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## CHAPTER 5

### Foreign Relations

#### A. LITIGATION INVOLVING NATIONAL SECURITY AND FOREIGN POLICY ISSUES

##### 1. *Meshal v. Higgenbotham*

In *Meshal v. Higgenbotham et al.*, the U.S. Court of Appeals for the District of Columbia Circuit decided that the lower court was correct in dismissing a *Bivens* action brought by a U.S. citizen against FBI agents relating to his detention and interrogation in foreign countries in the context of counterterrorism investigations. *Bivens* and its progeny allow the judiciary to imply a cause of action against federal officials for constitutional violations in certain circumstances. For discussion of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), see *Digest 2002* at 233–34. Excerpts below from the opinion of the D.C. Circuit (with footnotes omitted) explain why national security and foreign policy implications led the court to decide not to recognize a *Bivens* action in the *Meshal* case.

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*Meshal* downplays the extraterritorial aspect of this case. But the extraterritorial aspect of the case is critical. After all, the presumption against extraterritoriality is a settled principle that the Supreme Court applies even in considering statutory remedies. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010). If Congress had enacted a general tort cause of action applicable to Fourth Amendment violations committed by federal officers (a statutory *Bivens*, so to speak), that cause of action would not apply to torts committed by federal officers abroad absent sufficient indication that Congress meant the statute to apply extraterritorially. *See Morrison*, 130

S. Ct. at 2877. Whether the reason for reticence is concern for our sovereignty or respect for other states, extraterritoriality dictates constraint in the absence of clear congressional action.

## D

Once we identify a new context, the decision whether to recognize a *Bivens* remedy requires us to first consider whether an alternative remedial scheme is available and next determine whether special factors counsel hesitation in creating a *Bivens* remedy. *See Wilkie*, 551 U.S. at 550.

Meshal has no alternative remedy; the government does not claim otherwise. *See Meshal*, 47 F. Supp. 3d at 122 (“The parties agree that Mr. Meshal has no alternative remedy for his constitutional claims.”). Meshal, backed by a number of law professors appearing as amici curiae, argues that, when the choice is between damages or nothing, a *Bivens* cause of action must lie. The Supreme Court, however, has repeatedly held that “even in the absence of an alternative” remedy, courts should not afford *Bivens* remedies if “any special factors counsel[ ] hesitation.” *Wilkie*, 551 U.S. at 550; *see also Schweiker*, 487 U.S. at 421–22. *Cf. Wilson*, 535 F.3d at 708–09. Put differently, even if the choice is between *Bivens* or nothing, if special factors counsel hesitation, the answer may be nothing. *See Andrew Kent, Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1151 (2014) (“Kent”) (noting “the Court’s *Bivens* doctrine has long tolerated denying *Bivens* even when there is no other effective remedy”).

The “special factors” counseling hesitation in recognizing a common law damages action “relate not to the merits of the particular remedy, but to the question of who should decide whether such a remedy should be provided.” *Sanchez- Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.). Where an issue “involves a host of considerations that must be weighed and appraised,” its resolution “is more appropriately for those who write the laws, rather than for those who interpret them.” *Bush*, 462 U.S. at 380.

Two special factors are present in this case. We do not here decide whether either factor alone would preclude a *Bivens* remedy, but both factors together do so. First, special factors counseling hesitation have foreclosed *Bivens* remedies in cases “involving the military, national security, or intelligence.” *Doe*, 683 F.3d at 394. Second, the Supreme Court has never “created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States.” *Vance*, 701 F.3d at 198–99.

Adding to the general reticence of courts in cases involving national security and foreign policy, the government offers a laundry list of sensitive issues they say would be implicated by a *Bivens* remedy. Further litigation, the government claims, would involve judicial inquiry into “national security threats in the Horn of Africa region,” the “substance and sources of intelligence,” and whether procedures relating to counterterrorism investigations abroad “were correctly applied.” Br. for the Appellees at 25–26, *Meshal v. Higgenbotham*, No. 14-5194 (D.C. Cir. Feb. 13, 2015). The government also alleges *Bivens* litigation would require discovery “from both foreign counterterrorism officials, and U.S. intelligence officials up and down the chain of command, as well as evidence concerning the conditions at alleged detention locations in Ethiopia, Somalia, and Kenya.” *Id.* at 26.

Unlike other cases where a plaintiff challenges U.S. policy, the plaintiff here challenges only the individual actions of federal law enforcement officers. At oral argument, the government had few concrete answers concerning what sensitive information might be revealed

if the litigation continued. ...Still, to some extent, the unknown itself is reason for caution in areas involving national security and foreign policy—where courts have traditionally been loath to create a *Bivens* remedy.

At the end of the day, we find the absence of any *Bivens* remedy in similar circumstances highly probative. Matters touching on national security and foreign policy fall within an area of executive action where courts hesitate to intrude absent congressional authorization. See *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988). Thus, if there is to be a judicial inquiry—in the absence of congressional authorization—in a case involving both the national security and foreign policy arenas, “it will raise concerns for the separation of powers in trenching on matters committed to the other branches.” *Christopher v. Harbury*, 536 U.S. 403, 417 (2002). The weight of authority against expanding *Bivens*, combined with our recognition that tort remedies in cases involving matters of national security and foreign policy are generally left to the political branches, counsels serious hesitation before recognizing a common law remedy in these circumstances.

There are also practical factors counseling hesitation. One of the questions raised by Meshal’s suit is the extent to which Defendants orchestrated his detention in foreign countries. The Judiciary is generally not suited to “second-guess” executive officials operating in “foreign justice systems.” *Munaf v. Geren*, 553 U.S. 674, 702 (2008). And judicial intrusion into those decisions could have diplomatic consequences. See Br. for the Appellees at 26 (allowing *Bivens* here would expose “the substance of diplomatic and confidential communications between the United States and foreign governments” regarding joint terrorism investigations). Moreover, allowing *Bivens* suits involving both national security and foreign policy areas will “subject the government to litigation and potential law declaration it will be unable to moot by conceding individual relief, and force courts to make difficult determinations about whether and how constitutional rights should apply abroad and outside the ordinary peacetime contexts for which they were developed.” Kent, at 1173. Even if the expansion of *Bivens* would not impose “the sovereign will of the United States onto conduct by foreign officials in a foreign land,” Dissent at 18, the actual repercussions are impossible to parse. We cannot forecast how the spectre of litigation and the potential discovery of sensitive information might affect the enthusiasm of foreign states to cooperate in joint actions or the government’s ability to keep foreign policy commitments or protect intelligence. Just as the special needs of the military requires courts to leave the creation of damage remedies against military officers to Congress, so the special needs of foreign affairs combined with national security “must stay our hand in the creation of damage remedies.” *Sanchez-Espinoza*, 770 F.2d at 208–09.

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## 2. *Sokolow*

On August 10, 2015, the United States submitted a statement of interest in the U.S. District Court for the Southern District of New York in *Sokolow v. Palestine Liberation Organization*, No. 1:04-cv-00397-GBD-RLE. The U.S. statement of interest, which includes a declaration from Deputy Secretary of State Antony J. Blinken, appraises the court of the critical national security and foreign policy interests to be considered by the court in deciding whether to stay execution of a judgment against the Palestinian

Authority without a supersedeas bond. Excerpts follow from the U.S. statement of interest, which is available in full, along with Deputy Secretary Blinken’s declaration, at <http://www.state.gov/s/l/c8183.htm>.

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...The United States strongly supports the rights of victims of terrorism to vindicate their interests in federal court and to receive just compensation for their injuries. See 18 U.S.C. § 2333 (providing U.S. national victims of international terrorism with a cause of action, with treble damages and attorney fees, against terrorists and those who actively support terrorism that harms Americans abroad); Attached Declaration of Deputy Secretary of State Antony J. Blinken ¶¶ 3-6, 12 (Aug. 10, 2015); see also, *e.g.*, *Brabson v. The Friendship House of West. New York, Inc.*, 2000 WL 1335745, at \*2 (W.D.N.Y. Sept. 6, 2000); *Harris v. Butler*, 961 F. Supp. 61, 63 (S.D.N.Y. 1997). At the same time, the declaration notes that the United States has significant concerns about the harms that could arise if the Court were to impose a bond that severely compromised the Palestinian Authority’s (“PA”) ability to operate as a governmental authority. See Attached Declaration of Deputy Secretary of State Antony J. Blinken ¶¶ 7-11; see, *e.g.*, *Morgan Guar.*, 702 F. Supp. at 66; *Teachers Ins. & Annuity Ass’n v. Ormesa Geothermal*, 1991 WL 254573, at \*4 (S.D.N.Y. Nov. 21, 1991).

