

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

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4  
5 LAURA GONZALEZ-VERA, et al.,

6 Appellees,

7 v.

No. 05-5017

8 HENRY ALFRED KISSINGER, et al.,

9 Appellants.  
10

11 Monday, March 27, 2006

12 Washington, D.C.

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

15 BEFORE:

16 CHIEF JUDGE GINSBURG AND CIRCUIT JUDGES ROGERS AND  
17 BROWN

18 APPEARANCES:

19 ON BEHALF OF THE APPELLANTS:

20 AARON LLOYD, (Student Counsel)

21 ON BEHALF OF THE APPELLEE:

22 ROBERT M. LOEB, ESQ.  
23  
24  
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P R O C E E D I N G S

THE CLERK: Case number 05-5017, Laura Gonzalez-Vera, et al., Appellants v. Henry Alfred Kissinger, in his individual capacity and as National Security Advisor and Secretary of State, et al. Mr. Lloyd for the Appellants; Mr. Loeb for the Appellees.

MR. TIGAR: Chief Judge Ginsburg, may it please the Court, my name is Michael Tigar. I'm a professor of American University of Washington College of Law. I want to introduce our student lawyer, Aaron Lloyd. We've filed the necessary papers and I ask the Court's leave that he present the oral argument this morning.

JUDGE GINSBURG: Be happy to hear from him.

MR. TIGAR: Thank you very much.

ORAL ARGUMENT OF AARON LLOYD

ON BEHALF OF THE APPELLANTS

MR. LLOYD: Good morning, Your Honors. May it please the Court, my name is Aaron Lloyd and I represent Laura Gonzalez-Vera and the other plaintiffs in this case.

Your Honors, my argument will demonstrate two points. First, Schneider, Youngstown, and the Committee of U.S. Citizens cases show that these claims are justiciable. Two, no immunities bar this Court from hearing this case and providing a remedy for the harms of torture and extrajudicial killing.

1           Your Honors, Schneider does not bar the hearing of  
2 this case. In Schneider, the Court found that it was U.S.  
3 national policy that a General be removed from power to  
4 prevent an unfriendly government from coming into office. At  
5 no point has the U.S. said that it was national policy to aid  
6 and abet torture. In contrast, aiding and abetting torture is  
7 clearly contrary to U.S. policy. The Hughes-Ryan Amendment in  
8 1974 clearly said that from that point onward Congress said  
9 that the CIA shall not engage in any activities other than  
10 strict intelligence gathering. The TVPA indicates  
11 Congressional policy that torture shall be both illegal and  
12 those who torture shall be liable. House Joint Resolution 605  
13 in 1984 stated that it is the continuing policy of Congress  
14 and the United States that torture shall be illegal at all  
15 times for any ideological reasons. And it is U.S. foreign  
16 policy to oppose torture.

17           The Youngstown case actually assumes that the case  
18 was justiciable and proceeded to the merits. In that case it  
19 was an action by the Chief Executive himself. And surely  
20 within the scope of employment for the President to take those  
21 actions and yet the Court found that it was beyond his  
22 authority, it was unconstitutional for the President himself  
23 to order that seizure.

24           In Committee of U.S. Citizens v. Reagan, the  
25 plaintiffs there were directly attacking a law passed by

1 Congress, signed by the Executive, that it was clearly U.S.  
2 national policy. It was that policy that they were  
3 challenging. Whereas, in this case, we do not challenge the  
4 foreign policy of the United States.

5 JUDGE GINSBURG: Well, it seems -- I may be wrong,  
6 but I thought there was an allegation in the complaint that  
7 the United States aided the Chilean quote terror.

8 MR. LLOYD: Yes, Your Honor.

9 JUDGE GINSBURG: So why -- that sounds like it was  
10 the policy of the United States.

11 MR. LLOYD: Your Honor, it is our complaint that  
12 Kissinger acted outside of his scope of employment. But if  
13 this Court finds that he did, in fact, act within his scope of  
14 employment, we hold that these are actions which no sovereign  
15 may authorize. That if it was found by this Court that the  
16 sovereign did, in fact, authorize these actions that jus  
17 cogens norms prevent this -- prevent an Executive from  
18 authorizing such things as torture. But we don't need to  
19 resolve that because the Executive and Congress have never  
20 authorized torture and there is no claim that it was ever U.S.  
21 national policy to aid and abet.

