

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 BARSO, 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

PAGES 1 - 25

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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 ^{THE} 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 ^{to} ~~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 ^{with} ~~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~~ ^{SAYS} ~~but~~ WHEN YOU READ THE BIBLE YOU FIND OUT
 21 SOMETHING ENTIRELY DIFFERENT, ^{SO} ~~^~~ YOU DON'T WANT TO READ THE BIBLE;
 22 AS I DON'T THINK THE CONGRESS WANTS ~~TO~~ 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 ~~X~~ 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~~ ^{MARLBURY} ^{vs} AND MADISON,
23 HE REFUSED TO DO WHAT THE COURT TOLD HIM TO DO. IN THE ALIEN
24 AND SEDITION ACT OF 1⁷98, HE REFUSED TO DO WHAT THE ^{CONGRESS} ~~COURT~~ TOLD
25 HIM TO DO, AND HE HAS EVERY AUTHORITY. NOT ONLY DOES HE HAVE

1 VETO POWER OVER THE CONGRESS, BEING A SEPARATE^{but} 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 ^{MAKE} ~~HAVE~~ THIS SAME MISTAKE
10 AGAIN.

11 WE'VE BEEN IN, AS I SAID IN MY COMPLAINT, 240
12 DIFFERENT CONFLICTS^{since 1947,} ~~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 ^{WHO} ~~THAT~~ WROTE THAT WERE NOT IGNORANT ^{MSJ}
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.

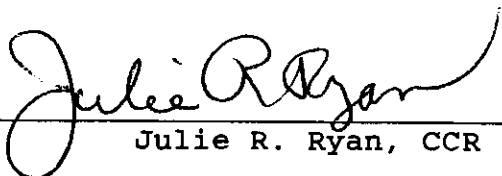
25 (WHEREUPON, COURT WAS ADJOURNED AT 2:35 P.M.)

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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