The United States respectfully urges the Court to take into account these factors as it considers the evidence regarding the PA’s financial situation. The Court and the parties made clear at the July 28, 2015 hearing that they are aware of the issues regarding the PA’s financial stability, and the need to have some mechanism for plaintiffs to secure payment if the Court’s judgment is affirmed.

The United States does not herein express a view on the ultimate merits of defendants’ Rule 62 motion (or any other issue in the case). The United States files this Statement of Interest solely to inform the Court of its interests as the Court considers where the public interest lies in ruling on defendants’ Rule 62 motion.

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## **B. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT**

### **1. Overview**

The Alien Tort Statute (“ATS”), also referred to as the Alien Tort Claims Act (“ATCA”), was enacted as part of the First Judiciary Act in 1789 and is now codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts “shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.” In 2004 the Supreme Court held that the ATS is “in terms only jurisdictional” but that, in enacting the ATS in 1789, Congress intended to “enable[] federal courts to hear claims in a very limited category defined by the law of nations and

recognized at common law.” *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act (“TVPA”), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against “[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation” for individuals, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2015 developments in a selection of cases brought under the ATS and the TVPA in which the United States participated.

## 2. Extraterritorial Reach of ATS post- *Kiobel*

In 2013, the U.S. Supreme Court dismissed ATS claims in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). For further background on the case, see *Digest 2013* at 111-17 and *Digest 2011* at 129-36. The majority of the Court reasoned that the principles underlying the presumption against extraterritoriality apply to claims under the ATS, and that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”

In 2015, the U.S. Court of Appeals for the Second Circuit in *Balintulo et al. v. Ford Motor Co., and IBM Corp.*, 796 F.3d 160, affirmed the district court’s 2014 dismissal of all claims against the remaining corporate defendants for allegedly aiding and abetting the apartheid regime in South Africa. As discussed in *Digest 2014* at 147-49, the district court had been directed to reconsider the case in light of the Supreme Court’s decision in *Kiobel*. The United States had submitted a statement of interest, as well as multiple *amicus* briefs, at earlier stages in the long-running litigation. See *Digest 2009* at 140-44; *Digest 2008* at 236-38; and *Digest 2005* at 400-11. For further background on the case, see *Digest 2007* at 226-27 and *Digest 2004* at 354-61. Excerpts follow (with footnotes omitted) from the 2015 opinion of the Second Circuit Court of Appeals.

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Turning to the complaints in the instant case, plaintiffs assert that the following conduct by defendant Ford is sufficient to displace the ATS’s presumption against extraterritoriality: (1) Ford provided specialized vehicles to the South African security forces that enabled these forces to violently suppress opposition to apartheid; and (2) Ford was responsible for aiding and abetting the suppression of its own workforce in South Africa.

As for IBM, plaintiffs allege that (1) IBM employees trained employees of the South African government on how to use their hardware and software to create identity documents—“the very means by which black South Africans were deprived of their South African nationality”; (2) IBM bid on contracts in South Africa with unlawful purposes such as

denationalizing black South Africans; and (3) IBM designed specific technologies that were essential for racial separation under apartheid and the denationalization of black South Africans.

In *Balintulo I*, we reasoned that the Companies' alleged domestic conduct lacked a clear nexus to the human rights abuses occurring in South Africa. Here too, plaintiffs' amended pleadings do not establish federal jurisdiction under the ATS because they do not plausibly allege that the Companies themselves engaged in any "relevant conduct" within the United States to overcome the presumption against extraterritorial application of the ATS.

### **1. Allegations Against Ford**

Beginning with the allegations against Ford, plaintiffs only allege "relevant conduct" that occurred in South Africa... It was Ford's subsidiary in South Africa, not Ford, that is alleged to have assembled and sold the specialized vehicles to South Africa's government, with parts shipped principally from Canada and the United Kingdom—not from the United States. Similarly, it was Ford's South African subsidiary, not Ford, that allegedly provided information to the apartheid government about anti-apartheid activists in South Africa. Although plaintiffs repeatedly allege—no less than six times in their proposed amended complaint—that Ford controlled their South African subsidiary, we have previously rejected a vicarious liability theory based on allegations materially identical to those asserted here.

Plaintiffs contend that their amended pleadings demonstrate that the Companies controlled their South African subsidiaries from the United States such that they could be found directly—and not just vicariously—liable for their subsidiaries' conduct under the ATS. But holding Ford to be directly responsible for the actions of its South African subsidiary, as plaintiffs would have us do, would ignore well-settled principles of corporate law, which treat parent corporations and their subsidiaries as legally distinct entities. While courts occasionally "pierce the corporate veil" and ignore a subsidiary's separate legal status, they will do so only in extraordinary circumstances, such as where the corporate parent excessively dominates its "subsidiary in such a way as to make it a 'mere instrumentality' of the parent."

Here, plaintiffs present no plausible allegations—indeed, they present no allegations—that would form any basis for us to "pierce [Ford's] corporate veil." The complaints do not suggest that Ford's control over its subsidiaries differed from that of most companies headquartered in the United States with subsidiaries abroad. Allegations of general corporate supervision are insufficient to rebut the presumption against territoriality and establish aiding and abetting liability under the ATS.

### **2. Allegations Against IBM**

Plaintiffs' first allegation against IBM also fails because the "relevant conduct" all occurred within South Africa... Just as in the case of Ford, it is IBM's South African subsidiary—not IBM—that is alleged to have trained South African government employees to use IBM hardware and software to create identity materials. These allegations cannot rebut the presumption against extraterritoriality as they do not sufficiently "tie[ ] the relevant human rights violations to actions taken within the United States."

Plaintiffs' second allegation against IBM—that the company bid on contracts meant to further the denationalization of South African blacks—falls short of alleging a violation of the law of nations for a simple reason: IBM did not win the contract for the only bid specifically alleged to have been made by IBM, rather than IBM's South African subsidiary. Indeed, even according to plaintiffs, another company, ICL, won the passbooks contract over IBM. It is simply not a violation of the law of nations to bid on, and lose, a contract that arguably would help a sovereign government perpetrate an asserted violation of the law of nations.

Plaintiffs final allegation against IBM, on the other hand, appears to “touch and concern” the United States with sufficient force to displace the presumption against extraterritoriality. Their proposed amended complaint reads, in relevant part, as follows:

In the United States, IBM developed both the hardware and the software—both a machine and a program—to create the Bophuthatswana ID. Once IBM had developed the system, it was transferred to the Bophuthatswana government for implementation.

Identity documents, like those allegedly created by IBM and transferred to the Bophuthatswana government, were an essential component of the system of racial separation in South Africa. And so, designing particular technologies in the United States that would facilitate South African racial separation would appear to be both “specific and domestic” conduct that would satisfy the first of the two steps of our jurisdictional analysis. Accordingly, if this allegation is able to also satisfy the second prong of our extraterritoriality inquiry—that is, if such conduct aided and abetted a violation of the law of nations—the presumption against extraterritoriality would be displaced and we would be able to establish jurisdiction for this particular claim under the ATS.

Upon an initial review of the “relevant conduct” in the complaint, however, we conclude that plaintiffs’ claim against IBM does not meet the *mens rea* requirement for aiding and abetting liability established by our Court. While the complaint must “support [ ] an inference that [IBM] acted with the ‘purpose’ to advance [South Africa’s] human rights abuses,” it plausibly alleges, at most, that the company acted with knowledge that its acts might facilitate the South African government’s apartheid policies. But, as we noted earlier, mere knowledge without proof of purpose is insufficient to make out the proper *mens rea* for aiding and abetting liability.

Moreover, where the language in the complaint seems to suggest that IBM acted purposefully, “it does so in conclusory terms and fails to establish even a baseline degree of plausibility of plaintiffs’ claims.” A complaint will not “suffice if it tenders naked assertions devoid of further factual enhancement.” Indeed, plaintiffs do not—and cannot—plausibly allege that by developing hardware and software to collect innocuous population data, IBM’s purpose was to denationalize black South Africans and further the aims of a brutal regime. This absence of a connection between IBM’s “relevant conduct” and the alleged human rights abuses of the South African government means that plaintiffs, even if allowed to amend their complaint, will be unable to state a valid ATS claim against IBM.