22 JUDGE GINSBURG: Well, if the Congress -- suppose  
23 the Congress, as it did through resolutions and bills, pretty  
24 clearly establishes that it is contrary to the policy of the  
25 United States to use or facilitate others in the use of

1 torture? And it is nonetheless, let us assume, the policy of  
2 a particular administration to do things that arguably are  
3 contrary to that, that arguably include torture, what is the  
4 policy of the United States in that circumstance?

5 MR. LLOYD: Well, I think in those circumstances  
6 that's -- it's the kind of general policy claim that something  
7 is part of policy that the U.S. Supreme Court in Hamdi said  
8 cannot be used as a way to not examine the individual harms.  
9 The fact that there is a broad executive policy doesn't mean a  
10 court cannot examine whether individuals have been harmed.

11 JUDGE BROWN: But don't you have more than that  
12 here? Because, in fact, you have a certification from the  
13 Attorney General that the Secretary was actually acting within  
14 the scope of his employment.

15 MR. LLOYD: Yes, Your Honor.

16 JUDGE BROWN: You have some evidence that, in fact,  
17 the initial mandate for this came from the President himself.  
18 So I think it's beyond a general statement of policy. So I  
19 think the question is then what -- how does it work when you  
20 say on the one hand, one part, one political department, the  
21 Congress, has enacted this statute? On the other hand,  
22 perhaps the Executive has given directions that are contrary  
23 to that.

24 MR. LLOYD: Your Honor, you are certainly correct  
25 that there is a certification here. We would dispute that

1 there is any directive from the Executive for these actions.  
2 The opposition would refer to a 1970 discussion that President  
3 Nixon had saying take all steps to remove Allende from power.  
4 But this case is not Schneider. You cannot draw out a  
5 conversation in 1970 regarding preventing someone coming into  
6 power as authorization that in 1973 to 1976 you should engage  
7 in a policy of aiding and abetting torture. But even with  
8 that hypothetical, if there was a U.S. policy to aid and abet  
9 and torture, which we have not seen pled here, Youngstown says  
10 that even actions of the Executive are judicially reviewable,  
11 especially when they are directed contrary to the policy of  
12 Congress.

13 JUDGE BROWN: Okay. Well, let's follow up on that a  
14 little bit because if, in fact -- what Youngstown said is the  
15 powers of the Executive may be at a low ebb when they come  
16 into conflict with the Congress. But does that mean that we  
17 just ignore them? I mean, the line between those two things  
18 has really never been firmly established. So is the question  
19 the power that Congress has to intrude on what the Executive  
20 does or is that itself a political question?

21 MR. LLOYD: Your Honor, I would say that, trying to  
22 follow -- stick with your hypothetical, that in that case they  
23 found that even when the Executive himself was directly  
24 contrary to Congress' will that that was justiciable and ruled  
25 against him. You basically take the Executive's own

1 individual powers under its different articles and subtract  
2 from them, from what Congress has expressed at its will. It's  
3 very clear the will of Congress. And in Youngstown, the  
4 action the Executive took was passably, you know, legal, but  
5 the Executive could believe that it is legal. There is no way  
6 the Executive could believe that authorizing torture would be  
7 legal and we would submit that it is even below the third  
8 category because there is no clear authorization to an  
9 Executive Officer to engage in such a policy.

10 Now, even assuming --

11 JUDGE GINSBURG: Mr. Lloyd?

12 MR. LLOYD: Yes, Your Honor?

13 JUDGE GINSBURG: The statute provides that the  
14 Secretary of State is responsible for both conducting the  
15 business of the Department in such a manner as the President  
16 shall direct.

