note: This was a lawsuit for damages. The Supreme Court held that a president has absolute immunity from damages liability predicated on his official acts. (Of course he has no immunity against a criminal charge.)

> 4. The same is true as to declaratory relief. *Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010) “A court—whether via injunctive or declaratory relief—does not sit in judgment of a President’s executive decisions.”

Note: The complaint was that the president was going to use religious words at his Inaugural Ceremony. The court dismissed it saying a president can run his Inauguration as he wishes.

> 5. *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973) "[A] court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith."

Note: Smith is not interested in judicially condemning the president. Anyway that quote is not near the theme of Judge Wyzanski's ruling. Of great interest is his statement:

> Nor do we see any difficulty in a court facing up to the question as to whether because of the war's duration and magnitude the President is or was without power to continue the war without Congressional approval.
>
> But the aforesaid question invites inquiry as to whether Congress has given, in a Constitutionally satisfactory form, the approval requisite for a war of considerable duration and magnitude. Originally Congress gave what may be argued to have been its approval by the passage of the Gulf of Tonkin Resolution, 78 Stat. 384 (1964). …However, that resolution cannot serve as justification for the *indefinite* continuance of the war since it was repealed by subsequent Congressional action, 84 Stat. 2055 (1971).

Amazing! Congress did take action – by repealing its resolution. However, the case was dismissed for "the political question."

In any case, the matter of the wrongness of suing a president can be put to rest now. In *Clinton v. Jones*, 520 U.S. 681 (1997), Paula Jones sued President Clinton for sexual harassment. That would not be relevant to Nathan Smith's case, or the Appeal at hand, as Jones sued the president in his private capacity. But luckily, a clear statement, of usefulness to us, appears as an aside in *Clinton v. Jones* at 628:

> "Of greater significance, it is settled that the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, see, *e. g., Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579."

CONCLUSION

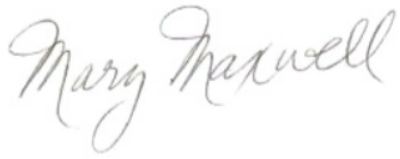
The dismissal of this case, Maxwell v. Trump, by the District Court was incorrect.

Appellant has standing and the matter is justiciable.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief is in font 14 Times New Roman, and contains 6933 words, not counting the Addendum and Appendix.

s/



MARY MAXWELL

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the 1st Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

ADDENDUM
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Memories of My Father's Memories
by Ralph G. Steinhardt on August 1, 2015

In sorting through my mother's papers recently, I came across an old Virginia newspaper that she had saved, *The Roanoke Times & World News* from January 28, 1979. Under the headline "He Was There an atomic bomb, code-named "Trinity," at a site in a New Mexico desert in July 1945. The quotation accompanying the picture of this haunted man reads simply, "We realized it was going to work. And we realized what it was going to be used for."

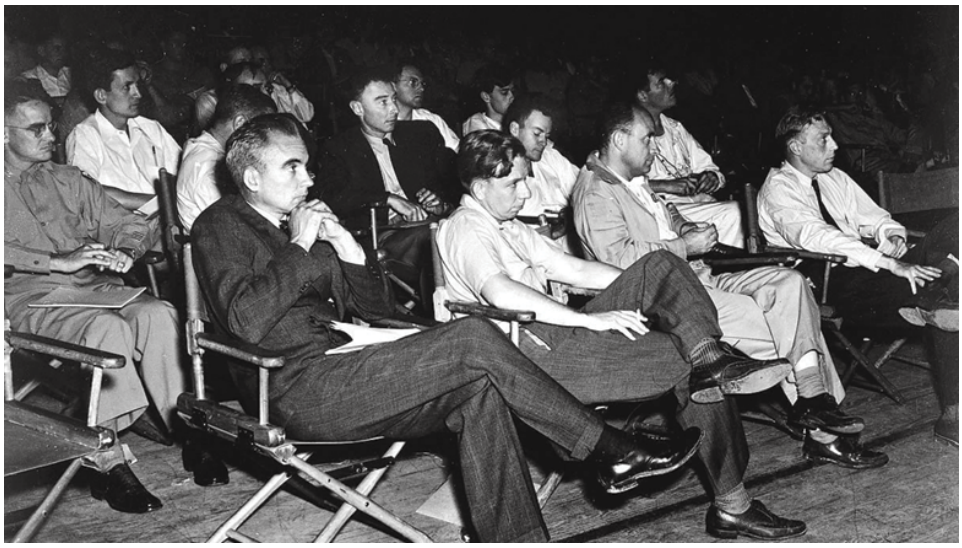
By "we" he meant the scientists and engineers who worked on the Manhattan Project at Los Alamos, New Mexico, and my father, a member of the Army's Special Engineer Detachment, was one of them, at 26 years old.