Accordingly, because plaintiffs fail plausibly to plead that any U.S.-based conduct on the part of either Ford or IBM aided and abetted South Africa’s asserted violations of the law of nations, their claims cannot form the basis of our jurisdiction under the ATS. We therefore affirm the District Court’s denial of plaintiffs’ motion for leave to file an amended complaint because the proposed amendments are futile as a matter of law.

\* \* \* \*

## C. ACT OF STATE, POLITICAL QUESTION, AND PREEMPTION DOCTRINES

### 1. Political Question: Lawsuits Seeking Evacuation From Yemen

As discussed in Chapter 2, U.S. citizens filed two lawsuits in 2015 seeking a formal U.S. government evacuation of private U.S. citizens from Yemen. In the first of these cases to be decided by a court, the claims were dismissed based on the political question doctrine. *Sadi v. Obama*, No. 15-11314 (E.D. Mich. 2015). Excerpts follow from the U.S. brief in support of the motion to dismiss. The second case, *Mommaraz v. Obama*, was pending in the D.C. District Court at the end of 2015.

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Plaintiffs' claims should be dismissed because adjudicating them would require the Court to rule on nonjusticiable political questions that are outside the unique competencies of the judiciary. "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. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The doctrine arises from two key constitutional principles of our system of government: the separation of powers among the three coordinate branches and the inherent limits of judicial competence. See, e.g., *Baker v. Carr*, 369 U.S. 186, 210-11 (1962); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111-12 (1948). "[N]o justiciable 'controversy' exists when parties seek adjudication of a political question." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007).

The Supreme Court has set forth the factors a court is to consider in determining whether a particular claim raises nonjusticiable political questions:

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; *or* [2] a lack of judicially discoverable and manageable standards for resolving it; *or* [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; *or* [4] the impossibility of a Court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; *or* [5] an unusual need for unquestioning adherence to a political decision already made; *or* [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker*, 369 U.S. at 217 (emphasis added). The existence of any one of these factors indicates the existence of a political question. See *id.*; *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) ("To find a political question, we need only conclude that one [of these] factor[s] is present, not all.").

Plaintiffs' claims—which ask the Court to review the Executive Branch's current posture on the evacuation of U.S. citizens in Yemen, and order the President, the Department of State,

and the Department of Defense to evacuate these individuals—provide a quintessential example of a nonjusticiable political question, and implicate several of the *Baker* factors, in particular the first three. As one court noted:

We have consistently held, however, that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security.

*El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010).

In this case, plaintiffs question the wisdom of the Executive Branch’s current stance on the evacuation of private U.S. citizens from Yemen, and in the process ask the Court to assess the wisdom of this foreign policy and national security judgment. This Court is not a proper forum for such claims.

With respect to the first *Baker* factor, under the Constitution, the conduct of American diplomatic and foreign affairs is entrusted to the political branches of the federal government. See, e.g., *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention”); *Chicago & S. Air Lines, Inc.* 333 U.S. 103 at 111; *United States v. Pink*, 315 U.S. 203, 222-23 (1942). As the Supreme Court has observed:

The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—“the political”—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

*First Nat’l City Bank v. Banco Nacional De Cuba*, 406 U.S. 759, 766 (1972), quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). Judicial refusal to review the kind of foreign policy judgments at issue here shows proper deference to the prerogatives committed to the political branches, as well as the practical limitations on the role of the judiciary. *Chicago & S. Airlines, Inc.*, 333 U.S. at 111.

To undertake the review sought by plaintiffs here would entangle the Court in the very type of diplomatic and military judgments uniformly committed to the political branches. Such review would require the Court to make determinations regarding the appropriateness of the Government’s policy judgments in response to the ongoing military activities in Yemen.

In particular, the relief plaintiffs seek would implicate the potential use of U.S. military resources.

It is difficult to think of an area less suited for judicial action than . . . the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.

*Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir. 1967) (affirming dismissal where plaintiff sought to enjoin Secretaries of Defense and Army from sending him to Vietnam) (citing cases); see also *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311-12 (2d Cir. 1973) (refusing to adjudicate the legality of military decisions concerning Cambodia). It is the Executive Branch’s prerogative

to decide what and whether military and other resources should be allocated to evacuate private U.S. citizens remaining in Yemen.

Nor can there be any question that the issue before the Court involves foreign policy and the control of military forces. For example, Executive Order 12656, as amended by Executive Order 13074, assigns responsibilities to various Executive Branch Departments with respect to “national security emergencies.” See Ex. 1. The Executive Order expressly notes that the Secretary of State’s responsibilities with respect to protecting or evacuating U.S. citizens abroad are “includ[ed]” as part of his “responsibilities in the conduct of the foreign relations of the United States during national emergencies.” *Id.*, §1301(2). And section 501(16)’s allocation of lead responsibility to the Secretary of Defense clearly implicates the control of the military forces, delegating lead responsibility to the Secretary of Defense for “the deployment and use of military forces . . . in support of their evacuation from threatened areas overseas.” *Id.* § 501(16) (added by E.O. 13074). In addition, the statute authorizing the Secretary of State to expend appropriated funds for evacuation requires that such expenditure “serve to further the realization of foreign policy objectives.” 22 U.S.C. § 2671(b)(1)(A). There can be little doubt, therefore, that both military and foreign policy judgments are at issue in any decision to evacuate U.S. citizens from Yemen at this time, and these judgments are committed to the Executive Branch.

With respect to the second *Baker* factor, there simply are no judicially manageable standards by which the Court could assess whether the current situation in Yemen requires the evacuation of U.S. citizens there:

The conclusion that the strategic choices directing the nation’s foreign affairs are constitutionally committed to the political branches reflects the institutional limitations of the judiciary and the lack of manageable standards to channel any judicial inquiry into these matters.

*El-Shifa*, 607 F.3d at 843. Nor are there any standards by which the Court may review whether an evacuation decision—once it has finally been made—is appropriate. The Secretary of State bears responsibility for the development and implementation of programs to provide for the evacuation of U.S. citizens “when their lives are endangered,” as well as the expenditure of funds once a decision to evacuate has been made, see 22 U.S.C. §§ 4802(b), 2671(b)(2)(A), but there are no statutory or regulatory provisions by which a Court may determine when evacuation is appropriate and required. In fact, the MOA between the DOS and DoD notes the discretionary balancing that must occur: “successful evacuation operations must take into account risks for evacuees and U.S. forces.” MOA, App. 1. This is a balance uniquely within the province of the DOS and DoD.

By the same token, the third *Baker* factor—the impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion—also supports the defendants in this case. In order to find in plaintiffs’ favor, the Court must second-guess the current foreign policy determination of the defendants, and order that an evacuation occur. Such a decision should remain solely within the purview of the Executive Branch.

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On June 8, 2015, the district court issued its opinion, dismissing plaintiffs' claims first and foremost on the basis that they raise nonjusticiable political questions. Excerpts follow from the court's opinion. *Sadi v. Obama*, No. 15-11314 (E.D. Mich. 2015).

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Justiciability is a jurisdictional issue. “[J]usticiability doctrines determine which matters federal courts can hear and decide and which must be dismissed.” Erwin Chemerinsky, *Federal Jurisdiction* 42 (6th ed. 2012). “Justiciability is an analytical approach that has been developed to identify appropriate occasions for judicial action, both as a matter of defining the limits of the judicial power created by Article III of the Constitution, and as a matter of justifying refusals to exercise the power even in cases within the reach of Article III.” *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1146 (6th Cir. 1975) (internal quotation marks and citation omitted). To denote something as “nonjusticiable” is to say that it is “inappropriate[] . . . subject matter for judicial consideration.” *Baker v. Carr*, 369 U.S. 186, 200 (1962) (alterations in original).

Issues of justiciability include “the prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine.” *Id.* These doctrines support the conservation of judicial resources, maintain the separation of powers among the three branches of our government, “improve judicial decision making by providing the federal courts with concrete controversies best suited for judicial resolution,” and “promote fairness, especially to individuals who are not litigants before the court.” Chemerinsky, *supra* at 43–44.

As mentioned, the political question doctrine falls within the purview of justiciability analysis. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 44 (D.D.C. 2010). “The nonjusticiability of a political question is primarily a function of the separation of powers.” *Baker*, 369 U.S. at 210. “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. Amer. Cetacean Soc.*, 478 U.S. 221, 230 (1976). “The Judiciary is particularly ill suited to make such decisions, as ‘courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.’” *Id.* (quoting *U.S. ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981)).

