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Judicial Failure to Enforce Human Rights Legislation: An Alternative Analysis of Crockett v. Reagan

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Since the early 1970s, with varying degrees of effort and success, the United States has made human rights concerns a part of its foreign assistance and foreign policy. The legal basis for the pursuit of human rights goals can essentially be found in Section 502B of the Foreign Assistance Act. Section 502B reads

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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."²

Notwithstanding the existence of the human rights legislation noted above,³ it is far from clear that human rights concerns have in fact played a meaningful role in the provision of foreign assistance.⁴ Furthermore, a very strong case could be

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³ The two strongest pieces of evidence of this are provided by Cohen, Conditioning U.S. Assistance, supra note 1, and Carleton & Stohl, The Foreign Policy of Human Rights: Rhetoric and Reality from Jimmy Carter to Ronald Reagan, 7 Hum. Rts. Q. 205 (1985) [hereinafter Carleton & Stohl]. Cohen goes into great depth in depicting a State Department bureaucracy where human rights concerns were virtually ignored during the
made that various human rights laws have been violated. It is this problem, and its possible solution, that will be addressed here.

The focus of this article will be *Crockett v. Reagan*, a suit brought by 29 Congressmen challenging U.S. military policy in El Salvador as well as the security assistance provided to that country. Part I examines the *Crockett* case and provides an alternative approach to that taken by the court. Part II examines the philosophical justification for human rights legislation. The argument made in this section is that what has essentially been missed thus far, by policymakers and judicial actors alike, is the moral culpability that is involved when a nation provides support to an unjust regime. Part III explores the rationale for judicial deference exhibited in *Crockett*. What is challenged is the oft-relied upon idea that there are no "judicially discoverable and manageable standards" for the court to employ in matters involving foreign affairs. The position taken here is that the judiciary does in fact have available to it some data on human rights conditions in other countries that could be used in subsequent challenges to the expenditure of U.S. security assistance. Finally, Part IV examines the notion of the judiciary serving as a forum for the "moral evolution" of American society.

Carter administration. The empirical work by Carleton and Stohl, discussed further, infra notes 64-68 and accompanying text, indicates quite convincingly that with only a few exceptions, the reality of the pursuit of human rights concerns has been decidedly different from the high sounding rhetoric. But see Cingranelli & Pasquarello, *Human Rights Practices and the Distribution of U.S. Foreign Aid to Latin American Countries*, 29 AM. J. POL. SCI. 539 (1985). It should be pointed out that contrary to most of the empirical work in this area, Cingranelli and Pasquarello generally find a negative correlation between human rights violations and the level of U.S. assistance. What makes this work suspect, however, is that El Salvador is not included in the analysis.


6. *Id.* at 898. The court disagreed with the defendants on whether the issue involved was a "type of political question which involve[d] potential judicial interference with executive discretion in the foreign affairs field." *Id.* Instead, the court based its decision on the view that the lack of employable judicial standards prevented judicial involvement in this case.

I. Crockett v. Reagan and Justiciability

The backdrop to Crockett v. Reagan is a brutal civil war in El Salvador that has claimed the lives of over 40,000 civilians.\textsuperscript{8} The court in Crockett provided some background information on the war, such as the antagonists,\textsuperscript{9} but the opinion itself gives no information about the conduct or the consequences of the war. Crockett involved two main issues. The first involved the nature of U.S. military activity in El Salvador, and whether the activities of American servicemen violated the Constitution\textsuperscript{10} and the provisions of the War Powers Resolution (WPR).\textsuperscript{11} The second issue concerned whether the security assistance that the United States has provided to El Salvador violated 502B.\textsuperscript{12} The court granted the defendants' motion to dismiss on both issues.

A. War Powers Claim

The basis of the plaintiffs' complaint involving the WPR concerned the activities of 56 members of the U.S. Armed Forces. The plaintiffs' factual claim was that these soldiers had been coordinating the war effort of the Salvadoran government, and were assisting in planning specific operations against the rebel forces.\textsuperscript{13} Moreover, the plaintiffs also claimed that many of these military personnel worked in or around areas where there was heavy combat.\textsuperscript{14} The plaintiffs' claim was that such activi-

\textsuperscript{9} 558 F. Supp. at 895.
\textsuperscript{10} U.S. Const. art. I., § 8, cl. 11.
\textsuperscript{11} 50 U.S.C. §§ 1541-1548 (1983). The WPR requires that absent a declaration of war, a report must be made to Congress within 48 hours of any time when United States armed forces have been introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and that 60 days after a report is submitted or is required to be submitted, the President shall terminate any use of United States armed forces unless Congress declares war, enacts specific authorization for such use of United States armed forces, or extends the 60-day period for an additional 30 days. The WPR issue in Crockett was whether such a report should have been filed.
\textsuperscript{12} Bonner claims that as of 1984 the United States had spent over a billion dollars in trying to prop up the Salvadoran government. Bonner, supra note 8.
\textsuperscript{13} 558 F. Supp. at 897.
\textsuperscript{14} Id. In support of its allegations, the plaintiffs submitted two articles describing the activities of U.S. servicemen in El Salvador. The first article described U.S. military personnel as “fighting side by side” with Salvadoran troops. The second article was based on a General Accounting Office report which disclosed that U.S. military personnel had been “drawing 'hostile fire pay,' and that a tentative Pentagon ruling that all of El
ties of U.S. servicemen violated the WPR.

