

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

NO.: 03-CV-39

DONALD SULLIVAN, LTC; JEFFREY  
S. SULLIVAN, SP4

plaintiff

v.

UNITED STATES OF AMERICA,  
GEORGE W. BUSH, Honorable;  
JOEL HEFLEY, Honorable;  
Chairman, House Committee on  
Official Conduct; HENRY HYDE,  
Honorable, Chairman, House  
Committee on International  
Affairs; JOHN BARCO, Chief-  
of-Staff, House Committee on  
Official Conduct; 535 JOHN  
DOES

defendant

Wilmington, North Carolina  
March 21, 2003

MOTION FOR TEMPORARY RESTRAINING ORDER  
HEARING BEFORE THE HONORABLE JAMES C. FOX  
SENIOR UNITED STATES DISTRICT COURT JUDGE

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dictation.

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P R O C E E D I N G S

1:55 P.M.

1  
2           **THE COURT:**                   GOOD MORNING, EVERYONE.   PLEASE  
3 BE SEATED.

4           COLONEL, I'D LIKE TO SEE YOU AND COUNSEL AT THE BENCH,  
5 PLEASE. I'D LIKE TO SEE YOU UP HERE JUST A SECOND.

6           (BENCH CONFERENCE OFF THE RECORD.)

7           **THE COURT:**                   ALL RIGHT, COLONEL, IT'S YOUR  
8 MOTION, I'LL BE GLAD TO HEAR FROM YOU.

9           **MR. SULLIVAN:**               YOUR HONOR, I'LL BE BRIEF. MY  
10 NAME IS DONALD SULLIVAN. I'M ONE OF THE PLAINTIFFS IN THIS  
11 MATTER. AND I HOPE YOU'VE HAD AN OPPORTUNITY TO READ MY  
12 COMPLAINT.

13           **THE COURT:**                   WELL, I CAN ASSURE YOU I'VE READ  
14 YOUR COMPLAINT, ALL THE EXHIBITS AND YOUR REPLIES AND YOUR  
15 RESPONSES.

16           **MR. SULLIVAN:**               OKAY. THANK YOU, YOUR HONOR.  
17 UNFORTUNATELY, THE CO-PLAINTIFF IS NOT HERE TODAY. I DON'T KNOW  
18 WHERE HE IS. I CAN'T CONTACT HIM. HE'S BEEN MOVED. SO, WHERE  
19 HE IS IS UP TO THE PRESIDENT, I GUESS. SO, IF YOU WILL JUST  
20 BEAR WITH ME IN HIS ABSENCE.

21           I WOULD LIKE TO SAY THAT MANY YEARS AGO, I TOOK AN  
22 OATH TO SUPPORT AND DEFEND THE CONSTITUTION AGAINST ALL ENEMIES  
23 FOREIGN AND DOMESTIC, AND FOR MANY YEARS I OBEYED THE ORDERS OF  
24 THOSE ~~IN~~ PLACED IN POSITIONS ABOVE ME WITHOUT QUESTION. AND  
25 HAVING GROWN UP IN THE VIETNAM ERA AND BEEN IN THE ARMY IN THE

1 VIETNAM ERA, THERE WERE QUESTIONS, BUT I DIDN'T ASK THOSE  
2 QUESTIONS. ~~AND~~ AS I GREW OLDER, OLD AGE BEING <sup>THE</sup> CURE FOR  
3 IGNORANCE, I BEGAN TO QUESTION THINGS. AND WHEN THIS IRAQ  
4 MATTER CAME UP, I DECIDED I WOULDN'T GET INVOLVED IN THAT, NOT  
5 MY BUSINESS, AND I WAS JUST NOT -- I'M PAST THAT. ~~AND~~ THEN MY  
6 NEPHEW GOT ACTIVATED, AND AT THAT TIME IT SEEMED LIKE IMMINENT  
7 DEPLOYMENT, AND HE MAY BE THERE NOW. AS I SAID, I DON'T KNOW  
8 WHERE HE IS. ~~AND~~ I DECIDED THAT IT WAS TIME TO ASK THE  
9 QUESTIONS.

10 AND SO, I TALKED TO THE GOVERNOR; TALKED TO THE  
11 COMMANDER OF THE NATIONAL GUARD OF NORTH CAROLINA; WROTE  
12 LETTERS, ~~AND~~ AS YOU SAW IN THE EXHIBITS, TO THE CONGRESS ASKING  
13 HOW WE CAN DO THIS OVER AND OVER AND OVER WITHOUT SOMEONE  
14 STANDING UP AND STRAIGHTENING THINGS OUT. ~~AND~~ AFTER THE PHONE  
15 CALLS AND THE LETTERS AND NO RESPONSE, NOT EVEN RETURN PHONE  
16 CALLS IN SOME CASES FROM THE CONGRESSIONAL COMMITTEES, ~~AND~~  
17 BECAUSE OF THE URGENCY OF THE CASE BEFORE THE COURT, I WENT  
18 AHEAD AND PUT THE DOCUMENTS TOGETHER AND FILED THE CASE.

19 THAT HAVING BEEN SAID, I WILL SAY THAT I BELIEVE THE  
20 CASE STATES SUFFICIENT SUPPORT FOR A PRIMA FACIE CASE FOR A  
21 RESTRAINING ORDER OR AT LEAST A STAY OF FURTHER HOSTILITIES. WE  
22 CAN FILE BRIEFS IN SUPPORT, WHICH I DON'T REALLY THINK ARE  
23 NECESSARY. THE EVIDENCE IS ALL VERY CLEAR. UNTIL THE CONGRESS  
24 CAN MEET AND ISSUE A DECLARATION OF WAR TO THE PRESIDENT,  
25 PLAINTIFFS STAND BY THEIR COMPLAINT. THE PLAINTIFFS ALSO PRAY

1 THIS HONORABLE COURT DENY THE DEFENDANT'S MOTION TO DISMISS THIS  
2 MATTER, AND IN THE ABSENCE OF A T.R.O., AT LEAST WE WILL THEN BE  
3 ABLE TO HAVE IT HEARD BEFORE A COURT AND A FINAL DECISION  
4 RENDERED <sup>to</sup> AND REQUIRE THE FEDERAL GOVERNMENT TO AGAIN OBEY THE  
5 TENETS OF THE CONSTITUTION.

6 FURTHER I HAVE NOTHING, YOUR HONOR.

7 THE COURT: WELL, I THINK YOU RAISE SERIOUS  
8 ISSUES OF THE WAR POWERS CLAUSE OF THE CONSTITUTION. IT HAS  
9 BEEN A SOURCE OF A GREAT DEAL OF DISCUSSION FROM TIME TO TIME.  
10 I'M FRANK TO SAY THAT IF I WERE TO GRANT YOUR TEMPORARY  
11 RESTRAINING ORDER I'M NOT FOR SURE HOW I WOULD ENFORCE IT, NOR  
12 WOULD I REALLY HAVE ANY -- ONE OF THE PROBLEMS OBVIOUSLY IS THAT  
13 JUST AS THERE ARE A GREAT MANY PROBLEMS THAT WOULD HAVE TO BE  
14 RESOLVED, POLICY ISSUES AND OTHERS BEFORE HOSTILITIES ARE  
15 COMMENCED, I'M QUITE SURE THAT THERE ARE SIMILARLY A GREAT  
16 NUMBER <sup>with</sup> OF HOSTILITIES HAVING COMMENCED THAT I DON'T KNOW HOW THE  
17 COURT WOULD SUPERVISE THEIR TERMINATION IN ANY WAY, SHAPE OR  
18 FORM THAT WOULD INVOLVE -- THAT WOULD CERTAINLY INVOLVE POLICY  
19 DECISIONS. AND ONE OF THE ISSUES THAT -- I HAD ORIGINALLY SET  
20 YOUR CASE I THINK FOR THIS MORNING SOMETIME. WE TRIED TO REACH  
21 IT AS QUICKLY AS POSSIBLE, HAVING HAD THE CHANCE TO READ YOUR  
22 MATERIAL AND NOW THE GOVERNMENT'S RESPONSE AND YOUR REPLY.

