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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FARAG M. MOHAMMED SALTANY, *et al.*, Appellants,	)	No. 89-5051
v.	)	
RONALD W. REAGAN, *et al.*, Appellees.	)	

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UNITED STATES' REPLY TO APPELLANTS' OPPOSITION TO MOTIONS FOR SUMMARY DISPOSITION

On the evening of April 14, 1986, United States air and naval forces, at the direct order of the President, attacked the Sidi Bilal Terrorist Training Camp and other Libyan terrorism facilities. The recurrent theme of plaintiffs' opposition to summary disposition of their appeal is that these attacks constituted crimes against humanity.

For all their shrill condemnation of United States foreign policy toward Libya and for all the clamor about the "profound significance" of the issues they raise "to the place of the United States, its President and Courts in history" (Opp 7), plaintiffs completely fail to come to grips with the settled doctrines of jurisdiction and immunity that govern their claims. Those doctrines, the district court rightly concluded, required dismissal of their complaint below and, especially in light of subsequent authority from the Supreme Court, warrant summary disposition here.

Argument

I. SOVEREIGN IMMUNITY BARS THE CLAIMS AGAINST THE UNITED STATES.

Plaintiffs begrudgingly recognize that their claim against the United States is barred unless sovereign immunity has been waived by Congress (Opp 11-12). They cannot find that waiver in the Alien Tort Statute, 28 U.S.C. § 1350, the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674 or in general principles of international law.

1. Alien Tort Statute: Our opening brief pointed out that this Court twice has held that § 1350 does not constitute a waiver of the United States' immunity from suit. *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C.Cir. 1982); *Sanchez-Espinoza v. United States*, 770 F.2d 202, 207 (D.C.Cir. 1985). Plaintiffs offer no contrary authority. They simply state that the earlier precedents of this Court must be discounted because the *Canadian Transport* and *Sanchez-Espinoza* panels placed too much weight on the absence of any "literal mention of the immunity of the United States" in the statute (Opp 12). This argument -- that waivers of sovereign immunity may implied from the enactment of a general remedial statute -- has long been discredited. "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed'" when Congress consents to suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980), quoting *United States v. King*, 395 U.S. 1 4 (1969).

2. Federal Tort Claims Act: Plaintiffs also offer little in the way of reasoning as to why the discretionary function exception, 28 U.S.C. § 2680(a), does not bar their FTCA claims.[1]

At the core of this case is a President's decision to use military force to respond to foreign aggression against United States military personnel, diplomats and citizens.[2] In view of the constitutional prerogatives of the President in the military and foreign policy arena (see USA Motion 7-9), the suggestion that the President's decision to commit combat forces involves anything but highly discretionary judgments is frivolous. Plaintiffs are challenging a quintessential discretionary judgment, one which Congress neither intended nor anticipated would be reviewable "through the medium of an action in tort." *Berkowitz v. United States*, 108 S.Ct. 1954, 1959 (1988); *cf., Crockett v. Reagan*,

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[1] The motion for summary affirmance focused on why plaintiffs' FTCA claims are barred by the discretionary function exception. Accordingly, it is not necessary to discuss at this time plaintiffs' disagreement with the district court's alternative holding that their claims also would be barred by the exceptions for combat activities and claims arising in a foreign country (Opp 18-20).

[2] Plaintiffs are incorrect when they intimate that the sole reason given for the air attacks was the terrorist bombing of a Berlin discotheque in which a United States serviceman was killed (Opp 4). In addition to the bombing, the President cited other Libyan terrorist actions directed at United States installations, diplomats and persons. The air attacks, moreover, followed a formal declaration by the President that the terrorist policy of Libya constituted "an unusual and extraordinary threat to the national security and foreign policy of the United States." EO 12543, 1986 Papers of the President 19 (Jan. 7, 1986).

720 F.2d 1355 (D.C.Cir. 1983)(adequacy of compliance with War Powers Resolution a nonjusticiable political question).

3. International Law: Plaintiffs finally argue that the United States has no immunity in this case because the air strikes violated international law (Opp 20-22).