17 MR. LLOYD: Yes, Your Honor.

18 JUDGE GINSBURG: So if you're correct that the  
19 President's direction, if contrary to statutory requirement,  
20 must yield and is unlawful --

21 MR. LLOYD: Yes, sir.

22 JUDGE GINSBURG: -- does it follow that Kissinger,  
23 or the Secretary, has acted unlawfully when his obligation is  
24 to follow the directions of the President?

25 MR. LLOYD: Yes, Your Honor, and I would submit that

1 it was actually the policy of the Executive as well from 1973  
2 to 1976 to be opposed to torture. So there is not statement.  
3 You will see in the authorized duties of the Secretary of  
4 State, from which you quote, there is a long list of kind of  
5 the pro forma everyday activities of the Secretary of State -  
6 negotiating with diplomats, going to events, you know, kind of  
7 the run-of-the-mill of the Secretary of State, and then any  
8 other authorized duties the President shall submit to him. I  
9 would say that that means that we would need a direct tie, we  
10 would need an order from the Executive saying you shall  
11 participate in these things.

12           Because both the common law and the will of Congress  
13 are extremely clear here. Torture has been outlawed since the  
14 time of Magna Carta. So to say that a generalized  
15 conversation in 1970 should lead an Executive Officer in 1973  
16 to 1976, even after Nixon is out of power, to believe that he  
17 could engage in these things, I don't believe that that  
18 section, directed -- as other authorized as the President  
19 shall direct, would be that authorization.

20           JUDGE GINSBURG: Let me ask you this, if the TVPA  
21 claim is justiciable, am I correct in recalling that that  
22 requires that the defendant had been acting under color of  
23 foreign law?

24           MR. LLOYD: Yes, Your Honor.

25           JUDGE GINSBURG: So what possible grounds do you

1 have for claiming that Kissinger is acting under color of  
2 foreign law?

3 MR. LLOYD: The color of foreign law requirement of  
4 the TVPA is clearly governed by Section 1983. The legislative  
5 history in other courts that have looked at this clearly say  
6 that you look to Section 1983. What is the standard under  
7 1983? It's willing participant. From the Adickes v. Kress  
8 and Princz cases, it's clear that a private individual, or  
9 someone acting as a private individual, cooperating, for  
10 example, as in the Princz case, with police officers is acting  
11 under the color of that law, under the law but under --

12 JUDGE GINSBURG: But in that case, and pardon me, as  
13 a general matter, does it not, asserting an authority, derive  
14 from that state?

15 MR. LLOYD: It's not required, Your Honor, that they  
16 assert the authority. The individuals in the Princz case who  
17 took Schwaney, Goodman Chair Schwaney [PHONETIC SP.] aside on  
18 a highway and beat them to death weren't necessarily asserting  
19 that they were policemen or that they had the authority of  
20 policemen, they were willing participants with police officers  
21 in that engagement. So under color of foreign law, clearly  
22 the Chilean actors involved were under color of foreign law.  
23 They were --

24 JUDGE GINSBURG: I didn't know if that was clear or  
25 not. I thought, perhaps, they were in violation of their own

1 law.

2 MR. LLOYD: It is not legal under the law of Chile  
3 to torture people. There was no claim that the Chilean  
4 officers were pronouncing judicial verdicts when they were  
5 extrajudicially killing those person or when they were  
6 torturing them.

7 JUDGE GINSBURG: The claim is that they were  
8 nonetheless abusing their office.

9 MR. LLOYD: Well, they were officers. They were  
10 members of the DINA, the Chilean Secret Service. And I would  
11 submit, Your Honor, that if we are to find that Kissinger is  
12 within the scope of employment this would be a factual issue  
13 that should have been examined in the lower court in a factual  
14 hearing. It's clear reversible error for the court below to  
15 have said that scope of employment is a question of law. In  
16 the opinion, page 11, footnote 9, appendix page 170, the Court  
17 clearly says, "scope of employment for purposes of immunity is  
18 a question of law." This, clearly, is incorrect and in  
19 contrast with the rest of the jurisprudence of both this  
20 Circuit and the D.C. Circuit, which we look to.

