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CHAPTER 5

Foreign Relations

A. LITIGATION INVOLVING NATIONAL SECURITY AND FOREIGN POLICY ISSUES

1. *Meshal v. Higgenbotham*

As discussed in *Digest 2015* at 142-44, the U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal of a *Bivens* action against FBI agents relating to detention and interrogation in foreign countries in the context of counterterrorism investigations. *Meshal v. Higgenbotham*, 804 F.3d. 417 (D.C. Cir. 2015). On February 2, 2016, the Court denied rehearing en banc. On May 31, 2016, Meshal filed a petition for certiorari in the U.S. Supreme Court. On September 20, 2016, the United States filed its brief in opposition to certiorari, arguing that the court of appeals correctly held that consideration of factors including extraterritoriality, national security, and foreign policy makes unavailable a *Bivens* remedy and that further review by the Supreme Court is not warranted. Excerpts follow from the U.S. brief.

* * * *

A two-step analysis governs the decision whether to extend *Bivens* to a new context. First, a court should consider "whether any alternative, existing process for protecting the [plaintiff's] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). Second, "even in the absence of [such] an alternative" remedial mechanism, the court must make an assessment "appropriate for a common-law tribunal" about whether judicially created relief is warranted, "paying particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Ibid*. (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)). That inquiry involves a "case-by-case," rather than categorical, "approach in determining whether to recognize a *Bivens* cause of action." Pet. App. 13a.

b. The court of appeals correctly applied that framework in declining to extend the judicially inferred damages remedy to "alleged actions occurring in a terrorism investigation

conducted overseas by federal law enforcement officers." Pet. App. 17a. Courts are "reluctant to intrude upon the authority of the Executive in military and national security affairs," "unless Congress specifically has provided otherwise." *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988). Such reluctance is appropriate because "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). Thus, even in the habeas context (where the judiciary need not infer the existence of a remedy), courts should not "second-guess" determinations about "sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally," because those are determinations that "the political branches are well situated to consider." *Munaf* v. *Geren*, 553 U.S. 674, 702 (2008).

Petitioner's claims squarely implicate national-security and foreign-policy sensitivities. Petitioner seeks to hold liable in damages U.S. officials who were conducting a terrorism investigation in cooperation with foreign governments. "One of the questions raised by [petitioner's] suit is the extent to which [respondents] orchestrated his detention in foreign countries." Pet. App. 22a. Litigating about such questions could have serious "diplomatic consequences" and could "affect the enthusiasm of foreign states to cooperate in joint actions or the government's ability to keep foreign policy commitments or protect intelligence." *Id*. at 22a-23a.

This case, moreover, involves "U.S. officials" who "were attempting to seize and interrogate suspected al Qaeda terrorists in a foreign country." Pet. App. 32a (Kavanaugh, J., concurring). As the district court correctly found, *id*. at 95a, petitioner's suit, which turns in part on whether the conduct of U.S. officials was unreasonable, would require inquiry into other sensitive issues, including national-security threats in the unstable Horn of Africa region (and petitioner's own potential contribution to those threats); the substance and sources of intelligence information; the government's policies for conducting counterterrorism investigations, see C.A. App. 24-25, 32, 57; the consistency of petitioner's detention and treatment with Kenyan, Somali, and Ethiopian law and policy and the supposed cooperation of foreign governments and their officials with U.S. investigative efforts, see *id*. at 25, 45; and evidence concerning the conditions of detention in Ethiopia, Somalia, and Kenya. Answering such questions could require discovery of national-security information from foreign counterterrorism officials and from U.S. officials up and down the chain of command. See, *e.g.*, *id*. at 57 (petitioner's allegation that his treatment was conducted with full awareness of other U.S. officials "including officials designated by the Attorney General and the Director of Central Intelligence"). The sensitivities associated with litigating this case are not, as petitioner suggests (Pet. 17), merely "conjectural."

c. The fact that petitioner's claims arise from respondents' *extraterritorial* conduct provides a particularly compelling reason to reject extension of the *Bivens* remedy. This 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* v. *Rumsfeld*, 701 F.3d 193, 198-199 (7th Cir. 2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013). The decision below correctly recognized that the extraterritorial nature of the conduct petitioner challenges is "critical." Pet. App. 18a.

This Court presumes that judge-elaborated causes of action do not apply to conduct occurring abroad even where a statute has already authorized the courts to recognize new causes of action. See *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-1665 (2013). The Court has applied that presumption when, as here, the question is whether Congress has implicitly delegated the authority to recognize a cause of action. See *ibid*. "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" outside the United States unless Congress had sufficiently indicated its intention to overcome the presumption against extraterritorial application. Pet. App. 18a. "There is no persuasive reason to adopt a laxer extraterritoriality rule in *Bivens* cases." *Id*. at 31a (Kavanaugh, J., concurring). In fact, it would be "grossly anomalous * * * to apply *Bivens* extraterritorially when [the Court] would not apply an identical statutory cause of action for constitutional torts extraterritorially." *Ibid*.

* * * *

d. Contrary to petitioner's characterizations (Pet. 14-17, 31-34), the decision below does not establish a categorical rule granting absolute immunity to counterterrorism agents acting abroad. Whether a federal court should extend *Bivens* to a new, sensitive context "is analytically distinct from the question of official immunity from *Bivens* liability." *United States* v. *Stanley*, 483 U.S. 669, 684 (1987). The relevant question therefore is not whether respondents are immune from suit, but whether the creation of any remedy is best left to Congress rather than the courts. Pet. App. 20a- 23a; see *id*. at 30a-31a (Kavanagh, J., concurring).

Rather than issue a "categorical" (Pet. 14, 31) ruling, moreover, the court of appeals followed this Court's "case-by-case" approach and was careful to make its holding "context specific." Pet. App. 13a-14a (citing *Wilkie*, 551 U.S. at 550, 554). It therefore refused to decide "whether a *Bivens* action can lie against federal law enforcement officials conducting non-terrorism criminal investigations against American citizens abroad." *Id*. at 13a. And it refused to decide "whether a *Bivens* action is available for plaintiffs claiming wrongdoing committed by federal law enforcement officers during a terrorism investigation occurring within the United States." *Ibid*. Instead, it appropriately based its holding on the confluence of multiple factors, including the terrorism-related nature of respondents' investigation, the extraterritorial locus of the allegedly wrongful conduct, and the alleged involvement of foreign governments and officials in petitioner's detention. *Id*. at 22a-23a.

e. Finally, petitioner emphasizes (Pet. 20) that he has no alternative mechanism to obtain damages for his asserted claims. As the court of appeals explained, however, this Court "has repeatedly held that 'even in the absence of an alternative' remedy, courts should not afford *Bivens* remedies if 'any special factors counsel[] hesitation.' " Pet. App. 19a (quoting *Wilkie*, 551 U.S. at 550, and citing *Schweiker*, 487 U.S. at 421- 422).

If Congress chooses to create a civil money-damages remedy for claims like petitioner's, which relate to detention and interrogation that occurred in the course of counterterrorism operations undertaken abroad in alleged cooperation with foreign governments, Congress in crafting such legislation can take steps to reduce the potentially harmful effects of private suits on national security and foreign policy. In such contexts, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" and may "tailor any remedy to the problem perceived." *Wilkie*, 551 U.S. at 562 (citation omitted). "[W]hen Congress deems it necessary for the courts to become involved in sensitive matters, * * * it enacts careful statutory guidelines to ensure that litigation does not come at the expense of national security concerns." *Lebron*, 670 F.3d at 555. Thus, Congress has "created the special Foreign Intelligence Surveillance Court to consider wiretap requests in the highly sensitive area of " foreign-intelligence investigations. *Ibid*. Congress enacted the Classified Information Procedures Act, 18

U.S.C. App. at 860, to regulate the use and disclosure of sensitive information in criminal cases. See generally *United States* v. *Yunis*, 867 F.2d 617 (D.C. Cir. 1989). In the absence of such statutory safeguards, however, the court of appeals correctly declined to recognize an extrastatutory, and extraterritorial, damages action in the sensitive context presented by petitioner's claims.

3. Petitioner contends (Pet. 9-14) that the Court should grant review in this case to address confusion in the courts of appeals about "the status of national security as a bar to *Bivens* relief." Pet. 13. The decision below, however, comports with the great weight of authority in the courts of appeals, which have repeatedly held that "special factors counseling hesitation * * * foreclosed *Bivens* remedies in cases 'involving the military, national security, or intelligence.'" Pet. App. 20a (quoting *Doe*, 683 F.3d at 394); see also *id.* at 11a-12a (citing *Vance*, 701 F.3d at 198-199; *Lebron*, 670 F.3d at 548-549; *Arar*, 585 F.3d at 571; *Wilson* v. *Libby*, 535 F.3d 697, 705-708 (D.C. Cir. 2008), cert. denied, 557 U.S. 919 (2009)). Most closely on point, the Fourth, Seventh, and D.C. Circuits have all rejected *Bivens* actions challenging the conditions under which federal officials have detained persons, including U.S. citizens, suspected of having ties to terrorism. See *Vance*, 701 F.3d at 197-203; *Doe*, 683 F.3d at 395-396; *Lebron*, 670 F.3d at 547-556; *Ali* v. *Rumsfeld*, 649 F.3d 762, 765-768 (D.C. Cir. 2011); *Rasul* v. *Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir.), cert. denied, 558 U.S. 1091 (2009). Petitioner suggests (Pet. 11) that those cases are distinguishable from this one because they involved "suits against military officials" about "the conduct of war." That potential distinction, however, is still consistent with the conclusion of the court below that national-security considerations—when taken *in conjunction with other factors*—may justify a refusal to extend the *Bivens* remedy.

* * * *

…The decision below, however, is in harmony with all of the most analogous court of appeals decisions, which have uniformly declined to recognize a *Bivens* remedy in suits that challenge overseas conduct implicating national security. The D.C. Circuit's ruling therefore does not warrant further review.

* * * *

2. *Sokolow*

As discussed in *Digest 2015* at 144-45, the United States filed a statement of interest in a case against the Palestinian Authority ("PA") and the Palestinian Liberation Organization ("PLO") urging the court to take into account national security and foreign policy interests in deciding whether to stay execution of a judgment against the PA. On August 31, 2016, the U.S. Court of Appeals for the Second Circuit decided that the PA and PLO were not subject to general personal jurisdiction or specific personal jurisdiction in the United States and vacated and remanded the judgment of the district court. *Waldman v. PLO*, 835 F.3d 317 (2d. Cir. 2016).[*]

[*] Editor's note: The plaintiffs filed a petition for certiorari on March 3, 2017.

B. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Statute ("ATS"), sometimes referred to as the Alien Tort Claims Act ("ATCA"), was enacted as part of the First Judiciary Act in 1789 and is 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 2016 developments in a selection of cases brought under the ATS and the TVPA in which the United States participated.

2. ATS and TVPA Cases 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."

a. Warfaa v. Ali

On February 1, 2016, the U.S. Court of Appeals for the Fourth Circuit issued its decision in *Warfaa v. Ali*, 811 F.3d. 653 (2016), affirming the 2014 judgment of the district court dismissing Warfaa's ATS claims after applying the presumption against extraterritorial application of the ATS set forth in *Kiobel*. *Warfaa v. Ali*, 33 F.Supp.3d 653 (E.D.Va. 2014). The Fourth Circuit also affirmed the district court's determination that the TVPA claims could proceed because Ali was not entitled to immunity under binding Fourth Circuit precedent. The United States did not express a view on defendant's entitlement to immunity in the district court or the Fourth Circuit in this case. In the Fourth Circuit, plaintiff cited the U.S. statement of interest filed in *Yousuf v. Samantar*, another case in

the Eastern District of Virginia against a former Somali official. See *Digest 2011* at 338-40 for discussion of the U.S. statement of interest in *Yousuf v. Samantar*. On May 2, 2016, Ali filed a petition for certiorari in the U.S. Supreme Court on the immunity issue. Warfaa conditionally cross-petitioned for certiorari on the ATS issue. On October 3, 2016, the Supreme Court invited the Acting Solicitor General to file a brief in the case expressing the views of the United States on both petitions.

b. Doğan v. Barak

On June 10, 2016, the United States filed a suggestion of immunity in U.S. District Court for the Central District of California in *Doğan et al. v. Barak*, No. 2:15-CV-08130. The Department of State determined that Ehud Barak, former defense minister of Israel, was immune from the claims in this suit. Plaintiffs sued after their son was killed by Israeli Defense Forces ("IDF"), alleging that Barak knew about and failed to prevent human rights abuses in the operations that led to their son's death. On October 13, 2016, the district court issued its decision, granting Barak's motion to dismiss the case on immunity grounds. The discussion of the TVPA's effect on common law immunity in the U.S. brief follows (with footnotes omitted). The suggestion of immunity is discussed and excerpted further in Chapter 10 and available in full at http://www.state.gov/s/l/c8183.htm.

