

United States Court of Appeals  
For the First Circuit

No. 03-1266

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JOHN DOE I, *et al.*,  
PLAINTIFFS-APPELLANTS,

v.

PRESIDENT GEORGE W. BUSH, *et al.*,  
DEFENDANTS-APPELLEES.

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

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PLAINTIFFS/APPELLANTS' PETITION FOR REHEARING  
ON AN EMERGENCY BASIS

In accordance with Rule 40 of the Federal Rules of Appellate Procedure, Plaintiffs hereby file this Petition for Rehearing on an Emergency Basis. In light of the urgency of this matter and the Defendants' plans to abandon efforts to secure United Nations approval of a war with Iraq and to invade Iraq within days, Plaintiffs respectfully request that this Court act immediately on this petition.

On March 13, 2003, this Court issued a ruling and opinion affirming the district court's dismissal of Plaintiffs' complaint. *Doe I v. Bush*, No. 03-1266 (1st Cir., March 13, 2003). Plaintiffs have argued that, if the October Resolution passed by the United States Congress is to be read as constitutional, it "only

permits actions sanctioned by the Security Council [of the United Nations].” *Id.* at 14. In its opinion, this Court held that “this issue is not fit now for judicial review ... Many important questions remain unanswered about whether there will be a war, and if so, under what conditions.” *Id.* This Court further stated: “To evaluate this claim now ... [w]e would need to assume that the Security Council will not authorize war, and that the President will proceed nonetheless.” *Id.* at 15.

Since this Court’s ruling on March 13, events have unfolded and the facts have become sharply defined. On March 17, the United States withdrew a resolution it had presented to the Security Council seeking authorization from the Security Council for a war against Iraq. Alan Elsner, *U.S. Ends Diplomacy; U.N. to Pull Out of Iraq*, (Mar. 17, 2003, at <http://Reuters.com/newsArticle.topNews&Story,ID2393132> (last visited on Mar, 17, 2003)). This withdrawal came after it had become publicly reported that the Security Council would not approve the resolution. *Id.*<sup>1</sup> Thus, “it [has]

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<sup>1</sup> The United Nations Security Council Resolution 1441, passed on November 8, 2002, does not serve as a Security Council authorization of war. Resolution 1441 specifically directs United Nations inspectors to report to the Security Council “any failure by Iraq to comply with its disarmament obligations” and further states that the Security Council will “convene immediately upon receipt of a report...in order to consider the situation...” United Nations Security Council Resolution 1441 (2002), ¶¶ 11-12. There would be no point to this procedure if the Security Council had automatically authorized war through the resolution. Prior to the passage of Resolution 1441, two veto-holding members of the Security Council, France and Russia, made clear that they did not want any “hidden triggers.” See Paul Reynolds, “Analysis: UN decision time nears,” BBC News Online, October 24, 2002, [http://news.bbc.co.uk/2/low/middle\\_east/2353369.stm](http://news.bbc.co.uk/2/low/middle_east/2353369.stm), visited on March 16, 2003. In response, the United States “toned down some of its conditions. It drop[ped] the threat that ‘all necessary means’ (that means war) would be used if Iraq failed in its obligations. Instead, it talk[ed] about ‘serious consequences.’” *Id.* See also Patrick E. Tyler and Felicity Barringer, “Annan Says U.S. Will Violate Charter if It Acts Without Approval,” *The New York Times*, March 11, 2003, A8 (reporting public

become clear that diplomacy has ... failed decisively.” *Doe I*, at 15. United Nations inspectors and other foreigners are evacuating Baghdad, *id.*, while the United States State Department has ordered the departure of diplomats’ family members and non-emergency personnel from its embassies and consulates in Kuwait, Syria and Israel. [HTTP://travel.state.gov/Kuwait\\_warning.html](http://travel.state.gov/Kuwait_warning.html); [HTTP://travel.state.gov/Syria\\_warning.html](http://travel.state.gov/Syria_warning.html); [HTTP://travel.state.gov/Israel\\_warning.html](http://travel.state.gov/Israel_warning.html) (last visited on Mar. 17, 2003). In a primetime address to the nation set for the evening of March 17, it is widely reported that the President will issue an ultimatum to Iraq, *see* Thomas W. Lippmann, *Bush to Issue Ultimatum in TV Address Tonight* (concluding that “[w]ar against Iraq now appears certain”), [HTTP://www.washingtonpost.com/up-dyn/articles/A38461-2003Mar17.html](http://www.washingtonpost.com/up-dyn/articles/A38461-2003Mar17.html) (last visited on Mar. 17, 2003). The facts now demonstrate that “the President will proceed [to launch a war against Iraq] nonetheless.” *Doe I*, at 15.

The plaintiffs’ claim is now ripe for this Court’s review. “[T]he available facts make it possible to define the issues with clarity.” *Id.* at 18. This Court noted that its opinion, as facts stood on March 13, 2003, did not mean that challenges

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(continued)

statement by the Secretary General of the United Nations, Kofi Annan, that U.S. military action absent Security Council approval would violate the United Nations Charter). Further, this Court’s ruling on March 13 that this issue was not ripe for judicial review meant, by direct implication, that the Security Council had not yet acted to authorize this war. If Resolution 1441 authorized this war, then that issue should have been ripe for review when it first reached this Court.

such as that of the Plaintiffs would never be ripe for decision before military action began. *Doe I*, at 18, n.9. If, however, in light of the ripening of the circumstances in this case, this Court were still to decline to reach the merits of Plaintiffs' claim, it would essentially be conceding that courts may never review these matters before military action begins.

The October Resolution, to be read as constitutional, authorizes the President to use military force against Iraq only if the Security Council permits it. The President does not have the constitutional authority to launch a war against Iraq without Security Council approval or without a new unconditional declaration of war from the United States Congress. The President's plans for imminent military action are in direct conflict with the conditions set by the United States Congress in the October Resolution and demand immediate judicial intervention. At this crucial hour, the lives of the soldier-plaintiffs and the sons of the parents-of-soldier plaintiffs are at stake. So, too, is the integrity of the United States Constitution.

Plaintiffs respectfully request that this Court act immediately to uphold and protect Art. I § 8 of the United States Constitution and the rule of law. For the reasons stated in the Plaintiffs' earlier briefs and at oral argument, this Court should now reverse the district court's ruling and issue an order declaring that the President does not, at this time, have the constitutional authority to wage a first-

strike war against Iraq. This Court further should direct the district court to enjoin the defendants from launching a military invasion of Iraq absent Security Council authorization or an unconditional declaration of war from the United States Congress.

Respectfully submitted,

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