UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURA GONZALEZ-VERA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:02-CV-02240 (HHK)
	)	
HENRY A. KISSINGER, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION TO DISMISS

The defendants the United States of America and Henry A. Kissinger hereby move pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss this action on the grounds that the Court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted. A Certification of Scope of Office or Employment and a Memorandum of Points and Authorities have been submitted in support of this motion.

WHEREFORE the defendants respectfully move for the relief described above.

Respectfully submitted,

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Assistant Attorney General, Civil Division

ROSCOE C. HOWARD, Jr.
United States Attorney

HELENE M. GOLDBERG
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/s/

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Attorneys for the United States of America,
and Henry A. Kissinger

Dated: February 28, 2003

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2003, I served a true copy of the foregoing Motion to Dismiss by both facsimile and first class mail, postage pre-paid, addressed to the plaintiffs' counsel as follows:

Michael E. Tigar, Esq.
1025 Connecticut Avenue, NW, Suite 1012
Washington, D.C. 20036

/s/
Richard Montague

UNITED STATES DISTRICT COURT
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	)	

CERTIFICATION OF SCOPE OF OFFICE OR EMPLOYMENT

I, Helene M. Goldberg, Director, Torts Branch, Civil Division, United States Department of Justice, acting pursuant to the provisions of 28 U.S.C. § 2679(d)(1), and by virtue of the authority vested in me by Civil Division Directive No. 90-79, *reprinted in* Appendix to 28 C.F.R. § 15.3, hereby certify that Henry A. Kissinger was acting within the scope of federal office or employment at the time of the incident out of which the plaintiff's claims in this action arose.

Dated: February 28, 2003

/s/
HELENE M. GOLDBERG
Director, Torts Branch, Civil Division
United States Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2003, I served a true copy of the foregoing Certification of Scope of Office or Employment by both facsimile and first class mail, postage pre-paid, addressed to the plaintiffs' counsel as follows:

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	)	
Defendants.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DEFENDANTS' THE UNITED STATES OF AMERICA'S AND HENRY A. KISSINGER'S MOTION TO DISMISS

The plaintiffs in this action allege that they are "direct victims and/or relatives of direct victims of the state-sponsored repressive apparatus that ruled Chile following the 1973 coup." Complaint ¶ 19. Despite claiming to be direct victims of repressive measures by a foreign government, the plaintiffs look for redress to the United States of America and to former Secretary of State Henry A. Kissinger, whom they purport to sue in both an individual and official capacity.[1] They ask the Court to award compensatory and punitive damages against the United States and former Secretary of State Kissinger, and they seek declaratory relief. For the reasons explained below, such relief is unavailable for a number of reasons, and this suit should be dismissed. The plaintiffs' claims are non-justiciable, and the Court otherwise lacks jurisdiction over the subject matter. Further, the complaint fails to state claims upon which relief can be granted against the United States and Dr. Kissinger.

[1] During times relevant to this lawsuit, Dr. Kissinger also served as Senior Assistant to the President for National Security Affairs. *See* Compl. ¶ 33.

A.

This action apparently has its genesis in historical events. The complaint is broad and sweeping, and, in a number of respects, is contradicted by the historical record. Nevertheless, in demonstrating the complaint's jurisdictional and legal insufficiency, we assume for argument's sake that its factual allegations could be proven. *See Moore v. Valder*, 65 F.3d 189, 192, 196 (D.C. Cir. 1995) (Rule 12(b)(1) and 12(b)(6) standards); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1273 (D.C. Cir. 1994) (Rule 12(b)(6) standard). According to the complaint, "[i]n 1970, Dr. Salvador Allende was democratically elected President by the citizens of Chile." Compl. ¶ 36. That was unacceptable to the United States, and "[i]n order to prevent and remove Dr. Allende from governing Chile, the United States and Henry Kissinger supported, assisted, and recklessly encouraged members of the Chilean military who were willing to organize a coup against Dr. Allende." *Id.* Despite a failed coup attempt in October 1970, the plaintiffs allege, the United States continued to support Chilean dissidents in their alleged efforts to overthrow the Allende government inaugurated in November, 1970. *See id.* In September, 1973, according to the complaint, a successful military coup did occur leading to overthrow of the Allende government and the "eventual repressive regime of Augusto Pinochet." *Id.* ¶ 39. The plaintiffs further allege that they, or their family members, were victims of the Pinochet regime's subsequent brutal repression. *See id.* ¶¶ 14, 19, 20-32.

The gist of the complaint is that the United States instigated the 1973 military coup and tolerated or encouraged the grave human rights violations of what the plaintiffs describe as the "eventual repressive regime" that came to power as a result. These allegations are contrary to both the historical record and the findings of a Select Committee of the United States Senate. At a point far closer in time to the events placed at issue here, the Church Committee, as it was known, investigated "the full range

of governmental intelligence activities and the extent, if any, to which such activities were `illegal, improper, or unethical.'" ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS: AN INTERIM REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, United States Senate, S. Rep. No. 94-465 at 1 (1975) (hereinafter "Church Committee Interim Report"). The Committee had before it all relevant Executive Branch documents, which included "raw files from agencies and departments, [and] the White House." *Id.* at 2 & n.2.

With respect to the 1970 coup plot that resulted in the death of Chilean Army Commander-in-Chief General Rene Schneider, *see* Compl. ¶¶ 47, 51, the Church Committee found that "United States officials offered encouragement to the Chilean dissidents who plotted the kidnapping of General Rene Schneider, but American officials did not desire or encourage Schneider's death." *Id.* at 256. The Committee recognized that the CIA's efforts to encourage the Chilean military to intervene and forestall an Allende presidency were on the direct orders of President Nixon given at a meeting on September 15, 1970. *See id.* at 225, 227-29. The Committee also found that "[a]lthough the CIA continued to support coup plotters up to Schneider's shooting, the record indicates that the CIA had withdrawn active support of the group which carried out the actual kidnap attempt on October 22, which resulted in Schneider's death." *Id.* at 5. Indeed, as recounted in the Church Committee Interim Report, in a meeting held on October 15, 1970, seven days prior to the attempted kidnapping that led to General Schneider's death, Dr. Kissinger and other officials decided to abandon any support or encouragement of a coup led by retired Chilean General Roberto Viaux. *See id.* at 242. The reason for this decision, according to the Church Committee Report, was United States officials' belief that such a coup had little chance of success. *See id.* Nevertheless, after a Viaux associate was informed on October 17,

1970 of the United States' decision, the Viaux associate responded that the United States' position did not matter because "they had decided to proceed with the coup in any case." *Id.* at 243. The Committee's report continued that "it does not appear that any of the equipment supplied by the CIA to coup plotters in Chile was used in the kidnapping." *Id.* at 5. Finally, the Committee concluded that "[t]here is no evidence of a plan to kill Schneider or that United States officials specifically anticipated that Schneider would be shot during the abduction." *Id.*[2]

With respect to the September, 1973 coup that overthrew the Allende government, a staff report prepared for the Church Committee concluded that "[t]here is no hard evidence of direct U.S. assistance to the coup, despite frequent allegations of such aid. Rather the United States – by its previous actions during Track II [the CIA effort ordered by President Nixon on September 15, 1970], its existing general posture of opposition to Allende, and the nature of its contacts with the Chilean military – probably gave the impression that it would not look with disfavor on a military coup." COVERT ACTION IN CHILE 1963-1973, Staff Report of the Select Committee To Study Governmental Operations With Respect to Intelligence Activities, at 28 (1975).[3] Similarly, what the plaintiffs describe as the "Hinchey Report," *see* CIA ACTIVITIES IN CHILE (Sept. 18, 2000),[4] and cite with apparent

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[2] The Committee drew a sharp distinction between the Schneider affair and the other assassinations it studied. With respect to Fidel Castro and Patrice Lumumba, the Committee identified what it described as "plots conceived by United States officials to kill foreign leaders." *Id.* at 6. With respect to Schneider, the Committee found that "even though the [United States'] support [for Chilean dissidents] included weapons, it appears that the intention of both the dissidents and the United States officials was to abduct General Schneider, not to kill him." *Id.*

[3] *Available at* www.foia.state.gov/Reports/ChurchReport.asp.

