

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 06-3003

TRACKWELL, *et al*
Plaintiffs, Appellants,

v.

U.S. Government
Defendants, Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Opening Brief for the Plaintiffs-Appellants

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Table of Contents

	Pages
OPENING BRIEF FOR THE PLAINTIFFS-APPELLANTS	1
USSC Rule 22.1 Application To Justice Stephen G. Breyer.	2
Appellants’ Statement Of The Case.	3
Jurisdiction To This Court.....	5
I. Jurisdiction Straight From The Constitution.	5
II. Jurisdiction By United States Codes 28 U.S.C. §§ 1331, 1343(a)(4), 1346(a)(2), 1361, 1367(a), 1295(a)(2).....	6
III. Ancillary And Pendent Jurisdiction.....	8
IV. Jurisdiction To This Court Is Invoked By:	8
CLAIMS AGAINST THE U.S. GOVERNMENT	9
I. First Claim Against The U.S. Government.....	9
II. Second Claim Against The U.S. Government	11
III. Third Claim Against The U.S. Government.....	12
IV. Fourth Claim Against The U.S. Government	15
V. Fifth Claim Against The U.S. Government	16
VI. Sixth Claim Against The U.S. Government	18
CASE LAW.....	19
USSC FEDERAL QUESTIONS.....	28
I. First Federal Question.....	28
II. Second Federal Question	29
III. Third Federal Question	29
IV. Fourth Federal Question	30
FINAL ARGUMENT	30
Conclusion.....	32

Table of Authorities

CASES	Page(s)
<i>Allen v. Wright</i> , 468 U.S. 737, 751, 82 L.Ed. 2d 556, 104 S.Ct. 3315 (1984).....	25
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	19, 23, 24
<i>Blum v. Yaretsky</i> , 457 U.S. 991, 1001-2, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982)	2
<i>Buckley v. Valeo</i> , 424 U. S. 1, 122 (1976) (per curiam)	20
<i>Doe v. Bush</i> , 323 F.3d 133 (1st Cir. 2003)	2, 3, 6, 12, 16, 18, 21
<i>Duncan v. Kahanamoku</i> , 327 U.S. 304, 335 (1946) (Murphy, J., concurring)	27
<i>Edwards v. South Carolina</i> , 372 U.S. 229 (1963)	27
<i>Goldwater v. Carter</i> , 444 U.S. 996 (1979)	22, 23
<i>Gregg v. Barrett</i> , 248 U.S. App. D.C. 347, 771 F.2d 539 (1985)	25
<i>Humphrey v. Baker</i> , 270 U.S App. D.C. 154, 848 F.2d 211 (D.C. Cir. 1988)	25
<i>Marin v. Suter</i> , 956 F.2d 339, 340 (D.C.Cir.1992) (per curiam).....	23
<i>Massachusetts v. Laird</i> , 451 F.2d 26 (1st Cir. 1971).....	24
<i>Melcher v. Federal Open Market Committee</i> , 266 U.S. App. D.C. 397, 836 F.2d 561 (D.C. Cir. 1987)	25
<i>Milward v. McSaul</i> , D.C.S.D.N.Y. 1846, 17 Fed.Cas.No. 9,623	22
<i>Mistretta v. United States</i> , 488 U. S., at 380-382	21
<i>Moore v. United States House of Representatives</i> , 236 U.S. App. D.C. 115, 733 F.2d 946, 950 (D.C. Cir. 1984)	25
<i>New York v. United States</i> , 505 U.S. 144, 182 (1992).....	20
<i>Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.</i> , 458 U. S. 50 (1982).....	21

Continued Next Page

Table of Authorities

CASES	Page(s)
<i>Popovici v. Alger</i> , 1930, 50 S.Ct. 154, 280 U.S. 379, 74 L.Ed. 489	22
<i>States v. Robel</i> , 398 U.S. 258, 264 (1967)	27
<i>United States v. Nordic Village, Inc.</i> , 503 U.S. 30, 33-35 (1992)	27
<i>United States v. Sisson</i> , 294 F. Supp. 511 (D. Mass. 1968), appeal on other grounds dismissed, 396 U.S. 1035 (1970)	24
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464, 70 L.Ed. 2d 700, 102 S.Ct. 752 (1982).....	25
<i>Wayman v. Southard</i> , 23 U.S. (10 Wheat.) 1 (1825)	20
<i>William Marbury v. James Madison</i> , February 1803	3, 21, 28, 32
<i>Youngstown Sheet & Tube Co., et al. v. Sawyer</i> , 343 U.S. 579 (1952).....	26
 UNITED STATES CONSTITUTION	 Page(s)
U.S. Const. art. I, § 8, cl. 11.....	3, 12, 14
U.S. Const. art. II, §2, cl. 2	3, 15, 16
U.S. Const. art. III, § 1	6
U.S. Const. art. III, § 2, cl. 1	5, 8, 12, 18
U.S. Const. art. III, § 2, cl. 2	2, 5, 6, 8, 11, 12, 17, 18
U.S. Const. art. VI, §2.....	16
U.S. Const. amend. I	4, 5, 6, 7, 8, 9, 10, 11, 18, 19, 26, 27, 32
 FEDERAL STATUTES	 Page(s)
22 U.S.C. § 287.....	15
28 U.S.C. § 1251	10, 22

