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.	)	
	)	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS
UNITED STATES' AND HENRY KISSINGER'S MOTION TO DISMISS

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The plaintiffs' Opposition to Defendants' Motion to Dismiss (hereinafter "Opposition") demonstrates with a clarity rivaled only by the plaintiffs' complaint that the plaintiffs have no cognizable claims against the United States or Dr. Kissinger. The plaintiffs' approach to this case is captured in such assertions as "[t]he defendants correctly note that Defendant Kissinger indeed mentioned that the United States wanted the Chilean government to improve its human rights record," but that "Defendant Kissinger failed to communicate the U.S. government's position by expressly disavowing Congressional disapproval of Pinochet's oppressive tactics, thereby condoning Pinochet's human rights violations." Opposition at 6-7 (footnote omitted). As this passage makes clear, this case arises from nothing less than United States policies with which the plaintiffs disagree. Equally clear is that this suit presents no cognizable claims and should be dismissed.

I. JURISDICTION.

A. Political Question Doctrine.

According to the plaintiffs they "acknowledge that government officials' ability to negotiate freely in making policy determinations is crucial to democracy and the maintenance of security of this nation. As such, the plaintiffs are not questioning the propriety of U.S. policy toward Communist states. Rather, the plaintiffs are challenging the defendants' role in assisting grave human rights violations." Opposition at 9. As the passage quoted at the outset illustrates, however, the plaintiffs really are objecting to a United States policy toward the Pinochet regime that the plaintiffs think insufficiently vigorous on the question of human rights. As the cases applying the political question doctrine in the foreign and national security policy context uniformly teach, the plaintiffs' novel view has never been the law. *See* Opening Memorandum at 10-15 (and cases cited therein). *Cf. Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600 (D.D.C.

1983) (political question doctrine barred suit arising from United States support of Nicaraguan insurgents), *aff'd on other grounds*, 770 F.2d 202 (D.C. Cir. 1985); *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).

The plaintiffs rely almost exclusively on generalities, none of which has meaningful application to the case at hand. For example, the plaintiffs invoke *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for the proposition that "every right, when withheld, must have a remedy, and every injury its proper redress." Opposition at 10 (quoting *Marbury*, 5 U.S. (1 Cranch) at 163 (internal quotations omitted)). *Marbury* hardly stands for the judicial absolutism that the plaintiffs suggest. As every student of constitutional law knows, the Court in *Marbury* declined to provide the plaintiff a remedy precisely because the Court lacked jurisdiction over the cause. *See Marbury*, 5 U.S. (1 Cranch) at 173-79. *Marbury* actually illustrates precisely why this case should be dismissed – courts do not "decide on the rights of individuals" *see id.* at 163, where they lack jurisdiction to do so.

The plaintiffs inadvertently acknowledge as much, quoting *Marbury* for the proposition that it is not for the courts "to inquire how the executive, or executive officers, perform duties in which they have a discretion." *Id.* at 170. *See* Opposition at 10. Foreign and national security policy quintessentially is an area of Executive Branch discretion. *See 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). Even assuming for argument's sake that treaty or international law was violated in the circumstances the plaintiffs describe, therefore, the power of

the Executive to disregard international law in the performance of its constitutional functions is well-established. *See, e.g., Garcia-Mir v. Meese*, 788 F.2d 1446, 1454 (11th Cir. 1986). *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir. 1991); *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1447 (5th Cir.), *amended,* 997 F.2d 1122 (5th Cir. 1993) (per curiam); *United States v. Berrigan*, 283 F. Supp. 336, 342 (D. Md. 1968) ("Whether the actions by the executive and legislative branches in utilizing our armed forces are in accord with international law is a question which necessarily must be left to the elected representatives of the people and not the judiciary. This is so even if the government's actions are contrary to valid treaties to which the government is a signatory."); Restatement (Third) Foreign Relations Law of the United States, § 115, Reporters Note 3 ("There is authority for the view that the President has the power, when acting within his constitutional authority, to disregard a rule of international law or an agreement of the United States."); L. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION, at 221-22 (1972) ("[T]he courts will give effect to acts within the constitutional powers of the political branches without regard to international law."). *Cf. Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d at 943 ("Congress' violation of a treaty is not cognizable in domestic court.").[1] Accordingly, the "individual rights" the plaintiffs – all of whom suffered at the hands of a *foreign* government – invoke do not bring this case within the category of

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[1] Although it generally is true that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination," *The Paquete Habana*, 175 U.S. 677, 700 (1900), the courts resort to this principle only "where there is no treaty and no controlling executive or legislative act or judicial decision." *Id.*

justiciable controversies.[2]

The plaintiffs persist, however, by arguing that "adjudication of the claims at hand would involve the Court to place [sic] narrow focus on the issues of, inter alia, third-party liability, international law, claims, and domestic tort claims." Opposition at 12. The plaintiffs go on that "[s]tandards that would guide the Court's determination are readily available." *Id.* at 12. The problem again is that the plaintiffs overlook that their claims put at issue United States foreign and national security policy. The conduct of foreign and national security policy is committed to the so-called political branches of government, and the determination of how the United States should react to events in other countries is a question reserved exclusively to the Executive and Legislative Branches. Otherwise, foreign governments and foreign citizens routinely could