[4] *Available at* www.odci.gov/cia/pulications/chile. Among numerous factual errors or misstatements in the complaint is the description of the "Hinchey Report" as a "2000 Congressional investigation." Compl. ¶ 67. This report resulted from Congress' direction in Section 311(a) of the (continued...)

approval, *see, e.g.*, Compl. ¶ 67, makes clear that, although the CIA in the 1960s and 1970s undertook a variety of covert operations designed to influence events in Chile, including providing support to some coup plotters in 1970, the CIA and the United States did not instigate the 1973 coup that actually deposed the Allende government. At most, according to the report, because the CIA was "aware of coup-plotting by the military, had ongoing intelligence collection relationships with some plotters, and – because CIA did not discourage the takeover and had sought to instigate a coup in 1970 – [the CIA] probably appeared to condone" the 1973 coup.

The CIA's Hinchey Amendment Report also makes clear that "[a]fter the coup in September 1973, CIA suspended new covert action funding but continued some ongoing propaganda projects, including support for news media committed to creating a positive image for the military Junta. Chilean individuals who had collaborated with the CIA but were not acting at CIA direction assisted in the preparation of the "White Book," a document intended to justify overthrowing Allende. It contained an allegation that leftists had a secret "Plan Z" to murder the high command in the months before the coup, which CIA believed was probably disinformation by the Junta." *Id.* United States support of propaganda efforts by Chilean political elements was nothing new. As the Hinchey Report explains, beginning in 1962 and continuing thereafter, the United States supported propaganda efforts in Chile designed to counter the influence of leftist political movements. Indeed, "[t]he overwhelming objective [of CIA covert activities] – firmly rooted in the policy of the period – was to discredit Marxist-leaning

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[4](...continued)
Intelligence Authorization Act for Fiscal Year 2000, Pub. L. No. 106-120, 113 Stat. 1606 (1999) (the "Hinchey Amendment"), that the Director of Central Intelligence submit a report to designated committees of the House and Senate a report "describing all activities of officers, covert agents, and employees of all elements in the intelligence community" with respect to: Allende's assassination in 1973; Pinchot's accession to power; and subsequent human rights violations by the Pinochet government. *Id.*

political leaders, especially Dr. Salvador Allende, and to strengthen and encourage their civilian and military opponents to prevent them from assuming power." In light of the communist takeover of Cuba in 1959 and the Soviet-American rivalry for influence throughout the Third World, the growth of the Chilean left and the weakening and fragmentation of moderate and conservative political forces were a matter of concern to the United States. *See id.* As for the human rights abuses of the Pinochet regime, both the Church Committee Staff Report and the CIA's Hinchey Amendment Report make clear that the United States did not condone the repression. The CIA did, however, continue contact, for intelligence gathering purposes, with Chilean security officers, a number of whom were implicated in human rights abuses. The purpose of these relationships, the reports point out, was intelligence gathering with an eye toward external threats and communist subversion; the purpose was not to assist the Pinochet regime in its campaign of suppressing dissent. *See id.*[5]

B.

In this case, the plaintiffs seek to predicate liability on a variety of sources, including the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368

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[5] With respect to CIA liaison activities with Chilean securities services, the Church Committee Staff Report noted that:

> Concern was expressed within the CIA that liaison with such organizations would lay the Agency open to charges of aiding political repression; officials acknowledged that, while most of CIA's support to the various Chilean forces would be designed to assist them in controlling subversion from abroad, the support could be adaptable to the control of internal subversion as well. However, the CIA made it clear to the Chileans at the outset that no CIA support would be provided for use in internal political repression. Furthermore, the CIA attempted to influence the Junta to maintain the norms the Junta had set in its `Instructious [sic] for Handling of Detainees' which closely followed the standards on human rights set by the 1949 Geneva Convention.

Id. at 40.

(entered into force Sept. 8, 1992); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (entered into force Nov. 20, 1994); the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, TS 993; the Universal Declaration of Human Rights, GA Res. 217 (III), U.N. Doc. A/910 at 71 (1948); the Charter of the Organization of American States, 2 U.S.T. 2394, 119 U.N.T.S. 3, as amended, Protocol of Buenos Aires of 1967, 21 U.S.T. 607, 721 U.N.T.S. 324; the Declaration of the Protection of all Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc.A/10034 (1975); the Organization of American States Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 25 I.L.M. 519; the American Declaration of Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. LV/II.82 doc. 6 rev. 1 at 17 (1992); the United Nations General Assembly Resolution and Declaration on the Protection of All Persons from Enforced Disappearance, Dec. 18, 1992, 32 I.L.M. 903; the Charter of the International Military Tribunal, August 8, 1945, confirmed by G.A. Res. 3, U.N. Doc. A/50 (1946); the Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, *reprinted in* 37 I.L.M. 999; Statute for the International Criminal Tribunal for Rwanda, Nov. 8, 1994, U.N. SCOR, 49th Sess., 3453d mtg., at 1, U.N. Doc. S/RES/955, reprinted in 33 I.L.M. 1598 (1994); Declaration on the Elimination of Violence Against Women, G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993); the Inter-American Convention on the Prevention, Punishment, & Eradication of Violence Against Women,

33 I.L.M. 1534 (entered into force Mar. 5, 1995); the Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992); 28 U.S.C. 1350; the Laws of Chile; "Laws of the District of Columbia, including but not limited to common law principles of wrongful death, assault and battery, intentional infliction of emotional distress and false imprisonment;" and customary international law. Compl. ¶¶ 9, 10. Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1350, and 1367. *See* Compl. ¶ 6.

