Federal Jurisdiction Over Alien Tort Claims (Sanchez-Espinoza v. Reagan)

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FEDERAL JURISDICTION OVER ALIEN TORT CLAIMS—Sanchez-Espinoza v. Reagan—On August 13, 1985, the United States Court of Appeals for the District of Columbia Circuit failed to take advantage of an opportunity to promote a recent movement in the American justice system toward allowing United States federal courts to hear cases involving fundamental human rights in their international dimension. Sanchez-Espinoza v. Reagan is a case in which alien plaintiffs asserted that violations of human dignity, including torture, had been committed by the United States Government. The international context of the allegations mandated that the courts exercise prudence in their resolution of the dispute. There are various factors which must be considered by courts when adjudicating disputes of international dimension. As only one branch of a tri-partite governmental framework, the federal courts must exercise care to ensure that United States policy abroad is consistent with the goals of the executive and legislative branches as well as with the goals of international justice. Thus, courts are presented with many problems when confronted with cases involving international law, especially when it has been averred that United States foreign policy has resulted in torture abroad.

These problems were exemplified in the Sanchez-Espinoza case. The United States District Court for the District of Columbia dismissed the action against the President of the United States and other federal officials as a non-justiciable political question. The Court of Appeals affirmed and added other grounds for dismissal.

2. Cf. Lobel, The Limits of Constitution Power: Conflicts Between Foreign Policy and International Law, 71 Va. L. Rev. 1071 (1985). Lobel argues that the judiciary has an obligation to review foreign policy actions because treaties and customary international law are part of the supreme law of the land. Thus, the courts should have an active role in preventing the other branches of government from violating treaties and international norms. Id. See also infra note 103 and accompanying text.
I. FACTUAL BACKGROUND

The claims presented in Sanchez-Espinoza arose out of the United States Government's alleged support of "Contra" forces which actively bear arms against the government of Nicaragua in an attempt to overthrow the ruling regime. The complaint asserted that these Contra forces "have carried out 'scores of attacks upon innocent Nicaraguan civilians' which have 'resulted in summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities.'" It may be noted that the Nicaraguan government responded by taking and torturing thousands of political prisoners.

The specific allegations are netted in a complex web of plaintiffs and defendants. For clarity, the district court categorized the plaintiffs and defendants into groups.

The plaintiffs in Sanchez-Espinoza were divided into three groups. The first group consisted of twelve Nicaraguan citizens seeking redress for tortious injuries committed by the Contras in

5. Id. at 204.
6. Id. at 205 (quoting Amended Complaint para. 81).
7. Country Reports on Human Rights Practices: Report to the Joint Committee on Foreign Relations and Foreign Affairs, 97th Cong., 1st Sess. 489 (Feb. 2, 1981). In 1980-81, reliable reports asserted that torture had been used by the police at the Palo Alto State Security Investigation Center and at the Department of State Security. Prisoners had been forced to sign statements claiming that they had not been abused, and were threatened with severe retaliation if they later asserted that they had been abused. In 1981, the Nicaraguan government (dominated by the Sandinista National Liberation Front) was reportedly responsible for cruel, inhuman or degrading treatment or punishment of about 5,000 political prisoners, 96 cases of disappearances, arbitrary arrests and imprisonment, denial of fair public trial, invasion of the home abuses, and several other human rights violations, including suppression of civil and political liberties. Id. at 489-97.
8. Sanchez-Espinoza, 508 F. Supp. at 598. The specific allegations are more easily understood when the many plaintiffs and defendants are divided into groups, then the particular assertions presented by each group can be identified and analyzed in a clear and organized fashion. This is what the district court did. The court of appeals followed suit and maintained the district court's grouping of plaintiffs and defendants. Sanchez-Espinoza, 770 F.2d at 205. The relief sought may be listed as "compensatory and punitive damages, declaratory relief, mandamus, injunction, attorneys' fees, and any other just and proper relief," 770 F.2d at 206, but the deeper goal of the plaintiffs, it may be argued, was politically motivated. They wished to alter United States foreign policy in Nicaragua.
9. Sanchez-Espinoza, 770 F.2d at 205.
Nicaragua against these plaintiffs and their families. The second group consisted of twelve members of the United States Congress seeking injunctive and declaratory relief due to the failure of the defendants to conform with the constitutional provision maintaining Congress' right to declare war and defendants' disregard for congressional statutes prohibiting support of the Contras by the United States. Finally, two residents of Dade County, Florida joined in the action to enjoin the maintenance and operation of paramilitary training camps at that location which constituted an alleged nuisance.

