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### Human Rights and Human Consequences: A Critical Analysis of Sanchez-Espinoza v. Reagan

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Human Rights and Human Consequences:  
A Critical Analysis of *Sanchez-Espinoza*  
*v. Reagan*

MARK GIBNEY\*

I. INTRODUCTION

*Sanchez-Espinoza v. Reagan*<sup>1</sup> raises the question of whether citizens of one country can challenge another country's foreign policy forays, and that policy's resulting human consequences, through judicial means. In this case, plaintiffs challenged various aspects of United States activity in Nicaragua. The plaintiffs can be divided into three groups: twelve Nicaraguan citizens,<sup>2</sup> twelve members of the

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1. 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

2. Javier Sanchez-Espinoza, "resident of the village of San Francisco de Guajiniquilapa, Department of Chinandega;" Myrna Cunningham, "resident of Puerto Cabezas, Department of Zelaya;" Brenda Rocha, "resident of the village of Bonanza, Department of Zelaya;" Maria Espinal-Mondragon (Viuda de Guevara), individually and as personal representative of Victorino Guevara-Centeno, "resident of the village of San Francisco de Guajiniquilapa, Department of Chinandega;" Victorino Hernandez-Aguilara, "resident of the village of San Francisco de Guajiniquilapa, Department of Chinandega;" Jose Santos-Barrera, individually and as personal representative of Evilio Baquedano Barrera, "resident of the village of San Francisco de Guajiniquilapa, Department of Chinandega;" Elia Maria Espinoza (Viuda de Moncada), individually and as personal representative of Ramon Aristides Moncada, "resident of the village of San Francisco de Guajiniquilapa, Department of Chinandega;" Roseangela Resquita Grosjean, individually and as personal representative of Dr. Pierre Grosjean, "resident of Paris, France;" Maria Rigat-Pflaum, individually and as personal representative of Dr. Albrecht Pflaum, "resident of Berlin, Germany;" Ullrich Pflaum, individually and as personal representative of Dr. Albrecht Pflaum, "resident of Frankfurt, Germany;" Maria Bustillo de Blandon, individually and as personal representative of Ricardo, Leonardo, Gregorio, Juan Angeles, Nicolas and Antonio Blandon, "resident of La Fragua, Department of Nueva Segovia;" Concepcion Lopez-Torres, "resident of Ocotal, Department of Nueva Segovia." Plain-

United States House of Representatives,<sup>3</sup> and two residents of the state of Florida.<sup>4</sup> The named defendants were nine present or former officials of the Executive branch including President Reagan,<sup>5</sup> three non-federal defendants,<sup>6</sup> and a group of unidentified officers or agents employed by the United States.<sup>7</sup>

The Nicaraguan citizens based their suit on allegations that the United States was providing support to the Contra forces<sup>8</sup> who were

tiffs' First Amended Complaint at 1, *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985) (copy in office of Loy. L.A. Int'l & Comp. L.J.).

3. Ronald Dellums (Cal.), William Clay (Mo.), George Crockett (Mich.), John Conyers (Mich.), Melvyn Dymally (Cal.), Walter Fauntroy (D.C.), Mickey Leland (Tex.), George Miller III (Cal.), Parnen Mitchell (Md.), Major Owens (N.Y.), Gus Savage (Ill.), and Theodore S. Weiss (N.Y.). *Id.* at 1-2.

4. Eleanor Ginsberg and Larry O'Toole. *Id.* at 2.

5. Ronald Wilson Reagan, individually and in his official capacity as President of the United States; William Casey, individually and in his official capacity as Director of Central Intelligence; Alexander M. Haig, Jr.; George P. Shultz, individually and in his official capacity as United States Secretary of State; Thomas O. Enders, individually; Vernon Walters, individually and in his official capacity as United States Ambassador-at-Large; Caspar Weinberger, individually and in his official capacity as United States Secretary of Defense; Nestor Sanchez, individually and in his official capacity as United States Assistant Secretary of Defense; John D. Negroponte, individually and in his official capacity as United States Ambassador to Honduras.

*Id.* at 3.

6. "Max Vargas, individually; Alpha 66 Inc., a Florida corporation; Bay of Pigs Veterans Association, Brigade 2506, Inc." *Id.*

7. "John Doe and Richard Roe, as yet unidentified officers or agents employed by the United States." *Id.*

8. The plaintiff-appellants' brief argues that "when the original Complaint was filed, in November of 1982, the federal defendants had not yet acknowledged that they were funding, training and directing the activities of the contras." Brief for Appellants at 11, *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). The original complaint filed in November 1982 alleged, however, that:

the federal defendants were implementing a plan which included the following: (a) providing at least \$19 million to finance covert paramilitary operations; (b) financing the training of invasionary forces including former Somoza National Guardsmen, and various terrorist groups; (c) conducting CIA intelligence activities to determine the specific targets for terrorist forces; (d) supporting organizations of Nicaraguan and Cuban exiles in the United States which, in turn, train and support invasionary forces; (e) sending at least 50 CIA agents and other U.S. government agents to Honduras and Costa Rica to participate and assist in covert military operations directed against the people and government of Nicaragua; and (f) sending at least 96 U.S. military "mobile training teams" members to advise and train terrorists to attack Nicaraguan civilians.

*Id.* at 11-12 (citations omitted).

The original complaint also alleged that "the above plan was reviewed and approved by defendants Reagan, Casey, Haig, Enders, Weinberger and Sanchez, and that it was implemented from Honduras under the direction of defendants Negroponte and Sanchez." *Id.* at 12 (citations omitted). The complaint further alleged:

specific details regarding U.S. actions in furtherance of the paramilitary operations. These include payment of certain sums of money to the contras for arms; numerous

committing terrorist raids in Nicaragua.<sup>9</sup> The Nicaraguan plaintiffs claimed that the United States sponsored terrorist raids which vio-

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meetings with them during which CIA agents and State Department officials were promised combined funding and support; . . . efforts by the United States to mold a single contra organization out of the diverse factions.

*Id.* at 12-13. The complaint also alleged that:

the federal defendants provided underwater equipment and explosives for sabotage teams to attack Puerto Cabezas, Nicaragua; that 16-20 U.S. airforce personnel, in an operation named "Royal Duke," fl[ew] regular intelligence missions along the Honduran-Nicaraguan border [and] provide[d] information . . . to the contras to enable them to carry [out] our attacks on Nicaragua; that representatives of the U.S. Army's Southern Command and CIA experts support[ed], train[ed] and direct[ed] terrorist training camps in Honduras; and that the federal defendants knowingly . . . provid[ed] substantial assistance for the launching of raids against Nicaraguan civilians.

*Id.* (citations omitted).

The plaintiff-appellants' brief alleges that since the filing of the complaint:

the federal defendants have openly admitted their participation in this operation, increased the number of CIA agents from 50 to 200, admitted that \$40 million had been spent by the United States in direct support of the contras, and admitted that the CIA provides money, military equipment and military training to the anti-Nicaragua forces.