“The precise contours of the political question doctrine remain murky and unsettled.” *Al Aulaqi*, 727 F. Supp. 2d at 44 (internal citation and quotation marks omitted). Nevertheless, *Baker v. Carr*, 369 U.S. 186 (1962) is the oft-quoted, authoritative United States Supreme Court case concerning the political question doctrine. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 Duke L.J. 1457, 1458 (2005) (“The political question doctrine . . . has been most ambitiously, and authoritatively, defined by the Supreme Court in *Baker v. Carr* . . .”); see also Wright & Miller, *Fed. Prac. & Proc.* § 3534 (3d ed. 2008) (“By far the closest approach to authoritative delineation of the factors separating judicial from political power is found in the classic legislative apportionment opinion in *Baker v. Carr*.”).

In [*Baker v. Carr*], the Supreme Court identified six factors to distinguish a political question that is nonjusticiable: . . . *Biton v. Palestinian Interim Self-Gov’t Auth.*, 412 F. Supp. 2d 1, 6 (D.D.C. 2005) (quoting *Baker*, 369 U.S. at 217). “The factors are probably listed in descending order of both importance and certainty.” *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (citations

and quotations omitted). “[I]n order for a case to be non-justiciable, the court ‘need only conclude that one factor is present, not all.’” *Al-Aulaqi*, 727 F. Supp. 2d at 44 (quoting *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005)). Application of the political question doctrine “must be made on a ‘case-by-case’ basis.” *Schroder v. Bush*, 263 F.3d 1169, 1174 (10th Cir. 2001) (quoting *Baker*, 369 U.S. at 211). “Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question’s presence.” *Baker*, 369 U.S. at 217.

Regarding the second *Baker* factor—“lack of judicially discoverable and manageable standards for resolving” the issue(s)—Defendants argue that “there simply are no judicially manageable standards by which the Court could assess whether the current situation in Yemen requires the evacuation of U.S. citizens there . . . .” (Defes.’ Mo. at 10). Defendants maintain that “there are no statutory or regulatory provisions by which a Court may determine when evacuation is appropriate and required.” (*Id.*).

Defendants’ position is well-taken. This Court finds that Plaintiffs have not cited to any judicially discoverable and manageable standards that this Court can rely on to determine if, when, and under what circumstances the United States is obligated to evacuate its citizens from dangerous areas overseas.

Plaintiffs point out that, by statute, Congress has directed the Secretary of State to “develop and implement policies and programs to provide for the safe and efficient evacuation of . . . private United States citizens when their lives are endangered.” 22 U.S.C. § 4802. Plaintiffs interpret 22 U.S.C. § 4802 as imposing upon the Executive branch a duty to conduct evacuation operations when U.S. citizens’ lives are endangered. But this statute does not unequivocally impose any such duty upon the Executive branch. Rather, § 4802 requires the Secretary of State to “develop and implement” certain evacuation-related “policies and programs,” while leaving the content of those policies and programs to the Secretary of State’s discretion.

More to the point, § 4802 provides absolutely no standards by which this Court could determine whether U.S. citizens’ lives are endangered, whether their evacuation would be “safe and efficient,” or by what means evacuation should be executed. Again, § 4802 appears to afford significant discretion to the Secretary of State to make those value determinations. The Court finds that 22 U.S.C. § 4802 does not set forth judicially manageable standards by which Plaintiffs’ claims may be resolved.

Executive Order 12656 provides no further guidance. It simply describes the responsibilities of the Departments of State and Defense in the event of a national security emergency, which may include “protection or evacuation of United States citizens and nationals abroad . . . .” Exec. Order 12656, 53 FR 47491. Even still, Executive Order 12656 makes clear that the Secretary of State must carry out its responsibilities “under the direction of the President . . . .” Exec. Order 12656, 53 FR at 47503–04 (emphasis added). Executive Order 12656 does not require the Secretary of State to independently initiate any evacuation measures, and it certainly does not set forth standards for determining whether evacuation is warranted or feasible.

Nor does the MOA improve Plaintiffs’ position. It sets forth the policies of the Departments of State and Defense, and describes their respective responsibilities in the event that an evacuation is ordered. However, the MOA does not provide the standards by which the agencies, or this Court, may determine whether evacuation is “necessary and feasible.” (MOA at ¶ A).

The Court concludes that Plaintiffs have not cited to any “judicially discoverable and manageable standards” by which to adjudicate the issues in this case. See *Baker*, 369 U.S. at 217.

As Defendants aptly pointed out at the hearing, the situation in Yemen is fluid, volatile, and dangerous. Neither Plaintiffs nor this Court have the wherewithal to discover what preparations are necessary before a large-scale evacuation can occur, what the conditions in Yemen are or will be at any given time, or what dangers may be posed to individuals involved in the evacuation effort. Even if all of these factors could be understood to some degree of certainty, the Court still lacks the resources to determine whether evacuation is a prudent measure. These fact based judgments have been committed to the discretion of the Executive branch, to be made on a case-by-case basis.

Accordingly, based on the characteristics “[p]rominent on the surface of” this case, *Baker*, 369 U.S. at 217, the Court concludes that this case presents nonjusticiable political questions.

Therefore, the Court shall GRANT Defendants’ Motion to Dismiss.

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## 2. *Marshall Islands v. United States*

See Chapter 19 for discussion of the court opinion dismissing claims on the grounds that the Marshall Islands lacked standing to sue for purported treaty breach and that the case presented a nonjusticiable political question.

## 3. *Lin v. United States*

The United States filed two briefs in support of dismissal of a complaint brought by residents of Taiwan alleging they were unlawfully denied their Japanese nationality at the conclusion of World War II when the Republic of China issued nationality decrees while allegedly “acting as an agent of the United States.” *Lin v. United States*, No. 1:15-CV-295-CKK (D.D.C.). For a discussion of the previous case brought by the same plaintiffs seeking recognition as U.S. nationals, which was dismissed on the basis that the challenge presented a nonjusticiable political question, see *Digest 2008* at 1, 443-47; *Digest 2009* at 300-03. The U.S. briefs assert several bases for dismissal: failure to identify a cause of action; the statute of limitations; lack of standing; and the political question doctrine. Excerpts follow from the political question discussion in the U.S. opening brief in support of its motion to dismiss, filed July 15, 2015. The full brief is available at <http://www.state.gov/s/l/c8183.htm>.

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This case also should be dismissed because it presents a non-justiciable political question. “The political question doctrine is one aspect of ‘the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the ‘case or controversy’ requirement’

of the Article III of the Constitution.” *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974)). The doctrine is “primarily a function of the separation of powers,” *id.* (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962)) (quotation marks omitted), and “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution” to the legislative and executive branches. *Wilson v. Libby*, 535 F.3d 697, 704 (D.C. Cir. 2008) (internal quotation marks omitted).

In *Baker v. Carr*, the Supreme Court identified six factors that may render a case non-justiciable under the political question doctrine... 369 U.S. at 217; see also *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (“[A] controversy “involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’ ”) (citing *Nixon v. United States*, 506 U.S. 224, 228 (1993)). The presence of any one of the six *Baker* factors can be sufficient for dismissal under the political question doctrine. *Bancoult*, 445 F.3d at 432 (citing *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005)).

Here, Plaintiffs ask this Court to address broad questions about the nationality of Taiwan residents under international instruments and to issue declarations regarding their nationality. . . . Under settled D.C. Circuit precedent, however, the nationality of Taiwan residents presents a quintessential non-justiciable political question.

In *Lin v. United States*, 539 F. Supp. 2d 173 (D.D.C. 2008), Plaintiff Roger C.S. Lin and a group of Taiwan residents sought a judicial declaration that they are nationals of the United States with all related rights and privileges, including the right to obtain U.S. passports. *Id.* at 176-77. Judge Collyer granted the government’s motion to dismiss, concluding that plaintiffs’ challenge involved “a quintessential political question” that required “trespass into the extremely delicate relationship between and among the United States, Taiwan and China.” *Id.* at 178. The court noted that plaintiffs were asking it to “catapult over” a decision by the political branches to “obviously and intentionally not recognize[] any power as sovereign over Taiwan.” *Id.* at 179 (emphasis in original). Given the “years and years of diplomatic negotiations and delicate agreements” between the United States and China, the court concluded it “would be foolhardy for a judge to believe that she had the jurisdiction to make a policy choice on the sovereignty of Taiwan.” *Id.* at 181.