ARGUMENT

Introduction

Decades removed from the events at issue it should not be forgotten that the United States' policy in respect of Chile was formulated against the backdrop of United States-Soviet rivalry and a number of international crises, all of which in one way or another implicated persistent Cold War tension between the superpowers. For example, in the spring of 1970, the Soviet Union moved troops and air defense missiles into Egypt to strengthen the defense of the Suez Canal. *See* H. Kissinger, *The White House Years*, 569, 572 (1979). In September, several aircraft highjackings occurred in the Middle East. Syria invaded Jordan, where the captured aircraft and their passenger hostages had been flown. United States forces in Europe were placed on alert before the United States both prevailed upon the Soviet Union to pressure the Syrians to withdraw and successfully negotiated an end to the hostage crises. *Id.* at 594-631. While these events were playing out in the Middle East, information came to light that the Soviets – in disregard of the secret understanding regarding Soviet forces in Cuba reached between President Kennedy and Premier Khrushchev at the end of the Cuban missile crisis – were building a submarine base in Cuba. That information, and the prospect for yet another superpower confrontation over Cuba, became public on September 25, 1970. *Id.* at 632-52. These events, all of which occurred at the same time that the United States was trying to negotiate an end to

the Viet Nam War, heightened the United States' concern over the prospect that Chile under a Marxist president might become yet another Communist base in the Western Hemisphere. *See id.* at 978.

Adjudication of the plaintiffs' claims in this case would involve judicial review of the decisions of the President of the United States and his closest advisors, based upon their assessment of the national interest, concerning United States foreign policy with respect to Chile. Lawsuits are not the forum in which to judge the wisdom or necessity of United States foreign policy. That is particularly so here. The plaintiffs' various claims in this case present no judicially cognizable question. Presenting as they do questions of foreign and national security policy, neither the United States' response to the potential for an Allende presidency in Chile nor the United States' response to the human rights abuses of the "eventual repressive regime of Augusto Pinochet," Compl. ¶ 39, that followed Allende's overthrow are cognizable in a damages suit. As explained below, dismissal of this case therefore is required under the political question doctrine. Moreover, the Court lacks subject matter jurisdiction over the plaintiffs' claims against the United States, which has not waived its sovereign immunity in the circumstances alleged in the complaint. The complaint's factual allegations, even assuming they were true, fail to allege any actionable claim against Dr. Kissinger who is sued for acts taken in an official capacity as Senior Assistant to the President for National Security Affairs and as Secretary of State. Accordingly, the plaintiffs have no remedy against Dr. Kissinger as a matter of law.

I. THE POLITICAL QUESTION DOCTRINE BARS ALL OF THE PLAINTIFFS' CLAIMS.

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean*

Society, 478 U.S. 221, 230 (1986). As the doctrine has developed, it has come to be recognized "as essentially a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Several factors help identify those cases that present such a non-justiciable political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. Whenever even one of these factors is "inextricable from the case at bar," the suit must be dismissed because its judicial resolution can be obtained only by the resolution of an otherwise non-justiciable question. *See id.*

The present case quite plainly falls within several of these factors. Although the plaintiffs have formulated their claims as seeking the vindication of personal rights, those claims directly challenge the legality of actions undertaken by Executive Branch officials in response to a perceived national security threat posed by events occurring in a foreign nation. The gist of the complaint is that in 1970 the United States, in response to the prospect of an Allende presidency in Chile, sought to foment a military coup. *See* Compl. ¶¶ 44, 47. The 1970 coup attempt failed after General Schneider was shot in a botched kidnap attempt, but the United States continued to apply pressure to destabilize the Allende government. *Id.* ¶¶ 50, 51, 53, 54, 55. In 1973, a successful coup did occur, and a military junta seized power in Chile. *Id.* ¶ 56. Following the coup, between 1973 and 1978, "brutal repression was directly coordinated and enforced by the Chilean Directorate of National Intelligence (DINA)." Compl. ¶ 60. Dr. Kissinger and other United States officials were aware of the DINA's brutal

repression of the Chilean junta's political opponents, *see id.* ¶ 63, but did not release to the public information regarding the true extent of the DINA repression. *Id.* During this time, the CIA continued its intelligence-gathering relationships with Chilean officials, including some directly involved in the DINA's human rights abuses. *Id.* ¶ 67. Further, "[d]espite the knowledge of the DINA's brutal record, the U.S. Government and Henry Kissinger continued to support the regime and were reluctant to speak out against these atrocities." *Id.* ¶ 68.[6]

Plainly this suit implicates United States foreign and national security policy and raises a non-justiciable political question. To begin, there is a clear textually demonstrable commitment of the power to conduct foreign affairs to the Executive and Legislative Branches. It is elementary that "[t]he conduct

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[6] The complaint also alleges that while serving as Secretary of State Dr. Kissinger "misled the international community into thinking that Henry Kissinger and the U.S. opposed Pinochet's brutal repression," but that "behind closed doors, Henry Kissinger indicated to Pinochet that the U.S. Government was sympathetic to Pinochet's goal of eliminating any ideological opposition." Compl. ¶ 74. The plaintiffs refer to "[a] recently declassified memorandum of conversation between Pinochet and Henry Kissinger." *Id.* That document indicates nothing of the sort. Instead Dr. Kissinger clearly stated in several instances the need for the Chilean government to improve its human rights record. *See* U.S. Department of State, Memorandum of Conversation of June 8, 1976, at 3-6, 9, 10. Statements by Dr. Kissinger that the plaintiffs inaccurately attribute to sympathy to "Pinochet's goal of eliminating any ideological opposition" in fact occurred in the context of a discussion of a conflict – potentially a military conflict – between Chile and Peru and the possibility that Cuban military forces could intervene on Peru's behalf. For example, in the very next sentence after his statement that "[w]e are not out to weaken your position" (which plaintiffs erroneously describe as expressing "sympathy" for Chile's repressive human rights policies), Secretary Kissinger stated "[o]n foreign aggression, it would be a grave situation if one were attacked. That would constitute a direct threat to the inter-American system." In the same conversation, Dr. Kissinger discussed with Pinochet prospects for American aid to Chile and that "[i]t would help you if you had some human rights progress, which could be announced in packages. The most important are the constitutional guarantees" and that "[r]ight to habeas corpus is also important." *Id.* at 9-10. The most that fairly can be said of Dr. Kissinger's comments to Pinochet is that Dr. Kissinger perhaps was cognizant of Chilean sensibilities on the matter of human rights and therefore emphasized that Chile was not being singled out. Viewed in the context of a diplomatic discussion with a foreign head of state, it should be no surprise that Dr. Kissinger told Pinochet that his public statements were "not offensive to Chile. Ninety-five percent of what I say is applicable to all the governments of the Hemisphere. It includes things your own people have said."

of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – `the political' – Departments." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 934 (D.C. Cir. 1988). The actions attributed to the United States and Secretary Kissinger fall well within the conduct of foreign relations. An Allende government in Chile was deemed inimical to the United States' interests. How to react to that event is indisputably a question of foreign relations committed by the Constitution to the so-called "political" branches of the government. The same is true with respect to the accession to power of the military junta that overthrew Allende and how to react to the subsequent Pinochet government's human rights abuses.

Because the events at issue so clearly implicate a matter textually committed to Executive Branch discretion, it should come as little surprise that the second and third *Baker* factors – a lack of judicially discoverable and manageable standards for resolving the matter, and the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion – also apply. Deciding how to respond to events in Chile between 1970 and 1977 assuredly entails a "policy determination of a kind for nonjudicial discretion" and is a matter for which judicially discoverable and manageable standards just do not exist. Stated another way, there is no discernable legal principle by which a court can decide that any particular Chilean government would have been better or worse for the United States' interests and likewise no legal principle by which a court could determine whether the United States' interests would be better or worse served by assisting those plotting to form an alternative government. The same is true with respect to United States policy toward the subsequent Pinochet regime. *Cf. Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) ("We have * * * not only recognized the limits of our own capacity to `determin[e] precisely when foreign

nations will be offended by particular acts," * * * "but consistently acknowledged that the `nuances' of `the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court." (citations omitted)).

