UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

Case No. A042 241 058

In the matter of:

VIDES CASANOVA, Carlos Eugenio

In removal proceedings

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RESPONDENT'S INITIAL BRIEF

Respondent, CARLOS EUGENIO VIDES CASANOVA, by and through undersigned counsel, respectfully submits this Initial Brief. For reasons discussed herein, the Courts decision should be reversed.

The government bears the burden of proof in this case, and must establish grounds for removal by clear and convincing evidence. The grounds for removal that are relied upon as the basis for deportation of Respondent in this case are those specified in Section 237(a)(4)(D) of the INA, which is that Respondent allegedly "assisted or otherwise participated in" acts of torture, as defined by the statute.

A. FACTS OF THE CASE

Defendant Carlos Eugenio Vides is a native and citizen of El Salvador. He has lived in the United States as a Legal Permanent Resident since 1989. The United States Department of Homeland Security ("the Department" or "Homeland Security"

hereinafter) has charged that Vides is removable from the United States because from "1979 to 1989, . . . [he] assisted or otherwise participated in the commission of acts of torture." (Notice to Appear, at p. 2). The Department relies on "Section 237(a)(4)(D)" of the Immigration and Nationality Act ("INA"), allowing for the removal of aliens who are in turn inadmissible under "section 212(a)(3)(E)(iii)(I)" of the INA. (*Id.*). This "inadmissibility" provision is codified at, and more properly cited as, a portion of 18 U.S.C. § 1182.

Despite the long span of years listed in the Notice to Appear, the Department's notice does not list ***one single incident*** of "torture" with which Respondent purportedly assisted or "otherwise participated" in. Respondent has stated that he was, as alleged in Homeland Security's notice, the head of the Salvadoran National Guard and subsequently the Minister of Defense of El Salvador during the stated time period, but has denied taking part in or ordering any torture, and further stated that all his actions were taken in compliance with the law and constitution.

EVIDENCE SUBMITTED AT HEARING

The evidence presented at the hearing in this case (which occurred April 18-22 and May 24 and 26, 2011) by DHS in support of its allegations against Respondent consisted of in-person testimony by four witnesses – Ambassador Robert White, Daniel Alvarado, Dr. Juan Romogoza Arce, and Professor Terry Karl – as well as the submission of certain documents, most significantly a report of the United Nations Commission appointed to study and report on human rights violations connected with the Salvadoran civil war, and a report that had been prepared by the aforementioned Professor Terry

Karl.[1] In response to this evidence produced by the government, Respondent cross-examined the above-referenced witnesses, and also presented testimony of Respondent and two additional witnesses – Ambassadors David Passage and Edwin Corr.

It is conceded that the evidence of record establishes that El Salvador experienced a bloody civil war between the years 1980 through 1992, during which numerous atrocities were committed by combatants on both sides. The evidence also establishes that the military regime of which Respondent was an upper-echelon officer was deemed by the Reagan Administration to be a "progressive" and democratically leaning regime; and was a staunch and reliable ally of the United States in opposing communist expansion in the Western Hemisphere. The evidence also establishes that while this regime had initially assumed power in a *coup d'etat*, it ultimately bequeathed upon El Salvador the democratic institutions it enjoys today (and under which the "present day political successors" of the "former rebels" are currently wielding political power in the country). More importantly, however, the evidence fails to establish clearly and convincingly that Respondent *personally* engaged in any conduct that could be deemed "assisting" or "participating in" any act of torture, and his mere status as an officer in a

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[1] For reasons discussed in the argument section this brief, Respondent respectfully submits that neither the report of the U.N. Commission nor that of Professor Karl amounts to competent, admissible evidence, and therefore such materials introduced into evidence by the government should be disregarded. Such reports contain many statements constituting hearsay by numerous parties who are unidentified or otherwise not subject to any form of cross-examination, and allowing Respondent to be deported on the basis of such evidence would amount to a violation of due process that cannot be tolerated. For similar reasons, the testimony provided at the hearing by Professor Terry Karl should also be disregarded, insofar as such testimony clearly is based on hearsay statements rather than on the basis of any personal knowledge that Professor Karl has, and such testimony cannot be deemed admissible on the basis that it is "expert opinion testimony."

regime in which such atrocities were committed is not a sufficient basis to remove him from the United States, under the statutory provisions relied on in this case.

The government's brief discusses the testimony of Ambassador David White at some length, but fails to mention several significant aspects or portions of such testimony. For one thing, while it is admitted that Ambassador White met many times with then-Minister of Defense Garcia, and that Respondent sometimes attended these meetings, any suggestion that Respondent had the ability personally to put an end to all acts of torture, had he so desired, is simply not consistent with the record in this case. During all times that Ambassador White was serving in El Salvador, Respondent was merely the head of the National Guard, but Ambassador White's testimony concerning acts of torture does not distinguish the National Guard from other components of the Salvadoran military.

Furthermore, Ambassador White's own statements refute his suggestion that Respondent could and should have put an end to all torture during the time of White's service in El Salvador. On cross-examination, Ambassador White testified that at one of the meetings he had with both Garcia and Respondent in which the subject of torture was discussed, Respondent made a statement to Garcia which indicated that Respondent had previously advised Garcia that the acts of torture needed to be eliminated, but that Garcia had refused to take any action on the basis of such recommendations by Respondent. This evidence refutes Ambassador White's suggestion that Respondent had the ability to eliminate the torture if he had only chosen to do so.

Ambassador White also testified on cross-examination that the military junta of which Respondent was an officer was a staunch ally of the United States in its opposition

to the so-called rebel forces, as it was the official position of the Reagan administration that allowing the rebels to gain control of El Salvador would create an unacceptable risk of communism spreading throughout the Western Hemisphere. In fact, Ambassador White testified that during the time of his diplomatic service, he was consistently requested to "sign off" on official diplomatic statements to the effect that the torture problem in El Salvador was "improving," but that he refused to do so, and that such refusal was ultimately the reason he lost his position as Ambassador to El Salvador. Ambassador White also admitted on cross-examination that he did not believe it was appropriate or "fair" to now be "sitting in judgment after the fact" of the propriety of actions previously taken by Respondent as a former ally of the United States and at the request of the United States government.

The testimony of witness Pedro Daniel Alvarado is insufficient to establish that Respondent "assisted" or "participated in" any act of torture. Although Alvarado testified that he was subjected to several acts of torture during the time period commencing August 25, 1983 and continuing for approximately one week thereafter, there is absolutely nothing in his testimony to indicate that Respondent had any personal involvement in such acts of torture, which Alvarado testified were all committed by members of the Treasury Police under the direction of its director, Colonel Nicolas Carranza.

The only aspect of Alvarado's testimony that relates in any way to Respondent is his claim that in November 1983, long after commission of the acts of torture he claims he was subjected to, he was visited in his jail cell by a colonel who claimed to have been sent by Respondent, and who allegedly offered to have Alvarado released if he would

agree to serve as an informant against the guerillas. Such testimony should not be considered at all, insofar as it is inadmissible hearsay, but regardless of whether the Court is inclined to consider it, such testimony simply does not show that Respondent "assisted" or "participated in" any act of torture. The alleged statement was one *offering to release Alvarado* if he agreed to the proposed terms; *it did not threaten torture* as a consequence of failure to agree.

The evidence presented at the hearing, particularly Alvarado's own testimony on cross-examination, establishes that Alvarado was a pro-rebel agitator or "organizer," rather than a neutral noncombatant as he claimed to be. In light of such status, the offer made by the colonel clearly was intended to obtain valuable military intelligence information rather than to threaten any torture or other adverse consequences against Alvarado following a refusal. Thus, Alvarado's testimony regarding this incident is not sufficient to personally implicate Respondent in any specific acts of torture that may have been committed against Alvarado.

