

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

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4  
5 OLIVIER BANCOULT, ET. AL.,

6 Plaintiffs-Appellants,

7 v.

No. 05-5049

8 ROBERT S. MCNAMARA, ET. AL.,

9 Defendants-Appellees.  
10

11 Thursday, February 16, 2006

12 Washington, D.C.

13 The above-entitled matter came on for oral  
14 argument pursuant to notice.

15 BEFORE:

16 CIRCUIT JUDGES TATEL AND BROWN AND  
17 GRIFFITH

18 APPEARANCES:

19 ON BEHALF OF THE APPELLANTS:

20 DARRELL CHICHESTER, ESQ.

21 ON BEHALF OF THE APPELLEES:

22 MARK R. FREEMAN, ESQ.  
23  
24  
25

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C O N T E N T S

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Mark R. Freeman, Esq. On Behalf of the Appellees	16



1 an attack on the broader policy establishing (indiscernible)  
2 affairs.

3 THE COURT: So what's the difference between this  
4 case and Schneider?

5 MR. CHICHESTER: The fundamental difference between  
6 this case and Schneider is that in Schneider the Court found  
7 that the claims represented in the (indiscernible) policy  
8 merely recast (indiscernible). (Indiscernible) it's clear  
9 that the Chagossian's claims are separate and distinct from  
10 the (indiscernible) --

11 THE COURT: But isn't the executives view that the  
12 policy here requires a necessity that there be no Chagossians  
13 in Diego Garcia? They just can't be there and so how does  
14 that help you?

15 MR. CHICHESTER: Because no matter what policy the  
16 Government has and maintains secure military base, it still  
17 must act within (indiscernible) bounds in order to effect that  
18 policy.

19 THE COURT: And so what are the legal bounds?  
20 What's the self-executing treaty? What's the Congressional  
21 statute that SOSA says we need to look to to determine whether  
22 there's a cause of action here?

23 MR. CHICHESTER: Well, in this case, the Court's  
24 rule up to international law based on, the Chagossians made  
25 their claims under the Alien (indiscernible) --

1 THE COURT: What's your authority for that?

2 MR. CHICHESTER: The authority for bringing the  
3 claims under --

4 THE COURT: Right.

5 MR. CHICHESTER: -- international law?

6 THE COURT: Yes. When we have recognized the Tort  
7 Action based on international law?

8 MR. CHICHESTER: In fact, the SOSA court itself  
9 recognized the availability of Tort action under international  
10 law. And specifically it sat under ATCA. The Court's ruled  
11 up to certain actions falling within international  
12 (indiscernible) such that the nature, universally recognized  
13 that the Court should (indiscernible). In fact the Supreme  
14 Court in --

15 THE COURT: Such as? What are the ones here?

16 MR. CHICHESTER: In this case we're talking about  
17 torture, cruel, inhuman and degrading treatment, genocide.  
18 These are fundamental norms of international law. In fact  
19 (indiscernible) from which there can be no (indiscernible).

20 THE COURT: I still don't understand the difference  
21 between this case and Schneider. Schneider is a binding  
22 precedent in this court. So, what's the difference in  
23 Schneider, Schneider was tortured and killed and the Court  
24 said, "to determine whether drastic measures can be taken in  
25 matters of foreign policy and national security, i.e.

1 questions that are political questions, is not the stuff of  
2 adjudication (indiscernible)."

3 MR. CHICHESTER: Yes, that is correct. The Court  
4 found, in that case, that the specific claims involved were  
5 (indiscernible) from the broader policy. (Indiscernible) the  
6 Chagossians are bringing claims such as systematic  
7 discrimination. Currently, on Diego Garcia foreign  
8 (indiscernible) are permitted to work. Yet the Chagossians  
9 are excluded from doing so simply because of the fact that  
10 they are Chagossians. This is not a matter of foreign policy.  
11 This is a discriminatory (indiscernible).

12 THE COURT: Well, isn't the same thing true in  
13 Schneider? I mean they could have neutralized Schneider in a  
14 lawful way. They didn't have to torture and kill him.

15 MR. CHICHESTER: That is correct. However, the  
16 Court found that that policy, and that actions taken, the  
17 specific conduct was (indiscernible). The Supreme Court  
18 (indiscernible) --

19 THE COURT: See, I'm asking you why, if it was  
20 inextricable there it isn't inextricable here. If you just  
21 look at the facts in the two cases.

