

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NORA ALI MOBAREZ, et al.,)
)
)
 Plaintiffs,)
)
 v.) Civil Action No. 1:15-cv-0516 (KBJ)
)
 JOHN KERRY, Secretary, United States)
 Department of State, in his official capacity,)
)
 and)
)
 ASHTON CARTER, Secretary, United)
 States Department of Defense, in his official)
 capacity,)
)
 Defendants.)

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR
MOTION TO DISMISS**

INDEX OF EXHIBITS

Exhibit	Description
1	<i>Sadi v. Obama</i> , No. 15-11314, slip op. (E.D. Mich. June 8, 2015)
2	Executive Order 12656, 53 Fed. Reg. 47491 (Nov. 18, 1988), as amended by Executive Order 13074, 63 Fed. Reg. 7277 (Feb. 9, 1988) (attached together)
3	Memorandum of Agreement Between the Department of State and Defense on the Protection and Evacuation of U.S. Citizens and Nationals and Designated Other Persons from Threatened Areas Overseas (Jul. 14, 1998)

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INTRODUCTION

This is the second in a pair of lawsuits brought by U.S. citizens located in Yemen who claim the United States has deprived them of their right to an evacuation from Yemen and who seek the extraordinary relief of an order compelling the Government to initiate an evacuation. The first suit was dismissed on the pleadings after the district court found (i) that the political question doctrine barred judicial review of discretionary decisions concerning the evacuation of U.S. citizens overseas and (ii) that, in any event, review under the Administrative Procedure Act (“APA”) would be improper because any final evacuation decision would be committed to agency discretion and thus not subject to judicial review. *Sadi v. Obama*, No. 15-11314, slip op. at *7-14 (E.D. Mich. June 8, 2015) (Ex. 1). There is no reason for the Court to reach a different outcome here.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

Plaintiffs cite to no statutory or other authority as the basis for this complaint, instead claiming a “federal constitutional violation” without reference to a particular constitutional clause. Compl., ECF No. 2, ¶ 27. However, as relevant to this litigation, the statutory and other authorities governing the overseas evacuation activities of the U.S. Government address two general matters: (1) planning and preparing for the possibility of evacuating private U.S. citizens overseas; and (2) the commitment of personnel and resources in carrying out any such evacuations. Nothing in these authorities purports to dictate *when* an evacuation must occur; rather, any directives are limited to the development of plans and policies in preparation for an evacuation. Whether to undertake an evacuation is solely within the province of the Executive

Branch, which has the unique expertise and information to make that decision, including weighing the risks to military and civilian personnel, and to the potential evacuees.

A. PLANNING AND PREPARATION FOR EVACUATIONS

1. Statutory Authorities

The Secretary of State bears responsibility for:

develop[ing] and implement[ing] policies and programs to provide for the safe and efficient evacuation of United States Government personnel, dependents, and private United States citizens when their lives are endangered.

22 U.S.C. § 4802(b). This responsibility involves 1) developing a model contingency plan for evacuations in foreign countries; 2) developing a mechanism by which U.S. citizens can be contacted, and information about their location maintained, in the event of an evacuation; 3) assessing transportation and communications resources in the evacuation areas; and 4) developing a plan for coordinating communications regarding the whereabouts of U.S. citizens abroad. *Id.* §§ 4802(b)(1)(2)(3)(4). Again, these provisions do not establish standards for determining when the Government must evacuate U.S. citizens from a foreign country, nor do they restrict the Secretary's discretion to do so.

2. Other Authorities

Executive Order 12656, 53 Fed. Reg. 47491 (Nov. 18, 1988), as amended by Exec. Order 13074, 63 Fed. Reg. 7277 (Feb. 9, 1988) (Ex. 2), assigns to the Secretary of State the responsibility to

(2) Prepare to carry out Department of State responsibilities in the conduct of the foreign relations of the United States during national security emergencies, under the direction of the President and in consultation with the heads of other appropriate Federal departments and agencies, including, but not limited to:

(f) Protection or evacuation of United States citizens and nationals abroad . . .