Furthermore, even if it is assumed *arguendo* that Alvarado's testimony would be sufficient on its face to prove that Respondent ever "assisted" or "participated in" any specific acts of torture, such testimony is not probative and thus deserves no consideration, as Respondent's cross-examination of Alvarado clearly revealed him to be a pro-guerilla "combatant" rather than the "neutral noncombatant" he portrayed himself as being, thus demonstrating a strong bias to fabricate evidence against Respondent.

The testimony of DHS's next witness – Dr. Juan Romogoza Arce – is similar to that of Mr. Alvarado in the sense that it describes numerous specific acts of torture committed against Dr. Romogoza, but does not establish that Respondent ever "assisted"

or "otherwise participated" in any of such acts. The only testimony of Dr. Romogoza that even purports to show direct involvement by Respondent in the torture committed against Dr. Romogoza consists of his testimony that on one occasion during the period of time while he was being imprisoned and tortured, he was visited by a person identified by his captors as "the colonel," who Dr. Romogoza claimed he was able to see for a very brief period of time, on the basis of which he identified "the colonel" as being Respondent. However, while such testimony, if believed, might be sufficient to establish Respondent's personal involvement in torture, the testimony on cross-examination of Dr. Romogoza establishes that such testimony is not worthy of belief and therefore should be rejected as lacking credibility.

Cross-examination established that Dr. Romogoza's testimony in the instant case differed significantly in several respects from that previously given by him in a prior civil action against Respondent. For instance, in the instant case, he claimed that when he was initially captured by government forces, he was transported to the place of his incarceration solely by truck. However, he had testified in the earlier case that he was transported partially by truck and partially by helicopter, and on cross-examination in the instant case he acknowledged this inconsistency with his previous testimony.

Another respect in which Dr. Romogoza's present testimony differs from that which he previously gave is in his description of the alleged incident in which he claims to have seen "the colonel's" face and identified it as being Respondent. In the present case, he testified that he was momentarily able to see "the colonel's" face "from the nose down," and that he recognized Respondent from previously seeing his picture on television. However, in the earlier civil case, Dr. Romogoza had testified very clearly

and specifically that he was only able to see those parts of "the colonel" which were "below the belt." Again, Dr. Romogoza acknowledged this inconsistency on cross-examination.

In view of the foregoing inconsistencies between Dr. Romogoza's present testimony and that which he has previously given under oath, such testimony is not credible and should be rejected. The lack of reliability of such testimony is further demonstrated by scientific studies (introduced into evidence by Respondent) which establish that persons subjected to torture or similar conditions have a limited capacity to subsequently identify their tormentors *even when they have a clear view of such persons.* According to this study, there would be a less than 50% chance that Dr. Romogoza could correctly identify "the colonel" even if he had been able to see "the colonel" without obstruction for a longer period of time than was allegedly involved in Dr. Romogoza's view of "the colonel." However, insofar as Dr. Romogoza admittedly was *not* able to get a good look at "the colonel" (even under Dr. Romogoza's "present version" of the events in question), it is clear that his identification of Respondent as "the colonel" is even less reliable than that.

For the above reasons, the testimony of Dr. Romogoza does not establish that Respondent "assisted" or "otherwise participated in" any acts of torture so as to be subject to removal.

The last witness whose testimony was introduced by DHS is Professor Terry Karl. Although described as an "expert witness," it is clear that the majority of the testimony provided by Professor Karl purports to be factual testimony rather than an "expert opinion." This testimony is based on years of work by Professor Karl in studying the

Salvadoran Civil War (which she has "made a career out of," literally), and includes "second-hand reports" of numerous statements allegedly made to Professor Karl by other persons concerning the subject matter of her studies. (In addition to the oral testimony of Professor Karl, DHS also introduced into evidence reports previously prepared by her based on her years of study.)

While Professor Karl described numerous acts of torture committed by both sides during the Salvadoran Civil War, she made no effort whatsoever to show any personal involvement in such acts of torture by Respondent, except in a few isolated instances. Her testimony with regard to these few instances should be disregarded, as it is clearly based on inadmissible hearsay, and allowing such testimony to be considered under the circumstances of the present case would constitute a denial of due process.

In addition, Professor Karl's testimony is simply not very probative or reliable, even if the above-referenced hearsay/due process considerations are not deemed a sufficient basis to disregard it. Professor Karl is admittedly sympathetic toward the so-called rebels who were the former adversaries of the military junta in which Respondent was an officer, so she clearly is biased against Respondent. Despite her sympathies toward the Salvadoran rebels, she conceded that they had engaged in acts of torture and other atrocities during the Civil War, as did the pro-government forces, and that her suggestions regarding actions that Respondent allegedly should have taken to eliminate torture were inconsistent with official United States policy at the time.

In addition to the foregoing considerations concerning whether Professor Karl's testimony is neutral and objective, there also are inherent inconsistencies in her testimony which render it highly suspect. For instance, Professor Karl testified that the military in

El Salvador during the time Respondent held his positions of authority was "rigidly hierarchical," and that the chain of command was "scrupulously observed." However, at the same time, Professor Karl also testified that loyalties within the Salvadoran military were not always directed toward superior officers in the military generally, and that there were competing claims on the loyalties of Salvadoran soldiers. She described the so-called "tanda" system, which refers to the fact that each member of a graduating class from the country's military academy develops a sense of loyalty to other members of the same graduating class. Such loyalties are of course inconsistent with her simultaneous description of strong concepts of authority and loyalty based on the "chain of command" within the military generally.

Due to the above-referenced shortcomings in Professor Karl's testimony regarding alleged involvement by Respondent in specific acts of torture, such testimony should be disregarded. However, even if Professor Karl's testimony relative to such incidents is deemed credible and worthy of belief, it is legally insufficient to show the required degree of personal involvement by Respondent required to satisfy the relevant standards of "assisting" or "otherwise participating in" torture. At most her testimony refers to alleged *failures to act* by Respondent rather than active conduct by him amounting to assistance of or participation in torture, and Respondent respectfully submits that such evidence of alleged *omissions to act* by Respondent does not constitute evidence of "assistance" or "participation" with respect to specific incidents of torture, and instead constitutes merely an attempt to hold Respondent responsible for torture committed by others based solely on his status as a "superior officer" of the actual wrongdoers.

Professor Karl's testimony regarding actions she claims Respondent should have taken to end the torture, but did not take, fails to establish that Respondent "assisted" or "participated in" torture. This is because the evidence fails to establish that Respondent should have been aware of a need to take action of the sort described by Professor Karl, or that even if such actions had been taken, they would have been successful in avoiding any specific acts of torture. Professor Karl testified for instance that Respondent failed to refer individual soldiers or officers who had engaged in acts of torture to the courts or a military tribunal to face charges, but that he should have done so. However, Professor Karl's contention that Respondent was aware of a need to take such action is inconsistent with the fact that he was receiving consistently high ratings from United States officials during that time period with regard to his performance of his duties, including his actions with regard to the torture situation in the country. Professor Karl also admitted that the U.S. government continued to fund the Salvadoran government during this time (and that such funding was contingent upon acceptable compliance with prevailing human-rights standards), and conceded that her views regarding what needed to be done to address the problem of torture was not consistent with official United States policy at the time.

In addition, Professor Karl also failed to establish that even if Respondent had taken the sort of preemptive or corrective actions that she contends should have been taken, such actions would have had any significant effect in eliminating or reducing torture. For instance, Professor Karl conceded on cross-examination that the courts of El Salvador during the relevant time period were corrupt for the most part, and even when they were not, they did not have much real power or authority. Therefore, there is no reason to believe that even if Respondent had taken the sort of actions recommended by

Professor Karl, those actions would have been effective to avoid any specific acts of torture. (The evidence establishes that no one was ever prosecuted for torture during the period of the Salvadoran Civil War.)