The political character of questions such as these is readily apparent, as recognized in cases treating as a political question the matter of recognition of foreign governments, for example. *See, e.g., Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938) ("What government is to be regarded * * * as representative of a foreign state is a political rather than a judicial question, and is to be determined by the political department of the government."). *See also United States v. Pink*, 315 U.S. 203 (1942). *Accord Baker*, 369 U.S. at 212 (observing that "recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called `a republic of whose existence we know nothing.'" (quoting *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 149 (1820)); *Antolok v. United States*, 873 F.2d 369, 381-82 (D.C. Cir.1989) (Sentelle, J., concurring). Disputes arising from the President's decision to deploy military force against a foreign government similarly have been recognized as raising a nonjusticiable political question. *See, e.g., Industria Panificadora, SA v. United States*, 763 F. Supp. 1154, 1159-61 (D.D.C. 1991), *aff'd on other grounds*, 957 F.2d 886 (D.C. Cir. 1992). *See also Eminente v. Johnson*, 361 F.2d 73 (D.C. Cir. 1966) (per curiam).

Quite logically, the decision to lend covert assistance to those who would change a foreign government from within – perhaps through force – also calls for the exercise of a policy discretion clearly of a non-judicial nature. Such judgments also fall in a realm in which there are no judicially discoverable or manageable standards for resolving controversies implicating the wisdom or propriety of the challenged government action. *See, e.g., Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600

(D.D.C. 1983), *aff'd on other grounds*, 770 F.2d 202 (D.C. Cir. 1985). *See also Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 738-39 (S.D.N.Y. 1986) (suit seeking damages arising from CIA mining of foreign harbor presented non-justiciable political question), *aff'd* 819 F.2d 1129 (2d Cir. 1987). As Dr. Kissinger himself has written, "[w]hether and to what extent the United States should seek to affect the domestic developments in other countries is a complicated question, the answer to which depends on a variety of elements, including one's conception of the national interest." Kissinger, at 658.

The conclusion that this case presents a non-justiciable political question is not altered, moreover, by the fact that the plaintiffs seemingly plead this case as if it were a personal injury tort action under District of Columbia law and the Alien Tort Act, 28 U.S.C. § 1350 (which allows an alien to bring suit "for a tort only, committed in violation of the law of nations or a treaty of the United States"). Clearly the plaintiffs' allegations cannot be addressed without passing on the means by which the United States reacted to the prospect of an Allende presidency, allegedly by providing support and encouragement to military coup plotters. The same is true to the extent to which the plaintiffs take issue with the United States' reaction to human rights abuses by the successor Pinochet regime. Efforts to apply tort or even international law concepts to the facts alleged in this case would serve only to subject to judicial scrutiny policy decisions regarding the conduct of foreign affairs and covert intelligence activities. The wisdom, necessity or (in tort law terms) "reasonableness" of taking such steps on the United States' behalf are determinations plainly of a non-judicial character and not susceptible to analysis through any judicially discoverable or manageable criteria. *See Sanchez-Espinoza*, 568 F. Supp. at 600. To hold otherwise in this context would mean that virtually any foreign citizen claiming personal injury or death as the result of the conduct of United States' foreign policy toward his country

could maintain an action challenging that policy in our courts. *Cf. Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) ("[A]s a general matter the danger of foreign citizens' using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist."). That prospect not only would risk "the potentiality of embarrassment from multifarious pronouncements by various departments on one question" of foreign policy, it would entail the very judicial encroachment upon the Executive and Legislative power that the political question doctrine precludes. No where is that danger more manifest than in a case where, as here, plaintiffs rely in part on the Secretary of State's personal conduct of diplomacy with the head of a foreign government as a basis for liability. *See, e.g.*, Compl. ¶ 74.

Because foreign policy and national security considerations are inextricable from the case at bar, the plaintiffs' claims against Dr. Kissinger and the United States present nonjusticiable political questions. Accordingly, the United States' and Dr. Kissinger's motion to dismiss should be granted.

II. SOVEREIGN IMMUNITY BARS THE PLAINTIFFS' CLAIMS AGAINST THE UNITED STATES.

"It is well established that `[t]he United States, as sovereign, is immune from suit save as it consents to be sued ..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *In re Sealed Case, No. 99-3091*, 192 F.3d 995, 999 (D.C. Cir. 1999) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). It is similarly well established that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, see, e.g., *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 * * * (1992), and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990)). *See also Floyd v. District of Columbia*,

129 F.3d 152, 156 (D.C. Cir. 1997) ("waivers of sovereign immunity must be unequivocally expressed in statutory text; we cannot imply a waiver of sovereign immunity").

No waiver of the United States' sovereign immunity embraces the plaintiffs' various theories of recovery asserted in their complaint. Although the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1); 2671-2680 (2000), is a limited waiver of sovereign immunity with respect to federal employees' torts committed in the scope of office or employment, the plaintiffs expressly disclaim reliance on the FTCA. *See* Compl. ¶ 12. In addition, the plaintiffs acknowledge that they have not completed the FTCA administrative claim requirement, *see* 28 U.S.C. § 2675(a), a jurisdictional prerequisite to instituting suit under the FTCA. *See Hohri v. United States*, 782 F.2d 227, 245 (D.C. Cir. 1986), *vacated on other grounds sub nom. United States v. Hohri*, 482 U.S. 64 (1987).[7]

Because the plaintiffs have not completed the FTCA administrative claim procedure, moreover, this action must be dismissed notwithstanding the United States' substitution of itself in place of Dr. Kissinger pursuant to 28 U.S.C. § 2679(d)(1). Although the FTCA, as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988, provides for substitution of the United States in place of employees sued in a personal capacity, the Act also provides that upon substitution the suit "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title *and shall be subject to the limitations and exceptions applicable to those actions*." 28 U.S.C. § 2679(d)(4) (emphasis added). Because the plaintiffs have

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[7] According to the complaint, "[a]s to * * * any claims for which Plaintiffs are required to exhaust administrative remedies prior to suit, Plaintiffs have made the appropriate administrative filings, and will amend this complaint *when those are resolved*." Compl. ¶ 12 (emphasis added). The FTCA requires, however, that a plaintiff's administrative claim be "resolved" – through final denial in writing by the concerned agency or by the passage of six months without final action by the agency – prior to instituting suit against the United States. *See* § 2765(a).

not completed the administrative claim process, *see* Compl. ¶ 12, this action must be dismissed for want of subject matter jurisdiction.[8]

Instead of relying on the FTCA waiver of sovereign immunity, the plaintiffs' suit against the United States appears to rest on two postulates: First, and most sweepingly, the plaintiffs assert that "the acts complained of are violations of customary and codified international law as to which no person or state may claim immunity." Compl. ¶ 13.a. Second, according to the plaintiffs, "the Administrative Procedures Act waives sovereign immunity in actions `seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.'" *Id.* ¶ 13.b (citing 5 U.S.C. § 702).