21 In the D.C. Circuit, it says --

22 JUDGE GINSBURG: Wait a minute, I'm confused. This  
23 Circuit and the D.C. Circuit?

24 MR. LLOYD: I'm sorry. The D.C. State Circuit. I'm  
25 sorry. The D.C. State Circuit is what this Circuit looks to

1 for scope of employment in the agency --

2 JUDGE GINSBURG: Local law.

3 MR. LLOYD: Local law. Yes, Your Honor.

4 In the Boykin case, Boykin v. District of Columbia,  
5 the Court ruled it is a question of fact, scope of his  
6 employment is a question of fact, for the jury. In Johnson v.  
7 Weinberg, they reversed the Court below saying it was an error  
8 for the Court to take the question from the jury because it  
9 was a question of fact. In Lyon v. Carey in this Court, they  
10 said the case was probably won for the jury. And in Kimbrow v.  
11 Velten, this Court said, "the certification," which is, Your  
12 Honor, reviewable by this Court and is challengeable by the  
13 plaintiffs, "the certification obliges the plaintiff to come  
14 forward after reasonable discovery with evidence supporting  
15 his allegations as to scope and to the merits. If there is a  
16 material dispute, the Court must resolve it in an evidentiary  
17 hearing." I would emphasize the word "must."

18 JUDGE GINSBURG: The AG certification is prima facie  
19 evidence, correct? The defendant was acting within the scope  
20 of his employment.

21 MR. LLOYD: Yes, but --

22 JUDGE GINSBURG: So your burden is to dislodge that.

23 MR. LLOYD: It is our burden, Your Honor, but as  
24 they said in Kimbrow, it is our burden after reasonable  
25 discovery with a hearing to prove our allegations as to he was

1 outside of the scope. In Stokes v. Cross, as Your Honor  
2 ruled, the plaintiff was not required to allege the existence  
3 of the evidence he might obtain through discovery. And in  
4 Kimbrow, it said that the statutory scheme here does not treat  
5 certification as really having any particular evidentiary  
6 weight.

7 JUDGE GINSBURG: What would you be seeking in  
8 discovery?

9 MR. LLOYD: Your Honor, we would be seeking in  
10 discovery to depose both Defendant Kissinger and to depose  
11 Defendant Michael Vernon Townley, who has already had a  
12 default judgment held against him. We would be seeking  
13 documents.

14 JUDGE GINSBURG: Right, but what are you asking?

15 MR. LLOYD: We are asking for --

16 JUDGE GINSBURG: What are you asking in discovery of  
17 those individuals?

18 MR. LLOYD: We would be asking for information that  
19 would establish that Defendant Kissinger was doing exactly  
20 what we allege, aiding and abetting, acting jointly with  
21 Chilean actors that tortured our plaintiffs. Your Honor, the  
22 Court below intimated that we did not even allege that  
23 Kissinger ordered, authorized, supported, or encouraged these  
24 acts of torture. That is exactly what we allege --

25 JUDGE GINSBURG: But the problem is you have alleged

1 also that the United States did that.

2 MR. LLOYD: Yes, Your Honor.

3 JUDGE GINSBURG: Which brings the first allegation  
4 within the scope of employment.

5 MR. LLOYD: Your Honor, it is necessary sometimes to  
6 plead in the alternative. So it's clear that --

7 JUDGE GINSBURG: Is that the way it's structured?

8 MR. LLOYD: Your Honor, we have claims against the  
9 United States and against Defendant Kissinger. This case is  
10 against both for each of their particular actions. The CIA  
11 and the Department of State were intimately involved, but not  
12 through the will of Congress, not through funding that was  
13 authorized for these purposes.

14 JUDGE GINSBURG: Thank you, Mr. Lloyd. You have  
15 used all of your time. Had you sought to save some for  
16 rebuttal?

17 MR. LLOYD: Yes, two minutes for rebuttal.

18 JUDGE GINSBURG: We'll give you at least a minute of  
19 that.

20 MR. LLOYD: Thank you, Your Honors.

21 ORAL ARGUMENT OF ROBERT M. LOEB, ESQ.

22 ON BEHALF OF THE APPELLEES

23 MR. LOEB: May it please the Court, my name is  
24 Robert Loeb from the Department of Justice and I represent the  
25 Appellees in this appeal, Dr. Kissinger and the United States.