The defendants, likewise, were classified into three distinct groups. Nine present or former executive officials of the United States were sued individually and in their official capacities. Two organizations—Alpha 66, Inc., and Bay of Pigs Veterans Association, Brigade 2506, Inc.—were alleged operators of paramilitary training camps in the United States and represented the second group of defendants. Max Vargas, a Nicaraguan exile, and several unidentified officers and agents of the Nicaraguan Democratic Union-Revolutionary Armed Forces of Nicaragua, which operates military camps in Nicaragua and elsewhere, comprised the third group.

Plaintiffs asserted eight claims for relief. The Nicaraguan plaintiffs (the first group) claimed 1) compensatory and 2) punitive damages for injuries sustained in United States sponsored Contra raids. They also asserted that paramilitary activities...
had been carried out and financed by the United States and its agents and employees in an effort to overthrow the government of Nicaragua. They maintained 3) that the raids violated fundamental human rights established under international law and under the United States Constitution. Finally, the Nicaraguan plaintiffs called for 4) injunctive relief prohibiting United States military involvement in Nicaragua in the future.

The Congressional plaintiffs (the second group) alleged that United States' activities in Nicaragua were acts of war which were not authorized by Congress. Therefore, 5) Congress' authority under article I, section 8, clause 11 of the Constitution to declare war had been violated. Similar arguments were made citing the Neutrality Laws and the War Powers Resolution.

205-06 (quoting Amended Complaint para. 117).
19. Id.
20. Id.
21. Id.
22. 18 U.S.C. §§ 956, 960 (1982). It is a crime to conspire to injure property of a foreign government. Section 956 provides:
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, or any railroad, canal, bridge, or other public utility so situated, 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.

Section 960 makes expeditions against friendly nations a crime:
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.
23. 50 U.S.C. §§ 1541-48 (Supp. 1987). The relevant portions of the War Powers Resolution are as follows:
§ 1541 Purpose and policy
(a) Congressional declaration
It is the purpose of this chapter 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.
(c) Presidential executive power as Commander-in-Chief; limitation
and declaratory relief was sought. The congressional plaintiffs also claimed that 6) defendants had violated the Boland Amendment to the 1983 Department of Defense Appropriations Act which prohibits the Central Intelligence Agency and the Department of Defense from using funds under the Act for activities meant to result in the overthrow of the Nicaraguan government,24 and 7) the Hughes-Ryan Amendment, which requires reports to Congress about United States intelligence activities.25

The final claim was promoted on behalf of the third group of plaintiffs, residents of Florida. They petitioned for 8) injunc-

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

§ 1542. Consultation; initial and regular consultations
The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Section 1543 requires the President to submit a written report to Congress within 48 hours of any hostile military operations and outlines the necessary contents of such a report.

§ 1544. Congressional action
(c) Concurrent resolution for removal by President of United States Armed Forces
[A]t any time that United States Armed Forces are engaged in hostilities outside the territory of the United States . . . such forces shall be removed by the President if the Congress so directs by concurrent resolution.

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.

25. 50 U.S.C. § 413 (Supp. 1987). This law provides that the heads of all departments, agencies and other entities of the United States involved in intelligence activities must keep the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence fully and currently informed of all intelligence activities in which the United States is involved. Id. For more on the purpose and legislative history of this act, see 1980 U.S. CODE CONG. & ADMIN. NEWS 4182; Note, United States Foreign Policy Through Cloak and Dagger War Operations: Terrorism or Mandate of National Security?, 11 OKLA. CITY U. L. REV. 159 (1986).
tive relief claiming that paramilitary training camps in Florida constituted a nuisance under Florida law.\(^2\)