The defendants' answer alleged that the U.S. military forces in El Salvador have not acted as combat advisors, and have not accompanied Salvadoran forces either in combat, in operational patrols, or in any situation where combat was likely. The State Department also stated that the U.S. military forces had not been subject to attack. Instead, the defendants alleged that the only role that the U.S. military personnel played was to train Salvadoran military units so as to create a "self-training capability in particular skills."

The court readily recognized the vast discrepancies in the factual allegations between the contending parties.

Plaintiffs present a significantly different picture of what is actually occurring in El Salvador, and the relationship of U.S. military personnel to it. Although consideration of the merits might reveal disagreements about the meaning of WPR terms such as "imminent involvement in hostilities," the most striking feature of the pleadings at this stage is the discrepancy as to the facts.

Not only are the factual allegations strikingly different, but the court also recognized that implicit in the plaintiffs' claims was the charge that the executive branch was distorting the reality of U.S. involvement in El Salvador, and that if one believed plaintiffs' assertions as true, one would find them "at a minimum, disturbing." However, having gone this far, the court then beat a hasty retreat, granting the defendants' motion to

15. Id. One of the oddities of the State Department's position is that the bureaucrats also guaranteed prospectively that no servicemen would do any of the activities they were alleged to have done.
16. Id.
17. Id. The court notes a possible discrepancy even in the Executive's account. While the State Department insisted that U.S. military personnel had not been subject to attack, the court notes that the testimony of Lieutenant General Ernest Graves, Director of the Defense Security Assistance Agency, does not exactly claim that American military personnel had not been exposed to hostile fire.
18. Id. It is not exactly clear what these particular skills are.
19. Id.
20. Id. at 897-98. Indeed for the purpose of deciding the government's motion to dismiss, the court had to accept those allegations as true.
dismiss the WPR claim on the ground that this is a nonjusticiab-
le question.\textsuperscript{21}

There are several aspects of the court's treatment of the
WPR issue that need further consideration. Generally, the dis-
cussion that follows is premised on a notion that is not com-
monly accepted in legal scholarship or practice, namely, that
courts can play an important role in certain cases involving for-
eign affairs, and that they should not automatically exclude
themselves from such matters.\textsuperscript{22} This is not to argue that the
judiciary should play a role equal to the political branches; how-
ever, the working assumption being used here is that the other
avenue should not always be the rule either.\textsuperscript{23} The facts of a par-
ticular case should determine the judiciary's role.

The first problem to be addressed in \textit{Crockett} is the vast
discrepancies in the factual allegations themselves, and the re-
sponse that this prompted for the court. As the court itself
pointed out, the parties' factual allegations were completely dif-
ferent.\textsuperscript{24} Moreover, the court also hinted at the possibility of Ex-
ecutive lying and manipulation.\textsuperscript{25} What is puzzling is why this
rather disturbing state of affairs did not elicit more concern
from the court.\textsuperscript{26}

Even if one accepted the notion that the judiciary should
tread slowly and softly when confronted with factual allegations
as diverse as those in \textit{Crockett}, particularly by members of two
coordinate branches of government, what is missing in \textit{Crockett}

\textsuperscript{21} \textit{Id.} at 898.

\textsuperscript{22} The dominant view is best exemplified in Louis Henkin's work \textit{Foreign Affairs
AND THE CONSTITUTION} (1972). It should be noted that although the court in \textit{Crockett} did
not employ the convenient "foreign affairs" shield, \textit{supra} note 6, certainly the fact that
what was at issue in the case involved issues of international affairs was quite important
in the court's exhibiting the deference that it did.

\textsuperscript{23} How far-reaching "foreign affairs" can be taken is rather remarkable. For a dis-
cussion of how questions of "foreign affairs" become inextricably (and unfortunately)
linked with virtually any questions involving immigration policy, see Gibney, \textit{The Role of

\textsuperscript{24} See \textit{supra} text accompanying note 19.

\textsuperscript{25} \textit{Id.} at 897-98. One might have to read between the lines to discern this, but the
court seemed more inclined to entertain the notion of distortion by the Executive than
by the plaintiff Congressmen.

\textsuperscript{26} It is ironic that the court mentions Vietnam, although in the context of showing a
situation where deciding the existence of America's involvement in that war would not
pose a political question. Of course, Vietnam could serve as an excellent example of the
distortion of U.S. military involvement, much like the plaintiffs' claim in \textit{Crockett}.
is any real attempt to clear up these "disturbing" factual discrepancies. For this the court should be faulted. In fact, the court quite easily depicts itself as completely unable to decipher any disagreements in factual allegations.