That no state may claim immunity from suit for a violation of peremptory norms of international law hardly is apparent. *See, e.g., Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994). In all events, the plaintiffs' first proposition is unsound because it ignores the well-settled case law recognizing that it is for Congress to conclude that the United States should be subject to suit for damages. *See Lane*, 518 U.S. at 192 ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed *in statutory text*.") (emphasis added). None of the statutes on which the plaintiffs invoke jurisdiction – 28 U.S.C. §§ 1331, 1350, and 1367 – contains the required clear and unequivocal language manifesting a congressional intent to waive sovereign immunity. Section 1331 merely confers jurisdiction upon federal courts to hear cases arising under federal law, and it is well-settled that such general jurisdiction-conferring statutes do not waive sovereign immunity.

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[8] Because the action must be dismissed on this ground, it is unnecessary for the Court to consider here other limitations and exceptions to the FTCA waiver of immunity that likely bar the plaintiffs' novel claim for relief, such as the FTCA's "discretionary function" exception, *see* 28 U.S.C. § 2680(a), the foreign country exception, *see* § 2680(k), and the FTCA's two-year statute of limitations, *see* 28 U.S.C. § 2401(b).

See, e.g., Koehler v. Commissioner of Internal Revenue, 153 F.3d 263, 266 n.2 (5th Cir. 1998). Likewise, it is well-established that the Alien Tort Claims Act, 28 U.S.C. § 1350, does not waive the United States' sovereign immunity. *See, e.g., Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992) (per curiam); *Sanchez-Espinoza v. Reagan*, 770 F.2d at 207. The supplemental jurisdiction statute, 28 U.S.C. § 1367, obviously no more waives sovereign immunity than does § 1331 or § 1350. Similarly, the TVPA, various treaties and other sources of international law to which the plaintiffs refer in their complaint do not operate as a waiver of sovereign immunity. None contains the requisite clear and unequivocal statement of Congressional intent to waive the United States' sovereign immunity. *See Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980).

As for the APA, without any viable equitable claims, the plaintiffs have no basis on which to invoke the APA waiver of immunity. *See* 5 U.S.C. § 702 ("Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground"). The plaintiffs purport to seek declaratory relief, but a plea for declaratory relief is subject to the same discretionary equitable standards for issuance as is a plea for injunctive relief. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985). *See also Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). What Justice (then-Judge) Scalia wrote for the Court of Appeals in *Sanchez-Espinoza*, is no less applicable here: "[T]he discretionary relief of declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court. Such equivalence of effect dictates an equivalence of criteria for issuance." 770 F.2d at 208 n.8.

In this case, the plaintiffs could not even seek an injunction because there is no immediate likelihood they will suffer irreparable harm. Under settled principles, a claim of past harm without more does not confer standing to seek prospective equitable remedies. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (while past exposure to alleged illegal conduct was presumably sufficient to establish plaintiff's standing to sue for damages, it was inadequate standing for injunctive relief). The same is true a desire to have declared unlawful the means and ends of United States foreign policy. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement" of standing. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 107(1998). "[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id.* (citations omitted). Without sufficient allegations of future injury, therefore, the plaintiffs have no standing to seek remedies such as injunctive or declaratory relief. *See Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1272 (D.C. Cir. 1994).[9] Finally, because the claims in this case challenge United States foreign and national security policy decisions, discretionary equitable relief would be particularly inappropriate. *See Sanchez-Espinoza*, 770 F.2d at 207 ("At least where the authority for our interjection into so sensitive a foreign affairs matter as this are statutes no more specifically addressed to such concerns than the Alien Tort Statute and the APA, we think it would be an abuse of our discretion to provide discretionary relief."). In sum, the APA waiver does not apply,

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[9] For the same reasons, declaratory relief is unavailable against Dr. Kissinger. *See Fair Employment Council*, 28 F.3d at 1272.

and because no clear and unequivocal waiver of the United States' sovereign immunity otherwise authorizes the plaintiffs' suit, the Court lacks subject matter jurisdiction. The claims against the United States should be dismissed.

III. THE COMPLAINT STATES NO COGNIZABLE CLAIMS AGAINST DR. KISSINGER.

The plaintiffs purport to sue former Dr. Kissinger allegedly in both his official capacities as former Secretary of State and Senior Assistant to the President for National Security Affairs, and in his individual capacity. As explained below, Dr. Kissinger is immune from suit, and the claims against him should be dismissed. The *Westfall* Act amendments to the Federal Tort Claims Act shield Dr. Kissinger from suit for the plaintiffs' claims under treaties, international law, and District of Columbia tort law. In addition, federal common law bars the plaintiffs' claims based on District of Columbia local tort law. The plaintiffs also state no actionable claim against Dr. Kissinger under the Torture Victims Protection Act of 1991, and Dr. Kissinger is in any event immune from suit under the TVPA.

A. Dr. Kissinger is Entitled to Absolute Immunity from Suit.

Commonly referred to as the "*Westfall* Act," the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified in part at 28 U.S.C. §§ 2671, 2674, 2679), generally confers upon all federal officers and employees a broad absolute immunity from suit for their "negligent or wrongful act[s] or omission[s]" while acting in the scope of office or employment. *See* 28 U.S.C. § 2679(b)(1); *United States v. Smith*, 499 U.S. 160, 163 (1991). *See also Kimbro v. Velten*, 30 F.3d 1501, 1504 (D.C. Cir. 1994). Because the Attorney General's designee has certified that Dr. Kissinger was acting in the scope of office or employment at the time of the incidents out of which the plaintiffs claims arose, he is entitled to be

"dismissed from the action and the United States is substituted as defendant." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995).

With the possible exception of any claim under the Torture Victims Protection Act (discussed below) the *Westfall* Act disposes of all of the plaintiffs' claims against Dr. Kissinger, including the claims under treaty, international law and the Alien Tort Claims Act. The *Westfall* Act was intended to confer upon federal officials a form of absolute immunity from suit in all but two narrow categories of federal claims for relief. As the Act is written, it precludes any civil suit against a government employee based upon "the negligent or wrongful act or omission of [that] employee of the Government while acting within the scope of office or employment," and makes an FTCA suit against the United States plaintiffs' exclusive means of recovery on any such claims. *See* 28 U.S.C. § 2679(b)(1). "Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred." *Id.*

There are only two exceptions to this broad rule of statutory immunity. First, Congress preserved personal liability in so-called "*Bivens* actions, " *i.e.*, suits against government officials in an individual capacity to recover money damages for alleged violations of the Constitution, *e.g., Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See* 28 U.S.C. § 2679(b)(2)(A). That exception is inapplicable here, where the plaintiffs have not alleged that Dr. Kissinger violated the United States Constitution.

Second, Congress preserved personal liability for certain federal statutory claims – those which are "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). With perhaps the exception of the

plaintiffs' TVPA claim, this second exception to the general rule of immunity also does not apply to the claims at issue here. To the extent the plaintiffs rely on various treaties or on sources of international law as the basis for the rights they claim were infringed, *see* Compl. ¶¶ 8, 9, their suit simply is not one for "a violation of a statute of the United States." The same obviously is true of the plaintiffs' various claims under District of Columbia law.