22 MR. CHICHESTER: Because the policy involved in this  
23 case is to establish a military base.

24 THE COURT: And the policy in Schneider was?

25 MR. CHICHESTER: Was to overthrow a government.

1 THE COURT: Yes.

2 MR. CHICHESTER: And part of that was the removal of  
3 an official.

4 THE COURT: Yes.

5 MR. CHICHESTER: Within the government.

6 THE COURT: And here the policy is to depopulate the  
7 island which you're not challenging, right?

8 MR. CHICHESTER: That's correct, Your Honor.

9 THE COURT: So the cases seem identical.

10 MR. CHICHESTER: Let me refer to this Court's  
11 holding and Committee of U.S. Citizens living in  
12 (indiscernible). The Court says specifically just because the  
13 (indiscernible) has authority in the area of foreign affairs  
14 does not give the carte blanche to trample the fundamental  
15 rights. Coupled with the Supreme Court's holding in Baker v.  
16 Carr in which there was a discriminating analysis of the  
17 specific claims involved (indiscernible) every case  
18 (indiscernible) foreign relations is rendered (indiscernible)  
19 issue. We look to the specific claims which the District  
20 Court failed to do and never conducted a discriminating  
21 analysis of the individual claims presented such as  
22 discrimination --

23 THE COURT: So the papers today are full of articles  
24 about more photographs from the Abu Ghraib (phonetic sp.)  
25 prison, in Iraq.

1 MR. CHICHESTER: Yes, sir.

2 THE COURT: Under your theory, could those prisoners  
3 sue in the U.S. courts?

4 MR. CHICHESTER: Potentially. And I believe, I  
5 guess the best answer to that is the mere fact that they  
6 didn't have to take action themselves because --

7 THE COURT: So in other words if we agree with you  
8 and write an opinion holding to this analytical question, that  
9 decision could be a basis for suits by these prisoners,  
10 correct?

11 MR. CHICHESTER: Perhaps, but I think there's a  
12 fundamental difference in the fact that what occurred in Abu  
13 Ghraib was in the midst of an active combat situation in which  
14 the military was directly participating in active combat. And  
15 this situation, we don't have a similar --

16 THE COURT: I think that all occurred after the war,  
17 during the occupation, which is very much like the situation  
18 here.

19 MR. CHICHESTER: Respectfully, Your Honor, I  
20 disagree that it had been after the combat because the combat  
21 is ongoing today. Yet, in Chagos, it was peace time. There  
22 was a cold war.

23 THE COURT: Yes, you just said that there was a cold  
24 war, right?

25 MR. CHICHESTER: Yes, but there were no active

1 military operations.

2 THE COURT: But wasn't it an active military base?

3 MR. CHICHESTER: It was in the process of being  
4 established, yes.

5 THE COURT: And was it being established in order  
6 for a military and foreign policy purpose, you aren't  
7 challenging, right?

8 MR. CHICHESTER: We do not challenge the broader  
9 policy of establishing a military base. Recently, that is  
10 (indiscernible) situation. Recently (indiscernible). Justice  
11 O'Connor claimed that the notion that the courts must focus  
12 solely on, the broader policy at hand, to the exclusion of the  
13 individual claims to be found (indiscernible) understanding  
14 and the separation upheld. Now, in that situation, the  
15 Supreme Court found that the plaintiff's claims were  
16 (indiscernible) contrary to the Government's argument that the  
17 Court's had to focus on broader contentions. In this situation  
18 the Chagossians are not challenging the existence of the base.  
19 They are merely asking the Courts to remedy --

20 THE COURT: Let me just bring you back to Schneider  
21 okay, because, I mean, if you were going to write the sentence  
22 in an opinion that (indiscernible) Schneider what would it  
23 say? Because you understand, I'm asking the question because  
24 you can say Hamdi and all these other cases all you want. But  
25 Schneider is a binding precedent that we need to distinguish,

1 don't you agree with that?

2 MR. CHICHESTER: I believe there are two elements  
3 here.

4 THE COURT: You can't just ignore it by citing other  
5 cases.

6 MR. CHICHESTER: No.

7 THE COURT: We have to distinguish it. How would  
8 you distinguish it? What's the sentence?

9 MR. CHICHESTER: Essentially that the finding in  
10 Schneider is that when (indiscernible) are inextricable from  
11 the broader policy, then they fall within the political  
12 question (indiscernible). That is not the case in this  
13 situation. It cannot be stated, and I don't think that the  
14 Government will argue that torture, genocide, cruel and  
15 inhuman and degrading treatment, the current policies are  
16 (indiscernible) discriminatory hiring practices, including the  
17 Chagossians from the outlying islands while yachters are  
18 committed to stay their time are within the broader policy of  
19 establishing a secure military base.