The D.C. Circuit affirmed that decision, holding that plaintiffs’ request to be declared nationals of the United States was barred by the political question doctrine. See *Lin v. United States*, 561 F.3d 502, 508 (D.C. Cir. 2009). The court explained that addressing plaintiffs’ attempt to be declared U.S. nationals “would require us to trespass into a controversial area of U.S. foreign policy in order to resolve a question the Executive Branch intentionally left unanswered for over sixty years: who exercises sovereignty over Taiwan. This we cannot do.” *Id.* at 503-04.

*Lin* demonstrates that Plaintiffs’ lawsuit is precluded by the political question doctrine. As in *Lin*, Plaintiffs ask this Court to address the nationality of Taiwan’s residents. It makes no difference that Plaintiffs contend to be Japanese nationals in this case, instead of United States nationals, as they argued in *Lin*. Here, Plaintiffs seek to judicially resolve the nationality of Taiwan’s residents, as they did in *Lin*, and that is a political question which this Court lacks jurisdiction to resolve.

The nationality of Taiwan's residents implicates numerous *Baker* factors, although the presence of even one factor is sufficient for the political question doctrine to apply. *Lin*, 539 F. Supp. 2d at 179 (citing *Schneider*, 412 F.3d at 194).

First, Plaintiffs' lawsuit raises policy questions that are textually committed to coordinate branches of government. *Baker*, 369 U.S. at 217. As in the first *Lin* case, Plaintiffs seek declarations regarding the nationality of Taiwan's residents, an issue which depends on the "antecedent question" of identifying Taiwan's political status, *Lin*, 561 F.3d at 506, and which if attempted to be resolved would interfere with the foreign policy of the United States. As the D.C. Circuit has observed, "[d]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Lin*, 561 F.3d at 505 (internal quotations and citation omitted). Further, the determination of sovereignty over a territory is non-justiciable. See *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political [ ] question. . . .") (collecting cases); *Baker*, 369 U.S. at 212 ("[R]ecognition 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....'"); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) ("the determination of sovereignty over an area is for the legislative and executive departments").

Second, this case is non-justiciable under the political question doctrine because there is a "lack of judicially discoverable and manageable standards" for resolving the suit. *Baker*, 369 U.S. at 217. Plaintiffs allege that the United States is legally responsible for the nationality decrees issued by the Republic of China in 1946 because the Republic of China was "acting as an agent of the United States" when it promulgated the decrees and thereafter. . . . Plaintiffs' agency theory is primarily based on General Douglas MacArthur's Order No. 1, which ordered the Japanese commanders within China and Taiwan to surrender to Generalissimo Chiang Kai-shek, the leader of the Chinese Nationalist Party . . . and the San Francisco Peace Treaty, in which Japan renounced any claim to Taiwan. . . .

No judicially manageable standards can be used to resolve the meaning of General Order No. 1. As Judge Collyer explained in *Lin*, "General Order No. 1 was entered very shortly after Japan signed the Instrument of Surrender and long before all Japanese soldiers actually laid down their arms." 539 F. Supp. 2d at 180. The court added: "the purpose, language, and intentions behind General Order No. 1 might have been entirely blunted by later events. What is clear is that the judiciary is not equipped to interpret and apply, 50 years later, a wartime military order entered at a time of great confusion and undoubted chaos." *Id.*

The San Francisco Peace Treaty likewise provides no judicially manageable standards for resolving this case. . . . While federal courts have the "authority to construe treaties and executive agreements," see, e.g., *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986), the SFPT cannot be interpreted in any manner that would resolve sovereignty over Taiwan or Plaintiffs' nationality. See *Lin*, 539 F. Supp. 2d at 178.

Finally, application of the remaining four *Baker* factors further demonstrates that this case is barred by the political question doctrine. For the last six decades, Taiwan has been the subject of the most sensitive and complex diplomatic concerns. Over sixty years ago the United States made clear that it considered Taiwan to be part of the Republic of China. . . .

Plaintiffs' lawsuit asks the Court to interject itself into the sensitive and complex issue of Taiwan's political status. To adjudicate Plaintiffs' claims, the Court would have to review and opine on the foregoing policy determination of the United States not to take a position on the political status of Taiwan. In doing so, the Court would be interjecting itself into a matter that

presents an “unusual need for unquestioning adherence to a political decision already made.” *Baker*, 369 U.S. at 217. Further, any judicial pronouncement on the nationality of Taiwan’s residents would require “an initial policy determination of a kind clearly for nonjudicial discretion”; demonstrate “lack of respect due coordinate branches of government”; and create “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.* Thus, because this case implicates numerous *Baker* factors, it should be dismissed as non-justiciable under the political question doctrine.

\* \* \* \*

The U.S. filed a reply brief on August 28, 2015. Excerpts below directly address Plaintiffs’ contention that their latest case differs from the claims brought in the earlier litigation that was dismissed based on the political question doctrine. The reply brief is also available in full at <http://www.state.gov/s/l/c8183.htm>.

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Plaintiffs argue in their opposition that this case is materially distinguishable from the first *Lin* case. This contention is meritless. Plaintiffs argue that in *Lin*:

This Court did not apply the political question doctrine to any question of nationality, but rather to the reading of international treaties and any question that would require identification of Taiwan’s sovereign. It was the question of sovereignty, not any question of nationality . . . , that the Court in the 2006 *Lin* case cited as a reason for dismissal pursuant to the political question doctrine.

Pls.’ Mem. 42-43 (internal citation omitted). Plaintiffs’ reading of *Lin* is wrong. First, it is simply not correct to say that the nationality of Taiwan residents was not at issue in the first *Lin* case. The very declarations sought in *Lin* asked the Court to declare plaintiffs to be nationals of the United States. *Lin*, 561 F.3d at 503; *Lin*, 539 F. Supp. 2d at 176-78. The Circuit, moreover, specifically held that “[d]etermining [Plaintiffs’] nationality would require us to trespass into a controversial area of U.S. foreign policy” and was therefore barred by the political question doctrine. *Lin*, 561 F.3d at 503-04 (emphasis added). In addition, the Circuit explained that resolving Plaintiffs’ claims regarding their nationality status would first require answering the “antecedent question” of identifying Taiwan’s sovereign, an issue that cannot be answered under the political question doctrine. *Id.* at 506. Similar to *Lin*, adjudicating Plaintiffs’ claims here, which are premised on the theory that the United States and the “Republic of China” share a principal-agent relationship spanning decades, would require the Court to address sensitive issues of foreign policy, including addressing the issue of sovereignty over Taiwan. The political question doctrine does not permit review of such claims. Under a straightforward application of *Lin*, this case should be dismissed as non-justiciable under the political question doctrine.

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#### 4. *Center for Biological Diversity et al. v. Hagel*

- On February 13, 2015, the U.S. District Court for the Northern District of California granted the U.S. government’s motion to dismiss challenges brought by Japanese individuals and four environmental groups to a decision by the U.S. government and the Government of Japan to build a new military base on Okinawa. *Center for Biological Diversity, et al. v. Hagel, et al.*, 80 F. Supp. 3d 991 (N.D. Cal. 2015). The plaintiffs asserted that construction of the new base would destroy critical habitat for the Okinawa dugong, a marine mammal similar to the manatee, which is critically endangered. Plaintiffs’ original lawsuit, filed in 2003, argued that the U.S. government failed to “take into account” adverse effects on the dugong as required by section 402 of the National Historic Preservation Act (“NHPA”). The initial district court order in the case in 2008 directed the U.S. government to comply with the NHPA. *Okinawa Dugong, et al. v. Gates, et al.*, 543 F. Supp. 2d 1082 (N.D. Cal. 2008). The U.S. government completed its report pursuant to the NHPA in 2014 and took steps to begin construction of the base, prompting plaintiffs to bring a new challenge pursuant to the Administrative Procedure Act (“APA”) seeking: (1) a declaratory judgment that the NHPA findings are arbitrary and capricious, or otherwise violate the APA; (2) an order setting aside the NHPA findings; and (3) an injunction prohibiting the building of the military base until the U.S. government complies with its NHPA obligations.