This analysis is unchanged by the plaintiffs' reliance on the Alien Tort Claims Act, 28 U.S.C. § 1350. Section 1350 provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." That the official conduct alleged here even is actionable under § 1350 is open to doubt.[10] In any event, it is clear that § 1350 creates no substantive rights or duties such that § 1350 can be "violated;" a necessary requirement for application of the § 2679(b) (2)(B) exception to immunity. *See Smith*, 499 U.S. at 173-74. Instead, § 1350 contemplates that the district courts can entertain an action for the violation of substantive rights conferred elsewhere, namely by the law of nations or by a treaty of the United States. Accordingly, because United States officials cannot "violate" § 1350, the liability preserving exception of § 2679(b)(2)(B) does not apply to such claims. *See Alvarez-Machain v. United States*, 266 F.3d 1045, 1053-54 (9th Cir. 2001) (so holding), *withdrawn*, 284 F.3d 1039

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[10] Although some courts have recognized § 1350 to authorize a cause of action for aliens seeking redress for violations of international law, *see, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the issue remains undecided in this Circuit. *Compare Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 811-16 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that § 1350 confers jurisdiction but does not by itself confer a cause of action), *with id.* at 791-96 (Edwards, J., concurring) (concluding that § 1350 does provide a private cause of action). *See also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985).

(9th Cir. 2002).[11] *See also United States v. Smith*, 499 U.S. at 173-74. Dr. Kissinger remains immune from suit.

B. Common Law Immunity Also Bars the Plaintiffs' Claims.

Although it is a fundamental principle of our federal system of government that "[t]here is no federal *general* common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added), it is equally well-established that "a few areas, involving `uniquely federal interests,' * * * are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts — so-called `federal common law.'" *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (citations omitted). As demonstrated below, this principle defeats the plaintiffs' District of Columbia tort law claims challenging the manner in which Dr. Kissinger conducted his official responsibilities on behalf of the United States.

For federal displacement of state law to happen, two conditions must be met. First, the subject matter at issue must be an area of "uniquely federal interest." *Id.* at 504. The *Boyle* court identified the "liability of federal officials for actions taken in the course of their duty" *id.* at 505, as well as "the liability of independent contractors performing work for the Federal Government," *id.* at 505 n.1, as two such areas of "uniquely federal interest." *See id.* at 505. The Court explained that both examples "obviously implicated the same interest in getting the Government's work done." *Id.*

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[11] The *Alvarez-Machain* opinion was withdrawn after the Court of Appeals for the Ninth Circuit granted the United States' petition for rehearing en banc, which raised different issues. *Alvarez-Machain* remains persuasive authority on the application of § 2679(b)(1) to claims such as the plaintiffs bring here.

The second condition for the displacement of state law by a federal common law rule requires that "a `significant conflict' exists between an identifiable `federal policy or interest and the [operation] of state law,'" *id.* at 507, or that "the application of state law would `frustrate specific objectives' of federal legislation * * * ." *Boyle*, 487 U.S. at 507 (citations omitted). When the area in question is one of uniquely federal concern, moreover, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates `in a field which the States have traditionally occupied.'" *Id.* (citation omitted). "[T]he fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." *Id.* (footnote omitted).

Those two conditions for displacement of state tort law plainly are triggered here. First, the plaintiffs seek to hold Dr. Kissinger personally liable for his conduct in office as Senior Assistant to the President for National Security Affairs and as Secretary of State. This lawsuit plainly implicates the government's ability to "get its work done." *Boyle*, 487 U.S. at 505. That general interest in getting the government's work done consistently has been recognized to justify some form of federal common law rule exempting federal officials from state tort liability. *See id. See also Westfall v. Erwin*, 484 U.S. 292, 295 (1988); *Howard v. Lyons*, 360 U.S. 593, 597 (1959); *Martin v. Malhoyt*, 830 F.2d 237, 250-51 (D.C. Cir. 1987). In addition, this lawsuit implicates another, more particular, area of uniquely federal interest – the conduct of our nation's foreign affairs. As we demonstrate, the plaintiffs' efforts to hold a high-level federal official personally liable for his conduct of the nation's foreign policy produces a sharp conflict between federal and state authority such that a federal common law rule of immunity must apply to defeat state tort liability.

"Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). The Constitution's delegation of a variety of powers to the national government, and its denial to the States of a variety of other powers regarding relations with foreign governments has been recognized to vest in the national government exclusive authority to conduct the foreign relations of the United States. As the Supreme Court has explained, "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. at 233. This so-called "foreign affairs power of the federal government," *see, e.g., National Foreign Trade Council v. Natsios*, 181 F.3d 38, 49 (1st Cir. 1999), *aff'd on other grounds, sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), has been recognized to operate in a manner much like the "dormant" commerce power: Even in the absence of specific federal action, the power's very delegation to the federal government operates to invalidate certain state action whose effect is inconsistent with that delegation's purpose. *See Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968). *See also Natsios*, 181 F.3d at 52-54.[12]

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[12] The term "foreign affairs power" is something of a misnomer. Instead of granting a "foreign affairs power" in so many words, the Constitution grants a number of foreign affairs-type powers to the Congress and the President, while denying, (or in some instances strictly conditioning the exercise of) the same or similar powers with respect to the states. Hence, Congress is granted the powers "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1; "[t]o regulate Commerce with foreign Nations," *id.* cl. 3; "[t]o establish an uniform Rule of Naturalization," *id.* cl. 4; "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* cl. 10; and "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* cl. 11. In addition, "[t]he Congress shall have Power to declare the Punishment of Treason." *Id.* art. III, § 3, cl. 2. "Treason against the United States" is defined as "levying war against them, or in adhering to their Enemies, giving them Aid and Comfort." *Id.*, cl. 1.

(continued...)

Accordingly, in *Zschernig*, the Supreme Court held unconstitutional – under the dormant "foreign affairs power" – an Oregon probate statute requiring escheat where a nonresident alien claimed real or personal property except under certain conditions. The Supreme Court began by noting that in *Clark v. Allen*, 331 U.S. 503 (1947), it had upheld a probate statute containing a "general reciprocity clause" which "would have only `some incidental or indirect effect in foreign countries.'" *Zschernig*, 389 U.S. at 433 (quoting Clark, 331 U.S. at 517). In addressing the Oregon statute, the Court noted that since its decision in Clark, "the probate courts of the various States have launched inquiries into the type of governments that obtain in particular foreign nations – whether aliens under their law have enforceable rights, whether the so-called `rights' are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation." *Id.* at 433-34. The Court observed that, consistent with this trend, the Oregon statute "as construed seems to make

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[12](...continued)

With respect to the President's powers, the Constitution appoints him Commander in Chief of the armed forces, *id.* art. II, § 2, cl. 1, and, with the advice and consent of the Senate, grants him the power "to make Treaties" and to "appoint Ambassadors," *id.* cl. 2. Additionally, the President is empowered to "receive Ambassadors and other public Ministers." *Id.* § 3.