Continued Next Page

Table of Authorities

FEDERAL STATUTES	Page(s)
28 U.S.C. § 1291	12, 17
28 U.S.C. § 1295(a)(2).....	6, 8, 18
28 U.S.C. § 1331.....	6, 8, 18
28 U.S.C. § 1343(a)(4).....	6, 8, 18
28 U.S.C. § 1346(a)(2).....	6, 7, 8, 18
28 U.S.C. § 1361	6, 7, 8, 18, 19
28 U.S.C. § 1367(a)	7, 8, 18
28 U.S.C. § 2072(a)(b).....	18
42 U.S.C. § 1983.....	11
1948 Federal Tort Claims Act.....	27
1973 War Powers Act H. J. Res. 542.....	28, 29
107th congressional H.J. Res. 114.....	17, 29
MISCELLANEOUS	Page(s)
FRCvP 4.....	5
FRCvP 8(d)	18, 31
FRCvP 12(b)(6).....	30
Fed. R. App. P. 3(c)(3).....	1
Fed. R. App. P. 10(a)(1).....	5
Fed. R. App. P. 35(b)(1)(B)	18
Addendum II, Criteria (3)(4)(5) of the Fed. R. App. P. for the Tenth Circuit Rules	32
USSC Rule 1	22

Continued Next Page

Table of Authorities

MISCELLANEOUS	Page(s)
USSC Rule 11	12, 17
USSC Rule 17	2, 10, 30
USSC Rule 22.1	2, 4, 7, 9, 10, 11, 34
Federalist No. 51	21
Federalist No. 69	13
The Writings of James Madison 312-13 (G. Hunt ed. 1906)	14
Collected Works of Abraham Lincoln 452 (R. Basler, ed. 1953)	14
The Supreme Court; New Edition by William H. Rehnquist; Alfred A. Knopf, New York 2003	9, 33
The Words We Live By, Linda R. Monk, Copyright © 2003 Linda R. Monk and The Stonesong Press, Inc.....	10, 21
U.N. Chart., Art. 33 & 37 http://www.un.org/aboutun/charter/ ...	15, 16
http://www.cnn.com/2003/WORLD/meast/03/17/sprj.irq.main/	14
John Milton	26

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APPEALING CASE 5:04cv-4168-SAC OF THE UNITED STATES DISTRICT COURT
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OPENING BRIEF FOR THE PLAINTIFFS-APPELLANTS

Trackwell, et al¹, Appellants, seek to have this Court, uphold the Bill of Rights and allow this USSC Amendment One Original Jurisdiction² Petition by this Application to reach the USSC justices via one justice, Stephen G. Breyer, so that the USSC may jurisdictionally choose rather or not to maintain the long established precedent that only the United States Congress may declare war. USSC Exclusive Original Jurisdiction is axiomatic as one of the Claims is against the U.S. First

¹ Fed. R. App. P. 3(c)(3) states, “In a class action, whether or not the class has been certified, the notice of appeal (as filed) is sufficient if it names one person qualified to bring the appeal as representative of the class.”

² USSC ORIGINAL JURISDICTION gives the USSC cognizance to act in the first instance by U.S. Const. art. III, § 2, cl. 2 for redressing the injury within this Case that will **drastically** affect ambassadors, other public ministers and consuls.

Circuit Court Of Appeals Case 03-1266, see *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003), as the ruling sets an unconstitutional precedent that allows the Executive to Declare War without Congress, a continuing threat to the Constitution that needs redressing pursuant to USSC Case Law, see *Blum v. Yaretsky*³, 457 U.S. 991, 1001-2, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982).

USSC Rule 22.1 Application To Justice Stephen G. Breyer

This application serves as both a USSC Rule 17.3 motion for leave to file and a USSC Rule 17.3 accompanied brief in support. This application's sought relief from the USSC Clerk is for Justice Stephen G. Breyer to review this petition and accordingly add this case to the discuss list the Chief Justice maintains as any justice may add a case to that list. A bench memo summary is given below:

1. Jurisdiction by Original Jurisdiction of the USSC pursuant to U.S. Const. art. III, § 2, cl. 2. All cases affecting Ambassadors, other public Ministers and Consuls invoke USSC original jurisdiction. The March 17, 2003 non-congressional U.S. Declaration of War to Iraq, alleged unconstitutional, drastically affects Ambassadors, other public Ministers and Consuls.

³ In *Blum v. Yaretsky* the alleged threatened injury to Medicaid patients residing in a nursing home was found to be "quite realistic" in that decisions had actually been made to transfer others similarly situated, including at least one member of the plaintiff class, to a lower level of care under allegedly improper procedures. The threatened injury engendered by the application of such procedures was merely delayed and not a speculative possibility, as is in this Case 06-3003 attempting to re-establish proper constitutional procedures for Declaring War as to prevent further future harm to the United States Constitution, constitutional democracy and Popular Sovereignty.

2. The Government's precedence as set down by an Article I judge pursuant to *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) requires a USSC review and action as deemed proper for preventing further threats to constitutional procedural limits for declaring war and maintaining treaties pursuant to U.S. Const. art. I, § 8, cl. 11 and U.S. Const. art. II, § 2, cl. 2 respectively. This relief is only available by Original Jurisdiction & Judicial Review of the USSC deemed necessary by Case Law in 1803 by *Marbury v. Madison* subject only to the Article V process.
3. The merits of this case per academics of law mandates consideration by the USSC as this current unresolved problem is of such imperative public importance that it urges the USSC to have the ultimate word on what the Constitution means.
4. The Plaintiff has a strong vested interest pursuant to his U.S. Army oath for defending the Constitution. A vested interest for letting the USSC know our Constitution does not live by Article V alone as the heartbeat of the Constitution is within the USSC. Keep that heart a beating and place an honorable page in History by hearing this cry for popular sovereignty. Let America know the HONOR within this Court.