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* * * *

Plaintiffs also err in suggesting that Congress abrogated immunity under the common law for foreign officials accused of torture or extrajudicial killing. Opp'n at 9. Indeed, they argue that the TVPA does so "unambiguous[ly]." Opp'n at 10. This is plainly incorrect, as the TVPA is entirely silent as to whether it limits the immunities of foreign officials. Indeed, Plaintiffs can cite no portion of the TVPA that references or mentions common law immunity. As the Supreme Court has noted, "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)); see also The *Schooner Exch. v. McFaddon*, 11 U.S. 116, 146 (1812) (noting that courts may not infer a rescission of foreign sovereign immunity unless expressed by the political branches "in a manner not to be misunderstood"). The TVPA lacks any such clear statement abrogating immunity.

Indeed, the Court of Appeals for the D.C. Circuit rejected on this basis the proposition that the TVPA supersedes common law head-of-state immunity. See *Manoharan v. Rajapaksa*, 711 F.3d 178, 180 (D.C. Cir. 2013) (per curiam). The D.C. Circuit relied on "'[t]he canon of construction that statutes should be interpreted consistently with the common law[, which] helps us interpret a statute that,' as here, 'clearly covers a field formerly governed by the common law.'" Id. at 179 (quoting Samantar, 560 U.S. at 320). Finding no "language [in] the TVPA . . . [that] supersedes the common law," the D.C. Circuit "conclude[d] that the common law of head of state immunity survived enactment of the TVPA." *Id*. at 180. The same is true of the common law of foreign official immunity more generally.

The legislative history of the TVPA further confirms that the TVPA does not abrogate common law foreign official immunity. The Senate Judiciary Committee Report ("Senate Report") specifically states that the "TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign governments immune from suits in U.S. courts, except in certain instances." S. Rep. No. 102-249, at *7 (1991) (footnote omitted). Additionally, the Senate Report emphasizes that the TVPA was not intended to override diplomatic and head-of-state immunities. *Id*. at *7–*8; see also H.R. Rep. No. 102-367, at *5 (1991) ("[N]othing in the TVPA overrides the doctrines of diplomatic and head of state immunity."). With respect to conduct-based immunity, the legislative history indicates that Congress believed that foreign states rarely would request immunity on behalf of an official in cases where torture or extrajudicial killing occurred—since states would rarely "admit some knowledge or authorization of relevant acts." Senate Report at *8 (internal quotation marks omitted). But the converse implication is that where, as here, the foreign state has asserted that the acts alleged were taken in an official capacity, the Senate Judiciary Committee understood that the TVPA would not override foreign official immunity.

Contrary to Plaintiffs' assertion, reading the TVPA in harmony with the immunities of foreign officials does not render the TVPA a "[v]irtual [n]ullity." Opp'n at 12. For example, foreign officials may be liable under the TVPA, even for official acts, where the parent state waives their immunity. See *In re Estate of Ferdinand Marcos*, 25 F.3d at 1472 (noting the "Philippine government's agreement that the suit against Marcos proceed"). And a foreign official will be subject to liability under the TVPA in any case where the Executive Branch informs the court that it has decided not to recognize the foreign official's claim of immunity from suit, as was the case in *Samantar*. Here, however, the Executive Branch has determined that Barak is immune from suit under the TVPA.

* * * *

C. POLITICAL QUESTION DOCTRINE, COMITY, AND *FORUM NON CONVENIENS*

1. Political Question: Lawsuits Seeking Evacuation From Yemen

As discussed in *Digest 2015* at 149, groups of U.S. citizens sued the Departments of State and Defense in Michigan and Washington, D.C. in 2015 seeking a formal U.S. government evacuation of private U.S. citizens from Yemen. One such case was dismissed in 2015. *Sadi v. Obama*, No. 15-11314 (E.D. Mich. 2015). The second case, *Mobaraz v. Obama*, was dismissed in 2016 on a similar basis, that resolving the complaint would involve a nonjusticiable political question. Excerpts follow (with footnotes omitted) from the May 17, 2016 memorandum opinion of the U.S. District Court for the District of Columbia.

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* * * *

Plaintiffs have asked this Court, in no uncertain terms, to issue an order that compels the Executive Branch to conduct an evacuation of American citizens in Yemen. Not surprisingly, Defendants insist that any such order would impermissibly encroach upon the discretion that the Constitution affords to the political branches to conduct foreign affairs; therefore, prior to considering Defendants' contention that Plaintiffs' complaint fails to state a claim under the APA, this Court must first determine whether or not it has the authority to traverse the thicket of thorny foreign-policy issues that encompasses Plaintiffs' allegations. Precedent in this area makes it crystal clear that federal courts cannot answer "political questions" that are presented to them in the guise of legal issues, *see infra* Part III.A., but identifying *which* claims qualify as nonjusticiable political questions—and which do not—can sometimes be a substantially less lucid endeavor. Not so here: as explained below, after considering the parties' arguments and the applicable law regarding the boundaries of the political-question doctrine, this Court is confident that Plaintiffs' claims fit well within the scope of the nonjusticiability principles that the Supreme Court and D.C. Circuit have long articulated. Accordingly, in its Order of March 31, 2016, the Court granted Defendants' motion and dismissed Plaintiffs' case.

A. The Political-Question Doctrine

The political-question doctrine is, in essence, "a function of the separation of powers," insofar as it recognizes that "some [q]uestions, in their nature political, are beyond the power of the courts to resolve[.]" *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (en banc) (first alteration in original) (internal quotation marks and citations omitted). The Supreme Court has said that the doctrine aims "to restrain the Judiciary from inappropriate interference in the business of the other branches of Government[.]" *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). As such, it "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[.]" *El-Shifa*, 607 F.3d at 840 (internal quotation marks and citations omitted).

That said, it is important to note that the political-question doctrine is "a narrow exception" to the rule that "the Judiciary has a responsibility to decide cases properly before it," *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (citations omitted); moreover, the doctrine is also "notorious for its imprecision," *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008). This means that courts have often struggled to ascertain whether, and under what circumstances, claims in a plaintiff's complaint raise nonjusticiable political issues.

Fortunately, some guideposts do exist. The D.C. Circuit has announced that a court identifies a nonjusticiable political question by "[c]onducting [a] discriminating analysis of the particular question posed by the claims the plaintiffs press[.]" *El Shifa*, 607 F.3d at 844 (internal quotation marks and citation omitted); *see also id*. at 842 ("[T]he presence of a political question in these cases turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action." (citation omitted)). This probing analysis of a plaintiff's claims historically has centered on ascertaining whether any one of the several factors that the Supreme Court first laid out in *Baker v. Carr*, 369 U.S. 186 (1962), are present. *See El Shifa*, 607 F.3d at 841. Under settled Supreme Court precedent,

> a claim presents a political question if it involves: [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 the 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.

Id. (internal quotation marks omitted) (quoting *Baker*, 369 U.S. at 217); *see also Simon v. Republic of Hungary*, 812 F.3d 127, 149–50 (D.C. Cir. 2016). Notably, these factors are disjunctive, and when any one of them is "[p]rominent on the surface" of a case, the case involves a nonjusticiable political question and the court cannot proceed. *Baker*, 369 U.S. at 217.

Given these touchstones, it is easy to see why "[d]isputes involving foreign relations" often raise nonjusticiable political questions. *El-Shifa*, 607 F.3d at 841 (noting that claims regarding foreign-policy matters "raise issues that frequently turn on standards that defy judicial application or involve the exercise of a discretion demonstrably committed to the executive or legislature" (internal quotation marks and citation omitted)). Indeed, the President has "'plenary and exclusive power' in the international arena" and acts "'as the sole organ of the federal government in the field of international relations[,]'" *Schneider v. Kissinger*, 412 F.3d 190, 195 (D.C. Cir. 2005) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)); consequently, courts have found that controversies that are "intimately related to foreign policy" are "rarely proper subjects for judicial intervention," *El-Shifa*, 607 F.3d at 841 (internal quotation marks and citation omitted).

But there is no per se 'foreign policy' rule—*i.e.*, a claim is not nonjusticiable simply and solely because it "implicates foreign relations." *Id.* (citation omitted). And drawing the line between nonjusticiable and justiciable claims, at least in foreign-relations cases, involves identifying those claims that require the court to opine on the "wisdom of discretionary decisions made by the political branches in the realm of foreign policy[,]" as distinguished from claims that "[p]resent[] purely legal issues such as whether the government had legal authority to act." *Id.* at 842 (second alteration in original) (internal quotation marks and citation omitted). That is, if "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination" and, instead, are merely tasked with the "familiar judicial exercise" of determining how a statute should be interpreted or whether it is constitutional, the claim does not involve answering a political question and is justiciable. *Zivotofsky*, 132 S. Ct. at 1427; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986) (explaining that not "every case or controversy which touches foreign relations lies beyond judicial cognizance[,]" and emphasizing that courts "have the authority to construe treaties[,] . . . executive agreements, and . . . congressional legislation" and to address other "purely legal question[s] of statutory interpretation" in the foreign-policy realm (internal quotation marks and citation omitted)). However, if the court is being called upon to serve as "a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security[,]" then the political-question doctrine is implicated, and the court cannot proceed. *El-Shifa*, 607 F.3d at 842.

In this regard, then, *El-Shifa*'s dichotomy between claims presenting purely legal questions, on the one hand, and claims requiring the reconsideration of discretionary foreign-policy decisions, on the other, helpfully directs a court's attention to its own role in determining the issue presented when deciding a case with foreign-policy implications. When deciding the claim merely requires the court to engage in garden-variety statutory analysis and constitutional reasoning, it has authority to do so (*i.e.*, the claim is justiciable), but a claim that goes beyond those classically judicial functions to request that a court override discretionary foreign-policy

decisions that the political branches have made—however framed—falls within the heartland of the political- question doctrine. *See Ali Jaber v. United States*, No. 15-0840, 2016 WL 706183, at *4 (D.D.C. Feb. 22, 2016) ("If plaintiffs' claims, '*regardless of how they are styled*, call into question the prudence of the political branches in matters of foreign policy or national security,' then they must be dismissed." (emphasis in original) (quoting *El-Shifa*, 607 F.3d at 841)). In other words, the political-question doctrine demands that a court assiduously avoid "assess[ing] the merits of the President's [discretionary] decision[s]" regarding foreign-policy matters, *El Shifa*, 607 F.3d at 844, by "declin[ing] to adjudicate claims seeking only a 'determination[] whether the alleged conduct *should* have occurred[,]'" *id.* at 842 (second alteration in original) (emphasis in original) (quoting *Harbury*, 522 F.3d at 420).

B. Plaintiffs' Claims Require This Court To Determine Whether The Executive Branch Should Have Decided To Conduct Complex Overseas Operations, Which Is A Quintessential Political Question

Plaintiffs' APA claims—as elucidated in the complaint—rest fundamentally on the contention that the failure of State and DOD to provide "a swift, accommodating, and reasonable evacuation from Yemen" (Compl. ¶ 82) constitutes agency action that is "arbitrary[,] capricious[,] an abuse of discretion[, or otherwise] not in accordance with law[,]" in violation of the APA. (*Id.* ¶ 81 (citing 5 U.S.C. § 706); *see also id*. ¶¶ 82-92.) It is clear to this Court that this claim fits squarely within the recognized standards for identifying nonjusticiable political questions described above, for several reasons.

