UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Shimon ROSENBERG, et al.; Kia SCHERR, et al.; and Emunah CHROMAN, et al.,

Plaintiffs,

v.

LASHKAR-E-TAIBA (also known as Idara Khidmat-e-Khalq, Jamat ud Dawa, Markaz ud Dawa and Tehrik-e-Tahaffuz-e-Qibla Awal); MOHAMAED HAFIZ SAYEED; ZAKI ur REHMAN LAKHVI; SAJID MAJID (also known as Sajid Mir); AZAM CHEEMA; INTER-SERVICES INTELLIGENCE of the ISLAMIC REPUBLIC OF PAKISTAN; AHMED SHUJA PASHA, NADEEM TAJ, MAJOR IQBAL and MAJOR SAMIR ALI,

Defendants.

Memorandum of Law in Opposition to Motion to Dismiss Submitted by Defendants Inter-Services Intelligence, Pasha and Taj

10-cv-5381
10-cv-5382
10-cv-5448

PRELIMINARY STATEMENT

Plaintiffs, the United States victims of the November 26, 2008 Mumbai terror attacks and their surviving family members, have brought a civil action against, among others, defendants Inter-Services Intelligence ("ISI") Ahmed Shuja Pasha ("Pasha"), the current ISI director, and Nadeem Taj ("Taj"), the former ISI director, pursuant to the Antiterrorism Act ("ATA"), 18 U.S.C. § 2331 *et seq*. and supplemental causes of action. Defendants ISI, Pasha and Taj (the "moving defendants") have raised a facial challenge to this Court's subject matter jurisdiction on the grounds that they are immune under either the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 *et seq.* ("FSIA"), or principles of common law immunity and that the lawsuit presents non-justiciable political questions, despite the fact that during the recently concluded criminal

prosecution of Tahawwur Rana, the United States Department of Justice relied upon much of the same evidence and arguments regarding the ISI and the Mumbai attacks that the plaintiffs intend to present in this action.

In support of their facial challenge to the complaints,[1] the moving defendants have submitted sworn statements and documentary exhibits, arguing that no questions of genuine fact exist on the jurisdictional and justiciability questions. For the reasons set forth below, however, this Court should defer a decision on the immunity argument and deny, or, at the least, defer the motion to dismiss on political question grounds. With respect to sovereign immunity, the plaintiffs must be allowed to conduct limited jurisdictional discovery and the Executive Branch must be provided an opportunity to submit a statement of interest. As for the political question issue, the federal government has already impliedly taken the position that the assertions in plaintiffs' claims raise no non-justiciable issues, as the Department of Justice presented the same arguments and theories in a recent criminal prosecution arising out of the Mumbai attacks. If the Court requires further articulation of the government's position, however, a decision on the justicability argument should be deferred to allow the Executive Branch to submit a statement of interest on this issue, as well.

I. OVERVIEW

Plaintiffs and their decedents all suffered terrible physical, emotional and pecuniary injuries as a result of the Mumbai terror attacks. The moving defendants, acting both

[1] A facial challenge to subject matter jurisdiction under Rule 12(b)(1) is reviewed under the same standard as a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir. 2003). Although the moving defendants do not expressly state that their challenge is a facial one, their attacks are limited to the allegations in plaintiffs' complaints and they concede that for purposes of this motion, the Court must accept the factual allegations in the complaints as true. Moving Defendants' Memorandum of Law in Support of Motion to Dismiss ("Def. Memo. of Law"), p. 9.

independently and in concert with the terrorist organization Lashkar-e-Taiba ("LeT") and its members, also named in this suit, provided critical planning, material support, control and coordination of those attacks.

Since commencing this lawsuit, plaintiffs' counsel has met with senior staff members of the Executive and Legislative Branches, advising them of the claims made in this litigation. Declaration of James P. Kreindler ("Kreindler Decl."), attached hereto, ¶¶ 3, 24. Despite such notice, the United States Government has not, to date, filed a statement of interest on the immunity or political question issues. *Id.*, ¶ 3. While such silence may create a presumption that the Executive Branch does not support a finding of immunity or non-justiciability here, deferral of a decision on this motion would allow the government an opportunity to submit a written statement regarding those issues.

In support of their immunity claims, movants rely on two documents: (1) a declaration from the country's current attorney general, Maulvi Anwar ul Haq and (2) a heavily-redacted half-page document in translation (from an unidentified language) bearing no official seal, purported to be a letter establishing the ISI in 1948. Mr. ul Haq, however, has recently stated during proceedings in Pakistan's Supreme Court that no legal instrument supports the creation or functioning of the ISI and that the organization is not bound by any of Pakistan's rules or laws, a representation in conflict with the assertions in his declaration.[2] Plaintiffs, who contend that the ISI is not a political subdivision of the Government of Pakistan for purposes of the FSIA, and that its directors are not shielded by common law immunity, must be afforded an opportunity to

[2] Mr. ul Haq's prior in-court statements are consistent with representations by Pakistan officials in other court proceedings, as discussed in greater length below.

test the veracity and credibility of the defendants' submissions through jurisdictional discovery; and the United States Government must be afforded an opportunity to weigh in on these issues.

Further, this case presents no non-justiciable political question. The facts, assertions and arguments plaintiffs rely on in their claims is, in most respects, the same as the information proffered by the United States Department of Justice during its recent criminal prosecution of Tahawur Rana in the Northern District of Illinois and in its recently unsealed criminal indictment of non-moving defendant Major Iqbal. *See* Kreindler Decl., ¶ 16, Exhibit KK, *United States v. Kashmiri et al.*, 09-cr-830, docket entry number 213. Judicial resolution of the claims here requires no greater intrusion into foreign affairs or political matters than those criminal prosecutions in which the Executive Branch has voluntarily sought out judicial consideration of these issues. Given the manner in which the federal government has proceeded in the Rana prosecution and the Iqbal indictment – and its silence regarding this litigation, despite having known about the plaintiffs' suit for nearly a year – the question as to whether these lawsuits implicate political questions has already impliedly been answered in the negative. In addition, plaintiffs' wrongful death and injury claims are made pursuant to federal statutes passed by Congress and signed into law by the President (as well as the common law) and, thus, have the implicit approval of the political branches. For all of those reasons, the defendants' motion to dismiss on political question grounds should be denied or, at a minimum, deferred to allow the Executive Branch a chance to submit a statement of interest on the issue.