Appellants' Statement Of The Case

Statement of the Case centers on the Subject Matter Jurisdiction to this Court. The Appellant has alleged claims alleging the Executive's Declaration of War (DOW) to Iraq on March 17, 2003 was unconstitutional, that the First

Appellate Court by Case 03-1266 was in a position to prevent the alleged unconstitutional DOW and did not and the 108th Congress by the 1973 War Powers Act had an obligation to determine the constitutionality of the stated DOW within 48 hours of its announcement and did not! A burden this abecedarian of constitutional law wishes not to carry, as the Appellant has no jurisdictional authority for carrying such an overwhelming burden, the judicial injury defined! Thus, by a U.S. Army Soldier constitutional oath to defend and protect the U.S. Constitution, the Appellant has attempted to relieve the burden nine times unsuccessfully from May 30, 2003 thru July 28, 2004 by reporting this alleged constitutional breach to the USSC pursuant to the Amendment One Right to petition the U.S. Government. The later attempt was unconstitutionally rejected by the USSC Clerk with a stern warning that no more answers would be provided to future filings, thus the USSC Original Jurisdiction petition was held back from the rightful owners, the nine Honorable Justices, confirming this route exhausted despite the valid USSC Rule 22.1 application to Justice Stephen G. Breyer. Thus, the subject matter jurisdiction defined, the USSC Clerk not allowing the Appellant to petition the Government by the Bill of Rights! That subject matter jurisdiction became within the jurisdictional authority of the USDC of Kansas by jurisdictional codes presented and defended, however the USDC of Kansas abdicated the responsibility of honoring those jurisdictional codes, thus the reason for this appeal.

Jurisdiction To This Court

I. Jurisdiction Straight From The Constitution

This Court has constitutional vested powers to address the Subject Matter Jurisdiction and its in personam jurisdiction within this Case. Subject Matter Jurisdiction is the alleged violation of the Bill of Rights, specifically the Amendment One Right to petition the United States Government. That petitioning process requires completion if this right is to have substance within the Judiciary, a judge or judges reviewing the petition with jurisdictional authority to act as so shall deemed proper. Preventing a USSC Original Jurisdiction Petition against the U.S. Government from reaching a justice or justices is a violation of U.S. Const. amend. I as alleged against the USSC Clerk. In personam jurisdiction on the USSC Clerk via the U.S. Government was completed by meeting the FRCvP 4 requirement of Notice, see USDC (Dks 2-6) that is part of the record by Fed. R. App. P. 10(a)(1).

Original Jurisdiction is delegated by U.S. Const. art. III, § 2, cl. 1 and U.S. Const. art. III, § 2, cl. 2 as quoted. The USSC Original Jurisdiction of interest “arising under this Constitution” is for “all Cases affecting Ambassadors, other public Ministers and Consuls” and the “inferior Courts” Original Jurisdiction of interest “arising under this Constitution” is for cases “to Controversies to which the United States shall be a Party”. Inferior Courts to the USSC include this Court and the USDC by definition, “inferior Courts as the Congress may from time to time

ordain and establish.” see U.S. Const. art. III, § 1. The Constitution establishes jurisdiction to this Court prior to consulting the United States Codes.

II. Jurisdiction By United States Codes 28 U.S.C. §§ 1331, 1343(a)(4), 1346(a)(2), 1361, 1367(a) and 28 U.S.C. § 1295(a)(2)

28 U.S.C. § 1331 Federal question-*The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.* The Federal Question: Should the Clerk of the U.S. Supreme Court be allowed to violate Plaintiff’s U.S. Const. amend. I right to petition the Supreme Court under its original jurisdictional code, U.S. Const. art. III, § 2, cl. 2? The Plaintiff says, “NO”! emphasis added. This is a valid Federal Question since all other avenues to petition the U.S. Government alleging the Executive’s March 17, 2003 DOW to Iraq as unconstitutional are blocked by “stare decisis” pursuant to the March 18, 2003 ruling by the U.S. Court of Appeals, First Circuit, see *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003). Addressing a U.S. Const. amend. I right definitely rise under the Constitution.

28 U.S.C. § 1343 (a) (4) Civil Rights- *The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.* The specific civil rights statute or authorization by law is U.S. Const. amend. I within the Bill of Rights (the Bill of Rights is Civil Rights) proposed September 25, 1789, ratified December 15, 1791.

Ratification constitutes the Bill of Rights were enacted by Congress and the States of these United States.

28 U.S.C. § 1346 (a) (2) United States as defendant-*The district courts shall have original jurisdiction ... of any ... civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, ... or upon any express or implied contract with the United States.* This action is founded upon the Constitution, the Amendment 1 right to petition the U.S. government and does not exceed \$10,000 as no money is sought.

28 U.S.C § 1361 Action to compel an officer of the United States to perform his duty-*The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Sup.Ct. R 22.1 - An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief.* The duty of transmitting this Application to Justice Stephen Breyer is a duty owed to the Plaintiff by enforcing Supreme Court Rule 22.1. 28 U.S.C § 1361 was coded for enforcing such a duty.

The USDC failing to take jurisdiction initiated a controversy under Article III invoking further jurisdictional powers by 28 U.S.C. § 1367(a).

This Court has further jurisdiction by 28 U.S.C. § 1295(a)(2) as the jurisdiction to the USDC was based in part on section 1346 founded upon the Constitution, the Amendment One Right to petition the U.S. Government.

III. Ancillary And Pendent Jurisdiction

There are two original jurisdictional issues, one directed to the USSC and the other to the inferior Courts. The first one is, “All Cases affecting Ambassadors, other public Ministers and Consuls” to the USSC. The second one is, “to Controversies to which the United States shall be a Party” to this Court. The presented Subject Matter Jurisdiction encompasses both the USSC and the jurisdiction of this inferior Court and thus by the doctrine of ancillary and pendent jurisdiction as codified by [28 U.S.C. § 1367(a)] allow this Court to have Subject Matter Jurisdiction on all claims as raised infra against the U.S. Government.

IV. Jurisdiction To This Court Is Invoked By:

(U.S. Const. art. III, § 2, cl. 1 and U.S. Const. art. III, § 2, cl. 2)
(28 U.S.C. §§ 1331, 1343(a)(4), 1346(a)(2), 1361, 1367(a))
(28 U.S.C. §1295(a)(2))

CLAIMS AGAINST THE U.S. GOVERNMENT

I. First Claim Against The U.S. Government

The Supreme Court Clerk has violated U.S. Const. amend. I by withholding a valid Sup.Ct. Rule 22.1 application from Justice Stephen G. Breyer.

