No. 05-743

In the Supreme Court of the United States

RENÉ SCHNEIDER, ET AL., PETITIONERS

v.

HENRY KISSINGER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioners' tort claims, based on the United States' alleged involvement in covert activities in Chile during the 1970s, are not justiciable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 412 F.3d 190. The memorandum opinion of the district court (Pet. App. 24a-59a) is reported at 310 F. Supp. 2d 251.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2005. A petition for rehearing was denied on September 9, 2005 (Pet. App. 62a-65a). The petition for a writ of certiorari was filed on December 8, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the United States' alleged involvement in covert activities in Chile during the 1970s,

and, in particular, in the death of General René Schneider, the commander-in-chief of the Chilean army. Petitioners are René and Raúl Schneider, General Schneider's surviving sons, and José Pertierra, the personal representative of General Schneider's estate. Respondents are the United States and Dr. Henry Kissinger, who served as National Security Advisor to President Nixon during the events at issue. Petitioners filed suit against respondents in the United States District Court for the District of Columbia, alleging various tort claims arising from the death of General Schneider. The district court dismissed petitioners' claims on the ground, *inter alia*, that they presented a nonjusticiable political question, Pet. App. 24a-59a, and the court of appeals affirmed, *id.* at 1a-21a.

1. As alleged in the complaint, the facts are as follows. In September 1970, Salvador Allende, leader of the Socialist Party of Chile, won a slight plurality of the vote in Chile's presidential election. In the wake of the Chilean election, "[k]ey United States policymakers," who were opposed to the formation of a socialist government in a Latin American country, began assessing "the pros and cons and problems and prospects involved should a Chilean military coup be organized . . . with U.S. assistance." After consulting with senior officials (including National Security Advisor Kissinger), President Nixon undertook to prevent Allende from becoming president of Chile, and ordered the Central Intelligence Agency (CIA) to "play a direct role in organizing a military coup d'etat." Pet. App. 3a, 26a-28a.

As part of the efforts to prevent Allende from taking power, the United States' ambassador to Chile, Edward Korry, was authorized to make contacts with the Chilean military and to encourage a coup. Ambassador Korry

informed National Security Advisor Kissinger that "General Schneider would have to be neutralized, by displacement if necessary," if any coup were to succeed. In October 1970, the CIA learned that Chilean dissidents, to whom the CIA had provided weapons and other support, intended to kidnap General Schneider. The complaint alleges that respondents "never gave any instruction to leave General Schneider unharmed" and that "[i]t was foreseeable . . . that the kidnaping would create a grave risk of death to General Schneider and consequent harm to his family." After two unsuccessful kidnapping attempts, General Schneider was shot during a third attempt on October 22, 1970, and died of his wounds a few days later. Allende took office in November 1970 and served as president until he was deposed in 1973. Pet. App. 4a, 28a-29a.[1]

2. On September 10, 2001—more than 30 years after the alleged conduct—petitioners filed suit against respondents in the United States District Court for the District of Columbia.[2] As amended, petitioners' complaint alleged that respondents had engaged in summary execution, torture, cruel or degrading treatment, arbitrary detention, conduct resulting in wrongful death,

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[1] A Senate committee later found that, while American officials had encouraged the dissidents who attempted to kidnap General Schneider, they had withdrawn active support of the dissidents before the ultimate kidnapping attempt, and did not desire or encourage General Schneider's death. See *Alleged Assassination Plots Involving Foreign Leaders: An Interim Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. No. 465, 94th Cong., 1st Sess. 5, 256 (1975).

[2] Petitioners also filed suit against Richard M. Helms, who served as Director of Central Intelligence during the events at issue. Petitioners dismissed their claims against Helms after he died in 2002.

assault and battery, and intentional infliction of emotional distress, in violation of federal, District of Columbia, international, and Chilean law. Pet. App. 31a-32a.

After the Attorney General certified that former National Security Advisor Kissinger was acting within the scope of his office or employment at the time of the incident out of which the claims arose, the United States sought to be substituted as defendant on petitioner's claims against Kissinger pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(d)(1). Pet. App. 4a-5a. Respondents then moved to dismiss petitioners' claims on the grounds (1) that the district court lacked jurisdiction under the political question doctrine and (2) that petitioners had failed to state a claim because the United States, as the sole appropriate defendant, had sovereign immunity from petitioners' claims. *Id.* at 5a.

3. The district court granted respondents' motion to dismiss. Pet. App. 24a-59a.

The district court first held that it lacked jurisdiction under the political question doctrine. Pet. App. 33a-45a. The court reasoned that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Id.* at 33a.

The district court explained that, in *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court enumerated six factors, any one of which would render a case nonjusticiable under the political question doctrine:

> [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. at 217; see Pet. App. 33a-34a.