1           It is our position that the Schneider case is  
2 controlling in this matter. It arises from very similar  
3 claims brought by the same lawyers against Dr. Kissinger and  
4 the United States regarding the coup, supporting the coup in  
5 Chile, and this Court held that it was a non-justiciable  
6 political question. Hereto, we have the exact same sort of  
7 claims regarding supporting the coup in Chile. And so as to  
8 that aspect of the complaint Schneider is clearly controlling.

9           The other half of the complaint is supporting the  
10 resulting government after the coup. And this is even more  
11 clearly covered by the rationale of Schneider. And if you  
12 look at the allegations in their complaint, the allegations  
13 are even more clearly than in Schneider regarding policy  
14 decisions. If you look at pages 19 and 20 of the Joint  
15 Appendix, what they are accusing Dr. Kissinger of is acting as  
16 Secretary of State and supporting a regime, if you look at  
17 paragraph 68, and refusing to speak out against atrocities and  
18 still -- the United States and Henry Kissinger said still  
19 reported the regime in Chile.

20           In paragraph 74, it says that they were still  
21 sympathetic to the regime, even though there were allegations  
22 of these human rights abuses. So as they say here, they, in  
23 their argument in their briefs, write it in a way suggesting  
24 that Dr. Kissinger somehow committed the torture himself.  
25 What they are really accusing Dr. Kissinger of, as Secretary

1 of State, is not criticizing sufficiently the resulting  
2 government after the coup. And that, clearly --

3 JUDGE ROGERS: [VOICES OVERLAP] pleading deficiency?

4 MR. LOEB: Well, is it possible to be a complaint  
5 here that wouldn't fall into a political question? Perhaps.  
6 But this complaint, clearly, is not just touching upon matters  
7 of foreign affairs but is basically an attack on the conduct  
8 of foreign affairs by the Secretary of State.

9 JUDGE ROGERS: In other words, I'm just trying to  
10 understand if there is any leeway for cause of action at all  
11 when it pertains to a government official in your view?

12 MR. LEOB: There may not be. I can't come up with  
13 every --

14 JUDGE ROGERS: If they had alleged that Dr.  
15 Kissinger had told General X, a Chilean general, to torture  
16 the plaintiff or the plaintiff's relatives, would that be  
17 enough?

18 MR. LEOB: I --

19 JUDGE ROGERS: Just as a pleading question.

20 MR. LEOB: In the pleading question? On Schneider,  
21 they alleged that Dr. Kissinger was aware that General  
22 Schneider was going to be kidnaped and was aware, or should  
23 have been aware, that it would result in his torture and his  
24 murder. So --

25 JUDGE ROGERS: Being aware that atrocities are

1 happening is a different, in my hypothetical, of an allegation  
2 [VOICES OVERLAPS].

3 MR. LOEB: And yours is an extreme hypothetical,  
4 which is far afield from here, but I would say looking at the  
5 rationale of China that said that in that case they are  
6 alleging extreme measures and that a court is not very well  
7 positioned to decide whether those extreme measures were  
8 required under those circumstances or not, that that was a  
9 matter of national security, a matter of foreign affairs. And  
10 even if they are alleging that it was wrongful and that it  
11 ended up in extrajudicial killing and torture in the Schneider  
12 case, a court was not situated to second guess those,  
13 especially in the hindsight of 30 years.

14 JUDGE ROGERS: So, in other words, if the complaint  
15 pled we take no issue with U.S. policy, either in terms of a  
16 coup or in supporting the Allende government afterward. What  
17 we are focused on are the actions of one U.S. official and we  
18 make the following allegations. Does that get beyond  
19 Schneider?

20 MR. LOEB: It makes it a more difficult case than  
21 Schneider. I think you definitely --

22 JUDGE ROGERS: No, all I'm trying to understand is  
23 the Justice Department's position as to whether Schneider is a  
24 blanket cover for anything done by a U.S. official where the  
25 Attorney General certifies --

1 MR. LOEB: No, Your Honor --

2 JUDGE ROGERS: -- or where the line is drawn.

3 MR. LOEB: The Supreme Court and this Court says  
4 that as to questions, political questions, and  
5 nonjusticiability, you need to look at each case on their  
6 particular facts.