First of all, Plaintiffs' APA claim involves "a textually demonstrable constitutional commitment of the issue to a coordinate political department[,]" *El-Shifa*, 607 F.3d at 841 (internal quotation marks and citation omitted)—which is the first *Baker* factor, and a hallmark of political questions. It cannot be seriously disputed that "decision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider*, 412 F.3d at 194; *see also id.* at 194–95 (collecting the various explicit "[d]irect allocation[s]" in the Constitution of those responsibilities to the legislative and executive branches). And, indeed, Plaintiffs seek to have this Court question the Executive Branch's discretionary decision to refrain from using military force to implement an evacuation under the circumstances described in the complaint, despite the fact that, per the Constitution, it is the President who, as head of the Executive Branch and "Commander in Chief[,]" U.S. Const. Art. II, § 2, decides whether and when to deploy military forces, not this Court. *See El-Shifa*, 607 F.3d at 842 (explaining that a claim "requiring [the court] to decide whether taking military action was wise" is a nonjusticiable "policy choice[] and value determination[]" (second and third alterations in original) (internal quotation marks and citation omitted)).

Plaintiffs' suggestion that the court-ordered remedy they seek could very well stop short of a direct mandate for military intervention … makes no difference, as far as the political-question doctrine is concerned. Regardless, the clear basis for the complaint's assertion that Plaintiffs are entitled to any relief at all is the contention that the Executive Branch has abused its discretion— in APA terms—in refusing to evacuate U.S. citizens from Yemen thus far (*see, e.g.*, Compl. ¶ 81), and the Court's evaluation of *that* contention would necessarily involve second-guessing the "wisdom" of these agencies' discretionary determinations. *El-Shifa*, 607 F.3d at 842; *see also Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that, per the reasoned-decisionmaking requirement embedded in the APA's "arbitrary and capricious" standard, the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and

the choice made[,]" and the court must "review[] that explanation" and "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment" (internal quotation marks and citations omitted)). This means that it is effectively impossible to decide what Plaintiffs' complaint asks this Court to decide—whether or not State and DOD acted arbitrarily and capriciously in violation of the APA in evaluating the facts and deciding not to extract private American citizens from Yemen—without invading "a textually demonstrable constitutional commitment" to another branch (the first *Baker* factor). *El-Shifa*, 607 F.3d at 841 (internal quotation marks and citation omitted). Nor could this Court respond to the complaint's clarion call without making its own determination about the facts alleged in the complaint regarding the dangerous conditions in Yemen, and specifically, whether these facts, if true, warrant evacuation of the American citizens in that country—*i.e.*, "an initial policy determination of a kind [that is] clearly for nonjudicial discretion" (the third *Baker* factor). *Id.* (internal quotation marks and citation omitted).

…[T]he complaint's allegations make plain that Plaintiffs are seeking judicial review and intervention with respect to Defendants' decision not to evacuate American citizens from Yemen, and in so requesting, Plaintiffs are effectively asking this Court to decide whether the Executive Branch *should* have exercised its discretion to undertake a complex military operation in order to effect an evacuation in a foreign, war-torn country. Evaluating Plaintiffs' claims would involve "call[ing] into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion[,]" *El-Shifa*, 607 F.3d at 842, and also could not be accomplished without this Court making and imposing policy judgments of its own about the wisdom and/or reasonableness of the agencies' determination that the requested evacuation should not proceed. Therefore, on its face, Plaintiffs' complaint plainly raises a nonjusticiable political question.

C. Plaintiffs' Argument That Their Claims Are Justiciable Because State And DOD Have A Non-Discretionary Duty To Evacuate Endangered American Citizens Is Unavailing

The foregoing analysis of the facial nonjusticiability of the complaint's arbitrary-and-capricious claims under the political-question doctrine would ordinarily be the end of this matter. But Plaintiffs make a substantially different core contention about their APA claims in opposition to Defendants' motion to dismiss, and in order to explain the Court's application of the political-question doctrine fully, Plaintiffs' alternative characterization needs to be addressed. …Plaintiffs insist that the agency conduct they seek is not a *discretionary* determination at all, but a mandatory, non-discretionary duty of the Executive Branch that is enshrined in a statute, an executive order, and an internal inter-departmental memorandum. Plaintiffs say these three sources require State and DOD to conduct evacuations when American lives are "endangered" overseas (Pls.' Opp'n at 7), and therefore, "Defendants' inaction regarding Plaintiffs stranded in Yemen [is] actionable" under the APA. (*Id.* at 4).

The statute that Plaintiffs point to as a basis for their contention that State and DOD have no choice but to evacuate them (*see* Pl. Opp'n at 5) is subtitled "[o]verseas evacuations" and states:

> The Secretary of State shall develop and implement 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. Such policies shall include measures to identify high risk areas where evacuation may be necessary and, where appropriate, providing staff to United States Government missions abroad to assist in those evacuations.

22 U.S.C. § 4802(b). Plaintiffs also rely on an executive order (*see* Pls.' Opp'n at 5) that directs the Secretary of State 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 . . . , including, but not limited to . . . . [p]rotection or evacuation of United States citizens and nationals abroad[,]" Exec. Order No. 12656, 53 Fed. Reg. 47491, 47503–04 (Nov. 18, 1988), and directs further that the Secretary of Defense shall "[a]dvise 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.* at 47498. Additionally, Plaintiffs seize upon an internal memorandum of agreement between State and DOD (*see* Pls.' Opp'n at 6), which states in relevant part that

> it is the policy of the United States Government . . . to: 1. Protect U.S. citizens and nationals and designated other persons, to include, when necessary and feasible, their evacuation to and welfare in relatively safe areas[;] 2. Reduce to a minimum the number of U.S. citizens and nationals and designated other persons subject to the risk of death and/or seizure as hostages[; and] 3. Reduce to a minimum the number of U.S. citizens and nationals and designated other persons in probable or actual combat areas so that combat effectiveness of U.S. and allied forces is not impaired.

(Mem. of Agreement, Ex. 3 to Defs.' Mot., ECF No. 8-4, at 2.) Significantly for pres purposes, Plaintiffs' belated insistence that the Executive Branch has a non-discretionary duty to evacuate American citizens from Yemen by virtue of these legal provisions is an obvious attempt to establish that their APA claim presents a "purely legal issue[]" that a federal court is competent to decide, *El Shifa*, 607 F.3d at 842 (internal quotation marks and citation omitted), because showing the existence of such a duty under law would make it plain that evacuation is "a *discrete* agency action that [Defendants are] *required to take*[,]" *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (emphasis in original) (internal quotation marks and citation omitted) (examining 5 U.S.C. § 706(1)). After all, no less an authority than the Supreme Court has explained that Congress can create judicially administrable standards that purport to direct the Executive's actions in the foreign-policy realm; and, indeed, when Congress does so, the classic judicial role of deciding what those standards mean and whether they are constitutionally permissible—an exercise that is not susceptible to the political-question bar—is brought to the fore. *See Zivotofsky*, 132 S. Ct. at 1427 (explaining that "[t]he existence of a statutory right . . . is certainly relevant to the Judiciary's power to decide" a claim requesting judicial enforcement of that right, even when the statute relates to matters of foreign policy).

* * * *

In the instant case, Plaintiffs argue that the statute, executive order, and memorandum of agreement they rely on collectively establish a non-discretionary duty on the part of the Executive to evacuate American citizens abroad when they "are at immediate risk of death or seizure as hostages in a combat zone" (Pls.' Opp'n at 8 (citation omitted)), and, similar to the arguments about the significance of the statutory right in *Zivotofsky*, Plaintiffs here maintain that these evacuation-related provisions render their APA claims judicially enforceable. (*See id.* at 7 ("Once an evacuation is necessary or appropriate, . . . the Secretary of State does not have discretion to not implement [an] evacuation[.]"); *see also id.* ("[The provisions] contain clear and unambiguous language that the Secretary of State '*shall*' provide for the safe and efficient evacuation of U.S. Citizens when their lives are endangered[.]" (emphasis in original).) This line

of argument fails for several reasons—only one of which warrants substantial discussion here. That is, even assuming *arguendo* that the provisions to which Plaintiffs point mandate the implementation of evacuation procedures under the circumstances prescribed, it is clear to this Court that none of these provisions solves Plaintiffs' political-question problem, because none sets forth the kind of stark, obligatory action—*entirely* devoid of discretion—that was the subject of the *Zivotofsky* case, and Plaintiffs' breach-of-duty claim goes beyond requesting this Court's resolution of a debate about the meaning or constitutionality of the provisions at issue; rather, Plaintiffs seek judicial review of the agencies' conclusion that the prerequisites for evacuation that are allegedly prescribed by law have not been met.

To be specific, a careful examination of the provisions that Plaintiffs say create a non-discretionary duty to evacuate U.S. citizens reveals that these provisions are replete with *conditional* language, such as: evacuation "when necessary and feasible" (Mem. of Agreement at 2); "safe and efficient evacuation" when "lives are endangered[,]" 22 U.S.C. § 4802(b); and "evacuation . . . in threatened areas[,]" 53 Fed. Reg. at 47498. Thus, the duty Plaintiffs identify is clearly contingent upon the relevant agencies first exercising their discretion to make a determination regarding whether these prerequisites are satisfied, which means that the alleged duty is plainly *not* non-discretionary. Furthermore, if Plaintiffs' claims involved mere issues of interpretation and/or constitutionality with respect to these conditional provisions, then one might reasonably conclude that only mine-run, garden-variety, justiciable questions of law are being presented. But the question that Plaintiffs' APA claim poses is not just what these provisions *mean*; it is also whether, if they mean what Plaintiffs say they mean, the Executive has violated the mandate that these provisions establish, and it is *that* aspect of the court's inquiry that would necessarily require the court to answer a non-justiciable political question.

To understand why this is so, consider the statute's purported pronouncement that the U.S. government should arrange for the evacuation of American citizens from "high risk areas where evacuation may be necessary" and should provide "safe and efficient evacuation" of U.S. citizens overseas "when their lives are endangered." 22 U.S.C. § 4802(b). This requirement is substantially similar to the Executive Order's statement that evacuations may be executed when Americans are in "threatened areas overseas[,]" 53 Fed. Reg. at 47498, and also the Memorandum of Agreement's assertion that it is the policy of the United States to evacuate American citizens from foreign lands for their protection "when necessary and feasible" (Mem. of Agreement at 2). Determining whether or not State or DOD has breached its alleged evacuation duties—as Plaintiffs' claims would require this Court to do—would necessarily involve sifting facts to determine (a) whether an overseas situation actually endangers American lives, (b) whether the complex military operations that might be required to accomplish an evacuation are necessary or appropriate, and (c) whether an evacuation can be executed safely and efficiently under the circumstances presented. Each of these decisions (and likely others not known to this Court) is a determination that is squarely within the political branches' bailiwick, because each would require the application of judgment and expertise to the facts on the ground as the Executive Branch understands them. *See Schneider*, 412 F.3d at 194 ("[D]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government."). Put another way, even if this Court accepts Plaintiffs' argument that these alleged sources of law create a duty to evacuate when evacuation is "necessary" and "appropriate" (*see* Pls.' Opp'n at 7), to address Plaintiffs claim, this Court would have to venture far beyond the familiar judicial task of interpreting the law and, instead, would have to make its own assessment of the applicability of the "necessary" and "appropriate" conditions to the

Yemeni situation, despite what State and DOD have already decided in this regard. It is clear beyond cavil that this kind of second-guessing of the policy decisions of the political branches is precisely what the political-question doctrine forbids. *See El-Shifa*, 607 F.3d at 844 ("[C]ourts cannot reconsider the wisdom of discretionary foreign policy decisions." (citation omitted)); *see also Ali Jaber*, 2016 WL 3030183, at *4 (holding that a claim that asked the court to declare that a "drone strike violated domestic and international law" was nonjusticiable because, to decide it, the court would have to determine the "imminence" of the threat addressed with the drone strike, "the feasibility of capture," and the "proportionality" of the strike (internal quotation marks and citations omitted)).