Jurisdiction for the case was asserted pursuant to federal question jurisdiction,\(^2\) the Alien Tort Statute\(^2\) and the doctrine of pendent jurisdiction.\(^2\)

II. PROCEDURAL HISTORY

A. The District Court Decision

The complaint of the three groups of plaintiffs was originally filed in the United States District Court for the District of Columbia on November 30, 1982.\(^3\) Plaintiffs failed, however, to serve process on several of the defendants in a timely manner and the action as to them was dismissed on June 8, 1983, pursuant to Rule 4(j) of the Federal Rules of Civil Procedure.\(^4\) On July 20, 1983, an amended complaint was filed and was considered by the district court.\(^5\)

Judge Corcoran, writing for the district court, declared that all allegations by the Nicaraguan and congressional plaintiffs represented non-justiciable political questions.\(^6\) In determining whether resolution of the dispute violated separation-of-powers principles, thus making it a non-justiciable political question, the court relied on the following findings: 1) the United States Constitution committed the power to make foreign policy decisions to the coordinate political branches; 2) judicially manageable standards for resolving the case and adequate discovery were precluded by the international nature of the dispute; 3) policy decisions requiring non-judicial discretion were a necessary prerequisite to deciding the case; 4) resolution would express a lack of

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29. See United Mine Workers v. Gibbs, 383 U.S. 715, 716 (1966) (Justice Brennan, writing for the court, held that pendent jurisdiction "exists whenever there is a substantial federal claim and the relationship between it and the asserted state claims permits the conclusion that the entire action before the court comprises one 'case' ").
31. Id.
32. Id.
33. Id. at 597-602.
of respect for the coordinate political branches; 5) there existed a need for adherence to political decisions which had already been made by the coordinate political branches; and 6) resolution of the case risked contradiction between the various departments of government on a particular question. These findings were applied to the allegations by the nonresident aliens claiming that atrocities were committed against them by the Contras under United States sponsorship and to the claims by the congressional plaintiffs relating to the neutrality laws, War Powers Resolution, and the Hughes-Ryan and Boland Amendments to the National Security Act.

Additionally, the district court noted that the congressional claims could have been dismissed on a theory of equitable or remedial discretion. Riegle v. Federal Open Market Committee provides:

The most satisfactory means of translating our separation-of-powers concerns into principled decisionmaking [sic] is through a doctrine of circumscribed equitable discretion. Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislators action.

The court in Riegle believed, as did the court in Sanchez-Espinoza, that plaintiffs were attempting to circumvent the process of democratic decision making. The claims of the Florida residents had no basis for jurisdiction except under the doctrine of pendent jurisdiction, which provides federal jurisdiction over state claims in conjunction with substantial federal causes of action. Thus, the nuisance

34. Id. at 599-602. See infra note 54 and accompanying text.
35. Id.
36. Id. at 600-01 n.5.
40. Id. at 602.
41. Justice Brennan's majority opinion in United Mine Workers supports the pro-
claim under Florida state law could only be heard in the federal district court by virtue of the federal claims which accompanied it. Because all federal claims for relief had been dismissed under the political question doctrine, there was no jurisdictional "hook" to support plaintiffs' state action. The plaintiffs appealed the decision of the district court.

B. Issues on Appeal

The Court of Appeals for the District of Columbia Circuit affirmed the district court's decision. Judge Scalia, writing for the court of appeals, approved of the lower court's analysis with regard to the political question doctrine and presented additional grounds upon which the claims of the plaintiffs could be dismissed. The additional grounds included findings that the Alien Tort Statute did not provide the court with jurisdiction or the plaintiffs standing to sue. Furthermore, the doctrine of sovereign immunity protected the defendants from the plaintiffs' action. The circuit court dismissed the plaintiffs' constitutional claims, and claims under the War Powers Act and the Hughes-Ryan Amendment to the National Security Act were dismissed as having no available remedies. The assertions under the Neutrality Act were dismissed because the circuit court refused to allow a private right of action pursuant to a criminal statute. The claim relating to the Boland Amendment was declared moot because the amendment was no longer in force at the time of the circuit court's decision. Finally, the allegations under the state laws of Florida were dismissed for lack of independent jurisdiction. Each of these issues will be discussed in turn.