The United States filed a motion to dismiss the complaint on the basis of the political question doctrine. The court, after reviewing the *Baker* factors, discussed in sections C.2. and C.3., *supra*, proceeded to dismiss the case. The court found that the political question doctrine did not bar the declaratory judgment claim, but dismissed it nonetheless based on plaintiffs’ lack of constitutional standing because of the court’s inability to redress their alleged injury. The court dismissed the claim for injunctive relief on the basis of the political question doctrine. Excerpts follow from the decision of the district court.

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Before turning to the merits of this case, it is absolutely critical to note one final doctrinal caveat: The political question doctrine must be applied surgically—it is “incumbent upon [this Court] to examine each of the claims with particularity.” *Alperin*, 410 F.3d at 547. This is because the applicability of the political question doctrine “turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action.” *El-Shifa Pharmaceuticals*, 607 F.3d at 842 (citation omitted). Indeed, this point was most recently illustrated in *Zivotofsky I*, where the Supreme Court reversed the lower courts’ determination that the claim at issue presented a political question because those courts “misunderst[ood] the issue presented.” 132 S. Ct. at 1427. In that case, the lower courts had understood the Plaintiff to “ask the courts to decide the political status of Jerusalem.” *Id.*

(citation and internal quotation marks omitted). The Supreme Court noted that this frame was far too broad. “Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right . . . to choose to have Israel recorded on his passport as his place of birth.” *Id.* As *Zivotofsky I* deftly illustrates, when applying the political question doctrine it is crucially important to consider each claim individually and carefully, and not at a high level of abstraction. . . . The Court now analyzes the Government’s contentions with the above principles in mind.

*B. Plaintiffs’ Requests for Declaratory Relief and an Order Setting Aside the NHPA Findings do not Present Political Questions*

...As the Government correctly points out, national security and foreign relations cases “serve as the quintessential sources of political questions.” *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006). Thus, “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.” *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)); see also *Alperin*, 410 F.3d at 558 (noting that courts “should refrain from hearing those claims that require passing judgment on foreign policy decisions”); *Smith v. Reagan*, 844 F. 2d 195, 200 (4th Cir. 1988) (noting that “[t]he judiciary cannot oversee the conduct of foreign relations,” or “order the President to take specific action” in the sphere of foreign relations). Plaintiffs’ first claim seeks a declaration that the DoD’s NHPA Findings (that the FRF will have no adverse effect on the Okinawa dugong) are “arbitrary, capricious, and not in accordance with procedures required by law pursuant to the APA.” First Supplemental Complaint at ¶¶ 47-51, Prayer for Relief at ¶ 1. Plaintiffs contend, among other things, that the DoD violated the APA by: failing to consult “interested parties” or “seek public comment” before issuing its Findings; resting the Findings on faulty or incomplete data... For example, Plaintiffs allege that DoD failed to properly consider “the full range of possible adverse effects on the dugong caused by the FRF project, including population fragmentation, [and] the disruption of travel routes . . . .” First Supplemental Complaint at ¶ 43. Plaintiffs’ second claim seeks an order setting aside the Findings on the basis of these alleged APA violation(s). Prayer for Relief at ¶ 2.

\* \* \* \*

In sum, the Plaintiffs’ declaratory judgment claims will not be dismissed pursuant to the political question doctrine, for while they arise in the context of a political *case* they do not present a non-justiciable political *question*, as seen by applying each of *Baker*’s six tests to these claims.

*C. Plaintiffs’ Injunctive Relief Claim Presents a Non-Justiciable Political Question*

- In contrast to the declaratory judgment claims, Plaintiffs’ injunctive relief claim clearly presents a non-justiciable political question: Plaintiffs ask this Court for a “temporary” injunction ordering the DoD to halt all construction of an overseas military base that is being paid for by the Japanese government, built by Japanese workers, and erected on Japanese sovereign territory, until the DoD adequately satisfies its obligations under the NHPA. Prayer for Relief at ¶ 3. Plaintiffs’ injunctive relief claim likely “inextricably” implicates a number of *Baker* factors.

- Most importantly, Plaintiffs’ injunctive relief claim fails the second *Baker* test. This Court has no judicially discoverable and manageable standard(s) to apply in deciding whether to grant or deny the requested injunction. In order to obtain an injunction in this case,

Plaintiffs concede that they would have to prevail on the merits and then show that: (1) they suffered an irreparable injury; (2) their remedies at law are inadequate; (3) the balance of the hardships tips in Plaintiffs' favor; and (4) the public interest would not be disserved by the injunction. See *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)); see also Plaintiffs' Supplemental Brief at 3 n. 1. Even assuming that Plaintiffs could satisfy the first two requirements, there are no judicially administrable standards available to this Court in evaluating the remaining factors.

For instance, in evaluating the balance of the hardships, this Court would be required to weigh the serious harm construction of the FRF will likely cause to the dugong (including possible extinction) against claimed benefits of the FRF: e.g., maintaining the United States' "deterrence capability" in Asia, "sustaining public support on Okinawa" for the United States military presence, addressing the "threat posed by a nuclear-armed North Korea" or defusing "tensions over competing territorial and maritime claims in the East China Sea and South China Sea." See Zumwalt Decl. at 2 ¶¶ 10, 13. Evaluating these types of harm is an exercise "for which the Judiciary has neither aptitude, facilities nor responsibility," and thus they "have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Waterman*, 333 U.S. at 111...

In addition to the near impossibility of assessing the balance of hardships in the instant case which entail examination of fundamental foreign policy concerns, this Court would have to adjudicate the fourth injunctive factor—whether the public interest would be disserved by an injunction. This presents yet another task the Judiciary is ill-suited to adjudicate. Government declarants make what appears to be a compelling case that even temporary injunctive relief would "have a significant negative impact on U.S. foreign policy interests in the region." Zumwalt Decl. at 21 ¶ 4... He also notes that an injunction would diminish "the United States' position as a reliable ally for its [other] partners." *Id.* at ¶ 4... As noted above, these assertions are entitled to weight. See *Alperin*, 410 F.3d at 556; *Zivotofsky II*, 725 F.3d at 219. Beyond that, this Court is ill-equipped to meaningfully evaluate the Government's contentions.

Because Plaintiffs' request for injunctive relief "inextricably" implicates one of *Baker's* most important tests—the lack of judicially discoverable and manageable standards (see *Alperin*, 410 F.3d 13 at 545)—the claim for injunctive relief presents a non-justiciable political question.

Issuance of an injunction would implicate other *Baker* factors as well. An injunction would effectively countermand the Government's decision to "establish a military base on [foreign soil]," a political decision generally not reviewable by the courts. *Bancoult*, 445 F.3d at 436. Such a choice is plainly "an exercise of the *foreign* policy and national security powers entrusted by the Constitution to the political branches of our government." *Id.* (emphasis added); see also *Alperin*, 410 F.3d at 559 ("It is axiomatic that the Constitution vests the power to wage war in the President as Commander in Chief."). See *El-Shifa Pharmaceuticals*, 607 F.3d at 844 ("[C]ourts cannot reconsider the wisdom of discretionary *foreign* policy decisions.") (emphasis added); *Alperin*, 410 F.3d at 559 (explaining that "cases interpreting the broad textual grants of authority to the President and Congress in the areas of *foreign affairs* leave only a narrowly circumscribed role for the Judiciary") (emphasis added).

Similarly, an injunction that ascribes more importance to saving the Okinawa dugong than the Executive has chosen to afford in the context of constructing a foreign military base would "inevitably express a lack of respect for the Executive Branch's handling of" U.S.-Japan relations, *Alperin*, 410 F.3d at 555, and would also likely "cause the potentiality of

embarrassment from multifarious pronouncements by various departments on one question.” *Id.* at 558 (quotation omitted).