20 THE COURT: Let me ask you a different question. If  
21 we were to disagree with you on this question, that is, and  
22 believe that Schneider or something like it controls here with  
23 respect to the political question doctrine in barring the suit  
24 against the United States, would that conclusion also apply to  
25 your suit against the individual defendants?

1 MR. CHICHESTER: The claims against the individuals  
2 should not be barred while they claim immunity under the West  
3 Law Act.

4 THE COURT: No, I'm not asking the West Law Act  
5 question. I'm asking whether or not, if the political  
6 question doctrine bars the lawsuit against the United States  
7 why wouldn't it also bar the lawsuit against the Secretary of  
8 Defense?

9 MR. CHICHESTER: It should not bar claims against  
10 the individuals because they were not acting within the scope  
11 of their employment.

12 THE COURT: Okay, but if they were, if we think the  
13 D.C. case law indicates that under the circumstances of this  
14 case they were acting within the scope of their employment,  
15 then wouldn't it be barred by the political question doctrine?

16 MR. CHICHESTER: It might be barred by the political  
17 question doctrine (indiscernible).

18 THE COURT: So your case turns on convincing us that  
19 they were acting outside the scope of their employment.

20 MR. CHICHESTER: As to the individuals, yes, that is  
21 correct. However, in this situation they're claiming immunity  
22 under the West Law Act. Congress clearly never intended that  
23 Act to apply to egregious conduct.

24 THE COURT: Well, what do you do with all the cases  
25 we cited in Haddon? I mean, we applied it to, how can you say

1 it applies only, you say in your brief, garden variety torts  
2 when the D.C. courts have applied it to an intentional rape  
3 and shooting?

4 MR. CHICHESTER: Yes, in those cases courts found  
5 that their focus was solely on other (indiscernible). The  
6 individual was acting in (indiscernible) of their employers  
7 interests.

8 THE COURT: Right.

9 MR. CHICHESTER: Haddon specifically says that that  
10 is not sufficient in the terms (indiscernible). You must also  
11 look to whether or not the specific (indiscernible) was  
12 incidental to their legitimate duties.

13 THE COURT: Right and if in the rape case the  
14 employee was collecting the payment for the mattress. In the  
15 (indiscernible) case there was an argument over the shirt and  
16 here the argument is over depopulation which is exactly what  
17 the Secretary was directed to do. Aren't the cases exactly  
18 the same?

19 MR. CHICHESTER: They are not exactly the same, Your  
20 Honor. With respect to the claims of the Chagossians  
21 (indiscernible), these (indiscernible) much bigger  
22 (indiscernible). These are violations of (indiscernible) from  
23 which no (indiscernible) is permitted (indiscernible). It's  
24 unreasonable to then assume that employee of the same  
25 Government is permitted to engage in that action.

1 THE COURT: Well, what about rape?

2 MR. CHICHESTER: Excuse me, Your Honor?

3 THE COURT: What about rape? I mean, is the  
4 distinction here that violations of (indiscernible) the  
5 distinction is that the D.C. Court of Appeals cases that are  
6 cited in Haddon involved rape and shooting and that's more  
7 serious than (indiscernible) which could also involve both of  
8 those?

9 MR. CHICHESTER: Yes, rape is a (indiscernible) code  
10 violation.

11 THE COURT: Right.

12 MR. CHICHESTER: However, the Courts there did not  
13 look to the question of whether or not those duties were an  
14 incidental outgrowth. Their legitimate duties and  
15 furthermore, several courts since those decisions have  
16 discredited them as being at the extreme outer fringes.

17 THE COURT: Has the D.C. Court of Appeals  
18 discredited them?

19 MR. CHICHESTER: Not at this time, Your Honor.

20 THE COURT: Has this Court discredited them?

21 MR. CHICHESTER: We believe in part this Court has  
22 in its holding in Haddon by stating its emphasis that whether  
23 or not individuals furthering their employers interests is not  
24 sufficient. You must also look to whether or not those acts  
25 were incidental to (indiscernible) duties. In Congress,

1 (indiscernible) the Westfall Act was specifically addressing  
2 poor judgement, (indiscernible) negligence, in fact it states  
3 exclusively within the legislative --

4 THE COURT: Well, you're not arguing that we are  
5 bound by the D.C., we look to D.C. law in this, don't we? On  
6 this particular issue? You accept that in your brief.