Even if the plaintiffs could introduce admissible evidence concerning the state of hostilities in various geographical areas of El Salvador where U.S. forces are stationed and the exact nature of U.S. participation in the conflict (and this information may well be unavailable except through inadmissible newspaper articles), the Court no doubt would be presented conflicting evidence on those issues by defendants. The Court lacks the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact concerning the military situation in El Salvador.27

A related problem involves the court's treatment of the plaintiffs' allegations given the defendants' motion to dismiss.28 As the court correctly points out, these factual allegations must be treated as being true for the purposes of a motion to dismiss.29 However, after acknowledging this, the court then states that it did not have the resources and expertise to make the kinds of factual determinations that it thought it was being asked to make.30 The point to be underscored here is that with the defendants' motion to dismiss the court was not charged with making these factual determinations at this point in the proceedings. Again, the court's prospective treatment of the facts and issues of the case was unwarranted.

An ironic feature of the court's treatment of the WPR claim is that notwithstanding all of the court's language about judicial incapacities here, the court also indicated that if Congress now made a determination that a report under the WPR was warranted, then the requisite "constitutional impasse appropriate

27. 558 F. Supp. at 898. It is not clear why the court believes that newspaper articles would necessarily be inadmissible. In fact, newspaper accounts have served as a very useful source of information for certain courts in the past. Paul v. INS, 521 F. 2d 194, 199 (5th Cir. 1975); United States v. Esperdy, 234 F. Supp. 611, 617 (S.D.N.Y. 1964).
29. Id.
30. See supra text accompanying note 27.
for judicial resolution would be presented. What is unclear about this position, admittedly dicta, is that the court would presumably still be burdened by the same deficiencies in making factual determinations that it presently thought it was suffering from. Moreover, by waiting for a "constitutional impasse," the court thereby raises the stakes, but at the same time increases the likelihood of striking a blow at one branch of government. Finally, the gravest problem with the court's position about waiting for a declaration by Congress is that it evinces an attitude that the judiciary should not rule certain government behavior as being unlawful until another branch, in this instance Congress, so declares.

B. Foreign Assistance Act Claim

The second major issue raised by the plaintiffs in Crockett was whether the security assistance provided by the United States to El Salvador violated the provisions of Section 502B. The plaintiffs' contention was that the government of El Salvador had engaged in a consistent pattern of gross violations of internationally recognized human rights, and therefore, under the provisions of 502B, should be denied security assistance. The defendants sought dismissal on the grounds of either the political question doctrine, standing, equitable discretion, or the lack of a private right of action. The court granted the defendants' motion to dismiss using the equitable discretion doctrine. Essentially, the court maintained that since Congress had not objected to the President's certifications under Section 728 of the International Security and Development Cooperation Act of 1981, the plaintiffs' dispute was with other legislators and not the Executive branch.

Again, closer examination of the court's actions is needed. To begin, having used the political question doctrine as the basis for dismissal of the War Powers claim, on one level it is not

31. 558 F. Supp. at 899.
32. Id. at 902.
33. Id.
35. 558 F. Supp. at 902.
36. Supra note 6 and accompanying text. In determining that plaintiffs' claim under
clear why the court did not employ this same doctrine for the 502B claim as well. That is, the court could have remained entirely consistent with the first portion of its opinion by simply stating that the court was not in a position to make an independent judgment regarding conditions in El Salvador, that Congress has the expertise to make such determinations, and so on.\(^{37}\) One apparent reason why the court did not employ the political question doctrine again, however, was that there is very little that is subtle about the civil war in El Salvador. While the court could maintain that it did not have the resources and expertise to find out exactly what a relatively small number of U.S. military personnel were doing in El Salvador, it would have a much harder time convincing anyone that it could not develop an understanding of the general political, social, and military conditions in El Salvador.\(^ {38}\)

Without the political question doctrine to rely on, then, the court found a rather convenient means of avoiding a factual determination through the seldom used equitable discretion doctrine. At first glance the court’s reasoning seems quite convincing. The court maintained that under Section 728 assistance to El Salvador is conditioned upon certification by the President, 30 days after enactment and every 180 days thereafter, that the government of El Salvador is making a concerted and sig-

\(^{37}\) Supra note 27 and accompanying text.

\(^{38}\) An example of the effective manner in which another court handled factual determinations concerning El Salvador is Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982):

In short, the violent conditions in El Salvador are a matter of public record and are 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.

\textit{Id.} at 358.
significant effort to comply with internationally recognized human rights, is achieving substantial control over all elements of its own armed forces so as to bring an end to the indiscriminate torture and murder of Salvadoran citizens by these forces, is making continued progress in implementing essential economic and political reforms, including the land reform program, and is committed to the holding of free elections. 39

The court pointed out that since its enactment, the President had made two certifications under the Act, 40 and that Congress had taken no action to end aid to El Salvador under the Foreign Assistance Act or by other means.