Plaintiffs' insistence that the United States must be held accountable for its "war crimes" (Opp 21) is most remarkable for what is omitted -- any citation to "[s]pecific language in [a] treaty waiving the immunity of the United States." *Canadian Transport Co.*, 663 F.2d at 1092. Without that specific language, "the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom." *Id.* This was the same point made in *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 692 (1989), when the Court concluded that a foreign state does not waive its immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611, "by signing an international agreement that contains no mention of a waiver of immunity to suit ***."

Plaintiffs do not argue that the air strikes violated an international agreement which contains an express waiver of the United States immunity. As such, without an express waiver, they have no claim for damages against the United States for violation of international law.

II. PLAINTIFFS FAIL TO ASSERT A COLORABLE BASIS FOR THEIR CLAIMS FOR DAMAGES FROM THE PRESIDENT AND INDIVIDUAL UNITED STATES OFFICERS.

In opposing summary affirmance, plaintiffs also argue that their constitutional tort (or *Bivens*[3]) and international law individual claims are unaffected by prior decisions of this Court and the Supreme Court.[4] Once again, plaintiffs avoid controlling precedent on these issues.

1. Constitutional Tort Claims: Our opening brief pointed out that this Court already has foreclosed the *Bivens* claim by its decision in *Sanchez-Espinoza* that special factors counselled against (770 F.2d at 208-09)

> the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.

Aside from their general argument that courts have held military officers accountable in other contexts (see Opp 8-11, 13-14),[5] plaintiffs offer no reasoned basis to

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[3] *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388 (1971).

[4] The complaint in this case asserted a hodgepodge of theories -- ranging from the "criminal laws of the District of Columbia, Virginia, California and other States" to the "tort law of Libya" (Comp ¶¶ 4, 37) -- to recover damages from President Reagan for ordering the air strikes and from the civilian and military officers who planned the strikes and executed the President's order. Plaintiffs' opposition does not take issue with defendants' assertion that any state law claims would be barred by the absolute immunity doctrine under *Westfall v. Erwin*, 108 S.Ct. 580 (1988).

[5] *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), for example, was a suit for detention. Under prize law, military naval commanders and their crew personally benefited from a capture by receiving shares of the prize money. In seizing *The Flying Fish*, however, Captain Little exceeded the plain limit on his authority and thus was found liable for the improper seizure. See generally, "Additional Note on the (continued...)

distinguish *Sanchez-Espinoza* from this case (see Opp 14). There, as here, citizens and residents of a former nation sued the President and other federal officials for conduct that allegedly violated the Constitution and principles of international law for military operations abroad. This Court's conclusion that a *Bivens* remedy should not be recognized in those circumstances has equal application here.

Even if a remedy was recognized, it is clear that immunity would bar any *Bivens* claim. Aside from an oblique citation to the dissenting opinion in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), plaintiffs offer no basis to deny President Reagan the protection of the presidential immunity doctrine announced in that case (see Opp 16). And plaintiffs effectively concede that qualified immunity protects those who acted at President Reagan's direction when plaintiffs assert that "[t]he law applicable to [the facts they alleged] is extremely complex, diffuse, obscure and unsettled" (Opp 6). In short, defendants are being charged with violating "unsettled" law (Opp 6), not with violating "clearly established" law -- the *sine qua non* of *Bivens* liability under the qualified immunity standard adopted in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

2. International Law: Plaintiffs also broadly assert that this case presents a serious question regarding the

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[5](...continued)
Principles and Practice in Prize Cases," *reproduced at* 15 U.S. (2 Wheat.) 201 (1817).

amenability of the President of the United States and other United States officials to a suit seeking damages for violations of customary international law.[6]

Once again, plaintiffs fail to cite any specific treaty or agreement that creates or imposes individual damages liability in any situation even remotely like the one presented here. Moreover, plaintiffs proceed as if this Court had never considered the issue of a United States officer's amenability to suit under international law for his official actions. In *Sanchez-Espinoza*, this Court held that a suit against the President under the Alien Tort Statute for violating customary international law -- assuming the Statute applies to governmental as opposed to private acts -- would have to be brought against him in his official capacity and, thus, be barred by sovereign immunity. 770 F.2d at 206-07.