This Subject Matter Jurisdiction Claim's relief is to order the Clerk of the United States Supreme Court to transmit this Opening Brief to Stephen G. Breyer, as this Brief functions as a valid USSC Rule 22.1 application. Nine attempted Supreme Court filings and the USSC Clerk's responses have established the Subject Matter Jurisdiction. The USSC law clerk(s) should have written a "bench memo" about this Case but will not as the Plaintiff's petitions are returned immediately establishing an unconstitutional firewall around the USSC. However, there is a First Amendment One route through one justice with power to address this application pursuant to USSC Rule 22.1. "Shortly before each such conference, the Chief Justice sends out a list of the petitions he wishes to have discussed. After the Chief's discuss list has come around, each of the associate justices may request additional cases put on this list." The Supreme Court; New Edition by William H. Rehnquist; Alfred A. Knopf, New York 2003 at page 234. An individual justice has authority to grant the sought relief of Plaintiff's application, however, the USSC Clerk has to fulfill USSC Rule 22.1, but unfortunately that route is unsuccessful, and exhausted! The USSC Clerk

responses infra fails to provide any specific technical deficiencies and throws out haphazardly discretionary evaluations of USSC jurisdiction which literally means “the power to say what the law is” The Words We Live By, Linda R. Monk, Copyright © 2003 Linda R. Monk and The Stonesong Press, Inc. at page 99. The USSC Clerk does not have jurisdictional powers the last response is flaunting to a valid USSC Rule 22.1 application that does not honor the Plaintiff’s Amendment 1 right to petition the U.S. Government, **exhausted** as the last response from the USSC Clerk contained a stern warning that no more answers would be provided to future filings. Please find the USSC Clerk’s responses to Associate Justice Stephen G. Breyer’s applications below:

Letter dated February 3, 2004: Dear Mr. Trackwell: Your application addressed to Justice Breyer was received on February 3, 2004 and is herewith returned for the following reasons. Rule 22 of the Rules of this Court does not give a single Justice the authority to order the Clerk to file an action. The original jurisdiction of this Court generally extends only to cases or controversies between two or more states or between the United States and one or more states. See 28 U.S.C. 1251 and Rule 17 of the Rules of this Court. Sincerely, William K. Suter, Clerk By: s/ Cynthia Rapp (202) 479-3031.

Letter dated June 2, 2004: Dear Mr. Trackwell: Your application to an individual Justice received June 2, 2004 is herewith returned for the following reason(s): For the reasons stated in previous correspondence from this Office. Sincerely, William K. Suter, Clerk By: s/ Troy D. Cahill (202) 479-3024.

Letter dated July 29, 2004: Dear Mr. Trackwell: Your application to an individual Justice received July 28, 2004 is herewith returned for the following reason(s): For the reasons stated in correspondence from this office dated February 3, 2004, and June 2, 2004. If you continue

to resend the same papers they will not be returned to you. Sincerely,
William K. Suter, Clerk By: s/ Cynthia Rapp (202) 479-3031.

In conclusion for Claim #1: The USSC Clerk has withheld a valid USSC Rule 22.1 application from Justice Stephen G. Breyer that brings into question against the U.S. Government, 42 U.S.C. § 1983 and U.S. Const. amend. I, “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”.

II. Second Claim Against The U.S. Government

These claims affect U.S. & foreign Ambassadors, other public Ministers and Consuls invoking USSC Original Jurisdiction by U.S. Const. art. III, § 2, cl. 2.

These claims allege violations of Article I, II, & III per the U.S. government’s March 17-19, 2003 Iraq war powers precedent that drastically affected U.S. and foreign ambassadors, other public ministers and consuls. The U.S. ambassadors, other public ministers and consuls drastically affected by this alleged unconstitutional war powers precedent include president of USA, president of U.S. Senate, president pro tempore, Speaker of the U.S. House, all other members of Congress, all Middle East ambassadors, all U.S. other public ministers to the United Nations and many more U.S. public ministers throughout the world.

The foreign ambassadors, other public ministers and consuls drastically affected by this alleged unconstitutional war powers precedent above all include all

public ministers (including ambassadors & consuls) from the member countries of the United Nations Security Council and all foreign public ministers worldwide.

The U.S. Court of Appeals Case, *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003), March 18, 2003, stare decisis ruling, and 28 U.S.C. § 1291 invokes this last resort U.S. Const. art. III, § 2, cl. 2 jurisdiction to the USSC as direct review may be had by Supreme Court Rule 11 as this Case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in the USSC.

In conclusion for Claim #2: USSC jurisdiction pursuant to Article III Section 2 Clauses I & II are specified by the precise language of the Constitution as Gouverneur Morris the chief draftsman and editor of the Constitution ensured the U.S. Constitution to be as clear and obvious as our language would permit. Those discernable words of English invokes Original Jurisdiction to the USSC.

III. THIRD CLAIM AGAINST THE U.S. GOVERNMENT

The U.S. Government Executive's March 17, 2003 Iraq DOW usurped the Legislative by ceasing the U.S. Const. art. I, § 8, cl. 11 right to declare war.

The constitutional framers denied war powers to the president and further denied it to a single house of Congress. They located that power exclusively in the full Congress by U.S. Const. art. I, § 8, cl. 11. One constitutional framer, Alexander Hamilton (1755-1804), was a very strong advocate of Executive power

and our Constitution and emphasized that the president's power as Commander in Chief would be much inferior to that of the King, by The Federalist No. 69, he wrote in New York on Friday, March 14, 1788, "The president is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature."

James Madison wrote in 1793, "In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not the executive department. Beside the objection to such a mixture to heterogeneous powers, the trust and the temptation would be too great for any one man..." And again wrote, "The Constitution supposes, what the History of all Government demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature." Letter from James Madison to Thomas

Jefferson, Apr. 2, 1798, in 6 The Writings of James Madison 312-13 (G. Hunt ed. 1906).