II. BACKGROUND

While the moving defendants have submitted a declaration and a single document purportedly establishing the ISI's status as a "political subdivision" for Foreign Sovereign Immunity Act purposes, this issue is far from settled and is, in fact, the subject of contentious

debate within Pakistan, among United States government representatives and by a variety of experts. Questions regarding the creation, authority and control of the ISI must be answered before the moving defendants' immunity motion can be decided.

A. The Uncertain Status of Defendant Inter-Services Intelligence

The ISI exists without any legislative statute or executive order founding, creating or authorizing its activities. Kreindler Decl., ¶¶ 5 – 8. Pakistan's own current Attorney General, Maulvi Anwar ul Haq, said to the Supreme Court of Pakistan less than nine months ago that no rules or laws govern the ISI. *See* Kreindler Decl., ¶ 5.[3] Similarly, Lieutenant Colonel Khalid Iqbal Sahoo, Assistant Judge Advocate General of the Pakistan Army, filed a brief on behalf of Pakistan's Ministry of Defence with the Pakistan Supreme Court on July 11, 2006 in which he stated that his ministry had no operational control over the ISI. *Id.*, ¶ 7.[4] On July 19, 2006, in that same action, Tariq Wazeem Ghazi, a Defence Secretary with the Government of Pakistan, submitted an affidavit to the Pakistan Supreme Court in which he also asserts that the Government of Pakistan has no control over the ISI. *Id.*, ¶ 8.[5] Likewise, Sherry Rehman, a Member of Pakistan's National Assembly from 2002 to 2007 and Pakistan's Minister of Information from 2008 to 2009, wrote in June 2005 that the ISI "remain[s] above the law and unaccountable." *Id.*, ¶ 10(g).

[3] Plaintiffs are attempting to obtain the records from the proceedings at which Attorney General Haq made these statements, which directly contradict the assertions in the declaration before this Court. Kreindler Decl., ¶ 5.

[4] Plaintiffs are attempting to obtain the brief Lt. Col. Sahoo submitted to the Pakistan Supreme Court. Kreindler Decl., ¶ 7.

[5] Plaintiffs are attempting to obtain the affidavit Secretary Ghazi submitted to the Pakistan Supreme Court. Kreindler Decl., ¶ 8.

With increasing frequency, the ISI has, in fact, operated autonomously and even contrary to the stated missions, laws and objectives of the Government of Pakistan. For example:

- According to Pakistan's current Ambassador to the United States, between 1977 and 2002, the ISI attempted to manipulate Pakistan's official government-held elections on at least five occasions. *See* Kreindler Decl., ¶ 10(c).

- A United Nations commission concluded that the ISI hindered the investigation into the assassination of former Prime Minister Benazir Bhutto and that it may have been involved in other attempted assassinations of Ms. Bhutto. *See id.*, ¶ 10(d) – (f).

- The ISI has long and deep ties with the terrorist group Lashkar-e-Taiba. *See id.*, ¶ 11(a) – (b). In the late 1980's, the ISI created the LeT to fight proxy wars, including efforts against the Soviet presence in Afghanistan and against India in the Kashmir region. *See id.*

- The United designated the LeT a Foreign Terrorist Organization on December 26, 2001. *See id.*, ¶ 11(d). Shortly thereafter, on January 12, 2002, Pakistan's then-leader, General Pervez Musharraf, outlawed the LeT. *See id.*, ¶ 11(e).

- For years after the LeT was outlawed, the ISI, acting in direct contradiction to the orders of Pakistan's government, continued to offer financial, logistic and personnel support to the LeT. *See id.*, ¶ 11(e) – (i).

- The LeT's leader Hafiz Mohamed Saeed was imprisoned in light of General Musharraf's January 12, 2002 declaration. *See id.*, ¶ 11(e). Despite this, the ISI facilitated Mr. Saeed's release from prison and thereafter made substantial financial payments to him. *See id.*

- In 2008, the civilian Government of Pakistan attempted to put the ISI under the control of Pakistan's Ministry of the Interior, but the ISI refused to comply with those efforts. *See id.*, ¶ 10(b).

Western leaders, like their Pakistani government counterparts, have also called into question the legitimate authority of the ISI, noting that it has and continues to act in ways that are contrary to the stated goals and missions of the Government of Pakistan. For example, the United States Ambassador to Pakistan from 2007 to 2010, Anne Patterson, noted in November 2008 the troubling "extent of [Lashkar-e-Taiba's] current relationship with the ISI," despite the fact that the Pakistan government had outlawed the LeT. *See* Kreindler Decl., ¶ 11(l), Exhibit

CC. During a 2008 interview, the NATO Commander in Afghanistan, United States General David D. McKiernan, observed that "there certainly is a level of ISI complicity in the militant areas in Pakistan and organizations such as the Taliban." *Id.*, ¶ 11(k), Exhibit BB. Reflecting these concerns, a United States-produced document assisting investigators at Guantanamo includes the ISI in "a list of terrorist and terrorist support entities identified as associate forces … ." *Id.*, ¶ 11(j), Exhibit AA.[6]

These facts and statements, though not yet in admissible form, require additional investigation and discovery as to whether the ISI is a legitimate political subdivision of the Government of Pakistan. If facts elicited during jurisdictional discovery further support plaintiffs' belief that the ISI is not a true political subdivision of Pakistan but, rather, an autonomous organization, the ISI would not be entitled to invoke the immunity Congress has afforded sovereign governments under the FSIA nor could it or its leadership rely on the common-law immunity available to legitimate state actors for official government acts.

B. The Role of the ISI in the Mumbai Terror Attacks

In addition to the ISI's historical independence from the Pakistani government and its record of defying and obstructing the aims and objectives of the Pakistani state, which, alone, warrant jurisdictional discovery, substantial evidence (much of it based on testimony presented by the United States Government in the Rana trial) confirms plaintiffs' charge that the ISI was intimately involved in the planning, design and execution of the Mumbai terror attacks.

