

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
DR. ROGER C. S. LIN, ET AL.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 06-1825 (RMC)
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

On October 24, 2006, Plaintiffs filed a Complaint for Declaratory Relief with this Court, seeking a declaration of Plaintiffs' rights under the United States Constitution and laws. On January 12, 2007, Defendant filed a Motion to Dismiss, arguing that the Complaint should be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Defendant contends that the "political . . . nature" of this action requires dismissal. (Memo. Def.'s Mot. to Dismiss at 1.) This action does not present a nonjusticiable political question, but rather requires treaty, statutory, and constitutional interpretation, which this Court has the power and duty to do.

Defendant contends that Plaintiffs lack standing, and the "advisory nature" of this action requires dismissal. (*Id.*) Plaintiffs suffered an injury-in-fact caused by Defendant's wrongful conduct that will be redressable by this Court's declaration of Plaintiffs' rights.

Defendant argues it has sovereign immunity from this action. Defendant waived sovereign immunity by specific statutory consent.

Defendant erroneously contends this Court does not have Federal Question jurisdiction to interpret federal statutes, treaties, and the Constitution. Nothing could be more wrong.

Lastly, Defendant argues Plaintiffs do not have a private cause of action under the applicable statutes and treaties. Again, we will show they do.

For the reasons set forth below, Defendant's Motion to Dismiss should be denied.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS ACTION.

This Court has subject matter jurisdiction over this action. The case does not present a nonjusticiable political question, but rather requires interpretation of treaties, statutes, and the United States Constitution using regular means of interpretation. Plaintiffs are not asking this Court to issue an advisory opinion. Instead, Plaintiffs have standing to bring this action as they have suffered an injury-in-fact caused by Defendant's conduct and redressable by this Court's declaration of Plaintiffs' rights. This Court's subject matter jurisdiction is specifically authorized by statutes. Defendant waived sovereign immunity from this action by statutes.

A. This Case Does Not Present a Non-Justiciable Political Question.

This case does not present a nonjusticiable political question. The question presented in this case is simply whether the United States Constitution and laws guarantee any rights to Plaintiffs. The question presented in this case requires interpretation of treaties, statutes, and the Constitution using regular means of interpretation. Adjudicating this question does not require the court to contradict any policy determination already made by the political branches or interfere with their conduct of foreign relations.

1. The *Baker/Goldwater* standard for determining whether a case presents a nonjusticiable political question.

The political question doctrine is a narrow doctrine that restrains the courts from deciding "political questions," not "political cases." *Baker v. Carr*, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962) (emphasis added); *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 796-798, 233 U.S. App. D.C. 384 (1984) ("Nonjusticiability based upon "political question"

is *at best a limited* doctrine It is . . . clear that the political question doctrine is a very limited basis for nonjusticiability.”)(emphasis in the original).

The modern standard for determining whether a case presents a nonjusticiable political question is set forth in *Baker v. Carr*:

- Prominent on the surface of any case held to involve a political question is found
- [(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.

In *Goldwater v. Carter*, 444 U.S. 996, 998, 100 S. Ct. 533, 62 L. Ed. 2d 428 (1979) involving justiciability of President’s termination of the Mutual Defense Treaty with Taiwan, Justice Powell distilled the *Baker* test into three inquiries:

- (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? [covering the first *Baker* factor]
- (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? [covering the second and third *Baker* factors]
- (iii) Do prudential considerations counsel against judicial intervention? [covering the fourth, fifth, and sixth *Baker* factors]

Id. at 998 (Powell, J., concurring); *see also Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005) (applying the analysis discussed by Justice Powell in *Goldwater*). As we will show, Defendant has failed to establish that any of the *Baker/Goldwater* factors bar judicial resolution of the particular question presented by Plaintiffs.

2. Not all cases involving foreign relations present “political questions.”

With respect to the cases involving foreign relations, the Supreme Court cautioned in *Baker* that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” *Id.* at 211 (emphasis added). Rather than declining to exercise jurisdiction purely because a case involves foreign relations, the courts must engage in “a discriminating analysis of the particular question posed[.]” *Id.*

Applying *Baker* in a case involving foreign relations, the D.C. Circuit noted,

While the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation’s foreign affairs, it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs. The court must instead look at “the particular question posed” in the case. *Baker v. Carr*, 369 U.S. at 211. In fact, courts are routinely deciding cases that touch upon or even have a substantial impact on foreign and defense policy.

Dellums v. Bush, 752 F. Supp. 1141, 1146 (D.C. Cir. 1990) (emphasis added).