He often said that everyone who lived through World War II was injured by it, but he would not have described himself as a victim: his understanding of the effects of the bomb on the people of Hiroshima and Nagasaki (or the experiences of soldiers in combat or the lived nightmares of concentration camp inmates) was both too scientific and too visceral to allow that. Without comparing injuries, I think he was simply traumatized in his own way, day after day for 50 years after the war, by his informed imagination and his innate empathy.

This is not an abstraction for me. I am by profession an international human rights lawyer, representing the survivors of torture when they find their abusers in the United States. I have also taught international law and human rights for 30 years, and I routinely ask my law students to consider what legal scholar Richard Falk called "the irony of August 8, 1945." On that day—two days after the destruction of Hiroshima and one day before the destruction of Nagasaki—the Allies in Europe signed the London Charter, which set up the Nuremberg tribunals for the trials of major war criminals in that theater.

The London Charter became one pillar in the post-war development of an international legal régime protecting human rights and specifically establishing

individual criminal responsibility for international atrocities, including war crimes, crimes against humanity, and crimes against peace.



Los Alamos scientists watching a film of the nuclear explosion

I ask my students to consider a hypothetical in light of what was happening on August 8, 1945: what if Germany had developed the atomic bomb and destroyed New York with it? What if Germany went on—somehow—to lose the war? Can there be any doubt that the incineration of American civilians would have been count one in an indictment for war crimes or crimes against humanity?

The reality is that the legality of the bombing of Nagasaki and Hiroshima has never been formally tested because the weapons were used by the winners. My father knew and internalized this, right down to acknowledging his own role in aiding and abetting the atrocity. He also knew that the firebombing of Dresden and dozens of other cities in Europe and Japan was not somehow "better" for being relatively low tech.

In 1944 and early 1945, the pace became frantic to build and test what they called "the gadget." My father described exhaustion, the joy of working with other intense people on an urgent and difficult task at the cutting edge of physics and with the potential to end the war.

Nagasaki boy, carrying his dead brother on his back, stands in line at crematorium

After the war, my father joined the Association of Los Alamos Scientists (known by its poignant acronym, ALAS) and lectured widely on the imperative of disarmament and nonproliferation. I remember him quoting Einstein to the effect that, if World War III were fought with atomic weapons, World War IV would be fought with bows and arrows. He jokingly wished the Manhattan Project had been ordered to develop a solar death ray, because then at least human beings would have had the technology for abandoning fossil fuels by the 1960s.

. On his retirement from a life of teaching and research, his friend Louis Rubin wrote a long appreciation, containing one epic, spot-on description of my dad: "professor of chemistry, musician extraordinaire, man of letters, humorist, bon vivant, who could and did lecture on the aesthetic properties of the Periodic Table of the Elements, who was not only devoted equally to the conversion of [his] students into professional chemists and to the promulgation of the Bach B Minor Mass, but indeed considered them twin manifestations of the same sensibility.

Statement by Louis Fisher on January 30, 2007, at a US Senate Hearing by the Committee on the Judiciary, on the subject of "EXERCISING CONGRESS'S CONSTITUTIONAL POWER TO END A WAR".

Mr. Fisher, it is an honor to have you before the Committee again, and the floor is yours.

STATEMENT OF LOUIS FISHER, SPECIALIST IN CONSTITUTIONAL LAW, LAW LIBRARY, LIBRARY OF CONGRESS, WASHINGTON, D.C.

Mr Fisher. Thank you very much, Mr. Chairman. …The Constitution not only gives Congress the authority but the duty and the responsibility to decide national policy, domestic policy, foreign policy, national security policy. …That is why you are elected.

The system of Government we have … is that we believe in the Constitution where the sovereign power is placed with the people, and they give you their power temporarily to discharge. …The power is with the people, and you can revisit legislation any time you like.

… You are a temporary custodian of the Constitution which, very importantly, includes the checks and balance system and the separation of powers system. We have that because the Framers did not trust in human nature. They were afraid of any concentration of power being abused.

Now, when you passed the Iraq resolution in October 2002, you did not sign off and say the rest is for the President. Any statute that you pass, you have a duty to revisit it and recalibrate in light of new information…. You have few restrictions on what you can do…. I do not have any grounds for believing that the President has any special expertise or better judgment on whether to continue a war than the elected Members of Congress. The Framers put their trust in the deliberative process.