7 MR. CHICHESTER: That is correct, Your Honor.

8 THE COURT: Okay.

9 MR. CHICHESTER: That is correct.

10 THE COURT: All right.

11 MR. CHICHESTER: However, D.C. law is simply a  
12 guide. The guiding case on this issue is Haddon.

13 THE COURT: Uh-huh.

14 MR. CHICHESTER: And coupled with the Westfall Act,  
15 where Congress specifically stated that when an individual is  
16 accused of egregious misconduct rather than (indiscernible) --

17 THE COURT: What's the torture here? You used the  
18 phrase torture. You used the phrase genocide. What was the  
19 torture here? What would the specifics act of torture that  
20 occurred?

21 MR. CHICHESTER: Whether or not the individual  
22 conduct rises to the level of torture should have been a  
23 question for the District Court. That is why a trial on the  
24 merits must be had.

25 THE COURT: What was the torture that occurred here?



1 ON BEHALF OF THE APPELLEES

2 MR. FREEMAN: Thank Your Honor, may it please the  
3 Court, Mark Freeman on behalf of the United States and the  
4 individual defendants. I think (indiscernible) here, things  
5 here, apart from the number of jurisdictional grounds  
6 including foremost political questions (indiscernible) Westlaw  
7 Act (indiscernible) immunity and statute of limitations. I'm  
8 happy to address the Court's (indiscernible) on any of these  
9 points?

10 THE COURT: Well, yes, let's start with my question  
11 about the individual defendants.

12 MR. FREEMAN: Yes, sir.

13 THE COURT: If we were to agree with you that the  
14 case against the United States is barred by the political  
15 question doctrine, wouldn't that, is it your view that that  
16 would also bar the suit against the individual defendants?

17 MR. FREEMAN: Yes, sir. (Indiscernible.)

18 THE COURT: You didn't argue, I don't think you  
19 argued that in your brief, that way?

20 MR. FREEMAN: We certainly argued it, that point, in  
21 the brief, the Westfall Act question first.

22 THE COURT: Right.

23 MR. FREEMAN: Tracking the way that this  
24 (indiscernible) to the case. We thought (indiscernible) just  
25 to underscore the point (indiscernible) really

1 (indiscernible).

2 THE COURT: Well, the question I'm asking is if we  
3 conclude that there is a political question doctrine bar to  
4 the suit against the U.S., do we need to go through the  
5 Westfall analysis?

6 MR. FREEMAN: No, I don't think you do.

7 THE COURT: Well, suppose as counsel just argued,  
8 that the secretary was acting outside the scope of his  
9 authority?

10 MR. FREEMAN: I don't think that the scope of  
11 employment (indiscernible) matters for purposes of  
12 (indiscernible) doctrine. I just don't think --

13 THE COURT: You don't?

14 MR. FREEMAN: No, I don't think so because whether  
15 he was acting outside the scope of his employment, and again,  
16 we don't think there's any substantive question that he was  
17 acting inside the scope.

18 THE COURT: I know. That's a separate question.  
19 I'm asking you why that isn't relevant, though. Why we don't  
20 have to deal with that issue. I mean, suppose on a trip to  
21 Diego Garcia, you know, the Secretary, on a vacation while he  
22 was there, committed a crime.

23 MR. FREEMAN: Yes, sir.

24 THE COURT: That wouldn't be covered by the  
25 political question doctrine, would it?

1 MR. FREEMAN: I don't think (indiscernible) --

2 THE COURT: Okay.

3 MR. FREEMAN: -- would necessarily be covered by the  
4 political question doctrine but --

5 THE COURT: So the question whether he's acting  
6 within the scope of his authority is relevant.

7 MR. FREEMAN: I don't think it is relevant on the  
8 allegations as stated in this (indiscernible) because the  
9 allegation, of course, is that what he did, was negotiate with  
10 the United States strategic allies to create a military base,  
11 protect the national security of the United States. That's  
12 what they claimed was outside of the scope of his employment.  
13 And to the extent that is what the (indiscernible) outside the  
14 scope of employment. That is (indiscernible) --

15 THE COURT: Okay, so you're saying it's relevant but  
16 the record of this case indicates they were acting within the  
17 scope of their employment? Is that a fair (indiscernible)?

18 MR. FREEMAN: Yes, (indiscernible) presents that the  
19 Court's analysis in Schneider. There, the (indiscernible)  
20 Westfall Act analysis was really (indiscernible) any  
21 obligation (indiscernible) argue to resolve that question.  
22 And it simply disposed of the case (indiscernible) political  
23 question.