It is also quite clear—for many of the same reasons—that there are no judicially discoverable or manageable standards for this Court to apply when considering the extent to which the agencies have breached the duty of evacuation that the statute, executive order, and memorandum purportedly establish. *See El-Shifa*, 607 F.3d at 841 (stating *Baker* factor two); *see also Nixon v. United States*, 506 U.S. 224, 228–29 (1993) (noting the partial conceptual overlap of *Baker* factors one and two). That is, in order to determine whether State and DOD have violated the non-discretionary duty that Plaintiffs say exists pursuant to these provisions, the Court would need a means of measuring the existence of the factual predicates that trigger the duty; yet, Plaintiffs offer no standards for making that call, and this Court has found none. For example, what makes an evacuation "necessary," as opposed to merely preferable or appropriate, such that Defendants can be deemed to have violated the law in failing to evacuate Americans in Yemen "when necessary"? And what standard would the Court apply to assess the feasibility of an evacuation operation for the purpose of determining whether State and DOD have breached their duty to evacuate Americans in Yemen "if feasible"? Plaintiffs suggest that the terms "shall" and "will" in the statute, executive order, and memorandum provide sufficient guidance (*see* Pls.' Opp'n at 14), but that is not so, because those terms do not establish *how* a court is to determine whether requirements such as "necessary" and "feasible" have been satisfied. "[C]ourts are fundamentally underequipped to . . . develop standards for matters not legal in nature[,]" *El-Shifa*, 607 F.3d at 844 (internal quotation marks and citation omitted), and, indeed, this Court is not alone in its belief that the voyage upon which Plaintiffs have asked it to embark is essentially rudderless: as Defendants point out, another district court has reached this same conclusion in an indistinguishable case regarding these same provisions. *See Sadi v. Obama*, No. 15-11314, 2015 WL 3605106, at *5–*7 (E.D. Mich. June 8, 2015).

In the final analysis, then, this Court concludes that Plaintiffs' claims would necessarily require the Court to "supplant a foreign policy decision of the political branches with [this Court's] own unmoored determination" of whether the situation calls for evacuation in a manner that renders Plaintiffs' claims nonjusticiable under the political question doctrine. *Zivotofsky*, 132 S. Ct. at 1427. This conclusion is strikingly obvious, all things considered, and if any doubts remain, the D.C. Circuit's consistent construction of 8 U.S.C. § 1189(a) should remove them. That statute authorizes the Secretary of State to designate an organization as a "foreign terrorist organization" if (1) the organization is foreign, (2) the organization engages in terrorist activity or terrorism (as statutorily defined) and (3) "the terrorist activity of the organization threatens national security or U.S. nationals." *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 313 (D.C. Cir. 2014); *see also El-Shifa*, 607 F.3d at 843 (same example). The D.C. Circuit has held that the first two prongs of this statute are justiciable, but not the third, because whether or not an organization actually threatens the security of American nationals or the country as a whole rests on a "political judgment[]" for which the "Judiciary has neither aptitude, facilities

nor responsibility[.]" *People's Mojahedin Org. v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (internal quotation marks and citation omitted); *see also Ralls Corp.*, 758 F.3d at 313 (noting that this example amply "illustrate[s] . . . the distinction between a justiciable legal challenge and a non-justiciable political question").

So it is here. Even if the statute, executive order, and memorandum require "safe and efficient" evacuation when "necessary or appropriate" or when American lives are "endangered" (Pls.' Opp'n at 7), the existence of any or all of these factual predicates is a foreign-policy judgment that is constitutionally committed to the political branches, not the judiciary. And with respect to the facts on the ground in Yemen, State and DOD apparently have determined that the evacuation of American citizens is not, in fact, necessary, feasible, or safe. Under the political-question doctrine, this Court lacks the power, and the tools, to say otherwise.

* * * *

2. Political Question: *Center for Biological Diversity et al. v. Hagel*

As discussed in *Digest 2015* at 158-63, 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 (the Futenma Replacement Facility or "FRF"). *Center for Biological Diversity ("CBD"), et al. v. Hagel, et al.*, 80 F. Supp. 3d 991 (N.D. Cal. 2015). 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. The U.S. government considered effects on the dugong in accordance with a previous decision by the district court relying on the National Historic Preservation Act ("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 Section 402 of the NHPA in 2014 and took steps to begin construction of the base, prompting plaintiffs to move to reopen the case, claiming violations of the Administrative Procedure Act ("APA"). Excerpts follow (with footnotes omitted) from the U.S. brief, filed February 19, 2016, on appeal to the U.S. Court of Appeals for the Ninth Circuit. The brief is available in full at https://www.state.gov/s/l/c8183.htm.

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* * * *

I. CBD's claims … are barred by the political question doctrine.

The political question doctrine originated in Chief Justice Marshall's observation that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. 137, 170 (1803). The doctrine is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962); *see also Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005). And it is jurisdictional: "if a case presents a political question, [courts] lack subject matter jurisdiction to decide that question." *Corrie*, 503 F.3d at 980-82.

Political questions are not justiciable even where a statute, such as the APA, would otherwise provide for judicial review. "[A] statute providing for judicial review does not override Article III's requirement that federal courts refrain from deciding political questions." *El-Shifa Pharm. Indus. Co. v. United States,* 607 F.3d 836, 843 (D.C. Cir. 2010) (en banc). *See also Sierra Club v. Morton,* 405 U.S. 727, 732 n. 3 (1972) ("Congress may not confer jurisdiction on Art. III federal courts . . . to resolve 'political questions,' because suits of this character are inconsistent with the judicial function under Art. III") (internal citations omitted); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) (no presumption of reviewability applies "[w]hen it comes to matters touching on national security or foreign affairs").

…As this Court has noted, the *Baker* tests "are more discrete in theory than in practice, with the analyses often collapsing into one another." *Alperin v. Vatican Bank,* 410 F.3d 532, 544 (9th Cir. 2005). The first two tests—a textual commitment to another branch of government and a lack of judicially manageable standards—are "the most important," *Harbury v. Hayden,* 522 F.3d 413, 418 (D.C. Cir. 2008), but in order for a case to be nonjusticiable, the court "need only conclude that one factor is present, not all." *Schneider*, 412 F.3d at 194.

To be sure, not every case or controversy that touches on political matters lies beyond judicial cognizance. *Baker,* 369 U.S. at 211. The political question doctrine applies to "'political questions,' not . . . 'political cases,'" *id*. at 217, and must be applied narrowly based on careful case-by-case analysis of the claims at issue. *Zivotofsky ex rel. Zivotofsky v. Clinton,* 132 S. Ct. 1421, 1427 (2012) ("*Zivotofsky I"*); *Corrie*, 503 F.3d at 982.

Here, CBD's Supplemental Complaint seeks declaratory and injunctive relief, including an order setting aside the Secretary's Findings and "[a]n order that DoD not undertake any activities in furtherance of the FRF project…. As we demonstrate below, application of the *Baker* tests demonstrates that these claims for relief are non-justiciable.

A. The relief CBD seeks raises political questions under the first *Baker* test—a constitutional commitment of the issue to the political branches.

No areas of federal activity are more firmly committed to the political branches than foreign policy and national defense. *Schneider,* 412 F.3d at 194-95 (discussing U.S. Const. art. I, § 8 and art. II, §§ 2, 3). Indeed, the political question doctrine is universally recognized to apply with unique force where matters of foreign policy and national security are at play. *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 386 (2000) ("the nuances of the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court") (citations omitted); *Haig v. Agee,* 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp*., 333 U.S. 103, 111 (1948) ("*Waterman*") ("the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative"); *Oetjen v. Cent. Leather Co.,* 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative [branches] . . . and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision"); *see also Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1144 (9th Cir. 1999).

The relief sought by CBD runs afoul of the first *Baker* test. This is particularly apparent with respect to CBD's request for an injunction prohibiting the Secretary from undertaking "any activities in furtherance of the FRF project" until the Secretary complies with Section 402 in the

manner CBD contends is required. ER 59. This injunction would effectively require the United States to violate its bilateral commitments with the Government of Japan regarding the FRF—commitments negotiated at the highest levels of the two governments under the Security Treaty and the Status of Forces Agreement. Not only would the injunction block the Secretary's implementation of the FRF project, it would also *require the Secretary to bar the Government of Japan and its contractors from accessing sovereign Japanese territory*. Thus, as the district court found (ER 7, 32-36), the injunction CBD seeks would directly implicate foreign policy and national defense issues that are constitutionally committed to the political branches of government.

CBD's argument to the contrary (Br. 41-54) is not persuasive. CBD acknowledges that "political [and] national security decisions . . . are properly the domain of the executive or legislative branches," but contends that its claim "does not require the court to second-guess or supplant such decisions." Br. 41. CBD maintains that it does not seek review of "DoD's ultimate policy decisions concerning the location, design, construction, or operation of a military base," but only seeks review of the Secretary's "consultation, information-gathering, and evaluation process pursuant to the National Historic Preservation Act's 'take into account' requirement[.]" Br. 43-44; *see also* Br. 52 ("Plaintiffs' claims and the relief they request do not ask the court to opine on the decision to build the FRF."). But these characterizations of the case are not credible. CBD's challenge to the Secretary's NHPA procedures and Findings may not be a direct challenge to the Secretary's "ultimate policy decisions" concerning the FRF, but the *relief* CBD seeks strikes at the heart of those policy decisions. An injunction blocking the Secretary's implementation of the FRF project and requiring the Secretary to bar the Government of Japan and its contractors from accessing sovereign Japanese territory would be a gross intrusion into issues of foreign relations and national defense—issues committed to the political branches. *See Corrie*, 503 F.3d at 984 ("Plaintiffs may purport to look no further than Caterpillar itself, but resolving their suit will necessarily require us to look beyond the lone defendant in this case and toward the foreign policy interests and judgment of the United States government itself.").

* * * *

Likewise, the first *Baker* test also bars CBD's claims for declaratory relief. The declaratory relief that CBD seeks—a declaration that the Secretary's take-into-account process was unlawful and an order setting aside the Secretary's Section 402 Findings—would, at a minimum, call into question the United States' ability to fulfill its commitments to the Government of Japan regarding the FRF. The issues raised by CBD's requested declaratory relief are thus inextricably intertwined with the implementation of the Security Treaty, the Status of Forces Agreement, the 2006 Roadmap, and other bilateral commitments—matters of foreign policy and national security that are the province of the political branches, not the courts. Thus, like the injunctive relief, the declaratory relief that CBD seeks is non-justiciable.

* * * *

CBD's reliance (Br. 48-49) on *Zivotofsky I* is misplaced as well. *Zivotofsky I* involved a statute providing that Americans born in Jerusalem may elect to have "Israel" listed as their place of birth on their passports. The State Department declined to follow the law, citing its longstanding policy of not taking a position on the political status of Jerusalem. When sued by the parents of a child born in Jerusalem who invoked the statute, the Secretary of State argued

that the courts lacked authority to decide the case because it presented a political question. The Court of Appeals agreed, but the Supreme Court reversed. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009), *vacated by Zivotofsky I*, 132 S. Ct. 1421. The Court held that the question presented was not whether Jerusalem should be recognized as part of Israel (as the lower courts had reasoned), but whether the statute was constitutional—which, of course, is a decision for the courts. *Zivotofsky I* at 1428.