23 MR. SULLIVAN: I APPRECIATE THAT SENSE OF  
24 URGENCY, SIR.

25 THE COURT: WELL, MR. LEPORE, I'LL BE GLAD TO

1 HEAR WHAT YOU HAVE TO SAY FOR THE GOVERNMENT. I'VE READ YOUR  
2 BRIEF, AND I'LL BE GLAD TO HEAR ANYTHING YOU HAVE TO SAY IN ORAL  
3 ARGUMENT.

4 MR. LEPORE: MAY IT PLEASE THE COURT, YOUR  
5 HONOR. MY NAME IS MATTHEW LEPORE AND I'M HERE FOR THE PRESIDENT  
6 OF THE UNITED STATES AND NAMED MEMBERS OF CONGRESS.

7 AND, JUDGE, WHAT YOU'RE BEING ASKED TO DO TODAY, AS  
8 YOU'RE AWARE, HAS NEVER, EVER BEEN DONE IN THE HISTORY OF THIS  
9 NATION.

10 THE COURT: WELL, THERE'S A LOT OF THINGS THAT  
11 HAVEN'T BEEN DONE IN THE HISTORY OF THIS NATION. COURTS ARE  
12 CALLED UPON TO DO THINGS THAT HAVE NEVER BEEN DONE BEFORE  
13 CONSTANTLY. THAT'S REALLY A MEANINGLESS ARGUMENT AS FAR AS I'M  
14 CONCERNED. THE RATIONALE AS TO WHY I SHOULD OR SHOULD NOT DO  
15 SOMETHING IS WHAT'S IMPORTANT.

16 MR. LEPORE: OKAY, JUDGE, THEN I'LL GET RIGHT  
17 INTO THE POLITICAL QUESTION ISSUE. IN THE THREE CASES THAT  
18 RECENTLY HAVE DECIDED THIS VERY ISSUE WITH RESPECT TO THIS  
19 CURRENT CRISIS, I DIRECT YOUR HONOR TO *DOE V. BUSH* --

20 THE COURT: I'VE READ THAT.

21 MR. LEPORE: OKAY. THE POLITICAL QUESTION  
22 DOCTRINE, JUDGE, COUNSELS COURTS NOT TO GET INVOLVED IN ISSUES  
23 THAT ARE RELEGATED TO THE POLITICAL BRANCHES: THE EXECUTIVE  
24 BRANCH AND THE LEGISLATIVE BRANCH. AND IF THERE IS ONE ISSUE  
25 THAT ROUTINELY IS FOUND TO BE A POLITICAL QUESTION, IN THE

1 FOURTH CIRCUIT AND CIRCUITS AROUND THE COUNTRY, IT IS THAT  
2 INVOLVING WAR POWERS.

3           **THE COURT:**                   WELL, LET ME SAY THIS: THE COLONEL  
4 MAKES A POINT HE'S NOT TRYING TO SAY WHETHER OR NOT WE SHOULD OR  
5 SHOULD NOT GO TO WAR. HIS ISSUE IS WHETHER OR NOT -- THE POLICY  
6 OF WHETHER TO GO TO WAR OR NOT IS NOT THE ISSUE HE RAISES. THE  
7 ISSUE THAT HE RAISES IS WHETHER OR NOT CONGRESS IS REQUIRED TO  
8 ACT, PURSUANT TO ITS WAR POWERS CONFERRED UPON IT, PRIOR TO THE  
9 EXECUTIVE ACTING.

10           I MEAN, I DON'T PERCEIVE US TO BE ARGUING THE MERITS  
11 OR LACK OF MERITS TO THE CURRENT CONFLICT. IT'S STRICTLY A  
12 QUESTION OF THE PROCEDURAL POSTURE OF THE GOVERNMENT AS TO  
13 WHETHER OR NOT WHAT IT SHOULD OR SHOULD NOT HAVE DONE IN THIS  
14 CASE.

15           I THINK THE POLITICAL QUESTION ISSUE MAKES ITSELF MORE  
16 -- PERHAPS MORE APPARENT IF YOU PUT THE FACTUAL ISSUE IN  
17 REVERSE. FOR EXAMPLE, IF CONGRESS HAD DECLARED WAR, AND ONLY  
18 THE PRESIDENT COULD MAKE WAR, AND SUPPOSE HE REFUSED TO DO IT,  
19 THEN WHAT WOULD THE COURT DO? IF THE COURT WENT IN AND ORDERED  
20 HIM TO MAKE WAR AND THEN SUPERVISED ITS ORDER, IT WOULD HAVE  
21 EFFECTIVELY USURPED THE ENTIRE EXECUTIVE BRANCH. BY THE SAME  
22 TOKEN, IF THE COUNTRY WAS TO ENGAGE IN HOSTILITIES WITHOUT ITS  
23 BEING THRUST UPON IT, FOR EXAMPLE, THE ATTACK ON PEARL HARBOR OR  
24 WHATEVER, THE PRESIDENT MIGHT GO TO THE CONGRESS AND SAY, "HOW  
25 ABOUT DECLARING WAR?" AND THE CONGRESS MIGHT SAY, "NO, WE'RE NOT

1 GOING TO DO IT." AND IF THE COURT ORDERED THE CONGRESS TO  
2 DECLARE WAR, WELL, OBVIOUSLY, IT WOULD HAVE USURPED THE ENTIRE  
3 LEGISLATIVE BRANCH.

4 I MEAN, IF YOU PUT THE ISSUE IN REVERSE, I THINK IT  
5 BECOMES PRETTY APPARENT THAT THE COURT COULD NOT RESPOND TO  
6 EITHER OF THOSE SCENARIOS WITHOUT, IN FACT, TOTALLY IGNORING THE  
7 SEPARATION OF POWERS. BUT THAT'S JUST SOMETHING THAT OCCURRED  
8 TO ME. IT HAS NO BEARING IN THIS PARTICULAR INSTANCE. HOWEVER,  
9 I THINK IT DOES RAISE ISSUES OF, OR PUT MORE IN FOCUS, PERHAPS,  
10 THE POLITICAL QUESTION ASPECT THAT YOU'VE RAISED.