24 THE COURT: But how do you reach Schneider's  
25 discussion of the, you know, Schneider's got a couple of pages

1 where it talks about the (indiscernible) allegations.

2 MR. FREEMAN: Yes.

3 THE COURT: And a part of that could be read as  
4 suggesting the issue wasn't properly raised.

5 MR. FREEMAN: I didn't read the case that way, Your  
6 Honor. I think that the Court was saying that, I think the  
7 phrase was half-hearted or half-hearted argument that they  
8 were acting outside the scope of their employment.  
9 (Indiscernible) court said was it just isn't particularly  
10 relevant because the allegations are that the, at bottom they  
11 assumed was an attack on the Government's policy decisions  
12 intervening in political events (indiscernible) and it was  
13 that that's just not the kind of (indiscernible). And we  
14 don't think this case is really any different. I'm happy to  
15 (indiscernible) question analysis but --

16 THE COURT: Well, (indiscernible) ask you about  
17 that. Isn't this case actually quite a bit different from  
18 Schneider in the sense that here the actions they're  
19 challenging, there's clearing people out of an area where  
20 military base is being prepared, built. It's completely  
21 different from torturing and assassinating someone. The  
22 issues they were raising are issues that we deal with, courts  
23 deal with all the time. I mean if this were a case that came  
24 up within the United States for example, and there were  
25 allegations that people were forcefully removed from an area

1 where a military base was being developed. This Court would  
2 have no, no Court would have any problem dealing with that  
3 issue. But I mean, it's under existing, clearly established  
4 standards. We know, you know, what torts are. We know what  
5 standards are for taking property. Isn't that exactly what  
6 they're challenging here?

7 MR. FREEMAN: Yes, Your Honor. If the issue had  
8 arisen in the United States, we don't doubt that there are  
9 core principles that apply. The same thing was true in  
10 Schneider. The obligation for a wrongful death, the  
11 intentional infliction of emotional distress. Those are  
12 (indiscernible) familiar (indiscernible). But the Court said  
13 in the Schneider case was when those, this tort, acts are  
14 alleged (indiscernible) torts are fundamentally questionings  
15 entrusted to the branch of such. You could not decide  
16 (indiscernible) legal questions involved or grant the relief  
17 requested without challenging decisions entrusted  
18 (indiscernible) then the case is a political (indiscernible).  
19 We don't think that's any less true.

20 THE COURT: Well, wouldn't that be true of  
21 developing a major military base in the United States?

22 MR. FREEMAN: Well, the question whether it would be  
23 true in the United States, I'm not sure, I don't doubt that  
24 that would be a harder question for the political question  
25 doctrine but I have to say here (indiscernible) allegation

1 that this be removed from the islands pursuant to bilateral  
2 diplomatic negotiations.

3 THE COURT: Yes, but they say they're not  
4 challenging any of that. They say they're not challenging any  
5 of that. They're not challenging the decision to build the  
6 base. They're not even challenging the decision to depopulate  
7 the island.

8 MR. FREEMAN: They do say that, Your Honor, but  
9 (indiscernible) --

10 THE COURT: Yes, but they, that's a fact of their  
11 case.

12 MR. FREEMAN: I don't think so. If you look at the  
13 allegations of their complaint they say, and this is paragraph  
14 17 (indiscernible) joint appendix. They acknowledge that part  
15 of a negotiation of, for the construction of this base, was to  
16 "(indiscernible) the displacement of the whole (indiscernible)  
17 depopulation of the island." So they acknowledge that part  
18 and parcel of the negotiations between the United States and a  
19 strategic ally in light of the cold war was the displacement  
20 of this population and they're claims if you look through  
21 counts 1 through 8 of their complaint, the gravamen of each  
22 one of those claims is that they should not have been removed  
23 from their native homeland and displaced. So every one of  
24 those claims, it's (indiscernible) attacks the basic decision  
25 that was the (indiscernible) negotiations between United

1 States and a strategic ally in the cold war. And that's just  
2 not the kind of question that (indiscernible).

3 THE COURT: Counsel, would you agree that there  
4 would be some limits placed upon the way that the Government  
5 carries out that policy?

6 MR. FREEMAN: Yes. I don't think that  
7 (indiscernible) limits, Your Honor. And we don't need to  
8 advance any extreme position here. Simply saying that a  
9 (indiscernible) challenges negotiations with a foreign power  
10 by an executive branch is not a (indiscernible).