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[2] Although the plaintiffs argue their case as if Dr. Kissinger and presumably other United States officials directly participated in the torture, murder and other human rights abuses they allege, *see, e.g.*, Opposition at 10 ("After struggling to bring their perpetrators [sic] to justice for thirty years, the plaintiffs implore the Court to sanction the defendants for their role in this tyranny"), the complaint makes clear that this was not at all the case. Fairly construed the complaint alleges that the United States helped create conditions in Chile making a coup more likely, *see* Compl. ¶¶ 44-51, that such a coup finally occurred in 1973, *see id.* ¶ 56, that the plaintiffs suffered at the hands of the Chilean military junta that subsequently came to power, *see id.* ¶ 58, and the United States was not sufficiently vigorous in confronting the junta regarding its human rights abuses. *See id.* ¶¶ 73, 74. Although the complaint alleges that the United States provided the Chilean regime some assistance, such as propaganda and communications aid, *e.g.*, Compl. ¶¶ 69, 70, 71, it does not allege any direct United States aid in the coup itself or any aid in the subsequent brutal repression described in the complaint. As demonstrated in our Opening Memorandum, the propriety of United States policy raises a non-justiciable political question, the plaintiffs' rhetorical flourishes notwithstanding. The plaintiffs' reliance on the United States' *amicus curiae* brief in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), is misplaced, moreover. *Filartiga* did not involve a suit against the United States or United States officials. The suit was against a foreign government official who participated in torture. Moreover the plaintiff in *Filartiga* did not invoke international law norms to challenge United States foreign policy in the courts. Further, the plaintiffs overlook that the United States has taken a somewhat narrower view of the Alien Tort Claims Act, 28 U.S.C. § 1350, in subsequent cases. *See In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 500 (9th Cir. 1992).

challenge United States foreign and national security policy in domestic court, a result the Court of Appeals has expressly refused to countenance. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985). So while there may be standards by which the Court could determine that the plaintiffs had, for instance, been tortured by Chilean officials, it is quite another thing for the Court to determine whether or not the United States should have reacted to Chilean human rights abuses in any particular way or whether the United States should have supported Chilean coup plotters in the first instance. Such questions inherently are reserved to the Executive and Legislative branches and under the political question doctrine may not be challenged in court.

Accordingly, the plaintiffs miss the mark in arguing that "assisting in the commission of serious violations of international and domestic law by an official does not call into question the foreign policy of the United States" and that "adjudication of the instant action would not require this Court to make an initial policy determination, nor disregard any political decision already made." Opposition at 12 (citations and footnote omitted). The plaintiffs ask the Court to do nothing less than pass judgment on an alleged policy of supporting foreign opposition groups that resulted in a repressive dictatorship and an alleged subsequent policy of not confronting human rights violations by the successor government. Nothing could more plainly "call into question the foreign policy of the United States." As we have demonstrated, merely characterizing United States foreign policy as a violation of international law does not remove a controversy from the category of political questions. To the contrary, the very determination of what political, diplomatic, intelligence or military steps might be appropriate in light of circumstances and international law is inherently a political question committed exclusively to the Executive and Legislative Branches.

The plaintiffs thus wholly fail to demonstrate that they have raised a justiciable controversy under the standards of *Baker v. Carr*, 369 U.S. 186, 217 (1962). The plaintiffs allege essentially that United States officials knew or should have known that support of Chilean coup plotters could result in violence and oppression within Chile. *See* Compl. ¶ 41. Yet there is "a lack of judicially discoverable and manageable standards for resolving" whether an Allende government in Chile was sufficiently inimical to United States interests to warrant the risks inherent in attempting to prevent its coming to or consolidating power. Certainly there are no judicially discoverable or manageable standards by which a court can assess whether the risks of such a policy misfiring outweighed the potential benefits of success. Such policy decisions "are delicate, complex and involve large elements of prophesy." *Chicago and Southern Airlines, Inc. v. Waterman Steamship Corp.* 333 U.S. 103, 111 (1948). As such, "[t]hey are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Id.* (citations omitted). The same of course is true of decisions as to whether and to what extent to confront the succeeding Chilean government regarding its human rights abuses.

It follows that this case clearly implicates "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. That does not trouble the plaintiffs; they simply assume that United States foreign and national security policy always must comply with international law norms, that the Executive and Legislative Branches lack discretion to do otherwise, and that the federal courts routinely may impose hefty damages against the United States and its officials when they violate international law. *See* Opposition at 10-12. As demonstrated above, the assumption that such delicate

questions may be adjudicated at the behest of private litigations is wholly incorrect. It also is wholly unsupported by any precedent. The plaintiffs point to not one even remotely similar case in which a court permitted suit against the United States and its officials for the conduct of foreign and national security policy in circumstances comparable to these.[3] This case plainly implicates several, if not all, of the *Baker* factors.[4] Whenever even one such factor is "inextricably intertwined in the case at bar," *Baker*, 369 U.S. at 217, dismissal is required.

The plaintiffs' attempt to distinguish between "challenges to foreign policy decisions" and "challenges to implementation of foreign policy decisions" is unpersuasive. *See* Opposition at

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[3] Hence the cases cited by the plaintiffs in support of their position – cases usually involving killings or torture committed by foreign officials, and none involving actions by United States officials, *see, e.g.*, Opposition at 10, 12 n.18 – have no bearing on application of the political question doctrine here.