Even Abraham Lincoln, while a Congressman, said more than half a century later “no one man should hold the power of bringing war upon us”. The Collected Works of Abraham Lincoln 452 (R. Basler, ed. 1953) (letter to William H. Herndon) (emphasis in original).

President Bush gave Iraqi President Saddam Hussein 48 hours for him and his sons to leave Iraq before military action begins "at a time of our choosing", Executively issued on March 17, 2003 at 8 p.m. EST, see <http://www.cnn.com/2003/WORLD/meast/03/17/sprj.irq.main/>. On March 18, 2003, the President submitted a letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate informing the 108th Congress after the DOW was issued. Late officially, but the night of the DOW all of America with the Congress were informed!

In conclusion for Claim #3: U.S. Const. art. I, § 8, cl. 11 relevant words are quoted, “The Congress shall have Power To declare War”. Obviously that power is not with the president, but with the Congress, thus it is alleged, emphasis added, the president usurped the Legislative by his March 17, 2003 DOW.

IV. FOURTH CLAIM AGAINST THE U.S. GOVERNMENT

The U.S. Government by the Executive's March 17, 2003 DOW to Iraq violated a U.S. Const. art. II, §2, cl. 2 expressed treaty with the United Nations.

United States of America became a member of the United Nations October 24, 1945 by the Article II treaty process as the U.S. President signed, and the U.S. Senate ratified the U.N. Charter. The December 20, 1945 United Nations' participation act and its October 10, 1949 Amendment made available to the U.N. Security Council its responsibility for maintaining international peace and security. The president pursuant to this U.S./U.N. expressed treaty requires that rights of passage is made available to the U.N. Security Council on its call for the purpose of maintaining international peace and security. A congressional statute offers further validation of this U.S./U.N. treaty arrangement pursuant to 22 U.S.C. § 287.

On March 17, 2003 the U. S. government withdrew a resolution it had presented to the Security Council seeking authorization for a war against Iraq followed by the Executive's 2003 Iraq DOW that is alleged to have violated Article 33 & 37 of the United Nations Charter by interrupting the UN process by a treaty breach. U.N.C. Article 33 states, "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other

peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.” U.N.C. Article 37 states, “Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.” See <http://www.un.org/aboutun/charter/>.

In conclusion for Claim #4: The framers intended that all expressed treaty alliances to have credibility pursuant to these quoted words from the Constitution, “This Constitution, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”, see U.S. Const. art. VI, §2. Thus, it is alleged the U.S. Government by the Executive's March 17, 2003 DOW to Iraq violated a U.S. Const. art. II, §2, cl. 2 expressed treaty with the United Nations, a supreme Law of the Land.

V. FIFTH CLAIM AGAINST THE U.S. GOVERNMENT

The U.S. Government by U.S. Court of Appeals First Circuit Case 03-1266 violated Article III and set an unconstitutional legal precedent that turned the distribution of jurisdiction, made in the Constitution, into a form without substance.

The First Circuit Case 03-1266, *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003), was appealed from a February 24, 2003 ruling out of the USDC of Massachusetts by the plaintiffs, three members of the military, six parents of U.S. troops and six members of Congress that sought an injunction to stop potential U.S. military

action on the grounds that only Congress has the right to declare war that had distinguished support from a brief by 74 concerned law professors as amici curiae, emphasis added.

The Appellate 1st Circuit Judge Lynch's March 13, 2003 ruling defined the 2002 October Military Authorization Resolution as one with narrowed limits and further explained what it would take to ripen Case 03-1266, that ruling is quoted, "The week after his September 12 (2002) speech at the United Nations, President Bush proposed language for a congressional resolution supporting the use of force against Iraq. Detailed and lengthy negotiations between and among congressional leaders and the Administration hammered out a revised and much narrower version of the resolution to evaluate this claim now ... We would need to assume that the Security Council will not authorize war, and that the President will proceed nonetheless."

Case 03-1266 came to a climax on the same day the Executive issued a DOW to Iraq, March 17, 2003, when a petition for rehearing on an emergency basis was asked for as on that date Case 03-1266 became a judicially ripened Supreme Court Original Jurisdiction justiciable case pursuant to U.S. Const. art. III, § 2, cl. 2; Sup.Ct. Rule 11; and 28 U.S.C. § 1291. The March 18, 2003 short indecipherable one paragraph ruling of dismissal did not articulate any factual or legal basis and thus violated the substantive Bill of Rights of those plaintiffs per

28 U.S.C. § 2072(a)(b) and jurisdictional procedures set down by the Constitution, statutes and the Rules of the USSC.

In conclusion for Claim #5: First Circuit Appellate Court Case 03-1266 set an alleged unconstitutional legal precedent that turned the distribution of jurisdiction, made in the Constitution, into a form without substance.

VI. SIXTH CLAIM AGAINST THE U.S. GOVERNMENT

This Court has jurisdictional powers by the Constitution pursuant to U.S. const. art. III, § 2, cl. 1 and U.S. const. art. III, § 2, cl. 2 as confirmed by 28 U.S.C. §§ 1331, 1343(a)(4), 1346(a)(2), 1361, 1367(a), 1295(a)(2).

Jurisdictional powers that strongly suggest to the Defendant that the Claims have been made and require substantive right answers pursuant to FRCvP 8(d), 28 U.S.C. § 2072(a)(b) and U.S. Const. amend. I. FRCvP Rule 8(d), “Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading.” Failure of the Defendant to **ANSWER** each claim, one by one, admits these claims of such imperative public importance are true. These claims are Federal Questions of exceptional importance that are in conflict with the authoritative decisions of the First Circuit U.S. Courts of Appeals by Case 03-1266, see *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) and Fed. R. App. P. 35(b)(1)(B).