11 BUT GO AHEAD, I DIDN'T MEAN TO INTERRUPT YOU.

12 **MR. LEPORE:** NO, THAT'S OKAY, YOUR HONOR. AND  
13 THE ISSUES YOU JUST RAISED WITH RESPECT TO HOW CONGRESS WOULD  
14 RATIFY OR APPROVE A PRESIDENTIAL DECISION OR HOW THE PRESIDENT  
15 WOULD RESPOND TO A CONGRESSIONAL DECISION ARE EXACTLY THE TYPE  
16 OF POLITICAL QUESTIONS THAT WE ARE SAYING, THE PARTICULAR ISSUE  
17 BEFORE THE COURT, WHETHER OR NOT THE PRESIDENT'S ACTIONS WITH  
18 RESPECT TO THE CURRENT CRISIS ARE UNCONSTITUTIONAL, AND THOSE  
19 ARE THE POLITICAL QUESTIONS. AND AS YOUR HONOR JUST SAID, THOSE  
20 ARE THE ISSUES THAT WOULD BE USURPING THE LEGISLATIVE AND THE  
21 EXECUTIVE POWER, AND THAT'S WHY WE FEEL THAT THIS PARTICULAR  
22 CASE EPITOMIZES THE POLITICAL QUESTION DOCTRINE AS SET FORTH BY  
23 TIFFANY AND THE SUPREME COURT IN *GILLIGAN*.

24 **THE COURT:** WELL, IT WOULD BE YOUR VIEW, I  
25 PRESUME, THAT THE RECOURSE THAT THE CITIZENRY HAS IS THROUGH THE



1 POLITICAL PROCESS.

2           **MR. LEPORE:**           THAT'S PRECISELY THE RECOURSE IN  
3 THESE TYPES OF CASES, THE POLITICAL PROCESS. AND IN THIS CASE,  
4 YOUR HONOR, THE CONGRESS HAS SPOKEN CLEARLY ON THIS PARTICULAR  
5 ISSUE IN OCTOBER OF 2002 WITH A RESOLUTION. AND IN FACT, JUST  
6 TODAY, AND I DIDN'T GET TO PUT THESE IN THE BRIEF BECAUSE THEY  
7 WERE JUST LITERALLY LAST NIGHT AND TODAY, CONGRESS -- BOTH  
8 CONGRESS AND THE SENATE HAVE AGAIN SPOKEN SUPPORTING THE  
9 PRESIDENT'S USE OF FORCE WITH RESPECT TO THE CONSTITUTION. SO,  
10 ALL OF THE POLITICAL BRANCHES ARE IN UNISON HERE, AND THIS ISSUE  
11 IS RESOLVED.

12           **THE COURT:**           WELL, I TEND TO AGREE CONGRESS  
13 CERTAINLY IMPLICITLY HAS DECLARED WAR, IMPLICITLY IN THE SENSE  
14 THAT THEY HAVE LONG ARGUED FOR AND SUPPORTED AN AGGRESSIVE  
15 RESPONSE TOWARDS IRAQ AND ITS POLICIES SINCE THE 1991 CONFLICT.

16           WAS IT '91?

17           **MR. LEPORE:**           YES, SIR, THAT'S TRUE.

18           **THE COURT:**           AND ITS NO FLY ZONE, ET CETERA,  
19 AND I THINK YOU CAN MAKE AN ARGUMENT THAT CONGRESS IMPLICITLY  
20 HAS DECLARED WAR.

21           BUT ONE OF THE PROBLEMS THAT FRANKLY EVOLVES FROM THE  
22 POLITICAL PROCESS IS THE FACT THAT PEOPLE ENGAGED IN POLITICS  
23 SELDOM WANT TO BE FORCED TO MAKE A STAND, OR STAND AND BE  
24 COUNTED. WE FIND AS THE JUDICIARY, NOT INFREQUENTLY CONGRESS  
25 ENACTS VAGUE LEGISLATION WHICH COMPELS THE COURTS TO CONSTRUE

1 IT, AND THEN THE COURTS WHO CONSTRUE HAVE BEEN ACCUSED OF  
2 JUDICIAL ACTIVISM WHEN THEY'VE BEEN FORCED INTO THAT SITUATION  
3 BY NONE OTHER THAN THEIR ACCUSER. AND TO SOME EXTENT I THINK,  
4 YOU KNOW, YOU CAN ARGUE THAT THE CONGRESS OWES IT TO THE  
5 AMERICAN PUBLIC TO BELLY UP TO THE BAR, SO TO SPEAK, AND DECLARE  
6 WAR IF THEY'RE REALLY GOING TO ENGAGE IN HOSTILITIES.

7 NOW, SOMETHING THERE HAS PUZZLED ME A LITTLE BIT --  
8 AND AGAIN, I'M JUST TALKING OUT LOUD FOR THE PURPOSES OF OUR  
9 DISCUSSION HERE -- TWO ASPECTS: ONE, I THINK THAT WE WOULD ALL  
10 AGREE THAT IF SOMEONE ATTACKED THIS COUNTRY, THE EXECUTIVE  
11 SHOULD BE PREPARED TO ENGAGE IN HOSTILITIES TO THE UTMOST FORCE,  
12 WITHOUT A DECLARATION OF WAR. WOULD YOU AGREE WITH THAT,  
13 COLONEL?

14 MR. SULLIVAN: (NO RESPONSE)

15 THE COURT: WELL, LET ME PUT IT THIS WAY: DO  
16 YOU THINK WE SHOULD HAVE SHOT BACK AT PEARL HARBOR OR NOT?

17 MR. SULLIVAN: SIR?

18 THE COURT: DO YOU THINK THEY SHOULD HAVE SHOT  
19 BACK AT PEARL HARBOR OR NOT?

20 MR. SULLIVAN: ANY TIME WE'RE ATTACKED, WE CAN  
21 DEFEND OURSELVES, YES, SIR.

22 THE COURT: YES, SIR, I CERTAINLY AGREE WITH  
23 THAT.

24 MR. SULLIVAN: WE CAN GET THE ACT OF WAR NEXT  
25 WEEK, BUT THE ACT OF WAR HAS TO BE IMPLEMENTED FOR THE PRESIDENT

1 TO BE COMMANDER IN CHIEF. FOR HIM TO TAKE AWESOME CONTROL --

2 **THE COURT:** EXCUSE ME. I DON'T THINK THAT  
3 THAT'S CORRECT. HE'S THE COMMANDER IN CHIEF. IT'S ONLY WHEN  
4 THE MILITIA ARE CALLED UP THAT HE BECOMES THE COMMANDER IN CHIEF  
5 OF THE MILITIA. BUT HE'S THE COMMANDER IN CHIEF OF THE UNITED  
6 STATES ARMY AND NAVY AND OTHER ARMED FORCES AT ALL TIMES.