[4] Although we have focused primarily on the first three *Baker* factors, this case appears to implicate all six, notwithstanding the fact that the events at issue occurred decades ago. The significance of a federal court holding illegal past United States support for foreign opposition groups would not be lost on other nations today. Putting aside whether the United States adopted the best policy toward Chile in the 1970s, covert support for opposition elements is one means by which the United States can respond to threats to the national interest posed by potentially hostile foreign governments. As recent events illustrate, from time to time the President and Congress may view what has come to be called "regime change" as the best means of securing the United States against threats posed by foreign governments. Whether such a policy comports with international law often may be a hotly debated question and is one of the factors that the Executive and Legislature must consider when deciding on the best policy for confronting foreign threats. A judicial determination that efforts at regime change – whether by overt military action or through covert support of opposition groups – violates international law clearly would entail "the potentiality of embarrassment from multifarious pronouncements by various departments on one question" (the sixth *Baker* factor, *Baker*, 369 U.S. at 217). Such a judicial pronouncement also would express "lack of the respect due coordinate branches of government" (the fourth *Baker* factor). *Id.* Given the importance of the subject matter, even the fifth *Baker* factor – unusual need for unquestioning adherence to a political decision already made" – seems satisfied, at least to the extent that the President and Congress have decided that support for foreign opposition groups is a permissible means of accomplishing United States foreign and national security policy goals.

12. The plaintiffs rely for this argument on *DKT Memorial Fund, Ltd. v. Agency for International Development*, 810 F.2d 1236 (D.C. Cir. 1987); *Population Inst. v. McPherson*, 797 F.2d1062 (D.C. Cir. 1984); and *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113 (1985). Upon examination, however, it is apparent that these cases turn not upon any effort to pigeonhole official conduct as "foreign policy decisions" versus "foreign policy implementation." Instead each of these cases turned upon whether there were judicially discoverable and manageable standards under United States domestic law permitting judicial resolution of the controversy. *See generally INS v. Chadha*, 462 U.S. 919, 940-43 (1983); *see, e.g., Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986). Both *DKT* and *Population Institute v. McPherson* concluded that judicial review was permissible because the plaintiffs claimed violations of domestic statutes (a source of judicially discoverable and manageable standards) by Executive Branch officials. *See DKT*, 810 F.2d at 1236; *McPherson*, 797 F.2d at 1068-70. In *Ramirez*, a United States citizen sued solely for the expropriation of his property and for other property damages resulting from the United States military's establishing a training base in Honduras. The Constitution's Takings Clause, *see* U.S. Const. Amend. V, cl. 4, among other domestic law, provides ready standards for addressing such claims. *See* 745 F.2d at 1512. Here the plaintiffs do not allege a violation of the Constitution or, for the most part, any federal statute or self-executing treaty that would provide judicially discoverable and manageable standards for decision.[5]

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[5] The plaintiffs do rely on the Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) ("TVPA"), but that statute addresses only conduct taken under color of foreign law and therefore does not reach the conduct of United States officials. *See* Opening Memorandum at 28-31. In any event, the plaintiffs do not allege that United States officials

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Likewise, District of Columbia tort law hardly supplies judicially discoverable and manageable standards for assessing the propriety of United States policy toward Chile. *See* Opposition at 12 n.18; *id.* at 14. "So far as there is one central idea [in tort law] it would seem that it is that liability must be based upon conduct which is socially unreasonable." PROSSER & KEETON, § 2 at 6. Application of domestic tort law principles to foreign and national security policy judgments would entail ascertaining whether conduct in formulating and carrying out such policy was "socially unreasonable" under some tort law formulation. The judiciary would be required to substitute its judgment as to what is reasonable in the foreign and national security policy context for that of the Executive (to which the conduct of such policy is constitutionally committed). There can be no assessment of liability, in other words, without an antecedent judgment that the benefit to the United States' national interest did not justify the costs to Chilean citizens who might be harmed by United States' policy. While courts routinely make such judgments in fixing liability under domestic law regarding private transactions, to do so here necessarily would require an exercise of judgment as to what are appropriate means and ends in an area constitutionally committed to the other branches of government. The complaint quite clearly presents a non-justiciable political question, and therefore should be dismissed.

Lacking any support in case law, principle or logic, the plaintiffs assert broadly that "Congress has condemned U.S. involvement with Chile, and the Executive Branch itself has

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[5](...continued)
instigated or participated in the coup itself or engaged in torture or other conduct actionable under the TVPA; they allege only that the United States and former Secretary of State Kissinger pursued a policy that the plaintiffs describe as "condoning" or "aiding and abetting" torture and other abuses by the Chilean government. *See, e.g.* Compl. ¶¶ 73, 74. Whatever the wisdom of United States policy, there are no judicially discoverable and manageable standards, under the TVPA or any other provision of law, by which a court could adjudicate its lawfulness.