By way of responding to this contention, the plaintiffs asked the court to examine independently the President's certification of progress. 41 The court declined to do so, claiming that "it is clear that under these circumstances plaintiffs' dispute is primarily with their fellow legislators who have authorized aid to El Salvador while specifically addressing the human rights issue, and who have accepted the President's certifications." 42

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40. Id.
41. Id. ("Plaintiffs have asked the court to examine independently the President's certifications of the progress of El Salvador's government in the human rights field, which have been characterized by certain individual members of Congress as akin to calling night day or a duck an eagle.") For a harsh critique of these Presidential certifications, see Horton & Sellier, The Utility of Presidential Certifications of Compliance with United States Human Rights Policy: The Case of El Salvador, 1982 Wisc. L. Rev. 825.
42. 558 F.Sup. at 902. It should be noted that Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir. 1981), the case relied on by the court in Crockett for support of the equitable discretion doctrine, offers a markedly different situation. Riegle involved a question of standing in a suit brought by a U.S. Senator challenging the constitutionality of the procedures of the Federal Reserve Act for the appointment of the five federal bank members of the Federal Open Market Committee. In Riegle the court established a two-part test for the equitable discretion doctrine: a court should dismiss a congressional plaintiff's suit either when the legislator does not satisfy traditional standing requirements, or when she has standing but a legislative remedy is available and a similar action could be brought by a private plaintiff. Riegle, 656 F.2d at 878-79. Riegle and Crockett differ in several important respects. While the plaintiffs in Riegle challenged executive branch actions that were carried out in accordance with a federal statute that had been passed by a majority in both houses of Congress, in Crockett what was in dispute was the legality of executive branch activities in implementing legislation rather than the legality of the legislation itself. In essence, the plaintiffs in Crockett were not asking the court to circumvent the legislative process, as the court suggests; instead,
What the court has ignored in its analysis, however, is the force of 502B. The court can only avoid the 502B issue by treating Section 728 as if it supersedes 502B. Curiously enough, the legislative history seems silent on this. While the court takes special pains to give meaning to Section 728, it does not make a similar effort with 502B, now rendered meaningless, at least in terms of El Salvador. Sections 728 and 502B are not necessarily in conflict, but in terms of human rights conditions in El Salvador they are. While there is undoubtedly a consistent pattern of gross violations of internationally recognized human rights in that country, it is also true that there appears to be some “progress” in El Salvador. That is to say, that while torture, assassination, and the imprisonment of individuals on political grounds are rather commonplace, by at least some accounts they are not as commonplace as they once were. Thus, there is arguably the requisite “progress” for purposes of 728.

the court was being asked to enforce existing legislation. In terms of the standing issue, it is not clear that a private party would be able to show that human rights violations occurring in another country caused her “distinct and palpable injury.” Warth v. Seldin, 422 U.S. 490, 501 (1975). Where the decision in Crockett seems to lead is to a situation where no party could challenge the expenditure of U.S. foreign assistance. This is a curious and unfortunate result. For an excellent discussion of the issues addressed in this note, see Note, Constitutional Impediments to Enforcing Human Rights Legislation: The Case of El Salvador, 33 Am. U. L. Rev. 163, 182-203 (1983).


44. America’s Watch has continually maintained that there has been no sign of improvement in the human rights conditions in El Salvador. For example, America’s Watch The Continuing Terror (Seventh Supplement to the Report on Human Rights in El Salvador) (1985) states:

Though our “Report” and its seven supplements have chronicled many changes in the human rights situation, including significant reductions in some forms of abuse, at no time has it been possible for us to assert that there was a general improvement in human rights. To our regret, that remains true. President Duarte’s civilian government notwithstanding, the human rights situation in El Salvador remains terrible.


45. Thomas Enders, formerly the Assistant Secretary of State for Inter-American Affairs, has emphasized that progress is by no means equated with absolute respect for human rights. Certification Concerning Military Aid to El Salvador, Hearings Before the Senate Comm. on Foreign Relations, 97th Cong., 2d Sess., 12-16 (1982) (prepared statement of Thomas Enders). It should be noted that President Reagan’s pronouncement of a statistical decline in human rights violations in El Salvador has been vigorously challenged. See id. at 73-76 (prepared statement of Morton Halperin, American
Admittedly the existence of both 728 and 502B add confusion to an area not marked by clarity. Moreover, in light of this, in many respects El Salvador is not the best example of the general proposition proposed here: that the judiciary should not remove itself so completely in challenges to the expenditure of U.S. foreign assistance. The problem is that Crockett has been treated as if it is settled law. Moreover, given the approach taken in Crockett, perhaps no one could bring such a suit. This result is unfortunate. The rest of this article will not only assert why Crockett was erroneously decided, but it will also address standards and rationales for prospective judicial treatment of foreign assistance challenges.