7 MR. LEPORE, YOU HAVE ANYTHING FURTHER YOU WANT TO ADD  
8 ON THIS ISSUE?

9 **MR. LEPORE:** YES, SIR, I WAS GOING TO ADD WHAT  
10 YOU JUST SAID, THE PRESIDENT IS ALWAYS COMMANDER IN CHIEF AND  
11 HAS COMMANDER IN CHIEF EXECUTIVE POWERS, WHICH ARE NOT LIMITED  
12 LIKE CONGRESS'S ARE, IN THE CONSTITUTION. AND THE OTHER I THINK  
13 REAL IMPORTANT DISTINCTION ON THIS DECLARATION OF WAR DISCUSSION  
14 THAT WE'RE HAVING NOW IS THE DIFFERENCE -- AND YOUR HONOR SAID  
15 THIS EARLIER -- BETWEEN DECLARING WAR AND ENGAGING OR MAKING  
16 WAR. AND THROUGHOUT AN ENTIRE HISTORY OF THIS COUNTRY,  
17 PRESIDENTS OVER A HUNDRED TIMES HAVE ENGAGED IN WAR WITHOUT  
18 CONGRESSIONAL DECLARATION OF WAR. IN FACT ONLY FIVE TIMES --

19 **THE COURT:** WELL, I THINK THE COLONEL'S POINT  
20 THERE IS 40 WRONGS DON'T MAKE A RIGHT.

21 **MR. LEPORE:** WELL, I MEAN, THE SUPREME COURT  
22 HAS SAID THAT IF YOU LOOK AT THE HISTORY OF THE BRANCHES, THAT  
23 IS VERY ILLUSTRATIVE AS TO HOW THE CONSTITUTION SHOULD BE  
24 INTERPRETED. AND ON THIS PARTICULAR ISSUE AGAIN, FORMAL --  
25 WELL, NO COURT HAS EVER HELD -- AGAIN, I KNOW YOU DON'T LIKE

1 THIS ARGUMENT -- BUT NO COURT HAS EVER HELD THAT THE POWER TO  
2 DECLARE WAR EQUALS THE POWER TO ENGAGE IN WAR. AND THEY ARE  
3 VERY DISTINCT.

4           **THE COURT:**                   WELL, I QUITE AGREE WITH YOU ON  
5 THAT.

6           **MR. LEPORE:**                AND I MEAN, *MASSACHUSETTS V.*  
7 *LAIRD*, THE FIRST CIRCUIT CASE ON THIS ISSUE SAID IT GREAT, AND I  
8 QUOTE IT, AND I CAN READ IT FOR YOU. IT SAID, "CONGRESS DID NOT  
9 RECEIVE THE POWER TO MAKE WAR. THE CONGRESS WAS GIVEN THE POWER  
10 TO DECLARE WAR AND NOTHING WAS SAID ABOUT UNDECLARED  
11 HOSTILITIES. THE DRAFTERS OF THE CONSTITUTION, WHO WERE NOT  
12 INEPT, DID NOT SAY 'POWER TO COMMENCE WAR,' NOR DID THEY SAY 'NO  
13 WAR SHALL BE ENGAGED IN WITHOUT A DECLARATION BY CONGRESS.'" "

14           IT IS A SHARED RESPONSIBILITY BETWEEN THE POWERS, AND  
15 IN THIS PARTICULAR CASE, THEY ARE SHARING THOSE DUTIES PERFECTLY  
16 AND THEY ARE IN ABSOLUTE ACCORD ON THIS ISSUE.

17           **THE COURT:**                   WELL, I COULDN'T AGREE WITH YOU  
18 MORE THAT THE WAR POWERS ARE GIVEN TO THE LEGISLATIVE AND  
19 EXECUTIVE BRANCHES. THE JUDICIARY HAS NO WAR POWERS CONFERRED  
20 UPON IT BY THE CONSTITUTION, WHEREAS THE OTHERS EXPLICITLY DO.

21           THERE IS ONE OTHER ASPECT ABOUT THIS THAT WE TOUCHED  
22 UPON BRIEFLY, AND THAT IS THE EFFECT OF THE CONFLICT ITSELF AND  
23 THE FACT THAT IT IS NO LONGER INCHOATE. THAT IS TO SAY, AND  
24 I'LL USE THIS ANALOGY, IF MY WONDERFUL LABRADOR DOG GETS IN A  
25 SCRAP WITH A 'COON AND I MAY NOT WANT IT TO SCRAP, I MAY ORDER

1 IT NOT TO FIGHT AND TRY TO CALL HER OFF, BUT ONCE IN, SHE'S  
2 THERE; SHE'S GOT NO WAY TO GET OUT. ONCE SHE GETS THERE -- I  
3 MEAN, IN A SENSE, WE CAN ORDER THE PRESIDENT TO STOP THE WAR  
4 TOMORROW, BUT I DON'T KNOW WHETHER MR. HUSSEIN WOULD CONSIDER  
5 HIMSELF BOUND BY ANY OF OUR ORDERS. I MEAN, I THINK THAT THERE  
6 IS A PROBLEM THERE THAT HASN'T BEEN, AS FAR AS I KNOW, ADDRESSED  
7 IN ANY PARTICULAR -- AT ALL IN ANY OF THE WAR POWERS CASE, CASES  
8 THAT I'VE READ. AND THAT IS, ONCE IN -- WITHOUT REGARD TO HOW  
9 WE GOT THERE -- ONCE IN, IT'S NOT AS THOUGH YOU'VE GOT --  
10 THERE'S NO BRANCH OF THIS GOVERNMENT THAT YOU CAN COMPEL THE  
11 EXTRACTION FROM. IT TAKES TWO TO BRING THOSE HOSTILITIES TO AN  
12 END.

13 I'M QUITE CONFIDENT, AND I SAY THIS SINCERELY,  
14 COLONEL, THAT YOU WOULDN'T HAVE US JUST THROW DOWN OUR ARMS AND  
15 WALK AWAY FROM THE BATTLEFIELD OVER THERE. THAT WOULDN'T BE  
16 VERY SMART. WE COULDN'T DO THAT.

17 IN OTHER WORDS, WE HAVE A QUESTION HERE OF REALLY  
18 WHETHER OR NOT THERE IS ANY JUDICIAL REMEDY. I MEAN, IT MAY BE  
19 AN ISSUE THAT IS A GENUINE ONE. I'M NOT BELITTLING YOUR  
20 ARGUMENT IN THE SLIGHTEST, COLONEL. I THINK THAT YOU'VE RAISED  
21 A GENUINE ISSUE THAT I THINK HAS TROUBLED A GREAT MANY PEOPLE  
22 FOR A LONG PERIOD OF TIME.

23 **MR. LEPORE:** WELL, I COULDN'T AGREE MORE WITH  
24 RESPECT TO THE LACK OF JUDICIAL REMEDY, JUDGE, AND I THINK THAT  
25 RIGHT NOW YOU'RE DISCUSSING THE MOOTNESS DOCTRINE. WE DIDN'T

1 RAISE THE MOOTNESS DOCTRINE BECAUSE HE IS ALSO MAKING THE CLAIM  
2 TO STOP THE ONGOING WAR. AND WE CERTAINLY AGREE THAT ANY  
3 ATTEMPT TO NOW STOP -- PREVENT A WAR IS MOOT; IT'S A MOOT ISSUE.  
4 BUT TO STOP THE ONGOING WAR, WE DIDN'T PARTICULARLY RAISE THAT.  
5 AND WE WOULD SAY THAT UNDER ANY JUSTICIABILITY DOCTRINE, YOU  
6 COME BACK TO THE SAME AREA, WHICH IS THAT THIS TYPE OF ISSUE,  
7 WHETHER TO STOP AN ONGOING WAR, AS A POLITICAL QUESTION IS NOT  
8 JUSTICIABLE UNDER THE STANDING DOCTRINE, THE MOOTNESS DOCTRINE,  
9 AND THE POLITICAL QUESTION DOCTRINE PRIMARILY.