In contrast to the federal government, the states are forbidden to "enter into any Treaty, Alliance, or Confederation" or to "grant Letters of Marque and Reprisal," *id.* art. I, § 10, cl. 1; they may not "without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing [their] inspection Laws," *id.* cl. 2; and may not, "without the Consent of Congress * * * enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.* cl. 3. In addition, the Constitution provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." *Id.* § 9, cl. 8.

unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. That course of decision, the Court explained, had the potential to adversely affect foreign relations because other nations might react unfavorably to such treatment of their citizens based on state courts' evaluations of foreign governments and their policies and thereby trenched upon the exclusive federal power regarding foreign affairs. *See id.* at 440-41.

The continued vitality of *Zschernig* and its "dormant foreign affairs power"[13] doctrine was recognized recently by the Court of Appeals for the First Circuit which held unconstitutional a Massachusetts law restricting the ability of the State and its agencies to contract with firms conducting business in Burma. *See Natsios*, 181 F.3d at 49-61. Rejecting Massachusetts' argument that its Burma law was permissible in light of *Zschernig* as merely having an "incidental or indirect effect in foreign countries," the First Circuit reasoned that "*Zschernig* stands for the principle that there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed." *Natsios*, 181 F.3d at 52.

Although the exact scope of *Zschernig's* broad holding remains to be explored, *see Natsios*, 181 F.3d at 57, the fact that the federal government's so-called "foreign affairs power" alone can render state action unconstitutional – even in the absence of federal action – serves to illustrate that foreign affairs is one of those "few areas, involving `uniquely federal interests,' * * * [that] are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary," by federal common law rules. *Boyle*, 487 U.S. at 504. In this instance, the plaintiffs would have District of Columbia tort law applied to judge the actions of United States

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[13] *See* L. Henkin, *Foreign Affairs and the United States Constitution*, 162 (1996) (cited in *Natsios*, 181 F.3d at 59 n.14).

officials, including the Secretary of State, carrying out foreign policy. The States and the District, however, have no role to play in the formulation of foreign policy, whether it be by judging the policies of foreign governments, *see, e.g., Zschernig*, 389 U.S. at 440-41; *Natsios*, 181 F.3d at 49-61, or by judging the actions of United States officials in formulating and executing our own government's policy in respect of foreign nations. If, as *Zschernig* teaches, "foreign policy attitudes, the freezing or thawing of the `cold war' and the like" are "matters for the Federal Government, not for local probate courts," *id.* at 437-38, then assuredly passing upon the means and ends of United States foreign policy is for the Executive Branch and the Congress, not for local courts adjudicating personal injury tort suits.

In sum, the plaintiffs' claims in this case indisputably implicate an area of uniquely federal concern. That alone lessens the degree of conflict between federal and state policy needed for displacement of state law and application of an appropriate federal common law rule. *See Boyle*, 487 U.S. at 507. Where, as here, the States (and District of Columbia) have little or no traditional role in regard of the subject matter at issue, the application of a federal immunity rule barring suit is all the more essential to safeguarding the proper functioning of our federal system. To do otherwise would all but invite foreign nationals displeased with our nation's foreign policy to bring suit for damages in a local courts across the country, or even perhaps seek injunctions in those forums. Accordingly, because Dr. Kissinger was performing foreign policy and national security functions with respect to the events alleged in the complaint, he should be accorded absolute immunity from suit under state or District of Columbia law.

C. The Plaintiffs State No Cognizable Claim Under the TVPA.

1. The plaintiffs also invoke the Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) ("TVPA"), as a basis for their suit. The TVPA was enacted more than

twenty years after the events alleged in the complaint. It amends the Alien Tort Claims Act and provides for civil liability for torture or extrajudicial killing carried out by an individual "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2(a), 102 Stat. at 73. Although the TVPA is engrafted upon the Alien Tort Claims Act, it arguably contains in its definitions of "torture" and "extrajudicial killing" substantive norms such that the TVPA, unlike § 1350 generally, can be "violated." Assuming for argument's sake that a claim under the TVPA falls within the exception to absolute immunity provided in 28 U.S.C. § 2679(b)(2)(B), the complaint nevertheless states no cognizable claim against Dr. Kissinger or Ambassador Helms under the TVPA.

First, the TVPA imposes liability only upon individuals acting "under actual or apparent authority, or color of law *of any foreign nation* * * * ." TVPA § 2(a), 102 Stat. at 73 (emphasis added). High-level United States officials, such as the Secretary of State or the President's national security advisor assuredly do not act "under actual or apparent authority, or color of law of any foreign nation."[14] By its terms, then, the TVPA affords no claim against Dr. Kissinger. *See also White v. Paulsen*, 997 F. Supp. 1380, 1385 n.1 (E.D. Wa. 1998) ("On its face, the right of action created by the Torture Victim Protection Act is limited to conduct taken under color of law of a `foreign' nation. Pub. L. No. 102-256, § 2.").

Second, even if the TVPA were not limited to those who act under color of foreign law, it could not be applied retroactively to impose liability upon United States officials. As a general rule, statutes will not be construed to have retroactive effect unless their language so requires. *See Gersman v.*

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[14] Indeed, in his statement upon signing the TVPA into law, the first President Bush expressly noted this important limitation on the scope of the TVPA remedy. *See* Statement By President George Bush Upon Signing H.R. 2092, 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) ("I do not believe it is the Congress' intent that H.R. 2092 should apply to United States Armed Forces or law enforcement operations, which are always carried out under the authority of United States law.").

Group Health Ass'n, Inc., 975 F.2d 886, 897-98 (D.C. Cir. 1992). A statute has retroactive effect if its application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

Were it applied to Dr. Kissinger here, the TVPA would have retroactive effect, something its language clearly does not require. First, as demonstrated above, the 1988 *Westfall* Act amendments to the FTCA confer a form of absolute immunity from suit, *see United States v. Smith*, 499 U.S. at 163, broad enough to bar personal capacity damages claims for violations of treaties or the law of nations. *See Alvarez-Machain*, 266 F.3d at 1053-54. The TVPA was enacted in 1992 and the plaintiffs' claim under it either falls within the *Westfall* Act bar (like the rest of the plaintiffs' claims), or falls within the *Westfall* Act exception preserving personal liability for claims "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). For the TVPA to meet the latter test, however, it must be regarded as a statutory cause of action creating duties the violation of which are actionable under 28 U.S.C. § 2679(b)(2)(B). *See generally Smith*, 499 U.S. at 173-74 (explaining when a statute triggers the § 2679(b)(2)(B) exception to immunity). In that case, however, the TVPA, when applied to United States officials' pre-enactment conduct, clearly "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, [and] impose[s] new duties with respect to transactions already completed," and therefore is retroactive. *Landgraf*, 511 U.S. at 280. Simply put, had Congress not created the TVPA cause of action in 1992, Dr. Kissinger would be immune from suit for the events on which the plaintiffs premise their TVPA claim. Thus, application of the TVPA to pre-enactment conduct by United States officials would impose new violable statutory duties where none

existed before; it would impair rights (immunity from suit) those officials possessed prior to enactment; and it would increase the liability of those officials for their pre-enactment conduct (a consequence of creating a new duty the violation of which carries no immunity under § 2679(b)(2)(B)).