Judge Ginsburg filed a concurring opinion to clarify his position with respect to dismissal of the congressional plaintiffs' claims under the War Powers Clause. Judge Ginsburg cited Just-

position that state claims may be heard in federal courts only when federal causes are conjunctionally averred. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

42. Sanchez-Espinosa, 568 F. Supp. at 602.
43. Sanchez-Espinosa, 770 F.2d at 206-07.
44. Id. at 207-08.
45. Id. at 208-09.
46. Id. at 209-10.
47. Id. at 210.
48. Id.
tice Powell’s concurring statements in *Goldwater v. Carter* as
dispositive in *Sanchez-Espinoza*. He stated that the congres-
sional claim for relief is not “ripe for judicial review” since it is
not the court’s place to decide issues “‘affecting the allocation of
power between the President and Congress.’ ”

III. ANALYSIS OF THE ISSUES

A. Political Question

The political question doctrine is an aspect of justiciability
which is not often invoked. It is derived from the principles of
separation of powers and prudential concerns. Courts will not
decide matters which are committed to the executive or legisla-
tive branches of government, nor will they issue a decision based
on a particular factual setting when such an issuance would be
unwise due to a lack of discoverable standards or the necessity
of maintaining respect for previous policy decisions. The mod-
ern approach to deciding whether a case presents a non-justicia-
ble political question is outlined in the Supreme Courts’
landmark decision in *Baker v. Carr*.

In *Baker*, the Court announced a series of six factors, at
least one of which must be present in order to render an issue
non-justiciable:

Prominent on the surface of any case held to involve a
political question is found a textually demonstrable con-
stitutional commitment of the issue to a coordinate polit-
ical department; or a lack of judicially discoverable and
manageable standards for resolving it; or the impossibil-
ity of deciding without an initial policy determination of
a kind clearly for non-judicial discretion; or the impossi-
ibility of a court’s undertaking independent resolution
without expressing lack of respect due coordinate

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49. 444 U.S. 996, 997-1002 (1979) (Powell, J., concurring). Justice Powell wrote that
“[t]he judicial branch should not decide issues affecting the allocation of power between
the President and Congress until the political branches reach a constitutional impasse.”
Id. at 997.
51. Id. (quoting *Goldwater*, 444 U.S. at 997).
52. See infra note 54 and accompanying text.
53. 369 U.S. 186 (1962) (holding that the constitutionality of legislative apportion-
ment schemes is not a political question).
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.\textsuperscript{54}

These factors were all considered in the court’s dismissal of the \textit{Sanchez-Espinoza} plaintiffs’ complaint.\textsuperscript{55}

The circuit court also relied on the Supreme Court’s decision in \textit{Haig v. Agee},\textsuperscript{56} which stated that “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention” because they are “‘so exclusively entrusted to the political branches of government as to be largely immune to judicial inquiry or interference.’”\textsuperscript{57}

Not all questions involving United States foreign policy are shielded from judicial review. There are many examples of cases in which foreign policy issues did not preclude a ruling by the Court. For instance, in \textit{Youngstown Sheet and Tube Co. v. Sawyer},\textsuperscript{58} it was held that President Truman could not seize the nation’s steel mills during a strike despite the exigent circumstances which arose out of the Korean conflict.\textsuperscript{59} Similarly, in \textit{Dames and Moore v. Regan},\textsuperscript{60} the Supreme Court held that President Carter had authority to suspend damage claims against Iran as part of a bargain to secure the release of United States citizens who were being held hostage.