Moreover, the Government’s argument that the decision to build the FRF is a “political decision already made” that requires an “unusual need for unquestioning adherence” appears well taken. *See Baker*, 369 U.S. at 217. The United States and Japan signed a final executive agreement to build the FRF in 2006 (the Roadmap). *See Okinawa Dugong*, 543 F. Supp. 2d at 1086 (“The 2006 Roadmap . . . is a bilateral executive agreement between two sovereign nations . . . The agreements reached in the Roadmap have received needed approvals at the national levels of both governments, but the Government of Japan is still working to obtain needed approvals from affected local and prefectural governments.”);<sup>19</sup> *see also id.* at 1092 (“[T]he Roadmap is the final agreement between the United States and the Government of Japan marking the consummation of years of negotiation and planning.”). Construction of the FRF has already begun, and both the American and Japanese governments are committed to completing the FRF project expeditiously. *See Zumwalt Decl.* at ¶ 8 (“I understand the Japanese government wants initial work on the FRF to proceed expeditiously due to the desire to carry out the Realignment Roadmap in a timely manner”); Mot. to Dismiss, Exhibit 1 (April 2014 White House press release “reaffirm[ing] our commitment to reducing the impact of U.S. forces on Okinawa” through the “early relocation of Futenma Marine Corps Air Station to Camp Schwab”); Mot. to Dismiss, Exhibit 5 (December 2013 White House Press release indicating that the “United States is determined to implement our roadmap to relocate the base for Futenma as quickly as possible”). The Executive Branch (in consultation with the Japanese) has determined that there “are no viable alternatives to the FRF at Camp Schwab.” *Zumwalt Decl.* at ¶ 12. The last *Baker* factor further counsels against justiciability.

In conclusion, injunctive relief would inextricably implicate nearly all the tests of non-justiciability under *Baker*. Such a claim for relief must be dismissed.

*D. Plaintiffs’ Declaratory Judgment Claims Must be Dismissed Because This Court Cannot Fashion any Effective Relief*

The inability of this Court to fashion any injunctive or otherwise coercive relief to protect the dugong is also conclusive of another issue—Plaintiffs’ standing to assert their remaining declaratory judgment claims. If this Court cannot grant the Plaintiffs meaningful relief (*i.e.*, cannot redress their injuries), their claims for declaratory judgment must also be dismissed even if these claims do not in themselves present a political question. *See Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946, 957 (9th Cir. 2005) (holding that plaintiffs alleging procedural injury “must show only that they have a procedural right that, if exercised, *could* protect their concrete interests”) (emphasis in original), *overruled on other grounds by Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

1. Basics of Constitutional Standing

To bring or maintain a lawsuit in federal court, a plaintiff must establish that she has Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Specifically, a litigant must have “suffered an ‘injury in fact’” that is “‘concrete and particularized’” and “‘actual or imminent.’” *Mayfield v. United States (Mayfield II)*, 599 F.3d 964, 969 (9th Cir. 2010) (quoting *Lujan*, 504 U.S. at 560). The plaintiff must also “establish a causal connection between the injury and the defendant’s conduct . . . [and] show a likelihood that the injury will be ‘redressed by a favorable decision.’” *Id.* (quoting *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 43 (1976)).

Critically, a “plaintiff must demonstrate standing separately for each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Env'tl. Serv. Inc.*, 528 U.S. 167, 185 (2000). “Thus, a plaintiff who has standing to seek damages for a past injury, or injunctive relief for an ongoing injury, does not necessarily have standing to seek prospective relief such as a declaratory judgment.” *Mayfield II*, 599 F.3d at 969 (citations omitted).

## 2. Redressability of Plaintiffs’ Declaratory Relief Claims

In order to establish standing for their declaratory relief claims, Plaintiffs must show a favorable decision may redress their injuries. *Lujan*, 504 U.S. at 560. Plaintiffs must show there is a “direct relationship between the alleged injury” they seek to remedy “and the claim sought to be adjudicated.” *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973). Here, the ultimate injury Plaintiffs seek to remedy is the construction of the FRF and its impact upon the Okinawa dugong.

Admittedly, Plaintiffs’ claim for declaratory relief seeks only a judgment that the DoD violated the procedures required under the NHPA and an order setting aside the DoD’s allegedly flawed NHPA Findings. The declaratory judgment claims seek in the first instance to vindicate purely procedural injuries. However, parties do not have standing to insist that procedural rules be followed simply for the sake of enforcing conformity with legal requirements. *See, e.g., Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003). Instead, “a plaintiff asserting a procedural injury must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.” *Id.* Here, as noted above, the concrete interest is the construction of the FRF and its possible impacts on the Okinawa dugong. *See id.*; *see also Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225-26 (9th Cir. 2008) (recognizing that the “concrete interest” at the heart of a lawsuit to enforce specific procedures of the Endangered Species Act is the preservation and protection of the endangered species). In order to maintain this lawsuit for a declaration that DoD violated the procedures of the NHPA, Plaintiffs must show a sufficient likelihood that the declaratory relief will lead to the protection of this specific interest.

To be sure, where the statute allegedly violated prescribes rights and obligations of a procedural nature, plaintiffs do not face a “high bar” to establishing redressability. Plaintiffs are entitled to a presumption of redressability. *Mayfield II*, 599 F.3d at 971. A party alleging procedural injury must show “only that the relief requested—that the agency follow the correct procedures—*may* influence the agency’s ultimate decision of whether to take or refrain from taking a certain action.” *Salmon Spawning*, 545 F.3d at 1226-27 (emphasis added). That said, the Ninth Circuit has emphasized that “the redressability requirement is not toothless in procedural injury cases.” *Id.* at 1227.

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... This Court has determined that no injunctive relief may be issued to prevent or halt construction of the FRF. Moreover, the NHPA “take into account” process is only hortatory, mandating no particular result. *Okinawa Dugong*, 543 F. Supp. 2d at 1095 (explaining that the NHPA “does not require a particular outcome and it neither forbids destruction of a protected property nor commands its preservation”). Hence, there is no likelihood that the United States government, in response to an adverse declaratory judgment, will voluntarily halt construction of

the FRF. As a result, it cannot be said that declaratory relief “may” provide redress to Plaintiffs. *Salmon Spawning*, 545 F.3d at 1226-27.

...And for the reasons stated above, this Court cannot issue an injunction ordering the Government to pull out of the Roadmap or otherwise alter its plans for the FRF. *See* Section II.C, *supra*. Thus, “if we rule against the [Plaintiffs’] claim of procedural injury, they will continue to suffer injury; and, if we rule in their favor, they will still suffer injury because we cannot undo the [Roadmap].” *Salmon Spawning*, 545 F.3d at 1227. ...

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#### D. EXTRATERRITORIAL APPLICATION OF U.S. CONSTITUTION

##### *Hernandez*

In 2015, the United States government participated in litigation arising out of cross-border shooting incidents. The United States filed a brief and prevailed in the U.S. Court of Appeals for the Fifth Circuit, en banc, in *Hernandez v. United States*, No. 11-50792 (5<sup>th</sup> Cir.). *Hernandez* is a damages action against the United States and various federal officials, asserting claims under the Federal Tort Claims Act, the Alien Tort Statute, and the U.S. Constitution. The district court dismissed the claims—initially against the United States and subsequently against the federal officials—and plaintiffs appealed. A panel of the Fifth Circuit reversed only the district court’s dismissal of the claim against the border patrol agent. The en banc court, however, affirmed the district court’s dismissal as to all claims. The Supreme Court will consider whether to grant a petition for certiorari in *Hernandez* in 2016. The U.S. Court of Appeals for the Ninth Circuit is considering a similar case involving a cross-border shooting incident. *Rodriguez v. Swartz*, No. 15-16410 (9<sup>th</sup> Cir.).

Excerpts follow, first from the U.S. en banc brief in *Hernandez*, and, *infra*, from the Fifth Circuit’s decision en banc. The United States filed its en banc brief on January 5, 2015.

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The panel majority correctly affirmed the dismissal of most of the claims in this case. The panel majority erred, however, in concluding that the claims against U.S. Border Patrol Agent Mesa individually could go forward. Although Agent Mesa is separately represented, the United States urged that en banc review is appropriate because this ruling departed from Supreme Court precedent, created a conflict in the circuits, and threatens serious practical consequences. We respectfully submit the district court’s judgment should be affirmed in full.

**I.** The *Bivens* defendants are entitled to qualified immunity because the alleged conduct violated no clearly established constitutional rights.

The Supreme Court has established that aliens abroad with no substantial connections to the United States do not have Fourth or Fifth Amendment constitutional rights. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). Plaintiffs do not contend that the decedent, a Mexican national who was in sovereign Mexican territory at the time of the shooting incident, had such connections. Plaintiffs are wrong to suggest that *Boumediene v. Bush*, 553 U.S. 723 (2008), altered or overruled the “substantial

connections” test applied by the Supreme Court in *Verdugo-Urquidez*. *Boumediene*, and the three-factor test established and applied in that case, concerned “the reach of the Suspension Clause,” 553 U.S. at 766, and the unique setting of Guantanamo Bay, which are not at issue here. Contrary to plaintiffs’ contentions, *Boumediene*’s observation that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism,” *id.* at 764, is fully consistent with *Verdugo-Urquidez*. See 494 U.S. at 277-78 (Kennedy, J., concurring). In any event, there is no basis for concluding that an undefined portion of northern Mexico that is unquestionably sovereign Mexican territory is remotely analogous to the heavily fortified U.S. military base at Guantanamo Bay, Cuba, over which the United States has exercised “complete

The Court need not, in any event, resolve the question of whether the Fourth or Fifth Amendments may be applicable to non-citizens outside the United States. At a minimum, it was not clearly established at the time of the alleged shooting incident that the Fourth and Fifth Amendments applied to an undefined swath of Mexican territory near the U.S. border.