*Id.* at 14 (citations omitted).

9. The narrative from the plaintiff-appellants' brief describes this terror:

Twelve of the plaintiffs or their close family members have been subjected to murder, torture, mutilation, kidnapping and rape as a result of U.S.-sponsored paramilitary activities designed to ravage the civilian population of Nicaragua. Nine of these are citizens of Nicaragua who sue on behalf of themselves or as personal representatives of family members murdered and tortured. Two of the plaintiffs are the wife and brother of Dr. Albrecht Pflaum, a medical doctor executed while working in northern Nicaragua; the remaining plaintiff is the wife of Dr. Pierre Grosjean, another medical doctor executed by contras.

The facts of the injuries to each of the plaintiffs or their family members reflect brutal, inhumane activities, violative of fundamental laws of civilized nations. For example, plaintiff Maria Bustillo de Blandon, a resident of Nicaragua, saw her husband and five sons murdered and tortured by members of the Nicaraguan Democratic Front (FDN)—the main counterrevolutionary group funded by the federal defendants. On October 28, 1982, the contras entered her home, seized her husband, a lay pastor, and removed their five children from their beds. In front of the parents, the children were tied together, castrated, their ears cut off and their throats slit. The father was then killed.

In July 1982, 130 contras, members of the FDN, attacked San Francisco de Guajinaquilapa, with rifles, mortars and machine guns, ransacking houses and overrunning the town. After the attackers left, plaintiff Elia Maria Espinoza found her husband, his head smashed, and brains falling out. Seven other members of her family were previously found dead. Plaintiff Jose Santos-Barrera found his son lying face up, his chest bullet-ridden and his legs destroyed. Plaintiff Maria Espinal Mondragon found the body of her husband, with holes in his neck, stomach and right leg. His throat, as well as the throats of other victims lying near him, had been slit. The attackers kidnapped eight persons, including plaintiff Javier Sanchez-Espinoza, a 15-year-old student.

On April 8, 1983, ten contras, members of the FDN, seized a 15-year-old boy, plaintiff Concepcion Lopez-Torres, hit him with rifles, applied a hot instrument to his face, gave him electric shocks, and then tied him to a tree from which he escaped. Plaintiff Myrna Cunningham, a Nicaraguan doctor working in a hospital, was cap-

lated fundamental human rights established under international law<sup>10</sup> and the fourth and fifth amendments of the United States Constitution.<sup>11</sup> These non-resident alien plaintiffs sought monetary damages,<sup>12</sup> as well as declaratory<sup>13</sup> and injunctive relief<sup>14</sup> prohibiting further United States military involvement in Nicaragua.

The congressional plaintiffs alleged two different kinds of claims.

tured by contras who ransacked the hospital. She was threatened with death and raped 17 times. Thirteen other women from the town were also raped.

On April 30, 1983 a vehicle containing Dr. Pflaum, a German physician, and several others, was ambushed by contras; Dr. Pflaum identified himself as a medical doctor and was nonetheless summarily executed.

Brief for the Appellants at 7-9, *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (citations omitted) (copy in office of Loy. L.A. Int'l & Comp. L.J.).

10. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 601 n.6 (D.D.C. 1983) *aff'd*, 770 F.2d 202 (D.C. Cir. 1985). The plaintiffs relied on the following provisions of international law: American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, *reprinted in* Inter-American Commission on Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/11.50, doc. 6 at 17 (1980); Charter of the Organization of American States, 2 U.S.T. 2394, *as amended*, 21 U.S.T. 607; T.I.A.S. No. 6847; U.N. CHARTER; *Declaration of Principles of International Law Concerning Friendly Relations and Cooperation in Accordance with the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970); *Declaration on the Protection of all Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Punishment*, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3364, 75 U.N.T.S. 287; Inter-American Treaty of Reciprocal Assistance, 62 Stat. 1681, T.I.A.S. No. 1838; Treaty of Friendship, Commerce & Navigation, Jan. 21, 1956, United States-Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/1810, at 71 (1948). *Id.*

11. *Sanchez-Espinoza*, 568 F. Supp. at 601. The pertinent language from these amendments is as follows: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . ." (U.S. CONST. amend. IV); "No person shall . . . be deprived of life, liberty, or property without due process of law . . ." *Id.* amend. V.

12. Plaintiffs' Amended Complaint, at 38, *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985) (copy in office of Loy. L.A. Int'l & Comp. L.J.).

13. The declaratory relief sought by the plaintiffs was that "the conspiracy and acts of the defendants violate[d] international law and treaties, the Constitution of the United States, the National Security Act of 1947, the Hughes-Ryan Amendment, the Neutrality Act, the War Powers Resolution and the Boland Amendment." *Id.* at 38-39.

14. The injunctive relief sought was:

a [w]rit of [m]andamus and/or a preliminary and permanent injunction directing the defendants to cease immediately funding, supplying, training, and/or participating directly or indirectly in any and all acts of terror or violence directed against the people and property of Nicaragua and/or aimed at overthrowing the government of Nicaragua.

*Id.* Also, a writ of mandamus was sought "directing defendant Reagan to enforce the Neutrality Act and other applicable federal criminal statutes or to appoint independent counsel to enforce such laws." *Id.* at 39.

First, that the activities of the Executive branch violated Congress' authority under the Constitution to declare war,<sup>15</sup> and laws promulgated thereunder,<sup>16</sup> as well as provisions of the War Powers Resolution.<sup>17</sup> In addition, the congressional plaintiffs charged that the

15. *Sanchez-Espinoza*, 568 F. Supp. at 598. The specific constitutional provision is article I, section 8. U.S. CONST. art. I, § 8, cl. 11.

16. *Id.* The Court alluded to such laws as the so-called neutrality laws, 18 U.S.C. §§ 956-62 (1982). Among the pertinent sections of this law are the following:

If two or more persons within the jurisdiction of the United States conspire to injure or destroy specific property situated within a foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace . . . and if one or more such persons commits an act within the jurisdiction of the United States to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

18 U.S.C. § 956(a) (1982).

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both.

*Id.* § 960.

Whoever, within the United States, furnishes, fits out, arms, or attempts to furnish, fit or arm, any vessel, with intent that such vessel shall be employed in the service of any foreign prince, or state, or of any colony, district, or people, to cruise, or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony district, or people with whom the United States is at peace . . . . Shall be fined not more than \$10,000 or imprisoned not more than three years, or both.

*Id.* § 962. For an excellent discussion of the history of the Neutrality Act, and its applicability to cases such as *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985), see Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1 (1983).

17. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 598 (D.D.C. 1983). War Powers Resolution, 50 U.S.C. §§ 1541-48 (1973). Section 1541 reads:

(a) *Congressional declaration.*

It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) *Congressional legislative power under necessary and proper clause.*

Under article I, § 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) *Presidential executive power as Commander-in-Chief; limitation.*

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a

activities of the Executive branch violated the Boland Amendment.<sup>18</sup> Finally, the Florida plaintiffs sought to enjoin the alleged operation of United States sponsored paramilitary training camps located in Florida on the grounds that such camps constituted a nuisance under Florida law.<sup>19</sup>

All three groups of plaintiffs were unsuccessful.<sup>20</sup> The federal district court dismissed the claims of the Nicaraguans on the basis of the political question doctrine.<sup>21</sup> The court of appeals affirmed this order, but based its holding on the doctrine of sovereign immunity.<sup>22</sup> Both of the claims of the congressional plaintiffs were also dismissed by the trial court on the basis of the political question doctrine.<sup>23</sup> The court of appeals affirmed this order,<sup>24</sup> but relied on the mootness doctrine<sup>25</sup> to uphold the dismissal of the challenge to the financing of these activities, reasoning that only prospective relief was sought and that the Boland Amendment had since lapsed.<sup>26</sup> Finally, the claims of the Florida plaintiffs were dismissed by the lower court on the basis of a lack of federal subject matter jurisdiction.<sup>27</sup> This order was upheld by the court of appeals.<sup>28</sup>

This Article focuses on the claims of the Nicaraguan plaintiffs. What the Nicaraguan plaintiffs are asserting is no less than this: when a nation pursues foreign policy objectives, it should be held accounta-

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national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

*Id.*

18. *Sanchez-Espinoza*, 568 F. Supp. at 598. Department of Defense Appropriations Act of 1983, Pub. L. No. 97-377, § 101(c), 96 Stat. 1830, 1855. The Boland Amendment reads in pertinent part:

None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.

*Id.*

19. *Sanchez-Espinoza*, 568 F. Supp. at 602. The pertinent provision of Florida law is Title 44, § 823.05.

20. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

21. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 601 (D.D.C. 1983).

22. *Sanchez-Espinoza*, 770 F.2d at 207.

23. *Sanchez-Espinoza*, 568 F. Supp. at 600.

24. *Sanchez-Espinoza*, 770 F.2d at 210.

25. *Id.*

26. *See supra* note 18. The Boland Amendment restrictions were in force from 1984 to 1986.

27. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 602 (D.D.C. 1983).

28. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985).

ble for the human consequences of those actions. The implications of such a position are exceedingly far ranging, which is, in some odd sense, the most understandable explanation for why such an important question has received so little attention to date by courts and commentators.<sup>29</sup>

The first part of this Article examines the rather scant attention given to these claims by the federal district court and questions the court's use of the political question doctrine. In addition, this section questions whether a comparable suit could be brought at the present time, in light of the recently uncovered atrocities committed by the Contras and considering United States support for the Contra forces. The second part examines the decision of the court of appeals in an opinion written by Judge Scalia (now Justice). The third part addresses the broader question of such suits by non-resident aliens and the role that might be played by the judiciary in this particular realm of foreign affairs.

## II. ANALYSIS

### A. Political Question Doctrine

The federal district court devoted little time to the claims of the Nicaraguan plaintiffs, despite its recognition of the "gravity and complexity of the plaintiffs' claims."<sup>30</sup> The court explained its treatment of this part of the case in these terms: "In order to adjudicate the tort claims of the Nicaraguan plaintiffs, we would have to determine the precise nature of the United States government's involvement in the affairs of several Central American nations, namely, Honduras, Costa Rica, El Salvador, and Nicaragua."<sup>31</sup> Rather than explaining why the political question doctrine<sup>32</sup> was applicable, as it had done in its treat-

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29. Although *Sanchez-Espinoza* raises some extremely important issues, it has generally received very little attention from scholars and commentators on the judiciary. A rare exception is Cole, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 HARV. INT'L L.J. 155 (1985); see also, Rogers, *Domestic Legal Challenges to U.S. Policy in Nicaragua*, 6 ST. LOUIS U. PUB. L. REV. 77 (1987). See generally, Blum and Steinhardt, *Federal Jurisdiction Over International Human Rights Claims*, 22 HARV. INT'L L.J. 54 (1981); Paust, *Litigating Human Rights in the U.S. Courts*, 4 HOUS. J. INT'L L. 81 (1981).

30. *Sanchez-Espinoza*, 568 F. Supp. at 601.

31. *Id.*

32. The oft-quoted language in *Baker v. Carr*, 369 U.S. 186, 217 (1962), setting forth the "tests" of the political question doctrine is:

Prominent on the surface of any case held to involve a political question is found textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of



ment of the claims of the congressional plaintiffs,<sup>33</sup> the court simply offered the conclusion that the political question doctrine barred judicial inquiry into this matter, stating: "judicial resolution of this matter is not proper at this time because it involves a nonjusticiable political question . . . . This Court simply does not have the resources and expertise required to oversee United States military affairs in Central America."<sup>34</sup>

Leaving aside the propriety of the court's use of the political question doctrine in handling the claims of the congressional plaintiffs,<sup>35</sup> what is far from apparent is how this same political question doctrine is similarly applicable to the tort claims of Nicaraguan citizens. In order to examine the applicability of the political question doctrine to the claims of the Nicaraguan plaintiffs, it is necessary to break down the basis of their suit into its component parts. The first premise of the suit was that Nicaraguan citizens were being killed and tortured. The second premise was that the Contra forces were responsible for some of these atrocities. Finally, the premise underlying the suit of the United States officials was that the United States government was providing military and economic support to the Contras.<sup>36</sup>

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a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.*

33. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600 (D.D.C. 1983).

34. *Id.*

35. For a critique of the use of the political question and equitable discretion doctrine in a comparable case, see Gibney, *Judicial Failure to Enforce Human Rights Legislation: An Alternative Analysis of Crockett v. Reagan*, 4 HUM. RTS. ANN. 115 (1986).

36. Cole, *supra* note 29, at 159. At the time that *Sanchez-Espinoza* was filed in federal district court, the United States had already provided the Contras with at least \$19 million. It was unclear how much money the United States had spent in supporting the Contras because most of the money had been provided by the CIA and kept from public purview. It seems fair to assume, however, that this \$19 million figure is quite conservative. *Id.*

In terms of money appropriated by Congress, the Boland Amendment, *supra* note 18, declared a general ban on aid to the Contras, although the measure might have allowed for funding to interdict arms transfers from Managua to Marxist rebels in El Salvador. H.R. REP. NO. 122, 98 Cong., 1st Sess. 11 (1983). One of the disputed issues raised during the Iran-contra hearings, was whether the Boland Amendment applied to the President and the National Security Council. See *infra* note 45. Despite the Boland Amendment, Congress did allocate \$24 million to the Contras for fiscal year 1984. See Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983). When the Boland Amendment was lifted in October 1986, Congress authorized \$100 million in general appropriations for the Contra groups of which \$30 million was earmarked for non-military aid. Mili-

The first premise is the least controversial. The political question doctrine should have little bearing on a judicial determination that Nicaraguan citizens are being killed and tortured in the civil conflict in that country. This information was readily available to policymakers and the public alike,<sup>37</sup> and a recognition of this fact by a court of law would have been entirely appropriate.<sup>38</sup> That is, the court could certainly not be accused of directing United States' foreign policy in the Central American region by simply recognizing, perhaps by judicial notice, well-known events occurring in that region.