Discussing *Zivotofsky I*, CBD asserts that "[d]espite the Secretary's assertions of the foreign policy and national security effects of an order requiring the agency to implement the statute, the Court *did not find that the interpretation and application of the statute was barred by the political question doctrine.*" Br. 49 (emphasis added). This is true but beside the point. There was no dispute in *Zivotofsky I* regarding the interpretation of the statute. 132 S. Ct. at 1427 ("Moreover, because the parties do not dispute the interpretation of § 214(d), the only real question for the courts is whether the statute is constitutional.") Moreover, in a subsequent decision, the Supreme Court held the statute unconstitutional because it infringed on the President's exclusive power to recognize foreign sovereigns. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). Ultimately, *Zivotofsky I's* holding—that determining whether the passport statute was constitutional was a question for the courts—has no bearing on the question presented in this case: whether the injunctive and declaratory relief that CBD seeks against the Secretary's implementation of the FRF project raises a political question.

B. CBD's claims for relief are political questions under the second *Baker* test—lack of manageable standards.

CBD's requested relief also implicates the second *Baker* test: a lack of judicially discoverable and manageable standards. To obtain an injunction, CBD would have to prevail on the merits and show that (1) it suffered an irreparable injury; (2) its remedies at law are inadequate; (3) the balance of hardships tips in its favor; and (4) the public interest would not be disserved by the injunction. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011). Yet as the district court explained (ER 32), "there are no judicially administrable standards" by which a court could decide whether CBD satisfied the third and fourth elements of the injunction test. To evaluate the balance of hardships and the public interest, the court would have to weigh the harms asserted by CBD against the United States' foreign policy and national security interests. As the D.C. Circuit has explained, there are "no standards by which [a court] can measure and balance" such foreign policy considerations. *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006). *See also Schneider*, 412 F.3d at 196; *See also El-Shifa Pharma. Indus.*, 607 F.3d at 845 ("We could not decide this question [whether U.S. attack on Sudanese pharmaceutical plant was mistaken] without first fashioning out of whole cloth some standard for when military action is justified. The judiciary lacks the capacity for such a task.").

In response to the district court's well-founded concern about the lack of judicially administrable standards, CBD blithely asserts (Br. 51-52) that "the district court is fully capable" of weighing the balance of harms and the public interest, and that the court can do so *after* it decides the merits of CBD's NHPA claim. But that approach is backwards. The political question doctrine is jurisdictional, *Corrie*, 503 F.3d at 982, and "'[w]ithout jurisdiction the court cannot proceed at all in any cause.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). And while CBD notes (Br. 51) the "inherent flexibility of the courts' equitable jurisdiction," CBD does not even attempt to proffer a substantive standard that the district could use to decide whether the balance of harms

and the public interest require that the Secretary be enjoined from carrying out "any activities in furtherance of" the bilateral FRF project.

This lack of manageable standards also extends to CBD's claims for declaratory relief. As noted, CBD seeks (1) a declaration that the Secretary's take-into-account process was unlawful, (2) an order setting aside the Findings that were the product of that process, and (3) a remand to the agency for further proceedings. Ordinarily, interpreting legislation and reviewing agency action are "familiar judicial exercise[s]." ER 22 (district court decision, quoting *Zivotofsky I*, 132 S. Ct. at 1427). But here, NHPA § 402 provides no substantive standard by which to review either the procedures the Secretary used to consider the impacts of the FRF or the substance of his conclusion. Section 402 merely provides that the head of an agency "shall take into account the effect" of its overseas undertakings on certain types of historic property "for purposes of avoiding or mitigating any adverse effects." 54 U.S.C. § 307101(e) (formerly 16 U.S.C. § 470a-2). Neither Section 402 nor any other provision of the NHPA defines the requirements of that take-into-account process for foreign undertakings. Indeed, unlike Section 106, Section 402 does not even require the federal agency to afford the Advisory Council on Historic Preservation an opportunity to comment on the undertaking. *Compare* 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f) *with* 54 U.S.C. § 307101(e) (formerly 16 U.S.C. § 470a-2).

Moreover—and contrary to the reasoning of the district court's superseded 2008 decision—the regulations implementing the take-into-account process for *domestic* undertakings under NHPA § 106 are inapposite to foreign undertakings under Section 402. For example, the Section 106 regulations contemplate a consultation process that includes (in addition to the Advisory Council) the relevant (1) State Historic Preservation Officer, (2) Indian tribes and Native Hawaiian organizations, (3) representatives of local governments, and (4) "the public." 36 C.F.R. § 800.2. The first two are, by definition, domestic organizations, *see* 36 C.F.R. §§ 800.16(m), (s), (s), (w), and thus generally have no role to play in foreign undertakings. They are certainly irrelevant in this case. And the requirements to consult with representatives of local governments and "the public" are highly problematic in the context of foreign undertakings. Action of the United States in a foreign jurisdiction is subject to diplomatic constraints and the requirements of foreign law. Traditionally, the Executive Branch determines the activities of Executive Branch officials overseas, in consultation with foreign governments as appropriate.

As the district court observed, the second *Baker* test asks whether the court "has the legal tools to reach a ruling that is principled, rational and based upon reasoned distinctions." ER 23 (quoting *Alperin*, 410 F.3d at 552). And though the district court concluded otherwise with respect to CBD's claims for declaratory relief (ER 23-24), those legal tools are lacking here, because there are no applicable statutory or regulatory standards by which a court can review the Secretary's implementation of Section 402 in this case. Moreover, the process the Secretary used to take into account the effects of the FRF on the dugong is inextricably linked to the implementation of the bilateral arrangements with the Government of Japan to carry out the FRF project. CBD's request for declaratory relief would require the court to supplant the Secretary's national security and foreign policy judgments with "the court's own unmoored determination" of how the Secretary should conduct a take-into-account process where the relevant undertaking is a bilateral project on foreign territory and involves sensitive matters of national defense and foreign policy. *See Zivotofsky I*, 132 S. Ct. at 1427; *cf. Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence" than "[t]he complex, subtle, and professional decisions as to the composition,

training, equipping, and control of a military force"). Accordingly, CBD's claims for declaratory relief are non-justiciable political questions under the second *Baker* test. *See Schneider,* 412 F.3d at 197.

C. The relief sought by CBD is barred under the fourth, fifth, and sixth *Baker* tests.

CBD's claims for relief implicate the final three *Baker* tests as well. Those tests address "[4] the impossibility of a court's undertaking independent resolution without expressing lack of the 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. On the facts here, these three tests overlap with one another and confirm the problematic nature of CBD's claims under the first *Baker* test. *See Alperin,* 410 F.3d at 544 (*Baker's* tests "are more discrete in theory than in practice, with the analyses often collapsing into one another").

Both the injunction and the declaratory relief sought by CBD would express a lack of respect for the Secretary's decision to enter into the bilateral arrangement with the Government of Japan to implement the FRF project—a decision made in the exercise of the Executive's broad foreign policy and national security powers. The decision to build the FRF is also a "political decision already made" on an issue of foreign policy—an area where it is imperative that the government speak consistently and with one voice. *See Baker,* 369 U.S. at 211 (many question touching on foreign relations "uniquely demand single-voiced statement of the Government's views"). And there is an "unusual need" to defer to the Executive Branch here. *See Powell v. McCormack,* 395 F.2d 577, 594 (D.C. Cir. 1968) (the "unusual need" test will typically involve "a specific foreign policy determination within the scope of Executive power") (citations omitted), aff'd in part, rev'd in part, 395 U.S. 486 (1969). The understanding reached by the two governments on the location and layout of the FRF was exceptionally difficult to achieve, has been decades in the making, and has absorbed the energies of several Presidents and their Secretaries (State and Defense) and their counterparts in Japan. SER 10-12; *Dugong,* 2005 WL 522106 at *1-2. The United States has made commitments to facilitate Japan's construction of the FRF, and any failure to live up to those commitments "would be called into question by the [Government of Japan] as a significant failure of the alliance and a departure from the established norms of the relationship of the two Governments." SER 6. An injunction or declaratory relief setting aside the Secretary's decision could "seriously damag[e]" the U.S.-Japan relationship and harm the United States' broader foreign policy interests." SER 14.

This Court addressed similar concerns in *Corrie,* which involved a suit by Palestinians for injuries sustained when Israel used bulldozers, built and sold by defendant Caterpillar, to demolish homes in the occupied territories. The bulldozers were paid for by the United States. Even though the United States was not a defendant and plaintiffs were not seeking relief against the United States, this Court held that the suit raised a political question beyond the courts' jurisdiction:

> Allowing this action to proceed would necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel. It is difficult to see how we could impose liability on Caterpillar without at least implicitly deciding the propriety of the United States' decision to pay for the bulldozers which allegedly killed the plaintiffs' family members.

Corrie, 503 F.3d at 980-82; *see also id.* at 983 ("Plaintiffs' action also runs head-on into the fourth, fifth, and sixth *Baker* tests because whether to support Israel with military aid is not only a decision committed to the political branches, but a decision those branches have already made." (citation omitted)).

Here, as in *Corrie*, allowing CBD's suit to proceed would "necessarily require the judicial branch . . . to question the political branches' decision" to go forward with the bilateral FRF project. *See also Bancoult*, 445 F.3d at 436 ("the policy and its implementation constitute a sort of Mobius strip that we cannot sever without impermissibly impugning past policy and promising future remedies that will remain beyond our ken"); *Schneider*, 412 F.3d at 198.

II. CBD lacks standing to assert its claims for declaratory relief.

A party seeking to invoke the jurisdiction of a federal court bears the burden of establishing that it has Article III standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). To demonstrate standing, a plaintiff must establish that it has suffered "injury in fact"—that is, the "invasion of a legally protected interest which is . . . concrete and particularized" and "actual or imminent, not conjectural' or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). The injury must be fairly traceable to defendant's challenged action, and not the result of "the independent action of some third party not before the court." *Id.* at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976)). And it must be likely (as opposed to merely speculative) that a favorable judicial decision will prevent or redress the injury. *Id.* These elements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Id.*

Furthermore, "[a] plaintiff must demonstrate standing separately for each form of relief sought." *Los Angeles Haven Hospice v. Sebelius*, 638 F.3d 644, 655 (9th Cir 2011) (citation omitted). "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Defenders of Wildlife*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984), *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976), and *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

In cases where the plaintiff alleges procedural injury, the standard for establishing causation and redressability is somewhat relaxed. "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n. 7. Plaintiff 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" that impacts their concrete interests. *Salmon Spawning*, 545 F.3d at 1226-27 (emphasis added). Nevertheless, "the redressability requirement is not toothless in procedural injury cases." *Id.* at 1227. Parties do not have standing to insist that procedural rules be followed simply for the sake of enforcing conformity with legal requirements. *Id.* "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107.

As the district court recognized (ER 38-39), this case closely parallels *Salmon Spawning*. There, plaintiffs challenged actions of the National Marine Fisheries Service and the Secretary of State in connection with the United States' decisions to enter into, and remain a party to, a fisheries treaty with Canada. Plaintiffs' first claim, a procedural claim, alleged that the Fisheries Service violated the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, ("ESA") when it

conducted a consultation with the State Department and issued a biological opinion finding that entry into the treaty would not jeopardize listed species. 545 F.3d at 1225-27. This Court held that that claim was not redressable, explaining that while a court could, in theory, set aside the allegedly flawed ESA consultation and biological opinion,

> a court could not set aside the next, and more significant, link in the chain—the United States' entrance into the Treaty. While the United States and Canada can decide to withdraw from the Treaty, that is a decision committed to the Executive Branch, and we may not order the State Department to withdraw from it. . . . So, while the groups correctly allege that they have a right to a procedurally sound consultation, they cannot demonstrate that "that right, if exercised, *could* protect their concrete interests."

Id. at 1226 (quoting *Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946, 957 (9th Cir. 2005)) (emphasis in *Defenders).*

Plaintiffs second claim in *Salmon Spawning* was substantive: that the agencies' continued participation in the implementation of the treaty jeopardized listed salmon in violation of ESA § 7(a)(2) and the APA. Plaintiffs argued that a court order declaring that the agencies violated the ESA and APA would require the agencies to exercise their authority to reduce take by U.S. fisheries. *Id.* at 1228. After noting the higher showing required to establish redressability for claims for substantive rather than procedural injury, this Court held that this claim, too, was unredressable. "[T]his claim hinges on agency action vis-à-vis the Treaty. The court cannot order renegotiation of the Treaty, and discretionary efforts by the agencies are too uncertain to establish redressability." *Id.* at 1228.