expressed regret regarding U.S. support for Chile." Opposition at 13 (footnotes omitted). Quite plainly, however, non-justiciable foreign policy questions do not become cognizable merely because policy making officials later question the policy at issue. Moreover, the plaintiffs go too far with such assertions as "[t]he Church Committee condemned Defendant Kissinger's efforts to conceal his involvement in the attempted coup plot in 1970 as `an abdication of responsibility, and a perversion of democratic government.'" Opposition at 13 (citing Church Report at. 277-78). The Church Committee said no such thing. The passage the plaintiffs misleadingly quote condemned the practice of "plausible deniability" which the Committee described as "the custom that permitted the most sensitive matters to be presented to the highest levels of Government with the least clarity." Church Committee Report at 277. Dr. Kissinger served at those "highest levels of Government," and no where did the Committee issue the "condemnation" the plaintiffs purport to describe. Further, the plaintiffs omit that the Church Committee was discussing plots to assassinate foreign leaders but concluded that there never even was a United States plot to assassinate Chilean General Schneider as a prelude to a coup attempt. *See id.* at 276 ("there is no evidence that assassination was ever proposed as a method of carrying out the Presidential order to prevent Allende from assuming office").[6]

Likewise, the plaintiffs' case is not helped by such broad assertions as "the separation of

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[6] Similarly, the plaintiffs read too much into comments made by Secretary of State Powell in response to a high school student's question on a television program. *See* Opposition at 13 n.21 (citing www.state.gov/secretary/rm/2003/17841.htm). The plaintiffs interpret Secretary Powell's general comments as accepting the questioner's incorrect premise that the United States fomented the 1973 coup in Chile, but the Secretary's comments cannot be interpreted to so contradict the historical record. As noted in our Opening Memorandum at 4-5, both a Senate Staff Report and the Hinchey Report make clear that the United States did not foment the 1973 coup.

powers rationale does not extend to situations where the officials of the Executive Branch contravenes [sic] to [sic] the implied will of Congress." Opposition at 15 (citing *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952)). Nothing in the plaintiffs' complaint or even their Memorandum in Opposition identifies any statutes from which such "implied will of Congress" may be ascertained. The plaintiffs' only example is the Intelligence Authorization Act of 1997, § 302, 110 Stat. Pub. L. No. 104-293, § 302, 110 Stat. 3461 (1996), but they fail to explain how United States actions in the 1970s violated the very general terms of this later law.

The plaintiffs' arguments notwithstanding, this case presents a classic non-justiciable political question. For that reason, the Court lacks jurisdiction over the subject matter and this action should be dismissed.

B. Sovereign Immunity.

In arguing that the United States has no sovereign immunity from suit, the plaintiffs rely almost exclusively on one argument – that they have alleged violations of peremptory norms of international law

as to which no state may claim immunity. *See* Opposition at 15-21. The plaintiffs' argument amounts to little more than an exposition as to why settled law foreclosing their suit against the United States is wrong. Accordingly, the plaintiffs rely upon the dissenting opinion in *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1178 (D.C. Cir. 1994) (Wald, J., dissenting), apparently to argue for an implied waiver of sovereign immunity, when the *Princz majority* expressly refused to do exactly what the plaintiffs urge here. Moreover unlike in *Princz* (where the Foreign Sovereign Immunities Act at least permitted finding implied waivers of foreign

states' immunity, *see* 28 U.S.C. § 1605(a)(1); *Princz*, 26 F.3d at 1173), nothing in the Federal Tort Claims Act or apparently any other federal statute provides a basis for an implied waiver of the United States' sovereign immunity for torts or international law violations. *See generally Lane v. Pena*, 518 U.S. 187, 192 (1996); *Floyd v. District of Columbia*, 129 F.3d 152, 156 (D.C. Cir. 1997). The plaintiffs are not even really alleging that the United States and Dr. Kissinger caused them injury through actions in violation of *jus cogens* norms of international law. Instead, the complaint's well-pleaded allegation reveal that the United States allegedly maintained some cooperative ties with the Pinochet regime while not taking sufficient steps to curb its human rights abuses. *See, e.g.*, Compl. ¶ 73, 74. Such an alleged policy is a far cry from committing *jus cogens* violations of international law notwithstanding the plaintiffs' rhetorical gambit of calling United States policy "aiding and abetting" torture and other abuses.

The plaintiffs also assert that "the legislative history of the Torture Victims Protection Act of 1991 ("TVPA") "demonstrates an intent to abolish notions of sovereign immunity for harms such as torture." Opposition at 17 (citation omitted). The plaintiffs ignore that the abrogation of immunity to which they are referring is contained in the Foreign Sovereign Immunities Act and applies only to foreign states "designated as a state sponsor of terrorism" under statutory schemes not relevant here. *See* 28 U.S.C. § 1607(a)(7)(B). *See also* H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), *reprinted in* 1992 U.S.C.C.AN. 84, 87.

The plaintiffs' argument that "[t]he acts complained of have been the subject of two congressional investigations and Congress has condemned the CIA for contact with individuals in Chile who "actively engaged in committing and covering up serious human rights abuses,"

Opposition at 14 (citing "Hinchey Report at 14"),[7] is irrelevant. "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text * * * and will not be implied." *Lane v. Pena*, 518 U.S. at 192 (citations omitted); *see also Floyd*, 129 F.3d at 156. The plaintiffs point to no statutory text authorizing their suit, and no waiver can be implied merely from congressional committee reports critical of aspects of United States policy toward Chile. Whatever else Congress might have thought about the United States policies at issue, it clearly has not seen fit to authorize a lawsuit such as this.