In view of the questionable probative value of Professor Karl's hearsay-laden testimony, such testimony should be rejected outright, but even if it is considered, it fails to establish assistance or participation by Respondent in any specific acts of torture.

Respondent presented the testimony of Ambassadors David Passage and Edwin Corr in support of his position, as well as testifying in his own behalf. Ambassadors Passage and Corr both testified that Respondent received firm and consistent support from the United States for his actions while serving as head of the National Guard and later as Minister of Defense, and that he was regarded by authorities within the Reagan administration as being a "progressive" who was sympathetic to democratic ideals and institutions. They also contradicted Professor Karl's testimony regarding the alleged hierarchical nature of the Salvadoran military by testifying that during the Salvadoran Civil War, many of the pro-government forces acted autonomously – at the unit or platoon level – without direct orders from superior officers in the chain of command. These "rogue units" acted on the basis of orders from their immediate commanders – who in turn often directly defied orders from above.

Respondent, testifying in his own behalf, confirmed the testimony of Ambassadors Passage and Corr in this regard. He testified that most of the government soldiers in the field held primary loyalties to their unit commanders, and therefore could accurately be described as rogue units because they often were not carrying out orders of officers of a higher rank. He also testified that he had received firm and unwavering

support from United States officials during his service, as demonstrated by consistently high ratings on the diplomatic "country reports" for El Salvador during the time of his service in the military. Indeed, he had even been invited to the White House, where he met with President Reagan and was given medals in recognition of his service.

ARGUMENT

I. THE TESTIMONY OF PROFESSOR KARL AND THE WRITTEN REPORTS PREPARED BY PROFESSOR KARL AND THE UNITED NATIONS COMMISSION SHOULD BE DISREGARDED, AS SUCH TESTIMONY AND DOCUMENTS ARE BASED ON, AND INCLUDE, NUMEROUS HEARSAY STATEMENTS BY UNIDENTIFIED OR UNIDENTIFIABLE PERSONS WHO ARE NOT SUBJECT TO CROSS-EXAMINATION, AND CONSIDERATION OF SUCH EVIDENCE WOULD VIOLATE DUE PROCESS OF LAW.

As noted above briefly in the summary of evidence presented at the hearing in this case, the evidence presented by DHS included not only in-person testimony by Professor Karl based on her various studies, but also documentary evidence in the form of an official report by a United Nations commission on the Salvadoran Civil War, and a similar report prepared by Professor Karl. Respondent timely and properly objected to admission of this documentary evidence and Professor Karl's testimony on the ground that all such evidence was incompetent, inadmissible hearsay and its consideration would be improper. Although the Court admitted such testimony and documents into evidence over Respondent's objection, Respondent reiterates his objection to consideration of such evidence, and contends it should not be relied upon in rendering a decision in the instant case.

The law is clearly established that the formal rules of evidence do not apply in administrative proceedings such as alien removal proceedings by DHS, so that hearsay

evidence is not necessarily inadmissible in such proceedings, *see, e.g., Richardson v. Perales,* 402 U.S. 389, 402 (1971); *Garces v. United States Att'y Gen.,* 611 F.3d 1337, 1347 (11th Cir. 2010). Nevertheless, it remains impermissible for an administrative tribunal to rely on hearsay evidence as the basis for a decision under circumstances where the evidence is not of reliable probative value, or where its consideration would amount to a violation of the due process rights of the party against whom the evidence is offered. Thus, in *Tashnizi v. I.N.S.,* 585 F.2d 781 (5th Cir. 1978), the court said:

> ***Uncontradicted*** hearsay evidence is admissible in deportation proceedings ***if it is probative and its use is not "fundamentally unfair*** so as to deprive petitioner of due process."

Id. at 782-83 (emphasis added; citing *Marlowe v. I.N.S.,* 457 F.2d 1314, 1315 (9th Cir. 1972)). *See also, See Espinoza v. I.N.S.,* 45 F.3d 308, 310-11 (9th Cir. 1995) (test for admission of evidence in a deportation proceeding is whether the evidence is probative and its admission is fundamentally fair). Under such standards, Professor Karl's testimony and the reports prepared by her and the United Nations commission should not be considered, because the hearsay statements contained in such evidence are not undisputed, and because Respondent has no way of effectively cross-examining the hearsay declarants, such that it would be a violation of due process to hold Respondent subject to removal on the basis of such evidence.

As noted above in the discussion of the evidence presented in this case, there are several aspects of the above-referenced reports and testimony which were contradicted by other evidence presented at the hearing below. To the extent that such evidence was contradicted, it was erroneous to allow it to be admitted at all, as the foregoing cases make clear that hearsay cannot be relied on even in administrative proceedings where it is

contradicted. In any event, even if such hearsay evidence was not contradicted in this case, it would still be improper to consider it, because doing so contravenes the minimal requirements of due process.

The United Nations Commission Report and the report prepared by Professor Karl make numerous references to hearsay testimony by many declarants who are either unidentifiable or otherwise not subject to effective cross-examination at the present time. Professor Karl's in-person testimony similarly incorporates numerous hearsay statements made to her by various persons over the course of the many years she has been studying the Salvadoran Civil War. (Such testimony also purports to refer to facts relevant to the charges against Respondent in this case, rather than any "expert opinion," so that it cannot be deemed admissible and probative evidence on that basis.) In light of the number of declarants whose statements are referenced or relied upon in the U.N. and Karl reports and Professor Karl's in-person testimony, the lack of identification of such declarants in the reports/testimony, and the passage of time between when the declarants made such statements and the present date, there is no way that Respondent can effectively cross-examine the declarants whose out-of-court statements have been referenced or relied upon. Accordingly, it would be a violation of due process to allow such reports or testimony to be considered in this case. *See, Alford v. United States,* 282 U.S. 687 (1931) (lack of reasonable opportunity to cross-examine witness constituted violation of due process, where witness's direct testimony related to one of principal disputed issues in case).

II. THE EVIDENCE OF RECORD FAILS TO ESTABLISH THAT RESPONDENT "ASSISTED" OR "OTHERWISE PARTICIPATED IN" THE COMMISSION OF ACTS OF TORTURE.

As DHS concedes in its post-trial brief, there are three elements necessary to proving the allegations against Respondent relied on as the basis for removal: (1) an act of torture or extrajudicial killing occurred in El Salvador, (2) under color of law, (3) and that Respondent "assisted or otherwise participated in" such act of torture or killing. (DHS brief, page 30). Although there may be evidence of record to establish that the first two requirements have been satisfied, the government has failed to satisfy its burden of establishing the third element by clear and convincing evidence, and Respondent therefore should be deemed not subject to removal.

The statutory language upon which DHS' efforts to remove Respondent are predicated is much different than that used in the federal Torture Victims Protection Act ("TVPA" hereinafter). Unlike the language of the TVPA, which may be triggered by conduct which "subjects" a person to torture (such language having been judicially construed to warrant imposition of liability on "superior officers" of certain active participants in the torture, under the concept of "command responsibility"), the language used in the statute applicable to this case is more specific and detailed in requiring that the alien sought to be removed must have "ordered, incited, assisted or otherwise participated in the commission of" the torture.

On the basis of several established principles of statutory interpretation, such language must be narrowly construed – at least as compared to the "subjects" standard established by the TVPA. One of the most significant of these principles is the "plain meaning" rule, under which a statute is required to be interpreted according to the plain and ordinary meaning conveyed by the language used therein. *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1266 (11th Cir. 2006) [" 'A fundamental canon of statutory

construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary meaning.' *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L.Ed.2d 199 (1979) . . .' "]. Since all the relevant terms in the applicable statute ("ordered, incited, assisted, or participated") all are generally understood as requiring *some active conduct* rather than mere "status," this is clearly a basis for distinguishing the TVPA and the case law decided thereunder.