Exec. Order 12656 § 1301(2)(f), 53 Fed. Reg. at 47503-04. Under this Executive Order, the Secretary of Defense is to “[a]dvice and assist the Secretary of State . . . as appropriate, in planning for the protection, evacuation, and repatriation of United States citizens in threatened areas overseas.” *Id.* § 502(2), 53 Fed. Reg. at 47498. The amendment to Executive Order 12656 adds that the Secretary of Defense:

Subject to the direction of the President, and pursuant to procedures to be developed jointly by the Secretary of Defense and the Secretary of State, [is] responsible for the deployment and use of military forces for the protection of United States citizens and nationals and, in connection therewith, designated other persons or categories of persons, in support of their evacuation from threatened areas overseas.

E.O. 13074, 63 F.R. 7277.

On July 14, 1998, the Departments of State (“DOS”) and Defense (“DoD”) entered into a Memorandum of Agreement (“MOA”) concerning their “respective roles and responsibilities regarding the protection and evacuation of U.S. citizens and nationals and designated other persons from threatened areas overseas.” MOA, 1 (July 14, 1998) (Ex. 3). Under the MOA, DOS retains ultimate responsibility for such evacuations from foreign countries, MOA, §§ C.2, C.3.b. However, “[o]nce the decision has been made to use military personnel and equipment to assist in the implementation of emergency evacuation plans, the military commander is solely responsible for conducting the operations . . . in coordination with and under policies established by the Principal U.S. Diplomatic or Consular Representative.” *Id.* § E.2. The MOA further provides that while “[t]he safety of U.S. Citizens is of paramount concern . . . successful evacuation operations must take into account risks for evacuees and U.S. forces,” *id.* App. 1, and should be carried out only when “necessary and feasible,” *id.* § A.1. Like the statute and the Executive Order, the MOA does not purport to establish any requirements as to whether or when

an evacuation shall take place.

B. IMPLEMENTATION OF EVACUATIONS

Once a decision to evacuate has been reached, the Secretary of State is authorized to “make expenditures, from such amounts as may be specifically appropriated therefor, for unforeseen emergencies arising in the diplomatic and consular service and, to the extent authorized in appropriation Acts,” for the evacuation of “private United States citizens or third-country nationals, on a reimbursable basis to the maximum extent practicable.” 22 U.S.C. § 2671(a)(1), (b)(2)(A)(ii). Activities subject to such expenditures must, *inter alia*, “serve to further the realization of foreign policy objectives,” and must be “a matter of urgency to implement.” *Id.* § 2671(b)(1). Such activities may include “the evacuation when their lives are endangered by war, civil unrest, or natural disaster of . . . private United States citizens or third-country nationals.” *Id.* § 2671(b)(2)(A)(ii). The delegation of authority in section 2671 is an *authorization*, not a mandate; section 2761 does not purport to direct or control when an evacuation should occur.

II. THE COMPLAINT

Plaintiffs are a group of U.S. citizens located in Yemen who claim the United States Government has deprived them of their alleged right to a “swift, accommodating, and reasonable” evacuation from Yemen. Compl. ¶ 82. They seek a declaration that “Defendants’ inaction in not evacuating United States citizens from Yemen” violated the APA, as well as an injunction that would compel the Government “to initiate evacuation efforts and secure the safety and well-being of its citizens,” *id.* ¶ 28, using “all resources at their disposal that are necessary and available, including, but not limited to the deploying of military ships, vessels, and

airplanes” *id.* at p. 23.

ARGUMENT

I. PLAINTIFFS’ CLAIMS SHOULD BE DISMISSED.

A. Standard of Review

In ruling on a motion under Federal Rule of Civil Procedure 12(b), the Court is to presume the truth of all factual allegations in the complaint but need not and should not accept “‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)) (brackets in original). The Court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The Court may consider “the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint,” as well as “documents upon which the plaintiff’s complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss.” *Ward v. D.C. Dep’t of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011) (internal quotations and citations omitted).