The plaintiffs' third claim was procedural: that the State Department and the Fisheries Service were required by ESA § 7 to reinitiate consultation on the biological opinion due to new information. The Court held that plaintiffs had standing to raise this claim in part because "a court order requiring the agencies to reinitiate consultation would remedy the harm asserted. *Unlike the other claims, this claim is a forward-looking allegation whose remedy rests in the hands of federal officials and does not hinge on upsetting the Treaty*." *Id.* at 1229 (emphasis added).

CBD's claims in this case are indistinguishable from the first claim in *Salmon Spawning.* As the district court explained (ER 42), while a court could in theory set aside the Secretary's allegedly flawed Findings and take-into-account process, a court cannot set aside the Secretary's decision to commit to the 2006 Roadmap, or order the Secretary to withdraw from the Roadmap, or order the Secretary to negotiate a different understanding with the Government of Japan. Nor, of course, could a court order the Government of Japan to halt its implementation of the FRF. The location and design of the FRF have been established through the bilateral commitments of the two governments. The Government of Japan has completed its environmental analysis and finalized its stormwater management design, and is in the process of constructing the FRF. As a result, even assuming that CBD has a cognizable right under Section 402 to a procedurally sound take-into-account process, CBD cannot demonstrate that that procedural right, if exercised, could protect its concrete interest in protecting the dugong from the alleged impacts of the FRF. *See Salmon Spawning,* 545 F.3d at 1226-27; ER 42.

CBD argues that the district court erred by "limiting the possible results of the NHPA process to 'the extremes' of either the status quo (the FRF continuing under existing plans) or a total halt to the project" and failing to recognize the possibility that "DoD could make alterations to the project or its operational plans." Br. 32, citing *Tyler v. Cuomo,* 236 F3d 1124, 134 (9th Cir. 2000), and *Vieux Carre Property Owners v. Brown,* 948 F.2d 1436, 1447 (5th Cir. 1991).

The district court made no such error. To the contrary, the court recognized the theoretical possibility that the Secretary might seek modification of the FRF as a result of additional NHPA procedures. But the court correctly concluded that that outcome was "highly unlikely":

> As in *Salmon Spawning*, the "ultimate agency decision" to agree to the Roadmap and build the FRF at Camp Schwab has already been made, and it is highly unlikely that an order requiring the DoD to *revise or reconsider* its NHPA Findings will change that decision. . . . 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*.

ER 42 (emphasis added). Nor is there merit to CBD's assertion (Br. 33) that the court erred in finding it "highly unlikely" that a new NHPA process would lead to a change in the Secretary's decision to commit to the Roadmap with the Government of Japan. To the contrary, the district court's decision is consistent with *Salmon Spawning*. The district court correctly recognized that, like the decision to enter into the fisheries treaty in *Salmon Spawning*, the decision to undertake the FRF project is a bilateral decision that has already been made and cannot be undone by court order, and thus is highly unlikely to be altered by further NHPA procedures. ER 42; *see Salmon Spawning*, 545 F.3d at 1226-27.

The record supports the court's finding. The Government of Japan and the United States have been working towards a solution to the Futenma issue "[f]or almost 20 years." SER 12. In December 2013 the most significant roadblock to the FRF was lifted through the "historic" step of the Okinawa Governor's approval of the landfill permit. SER 11. Work by the Government of Japan is finally underway. SER 11-12. "If, after all these efforts, the United States is prevented from fulfilling its end of the bargain—even temporarily—as a result of a court order preventing DoD from moving forward, [the United States'] relationship with Japan will be seriously damaged." SER 12-13; *see also* SER 6, 14.12

CBD argues that on remand the Navy could "make adjustments to its role in the design and operation of the FRF that would mitigate harms to the dugong," Br. 29, 54, by "making changes to aircraft flight paths, protocols for controlling run-off and other discharge into Henoko Bay, or levels of night-time illumination." Br. 32. But flight paths are largely dictated by the location and design of the FRF—factors that are controlled by the 2006 Roadmap. SER 36, 38. Any adjustment of air traffic patterns outside U.S. facilities would have to be negotiated with the Government of Japan. ER 67. Likewise, stormwater management and night-time illumination are part of the Government of Japan's design, and were analyzed by Japan in its EIA after consideration of the mitigation measures the Navy submitted to Japan during the Navy's Section 402 consultation process. As a result, it is extremely unlikely that a remand for "reconsideration" of these issues would redress CBD's alleged injury.

* * * *

3. Political Question and Standing: *Lin v. United States*

As discussed in *Digest 2015* at 154-57, the United States sought dismissal in the district court 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.). On March 31, 2016, the

district court granted the motions to dismiss, finding plaintiffs lacked standing due to defects in their allegations that the United States caused their loss of nationality, and a lack of redressability by the court. The court also found that the case involves a non-justiciable political question, namely, the nationality of residents of Taiwan.

On May 20, 2016, plaintiffs appealed. The United States filed its brief on appeal in the U.S. Court of Appeals for the D.C. Circuit on November 4, 2016. The U.S. brief, arguing that both the political question doctrine and the lack of standing warrant dismissal, is excerpted below (with footnotes omitted) and available in full at https://www.state.gov/s/l/c8183.htm.

* * * *

I. Plaintiffs' Claims Are Nonjusticiable Under The Political Question Doctrine.

A. 1. "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 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 essentially a function of the separation of powers." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (en banc) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (internal quotation marks omitted). It "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." *El-Shifa*, 607 F.3d at 840 (quoting *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

While the parameters of the political question doctrine have not been susceptible to a precise formula, the Supreme Court has identified several considerations that may render a case nonjusticiable under the political question doctrine…*Baker*, 369 U.S. at 217. Even the presence of one *Baker* factor can trigger the political question doctrine. *See Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

"Disputes involving foreign relations ... are 'quintessential sources of political questions.'" *El-Shifa*, 607 F.3d at 841 (quoting *Bancoult*, 445 F.3d at 433). "[D]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Lin I*, 561 F.3d at 505 (quoting *Schneider*, 412 F.3d at 194). "Not only does resolution of" foreign relations issues "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211.

These considerations are especially relevant when deciding a case would require a court to determine sovereignty over a territory. "Who is the sovereign ... of a territory, is not a judicial, but a political, question." *Jones v. United States*, 137 U.S. 202, 212 (1890) (collecting cases); *see also 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 . . . .") (quotation marks omitted); *cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (concluding that a question was justiciable where it did not

require "courts to decide the political status of Jerusalem," but rather whether a plaintiff could vindicate a statutory right regarding his passport's listing of place of birth) (quotation marks omitted).

Applying these principles, this Court concluded in 2009 that a request to declare Taiwan's residents U.S. nationals presented a nonjusticiable political question. *See Lin I*, 561 F.3d at 503-08. "Because deciding sovereignty is a political task, Appellants' case is nonjusticiable." *Id.* at 505. This Court explained that "[d]etermining Appellants' nationality 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. This Court declined to "jettison the United States' long-standing foreign policy regarding Taiwan in favor of declaring a sovereign," observing that the courts "do not dictate to the Executive what governments serve as the supreme political authorities of foreign lands." *Id.* at 506- 07.

2. This Court's *Lin I* analysis applies equally here. …Once again, plaintiffs ask this Court to opine on sovereignty over Taiwan. Instead of seeking a declaration that the United States has sovereignty over Taiwan, plaintiffs seek a declaration that no state has sovereignty over Taiwan, such that Taiwan's residents are "stateless." *See* JA34. The underlying inquiry is the same; only plaintiffs' proposed answer is different. A court cannot adjudicate this case without impermissibly interfering with the Executive Branch's power to speak with one voice about "what governments," if any, "serve as the supreme political authorities of foreign lands." *Lin I*, 561 F.3d at 507 (citing *Jones*, 137 U.S. at 212).

B. Plaintiffs claim that their request to have this Court "review the legality" of the Republic of China's decrees from 1946 is distinguishable from the claim in *Lin I*, asserting that their present complaint does not implicate "the question of Taiwan's sovereignty." Appellants' Br. 47. Rather, plaintiffs argue, they want a declaration about their "nationality," which they contend was not addressed in *Lin I*. *Id.* But plaintiffs' claims in *Lin I* equally involved a claim about nationality. *See Lin I*, 561 F.3d at 503 (observing that plaintiffs "want to be U.S. nationals" and declining to determine their "nationality"); *id.* at 505 (describing the declarations plaintiffs sought regarding their asserted status as "U.S. nationals"). As this Court held, determining sovereignty over Taiwan was an "antecedent question to Appellants' claims" regarding their nationality. *Id.* at 505-06 (noting that "[o]nce the Executive determines Taiwan's sovereign, we can decide Appellants' resulting status and concomitant rights"). The same is true here. That plaintiffs' claim here would require opining on sovereignty over Taiwan is clear from plaintiffs' own filings. … And plaintiffs assert that "[t]he nationality status of Taiwan residents has remained unsettled ... because the [San Francisco Peace Treaty] did not transfer Taiwan *to* any sovereign" and that their resultant "lack of a recognized nationality constitutes statelessness." Appellants' Br. 12, 13; *see also id.* at 21-22 ("[I]n this case, complete sovereignty over Taiwan was not transferred to any other sovereign by treaty, including the [Republic of China], an ambiguity that persists to this day.").

Indeed, plaintiffs' arguments are nearly identical to those made unsuccessfully in *Lin I*, in which plaintiffs claimed that they did "not seek to contradict any political decisions relating to Taiwan" nor to "determine ultimate sovereignty over Taiwan." Appellants' Br. 26, 29, *Lin I*, No. 08-5078 (Nov. 3, 2008) (2008 WL 5416437). They argued "that the political question doctrine d[id] not prohibit the District Court from interpreting the [San Francisco Peace Treaty] in order to declare" them United States nationals. Appellants' Reply Br. 11, *Lin I*, No. 08-5078 (Dec. 16, 2008) (2008 WL 5416438). This Court rejected such arguments, explaining that although it

"could resolve th[e] case through treaty analysis and statutory construction," "the political question doctrine forb[ade] [it] from commencing that analysis." *Lin I*, 561 F.3d at 506-07. Here, as in *Lin I*, adjudicating plaintiffs' complaint would involve a determination regarding Taiwan's political status and therefore "jettison the United States' long-standing foreign policy regarding Taiwan." *Id.* at 506. The political question doctrine precludes this Court from taking such an action. *See El-Shifa*, 607 F.3d at 842-43 (explaining that the "courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy").

II. Plaintiffs Lack Standing Because They Cannot Establish Causation Or Redressability.

In the alternative, the Court could affirm the dismissal of plaintiffs' complaint for lack of standing. To establish standing, a plaintiff must show that: (1) it has suffered an injury in fact; (2) its injury was caused by the defendant's conduct; and (3) the relief sought is likely to redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court correctly concluded that plaintiffs' pleadings did not establish causation or redressability. *See* JA62-72.

A. Plaintiffs Cannot Establish Causation.

For a plaintiff to have standing, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant," not the result of "the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). "When '[t]he existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,' it becomes 'substantially more difficult to establish' standing." *American Freedom Law Ctr. v. Obama*, 821 F.3d 44, 48-49 (D.C. Cir. 2016) (quoting *Lujan*, 504 U.S. at 562 (internal quotation marks omitted)).

Plaintiffs allege that they are stateless because the decrees deprived them of an internationally recognized nationality. The Republic of China, not the United States, issued the decrees; plaintiffs' theory of liability turns on its assertion that the Republic of China acted as the United States' agent. … Before the district court, plaintiffs argued that the United States was liable because it was aware of the Republic of China's actions. *See* JA68; *see also* Dkt. No. 25, at 8, 28, 36-37. On appeal, plaintiffs recharacterize their assertions to argue that the United States is liable for failing to supervise the Republic of China and for ratifying its actions. Appellants' Br. 20-29.