You can look at Article I and Article II, and Article I obviously gives the lion's share of the war power to Congress.. None of those war prerogatives are given

solely to the President of the United States. They are either given expressly to Congress, or they are shared between the President and the Senate.

When you look at the Framers, their view of history was that executives over time, in their search for fame and glory, got nations into wars that were ruinous to the people and ruinous to the Treasury. So that is why the power of initiating war was placed in Congress, and the President has certain powers of a defensive nature to repel sudden attacks.

Now, about the Commander-in-Chief Clause. It is an important clause but not the way it is read today: one, it affirms unity of command. The unity of command means that the President is in charge of troops, but those troops can be controlled by Congress. The second very important part of the Commander-in-Chief Clause is civilian supremacy. The same duty that commanders have to the President, the President has to the elected representatives. …

Now, when the elected Members of Congress decide that a war has declined in use or value and you want to revisit it, you can place various conditions on appropriations, change legislative language. That is up to you. You may decide in doing that that you want to move U.S. troops to a more secure location. So there is no issue here about not protecting our troops.

The key question … is for Congress to determine that the continued use of military force and a military commitment is in the Nation's interest. I don't think when you are trying to decide that question that there is any help by saying that if you express an independent view, you are somehow emboldening the enemy.

A lot of people talk about the Steel Seizure case …. They miss [Justice] Robert Jackson's view at the end of his decision … where he says ''With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the executive be under the law and that the law be made by parliamentary deliberation.''

Thank you.

Rep. Tulsi Gabbard, Introduced in House (01/23/2017)

Stop Arming Terrorists Act

This bill prohibits the use of federal agency funds to provide covered assistance to: (1) Al Qaeda, Jabhat Fateh al-Sham, the Islamic State of Iraq and the Levant (ISIL), or any individual or group that is affiliated with, associated with, cooperating with, or adherents to such groups; or (2) the government of any country that the Office of the Director of National Intelligence (ODNI) determines has, within the most recent 12 months, provided covered assistance to such a group or individual.

"Covered assistance" is defined as:

- defense articles, defense services, training or logistical support, or any other military assistance provided by grant, loan, credit, transfer, or cash sales;
- intelligence sharing; or
- cash assistance.

The ODNI shall:

- make, within 90 days after this bill's enactment, initial determinations about such countries and about whether an individual or group is, or has been within the most recent 12 months, affiliated with, associated with, cooperating with, or an adherent to Al Qaeda, Jabhat Fateh al-Sham, or ISIL;
- review and make subsequent determinations regarding such countries, groups, or individuals every 6 months in consultation with specified congressional committees;
- brief such committees on each determination; and
- brief such committees on any other country, individual, or group that the ODNI considered but did not make a determination that the the country provided covered assistance to, or that the group or individual is affiliated with, associated with, cooperating with, or an adherent to, Al Qaeda, Jabhat Fateh al-Sham, or ISIL.

Speech of Senator Rand Paul on the Kaine-Corker Bill.

Nationally televised speech by Senator Rand Paul at the National Defense University on March 29, 2018, as printed at AmericanConservative.com, on May 7, 2018.

In the near future, Congress will debate a new Authorization for Use of Military Force (AUMF). I use the word "debate" lightly. So far, no hearings have been scheduled, and no testimony is likely to be heard unless something changes. That's a shame, because this is a serious matter, and this is a deeply flawed AUMF.

For some time now, Congress has abdicated its responsibility to declare war. The status quo is that we are at war anywhere and anytime the president says so. So Congress—in a very Congress way of doing things—has a "solution." Instead of reclaiming its constitutional authority, it instead intends to codify the unacceptable, unconstitutional status quo.

It is clear upon reading the AUMF, put forward by Senators Tim Kaine and Bob Corker, that it gives nearly unlimited power to this or any other president to be at war whenever he or she wants, with minimal justification and no prior specific authority….

The new Kaine/Corker AUMF declares war on *at least* the following places and people: the Taliban, al-Qaeda in the Arabian Peninsula, ISIS anywhere, al-Shabaab in Somalia and elsewhere, al-Qaeda in Syria, al-Nusra in Syria, the Haqqani network in Pakistan and Afghanistan, al-Qaeda in the Islamic Maghreb, in Niger, Algeria, Libya, and Nigeria, and *associated forces* (as defined by the president) around the globe.

That is simply breathtaking. Previous AUMFs have never included "associated forces"….

If this AUMF is passed, Congress will have chosen to make itself irrelevant on the issue of war. Currently, use of force without congressional authority is limited by the War Powers Act to national emergency or imminent attack. No more, under this AUMF.