11 THE COURT: If negotiations with the foreign  
12 government to remove people by torture, would that be beyond  
13 the limit?

14 MR. FREEMAN: I don't know (indiscernible). I mean,  
15 I don't mean to hide behind (indiscernible) court said is a  
16 very specific factual (indiscernible) claim by claim inquiry  
17 and my point here is simply that on the complaint as read by  
18 the complainants in this case, each one of their complaints  
19 challenges the decision to remove the plaintiffs from this  
20 island and that is, they say themselves, that was an  
21 (indiscernible) part of the negotiations.

22 THE COURT: So you're saying if they had tried  
23 instead not that they're complaint was with the decision to  
24 remove but the way the people were removed, would they have a  
25 case, do you think?

1           MR. FREEMAN: Maybe. But, and perhaps now is a good  
2 point to step aside from this and point out that even if the  
3 political question doctrine (indiscernible) bar this suit or  
4 everyone that (indiscernible) their suit, in a suit, they've  
5 gotten (indiscernible) liability on the United States that,  
6 and I just also want to be clear the Westlaw Act really does  
7 take the individual (indiscernible) out of this case. This is  
8 a suit against the government based on government policy. And  
9 at the end of the day, perhaps the easiest way to  
10 (indiscernible) it is to simply note that the events at issue  
11 here, took place 40 years ago. And we pointed out that the  
12 limitations question in our brief, in their reply brief they  
13 say well, we didn't know every detail (indiscernible) extent  
14 of the United States participation in the events here until  
15 1999. But of course that's not the (indiscernible) limitation  
16 purposes. So, on any number of grounds --

17           THE COURT: Is there any order in which we have to  
18 consider those issues?

19           MR. FREEMAN: No, Your Honor, these are  
20 (indiscernible) issues, including (indiscernible) limitations  
21 point because it goes to the (indiscernible). Thank you, Your  
22 Honor.

23           THE COURT: Thank you.

24           MR. FREEMAN: (Indiscernible.)

25           THE COURT: Did counsel have any time left?

1 THE COURT: No.

2 THE COURT: You can take two minutes.

3 MR. CHICHESTER: Thank you.

4 THE COURT: Would you start by responding to the  
5 point, counsel, the Government just made about your complaint?

6 MR. CHICHESTER: Which point?

7 THE COURT: His point is that if you read your  
8 complaint what you're really doing, regardless of what you say  
9 in your brief, that is, that you're not challenging the  
10 policy, the decision to depopulate. But if you read your  
11 complaint, that's what the complaint, in fact, does.

12 MR. CHICHESTER: Your Honor, I believe that's  
13 adamantly false. The Chagossians are clear. They do not  
14 challenge the existence of the base.

15 THE COURT: And so if we went back and read the  
16 complaint again, we would find that to be the case? We would  
17 find that the Government's assertion was wrong?

18 MR. CHICHESTER: Yes, Your Honor, and if you did  
19 that, you would be undertaking the discriminating analysis  
20 that the District Court failed to do.

21 THE COURT: Well, no, we would just be looking with  
22 the complaint to find out whether in fact, as you say in your  
23 brief, you're not challenging the decision to depopulate the  
24 island.

25 MR. CHICHESTER: That is correct, Your Honor. What

1 they challenge, what the Chagossians are seeking is to be able  
2 to have employment opportunities on the island of Diego  
3 Garcia. Just as other (indiscernible) civilians are permitted  
4 to do. They are also seeking to access the outlying islands  
5 just (indiscernible) to do (indiscernible) time but the  
6 Chagossians are precluded from doing so. In addition, this is  
7 not a case about (indiscernible) policy. It is about  
8 individual rights. As I mentioned before, this Court has  
9 acknowledged that just because the executive (indiscernible)  
10 foreign affairs does not give it the right to trample on  
11 rights. Counsel also noted that under the Baker court's  
12 decision there must be a (indiscernible). The District Court  
13 failed to enter into this (indiscernible), did not look at the  
14 individual claims and determine whether or not they were  
15 (indiscernible) through (indiscernible) policy. That is  
16 required.

17 THE COURT: Any further questions?

18 MR. CHICHESTER: (Indiscernible.)

19 THE COURT: I think your time is up, counsel.

20 MR. CHICHESTER: Thank you.

21 (Recess.)

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CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

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Heather Caban

2-22-06

DEPOSITION SERVICES, INC.