In fact, DHS apparently recognizes the inapplicability of standards and decisions developed under the TVPA, and that the most analogous statute and cases are those involving aliens who have allegedly participated in Nazi-era torture or persecutions. (DHS brief page 34-36). However, contrary to DHS' argument, the evidence in this case does not establish any "participation" by Respondent in any act of torture, under the standards that have been developed in connection with enforcement of such statutory provisions.

In fact, the United States Supreme Court has effectively rejected any such "status" analysis in *United States v. Federenko*, 449 U.S. 490 (1981), wherein the Court opined that courts must focus instead on "whether ***particular conduct*** can be considered assisting in the persecution of civilians." 449 U.S. at 512 n. 34 (emphasis supplied). In *Federenko, supra*, a prison guard had actually committed or assisted in such persecution, and thus was deemed properly removable, but the Court noted an example of a person would not be considered a participant in persecution – a fellow prisoner pressed into service by the prison to cut another prisoner's hair, and stated that – in contrast to the guard who would carry a gun and ensure that prisoners could not escape, etc. – such person was not an active participant in the persecution of the prisoners.

Other cases decided under the Nazi-persecution-inadmissibility provision of the INA have similarly held aliens removable where they ***personally*** participated in rounding up Jews, *see, e.g.*, *United States v. Koziy*, 540 F. Supp. 25 (S.D. Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 105 S. Ct. 130 (1984); ***personally*** reported to the Gestapo civilians selling food to Jews, *United States v. Dercacz*, 530 F. Supp. 1348 (E.D.N.Y. 1982); or participated, as voluntary members of the Nazi-organized Ukrainian police, in deporting Jews. *United States v. Osidach*, 513 F. Supp. 51 (E.D. Pa. 1981). Prison guards and supervisors were often held removable. *See, e.g.*, *United States v. Kairys*, 600 F. Supp. 1254 (N.D. Ill. 1984) (defendant denaturalized because of wartime service as armed camp guard at Treblinka labor camp), *aff'd*, 782 F.2d 1374 (7th Cir.), *cert. denied*, 106 S. Ct. 2258 (1986); *United States v. Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981) (defendant denaturalized because of wartime service as supervisor at concentration camp), *aff'd mem.*, 685 F.2d 427 (2d. Cir.), *cert. denied*, 459 US. 883 (1982); *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio. 1981) (defendant denaturalized because of wartime service as camp guard at Treblinka and many individual atrocities committed there), *aff'd per curiam*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

Like the lower-level guards, police and prison staff ***directly*** participating in persecution, case law has included ***higher*** officials who ***ordered*** persecution as subject to removal, since the INA specifically says aliens who have committed or "ordered" torture or killing can not be admitted. *See, e.g.*, *United States v. Palcianskas*, 559 F. Supp. 1294 (M.D. Fla. 1983), *aff'd*, 734 F.2d 625 (11th Cir. 1984) (Lithuanian mayor helped create Jewish ghetto and subsequently appropriated property of Jews ordered into ghetto);

Maikovskis v. I.N.S., 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 2915 (1986) (Latvian who volunteered to be police chief during Nazi occupation and ordered men to assist Germans in rounding up civilians and burning entire village down). However, although the nature of the actions taken by "higher-ups" are different than those of rank-and-file soldiers involved in the persecution or torture, it is clear that some sort of *personal conduct* is required, and that a "superior officer" cannot be deemed responsible for all actions taken by persons lower in the chain of authority, simply on the basis of such "superior officer" status.

The cases cited by DHS in its post-trial brief are not inconsistent with such a requirement of "personal involvement" in the torture in some fashion. For instance, in *Matter of D-R-*, 25 I. & N. Dec. 445 (B.I.A. 2011), which is cited by the government, the Board of Immigration Appeals held that the evidence established the necessary "participation" by the respondent in that case, who was a Bosnian police officer in charge of a unit consisting of approximately 25 subordinates, which was proved to have been involved in killing hundreds of Muslims over the course of approximately one week. The Board held that since the evidence clearly established that the unit was responsible for the killings and the respondent was in control of the unit, he was a participant in the killings. However, the Board clearly was not dispensing with a requirement of some "personal" involvement, but only held it was not necessary to prove involvement which was *both* personal *and* "direct."

> The respondent challenges the Immigration Judge's determination that the DHS proved by clear and convincing evidence that he "ordered, incited, assisted, or otherwise participated" in an extrajudicial killing. While the Act does not define the phrase "ordered, incited, assisted, or otherwise participated," the Attorney General has

interpreted this phrase in the context of the persecutor bar, saying that "[t]he plain meaning of the relevant words in the statute is broad enough to encompass ***aid and support provided*** by a political leader to those who carry out the goals of his group, ***including statements of incitement or encouragement and actions*** that result in advancing the violent activities of the group." *Matter of A-H-*, 23 I&N Dec. 774, 784 (A.G. 2005). The terms "are to be given broad application" and "do not require ***direct*** personal involvement in the acts of persecution." *Id.* "It is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies." *Id.* at 785.

The United States Senate Report for the proposed Anti-Atrocity Alien Deportation Act of 2003, S.710, 108th Cong. (2003), explains the role of command authority as a form of assistance or participation in persecution and indicates the intended broad reach of the legislation. S. Rep. No. 108-209, at 10, 2003 WL 22846178, at *10 (Leg. Hist.). The Anti-Atrocity Alien Deportation Act of 2003 was not passed as separate legislation, but the statutory language from this bill was incorporated into the IRTPA, which was enacted into law. The report states that the proposed act was "intended to close loopholes in U.S. immigration laws that have allowed aliens who have committed serious forms of human rights abuses abroad to enter and remain in the country." *Id.* at 1-2, 2003 WL 22846178, at *1-2. It further provides as follows:

> The statutory language—"committed, ordered, incited, assisted, or otherwise participated in"—is intended to reach the behavior of persons directly or personally associated with the covered acts, including those with command responsibility. Command responsibility holds a commander responsible for unlawful acts when (1) the forces who committed the abuses were subordinates of the commander (i.e., the forces were under his control either as a matter of law or as a matter of fact); (2) the commander knew, or, in light of the circumstances at the time, should have known, that subordinates had committed, were committing, or were about to commit unlawful acts; and (3) the commander failed to prove that he had taken the necessary and reasonable measures to (a) prevent or stop subordinates from committing such acts, or (b)

> investigate the acts committed by subordinates in a genuine effort to punish the perpetrators. Attempts and conspiracies to commit these crimes are encompassed in the "otherwise participated in" language. This language addresses an appropriate range of levels of complicity for which aliens should be held accountable, and has been the subject of extensive judicial interpretation and construction. *See Fedorenko v. United States*, 449 U.S. 490, 514 (1981); *Kalejs v. INS*, 10 F.3d 441, 444 (7th Cir. 1993); *U.S. v. Schmidt*, 923 F.2d 1253, 1257-59 (7th Cir. 1991); *Kulle v. INS*, 825 F.2d 1188, 1192 (7th Cir. 1987).
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> *Id.* at 10, 2003 WL 22846178, at *10.
>
> The cases cited in this provision indicate that ***there is a continuum of conduct ranging from passive acceptance, which does not meet the legal standard, to active, personal participation, which clearly does.*** *See United States v. Schmidt*, 923 F.2d at 1258 (citing *Fedorenko v. United States*, 449 U.S. at 512 n.34). *See generally Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 213-14 (BIA 2007) (discussing the particular significance of cases that Congress cited with approval in legislative history). These cited cases also make clear that one can be found to have "assisted" in persecution even if he has not "personally engaged in acts of violence." *Id.*; *see also Kalejs v. INS*, 10 F.3d at 444 (stating that "assistance" in persecution is an independent basis for deportation, which "may be inferred from the general nature of the person's role in the war, so the atrocities committed by a unit may be attributed to the individual based on his membership and seeming participation"). In light of this legislative history, we conclude that inadmissibility under section 212(a)(3)(E) of the Act is established where it is shown that an alien with command responsibility knew or should have known that his subordinates committed unlawful acts covered by the statute and failed to prove that he took reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators.