Finally, although their arguments are not entirely clear, the plaintiffs appear to argue that if the principle that "[*j*]*us cogens* norms are nonderogable" is "to have any doctrinal meaning and practical effect, sovereign immunity, a judge-made rule, cannot operate to insulate a state from violations of peremptory norms." Opposition at 20-21. Whatever the jurisprudential merit of that argument, it must be addressed to Congress, which has yet to waive sovereign immunity in these circumstances.

The plaintiffs imply that sovereign immunity must yield here because it is derived from the common law. *See id.* at 20 n.24. The plaintiffs overlook that the United States' sovereign immunity rests less on English common law, *see id.*, and more on constitutional principle. The Constitution provides in Article I, § 9, cl. 7, that [n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." Congress' exclusive appropriations power has been recognized as the basis for the United States' sovereign immunity from suit for money

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[7] As noted in our Opening Memorandum at 4 n.4, the plaintiffs refer to the so-called Hinchey Report as a "congressional report" when in fact the report was prepared by the CIA in accordance with Section 311(a) of the Intelligence Authorization Act for Fiscal Year 2000, Pub. L. No. 106-120, 113 Stat. 1606 (1999).

damages. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 424-26 (1990). *See also Reeside v. Walker*, 52 U.S. (11 How.) 272, 290 (1850). *Cf. FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994) (declining to create damages remedy against federal agency for constitutional violations as the issue is one of "federal fiscal policy"). Further, whether to allow foreign citizens to maintain a suit such as this has no small implications for the conduct of United States foreign policy, and appropriately is a question for Congress. *See 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."). The plaintiffs' arguments must be addressed to Congress.

II. IMMUNITY.

A. Westfall Act Immunity Shields Dr. Kissinger.

The Attorney General's designee has certified that Dr. Kissinger acted in the scope of office or employment under 28 U.S.C. § 2679(d)(1). The effect of that certification is to confer upon Dr. Kissinger an absolute immunity from all claims in this case subject to 28 U.S.C. § 2679(b). The plaintiffs challenge that certification not so much because they have any serious argument that Dr. Kissinger acted outside the scope of employment, but because they can. *See generally Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995).

According to the plaintiffs, "Defendant Kissinger suggests that the scope of employment of an Assistant to the President for National Security Affairs and a Secretary of State includes *carte blanche* power to encourage, aid and abet, and conspire to commit grave human rights violations, without the knowledge, much less approval of key members of the Executive Branch

and/or members of the Legislative Branch." Opposition at 27. The plaintiffs' efforts to overcome *Westfall* Act immunity solely by reference to their own legal characterizations of the conduct at issue has no basis in law or policy. As the Court of Appeals has observed in a similar context, "if the scope of an official's authority or line of duty were viewed as coextensive with the official's lawful conduct, then immunity would be available only where it is not needed; in effect, the immunity doctrine would be 'completely abrogate[d]'." *Ramey v. Bowsher*, 915 F.2d 731, 734 (D.C. Cir. 1990) (quoting *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1429 (D.C. Cir. 1987) (quoting in turn *Briggs v. Goodwin*, 569 F.2d 10, 15 (D.C. Cir. 1977))). That is no less true when immunity is claimed under the *Westfall* Act. *See, e.g., Johnson v. Carter*, 983 F.2d 1316, 1323 (4th Cir. 1993). Contrary to the plaintiffs' arguments, government officials do not act outside the scope of employment even assuming they have acted illegally.

Putting aside the plaintiffs' legal labels and examining their factual allegations, it is abundantly clear that Dr. Kissinger acted in the scope of employment. For purposes of the *Westfall* Act, scope of employment is determined by reference to local *respondeat superior* law. *See id.* Under District of Columbia law:

> [c]onduct of a servant is within the scope of employment if, but only if: [1] it is of the kind he is employed to perform; [2] it occurs substantially within the authorized time and space limits; [3] it is actuated, at least in part, by a purpose to serve the master; and [4] if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

Haddon v. United States, 68 F.3d 1420, 1423 (D.C. Cir. 1995) (quoting Restatement (Second) Agency § 228 (1957)). The plaintiffs make no real effort to analyze their factual allegations under the scope of employment test. As noted above, they instead focus almost exclusively on their legal characterization of that conduct. The complaint, however, makes clear that Dr.

Kissinger served as Senior Advisor to the President for National Security Affairs and as Secretary of State during the times relevant to this lawsuit. *See* Compl. ¶ 33. The complaint even purports to assert that Dr. Kissinger is sued in an official capacity, *see id.*, an allegation inconsistent with the notion that Dr. Kissinger acted outside the scope of federal office or employment.[8] The complaint alleges that in September and October, 1970, the United States supported unsuccessful efforts by Chilean military officers to effect a coup d'etat. Compl. ¶¶ 36-69. The Church Committee Report (which the plaintiffs cite with approval, *see, e.g.*, Opposition at 13, 29) makes clear that United States support for Chilean coup plotters had its origins in a direct order of the President of the United States. *See* Church Committee Report at 225 ("The CIA was instructed by President Nixon to play a direct role in organizing a military coup d'etat in Chile to prevent Allende's accession to the presidency"); *id.* at 227 (describing meeting of the President, Dr. Kissinger, Director of Central Intelligence Richard Helms, and Attorney General John Mitchell in which the President gave instructions to organize a military coup). The complaint goes on to allege that after the failed 1970 coup plot, the United States continued to pursue a policy designed to create conditions in Chile conducive to a coup against the Allende government. *See, e.g.*, Compl. ¶¶ 53-55. It is clear that Dr. Kissinger acted in the scope of office