Similarly, applying *Baker* in a case touching foreign relations, the Second Circuit opined,

Not every case “touching foreign relations” is nonjusticiable, . . . and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights Although these cases present issues that arise in a politically charged context, it does not transform them into cases involving nonjusticiable political questions. The doctrine is one of “political questions,” not one of “political cases.”

Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (emphasis added) (internal citations and quotations omitted).

The courts have consistently rejected the political question challenge in the cases requiring treaty, statutory, or constitutional interpretation, even though such cases involved foreign relations. *See, e.g., Wang v. Masaitis*, 416 F.3d 992 (9th Cir. 2005) (holding that the political question doctrine did not preclude the court from considering the constitutionality of the extradition treaty with Hong Kong, a non-sovereign, under the Treaty Clause of the

Constitution); *Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005) (holding that the political question doctrine did not preclude resolution of the question whether the Palestine Liberation Organization was a sovereign state immune from suit under the Anti-Terrorist Act and the Foreign Sovereign Immunities Act); *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004) (overcoming the political question challenge and holding that foreign detainees held at the Guantanamo Bay Naval Base in Cuba could challenge the legality of their indefinite detention under the United States laws in federal courts); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005) (holding justiciable the Vietnamese plaintiffs' claims against American chemical companies for exposure to herbicides used during the Vietnam War under international conventions and domestic statutes); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (holding justiciable the plaintiff's claims against President of Bosnian-Serb Republic Karadzic for genocide, war crimes, and crimes against humanity under international conventions and domestic statutes); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986) (rejecting the political question challenge and adjudicating on the merits the plaintiffs' claim against the Secretary of Commerce for failure to certify Japan as an international whaling quota violator pursuant to a statute, even though the United States and Japan concluded an international executive agreement whereby Japan promised to cease its whaling by 1988, and the Secretary of Commerce promised not to certify Japan.); *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (overcoming the political question challenge and deciding what process is due to a Guantanamo Bay detainee held as an "enemy combatant" pursuant to a statute); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (rejecting the political question challenge and holding that the United States' offensive military operations in Iraq rose to the level of "war" requiring a Congressional

declaration of war pursuant to the Constitution); *United States v. Shiroma*, 123 F. Supp. 145 (D. Haw. 1954) (deciding the issue whether the United States acquired *de jure* sovereignty over Okinawa, Ryukyu Islands, under the San Francisco Peace Treaty, and whether Okinawans owed permanent allegiance to the United States); *Cheng Fu Sheng v. Rogers*, 177 F. Supp. 281 (D.D.C. 1959) (deciding the issue whether Taiwan is a “country” for the purpose of the deportation statute, and whether Taiwan is part of China), *rev’d on other grounds, Rogers v. Cheng Fu Sheng*, 108 U.S. App. D.C. 115, 280 F.2d 663 (D.C. Cir. 1960) (reversed on the grounds that the deportation statute contemplates a broader meaning of the word “country” than “national sovereignties” to reduce the number of “undeportables”).

3. There is no “textually demonstrable” “commitment” of the question presented by Plaintiffs to the political branches.

With regard to the first *Baker* factor, there is a textually demonstrable commitment of the question presented by Plaintiffs to the judiciary as opposed to any coordinate political department. The Constitution explicitly extends judicial power to the interpretation of treaties and statutes. U.S. CONST. art. III, §2 (“The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”).

The Supreme Court reiterated that “the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.” *Japan Whaling Ass’n v. American Catecean Soc’y*, 478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986). Lower courts added that the “[c]ourts remain obliged to determine whether [statutory and treaty] provisions may be interpreted as guarantees of enforceable rights.” *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 69 (E.D.N.Y. 2005). The courts have a constitutional duty to interpret statutes and

treaties, considering that “under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.” *Id.* at 69. Lower courts adopted the view that “[t]reaties are the law of the land. Cases arising under treaties are justiciable. Louis Henkin, *Lexical Priority or ‘Political Question’: A Response*, 101 HARV. L. REV. 524, 531 (1987).” *Id.* at 75.

To the extent Defendant argues that the political question doctrine bars this Court from interpreting the San Francisco Peace Treaty¹ (“SFPT”), the Taiwan Relations Act² (“TRA”), the Immigration and Nationality Act³ (“INA”), the Administrative Procedure Act⁴ (“APA”), and the Constitution to ascertain Plaintiff’s rights, Defendant’s position is contrary to judicial precedents. Judicial precedents show that this Court has the constitutional power and duty to interpret the SFPT, the TRA, the INA, the APA, and the Constitution to determine whether their provisions guarantee enforceable rights to Plaintiffs.