During the recent criminal trial of Tahawwur Husain Rana in the United States District Court for the Northern District of Illinois, the United States Government called David Headley

[6] Recently obtained classified intelligence also shows that the ISI directed the 2011 killing of an investigative journalist. *See* Kreindler Decl. ¶ 10(j), Exhibit P. The Government of Pakistan has convened an investigation into the matter in light of the allegations against the ISI. *Id.*

as a witness. Prior to his trial, Headley had told Indian investigators that "every important member of LeT is handled by one or more ISI officials." Kreindler Decl.¶ 18, Exhibit MM, NIA Headley Report, p. 5. While testifying for the federal government last month, Headley said that after training with the LeT, he entered Pakistan's tribal areas, where he was recruited by the ISI sometime in early 2006. Kreindler Decl., ¶ 11(n), Exhibit FF, Hedley Testimony, pp. 671 - 673. At that time, non-moving defendant Major Iqbal became Headley's ISI "handler," directing, along with LeT members, Headley's reconnaissance efforts in Mumbai and providing Headley with $25,000 to help fund the terror attacks. Kreindler Decl. ¶ 14, Exh. FF, Headley Testimony, pp. 689, 141. According to Headley, the ISI settled him in Mumbai, providing him a cover business and directions on sites and locations to conduct surveillance on in anticipation of a terrorist attack. *Id.*, pp. 732 - 733. All efforts Headley made in preparation for the Mumbai attacks, such as target selection, the route for an amphibious approach to the city and a proposed safehouse for the gunmen on the ground, were submitted to and approved by the ISI. *Id.*, pp. 744, 746.

With the material support and encouragement of the ISI, Headley explored the sites targeted for the Mumbai attacks, including the Chabad House, the Oberoi Trident Hotel, the Taj Mahal Hotel, the CST Railway station and the Leopold Café. *Id.*, pp. 733 - 734. Between the winter of 2006 and the summer of 2008, Headley communicated with ISI leaders regarding his many surveillance trips to Mumbai, providing them with oral and video reports. *Id.*, pp. 744, 746.

In return, the ISI continued to give Headley instructions regarding further reconnaissance trips. *Id.*, p. 191.[7]

Just before the Rana trial, the United States Government filed a criminal indictment against non-moving defendant Major Iqbal, naming him as a conspirator in the Mumbai attacks. *See* Kreindler Decl., ¶ 16, Exhibit KK. But Major Iqbal was not the only ISI official working on the Mumbai attacks. Headley testified that his first contact with the ISI was with non-moving defendant Major Ali, who then turned him over to Major Iqbal. *See* Kreindler Aff., ¶ 14, Exhibit FF, Headley Testimony, p. 671. ISI Brigadier Riyaz was the ISI handler of defendant Zaki ur Rehman. *See* Kreindler Aff., ¶ 18, Exhibit MM, NIA Headley Report, p. 5. ISI Colonel Shah established and oversaw the Karachi safehouse, from which the Mumbai attack was planned. *Id.*, p. 6. ISI Colonel Hamza was defendant Major Iqbal's superior. *See id.*, p. 9. Headley, whose training was directed by Major Iqbal, worked with numerous low-level ISI members. *See* Kreindler Aff., ¶ 14, Exhibit FF, Headley Testimony, p. 676.

Based on the substantial preparation work Headley conducted for the ISI and LeT, ten attackers approached Mumbai by boat, anchoring off the shore of the city on the night of November 23, 2008. That night, the ten attackers split up, targeting the various sites previously selected by the ISI. The terrorists attacked the sites with firearms, bombs and other explosive devices brought with them from Karachi, murdering and injuring 170 people, including plaintiffs and their decedents.

---

[7] Headley's trial testimony was consistent with what he said in prior grand jury proceedings, where he testified that he "had been asked to perform espionage work for ISI" and that, at the behest of the ISI, he was on "assignment to conduct surveillance in Mumbai."Kreindler Decl., ¶ 13, Exhibit II, *United States v. Rana*, 09-cr-830, docket entry no. 197, slip op. at 3 - 4 (N.D.Ill. April 1, 2011).

C. Recent Events and Discoveries Involving the ISI

Recent discoveries and governmental statements further reveal the ISI's extensive involvement with terrorist groups and its continued proclivity to operate without legal authority. Following the Mumbai attacks, Ambassador Patterson, noted that it was not clear that Pakistani government leaders "have the power to force ISI to take action" regarding Lashkar-e-Taiba's activities inside Pakistan borders. Kreindler Decl., ¶ 11(l), Exhibit CC.[8]

In May of this year, the discovery of Osama bin Laden hiding deep inside Pakistan, a country whose officials and leaders have avowedly supported the United States efforts to bring bin Laden and other terrorists to justice, has focused additional suspicion on the ISI. Following the raid on the bin Laden compound, United States government officials have noted the probable involvement of the ISI in sheltering the terrorist leader. On May 6, 2011, Senator Christopher Coons, in a hearing before the Senate Foreign Relations Committee, stated that "at best, the ISI was unable to detect bin Laden's presence, at worst it was complicit in providing him safe haven, probably for six years and in either way, it then challenges us to recalibrate our relationship." Kreindler Decl., ¶22, Exhibit RR. This opinion is shared by individuals with direct knowledge of the relationship between bin Laden and the ISI. Two Pakistani militants (including one who personally met with bin Laden twice) recently interviewed by New York Times reporters have stated that they "received support from the ISI for years," and are both "convinced that the ISI played a part in sheltering Bin Laden." *Id.*, ¶ 11(o), Exhibit GG, *Seized Phone Offers Clues to Bin Laden's Pakistani Links*.

[8] These concerns regarding the ISI are shared by key United States allies. On June 10, 2002, Jack Straw, then the Foreign Secretary of the United Kingdom, stated to Parliament that "Her Majesty's Government accepts that there is a clear link between the ISI[] and" terrorist organizations, including Lashkar-e-Taiba. Kreindler Decl., ¶ 11(f) Exhibit X, Statement of Secretary Straw.