10           **THE COURT:**           WELL, AS FAR AS THE TEMPORARY  
11 RESTRAINING ORDER OR AN INJUNCTION IS CONCERNED, GENERALLY --  
12 AND I DON'T MEAN TO BE FACETIOUS IN BRINGING THIS UP, BUT IN THE  
13 NORMAL CONTEXT OF AN INJUNCTION YOU REQUIRE A BOND TO PROTECT  
14 THE OPPOSING PARTY. IF THE PERSON WHO GETS THE INJUNCTION, IF  
15 HE ASKS FOR IT AND GETS IT, YOU REQUIRE HIM TO POST A BOND TO  
16 PROTECT THE OTHER PARTY. THAT OBVIOUSLY WOULD BE IMPOSSIBLE IN  
17 THIS PARTICULAR CASE. THAT WHOLE CONCEPT HAS NO BEARING ON THE  
18 ISSUE.

19           IN OTHER WORDS, THE GOVERNMENT, IN A VERY REAL SENSE,  
20 COULD NEVER BE MADE WHOLE, WHEREAS I PRESUME INDIVIDUALS COULD  
21 BE MADE WHOLE INSOFAR AS OUR CONCEPTS OF DAMAGES ARE APPLICABLE.  
22 I WOULD BE THE FIRST TO ENTIRELY AGREE THAT, FOR EXAMPLE, IF  
23 YOUR NEPHEW -- IS IT YOUR NEPHEW, COLONEL?

24           **MR. SULLIVAN:**           YES, SIR.

25           **THE COURT:**           IF HE WERE TO BE BADLY INJURED OR,

1 GOD FORBID, KILLED IN ACTION, UNDER OUR PERSONAL INJURY AND  
2 WRONGFUL DEATH STATUTES, ET CETERA, THE REMEDY AS FAR AS DAMAGES  
3 IS CONCERNED IS ALWAYS MONEY, WHICH IS CERTAINLY IMPRECISE.  
4 THERE'S NO WAY TO PLACE A VALUE ON THOSE THINGS, AND YET, ON THE  
5 OTHER HAND, JURIES ARE CALLED UPON TO DO SO EVERY DAY. IT'S  
6 JUST THAT WE HAVE NO OTHER WAY TO HANDLE IT.

7 I'M RELYING PRIMARILY ON A CASE, *GOLDWATER V. CARTER*.  
8 AND THIS IS IN A DIFFERENT CONTEXT. JUSTICE BRENNAN MADE THE  
9 FOLLOWING COMMENTS THAT I THINK HAVE SOME VALUE. I'M JUST GOING  
10 TO READ THIS AND THEN I'M GOING TO COMMENT ON IT.

11 "AS SET FORTH IN THE SEMINAL CASE OF *BAKER V. CARR*,  
12 THE DOCTRINE" -- THIS IS THE POLITICAL QUESTION DOCTRINE -- "THE  
13 DOCTRINE INCORPORATES THREE INQUIRIES: DOES THE ISSUE INVOLVE  
14 RESOLUTION OF QUESTIONS COMMITTED BY THE TEXT OF THE  
15 CONSTITUTION TO A COORDINATE BRANCH OF GOVERNMENT." IN THAT  
16 CASE, THERE'S NO QUESTION ABOUT IT. OUR CONSTITUTION TEXTUALLY  
17 GIVES CONGRESS THE POWER TO DECLARE WAR AND GIVES THE PRESIDENT  
18 THE POWER TO MAKE WAR.

19 THE SECOND QUESTION IS "WOULD RESOLUTION OF THE  
20 QUESTION DEMAND THAT THE COURT MOVE BEYOND AREAS OF JUDICIAL  
21 EXPERTISE." AT FIRST BLUSH, YOU MIGHT ANSWER THAT QUESTION NO,  
22 BUT I THINK THE ANSWER IS YES THAT IT WOULD, BECAUSE I THINK IF  
23 WE WERE TO RESTRAIN THE PRESIDENT IN ANY FASHION, I BELIEVE THAT  
24 THE COURT, IN ORDER TO FASHION SOME TYPE OF ORDER, WOULD HAVE TO  
25 FASHION A REMEDY OR A METHODOLOGY FOR STOPPING HOSTILITIES THAT

1 I THINK IT WOULD BE TOTALLY INEPT ATTEMPTING.

2 AND THEN, THE THIRD QUESTION IS "DO PRUDENTIAL  
3 CONSIDERATIONS COUNSEL AGAINST JUDICIAL INTERVENTION." AS I'VE  
4 INDICATED, THERE'S NO QUESTION THERE'S A TEXTUALLY DEMONSTRABLE  
5 CONSTITUTIONAL COMMITMENT OF THE WAR ISSUES TO TWO COORDINATE  
6 POLITICAL DEPARTMENTS, BOTH THE LEGISLATIVE AND THE EXECUTIVE.  
7 I THINK THERE IS A LACK OF JUDICIALLY DISCOVERABLE AND  
8 MANAGEABLE STANDARDS FOR RESOLVING -- THAT IS TO SAY FOR  
9 TERMINATING OR BRINGING THE HOSTILITIES TO A HALT. AND I THINK  
10 THAT, AS INDICATED, THE POLITICAL QUESTION DOCTRINE RESTS IN  
11 PART ON PRUDENTIAL CONCERNS CALLING FOR MUTUAL RESPECT FROM THE  
12 THREE BRANCHES OF GOVERNMENT. AND I'M READING FROM THIS CASE.  
13 "THE JUDICIAL BRANCH SHOULD AVOID THE POTENTIALITY OF  
14 EMBARRASSMENT THAT WOULD RESULT FROM MULTIFARIOUS PRONOUNCEMENTS  
15 BY VARIOUS DEPARTMENTS ON ONE QUESTION."

16 HERE WE WOULD HAVE A PRONOUNCEMENT BY THE GOVERNMENT,  
17 EXECUTIVE, HE'S GOING TO MAKE WAR; BY THE CONGRESS, THEIR  
18 PRONOUNCEMENT WAS IN THE FORM OF A RESOLUTION IN THE PAST OR  
19 SOME OTHER; THEN YOU'D HAVE THE COURT'S ORDER ITSELF.

20 AND THEN HE CONCLUDES BY SAYING, "SIMILARLY, THE  
21 DOCTRINE RESTRAINS JUDICIAL ACTION WHERE THERE IS AN UNUSUAL  
22 NEED FOR UNQUESTIONING ADHERENCE TO A POLITICAL DECISION ALREADY  
23 MADE." NOW, THAT IS THE POINT THAT I RAISED A MOMENT AGO. WE  
24 ARE IN NOW, WHETHER WE WANT TO BE OR NOT, AND I THINK THAT THERE  
25 PROBABLY IS AN UNUSUAL NEED FOR UNQUESTIONING ADHERENCE TO THE



1 POLITICAL QUESTION, THAT IS, THE ENGAGEMENT OF WAR THAT'S  
2 ALREADY BEEN MADE BY THE EXECUTIVE BRANCH.

3 I THINK THERE ARE OTHER ASPECTS THAT DO HAVE A  
4 BEARING. I THINK THERE IS A GENUINE QUESTION AS TO STANDING IN  
5 THE SENSE THAT, YOU KNOW, NOT INFREQUENTLY THERE ARE TAXPAYERS'  
6 SUITS TO STOP THE EXPENDITURE OF MONEY ON THE BASIS THAT THE  
7 PLAINTIFF IS A TAXPAYER. THERE'S NO QUESTION HE'S FINANCING IT.  
8 BUT THAT HAS NEVER BEEN -- THAT TYPE OF STANDING HAS NEVER BEEN  
9 RECOGNIZED. AND I THINK IN A VERY REAL SENSE, I'M NOT SURE THAT  
10 THERE IS STANDING IN THIS PARTICULAR INSTANCE.