The \textit{Sanchez-Espinoza} court noted that when political decisions have already been made on a particular policy issue, deference must be appropriately given “to the decisions of the political branches, who are constitutionally empowered to conduct foreign relations and provide for national security.”\textsuperscript{61}

The court began its analysis with the claims of the congres-
sional plaintiffs. Those plaintiffs contend that because Congress had already done all it could, i.e., pass legislation, the judiciary was obligated to control the executive branch's abuse of power.\(^2\) The court, however, refused to exercise such control.\(^3\)

The district court found that the case presented a lack of judicially discoverable and manageable standards for resolution of the case\(^4\) and found support in the case of *Crockett v. Reagan*.\(^5\) *Crockett* involved a challenge to the legality of United States presence in, and military assistance to, El Salvador.\(^6\) Like *Sanchez-Espinoza*, *Crockett* required judicial inquiry into "sensitive military matters."\(^7\) These matters were held to be undiscoverable and unmanageable, and the case was, therefore, dismissed as a non-justiciable political question.\(^8\) The *Sanchez-Espinoza* court pointed out that military involvement in Nicaragua included the covert activities of C.I.A. operatives, thus rendering the facts of *Sanchez-Espinoza* less discoverable than those relating to the participation in El Salvadoran hostilities.\(^9\)

A second strand of the *Baker* factors was found to be present in *Sanchez-Espinoza* when the district court determined that it was unable to make an independent resolution of the issue without expressing a lack of respect toward the coordinate branches of government.\(^7\) President Reagan had, on numerous occasions, stated to the public and to Congress that he was not violating the Boland Amendment or any other legislation via his policies in Nicaragua.\(^7\) The court feared that if it were to hold that President Reagan was mistaken or was shielding the truth,

\(^{62}\) Id. at 600.  
\(^{63}\) Id.  
\(^{64}\) Id.  
\(^{66}\) *Crockett*, 720 F.2d at 1356.  
\(^{67}\) *Sanchez-Espinoza*, 568 F. Supp. at 600.  
\(^{68}\) *Crockett*, 720 F.2d at 1356.  
\(^{69}\) *Sanchez-Espinoza*, 568 F. Supp. at 600. See also *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982). In *Halkin*, plaintiffs asserted that they had been illegally subjected to surveillance and interception of their foreign communications during the Vietnam war era. The United States Circuit Court of Appeals for the District of Columbia Circuit dismissed the complaint on the grounds that the Central Intelligence Agency was protected by the state secrets privilege and that a judicial determination against intelligence-gathering operations would have been an abuse of discretion. Thus, C.I.A. covert activities are largely undiscoverable. 690 F.2d at 983-1009.  
\(^{70}\) *Sanchez-Espinoza*, 568 F. Supp. at 600.  
\(^{71}\) Id.
based on the court’s use of a “necessarily incomplete evidentiary record,” one or both of the coordinate political branches would have cause to be offended.\textsuperscript{72}

The court also found grounds for dismissal of the case as a political question in the danger of embarrassment from “multifarious pronouncements by various departments.”\textsuperscript{73} The President had asserted that his acts were within the bounds of legislation and were necessary for the security of the United States.\textsuperscript{74} Congress was at that time debating the validity of the President’s position.\textsuperscript{75} The district court opined that judicial resolution of the issues presented would yield a third position which would upset the “diplomatic balance that is required in the foreign affairs arena.”\textsuperscript{76}

The claims of the Nicaraguan plaintiffs were dismissed as non-justiciable political questions on the same grounds as those of the congressional plaintiffs.\textsuperscript{77} “In order to adjudicate the tort claims of the Nicaraguan plaintiffs, we would have to determine the precise nature and extent of the U.S. Government’s involvement in the affairs of several Central American nations, namely, Honduras, Costa Rica, El Salvador, and Nicaragua.”\textsuperscript{78} The district court upon dismissing the claims of the Nicaraguan plaintiffs asserted that it had neither the resources nor the expertise necessary to oversee United States military affairs in Central America.\textsuperscript{79}