II. PHILOSOPHICAL JUSTIFICATIONS

The notion that moral concerns should play a part in a nation's foreign policy is a recent phenomenon. In fact, one only needs to look as far back as the Nixon administration, particularly Henry Kissinger's view of realpolitik, to see how moral concerns were treated with open scorn and contempt. Despite this attitude, perhaps because of it, the United States has passed

Civil Liberties Union).


47. See also supra note 42.

48. Perhaps the most influential political philosopher espousing this position has been Charles R. Beitz, see C.R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979). Beitz has argued that the dominant amoral "Hobbesian" view of international affairs has ignored the interrelationship between nation-states that exists in the world order. See also B. BARRY, RICH COUNTRIES AND POOR COUNTRIES (forthcoming); H. SHUE, BASIC RIGHTS: SUBSISTENCE, APPLIANCE, AND U.S. FOREIGN POLICY (1980); T. NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES (1983).

49. For a good account of Kissinger's refusal to acknowledge congressional efforts to promote human rights see Cohen, Human Rights Decision-Making, supra note 1, at 217-22.

50. Sandy Vogelgesang attributes the surge in concern for human rights to several factors, among them: a proud tradition in this country concerning itself with human rights, domestic reaction to the American involvement in Vietnam, the spillover from the civil rights movement, and changes within Congress concerning the relationship between Congress and the Executive branch and the conduct of foreign affairs. Vogelgesang, Domestic Policies Behind Human Rights Diplomacy, in TOWARD A HUMANITARIAN DIPLOMACY: A PRIMER FOR POLICY 49-92 (T.J. Farer ed. 1980).
the human rights provisions that exist today.51

What is not exactly clear about U.S. human rights policy, apart from its inconsistent application, is the philosophical basis for the policy itself. What seems to be the driving force behind the moves to include moral concerns in U.S. foreign policy is the rather simple notion that it is morally wrong to support unjust regimes, and therefore the U.S. government ought not to do so. The following remarks by President Jimmy Carter reflect this idea.

In distributing the scarce resources of our foreign assistance programs, we will demonstrate that our deepest affinities are with nations which commit themselves to a democratic path to development. Toward regimes which persist in wholesale violations of human rights, we will not hesitate to convey our outrage nor will we pretend that our relations are unaffected.52

The argument that will be made here is that this notion that it is morally wrong to provide aid to unjust regimes, while commendable, does not give an accurate portrayal of the deeper moral issues involved in such cases. Instead, what is missing from such accounts is the notion of moral culpability in supporting unjust regimes.53 I have examined this point in much greater

51. See supra notes 1 and 3.
52. 30th Anniversary of the Universal Declaration of Human Rights, Dept. St. Bull. 1 (1979) (statement by President Jimmy Carter). The ambivalence in the President's statement is also reflected in the following passage from the Fraser Report:

The human rights factor is not accorded the high priority it deserves in our country's foreign policy. . . .Unfortunately, the prevailing attitude has led the United States into embracing governments which practice torture and unabashedly violate almost every human rights guarantee pronounced by the world community.

. . . .[A higher priority] for human rights in foreign policy is both morally imperative and practically necessary.

. . . .

The State Department too often has taken the position that human rights is a domestic matter. . . .When charges of serious violations of human rights do occur, the most that the Department is likely to do is make private inquiries and low-keyed appeals to the government concerned.

53. James Moeller's treatment of the moral culpability issue is quite unique. Moeller, supra note 3. One of the advances he sees in country-specific legislation, such as §728 of
detail elsewhere, but the position can be summarized as follows. When one nation provides military arms and security assistance to another nation, and the recipient nation pursues policies that violate the human rights of individuals, then the nation providing aid is morally responsible for the unjust practices of the receiving nation if the donor nation knew or should have known of such practices. Essentially this position is stating that nations cannot provide aid to other nations but then separate themselves from the negative human consequences of providing such "aid." The domestic examples of such a principle abound. For example, an individual who aids and abets in the commission of a crime is held at least partly responsible for the

the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat. 1519 (1981), as opposed to § 502B, is that the latter promotes the notion of moral culpability, while Moeller feels the former does not. Implicit in this kind of analysis is the idea that a nation can simply avoid moral culpability by merely not mentioning such culpability in the legislative goals. This position, of course, is quite untenable. Moeller also misses the point that "progress" in human rights does not necessarily equate with the absence of moral and legal wrongs. El Salvador would be an excellent example of this.


55. It should be noted that the form that assistance takes can be quite important in determining moral culpability. For example, a donor nation would not have the same moral responsibility for harms caused when it was providing food, say, to another country, as opposed to providing instruments of terror and torture.

56. Douglas MacLean has taken a similar position:

Certainly where we are responsible for having brought repressive regimes to power, we share complicity in their wrongdoings. Some of these cases, where our aid is necessary for their remaining in power, are morally equivalent to cases where we ourselves are the proximate cause of human rights violations. No doubt, awareness of U.S. complicity in such cases is one of the principal explanations for the current popularity of the human rights movement.