Supporting these suspicions is the long history of cooperation between the ISI and bin Laden. While bin Laden was in Sudan from 1991 – 1996, the ISI maintained contact with the Al Qaeda leader and likely "had advance knowledge of" his return to Afghanistan. Kreindler Decl.,¶ 11(c), Exhibit U, 9/11 Commission Report, p. 64. The ISI introduced bin Laden to Taliban leaders in Kandahar, Afghanistan, hoping to convince the Taliban to allow bin Laden to reestablish control over his former militant training camps in that country. *Id.*, pp. 64 – 65. While Al Qaeda was building up to the September 11, 2001 attacks, the ISI financed hundreds of weapons purchases directed by bin Laden on behalf of Al Qaeda, including the acquisition of Chinese and Russian made surface to air missile. *See* Kreindler Decl., ¶11(i), Exhibit Z, Rear Admiral Thomas Report, pp. 2, 6, 7.

The ISI, contrary to the position taken by the Government of Pakistan, which has been declared a major ally of the United States (*see* Exhibit B to Declaration of Kevin J. Walsh), was providing financial, strategic and logistical support to bin Laden and Al Qaeda, declared enemies of the United States. *See* Kreindler Decl., ¶ 11, Exhibits Q and R.

III. THE DEPARTMENT OF STATE'S VIEWS ARE CRITICAL TO THIS MOTION

The immunity of foreign parties from lawsuits in this country "is a matter of grace and comity on the part of the United States[.]"*Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983); *see also The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812) (in dispute between United States citizens and the French navy over ownership of a ship, the Supreme Court, relying on the federal government's statement of immunity in favor of the French party, dismissed the action). In the context of both foreign sovereign immunity and political question claims, United States courts have consistently recognized that the positions taken by the political branches must be granted deference. *See Whiteman v. Dorotheum GmbH,*

431 F.3d 57, 69 (2d Cir. 2005) ("Judicial deference to the Executive Branch on questions of foreign policy has long been established under the prudential justiciability doctrine known as the 'political question' doctrine[.]")

A. Executive Branch Statements of Interest in the Political Question Context

When facing a political question defense, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n. 21 (2004).[9] Though an assertion of the political question doctrine by the Executive Branch does not necessarily preclude adjudication, it is, nevertheless, "entitled to respectful consideration." *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1996); *see also Jota v. Texaco Inc.*, 157 F.3d 153, 159-161 (2d Cir. 1998) (though the views of foreign nations are a consideration in the political question context, they are not dispositive.)

In political question cases, the Executive Branch frequently submits statements of interest with the court in order to express its position. *See, e.g., Spectrum Stores, Inc. v. Citgo Petroleum Corp*., 632 F.3d 938, 951 – 52 (5th Cir. 2011) (Departments of State, Treasury, Energy and Justice filed statements arguing that adjudication of case "would result in the frustration of various objectives 'of vital interest to the United States' national security"); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 108 (2d Cir. 2008) (United States submitted a statement of interest supporting defendants' position with respect to the political question doctrine); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1205 – 06 (9th Cir. 2007) (giving State Department's statement of interest "great weight," but nevertheless denying dismissal

[9] The Executive Branch's opinion regarding political questions is important, but not dispositive. *See, e.g., First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972) (Powell, J., concurring) ("I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.")

political question dismissal motion); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354 (D.C.Cir. 2007) (Legal Adviser of the State Department submitted letter noting that whether the case "would adversely affect U.S. foreign policy depends upon 'the nature, extent, and intrusiveness of discovery'"); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1232 fn. 6 (11th Cir. 2004) (United States filed statement of interest informing the court that dismissal was in the foreign policy interests of the country).

Without a statement from the federal government that litigation impermissibly impedes upon the prerogatives of the political branches, the argument for dismissal is substantially weakened. *Compare Gross v. German Foundation Indus. Initiative*, 456 F.3d 363, 382 (3rd Cir. 2006) (reversing trial court's finding of non-justiciability in suit seeking additional funds for victims of Nazi-era wrongs in part because the Executive Branch filed no formal statement of interest) *with Whiteman*, 431 F.3d at 69 ("this case has elicited a statement of interest in which the United States invoked 'its foreign policy interests' to urge the dismissal of plaintiffs' claims" and, accordingly, dismissing those actions).

Indeed, if the interests that are the subject of the political question doctrine are implicated in a lawsuit, a court "would expect some communication from the United States Executive – direct intervention, a Statement of Interest under the Executive Agreement, a statutory statement of interest under 28 U.S.C. § 517, a letter to the court, or any other way in which the United States Executive can make its interests known to a court." *Gross*, 456 F.3d at 380; *see also Alperin v. Vatican Bank*, 410 F.3d 532, 556 – 57 (9th Cir. 2005) (noting "the Executive Branch's continuing silence on the Holocaust survivors' claims," but stating "[h]ad the State Department expressed a view, that fact would certainly" factor in the political question decision). The interests, if any, of the Executive Branch in this litigation, are a substantial factor for the political

question determination and the United States should be invited to, if it chooses to do so, submit a written statement before this Court reaches a decision on the issue. Following such an invitation, the absence of such a statement would be even further proof that this case is not barred by the political question doctrine.

B. Statements of Interest in the Foreign Sovereign Immunity Context

As with the political question doctrine, the Executive Branch's view on foreign sovereign immunity is highly probative. Prior to enactment of the Foreign Sovereign Immunity Act, if the Executive Branch submitted a certification asserting that a foreign party was immune from suit "to the district court, it became the court's duty, in conformity to established principles, to … proceed no further in the cause." *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); *see also Mexico v. Hoffman*, 324 U.S. 30, 37 (1945) only "[i]n the absence of recognition of the claimed immunity by the political branch of government," are the courts to decide for themselves whether a foreign party is entitled to sovereign immunity.) Thus, whether the Executive Branch supported a claim of sovereign immunity or was silent on the matter was the determining factor in deciding whether a foreign defendant was immune from suit in this country. *See Verlinden*, 461 U.S. at 486 – 87 (discussing judicial history of sovereign immunity); Restatement (Third) of Foreign Relations of Law of the United States ("Restatement (Third)"), pt. IV, ch. 5, subch. A, introductory note (1987).

The Executive Branch need not file a statement simply on its own initiative. Foreign parties sued in the United States courts have, historically, regularly made requests to the Department of State asking it to submit a suggestion of immunity to the courts. *See* H.R. Rep. 94-1487, 1976 U.S.C.C.A.N. 6604, 6606, 1976 WL 14078, *2 (regarding immunity to suit, "when a foreign state wishe[d] to assert immunity, it [would] often request the Department of

State to make a formal suggestion of immunity to the court."); *see also* Restatement Third, pt. IV, ch. 5, subch. A, introductory note (regarding immunity).