Because the TVPA would operate in this manner if applied to United States officials sued for their pre-enactment conduct, the statute in that respect would have to be deemed "retroactive." *See Landgraf*, 511 U.S. at 280. Yet nothing in the statutory language indicates that such a result is necessary to accomplish the TVPA's purpose or that Congress ever intended such a result. To the contrary, all indications in the statutory text are that Congress never imagined application of the TVPA to United States officials acting in an official capacity in respect of foreign policy or national security. Had Congress intended application (retroactive or otherwise) of the TVPA to United States officials, presumably it would have said so in language far more indicative of such an intent than the requirement that the defendant act "under actual or apparent authority, or color of law of any foreign nation."

Because the TVPA does not apply to United States officials acting in an official capacity, and because the Act clearly can have no retroactive application to such official acts, the complaint fails to state any cognizable claim under the TVPA and should be dismissed.[15]

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[15] *Alvarez-Machain v. United States*, 107 F.3d 696, 702-03 (9th Cir. 1996), is not to the contrary. Although the court in that case held that the TVPA could be applied to pre-enactment conduct of individuals hired by Drug Enforcement Administration officials to abduct the plaintiff in Mexico and turn him over to DEA in the United States, the court did not address the question of whether the TVPA could be applied to pre-enactment conduct of the DEA officials themselves or even whether the TVPA gave rise to a cognizable claim against United States officials acting in an official capacity. Indeed, the court noted the defendant's argument that the TVPA might be retroactive and therefore not apply with respect to a government official entitled to *Westfall* Act immunity. Because the defendant was not entitled to claim *Westfall* Act immunity, however, the court deemed this argument "too remote" to affect application of the TVPA in that case. *See id.* at 703.

D. Qualified Immunity Bar Plaintiffs' Claims Under the TVPA, Treaty and International Law.

Aside from the retroactivity problem, the TVPA claim also is barred, at a minimum, by Dr. Kissinger's qualified immunity from suit. Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (citation omitted). *See also Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984) ("[O]fficials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages."). Under this standard, "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the `objective legal reasonableness' of the action, *Harlow*, 457 U.S. at 819, assessed in light of the legal rules that were `clearly established' at the time it was taken, *id.*, at 818." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). *See also Butera v. District of Columbia*, 235 F.3d 637, 646-47 (D.C. Cir. 2001).

In this instance, the events alleged in the complaint occurred between 1970 and 1977 (when Dr. Kissinger left office). *See, e.g.*, Compl. ¶ 33. The TVPA was enacted on March 12, 1992, *see* 106 Stat. at 73, and accordingly was not among "the legal rules that were `clearly established'" at the time of Dr. Kissinger's alleged injury-causing actions. That statute, therefore, cannot be a basis for personal liability with respect to the events at issue. The *Harlow* standard is designed to allow officials to act "`with independence and without fear of consequences'" in circumstances in which the law is not clearly established. *Harlow*, 457 U.S. at 819 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). To this end, officials are not required to predict the future course of the law on pain of damages should

they guess wrong. *See Wilson v. Layne*, 526 U.S. 603, 617 (1999). Consistent with these principles, qualified immunity bars damages claims against government officials based upon later-enacted statutes, such as the TVPA. *See, e.g., Werner v. McCotter*, 49 F.3d 1476, 1481 (10th Cir. 1995) (qualified immunity barred damages claims based upon subsequent enactment of Religious Freedom Restoration Act of 1993); *Friedman v. South*, 92 F.3d 989 (9th Cir. 1996) (same); *Genas v. State of New York Department of Correctional Servs.*, 75 F.3d 825, 831 n.6 (2d Cir. 1996) (same).[16]

Dr. Kissinger also is entitled to qualified immunity because application of the TVPA's standards in these circumstances is unclear in any event. As noted above, the TVPA imposes personal liability upon individuals acting "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2, 102 Stat. at 73. That this later-enacted standard reaches the conduct of United States government officials carrying out United States foreign and national security policy is anything but "clearly established," even today.

Finally, qualified immunity also bars the plaintiffs' claims brought under treaty and international law. That the conduct alleged in the complaint was "clearly" unlawful in the sense that *Harlow* requires before officials are made to pay damages, *see Anderson v. Creighton*, 483 U.S. at 640-41, simply is not apparent. *Cf. Sanchez-Espinoza*, 702 F.2d at 205, 206-07 (questioning whether United States

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[16] In this respect, the qualified immunity rule applied to statutory causes of action often can yield the same result as the general presumption that statutes will not be construed to have retroactive effect unless their language so requires. *See Gersman*, 975 F.2d at 897-98. Qualified immunity doctrine, however, has an additional component; it protects discretionary decision making by federal and state government officials and thereby serves the public interest. *See Harlow*, 457 U.S. at 814-16. So even when as a general matter a statute's language may require retroactive application, the need to protect discretionary government decision making may require qualified immunity for officials who reasonably could not anticipate that their actions later would be made unlawful.

officials' "alleged support of forces bearing arms against the government of Nicaragua" violated any treaties of the United States).

* * * * *

Implicit in the plaintiffs' suit is the premise that a right of judicial review exists to second guess the means and ends of United States foreign policy at the behest of foreign citizens who no doubt vigorously disagree with that policy, and that courts may check supposed foreign policy excesses of the political branches by application of both international and domestic tort law. Today United States forces are engaged in combat in Afghanistan seeking to protect, not only the national interest, but the very safety of American citizens at home. The President deployed our armed forces with the support of a virtually unanimous Congress at a time of clear national emergency. If suits such as the present one were permissible in our courts, foreign citizens opposed to our government's policies would be free to set the Judicial Branch of government on a collision course with the President and Congress. Moreover, covert operations, such as the plaintiffs would challenge here, provide the President and Congress an alternative to direct military force when dealing with foreign governments whose policies are thought inimical to the United States' interests. That is no less true today, when our Government must confront threats posed by terrorist organizations, nations that may harbor terrorists, and by nations that pose a threat to our national security because seeking to obtain weapons of mass destruction. Yet under the plaintiffs' theories, there is no apparent reason why a foreign citizen claiming injury as the result of United States support of foreign dissidents could not bring a suit such as this and thereby challenge the means and ends of United States foreign policy. One need only pay a filing fee and allege an intent to "terrorize" a foreign population, *see, e.g., Saltany v. Reagan*, 702 F. Supp. at 320, or some other asserted international or domestic "tort" to set in motion judicial review of the manner by

which our government attends to the national interest in the always turbulent, often violent, realm of international affairs.

As explained above, the political question doctrine plainly forecloses such a constitutional conundrum. Neither section 1350 nor the TVPA was intended as a vehicle for United States courts to judge the lawfulness of United States government actions abroad in defense of national security. Any remedies for such actions are appropriately matters for resolution by the political branches, not the courts. For these reasons, and for the other reasons established above, the plaintiffs plainly can prove no set of facts consistent with their allegations that would entitle them to relief, and the complaint should be dismissed.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss on behalf of the United States and Dr. Kissinger should be granted.

Respectfully submitted,

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Dated: February 28, 2003

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2003, I served a true copy of the foregoing Memorandum of Points and Authorities by both facsimile and first class mail, postage pre-paid, addressed to the plaintiffs' counsel as follows:

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