In terms of the second premise—that the Contras were committing some of the atrocities that were frequently occurring in Nicaragua—it is also questionable whether the political question doctrine should be a bar to such a determination. The point to be made here is that despite the President's repeated depiction of the Contras as "freedom fighters,"<sup>39</sup> there was some indication that the State Department recognized that the allegations of atrocities had some basis in fact.<sup>40</sup> Although one might have to read between the lines to see this, the State Department Country Report on human rights conditions in Nicaragua for 1983,<sup>41</sup> supports the conclusion that the State Department was aware that the allegations of atrocities were well founded:

According to the Government, guerrillas killed some 300 soldiers and 346 civilians in 1983. There is no confirmation that guerrilla groups have deliberately killed civilians, but some civilians, including foreigners, have died in the fighting between the Government and the guerrillas.

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tary Construction Appropriation Act of 1987, Pub. L. No. 99-591, § 101(k), 100 Stat. 3341-300 (1986).

37. See *infra* note 40 and accompanying text.

38. In *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 358 (C.D. Cal. 1982), the court responded to a similar challenge with these findings:

In short, the violent conditions in El Salvador are a matter of public record and corroborated by all available accounts. The Court therefore believes that it can take judicial notice of the following facts without having to "second guess" the Executive Branch's analysis of events in El Salvador, as feared by defendants: (1) El Salvador is currently in the midst of a widespread civil war; (2) the continuing military actions by both government and insurgent forces create a substantial danger of violence to civilians residing in El Salvador; and (3) both government forces and guerrillas have been responsible for political persecution and human rights violations in the form of unexplained disappearances, arbitrary arrests, torture, and murder.

*Id.* (citations omitted).

39. See *infra* note 44.

40. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1983, REPORT SUBMITTED TO THE HOUSE COMM. ON FOREIGN AFFAIRS AND THE SEN. COMM. ON FOREIGN RELATIONS BY THE DEP'T OF STATE, 98th Cong., 2d Sess. 635 (1984).

41. *Id.*

The Government also charged the guerrillas with torturing and summarily executing prisoners. On at least two occasions, leaders of the Revolutionary Democratic Alliance, an anti-Government guerrilla group, claimed to have executed one or more prisoners. In September, a guerrilla recanted an earlier public denial and confessed to participation in the kidnapping and murder of a Nicaraguan couple. There is no confirmation that guerrillas have tortured prisoners.<sup>42</sup>

This report was compiled the year the district court dismissed the claim in the present suit.

The political question doctrine was most applicable to the court's third premise, United States' support of the Contras. At the time that suit was brought, the Nicaraguan and congressional plaintiffs were charging that the Executive branch was aiding and abetting the Contra effort,<sup>43</sup> and that such assistance was contrary to the provisions of the Boland Amendment,<sup>44</sup> while the Executive branch was categorically denying these allegations.<sup>45</sup> An independent resolution of this

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42. *Id.* at 635. A few things should be noted about the State Department Report. The first is that although the report on human rights conditions in Nicaragua at least hints at some atrocities by the contras, most of the report is devoted to detailing charges against the Sandinista regime. A second point is that other reports on human rights conditions were, and are, much less sanguine about the human rights record of the contras than the State Department Report was, and still is.

For example, in its 1983 yearly report on human rights conditions, Amnesty International portrayed the contras in these terms:

Amnesty International also received reports that the Honduran authorities and military officials had offered both tacit and logistical support to irregular units opposed to the current government in Nicaragua. These groups, known as the *contras* . . . operated from Honduran territory and conducted raids during 1983 which reportedly resulted in the "disappearance" and extrajudicial execution, in some cases on Honduran soil, of both Honduran and Nicaraguan non-combatant civilians, including Nicaraguan refugees in Honduras.

AMNESTY INTERNATIONAL REPORT 1984, at 169 (1985).

43. See *supra* note 8 and accompanying text.

44. See *supra* note 18 and accompanying text.

45. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600 (D.D.C. 1983) (emphasis in original). The district court described the impasse in this language:

A second reason for finding this matter non-justiciable is the impossibility of our undertaking independent resolution without expressing a lack of the respect due coordinate branches of government. President Reagan has stated on numerous occasions, to the Congress and to the public at large, that he is not violating the spirit or letter of the Boland Amendment, or any other statutes, in Nicaragua. By all media accounts, members of both Houses of Congress strenuously disagree with the President's assertion. Were this Court to decide, on a necessarily incomplete evidentiary record, that President Reagan either is mistaken, or is shielding the truth, one or both of the coordinate branches would be justifiably offended. At this stage, therefore, it is up to Congress and the President to try to resolve their differences and jointly set a course for U.S. involvement in Central America.

question by the judiciary might well have expressed a lack of respect for a coordinate branch of government, and such a determination would indeed open the possibility to multifarious pronouncements on this question. More importantly, it is not so clear that the judicial branch would have had discoverable and manageable standards for resolving such a dispute.

This line of analysis will not be explored further because there is a more intriguing question to pursue, namely, do these same obstacles exist at the present time? To put matters a different way, would the political question doctrine be an obstacle to a suit by Nicaraguan citizens at the present time? In terms of the second premise, much more is now known about the human rights violations of the Contra forces.<sup>46</sup> Thus, a court of law would be in a much better position to decide this particular question. In terms of the third premise, the Iran-Contra hearings have shown quite clearly that the Executive branch was committed to providing aid to the Contras despite the

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*Id.*

46. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1986, REPORT SUBMITTED BY THE HOUSE COMM. ON FOREIGN AFFAIRS AND THE SEN. COMM. ON FOREIGN RELATIONS BY THE DEP'T OF STATE, 100 Cong. 1st Sess. 569 (1987). The State Department Report for 1986 depicts human rights violations by the Contras in these terms:

The armed resistance similarly has been charged with numerous violations of human rights, including forced recruitment, use of pressure-sensitive mines, summary executions of prisoners and regime officials, torture, kidnappings of noncombatants, and attacks on civilians. As with most of the reports concerning the massacre of civilians in remote areas by the Sandinista authorities, it has proven extremely difficult to obtain objective independent verification of these charges.

*Id.*

Other human rights organizations have taken a much harsher line. AMERICA'S WATCH, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1986, at 91-92 (1987).