The 1976 enactment of the Foreign Sovereign Immunity Act codified sovereign immunity, granting foreign governments immunity from lawsuits involving the foreign state's public acts under a theory referred to as the restrictive principle of sovereign immunity, by which "the immunity of a foreign state is 'restricted to suits involving a foreign state's public acts.'" H.R. Rep. 94-1487, 1976 U.S.C.C.A.N. 6604, 6605, 1976 WL 14078, *2. Nevertheless, the Executive Branch retained the authority to file a statement of interest with the court in order to express its position on immunity issues. *See, e.g.,* 28 U.S.C. § 517. And the government's views on matters implicating relations with foreign states are entitled to serious judicial consideration. *See Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004). Indeed, when the United States Government submits statements of interest regarding immunity to federal courts, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view on the case's impact on foreign policy." *Sosa v. Alvarez-Machain*, 542 U.S. at 733 fn. 21 (citing *Altman* as to the impact of a statement of interest). This deference to the political branch is highly "case-specific" and depends on the political and foreign policy interests implicated by the individual litigation. *Id.*

Given the historical deference given the Executive Branch on pre-FSIA immunity determinations, when the issue of immunity arises with respect to individual actors, who are not entitled to FSIA immunity, the views of the State Department are critically necessary in order to make a determination regarding common-law immunity. *See Samantar v. Yousuf*, 2007 WL 2220579, *6 (E.D.Va. Aug. 1, 2007) (deferring decision on immunity for two years in order to allow the United States Department of State to submit a statement of interest on the sovereign

immunity arguments), *reversed on other grounds by* 552 F.3d 371 (4th Cir. 2009) and *affirmed and remanded by* 130 S.Ct. 2278; *see also Abi Jaoudi v. Cigna Worldwide Ins. Co.*, 2:91-cv-06785, docket entry number 231 (on remand from Third Circuit, entering order requesting that Department of State file a statement of interest within 60 days on, among other things, issue of common law immunity).

Plaintiffs in this action have informed representatives of the political branches of their claims but, to date, no governmental representative has made any formal or informal declaration that this tort lawsuit should be dismissed on immunity grounds. Having had notice of the lawsuit, the Executive Branch's silence on the immunity arguments is, in itself, a meaningful statement. While we believe that the government's silence is intentional, plaintiffs ask that a decision on this issue be deferred in order to provide the Executive Branch an opportunity to submit a statement of interest regarding the defendants' immunity arguments.

IV. THE PLAINTIFFS MUST BE AFFORDED LIMITED JURISDICTIONAL DISCOVERY ON THE SOVEREIGN IMMUNITY DEFENSE

In a motion to dismiss for lack of subject matter jurisdiction on sovereign immunity grounds, the defendant has the burden of making a "*prima facie* case that it is a foreign sovereign." *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) (internal quotation marks omitted.) Only if the defendant makes its *prima facie* case does the plaintiff have any burden of presenting evidence that immunity should not be granted. *Cargill Intern. S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993). The defendant always bears the "ultimate burden of persuasion" on immunity, which must be satisfied by a preponderance of the evidence. *Id*. at 1016 (quoting *Robinson v. Government of Malaysia*, 269 F.3d 133, 141 (2d Cir. 2001) (internal quotation marks omitted.))

When determining whether the defendant has met its burden, the court "must review the allegations in the complaint, the undisputed facts, if any, placed before it by the parties, and – if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue – resolve disputed issues of fact, with the defendant foreign sovereign shouldering the burden of persuasion." *Robinson*, 269 F.3d at 141. The district court's decision on jurisdiction is not coterminous with a decision on the merits and "jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action." *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

A. There Are Genuine Questions as to Whether the ISI is a Political Subdivision of the Government of Pakistan for FSIA Purposes

In determining whether a party is a "state" for purposes of the Foreign Sovereign Immunity Act, the Second Circuit "has limited the definition … to entities that have a defined territory and a permanent population, that are under the control of their own government, and that engage in, or have the capacity to engage in, formal relations with other such entities." *Klinghoffer*, 937 F.2d at 47 (internal brackets and quotation marks omitted) (emphasis added). The political subdivision analysis is, thus, concerned not only with the institutional design of the entity asserting immunity, but also the reality of the political relationship. Only entities under the actual control of the government are true political subdivisions or agencies entitled to share the immunity granted to the state. *See Compagnie Noga D'Importation et D'Exportation, S.A. v. Russian Federation*, 361 F.3d 676, 687 – 88 (2d Cir. 2004) (in arbitration enforcement case, if a judgment would be against the state and the state's purported political subdivision's assets are not separate from the state's assets, then the subdivision "is not a legal person separate from the state[.]")

On all questions, the party asserting immunity bears not only the burden of making a *prima facie* case that it is a political subdivision but also the burden "of producing evidence to establish its claim of sovereign immunity." *Outbound Maritime Corp. v. P.T. Indonesian Consortium of Const. Industries*, 575 F.Supp. 1222, 1224 (S.D.N.Y. 1983) (single affidavit from officer of defendant and a translated government proclamation insufficient to establish sovereign immunity.) Evidence "merely stat[ing] in conclusory terms that" the defendant's status entitles it to immunity does not satisfy that burden. *Id.*; *see also Emarat Maritime LLC v. Shandong Yantai Marine Shipping*, 2009 WL 1024317, *2 (S.D.N.Y. April 15, 2009) (defendant's "[d]eclaration is insufficient to make out a prima facie claim of sovereign immunity … because [the declarant's] conclusory statement does not provide the Court with a sufficient legal basis or analysis to determine whether [the defendant] is in fact and at law entitled to sovereign immunity") (internal quotation marks and citation omitted).