In this case, the district court concluded that the first four *Baker* factors were all met. Pet. App. 34a. The court reasoned that "[t]he decision to support a coup of the Chilean Government * * *, and the means by which the United States Government sought to effect that goal, implicate policy decisions in the murky realm of foreign affairs and national security best left to the political branches." *Id.* at 35a. The court rejected petitioners' argument that "this is a 'mere tort' case that does not raise any political questions." *Id.* at 36a. The court reasoned that petitioners' argument "begs the question" because "[t]he legality or propriety of [respondents'] actions in allegedly supporting the attempted kidnaping and resulting death of General Schneider * * * can be ascertained only by an examination of the genesis of U.S. foreign policy in 1970 and the President's decisions on how to implement it." *Id.* at 38a. "[Petitioners'] tort allegations," the court concluded, "go to the very heart of the political question doctrine: foreign policy directives from the President himself." *Id.* at 39a.

The district court also held, in the alternative, that petitioners had failed to state a claim because the United States, as the sole appropriate defendant, had

sovereign immunity from petitioners' claims. Pet. App. 46a-58a. The court first concluded that the United States was properly substituted for former National Security Advisor Kissinger under the Westfall Act, on the ground that "Dr. Kissinger was acting within the scope of his employment as National Security Advisor to President Nixon when he allegedly conspired to kidnap General Schneider." *Id.* at 49a. The court rejected petitioners' contention that Kissinger was not entitled to immunity under a different provision of the Westfall Act, 28 U.S.C. 2679(b)(2)(B), because petitioners had failed to identify any statute that gave rise to a substantive claim against Kissinger (with the possible exception of a claim under the Torture Victims Protection Act of 1991, 28 U.S.C. 1350 note, as to which Kissinger would have qualified immunity in any event). Pet. App. 50a-53a. The court then concluded that the United States was entitled to sovereign immunity, on the ground that petitioners had failed to identify a valid waiver of immunity. *Id.* at 55a. The court noted that petitioners had asserted a claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1), but reasoned that they could not avail themselves of the waiver of immunity in that statute because they had failed to exhaust their administrative remedies. Pet. App. 55a-58a.

4. The court of appeals affirmed. Pet. App. 1a-21a. The court concluded that this case presented a nonjusticiable political question and agreed that it should be dismissed for want of jurisdiction. *Id.* at 21a.

Like the district court, the court of appeals determined that the first four factors articulated by this Court in *Baker* were all satisfied in this case. Pet. App. 8a-16a. As to the first factor ("a textually demonstrable constitutional commitment of the issue to a coordinate

political department"), the court reasoned that "there could * * * be no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Id.* at 8a. "Neither can it be gainsaid," the court added, "that the subject matter of the instant case involves the foreign policy decisions of the United States." *Id.* at 10a. As to the second factor ("a lack of judicially discoverable and manageable standards for resolving [the issue]"), the court noted that "for a court to adjudicate this case would be for that court to undertake the determination of whether, 35 years ago, at the height of the Cold War * * *, it was proper for an Executive branch official . . . to support covert actions against a committed Marxist who was set to take power in a Latin American country." *Id.* at 11a-12a (internal quotation marks and citation omitted). "The courts," the court of appeals asserted, "are * * * ill-suited to displace the political branches in such decision-making." *Ibid.*

As to the third factor ("the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"), the court of appeals reasoned that, in order to decide the case, "we would be forced to pass judgment on the policy-based decision of the executive to use covert action to prevent that government from taking power." Pet. App. 15a. The court reiterated that "[t]o determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking." *Ibid.* Finally, as to the fourth factor ("the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"), the court noted that, "[f]rom what we have concluded as to the first

three *Baker* factors, it seems apparent to us that we could not determine [petitioners'] claims without passing judgment on the decision of the executive branch to participate in the alleged covert operations." *Ibid.* The court further noted that the Executive Branch's alleged participation "has already been the subject of a congressional investigation." *Ibid.*

Because the court of appeals affirmed the district court's decision to dismiss for lack of subject matter jurisdiction, it did not reach the question whether petitioner's complaint could also be dismissed on grounds of sovereign immunity.

5. The court of appeals denied a petition for panel rehearing and rehearing en banc, with then-Judge Roberts not participating. Pet. App. 62a-65a.

ARGUMENT

The unanimous decision of the court of appeals that this action is nonjusticiable is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly concluded that this case should be dismissed for lack of subject matter jurisdiction under the political question doctrine. In *Baker* v. *Carr*, this Court enumerated six factors that would render a case nonjusticiable under that doctrine. 369 U.S. at 217. The Court made clear that a case could properly be dismissed under the political question doctrine even if only *one* of the those factors was satisfied. See *ibid.* In this case, the court of appeals and the district court determined that at least *four* of the *Baker* factors were satisfied. See Pet. App. 8a-16a, 33a-45a. That analysis was plainly correct.