4. There is no “lack of judicially discoverable and manageable standards” or “impossibility of deciding without an initial policy determination.”

Concerning the second and third *Baker* factors, there is no “lack of judicially discoverable and manageable standards” or “impossibility of deciding without an initial policy determination.” In deciding this case, this Court would use “regular means of [treaty, statutory, and] constitutional interpretation” to ascertain Plaintiffs’ rights under the SFPT, the TRA, the INA, the APA, and the Constitution. *See Wang v. Masaitis*, 416 F.3d 992, 996 (9th Cir. 2005)

¹ Treaty of Peace with Japan, Sept. 8, 1951, Allied Powers-Japan, 3 U.S.C. 3169 (hereinafter “SFPT”).

² Taiwan Relations Act, 22 U.S.C. §§ 3301-3316 (2006).

³ Immigration and Nationality Act, 8 U.S.C. § 1101-1778 (2006) (hereinafter “INA”).

⁴ Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2006) (hereinafter “APA”).

(“Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provision at issue.”) (internal citations and quotations omitted). Domestic and international law provides judicially discoverable and manageable standards for treaty, statutory and constitutional interpretation. *See Kadic* 70 F.3d at 249 (“universally recognized norms of international law provide judicially discoverable and manageable standards”); *Agent Orange*, 373 F. Supp. 2d at 70 (“While the answers to questions of international law, like those of domestic law, may not always be clear, they are ascertainable and manageable.”).

This Court would not be deciding this case “without an initial policy determination” because such policy determination has already been made by the political branches. The policy determinations regarding Taiwan are reflected in the SFPT, the Mutual Defense Treaty,⁵ the TRA, Executive Order No. 13014, communiqués, memoranda, and other documents.

Thus, resolution of the question presented by Plaintiffs does not require this Court to move beyond areas of judicial expertise.

5. Judicial resolution of this case would not contradict any prior policy determination by the political branches and would not interfere with their conduct of foreign relations.

With regard to the fourth through sixth *Baker* factors, which Justice Powell in *Goldwater* grouped as “prudential considerations,” judicial resolution of this case does not require this Court to contradict any prior policy determination by the political branches regarding Taiwan or interfere with their conduct of foreign relations. *Kadic*, 70 F.3d at 249 (the “fourth through sixth *Baker* factors” are “relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would

⁵ Mutual Defense Treaty, Dec. 2, 1954, U.S.-ROC, 6 U.S.T. 433 (no longer in effect).

seriously interfere with important governmental interests” (emphasis added); *see also Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005).

Contrary to Defendant’s mischaracterization of the Complaint, Plaintiffs are *not* asking this Court to question the judgment of the political branches with regard to who exercises *de facto* or *de jure* sovereignty over the territory of Taiwan (although at least one court has done it).⁶ (*See* Memo. Def.’s Mot. to Dismiss at 10.) Plaintiffs are *not* asking the Court to decide the status of Taiwan (although Supreme Court’s precedents would provide a basis for that.)⁷

⁶ If Plaintiffs asked this Court to decide which country exercises *de jure* sovereignty over Taiwan—which Plaintiffs are *not* asking this Court to do—*United States v. Shiroma*, 123 F. Supp. 145 (D. Haw. 1954) would supply a persuasive authority. In *Shiroma*, the Hawaii District decided the issue whether the United States exercised *de jure* sovereignty over Okinawa, the Ryukyu Islands, and whether Okinawans owed permanent allegiance to the United States and were United States nationals. *Id.* at 148. The court examined Article 3 of the SFPT dealing with the disposition of the Ryukyu Islands and a speech by John Foster Dulles, a consultant to the Secretary of State at the time. *Id.* at 148-149. The court held that Japan as opposed to the United States had *de jure* sovereignty over Okinawa following the SFPT, and therefore Okinawans were not United States nationals. *Id.* at 149. Interestingly, in reaching its conclusion, the Court specifically compared and contrasted the wording of Article 3 dealing with the disposition of the Ryukyu Islands, with the wording of Article 2 dealing with the disposition of Taiwan.

⁷ If Plaintiffs asked this Court to decide the status of Taiwan—which Plaintiffs are *not* asking this Court to do—the “Insular Cases” summarized below would provide a basis. In the “Insular Cases,” the Supreme Court interpreted the Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754 (the “Treaty of Paris”) (which concluded the Spanish War), ascertained the status of Puerto Rico and the Philippines, and defined the rights of persons living there. The “Insular Cases” would be relevant here because they involved judicial interpretation of a peace treaty disposing of a territory following the cessation of hostilities. In the “Insular Cases,” Articles II and III of the Treaty of Paris provided for Spain ceding to the United States the island of Puerto Rico and the Philippine Islands. Similarly, in this case, Article 2(b) of the San Francisco Peace Treaty provided for Japan renouncing all right, title, and claim to Taiwan.