(Emphasis added). Clearly, the above standard, while not requiring "direct" personal involvement in the torture, killing, or persecution under consideration, does require *some form of personal conduct* (or at least a "conscious omission") rather than imposing

responsibility on a "superior officer" solely by virtue of his "command responsibility" or position of authority over others who may be actively and directly involved in such wrongful conduct.

Similarly, the decision of the Eleventh Circuit in *Chen v. Holder,* 513 F.3d 1255 (11th Cir. 2008), which is cited by DHS, does not dispense with a requirement of showing personal conduct of the person alleged to have "participated" in torture or similar wrongful acts, and in fact, *Chen* indicates that such "personal conduct" is actually the main focus of the "fact-specific inquiry" necessary to determine "participation" in such cases. The result in *Kalejs v. I.N.S.,* 10 F.3d 441 (7th Cir. 1993), another case cited by DHS, also is consistent with such a "personal conduct" requirement, insofar as it held the evidence established such participation by demonstrating membership (as a "key officer") in a specific unit that was shown to have committed specific atrocities.

The evidence in this case does not establish similar "personal" involvement by Respondent in torture, either "directly" or "indirectly." There is no indication that he directly committed or participated in any act of torture, or that any other persons under his direct and immediate command committed any acts of torture of which he was aware and in a position to prevent. There is no evidence that he made any statements having the apparent purpose or effect to incite or encourage torture, or to facilitate other persons' commission of acts of torture. There simply is no evidence of any "personal conduct" by Respondent that could be deemed to constitute "participation" in torture, and for that reason Respondent cannot be deemed subject to removal, because the relevant statutory provisions clearly require such personal conduct, and cannot be deemed satisfied by the mere concept of "command authority" or "superior officer" status in a military hierarchy,

particularly in a case such as this, where the evidence establishes that each unit of the pro-government forces during the relevant time period operated as autonomous units rather than following directives from above.

For the foregoing reasons, and based upon the standard established by the case law which requires some personal conduct having the purpose and effect of facilitating or promoting torture, the evidence in this case is insufficient to support a finding that Respondent was a participant in torture so as to be subject to removal.

On pages 41 through 44 of DHS's Post-Hearing Brief, it is suggested that regardless of whether or not the evidence in this case establishes Respondent's "assistance" of or "participation" in torture, he should nevertheless be deemed subject to removal because the statutory provisions upon which removal is sought to be compelled were *specifically written to address Respondent's residence in the United States.* Respondent respectfully submits that this is not a proper basis for an order of removal in this case. As noted previously, the "plain meaning rule" requires that statutes must be interpreted and applied according to the plain and ordinary meaning of the language used in the statute, and resort to extrinsic evidence of legislative intent is improper where the statutory language is clear and unambiguous on its face. *Polycarpe v. E & S Landscaping Service, Inc.*, 616 F.3d 1217, 1224 (11th Cir. 2010) ("We do not rely on legislative history at all when a statutory text is unambiguous or manifests some plain meaning."). In such cases, the statutory language is deemed controlling, and the legislature – if it intended a different result – is required to change the statutory language so that fair notice of the statute's operation can be ascertained from the language used therein.

In light of such considerations, Respondent respectfully submits that it is improper for DHS to suggest that, even if Respondent's actions do not constitute "assistance" or "participation" within the terms of the statute, he should still be deemed subject to removal because Congress specifically enacted the statute with him in mind. The only issue is whether DHS has demonstrated grounds for removal *based upon the language and standards established by the statute itself,* and for reasons discussed previously, the evidence in this case is woefully inadequate for such purposes. [It should also be noted that even the "legislative history" relied upon by DHS as support for its position that this legislation was "written with Respondent in mind" undermines its suggestion that such "legislative intent" should be controlling here, regardless of whether the terms of the statute are satisfied, because the legislative intent clearly indicates that Congress had only heard *allegations made against* Respondent and did not make any specific factual determinations regarding his actual conduct.]

For the foregoing reasons, DHS has failed to prove that Respondent personally engaged in any conduct that could be deemed "assistance of" or "participation in" acts of torture or extrajudicial killing. It is not sufficient merely to show that such acts may have been committed by some soldiers who were theoretically "lower in the chain of command" than Respondent, where he did not have any actual control over such persons, analogous to the field-level officer involved in the *Kalejs* case. Insofar as the evidence in this case establishes that the field-level soldiers who committed acts of torture or extrajudicial killings did so at the direction of the platoon leaders, and without any orders from higher-ups (or even in direct defiance of such orders), Respondent cannot be deemed to have participated in such acts solely by virtue of his status as a superior officer

in the chain of command. Absent evidence that Respondent was aware of specific acts of torture or extrajudicial killings, and took personal action to promote or facilitate such acts, he cannot be deemed a participant and subject to removal on that basis. There is no such evidence in this case, and removal therefore should be denied.

III. REMOVAL SHOULD BE DENIED ON THE BASIS OF THE DOCTRINE OF "POLITICAL QUESTION ABSTENTION."

Even if it is assumed *arguendo* that the evidence in this case is sufficient to establish that Respondent did in fact "assist" or "participate in" acts of torture or extrajudicial killings within the standards required by controlling case law, removal should nevertheless be denied because ordering Respondent subject to deportation from the United States on the basis of the allegations made against him in this case would adversely implicate the policy considerations that underlay the so-called "political question" abstention doctrine.

In *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), the court held that political-question abstention precluded the exercise of jurisdiction over the case before it, on the ground that doing so would conflict with official policies pursued by the executive branch of government under previous administrations in such a manner as to intrude on the executive's authority over the conduct of foreign policy and to cause international embarrassment to the United States. The claims in that case were based on alleged actions of Henry Kissinger, acting as a member of the Nixon administration, in planning and executing a military *coup d'etat* against Salvadore Allende, who had previously been elected president of Chile in a democratic election. The plaintiffs alleged that their decedent – an official in the Allende government – had been kidnapped, tortured, and ultimately killed as part of the coup, and sought recovery of damages. The court

described the nature of political-question abstention and the reason why it precluded jurisdiction over the case before it as follows:

> ***The principle that the courts lack jurisdiction over political decisions that are by their nature "committed to the political branches to the exclusion of the judiciary" is as old as the fundamental principle of judicial review.*** *Antolok v. United States*, 873 F.2d 369, 379 (D.C.Cir.1989) (separate opinion of Sentelle, J.). In the venerable case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), Chief Justice Marshall first expressed the recognition by the judiciary of the existence of a class of cases constituting "political act[s], belonging to the executive department alone, for the performance of which entire confidence is placed by our Constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy." *Id.* at 164. In a continuing line beginning with Chief Justice Marshall's analysis in Marbury v. Madison, ***this doctrine has evolved as a limitation of the jurisdiction of the courts particularly applicable to foreign relations.*** *See Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302–03, 38 S.Ct. 309, 62 L.Ed. 726 (1918). Chief Justice Marshall, writing again in *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 4 L.Ed. 471 (1818), described questions of foreign policy as "belong[ing] more properly to those ... who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; *to whom are entrusted all its foreign relations*; then to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it." *Id.* at 634 (emphasis added).
>
> Contemporary application of the Political Question Doctrine, as recognized by the District Court, draws on the analysis set forth in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The *Baker* Court first recognized that "the political question doctrine is 'primarily a function of the separation of powers.' " *Schneider v. Kissinger*, 310 F.Supp.2d at 258 (quoting *Baker*, 369 U.S. at 210, 82 S.Ct. 691). In *Baker*, the Supreme Court enumerated six factors that may render a case nonjusticiable under the Political Question Doctrine:
>
> > Prominent on the surface of any case held to involve a political question is found a [1] 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 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 of multifarious pronouncements by various departments on one question.
>
> *Baker*, 369 U.S. at 217, 82 S.Ct. 691. ***The Baker analysis lists the six factors in the disjunctive, not the conjunctive. To find a political question, we need only conclude that one factor is present, not all.*** Nonetheless, we note that most of the factors counsel against the exercise of jurisdiction over the controversy that Plaintiff–Appellants bring to the court.