"[G]enerally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue [in actions where the FSIA applies.]" *First City, Texas Houston, N.A. v. Rahdain Bank*, 150 F.3d 172, 176 – 177 (2d Cir. 1998); *see also Filus v. LOT Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990); *City of New York v. Permanent Mission of India to United Nations*, 376 F.Supp. 429, 431 (S.D.N.Y. 2005) (denying FSIA dismissal following jurisdictional discovery), *aff'd*, 446 F.3d 365 (2d Cir. 2006), *aff'd and remanded*, 551 U.S. 193 (2007). Refusal to do so when the non-movant has identified specific facts and questions undermining the jurisdictional defense constitutes an abuse of a court's discretion. *See First City, Texas-Houston, N.A.*, 150 F.3d at 177 (reversing dismissal because district court refused to allow plaintiff to take any jurisdictional discovery on FSIA immunity argument against Iraqi bank); *Ehrenfeld v. Mahfouz*, 489 F.3d 542, 550 n. 6 (2d cir. 2007) ("forbidding jurisdictional discovery

any time a plaintiff does not make a prima facie showing of jurisdiction … would indeed be legal error.")

In this case, plaintiffs have shown a reasonable basis for the assertion of this court's jurisdiction over the claims and multiple facts warrant jurisdictional discovery, both as to the legal architecture purportedly establishing and governing the ISI as well as to the facts regarding its relationship to or autonomy from the Government of Pakistan

First, the declarant upon whom the moving defendants rely in order to make their *prima facie* case that the ISI is a political subdivision has made contradictory statements in other court proceedings. Plaintiffs are in the process of obtaining official copies of those statements, which this Court should consider prior to reaching a decision here. Further, given that the contradictory statements challenge the credibility of the declarant, plaintiffs should be provided an opportunity to depose Mr. ul Haq on the statements he makes in his declaration.

Second, other official representatives of the Government of Pakistan have also made statements in Pakistani court proceedings concerning the creation and functioning of the ISI that call into question whether the ISI is, in fact, a political subdivision of the Pakistani state or is instead an autonomous organization not entitled to invoke the protections of the FSIA. In 2006, the Sindh High Court held a hearing on claims that the ISI had wrongfully abducted several Pakistani citizens for interrogation. *See* Kreindler Aff., ¶ 7. Lieutenant Colonel Khalid Iqbal Sahoo, then an Assistant Judge Advocate General of the Pakistan Army, filed a brief on behalf of the Pakistani Ministry of Defence in that case on July 11, 2006 in which he stated that Pakistan's Ministry of Defence has no operational control over the ISI. *Id.* On July 19, 2006, Pakistan's then-Defence Secretary, Tariq Ghazi, also filed an affidavit in that action in which he, like Lt. Col. Sahoo, asserted that the Government of Pakistan has no control over the ISI. *Id.*, ¶ 8.

Plaintiffs are making efforts to obtain those documents, which the Court should examine before reaching a decision.

Third, the single document upon which the moving defendants rely in arguing that the ISI is a political subdivision of the Pakistani state is of questionable probity. The document is a substantially redacted, translated copy of a letter by a person named R. Milory Hayes (listed as a deputy secretary to the Government of Pakistan) purporting to establish the ISI under the Ministry of Defence. Four of the letter's six paragraphs have been omitted. The document's original language is not identified. And, according to publicly available reports, the July 2006 Ministry of Defence brief submitted to the Pakistan Supreme Court contradicts the movant's exhibit, instead asserting that the Ministry of Defence has no control over the ISI. In light of these conflicting statements, plaintiffs cannot be required to take upon faith that this one-half page document is what the defendants assert it to be. Instead, plaintiffs should be given access to an unredacted document in the original language to review and have translated, as well as be given an opportunity to conduct discovery – including further time to complete their efforts to obtain official transcripts of Mr. ul Haq's contradictory statements – that would test the accuracy of the letter's assertions.

Finally, in addition to the materials submitted in court proceedings in Pakistan, an array of other statements and facts in the public record (though not yet in admissible form) raise questions as to whether the ISI is operating pursuant to its own interests and undermining, thwarting and subverting the goals and directives of the Government of Pakistan. *See* Kreindler Decl., ¶¶ 10(a) – 11(p).

These questions merit additional investigation through discovery and other means to explore whether the ISI is "under the control of [its] own government" and further warrant deferral of a decision on the pending motion.

B. A Decision on Immunity for Pasha and Taj is Premature

There is no question that defendants Pasha and Taj are not entitled to immunity from suit under the FSIA. As the Supreme Court recently held in *Samantar v. Yousef*, 130 S.Ct. 2278 (2010), the Foreign Sovereign Immunity Act "no longer protects government officials[.]" *Carpenter v. Chile*, 610 F.3d 776, 780 (2d Cir. 2010) (acknowledging abrogation of *In re Terrorist Attacks on Sept. 11, 2001*). The only conceivable basis for immunity that the individual defendants could invoke, therefore, is under the common law.[11]

As the Second Circuit has noted, in the absence of an applicable statute regarding immunity, the courts "deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions against" foreign defendants. *Mater v. Dichter*, 563 F.3d 9, 13 (2d Cir. 2009) (crediting statements of interest Department of State and Department of Justice filed in affirming dismissal). Thus, here, only if the government files a statement of interest asserting that defendants Pasha and Taj are entitled to immunity from suit should this action against them be dismissed. *See id.*

In addition, if this Court concludes that the ISI is not entitled to immunity because it is not a political subdivision of a foreign state, then defendants Pasha and Taj, whose defenses are linked directly to those of the ISI, would also not be entitled to immunity. Thus, for the same

[11] Certainly, if the ISI is not entitled to immunity under the FSIA, then defendants Pasha and Taj cannot invoke such protections under the common law by relying on an argument that they were sued for their acts undertaken in their "official capacity," for if the ISI was acting *ultra vires*, then so, necessarily, were its leaders.

reasons that the decision regarding the ISI must be deferred to allow for discovery, so must the decision regarding Pasha and Taj.

As for the direct involvement of Pasha and Taj in the attacks, plaintiffs have alleged that those defendants participated in the planning and execution of the Mumbai assault. In addition to the allegations in the complaint, which, at this stage, must be accepted as true, further evidence, as discussed in Section II.B., *supra*, supports the claims that Pasha and Taj were intimately involved in the assault in Mumbai. As set forth above, given the many ISI official involved with Headley and the geographic scope of the training and planning for the attack – which took place in Pakistan's tribal areas, Lahore and Karachi – it could not have been organized and executed without the knowledge and participation of the organization's highest-level leadership.[13] This, too, warrants additional discovery.