57. Moeller, supra note 3, presents a zero sum game between having an effective source of diplomatic leverage on the one hand and a possible implication in the violations of human rights by recipient nations, at least under § 502B, on the other hand. The issue of diplomatic leverage is used repeatedly, and is subject to considerable debate. The point that needs to be underscored here, however, is that just because a nation does not meet some of its moral responsibilities it does not have license to avoid all obligations. The point made in this article is that the United States ought not to provide security assistance to a ruling regime in El Salvador that is unjust. Assuming, however, that it does so continue, the U.S. should not ignore its moral duties to those who thereby suffer in the pursuit of certain foreign policy goals by this country. This point is examined at length in M. Gibney, supra note 54, at ch.7.
commission of that crime. The same kind of principle should apply in the international realm. It is interesting to note that one rationale for the "softness" in the implementation of human rights legislation is that to do so would be to embarrass an ally. What is being suggested here is that the donor should similarly suffer embarrassment, and, more importantly, moral censure. In fact, the nonrecognition of human rights violations in other countries can be attributed as much to a desire by the donor country to avoid culpability for its own actions of support.

III. AVAILABLE STANDARDS

In part I of this article, the judiciary's deference to the political branches was explored in the context of Crockett v. Reagan. One of the court's rationales for granting the defendants' motion to dismiss—explicit in the WPR issue, implicit in the 502B issue—was that there were no judicially discoverable and manageable standards on military, political, and social conditions in El Salvador. The argument that will be made in this section is that there are standards that could be used by a court in situations where the expenditure of U.S. foreign assistance is challenged. The past few years has seen a veritable explosion of information concerning human rights conditions in other countries. The most notable of these, for the present analysis, are the annual Country Reports on Human Rights Practices published by the State Department, and the yearly Amnesty International reports.

The larger point is that the judiciary should not prevent any and all challenges to the expenditure of U.S. foreign assistance, as the court in Crockett has done. This is not to call for judicial interference in the political processes, but simply to point out the need for the judiciary to assume its traditional role as a check on the other two branches of government. What gives added impetus for this judicial involvement is the moral blindness discussed in the previous section, which may or may not be rectified by a more alert judiciary.

A. State Department Reports

The information contained in the State Department Reports are noteworthy to the present analysis for two reasons. The first is simply the fact that there is a wealth of information about human rights conditions in other countries, in a format that should be quite accessible to a judge. The second noteworthy feature is that it is a coordinate branch of government that is providing this information. If the court in Crockett had examined the State Department Report for El Salvador in 1982, there might have been some evidence of “progress,” but also very strong indications of systematic abuses of human rights.

Serious human rights problems continued in El Salvador in 1982, despite signs of improvement throughout the year. Incidents of political assassinations, killings of civilians, disappearances, and torture continue to be reported, although at substantially lower levels than in 1981.

Violence in El Salvador is endemic. Political polarization has exacerbated the levels of violence. Extremes of the right and the left regularly utilize assassination to eliminate and terrorize suspected opposition members and their sympathizers.

There was a significant decrease in civilian deaths attributed to political violence in 1982. This decrease follows the downward trend identified in the latter half of 1981. The average of 445 deaths per month (as measured by press reports) in 1981 fell to an average of 219 deaths per month during 1982. While it is certain that these figures underreport the actual incidence of political violence, they do reflect trends. Supporting evidence of the decline in political violence can be derived from reports in the press of disappeared persons, some of whom undoubtedly were killed. These dropped from an average of 160 per month in 1981 to 38 in 1981.

Torture by elements of the Salvadoran armed forces, and on occasion by guerilla forces, does occur. It is not possible to establish the prevalence of torture because

60. See supra note 45 and accompanying text.
valid and systematic means for documenting cases do not exist. Some elements of the security forces engage in the use of psychological and physical coercion to extract information from suspected leftists. There is evidence that on these occasions the use of terror has been prolonged and extreme.\[61\]

B. Amnesty International Reports

A second source of information on human rights conditions in other countries, perhaps a more highly respected source, are the country reports provided by Amnesty International. Again, such information is quite accessible to members of the judiciary.\[62\] The Amnesty International country report on El Salvador for 1982 would have included the following information.