412 F.3d at 193-94 (bold emphasis added).

The court then proceeded to discuss each of the six factors mentioned in *Baker v. Carr* and to analyze their relevance to the case before it, concluding that exercise of jurisdiction was precluded by most of them. With respect to the first factor, the court concluded that there was textually demonstrable commitment in the constitution to the executive branch of authority over matters of foreign policy, and that resolution of the issues plaintiffs sought to raise in the case before it would clearly require the court to intrude into such areas in an impermissible way.

> [T]he subject matter of the instant case involves the foreign policy decisions of the United States. In 1970, at the height of the Cold War, ***officials of the executive branch, performing their delegated functions concerning national security and foreign relations, determined that it was in the best interest of the United States to take such steps as they deemed necessary to prevent the establishment of a***

> ***government in a Western Hemisphere nation that in the view of those officials could lead to the establishment or spread of communism as a governing force in the Americas. This decision may have been unwise, or it may have been wise. The political branches may have since rejected the approach, or not. In any event, that decision was classically within the province of the political branches, not the courts.*** As the Supreme Court has repeatedly reminded us, "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986). This is so because "[t]he Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.' " *Id.* (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C.Cir.1981)).

412 F.3d at 195-96 (emphasis and first bracketed matter added).

With respect to the second factor, which the court viewed as inter-related with the first, the court held that there were no manageable standards for determining the "propriety" of covert foreign policy decisions made by a previous administration decades earlier, which was the fundamental issue the court perceived the plaintiffs were seeking to raise. The third *Baker* factor was also deemed to preclude exercise of jurisdiction, because of the fact that "policy determinations" regarding foreign policy were entrusted under the constitution to the executive branch, and because courts were deemed unqualified to substitute their own policies for those made by the executive. The court then concluded that, in light of its findings regarding the first three *Baker* factors, the fourth factor also prevented the court from exercising jurisdiction, because doing so would constitute an unacceptable demonstration of lack of regard for the authority of the executive branch of government:

> From what we have concluded as to the first three *Baker* factors, it seems apparent to us that we could not determine Appellants' claims without passing judgment on the decision of the executive branch to participate in the alleged covert operations-participation in which, we note from the record, has already been the subject of congressional investigation. We therefore affirm the conclusion of the District Court that "[a] court should refrain from entertaining a suit if it would be unable to do so without expressing a lack of respect due to its coequal Branches of Government." 310 F.Supp.2d at 264 (citing *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. 691) (other citations omitted).

Id. at 198. The court also rejected the plaintiff's suggestion that while political abstention might bar a court from assuming jurisdiction over claims that intruded into the area of international "policy-making" by the executive branch, no such preclusion should be recognized where a plaintiff's claim raised questions about the implementation of policies previously made, as the plaintiffs sought to characterize their claims. The court reasoned that such a policy-making/policy-implementation dichotomy would not be practicable, and held that however characterized, the plaintiff's claims implicated issues of foreign policy and therefore were nonjusticiable.

In *Gonzales-Vera v. Kissinger,* 449 F.3d 1260 (D.C. Cir. 2006), the D.C. Circuit Court of Appeals reaffirmed its decision in *Schneider*, *supra*, and held that political-question abstention precluded jurisdiction over claims against Mr. Kissinger for his actions pursuant to the anti-Allende policies of the Nixon administration, even though the plaintiffs attempted to distinguish *Schneider* on the ground that it had involved claims based on actions that occurred prior to the military coup against Allende, whereas their claims arose out of actions taken after the coup had already installed Allende's successor – Pinochet – into power. The court stated that "the difference between actions taken to

place Pinochet in power and actions taken to keep him in power does not a viable distinction make: Both types of actions, if they occurred, were "inextricably intertwined with the underlying" foreign policy decisions constitutionally committed to the political branches." *Id.* at 1264.

Another recent case involving application of the political-question-abstention doctrine is *Matar v. Dichter,* 500 F. Supp.2d 284 (S.D.N.Y. 2007). This case, like the instant case, involved claims against an official of a foreign nation allied with the United States (Israel) rather than against an official of the United States itself as in the cases involving Mr. Kissinger. Nevertheless, the court held that the political-question doctrine precluded exercise of jurisdiction, because in view of the alliance between the foreign government in question and the United States, a judicial inquiry regarding propriety of the actions taken by the foreign official potentially could embarrass U.S. diplomatic efforts in the Middle East, which the court deemed potentially volatile, so that even greater deference to the executive's foreign policy authority was warranted than might otherwise be the case. *Id.* at 294-95.

In a recent decision, the Eleventh Circuit addressed the political question doctrine as to the actions of a Minister Defense of foreign country during a time of civil insurrection. Mamani v. Berzain, case no.: 09-16246 (11th Cir. August 29, 2011). With regard to the political question doctrine, the district court applied the multifactor test set out in Baker v. Carr, 369 U.S. 186, 217 (1962), which considers (1) a textually demonstrable constitutional commitment of the issue to a coordinate political

department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; and (6) the potential of embarrassment from multifarious pronouncements by various departments on one question.

The plaintiffs, Bolivian nationals, saught to sue former Bolivian officials for events that occurred solely in Bolivia. The Circuit Court explained that, "We know and worry about the foreign policy implications of civil actions in federal courts against the leaders (even the former ones) of nations and we accept that we must exercise particular caution when considering a claim that a former head of state acted unlawfully in governing his country's own citizens." Id. at 8. The court in Mamani stated that, "facing a situation where many of their opponents in Bolivia were acting boldly and disruptedely (for example, blocking major highways to the nations capital and forcing the defense ministry out of at least one town). Id. at 12. The court went on to declare that, "we do not accept that, even if some soldiers or policemen committed wrongful acts, present international law embraces strict liability akin to respondeat superior for national leaders at the top of the long chain of command in a case like this one." Id. at 13 and 14. The court explained that, "facts suggesting some targeting are not enough to state a claim of extrajudicial killing under already established and specifically defined international law." Id. at 14. The court very importantly pointed that there is, "no case where similar high-level decision on military tactics and strategy during a modern military operation

have been held to constitute . . . extrajudicial killing under international law. Id. at 16. Most importantly the court concluded that, "the possibility that . . . these defendants acted unlawfully is not enough for a plausible claim." Id. at 18. The decision stated that judicial restraint is demanded in these types of cases and the court declined to consider the claims by plaintiffs.

The Circuit Court held that it is well established that, under the political question doctrine, American courts are not equipped to evaluate judgments made by the American military. A fortiori, they are even less equipped to evaluate judgments made by a foreign military in dealing with a conflict on foreign soil several years ago.

The Court reasoned that resolution of that case would require a federal court to pass judgment on the actions of Executive Branch, which repeatedly ratified the actions of the Lozada government both during and after the events in question. And it would also require the court to pass judgment on the actions of the current president of Bolivia, who, according to the State Department's contemporaneous assessment, instigated the unrest in question. In doing so, the court would inevitably interfere with the State Department's ability to conduct relations with the current and former Bolivian regimes as it sees fit.

The Court held that, there is no specific or universal norm of international law prohibiting the disproportionate use of force. Recognition of such a norm, moreover, would have a disruptive effect, because it would impair the ability of foreign officials to carry out their duties; affirmatively trench upon the sovereignty of other nations; and flood the American courts with claims from civilians killed or injured in foreign conflicts.