III. PLAINTIFFS DISREGARD IMPORTANT IMMUNITIES THAT PROTECT FOREIGN SOVEREIGNS AND HEADS OF STATE.

Plaintiffs' opposition to the motion for summary disposition presented by the United Kingdom and Prime Minister Thatcher also raise special concerns for the United States which warrant comment in view of the impact of plaintiffs' arguments on United States interests.

We are initially disturbed by plaintiffs' insistence on pursuing their action against the United Kingdom. "Actions

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[6] This Court need not decide at this time whether a claim for violating international law is subject to an assertion of presidential or qualified immunity.

against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States" and have been the source of irritation in our bilateral relations with the defendant state, which often placed diplomatic pressure on the State Department. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, 487 (1983). The FSIA was enacted to "free the Government from the case-by-case diplomatic pressures" by imposing a "comprehensive scheme" that expressly provides when a foreign state may be sued and when it may not. *Id.* at 488-89.

The claims against the United Kingdom here squarely fall in the latter category. In *Amerada Hess*, the Supreme Court ruled unanimously and unequivocally that the FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in our courts." 109 S.Ct. at 686.[7] Seven members of the Court further agreed that a foreign state's use of military force allegedly in violation of international law fell outside any of the exceptions to the sovereign immunity provided by the FSIA. *Id.* at 690-92.[8] When plaintiffs filed their appeal here, with the ink barely dry in *Amerada Hess*, no conceivable argument could be made that their appeal was

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[7] The FSIA codifies the restrictive theory of foreign sovereign immunity. Foreign states are immune from the jurisdiction of federal and state courts, subject to a set of carefully drawn exceptions. 28 U.S.C. §§ 1604, 1605.

[8] The FSIA's exception for tortious conduct, § 1605(a)(5), only applies to injuries and loss occurring in the United States. *Amerada Hess*, 109 S.Ct. at 690.

warranted by existing law or by a good faith argument for reversal of existing law.

The United States agrees with and supports the United Kingdom's request for sanctions in these circumstances. The important goals of Congress in enacting the FSIA cannot be met if litigants may hail foreign sovereigns into court on frivolous FSIA claims with impunity. Deterrence of such suits, through the imposition of sanctions, will assure foreign sovereigns that United States courts, guided by the FSIA, will not condone attempts by plaintiffs to intrude into sensitive political and military judgments and activities of the defendant state.

The United States also agrees that sanctions are appropriate for plaintiffs' appeal against Prime Minister Thatcher. The Supreme Court long ago recognized the binding and conclusive nature of the executive's suggestion of immunity. See *Ex Parte Peru*, 318 U.S. 578, 588-89 (1943); *The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136-39, 147 (1812)*.[9] Plaintiffs did not address this authority below; nor is it addressed here.[10]

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[9] See also, *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945); *Republic of the Philippines v. Marcos*. 806 F.2d 344, 360 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 2178 (1987); *Spacil v. Crowe*, 489 F.2d 614, 616-17 (5th Cir. 1974).

[10] Plaintiffs' reliance on *Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 353 (1822), where the Court acknowledged that the foreign head of state "generally enjoys a personal immunity," underscores the complete absence of any basis to proceed against the Prime Minister.

Suits against foreign heads of state, like suits against foreign sovereigns, raise serious diplomatic concerns. Through the imposition of sanctions under Rule 38, Fed. R. App. P., plaintiffs like these must be discouraged from attempting to circumvent the strictures of the FSIA by pressing frivolous claims against a foreign head of government or other foreign officials for the acts of their government.

CONCLUSION

The judgment of the district court insofar as it dismissed plaintiffs' action should be affirmed.

Respectfully submitted,

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Dated: June 26, 1989

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing United States' Reply to Appellants' Opposition to Motions for Summary Disposition were served on appellants (No. 89-5051) and co-appellees (cross-appellants in No. 89-5053) the United Kingdom and Prime Minister Thatcher on June 26, 1989, by depositing the same in the United States Mail, postage prepaid, addressed to their counsel as follows:

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