28 U.S.C. § 2072(a)(b), “*The Supreme Court shall have power to prescribe general rules of practice and procedure and rules of evidence for cases in the*

United States district court and court of appeals. Such rules shall not abridge, enlarge or modify any substantive right.” Substantive rights are those general rights that reserves the individual basic rights that are strongly linked to the “Bill of Rights” among those, U.S. Const. amend. I that states, “Congress shall make no law prohibiting the free exercise thereof; or abridging the freedom of the right of the people to petition the Government for a redress of grievances.” This extends to all unwritten laws, i.e. Case Law, Common Law and all residual Doctrines!

28 U.S.C. § 1361, “The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” The USSC Clerk is an employee of the United States therefore this Court has jurisdictional power over this unsupervised USSC Clerk.

In conclusion for Claim #6: This Court has Subject Matter Jurisdiction on all raised Claims.

CASE LAW

By Case Law a cry for this single et al voice is made on foreign relations. In *Baker v. Carr*, 369 U.S. 186 (1962), Justice Brennan states, "There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably

committed to the executive or legislature; but many such questions uniquely demand SINGLE-VOICED STATEMENT of the Government's views."

Congress could not and therefore did not delegate to the Executive the power to declare war against Iraq in 2003 nor did congressional abdication approve of the Executive's DOW to Iraq, nor may Congress claim the fault belongs with the Executive alone as all branches have the means to resist intrusion, including the Judiciary! When blended political war powers fails to uphold the Constitution and the third branch does nothing, then the danger becomes unchecked! 524 U.S. at 452 (Kennedy, J., concurring) ("That a congressional cession of power is voluntary does not make it innocuous. . . . Abdication of responsibility is not part of the constitutional design."); cf. *New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment."). In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825) Justice Marshal noted limits on Congressional delegation, "It will not be contended that Congress can delegate... powers which are strictly and exclusively legislative." The principal function of the tripartite separation of powers is to protect individual liberty by providing a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U. S. 1, 122 (1976) (per curiam); *Mistretta v. United States*,

488 U. S., at 380-382. See *The Federalist* No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison) (separation of powers confers on each branch the means "to resist encroachments of the others"); 1 K. Davis, *Administrative Law* § 1.09, p. 68 (1958) ("The danger is not blended power[;] [t]he danger is un-checked power").

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U. S. 50 (1982) (Congress may not give away Article III "judicial" power to an Article I judge).

Why did the Article I judge for the First Circuit U.S. Court of Appeals by *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) rule on an obvious Article III USSC issue of such imperative public importance?

“If congress remains at liberty to give the (USSC) court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original, and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance...” Chief Justice Marshall; *William Marbury v. James Madison*, February 1803. “As the Court pointed out in *Marbury*, Congress has the power to change the appellate jurisdiction of the Supreme Court, but its original jurisdiction can be altered only by constitutional amendment.” *The Words We Live By*, Linda R. Monk, Copyright © 2003 Linda R. Monk and The Stonesong Press, Inc. at page 99. And what we have is an unsupervised USSC Clerk interpreting USSC Original Jurisdiction! Responding to the USSC Clerk letters, *supra* at page 7, having

Cynthia Rapp's unsupervised comments on USSC Original Jurisdiction; 28 U. S. C. § 1251 is an unauthorized redundant U.S. Code that has no application to ambassadors, public ministers, consuls or vice consuls representing the United States whereas Article III does by "to all Cases affecting Ambassadors, other public Ministers and Consuls". See *Milward v. McSaul*, D.C.S.D.N.Y. 1846, 17 Fed.Cas.No. 9,623 and State of Ohio ex rel. *Popovici v. Alger*, 1930, 50 S.Ct. 154, 280 U.S. 379, 74 L.Ed. 489.

A constitutional impasse was reached by The Executive's March 17, 2003 DOW to Iraq and the Legislative Branch did nothing, emphasis added establishing a continuing unchecked precedent threatening constitutional procedural limits for declaring war. This constitutional impasse ripens this Case! In his concurring opinion Justice Powell in *Goldwater v. Carter*, 444 U.S. 996 (1979), stated that courts should decline, on ripeness grounds, to decide "issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse."

A USSC original jurisdiction constitutional impasse was reached, and the **only USSC Rule 1 way** to inform the USSC is through the unsupervised USSC Clerk desperately needing supervision. Drawing an unsubstantiated conclusion that the USSC Clerk is supervised is objected to as it gives enormous USSC judicial power under the color of law to a hired governmental employee! Inaction is an

interference with the justices' right to know when supervision of their law clerks is required. *Marin v. Suter*, 956 F.2d 339, 340 (D.C.Cir.1992) (per curiam) (a lower court lacks subject matter jurisdiction to review any action by the Clerk of the Supreme Court, or to interfere with Supreme Court's exclusive supervisory authority over its clerk).

The UN Treaty and the Political Question are addressed. In *Goldwater v Carter*, December 13, 1979, Mr. Justice Powell, concurring opinion stated, "The present case involves neither review of the President's activities as Commander in Chief nor impermissible interference in the field of foreign affairs. Such a case would arise if we were asked to decide, for example, whether a treaty required the President to order troops into a foreign country." ... "In my view, reliance upon the political-question doctrine is inconsistent with our precedents. As set forth in the seminal case of *Baker v Carr*...(1962), the doctrine incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention? In my opinion the answer to each of these inquiries would require us to decide this case if it were ready for review". The Political Question doctrine is in force when a plenary power of one of the branches of government is questioned. For a shared power

among the political branches, such as war powers, great care must be taken to invoke it. In 1968 Judge Charles Wyzanski [*United States v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968), appeal on other grounds dismissed, 396 U.S. 1035 (1970).] confronted a Vietnam war-power question as justiciable by disregarding the “political question doctrine”. Judge Wyzanski recognized, as the Supreme Court has, that to pronounce a question "political" is itself a profound act of constitutional interpretation; justiciability and substance are "so close as often to overlap". See *Baker v. Carr*, 369 U.S. 186 (1962).