The political question doctrine is grounded in the principle that "[m]atters intimately related to foreign policy and national security are rare- ly proper subjects for judicial intervention." Aktepe v. United States, 105 F.3d 1400, 1403 (11th Cir. 1997) (quoting Haig v. Agee, 453 U.S. 280, 292 (1981)), cert. denied, 522 U.S. 1045 (1998). As the district court correctly recognized, the application of the political question doctrine is governed by the six-factor test established by the Supreme Court in Baker v. Carr, 369 U.S.186, 217 (1962). Notably, in order for a case to be dismissed under the political question doctrine, it is not necessary for all six of the Baker factors to be satisfied; instead, a case may be dismissed as long as "at least one of the [Baker] characteristics is present." Carmichael, 572 F.3d at 1280.

The Lozada case involves the unusual situation of a claim by foreign nationals against former officials of the same country for their actions in connection with the exercise of military and political power while in office. Yet the Lozada case, like the Vides removal case, in many respects presents the paradigmatic example of a political question that Article III or Article I courts lack the ability and capacity to resolve.

The Lozada court explained that the second factor of the Baker test, it is well established that courts lack judicially discoverable and manageable standards to evaluate judgments made by the military including judgments concerning the response to domestic civil upheaval. The Supreme Court most prominently recognized that principle in Gilligan v. Morgan, 413 U.S. 1 (1973). In Gilligan, a group of plaintiffs alleged that the National Guard "act[ed] . . . without legal justification" in suppressing the 1970 Kent State riots, and, specifically, that the National Guard's actions rendered inevitable the use of lethal force to suppress the unrest. Id. at 3; see also id. at 12-13

(Blackmun, J., concurring) (summarizing allegations). The Court concluded that the plaintiffs' claims were barred by the political question doctrine. Gilligan, 413 U.S. at 10. The Court reasoned that "it is difficult to conceive of an area of governmental activity in which the courts have less competence," on the ground that "[t]he complex, subtle, and professional decisions as to the com- position, training, equipping, and control of a military force are essentially professional military judgments" (as to which, in the context of the American military, the political branches have ultimate control). Id.

The Eleventh Circuit has applied the principle that courts lack judicially discoverable and manageable standards to evaluate military judgments in a variety of different contexts. For example, in Aktepe, supra, a miscommunication caused the American military to fire several live missiles at a friendly Turkish warship during a NATO training drill, resulting in several deaths and numerous injuries. See 105 F.3d at 1401-1402. This Court held that no judicially manageable standards existed because the conduct occurred in the course of a military exercise. Id. at 1404. Citing Gilligan, the Court explained that judgments on how to conduct such exercises "result from a complex, subtle balancing of many technical and military considerations, including the trade-off between safety and greater combat effectiveness." Id. The Court noted that "[c]ourts will often be without knowledge of the facts or standards necessary to assess the wisdom of the balance struck." Id. And critically for purposes of this case, the Court added that "courts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." Id.

Similarly, in Carmichael, supra, a service member brought a claim against a military contractor for injuries suffered in a road accident in Iraq.

572 F.3d at 1275. Once again, the Eleventh Circuit held that the claim was barred by the political question doctrine because of the lack of judicially manageable standards. Id. at 1288-1289. The Court reasoned that, "[g]iven the circumstances under which the accident in this case took place, we are without any manageable standards for making reasoned determinations regarding these fundamental elements of negligence claims." Id. at 1288. For example, the Court noted, "the dangerousness of the circumstances . .

. renders problematic any attempt to answer basic questions about duty and breach." Id. At 1289. Notably, the Court explained that, "[i]n the typical negligence action, judges and juries are able to draw upon common sense and everyday experience in deciding whether [the defendant] has acted reasonably," but that "these familiar touchstones have no purchase here, where any decision to [act differently] could well have jeopardized the entire military mission and could have made [military personnel] more vulnerable to an insurgent attack." Id.

Even assuming that the district court's assessment of the first Baker factor was correct, but see pp. 28-33, infra, the second Baker factor does not specifically address whether the involvement of the Judicial Branch would interfere with the decisions of the Executive Branch; instead, it addresses whether the Judicial Branch is competent to review the underlying conduct

at issue. As the D.C. Circuit has explained, "so-called political questions are denied judicial scrutiny, not only because they invite courts to intrude into the province of coordinate branches of government, but also because courts are fundamentally underequipped to formulate national policies or develop standards of conduct for matters not legal in nature." United States ex rel. Joseph v. Cannon, 642 F.2d 1373, 1379 (D.C.

Cir. 1981) (citations omitted), cert. denied, 455 U.S. 999 (1982). Put simply, an American court is no more competent to assess the military decisions of foreign leaders than a foreign court would be to consider a claim against the President for the accidental killing of civilians in Iraq or Afghanistan and, for that reason, plaintiffs' lawsuit should not have been allowed to proceed.

Indeed, it would be especially difficult for an American court to evaluate judgments made by the foreign military in this case in light of the difficulties in developing the factual record necessary for proper adjudication of claims made.

Here, the claims at issue concern the activities of Bolivian government forces in response to violent unrest, and the military dimension of the underlying events is central to those claims.

In advancing that argument below, plaintiffs principally relied on Linder v. Portocarrero, 963 F.2d 332 (11th Cir. 1992), which permitted claims to proceed against individual defendants who allegedly murdered an American in Nicaragua on the ground that the case involved only a "single incident" and did not "require the court to pronounce who was right and who was wrong in the Nicaraguan civil war." Id. at 337.

In this case, however, the allegations specific to each plaintiff simply cannot be divorced from the broader context of the unrest during which the deaths at issue occurred. Indeed, plaintiffs' own complaint broadly alleges that defendants were responsible for the deaths of some many persons, and in-

juries to many others, over a long period of time in cities across El Salvador. The Government moreover, does not allege that Vides directly ordered (or were even aware of) any of the specific killings at issue. In sum, because DHS's claims inevitably require a court to pass judgment on the Salvadorian government's response to the unrest of nearly 30 years ago there are no judicially discoverable and manageable standards to resolve them. See also Vance vs. Rumsfeld, 2012 U.S. App Lexis 23084 (7th Cir. 2012), civilian courts should not interfere with the military chain of command and knowledge of subordinates misconduct is not enough for liability.

Accordingly, "the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Id. Applying that principle, courts routinely dismiss cases, including cases involving alleged human-rights abuses, that would call into question the foreign policy of the Executive Branch. For example, the Ninth Circuit upheld the dismissal of claims brought against an American manufacturer of bull- dozers that the United States government approved for sale to Israel and that were used by the Israeli military to demolish homes in the Palestinian territories. See Corrie v. Caterpillar, Inc., 503 F.3d 974, 977-979, 983 (9th Cir. 2007). The court reasoned that "[a]llowing this action to proceed would necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel." Id. So too

here, given the Executive Branch's repeated endorsement and ratification of the actions of the Salvadoran government, the resolution of this case would require "reexamination

of a decision" taken by one of the political branches. McMahon, 502 F.3d at 1359. The resolution of this case, moreover, would not only require a court to pass judgment on the past statements and actions of the United States government.

It is well established, of course, that American presidents have broad authority to take actions to suppress violence that threatens the public order. See, e.g., 10 U.S.C. § 332. No American court has ever permitted a case to go to trial alleging that a current or former president is liable for the exercise of his statutory authority to suppress such violence, nor could a court tenably do so given doctrines such as absolute immunity that protect the actions of individuals in those positions. See, e.g., Nixon v. Fitzgerald, 457 U.S.

731, 756-757 (1982). And subject only to the constraints of the Fourth Amendment, even lower-level officials are immune from suit where, as here, the officials use force to respond to a violent insurgency and, where the insurgency threatens death or serious bodily harm, officials may use a correspondingly greater degree of force in order to protect the public welfare. See, e.g., Restatement (Second) of Torts § 142(2) (1965).