11 NOW, LET ME SAY THAT IF THERE WERE -- AS I THINK IT  
12 WAS THE *DOE* CASE REFERS TO, IF THERE WAS COLLISION BETWEEN THE  
13 CONGRESS AND THE PRESIDENT -- THAT IS TO SAY, THEY HAD DIFFERENT  
14 VIEWS AND WERE ANTAGONISTIC -- IF THE CONGRESS ITSELF OR THE TWO  
15 BRANCHES WERE DIRECTLY ANTAGONISTIC TO ONE ANOTHER, THEN I THINK  
16 IN THAT EVENT THE COURT MIGHT BE REQUIRED TO RESOLVE THE ISSUES.

17 THIS WAS, AGAIN, IN A DIFFERENT CONTEXT. IT WAS  
18 COMMENTED, BRENNAN AGAIN, "IF THE PRESIDENT AND CONGRESS HAVE  
19 REACHED IRRECONCILABLE POSITIONS, FINAL DISPOSITION OF THE  
20 QUESTION PRESENTED BY THIS CASE WOULD ELIMINATE, RATHER THAN  
21 CREATE, MULTIPLE CONSTITUTIONAL INTERPRETATIONS. THE SPECTER OF  
22 THE FEDERAL GOVERNMENT BROUGHT TO A HALT BECAUSE OF THE MUTUAL  
23 INTRANSIGENCE OF THE PRESIDENT AND CONGRESS WOULD REQUIRE THIS  
24 COURT TO PROVIDE A RESOLUTION PURSUANT TO OUR DUTY TO SAY WHAT  
25 THE LAW IS." AND I THINK THAT IF CONGRESS TOOK A POSITION

1 ADVERSE TO THE GOVERNMENT, TO THE EXECUTIVE, ON THIS ISSUE OR  
 2 ANY OTHER ISSUE, THAT UNDOUBTEDLY THE COURT WOULD BE REQUIRED TO  
 3 RESOLVE THAT DISPUTE. BUT I THINK THAT'S A DIFFERENT SITUATION  
 4 THAN WHAT WE HAVE HERE.

5 COLONEL, I'LL BE GLAD TO HEAR ANYTHING FURTHER YOU  
 6 HAVE TO SAY ON THIS ISSUE.

7 MR. SULLIVAN: NOW?

8 THE COURT: YES, SIR.

9 MR. SULLIVAN: THANK YOU, YOUR HONOR. YOU BRING  
 10 UP AN INTERESTING QUESTION ABOUT THE DISSENSION BETWEEN THE  
 11 CONGRESS AND THE EXECUTIVE BRANCH. WE DON'T HAVE DISSENSION IN  
 12 THIS CASE, AND I'M NOT ARGUING THAT WE DO.

13 THE COURT: I UNDERSTAND YOUR ARGUMENT. YOU  
 14 THINK THEY'VE GOT RATHER THAN COLLISION, THEY'VE GOT COLLUSION.

15 MR. SULLIVAN: COLLUSION, EXACTLY. ~~AND~~ THE  
 16 PROBLEM IS ~~THAT~~ I DON'T UNDERSTAND THE CONGRESS WHEN THEY'RE  
 17 READING THE CONSTITUTION ON ITS FACE, ~~AND~~ THEY ALL TOOK THE SAME  
 18 OATH YOU AND I DID, AND THEY CAN READ. IT'S PRETTY APPARENT  
 19 ~~WHAT IT MEANS WHEN IT SAYS WHAT IT MEANS.~~ LIKE A PREACHER TELLS  
 20 YOU WHAT THE BIBLE ~~MEANS,~~ <sup>SAYS BUT</sup> WHEN YOU READ THE BIBLE YOU FIND OUT  
 21 SOMETHING ENTIRELY DIFFERENT, <sup>SO</sup> YOU DON'T WANT TO READ THE BIBLE;  
 22 AS I DON'T THINK THE CONGRESS WANTS TO READ THE CONSTITUTION,  
 23 BECAUSE THEY LIKE WHAT THEY'RE BEING TOLD.

24 I FEEL LIKE THE JUDICIAL BRANCH HAS A RESPONSIBILITY  
 25 OF OVERSIGHT <sup>X</sup> PROTECTION OF THE CONSTITUTION AND WHAT IT SAYS,

1 ~~AND~~ I DON'T UNDERSTAND WHY THE CONGRESS REFUSES TO JUST SAY "WE  
2 DECLARE WAR ON IRAQ." WE STEP AROUND THE ISSUE. I THINK  
3 THEY'RE TRYING TO MAINTAIN DENIABILITY FOR SOME REASON.

4           **THE COURT:**           WELL, I DON'T DISAGREE WITH YOU,  
5 AND I THINK THAT PROBABLY THE ONLY REMEDY FOR THAT IS TO THROW  
6 THE RASCALS OUT.

7           **MR. SULLIVAN:**       RIGHT. BUT WE EVIDENTLY ARE NOT  
8 INTELLIGENT ENOUGH/SELECTIVE ENOUGH TO PICK THE RIGHT GUYS FOR  
9 THESE JOBS BECAUSE THEY JUST DON'T SEEM TO BE ABLE TO READ THE  
10 CONSTITUTION, AND THEY'VE DONE THIS -- WELL, YOU MENTIONED PEARL  
11 HARBOR EARLIER. WE WERE ATTACKED AT PEARL HARBOR, WE DEFENDED  
12 OURSELVES, NOT VERY WELL, IN PEARL HARBOR. BUT THEN THE NEXT  
13 DAY THE PRESIDENT TOOK THE TIME OUT AND ASKED THE CONGRESS FOR A  
14 DECLARATION OF WAR, THE CONGRESS DECLARED THE WAR, AND WE DID  
15 IT. IN THIS CASE, THE PRESIDENT COULD HAVE AT ANY TIME ASKED  
16 THE CONGRESS TO DECLARE WAR ON IRAQ AND THE CONGRESS WOULD HAVE  
17 HAD TO STEP UP TO THE PLATE. BUT THAT HAS NOT BEEN DONE. AS  
18 YOU SAY, IT'S COLLUSION.