In *De Lima v. Bidwell*, 182 U.S. 1, 21 S. Ct. 743, 45 L. Ed. 1041 (1901), the Supreme Court interpreted the Treaty of Paris to ascertain the status of Puerto Rico to decide whether an importer of sugar cane in Puerto Rico was required to pay an import duty). Likewise, in *Downes v. Bidwell*, 182 U.S. 244, 21 S. Ct. 770, 45 L. Ed. 1088 (1901), the Supreme Court examined the status of Puerto Rico to determine whether an importer of oranges in Puerto Rico was required to pay an import duty. Similarly, in *Dorr v. United States*, the Supreme Court examined the status of the Philippines to determine whether a criminal defendant in the Philippines was entitled to a jury trial under the Sixth Amendment of the Constitution. Also, in *Balzac v. Porto Rico*, 258

Instead, Plaintiffs are asking this Court to declare to what extent the United States Constitution and laws guarantee rights to Plaintiffs, based on pre-existing executive and legislative determinations considering Taiwan's status. By adjudicating the question presented by Plaintiffs, this Court would stay within the bound of judicial authority delineated in *Baker*:

[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area.

Baker, 369 U.S. at 212.

This is precisely what the Ninth Circuit did in *Wang v. Masaitis*, 416 F.3d 992 (9th Cir. 2005). In *Wang*, the issue was whether the extradition treaty with Hong Kong was constitutional considering that Hong Kong was a non-sovereign. Just as in this case, in *Wang*, the United States argued that the constitutionality of the extradition treaty was a nonjusticiable political question because it arguably required the court to decide the status of Hong Kong. The Ninth Circuit disagreed and found that it “need not decide the status of Hong Kong’s sovereignty.” *Id.* at 994. “Rather, the constitutional issue that Wang has raised is whether the term “treaty” in the Treaty Clause encompasses agreements with non-sovereigns, such as Hong-Kong -- and that question is clearly justiciable under *Baker v. Carr*” *Id.* Having considered the history of the transfer of sovereignty over Hong Kong from the United Kingdom to China in 1997, the legal instruments implementing the transfer, and the policy declarations regarding the transfer, the Ninth Circuit concluded that “China’s sovereignty over Hong Kong (and by corollary Hong Kong’s subsovereign status) has been resolved by the executive branch,

U.S. 298, 42 S. Ct. 343, 66 L. Ed. 627 (1922), the Supreme Court examined the status of Puerto Rico to determine whether a criminal defendant in Puerto Rico was entitled to a jury trial pursuant to Sixth Amendment of the Constitution.

and we do not question that judgment.” *Id.* at 995 (emphasis added). “However, this court may examine the resulting status of Hong Kong, and decide whether the Treaty Clause applies to Hong Kong as a constitutionally cognizable treaty party.” *Id.* (emphasis added). Having overcome the political question hurdle, the Ninth Circuit upheld the extradition treaty with Hong Kong because Hong Kong’s status was sufficient to satisfy the requirements of the Treaty Clause of the Constitution. *Id.* at 1000.

In light of *Wang*, this Court has the power to consider the history of the transfer of sovereignty over Taiwan from Japan in 1952, the SFPT implementing the transfer, and the legislative and executive policy statements regarding Taiwan embodied in the TRA, Executive Order No. 13014, communiqués, memoranda, and other documents. Defendant cites multiple legislative and executive policy statements regarding Taiwan, which, according to Defendant, make “clear” what Taiwan’s status is. (*See* Memo. Def’s Mot. to Dismiss at 10-14.) Without questioning the judgment of the legislative and executive branches regarding Taiwan’s status, this Court has the power to declare to what extent the United States Constitution and laws guarantee rights to Plaintiffs. Such declaration would not be incompatible with the position taken by the political branches regarding Taiwan. This Court will give deference to the policy statements by the political branches regarding Taiwan, and therefore will not show lack of respect due to them. Such declaration would not interfere with the nation’s ability to speak in one voice in the field of foreign relations, considering that Plaintiffs seek to vindicate their personal rights rather than influence America’s foreign policy. *See Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) (finding the trial court’s reliance on the political question doctrine misplaced so far as the plaintiffs sought to vindicate personal right rather than influence America’s foreign policy).