\begin{itemize}
\item\textsuperscript{72} Id.
\item\textsuperscript{73} Id. See supra text accompanying note 54.
\item\textsuperscript{74} Sanchez-Espinoza, 568 F. Supp. at 600.
\item\textsuperscript{75} Id.
\item\textsuperscript{76} Id. See also Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), \textit{cert. denied}, 416 U.S. 936 (1974) (question as to the legality of bombing and other military activities in Cambodia after removal of American forces from Vietnam was deemed a non-justiciable political question).
\item\textsuperscript{77} Sanchez-Espinoza, 568 F. Supp. at 601.
\item\textsuperscript{78} Id. See also Amended Complaint para. 40, 42, 46, 48-53, 73 & 76 (nondiscussable allegations); Eminente v. Johnson, 361 F.2d 73 (D.C. Cir.), \textit{cert. denied}, 385 U.S. 929 (1966) (action by nonresident alien for damages to property in a foreign country allegedly caused by United States armed forces could not be maintained against United States without its consent).
\item\textsuperscript{79} Sanchez-Espinoza, 568 F. Supp. at 602.
\end{itemize}
In 1789, the newly created federal district courts were granted jurisdiction over various international matters. The First Judiciary Act provided that “[t]he 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.”80 This Alien Tort Statute was long obscured by a lack of legislative history and judicial interpretation.81 However, the purposes of the act may be reasonably inferred through analysis of historical documents and the cases since 1980 which have based claims of jurisdiction on the Alien Tort Statute.

The language of the Alien Tort Statute clearly allows non-resident plaintiffs to commence civil actions in the United States district courts. The act does not require that defendants be citizens of the United States. Thus, the uncertainty before the Sanchez-Espinoza court stemmed from the necessity of determining whether Congress intended that the statute confer jurisdiction over nonresident defendants. Furthermore, the court had to make a ruling as to whether the statute allows aliens to bring suit against public defendants acting in their official capacities.

The available historical documents appear to indicate that Congress was principally concerned with violations of international law by American citizens acting privately.82 For example, events leading up to the enactment of the statute included congressional admonitions against the violation of the rights of neutrals on February 26 and May 9 of 1778,83 messages to Congress by the French Minister Gerard concerning the taking of neutral Spanish vessels on April 24 and May 19 of 1779,84 and the well publicized scandal of June, 1779 involving prominent Americans

81. The Alien Tort Statute had provided jurisdiction in only two cases prior to 1980: Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (child custody suit between aliens); Bolchos v. Darrel, 3 Fed. Cas. 810 (D.S.C. 1795) (statute used as alternate basis for jurisdiction in suit to determine title to slaves on board an enemy vessel taken on the high seas).
84. 3 Diplomatic Correspondence of the American Revolution 134-36, 170-171 (F. Wharton ed. 1889).
in the taking of a neutral Portuguese vessel. Congress responded with a resolution dated November 23, 1781, which was probably “the progenitor of the Alien Tort Statute.” It urged the state legislatures to enact criminal sanctions for violations of international law and provided “that it be farther recommended to authorize suits to be instituted for damages by the parties injured, and for compensation to the United States for damage sustained by them for an injury done to a foreign power by a citizen.”

This sketchy historical outline is not dispositive of the issue. Recent cases have indicated a broader interpretation of the Alien Tort Statute which allows alien plaintiffs to bring suit against foreign defendants in the United States federal courts. In Filartiga v. Pena-Irala, the Second Circuit allowed a suit to be brought pursuant to the Alien Tort Statute in which Paraguayan citizens claimed that their son had been tortured to death by the Paraguayan Chief of Police (defendant). The court held that official torture constitutes a violation of fundamental human rights and is therefore proscribed by customary international law. Thus, held the court, the law of nations had been violated and the jurisdictional grant of the Alien Tort Statute had been triggered.

The broad interpretation of the Alien Tort Statute by the Filartiga court was put in doubt four years later when the Court of Appeals for the District of Columbia Circuit decided the case of Tel-Oren v. Libyan Arab Republic. A suit brought under the Alien Tort law for alleged acts of terrorism in Israel was dismissed unanimously by a panel of judges which was sharply di-

86. 21 Journals of the Continental Congress 1136 (1781) (G. Hunt ed. 1912).
87. Note, supra note 82 at 1017.
88. Id. (quoting 21 Journals of the Continental Congress 1136 (1781) (G. Hunt ed. 1912)) (emphasis added).
90. 630 F.2d 876 (2d Cir. 1980).
91. Id. at 878.
vided on the rationale for dismissal. Judge Edwards agreed with the rationale of *Filartiga*, but voted to dismiss the action based on his findings that there was no international consensus that terrorism or unofficial torture is a violation of the law of nations. Judge Bork dismissed the action holding that the doctrine of separation of powers mandates a demonstration of express grant of authority to bring a private cause of action prior to invocation of the Alien Tort Statute. Finally, Judge Robb practically precluded all judicial review of alien tort claims by holding that all human rights claims under the Act are non-justiciable political questions.