V. THIS ACTION IS FULLY JUSTICIABLE

Adjudicating claims that the ISI was directly implicated in the Mumbai attacks does not involve the Court in United States-Pakistan foreign relations and does not require it to judicially designate the Government of Pakistan as a state supporter of terrorism. *See* Def. Memo., p. 20. The plaintiffs do not charge that the Government of Pakistan supports terrorism, but, rather, that an autonomous, rogue organization operating contrary to the directives and goals of the Pakistan state has committed acts of terror that have killed and injured United States citizens.

In this respect, plaintiffs claims are substantially similar to those presented by the federal government in the recent Rana criminal prosecution. In *Rana*, the Department of Justice presented much of the same evidence and theories that plaintiffs intend to rely on in this action.

[13] Senior ISI officers have likewise been implicated in coordination with terrorist groups disavowed by Pakistan's government. *See* Kreindler Decl., ¶ 11(p), Exhibit HH.

Consistent with the Department of Justice's arguments, plaintiffs seek to establish that the ISI was directly involved in the Mumbai attacks. As the federal government has sought to have such matters litigated in the court system, judicial resolution of plaintiffs' claims here cannot reasonably be said to threaten United States foreign policy or political considerations. This lawsuit, like the *Rana* prosecution, is not a "political" matter that must be kept out of the courts. And in light of the inference reasonably drawn from the Rana trial (as well as government's silence to date in this litigation) that the Executive Branch does not see this case as barred by the political question doctrine, if this Court does not deny the motion to dismiss in this regard, it should, at the very least, defer a decision to allow the federal government a chance to rebut plaintiffs' argument on this issue.

i. This Case Does Not Present a Political Question

Plaintiffs' claims arise out of the wrongful deaths and injuries to United States citizens and residents. A determination on the merits on the liability and damages questions posed by these lawsuits is expressly authorized by the Legislative and Executive Branches and thus this case is fully justiciable.

Ben Zion Chroman, Gavriel Noah Holtzberg, Moshe Holtzberg (Gavriel's two year old son) and Norma Shvarzblat-Rabinovich were all in the Chabad House in Mumbai, India on November 26, 2008 when terrorists targeted, approached and attacked that facility, using firearms, bombs and other explosive devices. They killed, among five others, Chroman, Gavriel Noah Holtzberg and left Moshe Holtzberg, a witness to the murder of both of his parents, wounded. Sandeep Jeswani, Andreina Varagona, Alan Scherr and Alan's 13 year old daughter Naomi Scherr were all at the Oberoi-Trident Hotel on November 26, 2008 when the terrorists targeted, approached and attacked the hotel. As with the Chabad House, the terrorists took over

the Oberoi-Trident and held its residents captive for two days. During the siege, Jeswani, Alan Scherr and Naomi Scherr were killed; Varagona, a witness to the deaths of the Scherrs, was seriously wounded.

Plaintiffs filed suit to recover for the losses they suffered as a result of the deaths and injuries inflicted by the defendants. The question presented in these cases is whether the defendants are liable in under 18 U.S.C. § 2333, the common law and supplemental causes of action for the harm caused by the specific attacks on November 28, 2006. This Court is thus "faced with an ordinary tort suit, alleging that the defendants breached a duty of care owed to the plaintiffs or their decedents … ." *Klinghoffer*, 937 F.2d at 49 (suit against foreign entitiesnot barred by the political question doctrine). [14]

The "nonjurisdictional, prudential doctrine" of political questions, *Kadic v. Karadzic*, 70 F.3d at 249, is grounded in the concept that when a representative of the Executive Branch is engaged in a purely discretionary matter, "nothing can be more perfectly clear than that their acts are only politically examinable." *Marbury v. Madison*, 1 Cranch 137, 166 (1803). "In such cases … whatever opinions may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are

[14] Unlike these wrongful death and personal injury claims, the cases upon which the moving defendants rely all required the courts to become involved in quintessentially foreign policy decisions. *See Schneider v. Kissinger*, 412 F.3d 190 (D.C.Cir 2005) (suit against the United States Government and its National Security Advisor for their role in Chilean politics was intertwined with Cold War decision-making and thus could not be adjudicated); *Haig v. Agee*, 453 U.S. 280 (1981) (issue of whether Department of State was entitled to revoke United States citizen's passport was a political question); *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997) (suit challenging safety of United States and NATO training exercises was non-justiciable because it "would require a court to interject itself into military decisionmaking and foreign policy"); *Mater v. Dichter*, 500 F.Supp.2d 284 (S.D.N.Y. 2007) (action raised questions about Israel's supposed "targeted killing" military policy); *Doe I v. Israel*, 400 F.Supp.2d 86 (D.D.C. 2005) (plaintiffs sued Israel and Israeli officials, alleging that the country's policy regarding the West Bank amounted to human rights violations).

political." *Id.* It is only those "political acts," however, that "can never be examinable by the courts." *Id.* "The fact that the issues before [the court] arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question." *Klinghoffer*, 937 F.2d at 49. Courts must be mindful that the doctrine "is one of 'political questions,' not one of 'political cases.'" *Klinghoffer*, 937 F.2d at 49, *quoting Baker v. Carr*, 369 U.S. 186, 217 (1962).

The moving defendants argue that the war in Afghanistan, Pakistan's role as a United States ally in that effort and other aspects of the United States-Pakistan relationship render this tort suit non-justiciable on political question grounds. The exhibits to the declaration of Kevin J. Walsh all concern the structure and governance of the Islamic Republic of Pakistan and its foreign policy relationship with the United States and have no bearing on whether this particular case improperly impinges on the prerogatives of the political branches. Indeed, nowhere have the defendants presented any statement from any government representative of the United States that this lawsuit poses any threat to those relations. As discussed above, in reaching a decision as to whether a case poses a non-justiciable question reserved to the political branches, the opinion of that branch of government whose interest is supposedly threatened is a critical issue. Here, the Executive Branch has not made any such statement.