7 JUDGE ROGERS: I gave you a hypothetical.

8 MR. LOEB: And I don't think I can give a specific  
9 answer to that hypothetical without looking at, you know,  
10 where you're saying that they particularly ordered it and --

11 JUDGE ROGERS: So even in my hypothetical that would  
12 still be insufficient under your -- on your legal position?

13 MR. LOEB: It might be, Your Honor. And it's a much  
14 harder case than this case.

15 JUDGE ROGERS: If they had a video showing that he  
16 pulled a trigger?

17 MR. LOEB: If there was a --

18 JUDGE ROGERS: In other words, is it the  
19 Department's position that Congress could not have intended  
20 that the Torture Victim Protection Act would apply to a U.S.  
21 official, no matter how egregious his action, where he's in a  
22 position such as National Security Advisor or Secretary of  
23 State?

24 MR. LOEB: Well, clearly, it only applies to someone  
25 acting under color of foreign law. And the Secretary of State

1 in carrying out the U.S. foreign policy is going to be almost  
2 always acting under color of U.S. law and not -- and to the  
3 extent where U.S. officials are involved in violence abroad,  
4 as you're suggesting, you have to recall if the United States  
5 decides that there is a regime abroad which is a threat to the  
6 United States, we, of course, can use our military power to  
7 commit acts of killing and violence, which, of course -- you  
8 know, and the question of how much force to use and whether to  
9 use it or not is a quintessential political question.

10 JUDGE GINSBURG: This statute wouldn't apply only to  
11 senior officials, correct?

12 MR. LOEB: Of course not, Your Honor.

13 JUDGE GINSBURG: It applies to everyone. So a rogue  
14 agent in the field who is turned and acts in concert with the  
15 foreign government's intelligence service and substantively  
16 violates the TVPA would seem to fit the bill.

17 MR. LOEB: Fit the bill? He would be within the  
18 statute, Your Honor?

19 JUDGE GINSBURG: Fits the bill of acting under color  
20 of foreign law.

21 MR. LOEB: It might be in that circumstance.  
22 Because the question is under the West v. Atkins analysis, if  
23 one was to buy into the 1983, is whether he's possessing his  
24 authority by virtue of Chilean law and where he's acting as a  
25 rogue authority and has no role regarding what he's doing in

1 Chile under U.S. law, it may be that he's deriving his  
2 authority in that context.

3 JUDGE GINSBURG: Well, if he's a station agent at  
4 the embassy in Chile, okay, and he's authorized there to act  
5 on behalf of the CIA, but instead he starts acting, as I said,  
6 in concert with the agents of the Chilean government, going  
7 out with them and identifying people to be picked up and  
8 tortured or what have you, as you said, facts matter, right?

9 MR. LOEB: The facts matter, but sometimes those  
10 factual inquiries will themselves derive into sort of  
11 political question inquiries about whether a foreign  
12 intelligence agency was acting within the scope of his  
13 assignment or under -- and what was the level of cooperation  
14 with another foreign government. There are a lot of --

15 JUDGE ROGERS: If it's a question of fact, then are  
16 the plaintiffs entitled to some limited discovery here?

17 MR. LOEB: In a wildly different hypothetical.

18 JUDGE ROGERS: No, with this complaint that they  
19 have now.

20 MR. LOEB: With the complaint here, they are just  
21 alleging that Henry Kissinger didn't sufficiently criticize  
22 the government of Chile --

23 JUDGE ROGERS: No, in fairness, Mr. Leob, they  
24 allege more than that.

25 MR. LOEB: In, in, in --

1 JUDGE ROGERS: So he's acting jointly.

2 MR. LOEB: In acting jointly, but all of the -- I  
3 mean, they have to in their complaint give a -- they plead  
4 facts in their complaint and those facts all are about Henry  
5 Kissinger supporting the regime, reluctant to speak about  
6 against the regime.