The most recent case in which the Alien Tort Statute was invoked was *De Blake v. Republic of Argentina*. A California district court accepted jurisdiction pursuant to the Alien Tort Statute in a case in which an Argentine businessman claimed that he had been tortured by Argentine government officials. Argentina originally defaulted, but upon petition for reconsideration, the case was dismissed based on Argentina’s sovereign immunity defense.

The *Sanchez-Espinoza* court examined the plaintiffs’ claims under the Alien Tort Statute and concluded that the statute was enacted only to provide relief from private, nongovernmental acts by United States citizens abroad, such as privacy or assaults on ambassadors which violate the law of nations or treaties.

Judge Scalia found that no treaty exists which prohibits actions like those of the defendants when conducted by private individuals. Moreover, customary international law does not

94. Id.
95. Id. at 775-98 (Edwards, J., concurring).
96. Id. at 798-823 (Bork, J., concurring).
97. Id. at 823-27 (Robb, J., concurring).
99. Id.
103. See The Paquete Habana, 175 U.S. 677, 700 (1900). Customary international law is derived from the norms which are established by the customs and usages of civilized nations.
reach private, nongovernmental conduct.\textsuperscript{104} Therefore, there was no basis for invoking the Alien Tort Statute which applies only to private acts. The defendants' acts were not private acts which violated international law, and plaintiffs, therefore, had no valid claim.\textsuperscript{105}

The court of appeals was willing to assume for purposes of argument that the Alien Tort Statute covers official state acts as well as private acts.\textsuperscript{106} If that had been the case, then the federal defendants could be sued only in their official capacities.\textsuperscript{107} Thus, the plaintiffs would be seeking to alter the future actions of the United States.\textsuperscript{108} This result would violate the doctrine of sovereign immunity and would be inconsistent with the existing case law.\textsuperscript{109}

\textbf{C. Sovereign Immunity}

The court of appeals in \textit{Sanchez-Espinoza} relied on varied authority to support its holding that United States officials were insulated from suit in this case by the doctrine of sovereign immunity. For example, the court cited \textit{Eminente v. Johnson},\textsuperscript{110} in which the Court of Appeals for the District of Columbia Circuit invoked the doctrine of sovereign immunity when it held that a nonresident alien could not maintain an action against the United States for damage to property in Vietnam caused by United States armed forces, without the consent of the United States.\textsuperscript{111}

Judge Scalia also relied on the Supreme Court's application of the doctrine of sovereign immunity in both \textit{Land v. Dollar}\textsuperscript{112} and \textit{Larson v. Domestic and Foreign Commerce Corp.}\textsuperscript{113} Both

\begin{flushleft}
\textsuperscript{104} \textit{Sanchez-Espinoza}, 770 F.2d at 206-07. See \textit{Tel-Oren}, 726 F.2d at 791-96.
\textsuperscript{105} \textit{Sanchez-Espinoza}, 770 F.2d at 207.
\textsuperscript{106} \textit{Id}.
\textsuperscript{107} \textit{Id}.
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} \textit{Id}.
\textsuperscript{111} \textit{Sanchez-Espinoza}, 770 F.2d at 207.
\textsuperscript{112} 330 U.S. 731 (1947) (stockholders in a steamship company brought action to enjoin the Maritime Commission from selling stock which had been turned over to the commission pursuant to a subsidy and loan contract).
\textsuperscript{113} 337 U.S. 682 (1949) (a private corporation sued the Administrator of the War Assets Administration in his official capacity, but Chief Justice Vinson, writing for the Court, held that the suit was against the United States, and, in the absence of consent by
\end{flushleft}
cases held that sovereign immunity is an important doctrine which prevents judicial determinations which would interfere with public administration by restraining the government or forcing the government to act in a particular way.\textsuperscript{114} Suits against agents of the United States will only be entertained when the agent is acting illegally and is sued individually.\textsuperscript{115} For these reasons, the claims of the Nicaraguan plaintiffs were properly dismissed.\textsuperscript{116}