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[8] Likewise, the plaintiffs fail to recognize that their scope of employment arguments are self-defeating. The international law norms that the plaintiffs invoke apply only to persons acting in an official governmental capacity; not to private actors. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794-95 (D.C. Cir. 1984) (Edwards, J., concurring). By arguing that Dr. Kissinger acted outside the scope of federal office or employment, the plaintiffs effectively plead themselves out of court.

or employment in carrying out the policy of the United States as established by the President.[9]

The complaint further alleges that after the September 1973 coup in Chile and "[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," Compl. ¶ 68; Dr. Kissinger "authorized the CIA to `assist the junta in gaining a more positive image, both at home and abroad,'" *id.* ¶ 68; United States "military assistance and sales to Chile grew significantly during the years when the largest number of human rights abuses occurred," *id.* ¶ 72; Dr. Kissinger "continued to express disagreement with any attempt to limit Pinochet's economic and military power, be it by the U.S. Congress or the international community," *id.* ¶ 73, "misled the international community into thinking that Henry Kissinger and the U.S. opposed General Pinochet's brutal repression," *id.* ¶ 74; and told Pinochet "[m]y evaluation is that you are a victim of all left-wing groups around the world, and that your greatest sin was that you overthrew a government which was going Communist," *id.*[10] Absolutely none of this, even assuming it were

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[9] In fact the United States did not lend support to the September, 1973 coup that toppled the Allende government in Chile. *See, e.g.*, COVERT ACTION IN CHILE 1963-1973, Staff Report of the Select Committee To Study Governmental Operations With Respect to Intelligence Activities, at 28 (1975). The plaintiffs' allegations that United States support for Chilean coup plotters continued after October, 1970 nevertheless describes conduct quite clearly within the scope of office or employment. *See, e.g.*, Compl. ¶ 53 ("After failing to instigate a coup with the death of General Schneider in 1970, Henry Kissinger and the CIA designed secret covert operations designed to destabilize Chile's economy and promote a coup against Dr. Allende.").

[10] As noted in our Opening Memorandum at 11 n.6, Dr. Kissinger clearly communicated to the Chilean government the need to improve its human rights record. The plaintiff's mis-characterization of Dr. Kissinger's remarks as expressing "that the U.S. Government was sympathetic to Pinochet's goal of eliminating any ideological opposition," Compl. ¶ 74, is but one of numerous instances of the plaintiff's tendency to mis-characterize events and records in ways that the facts will not fairly support. In all events, the plaintiffs' allegations do not come close to describing conduct outside the scope of office or employment.

true, even comes close to describing conduct outside the scope of Dr. Kissinger's office or employment as both Senior Assistant to the President for National Security Affairs and Secretary of State. These allegations all describe a United States policy toward Chile with which the plaintiffs obviously disagree, but protecting officials in such circumstances is precisely the purpose of immunity.

The balance of the plaintiffs' argument is even less persuasive and bears little resemblance to an effort to apply scope of employment principles. The plaintiffs assert that "both the Executive and Legislative Branches have questioned whether Defendant Kissinger's actions in Chile constituted legitimate U.S. policy." Opposition at 28. Whether the policy was "legitimate" is irrelevant. The question for scope of employment purposes is whether Dr. Kissinger's actions were authorized by, or incidental to, his employment, and not whether the plaintiff asserts them to be illegal or a prohibited means of carrying out official responsibilities. *See Haddon*, 68 F.3d at 1423. "Indeed, [i]f the other [scope of employment] factors involved indicate that the forbidden conduct is merely the servant's own way of accomplishing an authorized purpose, the master cannot escape responsibility no matter how specific, detailed and emphatic his orders may have been to the contrary." W. P. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS, § 70 at 503 (1984) (footnote omitted).[11]

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[11] For this reason, the conclusory assertion (which does not appear in the complaint) that "[i]n furtherance of Defendant Kissinger's activities outside the scope of his employment, the CIA sent a cable to its officers in Santiago that instructed them `to continue their work of promoting a successful coup in spite of "other policy guidance" that they might receive from other branches of the U.S. government,'" Opposition at 29 (footnote omitted), is irrelevant even putting aside that this vague allegation does not attribute the described instruction to Dr. Kissinger himself. As the argument in the text explains, the plaintiffs' suggestion that somehow congressional oversight was thwarted in connection with CIA covert operations in Chile is

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Conducting foreign and national security policy and diplomacy clearly was within the scope of Dr. Kissinger's office or employment during the times of his government service.

In sum, the plaintiffs have not alleged conduct by Dr. Kissinger outside the scope of office or employment. To the contrary, they have succeeded only in describing conduct well within the scope of office or employment. Therefore, no evidentiary hearing is required because Dr. Kissinger is entitled to *Westfall* immunity as a matter of law. *See generally Davric Maine Corp. v. United States Postal Serv.*, 238 F.3d 58, 66 (1st Cir. 2001); *Taboas v. Mlynczak*, 149 F.3d 576, 581 (7th Cir. 1998); *RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1143 (6th Cir. 1996).