7 That in here it's a very telling thing, the support  
8 of the dictatorship, this is paragraph 72 on page 20 of the  
9 Joint Appendix, is illustrated. How is it illustrated?  
10 Because the United States government continued military  
11 assistance to Chile. You know, Henry Kissinger wasn't  
12 personally selling military arms to the government there. It  
13 was a U.S. policy to support the regime, which they are  
14 accusing him of aiding and abetting, and selling arms to that  
15 regime. So, you know, with due respect, Your Honor, that's  
16 the allegations of the complaint here. And this is an area  
17 fraught with hypotheticals, but the complaint here clearly  
18 falls within, even more so, within the scope of Schneider than  
19 Schneider itself.

20 I'm happy to address any questions that you have,  
21 including the question you asked for supplemental briefs on.

22 JUDGE GINSBURG: Well, I want to follow up a little  
23 bit on the question that Judge Brown raised earlier on. At  
24 least it was implicit in what she was saying, which is to ask  
25 whether the Congress -- when the Congress has, by statute,

1 laid down a mandate for foreign policy. Does that alter the  
2 line between -- or alter the precedence of authority in any  
3 way?

4 MR. LOEB: Well, this Court, the Crocket case dealt  
5 with a similar situation where it was the case being brought  
6 saying you are basically violating the War Powers Act and a  
7 statute we said which you could no longer support this regime  
8 abroad without a particular declaration of emergency, which  
9 hasn't taken effect. And this Court said in Crocket it was a  
10 political question raised as to whether that we could continue  
11 to have military support for that regime or not or whether the  
12 War Powers Act was violated or not.

13 So, I mean, it would depend on the particular  
14 statute and the bond, but as this Court said in Schneider,  
15 these type of political disputes about how much force to use,  
16 how much support to another regime to give are matters for the  
17 political branches. And there are political remedies. There  
18 are investigations. Congress can cut off funds. And as this  
19 Court noted, there is the even threat of impeachment which can  
20 be brought. So there are political remedies when there are  
21 these political checks.

22 And it's hard to imagine also a situation where that  
23 kind of check on the Executive would be subject to private  
24 enforcement. But if you had a statute that was subject to  
25 private enforcement, you know, it might be possible. But I

1 think the Crocket case gives it a good analysis of how must a  
2 simple restriction on the Executive about when and how to use  
3 force is generally not subject to political oversight,  
4 judicial oversight.

5 JUDGE BROWN: What if you don't have a simple  
6 restriction but what you have is really a conflict? Because  
7 here what's being said is on the one hand this was U.S.  
8 policy, this person was acting within the scope of his  
9 employment. What plaintiffs are saying is but, and the way  
10 the trial court analyzed this here was to say, well, there  
11 might be Westfall immunity but, perhaps, the TVPA falls into  
12 the exception. So what you really have is a conflict between  
13 the two branches, perhaps. And if you have that, how do you  
14 resolve it? I mean, does that remain a political question or  
15 is it justiciable but difficult?

16 MR. LOEB: It may be nonjusticiable -- let me just  
17 get to the conflict, as you asserted here. They say it's a  
18 conflict because there is a U.S. policy against torture and  
19 Henry Kissinger had a policy in favor of torture. Again, his  
20 complaint says the policy was supporting a regime which they  
21 say engaged in torture and human rights abuses.

22 JUDGE BROWN: Yeah, but I want to get beyond. I  
23 understand you think their complaint is deficient and you  
24 think that what they've said is not, but what I want you to  
25 tell me is what happens if you've got a sufficient complaint

1 here because the basis of the Political Question Doctrine and  
2 the Court's restraint in that area is based in part on  
3 separation of powers, okay? I mean, that's the justification  
4 for it. So if you have, in fact, a conflict between those  
5 political departments, what does the Court do?

6 MR. LOEB: Well, there is a conflict, as far as  
7 policy and how much force to use, especially in an area of  
8 foreign affairs, it is a matter of between the political  
9 branches, which this Court in Schneider I think wisely said it  
10 was a matter that the court must leave to the political  
11 remedies. And I think that's the short answer.