It is the prerogative of foreign governments to determine the extent to which, if at all, their officials are to be held accountable in their courts (or by the electorate) for their official acts. Permitting an American court to pass judgment on those acts would represent the very judicial overreaching into the affairs of foreign governments against which the Supreme Court warned in Sosa. See 542 U.S. at 727-728. ."

The Supreme Court held in Ijbal that conclusory allegations that senior government officials "knew of, condoned, and willfully and maliciously agreed to subject the [plaintiff]" to unlawful conduct did not suffice to state a claim against those officials.

129 S. Ct. at 1951. Even when those allegations were coupled with allegations that a defendant was the "principal architect" or was "instrumental" in adopting an unlawful policy, the Court held that those "bare assertions . . . amount[ed] to nothing more than a formulaic recitation of the elements" and therefore were "not entitled to be assumed true." Id. (internal quotation marks and citation omitted).

Similarly, in the instant case, this Court should decline to hold Respondent subject to removal on the basis of the grounds for removal asserted by DHS, because such action would require the court to evaluate the propriety of fundamental foreign policy decisions made by the Reagan Administration with regard to preventing the spread of communism in the Western Hemisphere. This region of the world – much like the Middle East at the present time – was viewed as potentially volatile in a political sense during the time period relevant to the issues in this case, and thus even greater deference than usual should be accorded the executive branch's exercise of discretion in formulating and implementing foreign policy, as in *Matar, supra.* For this Court to now second-guess actions of Respondent which were consistent with official U.S. policy of opposing the Salvadoran rebels by any and all means necessary, and which were taken with at least the tacit support of members of the Reagan Administration, would involve an unwarranted and excessive intrusion into the foreign policy authority of the executive branch, and pose an unacceptable threat of potential disruption or embarrassment to the United States' exercise of foreign policy in Latin America.

The evidence of record in this case clearly establishes that Respondent's actions in response to reports of torture and extrajudicial killings in El Salvador was supported completely and enthusiastically by United States officials during the relevant time period,

such that a judicial condemnation of such actions by this court in the instant proceeding would be a potential source of embarrassment or frustration to United States diplomacy. Thus, for instance, while the evidence does indicate that then-Vice President Bush stated at a meeting where Respondent was present that torture had to be eliminated or U.S. funding to the military junta would be eliminated, the funding was in fact never cut off. (Although Respondent disputes the government's suggestion that he had it within his power at that time to simply end all torture by any Salvadoran soldier by his own simple declaration or force of will, the fact that funding continued after the Bush visit does support Respondent's contention that he was never led to believe he had failed to do what was asked or expected of him by U.S. officials.)

Similarly, evidence of record establishes that during the time when Respondent was Minister of Defense, the U.S. State Department consistently indicated in its "country reports" pertaining to El Salvador that conditions in that country with reference to the problem of torture were "improving." It is true that the evidence indicates some members of the U.S. diplomatic corps did not share this opinion, but such disagreement within the diplomatic corps itself does not alter the inescapable fact that Respondent was supported in his actions by the "official policy statements" of the United States. Ambassador White was one of the diplomats who did not share the belief that the problem of torture was improving, as a result of which he refused to "sign off" on the "country reports" that contained such optimistic evaluations, but *Ambassador White was removed from his position as Ambassador because of his refusal to acquiesce in the "official view"* that the problems with torture had improved during Respondent's tenure as Defense Minister.

In short, it is indisputable that while there may have been some disagreement among U.S. diplomatic personnel themselves, Respondent was consistently and uniformly led to believe that his conduct was consistent with the "official policy" of the United States with regard to El Salvador during the relevant time period. Therefore, allowing Respondent to be deported on the basis of the accusations made against him in this case would impermissibly intrude into the foreign policy authority of the executive branch, and otherwise violate the political-abstention doctrine.

> The courts will apply the principle of estoppel against the government, to prevent a gross miscarriage of justice when a person has been misled by action or advice of government officers. Bochurchian v. INS, 751 F.2d 979 (9th Cir. 1984); Mcleod v. Peterson, 283 F.2d 180 (3rd Cir. 1960); Matter of Reimer, 12 I&N Dec. 443 (BIA 1967). Estoppel against the government is appropriate when needed to assure the "interest of citizens in some minimum standard of decency, honor and reliability in their dealings with the Government." Heckler v. Community Health Sevs, 467 U.S. 51 (1984).

In this case, the evidence has clearly shown that the United States Government through its military and political advisors was deeply embedded in each of the Salvadoran army units fighting the Civil War and was fully cognizant of the conduct of the Salvadoran military and National Guard units during that country's civil war. The Salvadoran armed forces and government relied on the advice, military and financial assistance of the U.S. government, without which it would not have succeeded in leading the country to eventual democracy. For the U.S. Government to conduct its foreign policy and military operations in conjunction with the Salvadoran Government and military and then to

punish a former Salvadoran Government official like Vides for carrying out those policies is a gross miscarriage of justice and violates minimum standards of decency, honor and reliability enunciated by the U.S. Supreme Court in the Heckler case. Id. Respondent Carlos Vides Casanova extensively relied on U.S. military and political advisors who were deeply involved in the Civil War in El Salvador. The U.S. Government is now estopped from removing him. The Government clearly has "unclean hands" in the removal proceedings because it knew of the way that the war in El Salvador was conducted, it advised the Salvadoran Government and armed forces on how to carry out that war and it provided the weapons and funds to carry out that war. It is manifestly unjust for the government to remove Respondent since the U.S. government is estopped by its prior actions.

The Government is barred from removing Vides since it is in violation of international law. International Covenant on Civil and Political Rights (ICTPR), 999 U.N.T.S. 171; Maria v. Mcelroy, 68 F.Supp. 2d 206 (E.D. N.Y. 1999); Behary v. Reno, 183 F.Supp. 2d 584 (E.D. N.Y. 2002), reversed on jurisdictional grounds, 329 F.3d 51 (2d Cir. 2003). In this case, international law would bar Vides' removal, particularly since the provision used by the Government to deport Vides is an ex post facto law seeking application of a new law to events that happened nearly 30 years ago. International law finds such an application repugnant.

For the above reasons, this Court should hold that Respondent is not subject to removal on the basis of the grounds alleged against him in this proceeding, because the

political-question-abstention doctrine bars such exercise of jurisdiction, even if DHS could prove all essential elements for removal based on the grounds relied on.

CONCLUSION

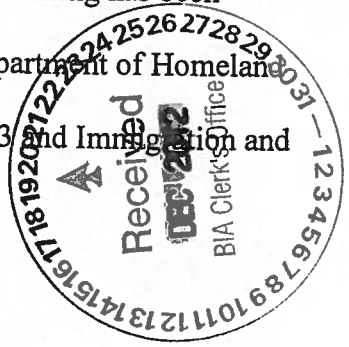
Much of the evidence relied upon by DHS in this case consists of incompetent and inadmissible hearsay that should not be considered, in view of its disputed nature, lack of reliability, and absence of any reasonable opportunity for Respondent to cross-examine the declarants providing the hearsay statements in question. However, regardless of whether or not such evidence is considered, DHS has failed to prove all essential elements of the grounds for removal alleged in this case.

Furthermore, regardless of whether or not the evidence of record is deemed sufficient to prove the charges against Respondent, the decision proceeding below should be reversed, and Respondent deemed not subject to removal, on the ground that the political-question-abstention doctrine precludes this Court from attempting to resolve the issues raised in this proceeding, on the grounds of estoppel and international law.

For any or all of the above reasons, Respondent should be deemed not subject to removal from the United States.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing notice of filing has been furnished by U.S. Mail to ICE Office of the Chief Counsel, Department of Homeland Security, 3535 Lawton Road, Suite 100, Orlando, Florida 32803 and Immigration and Customs Enforcement; this 19th day of December, 2012.



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