Amnesty International continued to receive reports of arbitrary arrests, abductions and subsequent “disappearances”, torture, and extra-legal executions. Persistent reports of the involvement of the official security forces in these violations of human rights led Amnesty International to send a fact-finding mission to Central America in August 1981. Testimony from refugees in Honduras, Costa Rica, Mexico and the United States of America


Using Salvadoran press sources (which essentially reprint official military figures), and considering these a valid basis for data even on rural areas, the Country Report concludes: "There was a significant decrease in political violence in 1982." Reporting by human rights organizations in El Salvador also shows a decline in reported, verified civilian political deaths, but these reports are necessarily incomplete, as violence has been concentrated in rural areas off-limits to human rights monitors (as well as the press). It is quite impossible in such circumstances to estimate the number of innocent dead, and misleading to state categorically that their numbers have declined. The most important fact about political murder, as well as disappearance and torture, in El Salvador in 1982, is that these practices continued at levels which would defy belief were we not by now so accustomed to the incidence of atrocity.

\[id\] at 38.

\[62\] The court in Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D.Cal. 1982), used both the State Department Reports on El Salvador and Amnesty International Reports to arrive at its conclusions about the anarchy and violence in El Salvador.
confirmed accounts received by Amnesty International that identified regular security and military units as responsible for widespread torture, mutilation and killings of noncombatant civilians from all sectors of Salvadoran society.63

C. Carleton and Stohl

An additional source for data on human rights conditions in other countries is the empirical work done by David Carleton and Michael Stohl. These two political scientists have categorized countries accepting U.S. military and economic assistance according to the level of human rights violations in these countries.64 Carleton and Stohl have used three sources of data: the

64. Carleton & Stohl, supra note 4, employ a “political terror” scale first suggested by Raymond D. Gastil in FREEDOM IN THE WORLD: POLITICAL RIGHTS AND CIVIL LIBERTIES (1980) [hereinafter FREEDOM HOUSE YEARBOOK OF 1980]. The Carleton and Stohl scale goes from a “just” situation on one extreme, to a situation of gross human rights violations on the other extreme. Part of the calculus is based on a schema first suggested in the FREEDOM HOUSE YEARBOOK OF 1980:

Five levels of political terror are distinguished. The most general criterion is the extent to which the people live under a recognizable and reasonably human rule of law. Countries on Level A live under a secure rule of law, people are not imprisoned for their views, and torture is rare or exceptional (though police and prison brutality may occur). Political murders are extremely rare. There is no detention without trial, and laws protect individual and group rights. On Level B there is a limited amount of imprisonment for nonviolent political activity. However, few persons are affected, torture and beating are exceptional, and psychiatric institutions are not used to silence political opponents. Political murder is rare, or, if present, characteristic of small terrorist organizations. On Level C there is extensive political imprisonment, or a recent history of such imprisonment. Executions or other political murders and brutality may be common. Unlimited detention, with or without trial, for political views is accepted. Incarceration in mental hospitals and the involuntary use of strong drugs may supplement imprisonment. On Level D the practices of Level C are expanded to larger numbers. Murders, disappearances, and torture are a common part of life in some societies at this level. In others there is large-scale incarceration of ideological opponents in labor camps or reeducation centers. In still others the terror may stem primarily from the arbitrary and capricious manner in which opponents are punished. In spite of its generality, on this level terror affects primarily those who interest themselves in politics or ideas. On Level E the terrors of Level D have been extended to the whole population, and may result from religious, ethnic, or ideological fanaticism. The leaders of these societies place no limits on the means or thoroughness with which they pursue personal or ideological goals. The worst periods of Nazi Germany or Stalinist Russia characterize countries on
Freedom House "civil rights" scale, the State Department Reports, and the Amnesty International Reports. The authors coded the data presented in the reports as if they were accurate and complete, so that any biases exhibited in the annual reports should be evident in the indices.\(^6\)

The uniqueness of the Carleton and Stohl coding scheme is that rather than attempting to employ a narrative account of human rights conditions in other countries, as one would find with both the State Department and Amnesty International Reports, they have, instead, used the data to compile ordinal measures. The authors write:

We are reasonably comfortable with the results because of the high level of intercoder reliability in constructing these indices. While they provide us with ordinal measures only, we are confident that the nations that are scored as having the highest rankings are those nations which in the reports of our two sources are responsible for higher numbers of deaths, torture, and political imprisonment than those below them, and that the study can be replicated.\(^6\)

According to Carleton and Stohl, in 1982 (the year that Crockett was decided) El Salvador is coded as a "4" under the State Department Reports\(^6\) and a "5" under the Amnesty Inter-

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Level E.

*Freedom House Yearbook of 1980*, at 37. Under the Carleton & Stohl analysis, Level A corresponds a "1," the most just state of affairs, while on the other extreme, level E corresponds to the number "5." See Carleton & Stohl, *supra* note 4, at 212-13.