Insofar as *contra* practices are concerned, they remained in 1986 as they had been previously. They showed no respect for the laws of war, engaging in both targeted attacks on civilians identified as Sandinista activists, and in many indiscriminate attacks which produced a large civilian death toll. The extensive use of land mines by the *contras* was symptomatic of their practices; at the least these were used indiscriminately and, given the circumstances of their placement, it appears they were used with the deliberate intent of killing civilians. . . .

From the standpoint of the Reagan Administration's policy, Nicaragua is a special case. Administration officials, starting with the President and including the National Security Council, the CIA, the State Department, and several agencies of the government that ordinarily are not involved in foreign policy are devoted to portraying the Sandinista government in the blackest light possible and, conversely, in portraying what they call "the democratic resistance," or "the Nicaraguan freedom fighters," as favorably as possible. No attempt whatsoever is made to moderate such portrayals in the light of actual performance. This is war; and by far as human rights policy is concerned, it is perceived by the Administration as an aspect of the war.

*Id.* at 92 (emphasis in original); see also Ford, *Questions About Human Rights Dog Contras' Image*, Christian Sci. Monitor, Jan. 23, 1987, at 9.

Boland Amendment.<sup>47</sup> Moreover, since the Boland Amendment has since lapsed,<sup>48</sup> the United States government has openly<sup>49</sup> provided aid to the Contras. One can easily conclude that many of the unanswered questions that existed in 1983, questions that might have properly invoked the political question doctrine,<sup>50</sup> have now been answered.<sup>51</sup>

Before turning to Judge Scalia's appellate court opinion, a few final comments are necessary regarding the district court's analysis of the political question doctrine, pertaining to the Nicaraguan plaintiffs. Even if one concludes that the political question doctrine should bar certain kinds of judicial determinations, it should also be noted that there is a tendency in this area to exaggerate both the need for judicial deference and the issues the court addresses. For example, the district court maintained that "in order to adjudicate the tort claims of the Nicaraguan plaintiffs, we would have to determine the precise nature

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47. Butterfield, *North Says Casey Aided him on Secret Contra Program; Challenges Key Officials*, N.Y. Times, July 9, 1987, at 1; Rosenbaum, *North Insists his Superiors Backed Iran-Contra Deals; Assumes Reagan Approved*, N.Y. Times, July 8, 1987, at 1.

48. The Boland Amendment was in effect from 1984 to 1986. See *supra* note 18.

49. An issue that warrants closer examination, but which will not be raised in this article, is whether U.S. assistance to the contras is violative of section 502(b) of the Foreign Assistance Act, 22 U.S.C. § 2304 (1961). Section 502(b) reads in part: "Except under circumstances specified in this Section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights." *Id.*

50. There is language in *Baker v. Carr*, 369 U.S. 186, 211 (1962), which criticizes the judicial deference so often displayed in this area. There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand a single-voiced statement of the Government's view. Yet, it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. *Id.* (citation omitted).

For a critique of this all-too-common phenomenon in the area of U.S. immigration/refugee policy see, Gibney, *The Role of the Judiciary in Alien Admissions*, 8 B.C. INT'L & COMP. L. REV. 341 (1985).

51. Special mention should be made of the ruling of the World Court against the United States. Among other things, the court found that the United States violated the 1956 Friendship Treaty between the U.S. and Nicaragua and general international law by mining Nicaragua's harbor. In addition, the Court also found that the United States breached the humanitarian law of war by disseminating a manual on psychological and guerrilla warfare. Further, the World Court found that the United States owed reparations to Nicaragua for injuries that it has caused, although it deferred on Nicaragua's petition for \$370 million until the parties had an opportunity to reach a negotiated settlement. Abram Chayes, who represented Nicaragua before the World Court, has claimed that the decision would be the basis of a billion dollar suit against the U.S. government. Lewis, *World Court Supports Nicaragua After U.S. Rejected Judges' Role*, N.Y. Times, June 28, 1986, at 1, col. 2.

and extent of the U.S. government's involvement in the affairs of several Central American countries . . . ."<sup>52</sup> The court believed a judicial determination of the Nicaraguan claims would constitute an "overseeing"<sup>53</sup> of United States' military affairs in Central America.

In some respects these charges are accurate, but only in terms of the injunctive relief sought by the Nicaraguan plaintiffs. The same cannot be said about the relief in tort for past harms allegedly caused by the Contra forces. Providing relief in tort to noncombatants for past harms is decidedly different from setting prospective policy.<sup>54</sup> This is not foreign policy by the judiciary. The propriety of such suits, and the purpose they may serve in a democratic society, is analyzed in Part C.

### B. Sovereign Immunity

The court of appeals affirmed the lower court's dismissal of the claims of the Nicaraguan plaintiffs, but purportedly on the basis of sovereign immunity rather than the political question doctrine.<sup>55</sup> In terms of the Nicaraguan citizens' claims for monetary damages, the court held:

It would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States.<sup>[56]</sup> Such judgments would necessarily "interfere with the public administration,"<sup>[57]</sup> or "restrain the government from acting, or . . . compel it to act . . . ."<sup>58</sup>

In terms of the claims for injunctive relief, the court held:

The support for military operations that we are asked to terminate has, if the allegations in the complaint are accepted as true, re-

52. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 601 (D.D.C. 1983).

53. *Id.* at 602.

54. A recent case highlights the distinction being drawn here. *See, e.g., Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984). The *Greenham* case involved a suit brought on the basis that the deployment of cruise missiles in the United Kingdom would make nuclear war more likely. The court held that such a determination was difficult enough for the political branches to make, and next to impossible for a court to make. Contrast this sort of determination with the claim of the Nicaraguan plaintiffs for past tortious harms.

55. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985).

56. *Id.* (citations omitted) (emphasis in original).

57. *Id.* (quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947)).

58. *Id.* (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949)) (citations omitted).

ceived the attention and approval of the President, the Secretary of State, the Secretary of Defense, and the Director of the CIA, and involves the conduct of our diplomatic relations with at least four foreign states—Nicaragua, Costa Rica, Honduras, and Argentina. Whether or not this is, as the District Court thought, a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all, we think it at least requires the withholding of discretionary relief.<sup>59</sup>

Judge Scalia's use of the sovereign immunity doctrine has several features which should be explored. First, Judge Scalia distinguishes domestic sovereign immunity from foreign sovereign immunity.<sup>60</sup> He contends that the suit by the Nicaraguan citizens is barred by domestic sovereign immunity.<sup>61</sup> Moreover, Scalia takes special pains to distinguish *Sanchez-Espinoza*<sup>62</sup> from *Filartiga v. Pena-Irala*.<sup>63</sup> The juxtaposition of these two cases, however, leads to an incongruous result.