B. Plaintiffs’ Claims Raise Nonjusticiable Political Questions.

As one court has already concluded, *see Sadi*, at *9, Plaintiffs’ claims should be dismissed because adjudicating them would require the Court to rule on political questions that are beyond the power of the courts to resolve. “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) (citation omitted).

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 presence 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 plainly implicate several of the *Baker* factors, in particular the first three.

With respect to the first *Baker* factor, while the Constitution vests some foreign policy powers in the Congress and others in the Executive Branch, it provides no such authority to the courts. *Schneider*, 412 F.3d at 193; *see also 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”); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (“[C]ourts 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”). To undertake the review sought by Plaintiffs here would entangle the Court in the very type of diplomatic and military judgments uniformly committed for resolution 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.

There can be no question that the Court’s intervention into the decision to evacuate U.S. citizens from Yemen implicates both military and foreign policy decisions. Executive Order 12656, which assigns responsibilities to various Executive Branch Departments with respect to “national security emergencies,” provides that the Secretary of State’s responsibilities with respect to the protection and evacuation of 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.” Exec. Order 12656 § 1301(2), 53 Fed. Reg. at 47503. The Executive Order’s delegation of responsibility to the Secretary of Defense plainly implicates the control of the military forces, allocating 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), 63 Fed. Reg. 7277 (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). As these authorities show, adjudicating Plaintiffs’ claims would require this Court to review the very type of discretionary foreign policy decisions that lie at the heart of the political question

doctrine.

But Plaintiffs do not merely ask the Court to involve itself in a substantive area ordinarily reserved for the political branches; they ask the Court to *compel* the Executive Branch to initiate evacuation efforts in the midst of a military conflict, and in the process to usurp the Executive Branch's prerogative to decide whether military and other resources should be allocated to evacuate private U.S. citizens overseas. *See Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir. 1967) ("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." (citations omitted); *see also Holtzman v. Schlesinger*, 484 F.2d 1307, 1311-12 (2d Cir. 1973) (refusing to adjudicate the legality of military decisions concerning Cambodia). This extraordinary request for relief is grounds alone for dismissal. *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45-56 (D.D.C. 2010).

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 warrants the attempted "swift" evacuation of U.S. citizens. The decision to initiate evacuation efforts is a decision driven by a range of discretionary factors that the Executive branch is uniquely positioned to evaluate and not reducible to a set of hard-and-fast rules. The statute governing the Government's overseas evacuation activities limits itself to planning and preparation. Congress mandates only that the Secretary of State "develop and implement policies and programs" to facilitate evacuations, 22 U.S.C. § 4802(b), and the statute "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."

Sadi, at *9 – 10. As the *Sadi* Court explained, “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.” *Sadi*, at *9; *see also El-Shifa*, 607 F.3d at 843 (describing “the institutional limitations of the judiciary and the lack of manageable standards” with respect to strategic choices in matters of foreign affairs).

In the same way, the third *Baker* factor – the impossibility of deciding the issue without an initial policy determination of a kind clearly for non-judicial discretion – also supports the Defendants in this case. In order to find in Plaintiffs’ favor, the Court must substitute its own judgment as to when evacuation is appropriate for the judgment of the Executive Branch. The MOA underscores the discretionary nature of evacuation determinations, which “must take into account risks for evacuees and U.S. forces,” MOA, App. 1, and which turn on sensitive, rapidly evolving assessments about conditions on the ground, including, among other factors, the “imminence of general or local hostilities or civil disturbances which may endanger U.S. citizens” and the “capability and willingness of local authorities to provide adequate protection for U.S. citizens.” MOA § C. 1. Thus, as the *Sadi* Court concluded, “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.” *Sadi*, at *11. Such a decision should remain solely within the purview of the Executive Branch.¹

¹ For similar reasons, the remaining *Baker* factors are also implicated by judicial review in this case, to the extent an independent resolution of the questions at issue fails to respect the policy judgments of the Executive Branch, and would risk multifarious pronouncements on evacuation policy concerning Yemen.