66. *Id.* The Carleton and Stohl findings are quite surprising and disturbing. In terms of the Carter administration, there are no negative correlations at the .05 level (the standard level of analysis), between the level of human rights violations in a country receiving U.S. aid and the amount of aid received, no matter which scale was used. Contrary to the public perception of the Carter administration, the authors conclude of that period: "In many cases there is a positive relationship between aid and human rights violations: the more abusive a state was, the more aid it received." *Id.* at 215. The Reagan administration record is more complex. The authors note that there were in fact the hoped for (and legally mandated) negative correlations between human rights violations and the amount of U.S. aid for 1982 and 1983, but only under their coding of the State Department reports, and not for either the Freedom House scale or the Amnesty International country reports. In light of these discrepancies, the authors echo some of the claims of possible political biases in the State Department reports. *Id.* at 217-18.

national data. The conclusion to be drawn from both sets of
data, simply stated, is that in 1982 the United States provided a
large amount of aid to a government that committed large-
scale terror on its own population. Aid to such a regime, it has
been argued here, is unlawful because it violates the provisions
of §502B. In addition, and perhaps more importantly, such aid
makes the U.S. government morally culpable for the human
rights violations committed by the recipients of such aid. Given
these unlawful and immoral actions, the judiciary’s role as a “fo-
rum of principle” will now be explored.

IV. THE ROLE OF THE JUDICIARY

One of the purposes of this article is to argue that the judi-
ciary could, and should, play a meaningful role in prospective
challenges asserting violations of §502B. It was argued in the
last section that there is data on human rights conditions in
other countries, data very accessible to the judicial branch. Such
data should not be ignored.

The focus of this section will be on the courts not as a legal
check, but as a moral check, perhaps a moral vanguard. The idea
of the judiciary serving in such a capacity has recently been de-
fended by Ronald Dworkin.

Judicial review insures that the most fundamental issues
of political morality will finally be set out and debated as
issues of political principle and not simply as issues of
political power, a transformation that cannot succeed, in
any case not fully, within the legislature itself.

68. Carleton & Stohl, supra note 4, at 227.
69. According to the State Department Report for that year, supra note 59, at 506,
the United States provided El Salvador over 264 million dollars in 1982.
70. The term comes from Ronald Dworkin, The Forum of Principle, 56 N.Y.U. L.
71. Analysis of another country might make this point clearer. In 1982 the United
states provided Zaire over 34 million dollars, 10 million in military and 24 million in
economic assistance. According to the Carleton and Stohl coding for that country, the
State Department data has Zaire at the level of “3,” and the Amnesty International
country report has it at a “4.” Carleton & Stohl, supra note 4, at 228. The point being
made in this article is that such assistance is violative of §502B, and that there should
be some mechanism whereby such practices can be challenged.
72. Dworkin, supra note 70 at 517. See also M. Perry, supra note 7. Perry argues
that a polity’s “moral evolution” is not consonant with the goals and incentives that
Dworkin’s position does not necessarily mean that the judiciary is necessarily imbued with greater moral insight than the political branches. Instead, under Dworkin’s view, the courts are to ensure that matters of principle are not separated and removed from political considerations.

What needs to be made clear is that while some, perhaps most, issues concerning “foreign affairs” do not involve moral issues, there are other foreign affairs issues that are unmistakably issues of a moral nature. Furthermore, it is asserted here that there is a moral component to a policy of foreign assistance to a nation that commits widespread human rights abuses on its citizenry. Congress has, to a limited extent, recognized the moral implications of such aid. It has been suggested here that the judiciary might play an important role in foreign affairs matters quite generally by raising moral questions where appropriate, and perhaps by leading the nation in answering them.

CONCLUSION

The United States has proclaimed itself committed to human rights. Moreover, it has passed legislation over the past decade to promote such concerns. Despite these well publicized efforts, it is indeed questionable whether the United States government has in fact been following the dictates of such human rights legislation.

This article has been critical of the court’s handling of Crockett v. Reagan, a lawsuit brought by a group of Congressmen challenging the activities of U.S. servicemen in El Salvador, as well as U.S. assistance to that country. Focusing on the sec-

legislators operate under. As a result, Perry asserts that the vigorous reevaluation of moral conventions so necessary in a Liberal society such as ours would be better performed by the judicial branch.

73. A related rationale for further judicial scrutiny of certain foreign affairs issues is that those who are affected by the policies of the political branches have absolutely no input into, or representation by, either of those branches of government. To use equal protection terminology, citizens of another country who suffer negative consequences from the pursuit of U.S. national policy goals are, in a very real sense, a “suspect” class. One would hope that the interests of this class would be recognized by the political branches in this country, but certainly there are no assurances of this. The U.S. Supreme Court has provided a special protection for suspect classes domestically, and it is suggested here that, to one degree or another, it should extend similar kinds of protection for suspect classes living elsewhere.
ond issue, the position taken here is that the courts have available the kind of data that could make for meaningful judicial participation concerning these vital questions. This is also to say that the judiciary should not be the kind of hesitant player that the court in *Crockett* was. This is not to say that the judiciary should usurp the role to be played here by the political branches. However, courts should not simply look the other way in the face of systematic violations of the law. Either such laws should be repealed, or the courts should hold the political branches to their own standards. Finally, it has been argued here that the support of human rights violations in other countries implicates the donor of such aid in the unjust practices. It has been asserted here that the judiciary has a unique role to play in injecting moral concerns into policy considerations.