*Filartiga*<sup>64</sup> allowed a suit in a United States court by a Paraguayan citizen against a member of the armed services of Paraguay for alleged harms occurring in Paraguay. *Sanchez-Espinoza*,<sup>65</sup> on the other hand, bars a suit brought in a United States court by citizens of another country for harm caused by the United States itself. It should be apparent that the United States has a much greater interest, and certainly a much greater involvement, in the second suit

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59. *Id.* at 208.

60. *Id.* at 207 n.5. Justice Scalia takes this position:

Since the doctrine of foreign immunity is quite distinct from the doctrine of domestic sovereign immunity that we apply here, being based upon considerations of international comity, rather than separation of powers, it does not necessarily follow an Alien Tort Statute suit filed against the officer of a foreign sovereign would have to be dismissed. Thus, nothing in today's decision necessarily conflicts with the decision of the Second Circuit in *Filartiga v. Pena-Irala*. (citations omitted).

*Id.*

61. *Id.*

62. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

63. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). One of the ironies about *Filartiga* is that at the request of the court of appeals, the Justice and State Departments filed an *amicus* brief for the United States. This brief urged the court to hear the case. It counseled that the law of nations includes universally accepted and enforceable human rights guarantees, including the proscription of torture, and the protection of fundamental human rights. The brief also took the position that the political question doctrine was not applicable, and that "a refusal to recognize a private cause of action . . . might seriously damage the credibility of our nation's commitment to the protection of human rights." Cole, *supra* note 29, at 155.

64. *Id.*

65. *Sanchez-Espinoza*, 770 F.2d 202, 206-07.

than in the first.<sup>66</sup> After all, the alleged harm has been caused by agents of the United States government. Yet, the end result is that one case can be brought in a United States court and the other cannot.<sup>67</sup>

In addition to drawing a distinction between domestic and foreign sovereign immunity,<sup>68</sup> Judge Scalia also attempted to draw a distinction between acts that were authorized by the sovereign<sup>69</sup> (and thus covered by the doctrine of sovereign immunity) and acts that were not authorized by the sovereign (and thus labeled "private wrongdoing").<sup>70</sup> However, it is by no means clear that *Filartiga*<sup>71</sup> involved a case of private wrongdoing, as opposed to torture being a part of state terror in that country.<sup>72</sup> Secondly, if unauthorized activities are not covered by the sovereign immunity doctrine, as Judge Scalia contends, then this determination works against the argument he is ultimately trying to make when one speaks of the unauthorized (by Congress, at least) and apparently illegal activities of the National Security Council in providing aid to the Contras.<sup>73</sup>

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66. Cole, *supra* note 29, describes the inconsistency in the U.S. government's position this way:

The government's reversal cannot be attributable to a change in the law. The same violation is alleged under the same statute; only the defendants have changed. While the plaintiffs in *Filartiga* asked the United States to apply international human rights law to foreign officials, those in *Sanchez-Espinoza* sought to have the United States apply that law to its own officials. The contrast in the Justice Department's stand with respect to these two cases suggests that it considers it appropriate to apply fundamental norms of international law to Paraguay, but not to the United States.

*Id.* at 156.

67. One of the exceptions to the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982), is for claims "arising in a foreign country." 28 U.S.C. § 2680(k) (1982). It might well be claimed that this exception would preclude a suit such as that brought by the Nicaraguan plaintiffs in *Sanchez-Espinoza* because the harms occurred in Nicaragua or Honduras. In the "Agent Orange" litigation, Federal District Court Judge Weinstein interpreted this provision to mean that a tort claim "arises" at the place where the negligent act or omission occurred, not necessarily where the injury occurred. Judge Weinstein then concluded: "Applying the above analysis to the case at bar, it is undisputed that the initial decision to use Agent Orange, the decision to continue using it, and decisions relating to the specifications for Agent Orange were made in this country." *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1255 (1984).

68. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 n.5 (D.C. Cir. 1985).

69. *Id.* at 207.

70. *Id.*

71. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

72. For example, Judge Kaufman's opinion referred to these deliberate acts of torture as being "under color of official authority." *Id.* at 878. For a discussion of this point and the *Filartiga* case, see generally Comment, *Torture as a Tort in Violation of International Law: Filartiga v. Pena-Irala*, 33 STAN. L. REV. 353, 364 (1981).

73. See *supra* note 18.



Another aspect of Judge Scalia's opinion has already been touched on before,<sup>74</sup> namely, the rationale that a judicial decree would be "restraining"<sup>75</sup> or "compelling"<sup>76</sup> the United States government to act a certain way. Again, a much stronger case for this argument can be made for the injunctive relief sought. The same cannot be said of relief for past harms. The granting of relief for past harms will not reflect negatively on both past and present activities, that much is certain. However, seeking relief from a court for past harms is qualitatively different from dictating prospective United States foreign policy.

By way of concluding this section, despite the arguments set forth explaining why the sovereign immunity doctrine should not have been a bar to this suit by Nicaraguan citizens for alleged harm caused by the United States supported Contras, still, *Sanchez-Espinoza* will no doubt prove to be a difficult precedent to overcome. However, it should also be pointed out that there are other possible causes of action that Nicaraguan citizens have available to them.

Under the *Filartiga* doctrine,<sup>77</sup> it might be possible for Nicaraguan citizens to bring a suit under the Alien Tort Statute<sup>78</sup> against members of the Contra forces for the violations of human rights.<sup>79</sup> Nicaraguan citizens may also have a claim against United States citizens who have provided economic assistance to the Contra forces.

74. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 598 (D.D.C. 1983); *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984).

75. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985).

76. *Id.*

77. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (opening the federal courts for adjudication of the rights already recognized by international law); see *supra* note 59 and accompanying text.

78. Alien Tort Statute, 28 U.S.C. § 1350 (1976), which states that: "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." (original version in Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73).

79. There are at least two potential obstacles to such a suit. One is the still unanswered question whether the Alien Tort Statute, 28 U.S.C. § 1350 (1976), is merely jurisdictional, or whether it also creates a private cause of action. Judge Kaufman in *Filartiga*, and Judge Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777-82 (D.C. Cir. 1984), held that the statute establishes a private cause of action. In *Tel-Oren*, Judge Bork took the opposite position in his concurring opinion. *Id.* at 810-19 (Bork, J., concurring).

A second possible obstacle would involve the status of the Contras. Judge Edwards' concurring opinion in *Tel-Oren* upholding the dismissal of the plaintiffs' suit was premised on the fact that he was unwilling to extend *Filartiga* to tortious conduct committed by a party other than a recognized state or one of its officials acting under color of state law. *Id.* at 776 (Edwards, J., concurring). In many respects, the Contras would share the same kind of status as such non-state terrorist organizations.