Not only has the Executive Branch submitted no statement of interest urging dismissal on political question grounds here, but recent events offer strong evidence that the United States Government is not worried about the foreign policy implications of this lawsuit. Just one week prior to the defendants' serving their moving papers in this case, the President of the United States authorized a military strike inside Pakistan's borders targeting Osama bin Laden's hideout. *See* Kreindler Decl., ¶ 21. On May 2, 2011, about two dozen Navy Seals and Central

Intelligence Agency operatives surreptitiously entered Pakistani territory, infiltrated a compound in Abbottabad, Pakistan, about 30 miles northeast of the nation's capital, and killed Osama bin Laden, who had been living there. *Id.*

Following this action, President Obama, in a press conference, explained that, beginning in August 2010, he had

> met repeatedly with my national security team as we developed more information about the possibility that we had located bin Laden hiding within a compound deep inside of Pakistan. … Today, at my direction, the United States launched a targeted operation against that compound in Abbottabad, Pakistan.

Id., ¶ 21, Exhibit PP, Remarks of President Obama. The United States Government undertook this operation without any prior warning to or approval from the Pakistan Government. *Id.*, ¶ 21, Exhibit QQ, Brennan Statement. As White House Counterterrorism Advisor John Brennan publicly stated, "We didn't contact the Pakistanis until after all of our people, all of our aircraft were out of Pakistani airspace. [The Pakistanis] had no idea about who might have been on [our aircraft]." *Id.*

The United States Government's recent actions with respect to Pakistan – conducting clandestine military actions inside its borders without advising the state's leaders – would surely present more of a challenge to the political relationship between these two nations than does a wrongful death and personal injury lawsuit. The defendants here can point to no actual threat to foreign relations posed by this lawsuit that this Court must endeavor to avoid. They cite no specific diplomatic impediment the lawsuit imposes, and instead allege that the plaintiffs' action will involve an inquiry of the "highest delicacy," while then simply referring to the political history between the United States and Pakistan. Def. Memo., pp. 18 – 20.

ii. Under the *Baker v. Carr* Test, this Case is Justiciable

Even under the moving defendants' theory that this litigation touches on foreign relations, which, as an ordinary tort action it does not, that, alone is not sufficient to warrant dismissal. "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. at 211; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230-31 (1986) (allowing lawsuit to force Secretary of Commerce to declare Japan in violation of international whaling agreement); *Comm. of United States Citizens Living in Nicaragua,* 859 F.2d 929, 934 (D.C.Cir.1988) (finding "troubling" the district court refusal to adjudicate claim of infringement of personal and property rights of United States citizens resulting from United States funding of Nicaraguan Contras).

As the Second Circuit has emphasized, "judges should not reflexively invoke the [political question] doctrine[] to avoid difficult and somewhat sensitive decisions … ." *Whiteman,* 431 F.3d at 69 (plaintiffs seeking reparations from Austrian entities for Nazi-era injuries were barred from suit when the United States Government had negotiated a claims process with Austria and filed a statement of interest urging the court to dismiss the claims). Under the "case-by-case" inquiry that must be employed, an action is nonjusticiable on political question grounds only if it involves one or more of the following factors:

> [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

Baker v. Carr, 369 U.S. at 217.

While no one factor is dispositive, "the first … is of particular importance." *Klinghoffer*, 937 F.2d at 49, *quoting Goldwater v. Carter*, 444 U.S. 996, 1006 (1979) (Brennan, J., dissenting); *see also 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152, 160 (2d Cir.2000) (the first factor, i.e., "textually demonstrable constitutional commitment of the issue to a coordinate political department," is the paramount concern) (*citing Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir.1991)).

The first *Baker* factor does not require dismissal here. Plaintiffs have filed wrongful death and personal injury lawsuits. They do not challenge any political, military or foreign policy act or relationship. Rather, their actions present this Court "with an ordinary tort suit, alleging that the defendants breached a duty of care owed to the plaintiffs or their decedents. The department to whom this issue has been 'constitutionally committed' is none other than … the Judiciary." *Klinghoffer*, 937 F.2d at 49.

As for the second factor, the common law of tort provides clear and well-settled rules on which this Court can easily rely and thus that factor's underlying concern – the absence of "judicially discoverable and manageable standards" – is of no moment. *Klinghoffer*, 937 F.2d at 49; *see also Biton v. Palestinian Interim Self-Gov't Auth.*, 412 F.Supp.2d 1, 6 (D.D.C.2005) ("*Biton II*") (noting that "the ATA provides jurisdiction for suits in federal courts, the basic elements of the claim lies in tort, not in the relations between Palestine and Israel.")

The political branches have spoken to the other four *Baker* questions by enacting legislation that allows plaintiffs to pursue actions against terrorists in federal courts, and thus none of those factors should prevent this Court from reaching the merits of the plaintiffs' claims here. *See Sokolow v. Palestinian Liberation Organization*, 583 F.Supp.2d 451, 456 (S.D.N.Y. 2008) ("By enacting the [Antiterrorism Act] both the Executive and Legislative Branches have

expressly endorsed the concept of suing terrorist[s] in federal court") (internal quotation marks omitted), *citing Klinghoffer*, 937 F.2d at 49. If, as plaintiffs contend, the moving defendants are not entitled to sovereign immunity, then the political question doctrine can present no bar to adjudication of their claims. "After all, Congress enacted the" legislation upon which plaintiffs' claims are based "and the President signed it." *Ungar v. Palestinian Liberation Org.*, 402 F.3d 274, 280 (1st Cir. 2005). The very purpose of these laws was to provide redress to victims of terrorism. Only if the moving defendants are entitled to immunity may the claims against them be dismissed. Congress and the President have spoken – without sovereign immunity, tort claims arising out of terrorist acts in other countries that injure United States citizens are fully justiciable.

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that this Court (1) defer a decision on the motion to dismiss on foreign sovereign immunity grounds in order to provide the United States a chance to submit a Statement of Interest and to allow the plaintiffs to conduct limited jurisdictional discovery and (2) deny defendants' motion to dismiss on political question grounds.

Dated: New York, New York
July 6, 2011

KREINDLER & KREINDLER

_____/s/_____
James P. Kreindler (JK7084)
750 Third Avenue
New York, NY 10017-5590
(212) 687-8181
(212) 972-9432 (Fax)

-- and --

THE SILVERMAN LAW FIRM
16 Squadron Boulevard
New City, NY 10956