C. Plaintiffs' Fail to State a Claim under the APA.

Even if Plaintiffs' APA claims were otherwise cognizable, the claims should still be dismissed because determinations concerning the evacuation of private U.S. citizens overseas are entrusted to the discretion of DOS and DoD and therefore not subject to judicial review. *See Sadi*, at *12-13. In addition, there has been no final agency action subject to APA review.

1. Evacuation decisions are committed to agency discretion by law.

"[B]efore any review at all may be had [under the APA], a party must first clear the hurdle of [5 U.S.C.] § 701(a)." *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). That section of the APA precludes judicial review over "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Action is committed to agency discretion "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Heckler*, 470 U.S. at 830.

Plaintiffs provide no constitutional, statutory, or other authority for their assertion that the Court should compel Defendants to initiate evacuation efforts for U.S. citizens in Yemen. That is because, as noted above, all authorities relating to U.S. government-coordinated evacuations are discretionary, not mandatory. Accordingly, such authority for planning or carrying out evacuations of private U.S. citizens in foreign countries is delegated in such broad terms "in a given case there is no law to apply," *see Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), and certainly "no meaningful standard against which to judge the agency's exercise of discretion," *Heckler*, 470 U.S. at 830. Congress has vested complete discretion in the Secretary to make judgments about when and how such evacuations are to be carried out. *C.f. Heckler*, 470 U.S. at 835-37. Likewise, there are no statutory authorities that impose any

restrictions on how the Secretary of State is to determine where or when such an evacuation may be necessary or appropriate. *See, e.g., Sadi*, at *12-13 (“[Section 4802(b)] does not require evacuation in every case, and provides no guidelines for determining when formal evacuation is appropriate.”); *see also Young America's Found. v. Gates*, 560 F. Supp. 2d 39, 44 (D.D.C. 2008) (concluding that substantive provision that informed the agency’s determination of non-compliance did not cabin agency discretion for the purposes of section 701(a)(2) because it did not “purport to direct the Secretary *when* to undertake an enforcement action”) (emphasis in original) (internal quotations and citations omitted); *cf. Legal Assistance for Vietnamese Asylum Seekers v. U.S. Dep’t of State*, 104 F.3d 1349, 1352-53 (D.C. Cir. 1997) (concluding that State Department consular venue policy was unreviewable because the governing statute, which provided that applications for visas and alien registration shall be made “in such form and manner and at such place as shall be by regulation prescribed,” provided no substantive standards against which the Secretary’s determination could be measured).²

This reading of 22 U.S.C. § 4802(b) finds further support in *Macharia v. United States*, 334 F.3d 61, 65 (D.C. Cir. 2003), where the D.C. Circuit relied on similarly broad language in 22 U.S.C. § 4802(a) in holding that the discretionary-function exception to the Federal Tort Claim Act (“FTCA”) barred claims against the United States based on decisions regarding embassy security prior to a terrorist bombing. The Court explained that determinations about embassy security “do not involve the mechanical application of set rules, but rather constant exercise of judgment and discretion,” *id.* (quoting *Macharia v. United States*, 238 F. Supp. 2d 13, 23

² The language of the statute authorizing the Secretary of State to “make expenditures, from such amounts as may be specifically appropriated therefor, for unforeseen emergencies” is similarly discretionary. 22 U.S.C. § 2671(a)(1). Nowhere does that statute provide any guidance as to what constitutes an “unforeseen emergency” or when an evacuation of U.S. citizens must occur, including when any such evacuation might be conducted safely.

(D.D.C. 2002), and expressly referred to Section 4802(a)'s expansive grant of authority to the Secretary of State "to develop and implement . . . policies and programs, including funding levels and standards, to provide for the security of United States Government operations of a diplomatic nature," *Macharia*, 334 F.3d at 65 (quoting 22 U.S.C. § 4802(a)(1)).³ The language of section 4802(a) quoted in *Mancharia* mirrors the text of section 4802(b) ("develop and implement policies and programs to provide for the safe and efficient evacuation of . . . private United States citizens when their lives are endangered"), and there is no reason to treat the two provisions differently for the purposes of the APA analysis. *See Gillis v. U.S. Dep't of Health & Human Servs.*, 759 F.2d 565, 577 (6th Cir. 1985) (analogizing the FTCA's "discretionary function exception" to the APA's "committed to agency discretion" exception).