These private citizens have provided monetary assistance and weapons to the Contras<sup>80</sup> and either know, or should know, of the atrocities that have been committed by them. As a result, these individuals may well face liability under the law.<sup>81</sup>

### C. Responsibility for Human Consequences

*Sanchez-Espinoza*<sup>82</sup> raises a number of important political questions including: should nations be held responsible for the human consequences of their foreign policy pursuits? If so, what role should the judiciary of the country causing harm play in such determinations?

To begin this analysis, it is essential not only to understand how unique the claims of the Nicaraguan plaintiffs are,<sup>83</sup> but also to recognize that such claims do have some ground in both domestic and international law. On one level the Nicaraguan citizens are seeking restitution analogous to war reparations,<sup>84</sup> a universally recognized, if still underdeveloped,<sup>85</sup> doctrine in international law.<sup>86</sup>

80. *Nicaragua Rebels Reported to Raise Millions in Gifts*, N.Y. Times, Sept. 9, 1984, at 1, col. 6; Thatcher, *Private Donors to Contras 'Misled' on 'Overhead' Costs*, Christian Sci. Monitor, May 22, 1987, at 1. For a moral condemnation of those who give such funds see, Gibney, *Citizen Involvement in Central America*, 246 CONTEMP. REV. 225-29 (May 1985).

81. See Note, *The Iran-Contra Affair, the Neutrality Act, and the Statutory Definition of "At Peace,"* 27 VA. J. INT'L L. 343 (1987).

82. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

83. One point that deserves clarification is that only civilian non-combatants should be able to allege harm. Soldiers have accepted the risk of being harmed, while civilians have not. For a discussion of this point, see, M. GIBNEY, STRANGERS OR FRIENDS: PRINCIPLES FOR A NEW ALIEN ADMISSION POLICY 86-88 (1986).

84. War claims are described as:

those which arise from and are deemed to be chargeable to the conduct of a State while a belligerent, or while engaged in hostilities as though it were one. Such claims are of great variety. They may be founded on any form of activity incidental to the prosecution of war, whether on sea or land, and whether attributable to the military or civil arm of the government. Thus they may spring from the conduct of the commander of a submarine or that of the occupant of enemy territory; they may grow out of the acts of an army in the field, or of a collector of a port. Such claims may have an enemy as well as neutral origin. The treaty of peace terminating the conflict may, however, contain a waiver of such claims, or it may provide that one party shall . . . adjust those possessed by its nationals against its former enemy. Again, the treaty may burden one party with responsibility for illegal acts attributable to it, and impose a duty upon it to meet claims of nationals of the enemy arising therefrom.

C. HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 952-53 (1947) (citations omitted).

85. For example, William Bishop has written:

The international law relating to war claims appears to be one of the least satisfactory parts of the law of state responsibility and international claims. Both international wars and civil wars usually entail extensive destruction of property and widespread personal injury and violent death. Nationals of the belligerent states (or of the state where civil war rages), as well as nationals of neutral states taking no part

There are comparisons in domestic law as well. In this regard the recent decision in *Ramirez de Arellano v. Weinberger*<sup>87</sup> is particularly noteworthy. *Ramirez de Arellano* involved a suit brought in a federal court by a United States citizen who alleged that the United States government had unlawfully seized and destroyed his property in Honduras during the course of military maneuvers in that country.<sup>88</sup> In overturning the district court's dismissal of this claim,<sup>89</sup> the court of appeals stressed that the government could not hide behind the political question doctrine.<sup>90</sup>

The plaintiffs did not seek judicial monitoring of foreign policy in Central America nor did they challenge the United States' relations with any foreign country. The case did not raise the specter of judicial control and management of United States foreign policy.<sup>91</sup>

The court then went on to say, "The Executive's power to conduct foreign relations free from unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry."<sup>92</sup>

*Ramirez de Arellano* raises a number of interesting questions. For example, to what extent should it matter that the plaintiff was a United States citizen rather than a citizen of Honduras? Logically there is no distinction, although there might be such a distinction in the law.<sup>93</sup> A second question involves the fact that this was an action

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in the conflict, are among the victims of war losses. Yet it is seldom that claims of one belligerent against the other, or of neutrals against either belligerent, are submitted to an international tribunal for *adjudication according to general rules of international law*.

W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 695-96 (2d. ed. 1962) (emphasis in original).

86. One of the more unique forms of war reparations involves that being paid to victims of Nazi war crimes. See B. FERENCA, LESS THAN SLAVES (1979).

87. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated and rem'd*, 471 U.S. 1113, (1985) (remanded in light of the Foreign Assistance and Related Appropriations Act, 1985, and efforts by Honduras to make restitution), *rev'd*, 788 F.2d 762 (D.C. Cir. 1986) (withdrawal of all U.S. personnel fundamentally altered the balance of equities).

88. *Ramirez*, 745 F.2d at 1505.

89. 568 F. Supp. 1236 (D.D.C. 1983).

90. *Ramirez*, 745 F.2d at 1514-15.

91. *Id.* at 1513.

92. *Id.* at 1515 (emphasis in original).

93. For example, Judge Wilkey, for a majority of the court, writes: "It is settled law that the Executive's power to take the private property of United States citizens must stem from an act of Congress or from the Constitution itself." *Id.* at 1510. In response to an assertion by the defendants that ownership of a Honduran corporation bars standing to bring suit in a United States court, Judge Wilkey writes:

involving property. The court repeatedly made mention of the protection of property by the judiciary.<sup>94</sup> Whether a tort claim would have received the same judicial reception is unclear.<sup>95</sup> Again, it is maintained here that this should not matter.

The point to be underscored is that there is some recognition—perhaps a growing one<sup>96</sup>—that individuals who are harmed by another country in this country's pursuit of foreign policy goals should be protected and compensated. Thus, on one level, the Nicaraguan plaintiffs in *Sanchez-Espinoza*<sup>97</sup> are not asking for the unthinkable. On another level, however, these claims are asking just that. *Sanchez-Espinoza*<sup>98</sup> is calling for a very different perspective on how relations between nation-states are conducted, and it is suggesting that we essentially rethink what the relationship between one nation and citizens of another country should be.<sup>99</sup>

One political argument against the position taken by the Nicaraguan plaintiffs is that it seemingly knows no bounds. A comparable argument was set forth in Judge Robb's concurring opinion in *Tel-Oren v. Libyan Arab Republic*.<sup>100</sup> This case involved a suit brought in a United States court by Israeli citizens against various factions of the

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It is bizarre to posit that the claimed seizure and destruction of the United States plaintiffs' multi-million dollar investment, businesses, property, assets, and land is not an injury to a protected property interest. The suggestion that a United States citizen who is the sole beneficial owner of viable business operations does not have constitutional rights against United States government officials' [sic] threatened complete destruction of corporate assets is preposterous. If adopted by this court, the proposition would obliterate the constitutional property rights of many United States citizens abroad and would make a mockery of decades of United States policy on transnational investments.