2. The plaintiffs assert that because the Alien Tort Claims Act, 28 U.S.C. § 1350 "provides both jurisdiction and a cause of action" it "therefore falls within one of the two exceptions to the Westfall Act immunity provision." *See* Opposition at 29-30. To the contrary, application of the *Westfall* Act's exception turns not on whether a federal statute "provides both jurisdiction and a cause of action," but on whether the claim at issue is one "brought *for a violation of*" a federal statute. *See* § 2679(b)(2)(B). Even assuming that § 1350 provides a private cause of action, *but see Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 811-16 (D.C. Cir. 1984) (Bork, J., concurring), the plaintiffs' argument fails because it conflates the two distinct questions of whether a statute confers substantive rights, on the one hand, and whether a

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[11](...continued)
irrelevant to whether Dr. Kissinger acted in the scope of office or employment. The plaintiffs, moreover, seem to overstate the significance of congressional oversight of intelligence activities during the relevant period. *Cf.* Supplementary Detailed Staff Reports on Foreign and Military Intelligence, 94th Cong., 2d Sess. at 88 (1976) (noting that as late as 1973, "no formalized reporting requirement existed between the CIA and the Congress, particularly with regard to the initiation of covert action").

statute confers a *cause of action* to remedy a violation of substantive rights, on the other.

As the text of the *Westfall* Act makes clear, immunity is available unless the claim at issue is one "which is [1] brought for a violation of a statute of the United States [2] under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). The plaintiffs' argument meets only the second of these conditions while ignoring the first. Section 1350 simply 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 *Westfall* Act immunity. *See United States v. Smith*, 499 U.S. 160, 173-74 (1991). Instead, § 1350 contemplates that the district courts can entertain an action for the violation of substantive rights conferred elsewhere, *i.e.*, by the law of nations or by a treaty of the United States. *See Alvarez-Machain v. United States*, 266 F.3d 1045, 1053-54 (9th Cir. 2001), *reh'g granted*, 284 F.3d 1039 (9th Cir. 2002) (order). *See also Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) ("we believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law").

Accordingly, because United States officials cannot "violate" § 1350, the liability-preserving exception of § 2679(b)(2)(B) does not apply to such claims, and Dr. Kissinger is immune. *See Alvarez-Machain*, 266 F.3d at 1053-54. The same is true to the extent the plaintiffs now purport to rely on 28 U.S.C. § 1331, customary international law or treaties of the United States. *See* Opposition at 40. As with a claim brought under the ATCA, a claim brought under § 1331, customary international law, or a treaty of the United States is not one "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).[12]

Finally, the plaintiffs' argument that *Westfall* Act immunity does not apply to intentional torts is clearly wrong. *See* Opposition at 39-40. By its terms, the relevant provision of the *Westfall* Act, 28 U.S.C. § 2679(b)(1), makes a suit against the United States the exclusive remedy for "the negligent *or wrongful* act or omission of any employee of the Government while acting in the scope of his office or employment" (emphasis added). Not surprisingly, courts consistently have held that the *Westfall* Act bars intentional tort claims arising from the scope of federal employment. *See, e.g., Singleton v. United States*, 277 F.3d 864 (6th Cir. 2002); *McLachlan v. Bell*, 261 F.3d 908 (9th Cir. 2001); *Davric Maine Corp. v. United States Postal Serv.*, 238 F.3d 58 (1st Cir. 2001); *Apampa v. Layng*, 157 F.3d 1103 (9th Cir. 1998); *Williams v. United States*, 71 F.3d 502 (5th Cir. 1995). Similarly, the plaintiffs are clearly incorrect in

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[12] In observing that *United States v. Smith*, 499 U.S. at 160, involved a different statute (the Gonzales Act, 10 U.S.C. § 1089) and not the ATCA, the plaintiffs identify a distinction without a difference. *See* Opposition at 32. *Smith* makes clear that a statute must confer both substantive rights as well as a cause of action before a claim brought under it triggers the *Westfall* Act exception. *See* 499 U.S. at 173-74. In reading *Alvarez-Machain* to involve only official capacity claims against government officials, the plaintiffs misread that case and fail to understand the distinction between official and individual capacity claims against government officials. *See generally Hafer v. Melo*, 502 U.S. 21, 25 (1991). The *Westfall* Act is designed to protect against individual capacity claims. As for *Jama v. U.S. Immigration and Naturalization Serv.*, 22 F. Supp. 2d 353 (D.N.J. 1998), the district court in that case did not even consider whether *Westfall* Act immunity bars an international law damages cause of action brought under the ATCA. The mere fact that *Jama* recognized a *cause of action* against government officials under the ATCA says nothing about the availability of an *immunity defense* to that cause of action. It is elementary that the availability of a cause of action "is a question logically distinct from immunity to such an action on the part of particular defendants." *United States v. Stanley*, 483 U.S. 669, 683 (1987). Hence, "[w]hen liability is asserted under a statute, for example, no one would suggest that whether a cause of action exists should be determined by consulting the scope of common-law immunity enjoyed by actors in the area to which the statute pertains." *Id.* The same obviously is true where (as in the *Westfall* Act) Congress provides for a statutory immunity in place of the common law. *Alvarez-Machain* speaks to the analytically distinct question of immunity; *Jama* does not.

asserting (Opposition at 26 n.28) that the *Westfall* Act does not confer absolute immunity. *See Smith*, 499 U.S. at 163; *Haddon*, 68 F.3d at 1423.