Petitioners' claims concern the alleged involvement of American officials in the death of the commander-in-chief of the Chilean army. Adjudicating those claims would necessarily require a court to evaluate the reasonableness of the President's broader decision, at the height of the Cold War, to take actions to prevent a Marxist-led government from taking power in Chile. See, *e.g.*, Pet. App. 10a-11a (noting that "officials[] of the executive branch * * * determined that it was in the best interest of the United States to take such steps as they deemed necessary to prevent the establishment of a government in a Western Hemisphere nation that * * * could lead to the establishment or spread of communism" and that "that decision was classically within the province of the political branches, not the courts"); *id.* at 37a (noting that "[t]he plaintiffs here * * * ask this Court to assess the reasonableness of the Executive Branch's decision to seek—perhaps through violent means—a change in the makeup of a foreign sovereign"). It is therefore clear that adjudication of petitioners' claims would implicate the constitutional commitment of the conduct of our Nation's foreign relations to the Executive and Legislative Branches; that there are no judicially discoverable or manageable standards for the adjudication of petitioners' claims; that the adjudication of petitioners' claims would necessarily involve a policy determination of a kind clearly for nonjudicial discretion; and that it would be impossible to adjudicate those claims without expressing a lack of respect for the Executive and Legislative Branches. *Baker*, 369 U.S. at 217.

2. Petitioners do not expressly contend that the decision of the court of appeals conflicts with the decision of any other court of appeals, or that the court of ap-

peals misapplied any of the factors articulated in *Baker*. Instead, they merely contend that lower courts "have displayed confusion over the proper application of the political question doctrine," and that the Court could use this case to "revisit the clarity and intelligibility of the *Baker* factors." Pet. 5. That argument should be rejected.

Petitioners do not identify any case involving the political question doctrine (other than this one) that they believe was incorrectly decided. Instead, the various cases cited by petitioner (Pet. 7-9) stand only for the unremarkable proposition that, in some cases, federal courts have concluded that the political question doctrine precludes judicial resolution of claims touching on foreign-policy and national-security concerns, and, in other cases, they have concluded that it does not. The differing results in those cases are wholly consistent with the principle that the political question doctrine requires a "case-by-case inquiry." *Baker*, 369 U.S. at 211; see generally 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3534, at 454 (2d ed. 1984) (noting that "application of the political question tests of [*Baker*] is * * * highly individualized").

To the extent that petitioners suggest that the political question doctrine should be inapplicable whenever a plaintiff alleges a violation of individual rights, see, *e.g.*, Pet. 11 (asserting that "[t]he political question doctrine, if used to exempt review of violations of individual rights, places the Executive branch above the law"), they effectively challenge the validity of the political question doctrine itself. As the court of appeals observed, however, "[t]he principle that the courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion

of the judiciary is as old as the fundamental principle of judicial review." Pet. App. 6a (internal quotation marks and citation omitted).

Indeed, the very case that petitioners cite (Pet. 13) for the proposition that "[t]his Court has a long history of protecting violations of individual rights," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), itself recognized that there is a class of cases involving "political act[s], belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive[,] and for any misconduct respecting which, the injured individual has no remedy," *id.* at 164. There is therefore no basis for the conclusion that the political question doctrine is inapplicable simply because a case involves an alleged violation of individual rights. See Pet. App. 13a (reasoning that "recasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments"); *id.* at 38a (reasoning that petitioners' argument that they were "seek[ing] only a vindication of personal rights" "begs the question") (internal quotation marks omitted).

To be sure, as petitioners note (Pet. 8), some lower courts and judges have observed that the precise contours of the political question doctrine are "murky." See, *e.g.*, *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985). Whatever uncertainty there may be about the application of the political question doctrine in cases at the fringes, however, there is no uncertainty about its application here. As the district court observed, the claims at issue in this case "go to the very heart of the political question doctrine: foreign policy directives from the President himself." Pet. App.

39a. It is therefore unsurprising that all four judges who considered this case below determined that it presented a political question.[3]

3. Finally, this case would constitute a poor vehicle for consideration of any question concerning the scope of the political question doctrine for an additional reason. Dismissal of this action was also appropriate on the non-jurisdictional ground that petitioners had failed to state a valid claim because the United States was immune from suit. As the district court correctly determined, the United States was properly substituted as defendant on petitioners' claims against former National Security Advisor Kissinger under the Westfall Act (with the possible exception of one claim as to which Kissinger would have qualified immunity), and petitioners failed to identify a valid waiver of the United States' sovereign immunity. See Pet. App. 46a-58a. Accordingly, even if jurisdiction were not lacking under the political question doctrine, dismissal would still be required.

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[3] Petitioners suggest (Pet. 10) that lower courts sometimes decline to apply the political question doctrine and instead "use alternative grounds to determine justiciability." See, *e.g.*, *Doe* v. *Bush*, 323 F.3d 133, 137-141 (1st Cir. 2003) (dismissing claim on ripeness, rather than political question, grounds). As this Court has made clear, however, it is entirely proper for a federal court to elect to dispose of a case on one threshold jurisdictional ground rather than another. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999). Petitioners identify no case in which a lower court refused to evaluate the applicability of the political question doctrine and instead disposed of the case on a *non-jurisdictional* ground. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (holding that a federal court generally must decide a jurisdictional issue before a merits issue).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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