Moreover, Executive Order 12656 and the MOA confirm the broad discretion granted to DOS and DOD regarding evacuations.⁴ The Executive Order directs the Secretaries of State and

³ *See also Spotts v. United States*, 613 F.3d 559 (5th Cir. 2010) (holding that decision not to evacuate inmates during emergency was subject to agency discretion for purposes of FTCA notwithstanding statute requiring agency to provide for safety of inmates); *Curran v. Laird*, 420 F.2d 122, 128-29 (D.C. Cir. 1969) (holding that the President's decision to use foreign ships in the transport of military supplies to Vietnam was committed to agency discretion and not subject to APA review) ("[T]he national interest contemplates and requires flexibility in management of defense resources; and the particular issues call for determinations that lie outside sound judicial domain in terms of aptitude, facilities, and responsibility."); *c.f. Freeman v. United States*, 556 F.3d 326, 340 (5th Cir. 2009) (holding that government decisions regarding aid and evacuation during the exigencies of Hurricane Katrina were "the types of decisions that the [FTCA's] discretionary function exception was designed to shelter from suit.").

⁴ The Executive Order and the MOA do not constitute legislative rules that could give rise to a legal obligation under the APA. *See Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980) (defining a legislative or substantive rule as one that "narrowly constrict[s] the discretion of agency officials by largely determining the issue addressed"). Rather, these materials are examples of administrative statements that "merely remind parties of existing duties," "express . . . internal practice or procedure," or "organiz[e] agency activities." *Id.* at 701-02 and n.29. Accordingly, these materials are not subject to APA review. *See City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 913-14 (10th Cir. 2004) (explaining that executive orders are not subject to APA review where they merely announce executive interpretation or intentions but do not provide "an objective standard by which a court can judge the agency's actions.") (citing 5 U.S.C. § 701(a)(2)); *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 900 (9th Cir. 1996) (explaining that non-binding agency pronouncements such as interagency guidelines or manuals are not reviewable under the APA); *see e.g., Patel v. U.S. Dept. of State*, No. 11-CV-6-WMC, 2013 WL 3989196, at *3-4 and n.7 (W.D. Wis. Aug. 2, 2013) (finding the U.S. Foreign Affairs Manual to lack the force of law and thus dismissing APA claims based on the State Department's alleged failure to comply with the Foreign Affairs Manual).

Defense to work together in the preparation and planning for the evacuation of U.S. citizens “as appropriate,” E.O. 12656, § 502(2), and “during national security emergencies.” *Id.* § 1301(2). It does not provide any substantive standards as to when an evacuation of U.S. citizens must occur, and it contains no language that purports to cabin the discretion of agency officials in determining when to evacuate. Likewise, the MOA discusses only the policy of the Government to protect U.S. citizens, and highlights several factors in the discretionary balance of interests that must be involved in determining whether to evacuate. MOA, App. 1. None of this limits discretion to carry out an evacuation or makes any Government decision whether to evacuate reviewable.⁵

Quite apart from the absence of any judicially manageable standards by which to evaluate evacuation decisions, the argument against APA review is especially strong in this case because Plaintiffs’ APA claim falls squarely within two “narrow categories” of cases involving decisions that courts have noted are “usually” committed to agency discretion. *Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007). First, as discussed throughout this memorandum, this case concerns sensitive and complex foreign policy decisions beyond the competencies of the judicial branch. *See, e.g., supra* at I.B.; *Legal Assistance for Vietnamese Asylum Seekers*, 104 F.3d at 1353 (recognizing “long-standing tradition” that “courts have been wary of second-guessing executive branch decision involving complicated foreign policy matters.”). Second, a government-coordinated evacuation involves discretionary decisions regarding the commitment of resources