The district court correctly observed that "[p]laintiffs have not put forward any evidence demonstrating that [their] current situation is a result of the events in 1946 and not a consequence of the 'years and years of diplomatic negotiations and delicate agreements' that have occurred during the intervening years." JA69 (quoting *Lin v. United States*, 539 F. Supp. 2d 173, 181 (D.D.C. 2008)). Plaintiffs do not account for intervening developments regarding Taiwan's status such as the United States' decision to recognize the People's Republic of China as the government of China, rather than the Republic of China, or the United Nations General Assembly vote to recognize the People's Republic of China as the representative of China before the United Nations. *See* JA54; G.A. Res. 2758 (XXVI) (Oct. 25, 1971). And, as the district court stressed, the causation inquiry would require it to "address[] the complex and delicate contours of certain non-justiciable political questions, including whether the United States exhibited sovereign control over Taiwan during the time period at issue." JA67-68. As discussed above, this the Court cannot do. *See supra* § I.

B. Plaintiffs Cannot Establish Redressability.

1. For a plaintiff to have standing, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quotation marks omitted). … A case where redress depends on the actions of "an international organization that is not regulated by [the United States] government and therefore not bound by [United States] [c]ourt[s]" "is even one step further removed from the typical case in which redress depends on the independent action of a third party." *Spectrum Five LLC v. FCC*, 758 F.3d 254, 261 (D.C. Cir. 2014).

Plaintiffs' theory of redressability depends entirely on discretionary actions by the international community. They concede that they "do not—and could not—ask the District Court to end [their] statelessness." Appellants' Br. 7. Instead, they assert that the declaration they seek "would significantly motivate the U.N. (and nations bound to comply with international laws prohibiting statelessness)" to provide them with an internationally recognized nationality. *Id.* at 38. They suggest that the requested declaration could prompt the U.N. High Commissioner for Refugees to provide assistance to them. *Id.* at 40, 42.

These assertions, as the district court correctly concluded, do not suffice to establish redressability. "Plaintiffs allege no facts plausibly demonstrating how the sought declaration ... would be used 'within international bodies such as the United Nations [] to end their statelessness.'" JA72 (quoting Pls.' Opp'n to U.S.'s Mot. to Dismiss, Dkt. No. 25, at 39). "[R]esolution of Plaintiffs' alleged injury necessarily involves "independent actors not before the court and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" JA72 (quoting *Lujan*, 504 U.S. at 562). This Court has upheld dismissals of plaintiffs' cases in which redressability required the independent action of just one non-party state, *see US Ecology*, 231 F.3d at 24-25, two non-party state regulators, *see Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 739-40 (D.C. Cir. 2008), or a non-party "specialized agency of the United Nations," *see Spectrum Five LLC*, 758 F.3d at 256, 260-64. Plaintiffs' generalized plan to use a U.S. court's declaration to enlist the United Nations' support for their cause thus cannot demonstrate the requisite redressability to sustain Article III standing. *See Spectrum Five LLC*, 758 F.3d at 264 (dismissing petition for lack of standing where theory of redress would have required an international third party to reconsider an earlier decision where petitioner had "not adduce[d] facts demonstrating how the .... reconsideration process work[ed], much less demonstrating that the [third party] would likely reach a different conclusion upon reconsideration") (quotation marks omitted).

* * * *

4. Political Question: *He Nam You v. Japan*

On February 11, 2016, the United States filed a suggestion of immunity in *He Nam You v. Japan*, No. 15-03257 (N.D. Cal.). The U.S. submission discusses the political question doctrine as applied in an earlier case in the D.C. Circuit. On February 26, 2016, the court dismissed the claims against Japan, the Emperor, and the Prime Minister. Excerpts follow (with footnotes omitted) from the U.S. submission, which is available in full at http://www.state.gov/s/l/c8183.htm. The portion of the U.S. submission suggesting immunity on behalf of Emperor Akihito and Prime Minister Abe of Japan is excerpted in Chapter 10.

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The United States has an interest in ensuring that foreign states are served in accordance with the FSIA, which mandates service in a manner that complies with customary international law. … The FSIA … sets forth the exclusive methods for service of process on foreign states. 28 U.S.C. § 1608(a). The procedures for service in Section 1608(a) are "hierarchical"; "a plaintiff must attempt the methods of service in the order they are laid out in the statute." *Magness v. Russian Federation*, 247 F.3d 609, 613 (5th Cir. 2001). The United States has an important interest in ensuring that foreign states are properly served in accordance with the FSIA's statutory requirements, as this issue has implications for the treatment of the United States in foreign courts. It is thus critical that foreign states have proper notice of a suit before the foreign state is required to appear in U.S. courts, and prior to a U.S. court taking steps that could adversely affect a foreign state's rights. It appears from the docket that Japan has not yet been served in this case. Prior to proper service upon Japan, it would be inappropriate for the Court to rule in favor of Plaintiffs in connection with the issues raised in their January 13, 2016 filing, including their assertion that Japan does not enjoy immunity from this action under the FSIA and that the suit does not merit dismissal under the political question doctrine. Nor does the United States believe it would be appropriate for this filing to address the Plaintiffs' specific arguments in any detail at this stage.

However, should the Court decide to reach the political question issue and conclude that the D.C. Circuit's decision in *Hwang Geum Joo* provides a sufficient basis for dismissing the claims against Japan in this case at this stage, the United States' view remains that dismissal of these types of claims on political question grounds would also be warranted. As noted earlier, with respect to World War II-era claims against Japan by former "comfort women" from South Korea, China, Taiwan, and the Philippines, both the D.C. Circuit and this Court in this very action have applied the political question doctrine, "defer[ring] to the judgment of the Executive Branch of the United States Government . . . that judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States." *Hwang Geum Joo v. Japan*, 413 F.3d at 48, 52-53 (holding that the case "presents a nonjusticiable political question, namely, whether the governments of the appellants' countries resolved their claims in negotiating peace treaties with Japan"); *see He Nam You v. Japan*, No. C 15-03257, 2015 WL 8648569, at *3 (N.D.Cal. Dec. 14, 2015) ("Although *Joo* is not binding in our circuit, it remains the only appellate authority on point . . . and [the court] adopts its thorough reasoning, which was informed by the position of the United States."). The United States' foreign policy determination, set forth in a Statement of Interest and two amicus briefs in the proceedings in *Joo*, that all wartime claims against Japan should be resolved exclusively through diplomacy, has not changed. It remains in the United States' foreign policy interest, as reflected in the 1951 San Francisco Peace Treaty, for such claims against Japan to be resolved exclusively through government-to-government negotiations, and thus, if the Court decides to reach the issue at this stage, dismissal of the claims against Japan in this lawsuit would also be warranted on political question grounds.

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5. Comity, *Forum Non Conveniens*, and Political Question: *Cooper v. TEPCO*

On December 19, 2016, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit in *Cooper v. TEPCO*, No. 15-56424, a case brought by U.S. service members who allege that they were exposed to radiation during the humanitarian operation in response to the earthquake, tsunami, and ensuing meltdown at the Fukushima-Daiichi nuclear power plant in Japan, operated by TEPCO. The U.S. brief, excerpted below, argues that the district court did not abuse its discretion in denying TEPCO's motion to dismiss on the grounds of international comity and *forum non conveniens*, and that it would be premature to consider application of the political question doctrine before conducting a choice of law analysis.

* * * *

I. The district court did not abuse its discretion in declining to dismiss this case on the basis of international comity.

A. Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). One strand of comity is "adjudicatory comity," pursuant to which a U.S. court "'as a discretionary act of deference'" declines to exercise jurisdiction over a case on the basis that it is more properly decided in a foreign forum. *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), cert. denied 136 S. Ct. 690 (2015) (quoting *In re Maxwell Commc'n Corp. ex rel. Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996)).

Under governing Ninth Circuit law, a court addressing adjudicatory comity weighs "several factors, including [1] the strength of the United States' interest in using a foreign forum, [2] the strength of the foreign governments' interests, and [3] the adequacy of the alternative forum." *Mujica*, 771 F.3d at 603 (brackets in original). This Court has set out the following nonexclusive list of factors relevant to ascertaining U.S. and foreign interests: "(1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests." *Id*. at 604; see also *id*. at 607 (indicating that "[t]he proper analysis of foreign interests essentially mirrors the consideration of U.S. interests"). The Executive Branch's view of its interests is also entitled to "serious weight" and due deference. *Id*. at 610. This Court reviews the district court's decision for abuse of discretion. *Id*. at 589.

In the view of the United States, the district court did not abuse its discretion in declining to dismiss this case under this test. The district court accurately identified *Mujica* as a recent statement of the governing law in this circuit and applied the relevant factors to the facts of this case. As the district court acknowledged, TEPCO is a Japanese corporation and its actions took place in Japan. Japan therefore has an interest in this litigation. Plaintiffs are U.S. citizens, however, who have chosen to litigate this case in a U.S. forum. This factor weighs against dismissal.

B. The foreign policy and public policy interests here do not require a holding that the district court abused its discretion. As described above, Japan is an important ally and a valuable partner. In addition, the United States applauds Japan's efforts to provide adequate and timely compensation for claims following Fukushima, as detailed in Japan's amicus brief filed with this Court. Japan Br. 2-3. Japan has informed the Court that 2.4 million claims have been resolved under its scheme and that it has paid approximately $58 billion in compensation. Japan Br. 2. These factors, however, are not a sufficient basis to conclude that the district court abused its discretion here.

Japan's remedial scheme differs in critical ways from remedial schemes as to which U.S. courts have applied principles of adjudicatory comity. Most significantly, while the United States acknowledges Japan's concerns that adjudication of claims outside its compensation scheme might undermine that scheme, Japan does not assert that the scheme is exclusive on its own terms. There is no provision of Japanese law foreclosing lawsuits arising out of the Fukushima disaster to which a U.S. court is asked to give force and effect. Cf. *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 585-86 (2d Cir. 1993) (dismissing suit brought by Indian mass tort victims for lack of standing where Indian law gave the Indian government the exclusive right to represent victims of the disaster and the Indian government had agreed to a global settlement). Additionally, the United States was not involved in the creation of Japan's compensation system and is not party to any bilateral or multilateral agreement recognizing or seeking recognition for Japan's compensation system as an exclusive remedy. Cf. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1231, 1239 (11th Cir. 2004) (dismissing on comity grounds where "the United States agreed to encourage its courts and state governments to respect the Foundation as the exclusive forum for claims from the National Socialist era" and "consistently supported the Foundation as the exclusive forum").

The United States has no clear independent interest in Japan's compensation scheme beyond our general support for Japan's efforts to address the aftermath of Fukushima. Under these circumstances, the district court could have reasonably determined that the interest in providing U.S. service members a U.S. forum for their claims was not outweighed by the interest in having the Japanese system address all claims arising out of the Fukushima nuclear accident.

C. The Convention on Supplementary Compensation for Nuclear Damage does not evince a public policy of the United States or Japan that would render the district court's comity ruling an abuse of discretion. On the contrary, the district court's decision in this case is consistent with U.S. interests in promoting the Convention.

The Convention entered into force after the Fukushima nuclear accident, so it does not apply to this case on its own terms. As a general rule, "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 339, art. 28 (May 23, 1969); *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 373 (2d Cir. 2004) ("Ordinarily, a particular treaty does not govern conduct that took place before the treaty entered into force."). Some commentators have suggested that jurisdictional provisions may sometimes be interpreted as applying to disputes that arose before the entry into force of the treaty on the theory that, "by using the word 'disputes' without any qualification, the parties are to be understood as accepting jurisdiction with respect to all disputes existing after the entry into force of the agreement." Draft Articles on the Law of Treaties, with commentaries, Yearbook of the Int'l Law Comm'n, 1966, Vol. II, at 212. However, under this theory, "when a jurisdictional

clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause." *Id*.