*Id.* at 1515-16. What is puzzling about this kind of analysis, however, is that U.S. courts have been quite reluctant to offer a similar kind of protection for the property—and lives—of foreign citizens.

94. *Id.* at 1512. "The federal courts historically have resolved disputes over land, even when the United States military is occupying the property at issue." *Id.* (citation omitted).

95. For a discussion of tort claims brought by aliens against the United States from events occurring outside the United States, *See Cole, supra* note 29, at 186 n.156.

96. *See, e.g., Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980) (holding that Chile could be held liable under international and domestic law for assassinating a civilian); *Siderman v. Argentina*, No. CV 82-1772, slip. op. (C.D. Cal. 1984) (holding that torture is not protected by the act of state doctrine).

97. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

98. *Id.*

99. What this is suggesting is that if nations were held accountable for the harm caused to others in the pursuit of "national interests" or "national security," one might expect the pursuit of such goals to be undertaken with much more regard for the human consequences. Certainly the world would look far different than it does today.

100. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Robb, J., concurring).

Palestine Liberation Organization for events occurring during an attack on a bus in Israel.<sup>101</sup> Judge Robb explained the attractiveness of such suits, but also his fears of the judiciary entering into this realm:

We are here confronted with the easiest case and thus the most difficult to resist. It was a similar magnet that drew the Second Circuit into its unfortunate position in *Filartiga*. But not all cases of this type will be so easy. Indeed, most would be far less attractive. The victims of international violence perpetrated by terrorists are spread across the globe. It is not implausible that every alleged victim of violence of the counter-revolutionaries in such places as Nicaragua and Afghanistan could argue just as compellingly as the plaintiffs here do, that they are entitled to their day in the courts of the United States. The victims of the recent massacres in Lebanon could also mount such claims. Indeed, there is no obvious or subtle limiting principle in sight.<sup>102</sup>

This "slippery slope" argument is haunting. Even so, it is important to keep it in perspective. Sadly enough, Judge Robb correctly points out that there is an almost incomprehensible level of political violence and terror in the world. Asking the courts of this country to rectify this situation would be a senseless task indeed. However, courts in this country can and should begin to ensure that the human consequences of *United States foreign policy pursuits*<sup>103</sup> are not ignored. This does not mean that a suit like *Filartiga*<sup>104</sup> should not be heard in a United States court. Instead, the suggestion presses the point that the United States judiciary be especially attuned to the harm caused by the political branches of this country.<sup>105</sup> In this respect, regardless of the remarkable decision in *Filartiga*,<sup>106</sup> it would have been even more extraordinary and, in many respects, more encouraging, if such a decision had been rendered by a Paraguayan court, rather than by a United States court. The same is being asserted with respect to courts in this country.<sup>107</sup>

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101. *Id.*

102. *Id.* at 826 (citation omitted).

103. For a similar argument, see Comment, *The Alien Tort Statute: United States Jurisdiction Over Acts of Torture Committed Abroad*, 23 WM. & MARY L. REV. 103, 120 (1980).

104. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

105. For an extended discussion of what I have termed the Harm Principle (HP), see, Gibney, *supra* note 80, at 79-102.

106. *Filartiga*, 630 F.2d 876.

107. Examples where the judiciary will find fault with the political branches in the realm of foreign affairs are few and far between. However, in some recent instances the judiciary has been quite searching in its review of actions of the political branches. One notable case of this occurring was *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982). Another note-

In *Sanchez-Espinoza*,<sup>108</sup> Judge Scalia argued for judicial restraint and reasoned that if a proper remedy in fact existed for the Nicaraguan plaintiffs, it ought to be fashioned by the political branches.<sup>109</sup> This reasoning conveniently ignores, of course, that the political branches will not do this. Unfortunately, nations are not in the practice of either looking at the human consequences of their own actions,<sup>110</sup> or admitting mistakes in the pursuit of their own "national interest." Thus, Scalia's position has a hollow ring to it.

Could one expect the judiciary to respond differently than the political branches have?<sup>111</sup> There is no assurance, of course, that a court of law would respond any differently than would the political branches. Nor would there be any expected response if judges simply viewed their own role as akin to those in the political branches. It appears quite possible, however, that the judiciary could play a unique role in this area.<sup>112</sup> Judge Scalia viewed the case in terms of separation of powers,<sup>113</sup> yet part of the notion of separation of powers is that there will be mutual checks on each branch of government. However, in terms of the pursuit of foreign policy objectives, checks are few and far between.<sup>114</sup>

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worthy case in this regard was the courageous decision of Judge King in *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom.*, *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

108. 770 F.2d 202 (D.C. Cir. 1985).

109. *Id.* at 209.

110. Michael Teitelbaum describes such a situation involving the generation of refugee populations:

Foreign policies have frequently served (often unintentionally) to *stimulate* international migrations. In particular, foreign military or political interventions, or internal or external responses to intervention, often result in mass migrations. Foreign-policy makers rarely evaluate such effects seriously when considering intervention. Instead, they perceive the possible refugee consequences (if they consider them at all) more as a problem for "others," if the flow is to other countries, or alternatively as an obligation that the intervenor [sic] owes to local collaborators, if the intervention proves unsuccessful. Importantly, the intervening power does not necessarily see even the possible future need to admit such dependent populations as refugees as a serious cost of policy failure.

Teitelbaum, *Immigration, Refugees and Foreign Policy*, INT'L ORG. 429, 433 (1984).

111. It might also be true, however, that judges view the world from the same perspective as those in the political branches. For a depiction of this occurring in South Africa, see Pitts, *Judges in an Unjust Society: The Case of South Africa*, 15 DEN. J. INT'L L. & POL'Y 49 (1986).

112. For a general discussion of the relationship between domestic courts and international law, see R. FALK, *THE ROLE OF THE DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964).

113. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985).

114. Robert Johansen describes the abandonment of the checks and balances system this way: "Too many interests within the United States executive branch, Congress, and the judicial system are all on the same (national) side of the global issues. Instead of the threefold

### III. CONCLUSION

This Article asserts that, rather than hide at the mention of "foreign affairs," the judicial branch in our system of government has an enormously important role to play. Courts in this country ought to serve as a check on the human consequences of American foreign policy forays.<sup>115</sup> Clearly, the courts are not being asked to dictate or oversee policy, or to determine the precise nature of the United States government's involvement in the affairs of other countries. In fact, this Article asks them to do much the opposite: to ignore the minutia of United States foreign policy and, instead, focus on its more global aspects.

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separation of powers extant on domestic questions, there is a threefold concentration of mutually reinforcing powers on global issues." R. JOHANSEN, *THE NATIONAL INTEREST AND THE HUMAN INTEREST* 381 (1980).

115. For a discussion of the role courts could play as a "moral check" in matters concerning foreign policy, see Gibney, *The Refugee Act of 1980: A Humanitarian Standard*, 21 *GONZ. L. REV.* 585, 596-602 (1985-86).