Kaine/Corker would forever allow the executive unlimited latitude in determining war, and would leave Congress debating such action after forces have already been committed. Under this bill, Congress could only *disapprove* of war, turning the Constitution on its head. Even worse, any resolution of disapproval could be vetoed, meaning two thirds of Congress would need to disapprove of a war, rather than a majority to approve of one. That's a huge, unwise, and unconstitutional change.

The Founders left the power to make war in the legislature on purpose and with good reason. They recognized that the executive branch is most prone to war. The Kaine/Corker AUMF would completely abdicate Congress's power under Article I. Handing war-making power from Congress to the executive branch is not an exercise in congressional power. It is the final and full abandonment of that power. It is wrong, it is unconstitutional, and it should be stopped.

A Soldier's Dilemma, by Capt. Nathan Smith, in *The Atlantic*, April 14, 2017

In 2010, I entered the Army as an officer, solemnly swearing to "support and defend the Constitution of the United States." … I remember the awesome weight of my oath as I pledged to serve during a time of war. That oath later led me to make the most difficult decision of my life. In May of 2016, I sued President Obama for issuing an illegal order for me to engage in the battle against the Islamic State. I believe his order violates the Constitution and the 1973 War Powers Resolution, which forbids on-going warfare without the specific consent of Congress….

People have asked me many times what truly motivated my decision to launch the lawsuit. "Did you hate Obama?" It's as if whatever I say in those subsequent seconds will drive their response to my actions one way or the other as they seek to determine if I am partisan friend or foe.

The truth is that I am a largely non-partisan soldier confronting a fundamental dilemma. On the one hand, I believed that the war was illegal because Obama failed to gain the congressional consent required. On the other hand, I was a soldier, and it was possible that there were legal arguments that had escaped my attention which might justify the president's actions.

When faced with this dilemma, I turned to the only available option that allowed me to continue to serve with honor. I asked the federal judiciary to determine whether Obama's failure to gain congressional consent was indeed a violation of the War Powers Act and the Constitution. While this question was pending in the courts, I would continue to serve in Operation Inherent Resolve just as I had before….

I also believe that by taking these core issues seriously, the Court of Appeals would encourage the president and Congress to examine their obligations to the Constitution, precisely as the Founders envisioned. They might also help ordinary Americans confront their own responsibilities to preserve the Founders' vision of the republic.

List of War Powers Cases
Underlined name if soldier; italicized name if Congressmen.

Vietnam

Luftig v. McNamara	1967/pq.	DC Circuit
Velvel v. Nixon	1969/stan.	10th Circuit
Berk v. Laird	1970/pq.	2nd Circuit
Massachusetts v. Laird	1971/pq.	US Supreme Court
Orlando v. Laird	1971/pq.	2nd Circuit
Mottola v. Nixon	1972/stan.	9th Circuit
Sarnoff v. Connally	1972/pq.	9th Circuit
Dacosta v. Laird	1973/pq.	2nd Circuit
Mitchell v. Laird	1973/stan.	DC Circuit

Cambodia

Holzmann v. Schlesinger	1973/pq.	2nd Circuit
Drinan v. Nixon	1973/pq.	1st Circuit

El Salvador

Crockett v. Reagan	1983/pq.	DC Circuit; denied Cert
	(no discoverable standards)	

Nicaragua

Sanchez-Espinoza v. Reagan	1985/pq.	DC Circuit

STAN.= STANDING AS REASON FOR DISMISSAL.
PQ. = "THE POLITICAL QUESTION" as reason for dismissal.
ED = "Equitable Discretion" as reason for dismissal.

Persian Gulf

Lowry v Reagan	1988/pq., ed	DC Circuit
Dellums v. Bush.	1990/ripeness	DC Circuit
Ange v. Bush	1990/pq. and ripeness	**DC Dist**

Iraq

Mahorner v Bush	2003/stan.	DC Circuit
O'Connor v. Bush	2003/stan.	DC Circuit
Doe v. Bush	2003/ripeness	8th Circuit

Kosovo

Campbell v Clinton	2006/pq.	DC Circuit; denied Cert

Iran/Syria

Maxwell v. Bush	2006/pq.	**NH Dist**
New Jersey Peace Action	2010/stan., pq.	3rd Circuit

Libya

Kucinich v. Obama	2011/stan**.**	**DC District**
Whitney v. Obama	2012/ moot	**DC Dist**

War on ISIL

Smith v. Trump	2016/pq., stan.	DC Circuit

Pre-emptive Strike and Nuclear Weapons

Maxwell v. Trump	2017/pq., stan.	Pending,1st Circuit

No case made it to the Supreme Court (*Massachusetts v. Laird* was an original jurisdiction case but was dismissed.)