B. The TVPA Claim Must be Dismissed.

As the scope of employment discussion illustrates, the plaintiffs sue Dr. Kissinger for his alleged conduct as the Senior Assistant to the President for National Security Affairs and as Secretary of State. The notion that in these capacities Dr. Kissinger acted under color of Chilean law or was an "accomplice" in human rights violations by a foreign government is absurd. Similarly absurd is the plaintiffs' attempt at comparison to French collaborators with the Nazi occupation of France. *See* Opposition at 34. As for the argument that "[i]n construing the terms `actual or apparent authority' and `color of law,' courts are instructed to look principles of agency law," Opposition at 35 (citation omitted), that only proves the point. The plaintiffs' TVPA claim would require the Court to conclude that Dr. Kissinger acted as an agent of the Chilean government while serving as Senior Assistant to the President for National Security Affairs and as Secretary of State. Nothing in the complaint's allegations or case law supports so novel a theory. In the plaintiffs' view virtually any cooperation by United States officials with officials even of repugnant foreign regimes would make those officials "agents" of the foreign regime liable for its human rights violations. That stretches both the TVPA and notions of "agency" beyond the breaking point. Dr. Kissinger was never an "agent" of the Chilean government. He was an agent of the United States, and engaging with Chilean officials in the course of his duties did not make him Chile's agent.[13]

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[13] Because as a matter of law Dr. Kissinger did not act under color of Chilean law, there also is no need for an evidentiary hearing on this point, contrary to what the plaintiffs suggest.

(continued...)

Contrary to the plaintiffs' bare assertion, this straight-forward reading of the "color of foreign law" requirement hardly is a "tenuous unnatural and excessively narrow" interpretation of Congress' intent in enacting TVPA. *See* Opposition at 33. Nothing in the text or legislative history of the Act indicates that Congress expected United States officials to act under color of another nation's law even when foreign officials or governments are enlisted to cooperate in achieving United States policy objectives or when United States officials do not condemn human rights abuses by foreign governments. The plaintiffs' argument amounts to little more than the bold claim that by not confronting the Pinochet regime regarding its human rights violations, Dr. Kissinger "condoned" those violations; became Chile's "agent" in respect of those violations; and somehow acted under color of Chilean law. The implications of such a fantastic theory of legal liability for the conduct of United States foreign policy require no elaboration. The TVPA does not make the Secretary of State the personal guarantor that foreign governments will respect basic human rights. As for the legislative history of the TVPA, it reflects a concern exclusively with a lack of judicial remedies for torture and extra-judicial killing in those nations where such practices are prevalent. *See* H. Rep. No. 102-367 at 3 (Nov. 21, 1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 85. The plaintiffs do not suggest that Congress thought ours to be one such nation.[14]

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[13](...continued)
See, e.g., Polk County v. Dodson, 454 U.S. 312, 324 (1981).

[14] The plaintiffs, moreover, are not correct in suggesting (Opposition at 33, 35-37) that the United States is in violation of its obligations under 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), or other treaties if the TVPA remedy is not available against United States officials. *Cf. Whitley v. Albers*, 475 U.S. 312, 319 (1986) ("'[T]he (continued...)

The plaintiffs' arguments that the TVPA applies retroactively to United States officials simply ignores the retroactivity problems posed by their claim. The plaintiffs rely on cases such as *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp.2d 1345, 1362 (S.D. Fla. 2001)), but none of those cases involved application of the TVPA to United States officials, who under the 1988 *Westfall* Act are immune from suit under the international law norms that the plaintiffs rely upon. The issue for retroactivity purposes is not simply whether the claim involves "violations of standards and norms long prohibited," Opposition at 38, but whether the particular statute at issue "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). The 1992 TVPA would impose on United States officials liability where prior law, including the 1988 *Westfall* Act, would impose none. Thus the TVPA would have retroactive effect if applied in these circumstances. Nothing in the text or legislative history of the Act requires that result, and so the TVPA does not apply here. *See generally Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 897-98 (D.C. Cir. 1992).[15]

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[14](...continued)
unnecessary and wanton infliction of pain * * * constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" (citation omitted)). *See generally* 42 U.S.C. § 1983; *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[15] The plaintiffs make only passing efforts to demonstrate that Dr. Kissinger is not entitled to qualified immunity in the circumstances alleged, *see* Opposition at 42-43, and no effort to demonstrate that Dr. Kissinger's conduct as described in the complaint violated "settled law *in the circumstances*." *See Hunter v. Bryant*, 502 U.S. 224, 226 (1991) (per curiam) (emphasis added). Instead the plaintiffs simply recite their conclusory allegation that Dr. Kissinger "further[ed] grave human rights violations" which they omit to note were perpetrated by officials of a foreign government. *See* Opposition at 43. Dr. Kissinger's supposed legal duty to act in the manner the plaintiffs suppose simply was not clearly established under the circumstances at issue.

CONCLUSION

For the foregoing reasons and the reasons set forth in our Opening Memorandum, this action should be dismissed.

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Dated: April 18, 2003