**II.** The Court should, moreover, be reluctant to infer a *Bivens* cause of action in a case of this kind, which presents special factors that counsel strong hesitation. If this Court were interpreting a statute that expressly created a cause of action, it would presume that the statute did not apply extraterritorially. That presumption should apply with at least equal force when the Court considers whether to create a constitutional cause of action in the first instance. When Congress created a statutory tort remedy against the United States in the Federal Tort Claims Act, it avoided the concerns that would be generated by applying the FTCA abroad by specifically precluding liability for tort claims involving injuries occurring in a foreign country. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). A court should be hesitant to create a constitutional tort with extraterritorial scope that implicates the problems that Congress avoided

The potential concerns arising from applying United States law to sovereign Mexican territory are evident. Border control policies implicate core issues of national security and foreign affairs. Indeed, plaintiffs themselves claim that their suit involves international treaties, as well as relations with the government of Mexico, which has filed two amicus briefs in these appeals.

**III.** In its principal brief as appellee before the panel on the *Bivens* claims, the United States urged that the judgment bar of the Federal Tort Claims Act provides an independent and alternative basis for affirming the district court’s judgment dismissing the *Bivens* claims. That judgment bar provides that “[t]he judgment in” a Federal Tort Claims action is “a complete bar to *any action* by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.” 28 U.S.C. § 2676 (emphasis added). Although the panel did not address this argument, that sweeping language precludes plaintiffs’ *Bivens* action. The district court entered final judgment on plaintiffs’ Federal Tort Claims Act claims, which arose from the same alleged conduct of the very same Border Patrol official, and plaintiffs are no longer contesting that the Federal Tort Claims Act claim was properly

**IV.** The panel correctly rejected plaintiffs’ claim that the Alien Tort Statute, 28 U.S.C. § 1350, imposes liability on the United States here. The Alien Tort Statute is “strictly jurisdictional.” *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Sosa*, 542 U.S. at 713). “It does not directly regulate conduct or afford relief.” *Id.* The Alien Tort Statute is therefore not a waiver of sovereign immunity, as every court of appeals that has

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The en banc court issued its decision on April 24, 2015, affirming the district court's dismissal of all claims.

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We rehear this matter en banc, *see Hernandez v. United States*, 771 F.3d 818 (5th Cir. 2014) (per curiam) (on petitions for rehearing en banc), to resolve whether, under facts unique to this or any other circuit, the individual defendants in these consolidated appeals are entitled to qualified immunity. Unanimously concluding that the plaintiffs fail to allege a violation of the Fourth Amendment, and that the Fifth Amendment right asserted by the plaintiffs was not clearly established at the time of the complained-of incident, we affirm the judgment of dismissal.

The facts and course of proceedings are accurately set forth in the panel majority opinion of Judge Prado, *Hernandez v. United States*, 757 F.3d 249, 255-57 (5th Cir. 2014). We conclude that the panel opinion rightly affirms the dismissal of Hernandez's claims against the United States, *id.* at 257-59, and against Agent Mesa's supervisors, *id.* at 280, and we therefore REINSTATE Parts I, II, and VI of that opinion. We additionally hold that pursuant to *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), Hernandez, a Mexican citizen who had no "significant voluntary connection" to the United States, *id.* at 271, and who was on Mexican soil at the time he was shot, cannot assert a claim under the Fourth Amendment.

The remaining issue for the en banc court is properly described as whether "the Fifth Amendment . . . protect[s] a non-citizen with no connections to the United States who suffered an injury in Mexico where the United States has no formal control or de facto sovereignty." *Id.* at 281-82 (DeMoss, J., concurring in part and dissenting in part). To underscore the seriousness of the tragic incident under review, we elaborate on that description only to note that the injury was the death of a teenaged Mexican national from a gunshot fired by a Border Patrol agent standing on U.S. soil.

To decide the assertion of qualified immunity made by defendant Agent Mesa, regarding the plaintiffs' Fifth Amendment claim, the court avails itself of the latitude afforded by *Pearson v. Callahan*: "The judges of the . . . courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. 223, 236 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

The prongs referred to are familiar: "First, a court must decide whether the facts . . . alleged . . . make out a violation of a constitutional right. . . . Second, if [so], the court must decide whether the right at issue was 'clearly established' at the time of [the] alleged misconduct." *Id.* at 232. "Qualified immunity is applicable unless [both prongs are satisfied]." *Id.*

The panel opinion correctly describes the substantive-due-process claim as "that Agent Mesa showed callous disregard for Hernandez's Fifth Amendment rights by using excessive, deadly force when Hernandez was unarmed and presented no threat." *Hernandez*, 757 F.3d at

267. The question is whether, under the unique facts and circumstances presented here, that right was “clearly established.”

The Supreme Court has carefully admonished that we are “not to define clearly established law at a high level of generality.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). To the contrary, a right is clearly established only where “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 202) (internal quotation marks omitted). The question here is whether the general prohibition of excessive force applies where the person injured by a U.S. official standing on U.S. soil is an alien who had no significant voluntary connection to, and was not in, the United States when the incident occurred. No case law in 2010, when this episode occurred, reasonably warned Agent Mesa that his conduct violated the Fifth Amendment.

Although the en banc court is somewhat divided on the question of whether Agent Mesa’s conduct violated the Fifth Amendment, the court, with the benefit of further consideration and en banc supplemental briefing and oral argument, is unanimous in concluding that any properly asserted right was not clearly established to the extent the law requires. The strongest authority for the plaintiffs may be *Boumediene v. Bush*, which addressed whether the Suspension Clause of the U.S. Constitution applied to aliens detained outside the United States at the U.S. Naval Base in Guantanamo Bay, Cuba. 553 U.S. 723, 732–33 (2008). Although the Court drew on cases from contexts other than habeas corpus, *see id.* at 755–64 (discussing the Court’s precedents on “the Constitution’s extraterritorial application,” including, *inter alia*, the *Insular Cases*, *In re Ross*, 140 U.S. 453 (1891), *Reid v. Covert*, 354 U.S. 1 (1957), and *Verdugo-Urquidez*, 494 U.S. 259), it expressly limited its holding to the facts before it, *see id.* at 795 (“Our decision today holds only that petitioners before us are entitled to seek the writ; that the [Detainee Treatment Act] review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court.”). Accordingly, nothing in that opinion presages, with the directness that the “clearly established” standard requires, whether the Court would extend the territorial reach of a different constitutional provision—the Fifth Amendment—and would do so where the injury occurs not on land long controlled by the United States, but on soil that is indisputably foreign and beyond the United States’ territorial sovereignty. By deciding this case on a ground on which the court is in consensus, we bypass that issue by giving allegiance to “the general rule of constitutional avoidance.” *Callahan*, 555 U.S. at 241.

“There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.” *Id.* at 237. Reasonable minds can differ on whether *Boumediene* may someday be explicitly extended as the plaintiffs urge. That is the chore of the first prong of the qualified-immunity test, which we do not address.

The alleged right at issue was not clearly established, under these facts, in 2010.

The judgment of dismissal is AFFIRMED.

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**Cross References**

*Evacuation of U.S. citizens from Yemen*, **Chapter 2.A.2.**

*Munoz Santos case involving comity and separation of powers*, **Chapter 3.A.3.c.**

*Zivotofsky case regarding executive branch authority over state recognition*, **Chapter 9.C.**

*Villoldo case (act of state doctrine)*, **Chapter 10.A.4.b(3)**

*Propriety of sanctions under FSIA (foreign relations concerns)*, **Chapter 10.A.4.e.**

*Exchange Visitors Program litigation*, **Chapter 14.D.**

*International comity*, **Chapter 15.C.3.**

*Litigation involving alleged NPT breach (political question)*, **Chapter 19.B.2.c.**