The Constitution overall "envisages the joint participation of the Congress and the Executive in determining the scale and duration of hostilities." See: *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971). Joint participation on Iraq required that the Executive and the Legislative would have honored the recognized narrowly focused October 2002 Resolution, tied by a treaty to the United Nations. That the 108th Congress would have come into session and voted to authorize the DOW constitutionally confirming such a large-scale commitment of the People's Taxes, taxation without representation all over again! And let us not forget the doctrine of *parens patriae*, that allow “We the People” to defend the Constitution with our Soldiers.

The Supreme Court has established a two-part test for determining standing under Article III of the Constitution. The plaintiff must allege: (1) that he

personally suffered actual or threatened injury, and (2) that the “injury ‘fairly can be traced to the challenged action’ and ‘is likely to be redressed by a favorable decision.” *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 70 L.Ed. 2d 700, 102 S.Ct. 752 (1982); *Allen v. Wright*, 468 U.S. 737, 751, 82 L.Ed. 2d 556, 104 S.Ct. 3315 (1984). The Plaintiff was harmed by the challenged action, the 2003 Iraq DOW, a legally-cognizable injury loss of a democratic constituent voice when Congress failed to respond to the 48-hour deadline for protecting the Congress’ right to vote on a war powers issue, the 2003 Iraq DOW of such imperative public importance entrusted to their respective chambers by the Constitution. In *Moore v. United States House of Representatives*, 236 U.S. App. D.C. 115, 733 F.2d 946, 950 (D.C. Cir. 1984), Moore pointed out explicitly that a congressional plaintiff suffers “unconstitutional deprivations of constitutional duties or rights . . . if the injuries are specific and discernible,” *Id.* at 952. See also, *Humphrey v. Baker*, 270 U.S App. D.C. 154, 848 F.2d 211 (D.C. Cir. 1988); *Melcher v. Federal Open Market Committee*, 266 U.S. App. D.C. 397, 836 F.2d 561 (D.C. Cir. 1987); *Gregg v. Barrett*, 248 U.S. App. D.C. 347, 771 F.2d 539 (1985). A favorable decision is simply the U.S. Const. amend. I right to report this constitutional breach to a USSC justice by this Application to Justice Stephen G. Breyer.

The Broad Use of Executive War Powers may be challenged, and over ruled pursuant to Case Law. *Youngstown Sheet & Tube Co., et al. v. Sawyer*, 343 U.S. 579 (1952). The Steel Seizure Case was a stinging rebuff to President Truman broad interpretations of war powers! May 12, 1952 the Supreme Court set aside five hours for oral argument to hear The Steel Seizure Case in the Supreme Court at noon on that Monday, every seat in the public section of the courtroom was filled, and the lawyer's section in front of the bar was populated on each side with attorneys for the respective parties. All the law clerks were in their "pews". The justices came on the bench, and after the announcement of the two opinions, the Court was ready to hear the arguments. Two hundred additional people were allowed into the courtroom to stand around the walls and listen to the arguments, while hundreds more waited in line outside. "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." John Milton.

The constitutional framers deemed necessary an antimajoritarian Federal Court System independent of the political branches majority rule as to keep the interpretation of the Constitution and constitutional heritage consistent and uniformed throughout the History of America that definitely includes upholding the Bill of Rights. Individual liberty is an antimajoritarian right that gives to one, several, and to Class Action millions the essential liberty of petitioning the U.S. Government by U.S. Const. amend. I. Taking that right away from one and/or

several is just the same as taking that right away from “We the People”. *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946) (Murphy, J., concurring) (quoting *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866)). As the Supreme Court noted in a different era, “‘war power’ cannot be invoked as a talismanic incantation . . . Even the war power does not remove constitutional limitations safeguarding essential liberties.” *United States v. Robel*, 398 U.S. 258, 264 (1967).

The Government’s Sovereign Immunity may not be used to counter the Bill of Rights; such a judicial thought is nonsensical. The Supreme Court has ruled that in a case involving the government's sovereign immunity the questioned U.S. Const. amend. I statute can only be “strictly construed” in favor of the sovereign. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-35 (1992). By the First Amendment, “Congress shall make no law... prohibiting the free exercise thereof; or abridging the freedom of... the right of the people...to petition the Government for a redress of grievances.” Thus, a questionable July 4, 1776 disengaged governmental doctrine of immunity from the King of England may not abridge the Bill of Rights especially when the **1948 Federal Tort Claims Act** has disposed of it! In *Edwards v. South Carolina*, 372 U.S. 229 (1963), Justice Stewart acknowledges in the opinion of the Court that the right “to petition the Government for a redress of grievances is a separate right.” Mr. Justice Stewart writes, “South Carolina infringed the petitioners’ constitutionally protected rights of free speech,

free assembly, and freedom to petition for redress of their grievances. It has long been established that these First Amendment freedoms are protected . . . ”. In *William Marbury v. James Madison*, February 1803, Chief Justice Marshall makes it clear that sovereign, absolute, and qualified immunities cannot be based on common-law and that these immunities do not exist in the United States. He said, “Is it to be contended that where the law in precise term, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country? Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law.”