19           ANOTHER THING IS, ANOTHER ISSUE, IS THAT EACH BRANCH OF  
20 THE GOVERNMENT HAS THE AUTHORITY, BY SEPARATION OF POWERS, TO  
21 DENY ANOTHER BRANCH OF GOVERNMENT, AND THE PRESIDENT HAS DONE IT  
22 MANY TIMES. JEFFERSON DID IT. EVEN WITH ~~MARTYRS~~ <sup>MARLBURY</sup> <sup>vs</sup> AND MADISON,  
23 HE REFUSED TO DO WHAT THE COURT TOLD HIM TO DO. IN THE ALIEN  
24 AND SEDITION ACT OF 1<sup>7</sup>98, HE REFUSED TO DO WHAT THE ~~COURT~~ <sup>CONGRESS</sup> TOLD  
25 HIM TO DO, AND HE HAS EVERY AUTHORITY. NOT ONLY DOES HE HAVE

1 VETO POWER OVER THE CONGRESS, BEING A SEPARATE <sup>BUT</sup> EQUAL BRANCH OF  
 2 THE GOVERNMENT, HE HAS VETO POWER OVER THE JUDICIAL BRANCH IF HE  
 3 DOESN'T AGREE WITH WHAT THEY SAY, AND WE ACKNOWLEDGE THAT.

4 AND WE'RE NOT ASKING -- WELL, WE DID ASK IN THE  
 5 COMPLAINT, AND I REALLY NEVER EXPECTED US TO BE AT WAR THIS  
 6 QUICKLY. ~~AND~~ I WAS SURPRISED AS MUCH AS ANYBODY, ~~AND~~ I WOULD NOT  
 7 ASK THE COURT IN GOOD CONSCIENCE TO STOP HOSTILITIES NOW THEY'VE  
 8 BEGUN, BUT I WOULD ASK THE COURT TO REQUIRE THE CONGRESS TO MAKE  
 9 IT RIGHT FOR THE FUTURE SO ~~THAT~~ WE DON'T <sup>MAKE</sup> ~~HAVE~~ THIS SAME MISTAKE  
 10 AGAIN.

11 WE'VE BEEN IN, AS I SAID IN MY COMPLAINT, 240  
 12 DIFFERENT CONFLICTS <sup>SINCE 1947,</sup> AND I CAN'T IDENTIFY ONE OF THOSE THAT WAS  
 13 PROTECTING MY DOMESTIC SECURITY OR MY CONSTITUTION. ~~AND~~ THE  
 14 PROBLEM IS ~~THAT~~ WE'VE ALLOWED OURSELVES TO BASICALLY BE OUT OF  
 15 CONTROL.

16 THE COURT: WELL, I THINK IT HAS OCCURRED OVER  
 17 -- I DON'T DISAGREE WITH EVERYTHING THAT YOU SAY. I THINK THAT  
 18 IT HAS OCCURRED OVER A LONG PERIOD OF TIME, AND CONSEQUENTLY,  
 19 THERE IS LESS HESITANCY ON THE EXECUTIVE BRANCH TO PRESERVE  
 20 ANYTHING. IT'S JUST LIKE KIDS WHO BREAK A RULE THE FIRST 200  
 21 TIMES AND AFTER A WHILE THEY DON'T CARE; THEY DON'T ACKNOWLEDGE  
 22 THAT THE RULE EXISTS. I DON'T SAY THAT YOUR ARGUMENT IS WITHOUT  
 23 MERIT. I REALLY DON'T.

24 I THINK, HOWEVER, I MUST SAY THAT I THINK THAT THERE  
 25 IS -- THE COURSE OF CONDUCT OVER A LONG PERIOD OF TIME HAS

1   ADVANCED THAT COLLUSION, IF YOU WILL, BETWEEN THOSE TWO  
2   BRANCHES.

3           **MR. SULLIVAN:**           DO WE NEED AN AMENDMENT THEN TO  
4   DELETE THAT PHRASE FROM THE CONSTITUTION?   BECAUSE IT'S IN THERE  
5   FOR A REASON.   THOSE GUYS <sup>WHO</sup> ~~THAT~~ WROTE THAT WERE NOT IGNORANT <sup>MBJ</sup>  
6   THEY KNEW WHAT THEY WERE DOING.

7           **THE COURT:**           I COULDN'T AGREE WITH YOU MORE.

8           **MR. SULLIVAN:**           BECAUSE WITHOUT AN AMENDMENT, WE  
9   CAN'T IGNORE THAT PHRASE IN THE CONSTITUTION.   IT MEANS WHAT IT  
10   SAYS.

11          **THE COURT:**           WELL, I UNDERSTAND YOUR ARGUMENT.  
12          DO YOU WANT TO RESPOND TO THAT, MR. LEPORE?

13          **MR. LEPORE:**           I JUST WANTED TO MAKE A FEW FINAL  
14   POINTS, BUT I WANTED TO MAKE SURE HE WAS --

15          **THE COURT:**           ANYTHING FURTHER YOU WANT TO SAY,  
16   COLONEL?

17          **MR. SULLIVAN:**           THAT'S ALL, THANK YOU, SIR.

18          **MR. LEPORE:**           JUST VERY, VERY BRIEFLY, JUDGE.  
19   BACK WHEN I WAS SPEAKING A FEW MINUTES AGO, AND MR. SULLIVAN  
20   PICKED UP ON IT, YOU WERE TALKING ABOUT THE DOE CASE AND YOU  
21   WERE TALKING ABOUT THE CONCEPT OF A COLLISION BETWEEN THE  
22   BRANCHES, AND I JUST WANT TO POINT OUT THAT IN DOE, NO SUCH  
23   COLLISION WAS FOUND, AND THAT IS IN THIS PARTICULAR --

24          **THE COURT:**           I AGREE WITH YOU.   I DON'T THINK  
25   THE PROBLEM IS -- THERE'S NO COLLISION.   I MEAN, THAT'S NOT

1 HERE. I DON'T THINK THAT'S HERE. IF THAT WERE HERE, IT WOULD  
2 BE A DIFFERENT BALL GAME.

3 **MR. LEPORE:** THERE COULD NOT BE A CASE MORE  
4 CLEAR THAT THE PARTIES ARE ACTUALLY NOT IN COLLISION. THEY ARE  
5 ONE HUNDRED PERCENT TOGETHER ON THIS POINT.

6 WHEN YOU MENTIONED STANDING EARLIER, JUST LISTENING TO  
7 MR. SULLIVAN, I JUST WANT TO POINT OUT, AND AS THE COURT KNOWS,  
8 I MEAN, GENERALIZED GRIEVANCES ARE NOT STANDING, AND IT SEEMS TO  
9 ME LIKE THAT'S WHERE WE'RE HEADED HERE. I JUST SAY THAT FOR  
10 WHAT IT'S WORTH.

11 AND FINALLY, BACK TO THE DECLARATION OF WAR, I MEAN,  
12 THERE'S NO BREAKING OF RULES HERE. THERE'S NO COLLUSION HERE.  
13 THESE PARTIES --

14 **THE COURT:** I UNDERSTAND.

15 **MR. LEPORE:** THESE BRANCHES ARE --

16 **THE COURT:** I DON'T MEAN TO SAY COLLUSION.  
17 THE QUESTION IS THAT THE -- HE'S ARGUING THAT THERE IS A --  
18 CONGRESS HAS DELEGATED ITS POWER. IT'S A DELEGATION ISSUE, I  
19 THINK, AS THE COLONEL SEES IT.