⁵ For similar reasons, Plaintiffs cannot maintain a claim under the APA’s “failure to act” provision. A court may compel an action under the “failure to act” provision of the APA only if that action is legally required. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in *Norton*). Under § 706(1), which “empowers a court only to compel an agency to perform a ministerial or non-discretionary act,” a court can compel agency action “only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.” *Norton*, 542 U.S. at 64. An act that requires an exercise of discretion cannot, therefore, be unlawfully withheld. *Id.* As discussed above, and contrary to plaintiffs’ argument, there is nothing that mandates the evacuation of private U.S. citizens from Yemen, and any such decision is discretionary on the part of the defendants.

that are necessarily unreviewable under the APA. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (decision whether, when, and how to commit resources using lump-sum appropriation is committed to agency discretion by law). Here, the statute authorizes the Secretary of State to “make expenditures, from such amounts as may be specifically appropriated therefor, for unforeseen emergencies.” 22 U.S.C. § 2671(a)(1). Whether, how, and when this emergency authority is exercised, including with respect to the evacuation of U.S. citizens under 22 U.S.C. § 2671(b)(2), is left to the Secretary’s discretion, which includes his assessments about safety and risks, and is outside APA review.

2. There has been no final agency action.

The APA claim fails for an additional reason: Plaintiffs have failed to challenge a final agency action. “Not everything an agency does constitutes final agency action reviewable by the courts,” *Ass’n of Admin. Law Judges v. U.S. Office of Pers. Mgmt.*, 640 F. Supp. 2d 66, 73 (D.D.C. 2009), and only “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704. In order for agency action to be “final,” the action “must mark the ‘consummation’ of the agency’s decisionmaking process.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). In addition, “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Id.* at 178.

Here, Plaintiffs seek review of what they describe as “the Department of State’s final agency action to not evacuate United States citizens in Yemen.” Compl. ¶ 80. But there are no allegations in the Complaint that support a plausible inference that the Government’s response to date “marks the consummation” of its consideration of a Government-coordinated evacuation of

private U.S. citizens in Yemen. To the contrary, the news reports cited by Plaintiffs indicate that no final evacuation decisions have been made, with the Government continuing to assess evacuation options in light of the security conditions on the ground. *See* Hamed Aleaziz, *Bay Area man, stuck in war-torn Yemen, returns home*, SFGate, April 7, 2015⁶ (“‘We’re continuing to re-evaluate the situation, and if we have any changes to whether or not we’ll evacuate people, we will certainly let folks know,’ said [Department of State spokeswoman Marie Harf]”); James Rosen, *U.S. agrees to refuel Saudi planes, but isn’t evacuating Americans from Yemen*, McClatchy Washington Bureau, April 6, 2015⁷ (“[U.S. Army Col. Steve Warren] said . . . that the United States has ‘assets in place’ to evacuate Americans but has not begun to do so.”). Such continued monitoring and evaluation are consistent with the agencies’ responsibilities as described in the MOA, *see* MOA § C, and should dispense with any suggestion that the Government has completed its decisionmaking process. Accordingly, no final agency action subject to APA review is at issue, and plaintiffs’ APA claim therefore should be dismissed.⁸

CONCLUSION

For the foregoing reasons, this Court should grant Defendants’ motion to dismiss.

⁶ Complaint ¶ 73 n.49.

⁷ Complaint ¶ 77 n.52.

⁸ To the extent Plaintiffs’ passing reference to mandamus relief constitutes an independent claim for relief, the claim should fail. The “remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances.” *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Specifically, mandamus is available in the limited circumstances where: “(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.” *N. States Power Co. v. U.S. Dep’t of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997) (citation omitted). As discussed throughout this memorandum, Plaintiffs have failed to state a claim under the APA, and they certainly have not demonstrated that they have a “clear and indisputable right to relief,” or that Defendants have a “clear duty to act.” *See College Sports Council v. Gov’t Accountability Office*, 421 F. Supp. 2d 59, 71 (D.D.C. 2006) (dismissing request for mandamus relief “[b]ecause the plaintiff has not stated any claims upon which relief can be granted”).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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