Rather than using the general term "disputes," the Convention's jurisdictional channeling is limited to "actions concerning nuclear damage from a nuclear incident" and provides that jurisdiction "shall lie only with the courts of the Contracting Party within which the nuclear incident occurs." Convention art. XIII(1). So even under this theory, the Convention's jurisdictional provisions would not be interpreted to apply retroactively. Both "nuclear damage" and "nuclear incident" are defined terms under the Convention, brought into existence only upon the Convention's entry into force. Additionally, the verb "occurs" is in the present tense, not the past tense as would be expected if the treaty applied retroactively. *Id*.

Moreover, retroactive application would significantly undermine the liability regime established by the Convention. For U.S. interests in the Convention to be fulfilled, it is essential that the treaty regime be widely adhered to internationally. The Convention creates a compensation regime whereby, if an incident occurs for which the baseline compensation is not sufficient, States Parties must pay into a supplementary compensation fund. See Convention art. III, IV. If a State were allowed to receive the benefit of the exclusive jurisdiction provisions and perhaps even access to the supplementary compensation fund by becoming a party to the treaty after a nuclear incident has taken place in its territory, there would be no need for any State to join the Convention prior to such an incident occurring. States would likely wait to join the Convention to avoid having to pay into the fund for an incident in the territory of another State Party. Additionally, if States Parties to the treaty were required to contribute to a supplementary compensation fund for incidents that predate the Convention's entry into force, the cost would be a significant disincentive to nations considering ratification.

As indicated above, the policies underlying the Convention do not require dismissal in a case to which the Convention does not apply. The Convention regime promotes U.S. interests both in providing prompt and adequate compensation to victims of nuclear incidents and in simultaneously protecting U.S. nuclear suppliers from potentially unlimited liability arising from their activities in foreign markets. See S. Exec. Rep. No. 109-15, at 2, 8. The treaty provisions work together to create an interlocking "system." Convention art. II(2). The regime must be viewed in its entirety, with the exclusive jurisdiction provision forming part of a bargain in exchange for robust and more likely compensation for victims of a potential incident. Holding that international comity requires dismissal of suits brought in the United States by U.S. citizens for injuries from nuclear incidents abroad would effectively provide for exclusive jurisdiction without the other components of the treaty. United States policy does not call for advancing one element of this system in isolation of the other.

In arguing that U.S. policy requires dismissal, TEPCO mistakenly relies on testimony by the State Department's then-Senior Coordinator for Nuclear Safety, Warren Stern, during 2005 Senate hearings on the Convention. In response to a question from the Chairman of the Senate Foreign Relations Committee regarding whether joining the Convention would "in effect limit the right of U.S. persons to bring suit against entities or companies in the United States courts or against U.S. companies for accidents overseas," Mr. Stern responded in the affirmative, but also noted: "As a practical matter, in today's legal framework, where there is no [Convention], we would expect that if a nuclear incident occurs overseas U.S. courts would assert jurisdiction over a claim only if they concluded that no adequate remedy exists in the court of the country where the accident occurred." 2005 Hearing at 27. This was a factual, predictive statement ("as a

practical matter"), not an expression of U.S. policy. Certainly, a district court could choose to dismiss a case based on international comity for a claim arising overseas. But it is not required to do so, and, as explained above, limiting this existing flexibility to hear claims outside the courts of the country where the accident occurred was one of the functions of the treaty. Mr. Stern made this clear in his testimony, explaining that "[o]nce the United States and the state whose nationals are involved are both Parties to the [Convention], liability exposure will be channeled to the operator in the 'installation state,' thus substantially limiting the nuclear liability risk of United States suppliers." *Id*. at 19.

II. The district court did not abuse its discretion in declining to dismiss this case on the basis of *forum non conveniens*.

Under the doctrine of *forum non conveniens*, a "district court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001). Courts consider the following private interest factors:

> (1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive.

Id. at 1145. The relevant public interest factors are "(1) local interest of lawsuit; (2) the court's familiarity with governing law; (3) burden on local courts and juries; (4) congestion in the court; and (5) the costs of resolving a dispute unrelated to this forum." *Id*. at 1147. This Court has explained that "[w]hen a domestic plaintiff initiates litigation in its home forum, it is presumptively convenient." *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1227 (9th Cir. 2011).

The party moving for dismissal has the burden of demonstrating that dismissal is warranted. *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995). The district court's decision is reviewed for abuse of discretion. *Lueck*, 236 F.3d at 1143.

Although "[t]he presence of American plaintiffs . . . is not in and of itself sufficient to bar a district court from dismissing a case on the ground of *forum non conveniens*," "a showing of convenience by a party who has sued in his home forum will usually outweigh the inconvenience the defendant may have shown." *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1990). This Court has upheld district court decisions dismissing cases on the basis of *forum non conveniens* that were brought by U.S. citizens against foreign defendants regarding conduct that occurred abroad. See, *e.g.*, *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 665–66 (9th Cir. 2009); *Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1028, 1032 (9th Cir. 2011). However, a defendant seeking to reverse the denial of a motion to dismiss on this basis faces a "doubly difficult task," given the standard of review on appeal. See *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1177 (9th Cir. 2006).

The district court did not abuse its discretion here. As the district court explained, relevant evidence is likely present in both countries, and both parties would incur additional costs and be inconvenienced by litigating in the other country. ER 35-40. The district court recognized Japan's interest in adjudicating the lawsuit, ER 41, and the United States sees no basis for concluding that the district court abused its discretion in determining that the balance of factors nevertheless weighed against dismissal.

TEPCO asserts that a plaintiff's choice of its home forum is irrelevant where a plaintiff would not be required to travel in person to litigate the case abroad. Reply Br. 16. This is incorrect. Plaintiffs may prefer to testify in person, even if this is not legally required, and may wish to do so in front of a tribunal that will hear their testimony in untranslated form. In any event, litigating in plaintiffs' home forum may be more convenient for many reasons, of which travel is only one. The many costs and hurdles inherent in litigating in a foreign legal system are relevant to the *forum non conveniens* analysis. See *Lueck*, 236 F.3d at 1145 (instructing courts to consider "practical problems that make trial of a case easy, expeditious and inexpensive"). TEPCO erroneously relies on cases addressing whether use of an alternative forum is unreasonable or inadequate, not merely inconvenient. See, *e.g.*, *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (addressing enforceability of forum selection clauses in contracts, which are presumed to be valid unless unreasonable under the circumstances); *Mujica*, 771 F.3d at 614 (holding that noncitizen plaintiffs had not made the required "powerful showing" that the alternative forum is "clearly unsatisfactory" for purposes of comity).

As the United States discusses in greater detail below, the district court did err in simply assuming that U.S. law would apply to this suit, without conducting a choice-of-law analysis. ER 42. However, this error does not require reversal of the *forum non conveniens* ruling. While this Court has stated that a choice-of-law analysis must precede a decision on *forum non conveniens*, it did so in the context of cases in which a potentially applicable rule of law mandated venue in U.S. courts. See Creative Tech., 61 F.3d at 700. The United States is not aware of any such statute that could apply in this case. Where no such venue provision is at issue, "the applicability of United States law to the various causes of action 'should ordinarily not be given conclusive or even substantive weight.'" *Lueck*, 236 F.3d at 1148 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981)).

III. This Court should refrain from addressing the political question doctrine at this preliminary stage without the benefit of a choice- of-law analysis.

The Court also invited the United States to express its views on the application of the political question doctrine to the claims in this case. The United States notes that, to the extent ruling on a plaintiff's claims would require a judicial inquiry into the reasonableness of military commanders' decisions regarding deployment of U.S. troops, which involves balancing the risks of a deployment decision against the benefits of mission objectives, those claims would be nonjusticiable under the political question doctrine. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Decisions regarding where to locate troops in dangerous and unfolding situations, involving a weighing of the risk to troops against mission objectives, are exactly the type of "complex, subtle, and professional decisions within the military's professional judgment and beyond courts' competence." *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 478 (3d Cir. 2013); see also *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 180- 81 (4th Cir. 2015); *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 553 (9th Cir. 2014); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843-44 (D.C. Cir. 2010) (en banc); *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997).

At this early stage of the litigation, however, it is premature to decide whether the political question doctrine applies prior to conducting a choice-of-law analysis. The United States accordingly takes no position now on the doctrine's application to the claims in this case.

This Court has explained that, "[a]lthough the political question doctrine often lurks in the shadows of cases involving foreign relations," such cases are often resolved on other legal grounds. *Alperin v. Vatican Bank*, 410 F.3d 532, 538 (9th Cir. 2005). "[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)).

Although this Court treats the political question doctrine as a jurisdictional bar, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007), it can wait for the issues in the litigation to be developed prior to dismissing on that basis, *New York v. United States*, 505 U.S. 144, 185 (1992); *Wong v. Ilchert*, 998 F.2d 661, 662-63 (9th Cir. 1993).

In order to assess the political question argument in this case, the Court must understand the elements of the cause of action and relevant defenses under the applicable law. TEPCO asserts that it has a defense based on the U.S. military's supposed recklessness in exposing its troops to radiation, which TEPCO argues is a superseding cause absolving it of liability. TEPCO makes this argument under California law. However, the parties have not yet briefed choice of law and the district court did not address it. Given that the relevant conduct that gave rise to plaintiffs' claims occurred in Japan, there is at least a possibility that Japanese law will apply to this case. See *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001) (explaining standard for choice of law determinations for cases filed in California). At a minimum, the district court would have to consider the potential bodies of law that apply, whether California's or Japan's; to determine whether there is a true conflict between those two bodies of law; to resolve any conflict by considering each state's interests in having its law applied; and, finally, to "apply the law of the state whose interest would be more impaired if its law were not applied." *Id*.

Without knowing whether California law will apply or whether a superseding-cause defense exists under Japanese law, it is premature to decide whether this case is nonjusticiable under the political question doctrine. Even if the superseding-cause defense were applicable, as the district court explained, at this early stage of the litigation it is far from clear whether the court would actually be called upon to evaluate the wisdom of military decision making. It is also unclear at this stage whether a need to review military decisions to adjudicate any superseding-cause defense would require dismissal, or whether the military's decisions simply could not qualify as a superseding cause. See *Harris*, 724 F.3d at 469 n.9. To the extent that the superseding-cause defense under governing law requires that the intervening actions be unforeseeable, the court may determine that it was foreseeable that rescue workers, including the U.S. military, would respond to this disaster even if some risk were involved. See, *e.g.*, *USAir Inc. v. U.S. Dep't of Navy*, 14 F.3d 1410, 1413 (9th Cir. 1994) ("A superseding cause must be something more than a subsequent act in a chain of causation; it must be an act that was not reasonably foreseeable at the time of the defendant's negligent conduct.") (applying California tort law).

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D. EXTRATERRITORIAL APPLICATION OF U.S. CONSTITUTION

1. *Hernandez*

As discussed in *Digest 2015* at 163-66, the U.S. Court of Appeals for the Fifth Circuit, en banc, affirmed the dismissal of all claims in *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015). *Hernandez* is a damages action against a U.S. Border Protection officer and the United States for the death a Mexican national in a shooting across the U.S. border with Mexico. On October 11, 2016, the U.S. Supreme Court granted the petition for certiorari in the case. The U.S. brief in the Supreme Court was filed in January 2017 and will be discussed in *Digest 2017.*

2. *Rodriguez*

On October 12, 2016, the United State notified the U.S. Court of Appeals for the Ninth Circuit, which was considering a case involving the same issues as *Hernandez*, discussed *supra*, that the Supreme Court had granted certiorari to review the Fifth Circuit's en banc judgment in *Hernandez*. The Court of Appeals in *Rodriguez v. Swartz*, No. 15-16410, had previously denied a motion to hold its consideration in abeyance pending consideration of the petition for certiorari in *Hernandez*. The Ninth Circuit, sitting en banc, heard arguments in *Rodriguez* on October 21, 2016. However, it deferred deciding the appeal until the Supreme Court decides *Hernandez*.

Cross References

Skalka *case discussing political question*, **Chapter 2.B.1.d.**
Universal jurisdiction, **Chapter 3.A.5**
He Nam You v. Japan, **Chapter 10.D.3.**