20 **MR. LEPORE:** AND AS I SAID EARLIER, I RELY ON  
21 THOSE ARGUMENTS AND OUR ARGUMENTS IN THE BRIEF. IT'S A SHARED  
22 POWER. EACH PARTY IS DOING ITS DUTY HERE, AND THE PRESIDENT IS  
23 COMMANDER IN CHIEF. THE PRESIDENT HAS MADE HIS DETERMINATION.

24 **THE COURT:** I WILL SAY I THINK, YOU KNOW,  
25 COLONEL, I HAVE TO TELL YOU THAT THERE ARE CASES WHERE A LONG

1 COURSE OF HISTORY IN FACT DOES CHANGE THE CONSTITUTION, AND I  
2 CAN THINK OF ONE INSTANCE. I BELIEVE I'M CORRECT ON THIS. I  
3 THINK IF YOU WERE TO GO BACK AND TRY TO FIND AND REVIEW THE  
4 RATIFICATION OF THE 16TH AMENDMENT, WHICH WAS THE INTERNAL  
5 REVENUE, INCOME TAX, I THINK IF YOU WENT BACK AND EXAMINED THAT  
6 CAREFULLY, YOU WOULD FIND THAT A SUFFICIENT NUMBER OF STATES  
7 NEVER RATIFIED THAT AMENDMENT.

8 MR. SULLIVAN: TRUE STATEMENT.

9 THE COURT: AND NONETHELESS, I THINK IT'S FAIR  
10 TO SAY THAT IT IS PART OF THE CONSTITUTION OF THE UNITED STATES,  
11 AND I DON'T THINK ANY COURT WOULD EVER --

12 MR. SULLIVAN: I WOULD LOVE TO HAVE A VERY LONG  
13 DISCUSSION WITH YOU ABOUT THAT SUBJECT.

14 THE COURT: -- WOULD SET IT ASIDE. WELL, I'VE  
15 SEEN THAT -- I'VE SEEN SOMEWHERE A TREATISE ON THAT, AND I THINK  
16 IT WAS -- I THINK I'M CORRECT IN SAYING THAT ACTUALLY THE  
17 RATIFICATION NEVER REALLY PROPERLY OCCURRED.

18 MR. SULLIVAN: CORRECT, SIR.

19 THE COURT: YET NONETHELESS, I'M SURE NO  
20 COURT'S GOING TO SAY THAT THE 16TH AMENDMENT PERMITTING INCOME  
21 TAX IS VOID FOR ANY REASON, ALTHOUGH I WOULDN'T MIND FILING FOR  
22 A REBATE MYSELF.

23 BUT I THINK THAT THERE MAY BE SOMETHING ANALOGOUS  
24 THERE VIS A VIS THE CONTINUED PRACTICE OF THE EXECUTIVE TO HAVE  
25 INCURSIONS AND POLICE ACTIONS OR TO COMMIT THE COUNTRY TO

1 HOSTILITIES WITHOUT THE FORMAL DECLARATION OF WAR.

2 ANYTHING FURTHER YOU'D LIKE TO ADD AT THIS TIME?

3 MR. LEPORE: NO, SIR, UNLESS YOU HAVE ANY  
4 QUESTIONS.

5 THE COURT: COLONEL, I'M NOT UNSYMPATHETIC TO  
6 YOUR CAUSE.

7 MR. SULLIVAN: MAY I SAY ONE MORE THING?

8 THE COURT: SURELY.

9 MR. SULLIVAN: THAT ALL BEING WELL AND GOOD, I  
10 THINK WE'RE ALL COMFORTABLE WITH THE KNOWLEDGE THAT THE BAY OF  
11 TONKIN EVENT NEVER HAPPENED. THE PRESIDENT WENT INTO WAR  
12 WITHOUT THE CONGRESS'S CONSENT, WITHOUT THE CONGRESS'S  
13 DECLARATION OF WAR BECAUSE HE HAD THIS EVENT THAT TOOK PLACE.  
14 NOW WE HAVE TO PROTECT OURSELVES FROM A ROGUE PRESIDENT. I'M  
15 NOT SAYING PRESIDENT BUSH IS A ROGUE OR ANYTHING. I'M JUST  
16 SAYING THAT TO PROTECT OURSELVES IN THE EVENTUALITY OF A ROGUE  
17 PRESIDENT COMING IN AND WANTING TO TAKE OVER THE WORLD FOR SOME  
18 REASON AND THE CONGRESS NOT DECLARING A WAR --

19 THE COURT: I UNDERSTAND.

20 MR. SULLIVAN: IF WE DON'T PUT THIS RESTRAINT ON  
21 THE PRESIDENT, WE ARE GOING TO BE -- WE ARE IN TROUBLE.

22 THE COURT: I DON'T KNOW WHAT -- I DON'T --

23 MR. SULLIVAN: *we've had* 56 YEARS OF NEEDLESS WARS, YOUR  
24 HONOR, WE NEED TO STOP.

25 THE COURT: WELL, NEED IT OR NOT, I DON'T



1 KNOW. BUT I'M GOING TO DENY YOUR TEMPORARY RESTRAINING ORDER.  
2 IF YOU WANT TO FILE ANYTHING FURTHER WITH REGARD TO THEIR MOTION  
3 TO DISMISS, I'LL BE GLAD TO RECEIVE IT, AND I'LL GIVE YOU TEN  
4 DAYS TO FILE IT.

5 MR. SULLIVAN: SAY THAT AGAIN, SIR.

6 THE COURT: IF YOU WANT TO FILE ANYTHING  
7 FURTHER -- YOU HAVE FILED A REPLY TO THEIR BRIEF. BECAUSE  
8 YOU'VE HAD VERY LITTLE TIME, I'LL GIVE YOU -- IF YOU WANT TO  
9 FILE ANYTHING FURTHER, I'LL BE GLAD TO HEAR FROM YOU. FILE IT  
10 WITHIN TEN DAYS OF TODAY'S DATE.

11 MR. SULLIVAN: THANK YOU.

12 THE COURT: LET ME SEE YOU ALL AT THE BENCH  
13 JUST A MOMENT, PLEASE.

14 MR. LEPORE: YOUR HONOR, WILL WE GET A REPLY IF  
15 HE DOES FILE SOMETHING?

16 THE COURT: YOU DON'T GET A REPLY TO A REPLY,  
17 DO YOU, UNDER THE RULES?

18 MR. LEPORE: HE'S RESPONDING TO OUR MOTION TO  
19 DISMISS.

20 THE COURT: WELL, THAT'S TRUE, I APOLOGIZE.  
21 YES, YOU WOULD.

22 (BENCH CONFERENCE OFF THE RECORD.)

23 THE COURT: THANK YOU ALL VERY MUCH. ADJOURN  
24 COURT.

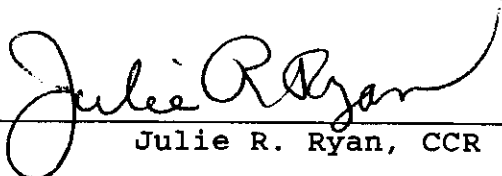
25 (WHEREUPON, COURT WAS ADJOURNED AT 2:35 P.M.)

\* \* \* \* \*

C E R T I F I C A T E     O F     R E P O R T E R

I, Julie R. Ryan, CCR, contract court reporter for the United States District Court, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-described action.

March 25, 2003  
Date

  
\_\_\_\_\_  
Julie R. Ryan, CCR