12 But as to the -- for the Torture Victim Protection  
13 Act, there is a remedy there that is not subject to Westfall  
14 immunity because it is a cause of action. But it is still  
15 subject to the Political Question Doctrine, where the acts  
16 here alleged are ones of foreign policy, about whether and how  
17 much to support a regime which they allege was engaging in  
18 human rights abuses.

19 For example, under their theory, if someone alleged  
20 there were human rights abuses in Iraq by the new regime  
21 there, we should basically stop supporting that regime as a  
22 matter -- it would be -- the officials who were doing that  
23 would be subject to liability in the future, personal  
24 liability in the future. The question of whether and how to  
25 support a regime, which has some human rights abuses, and

1 there are plenty of regimes around the world with spotty human  
2 rights records, but we're still trying to build relations with  
3 or we have national security interests in building relations  
4 with them and trying to coax them to having better human  
5 rights [INDISCERNIBLE]. And to say that plaintiffs can come  
6 to court and litigate our relationship with those countries,  
7 litigate whether we should have been more strongly objecting  
8 to their activities, whether we should cut off all aid to them  
9 because there were these allegations of human rights abuses.  
10 These are all matters a court just simply cannot assess, Your  
11 Honor.

12 JUDGE ROGERS: So that excludes the rogue official  
13 as well?

14 MR. LOEB: I think Chief Judge Ginsburg's  
15 hypothetical, you know, it depends on how rogue he is and  
16 outside his scope of authority. At some point we're going to  
17 say that he was not acting within the scope of his authority  
18 and that he was just acting alterverous [PHONETIC SP.] and  
19 there won't be even a scope certification in that regard.

20 JUDGE ROGERS: Again, that's basically a political  
21 decision by the Attorney General.

22 MR. LOEB: And under the Haddon case, you look, as  
23 far as the scope certification, at the allegations in the  
24 complaint and whether there is, on the face of the complaint,  
25 it's within the scope of the authority. And here, as far as

1 the Secretary of State, all of the factual allegations, if  
2 taken as true, are all about his actions, acting as Secretary  
3 of State, speaking out one way or the other about this regime,  
4 whether in support of it or not sufficiently condemning it or  
5 supporting military aid to it.

6 So here, taking the facts on their face, clearly, a  
7 court has the authority to say on this face the scope  
8 certification was correct and, similarly, into the political  
9 question you can say, looking at the face of the complaint,  
10 his allegations fall within that realm. Thank you.

11 JUDGE GINSBURG: Thank you, Mr. Loeb. Lloyd, you  
12 have a minute.

13 REBUTTAL ARGUMENT OF AARON LLOYD

14 ON BEHALF OF THE APPELLEES

15 MR. LLOYD: Your Honor, present Counsel referenced  
16 the Haddon case. The Haddon case, there was no factual  
17 dispute because the facts below did not dispute the facts.  
18 And the record so states that is, in fact, what I would say is  
19 the origin of the court below's error. That they said because  
20 the parties did not dispute the facts it is, therefore, a  
21 conclusion of law.

22 The Political Question Doctrine does not bar this  
23 case. The Baker case specifically says the PQ label has an  
24 ability to obscure the need for case by case inquiry. And the  
25 court below ably discussed the Political Question Doctrine and

1 decided not to rely on it, in part because of the scattered,  
2 disorganized nature of the Political Question Doctrine.

3           The Crocket case is clearly distinguishable. It's a  
4 war powers issue. We do not challenge such clear executive  
5 powers. The court below and the government are both picking  
6 and choosing from our complaint to find the things that they  
7 want to say we allege. We have alleged aiding and abetting  
8 and acting jointing in torture.

9           I see that my time has expired.

10           JUDGE GINSBURG: Thank you, Mr. Lloyd. Welcome  
11 back, when you are admitted to the bar. Mr. Lloyd and Mr.  
12 Loeb, thank you, the case is submitted.

13           (Recess.)

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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Debra L. Blum

June 15, 2006

DEPOSITION SERVICES, INC.