USSC FEDERAL QUESTIONS

I. First Federal Question

The 1973 War Powers Act H. J. Res. 542, Section 2 (c)(1)(2)(3) states, “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 a declaration of war, specific statutory authorization or a national emergency

created by attack upon the United States, its territories or possessions, or its armed forces.” We are down to “specific statutory authorization”. *Did the statutory authorization pursuant to the 2002 H. J. Res. 114 specifically say in 5 months forget the newly elected 108th Congress, disrespect the UN Charter, and issue a non-congressional U.S. Government Declaration of War to Iraq?*

II. Second Federal Question

The 1973 War Powers Act, Section 8(d)(2) states, “Nothing in this joint resolution is intended to alter the constitutional authority of the Congress or of the President, or the provision of existing treaties; or shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.” *Why did the 2002 H. J. Res. 114 invoke the 1973 War Powers Act when its disclaimer does not allow it?*

III. Third Federal Question

The 107th congressional H.J. Res. 114 explicitly states military action will be “in accordance with the Constitution” and “consistent with the United States and other countries” which supported ongoing efforts to “strictly enforce through the United Nations Security Council all relevant Security Council resolutions”. *The 2002 H.J. Res. 114 is not a Declaration of War so why did all three Branches (the*

third Branch by an Article I Court) fail to uphold a fundamental Article I right that Congress may only Declare War severing the popular sovereignty input from millions of protestors to their newly elected 108th Congress?

IV. Fourth Federal Question

Will this Plaintiff be able to give Justice Stephen G. Breyer the Case he is seeking? “The Framers understood the need for judicial independence.

Independent judges, as my colleague Justice Ginsburg recently put it, do not act on behalf of particular persons, parties, or communities. They serve no faction or constituency, and they must strive to do what is right in each individual case, even if the case in question should find the least popular person in America opposed by the most powerful government in the world”-Justice Stephen G. Breyer, July 15, 2002. The requested Supreme Court Case will not harm no individual, will strengthen the nation and put a page in America’s History that will honor the Third Branch of Government as it has never been honored before! The constitutional framers vested USSC Original Jurisdiction to allow a justice(s) to make an extraordinary interpretation of USSC Original Jurisdiction. Let them have that constitutional privilege, as it is their exclusive right!

FINAL ARGUMENT

USSC Rule 17.2 states FRCvP to be used for USSC Original Jurisdictional Petitions thus claims per FRCvP 12(b)(6) have been raised! Evidentiary Support of

these Claims is with “We the People”. The “RELIEF” is defined by the Rules as an “Answer”. This elucidates the USSC placing FRCvP 8(d) in the Federal Rules of Civil Procedures.

This pro se was awake the whole 48 hours after the DOW sending faxes to Senators and Congressmen and cried when what was constitutionally required failed to happen, the newly elected 108th Congress coming into session for constitutionally handling the Iraqi situation but unfortunately that constitutional drama was stolen from America and is gone forever and this is when Popular Sovereignty was lost on a USSC issue of such imperative public importance. Lost in an “inferior court” conducting USSC business that drastically affected Ambassadors, other public Ministers, and Consuls.

We have serious issues that deserve a team of topnotch USSC constitutional attorneys with an in depth paralegal research staff to ensure these pure federal questions of law are answered regardless if they arose *by a 48-hour birth within all three branches of government*. If these complex claims that are “USSC pure questions of law” are not thoroughly dealt with by those who have jurisdiction to do so, then what would be immortalized in the history books of America is that it is OK that the political branches disregard the Constitution at will in defiance to USSC Original Jurisdiction. The time is at hand to do your duty with the safest weapon of all, your precious judicial independence! The framers gave you a

lifetime post, wonderful benefits and the greatest job on this planet “just” for such an occasion as this one! *Marbury v. Madison* made you a genuinely coequal branch of this government and for this Case, “We the People’s” Case, it is manifestly clear that this Court should consider the means for these issues to be properly heard in the interests of justice. See Addendum II, Plan For Appointment Of Counsel, In Special Civil Appeals, Criteria (3)(4)(5) of the Federal Rules Of Appellate Procedure & Tenth Circuit Rules.

Oral Arguments? YES to Oral Arguments! In memory, “Probably the most important catalyst for generating further thought was the oral argument of a case / there may be an extremely rare case, which because of both its importance and its complexity requires more than an hour for oral argument, but in such cases the Court is generally willing to grant additional time. The USSC does not generally review evidentiary matters, and so the only questions before us in a given case are **pure questions of law.**” The Supreme Court; New Edition by William H. Rehnquist; Alfred A. Knopf, New York 2003 at pages 241 / 242.

Conclusion

Individual liberty is an antimajoritarian right that gives to one, several, and to Class Action millions the essential liberty of petitioning the U.S. Government by U.S. Const. amend. I. Taking that right away from one and/or several is taking that right away from “We the People”. There are no defined punishments for the

Legislature allowing the Executive to intrude on its war powers and if there were, the whole 108th Congress would be punished. Those prudential concerns are with the USSC and nowhere else. However, the U.S. Const. amend. I right for this U.S. soldier and the People to report this obvious USSC constitutional breach is an inalienable right. What is suggested? Dispose of each and everyone of the 108th Congress asking them, where were you when the Executive intruded on your exclusive war powers, the Right to Declare War? All of that is within this USSC request to provide *such other and further relief, as the USSC shall deem proper!*

The People's USSC Case will remove the unconstitutional war power precedent set in an Article I court, will not harm any individual, and would put a page in America's history honoring the Third Branch of Government as it has never been honored before! The constitutional framers vested USSC Original Jurisdiction for such an occasion as this to allow the justices to make an extraordinary interpretation of USSC Original Jurisdiction, as it is their exclusive right and certainly not with a hired governmental employee!

WHEREFORE: the USSC Clerk should be ordered to deliver this Application to Justice Stephen G. Breyer pursuant to USSC Rule 22.1.

Respectfully submitted.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation under Rule 32(a)(7)(B). The word processing program used was Microsoft Word 2000 (9.0.6925 SP-3). There are 9,113 words of proportional type in this brief as counted by Microsoft Word Tools.

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury under the laws of the United States of America that he is a natural born U.S. citizen and the Plaintiff/Appellant in the above action and has read that action and states that the information contained therein is true and correct.

PROOF OF SERVICE

I hereby certify that I have sent by Federal Express a true copy of the above and foregoing from Doha, Qatar on or before the 14th day of February 2006 to:

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