The court recognized that sovereign immunity may be waived in certain circumstances.\textsuperscript{117} Plaintiffs claimed that the Alien Tort Statute constituted such a waiver, but the circuit court relied on \textit{Canadian Transport Co. v. United States}\textsuperscript{118} in its determination that the Alien Tort Statute is not, in itself, a waiver of sovereign immunity.\textsuperscript{119} In \textit{Canadian Transport}, Judge Robb declared that the language of the statute does not indicate a waiver of sovereign immunity from tort suits or treaty violations, and that the court should not affix such a meaning to the statute.\textsuperscript{120}

Judge Scalia did find a waiver of sovereign immunity with respect to the claims for nonmonetary relief in the Administrative Procedure Act,\textsuperscript{121} which provides in relevant part:

[An action] seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States.\textsuperscript{122}

The court found, however, that all bases for nonmonetary relief are discretionary.\textsuperscript{123} Judge Scalia reasoned that all discre-
tionary relief should be withheld in *Sanchez-Espinoza* because of the sensitivity of the foreign affairs matters which were at stake. The court permitted to withhold the discretionary relief under the section of the Administrative Procedure Act which provides that the judicial review provision does not curtail "the power or duty of the court to dismiss any action or deny relief on any . . . appropriate legal or equitable ground." Thus, this waiver of sovereign immunity carried no practical weight in *Sanchez-Espinoza*.

Judge Scalia was careful in distinguishing the doctrine of foreign sovereign immunity from the doctrine of domestic sovereign immunity in order to prevent confusion in the future. He pointed out that an Alien Tort Statute suit filed against an agent of a foreign government would not necessarily have to be dismissed. By doing so, he preserved the Second Circuit’s decision in *Filartiga v. Pena-Irala*.

**D. Constitutional Issues**

Plaintiffs’ presented claims under the fourth and fifth amendments to the United States Constitution, which guarantee, respectively, freedom from unreasonable searches and seizures, and protection against deprivation of rights without due process of law or adequate compensation. Although the issue was presented as to whether plaintiffs (nonresident aliens) qualified for protection under the United States Constitution,


125. *Id.* (quoting 5 U.S.C. § 702 (1982)).
126. *Id.* at 207 n.5.
127. *Id.*
128. The full text of the fourth amendment 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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
   U.S. Const. amend. IV.
129. The relevant portions of the fifth amendment provide: "No person shall be . . . deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.
the circuit court declared that it need not discuss the question whether constitutional protections extend to noncitizens abroad.\textsuperscript{130} Both \textit{Johnson v. Eisentrager},\textsuperscript{131} and \textit{Pauling v. McElroy},\textsuperscript{132} suggest that nonresident aliens ordinarily could not appeal to the protection of the Constitution. The court of appeals concluded that no relief would be available to the \textit{Sanchez-Espinoza} plaintiffs in any case.\textsuperscript{133}

Judge Scalia recognized that in some instances, however, federal courts may create a damages remedy for violations of constitutional rights under the Supreme Court’s ruling in \textit{Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics}.\textsuperscript{134} The \textit{Bivens} decision is supplemented, however, by the Court’s later ruling in \textit{Chappell v. Wallace},\textsuperscript{135} which cautions “that such a remedy is not available when ‘special factors counselling hesitation’ are present.”\textsuperscript{136} What constitutes those special factors was further clarified in \textit{Bush v. Lucas}.\textsuperscript{137} “Where, for example, the issue ‘‘involves a host of considerations that must be weighed and appraised,’’ its resolution ‘‘is more appropriate for those who write the laws rather than for those who interpret them.’”\textsuperscript{138}

Applying the reasoning of \textit{Bush} to the facts of \textit{Sanchez-Espinoza}, the court of appeals entertained no doubts that judicial creation of damage remedies was improper in light of the considerations of institutional competence which were before the court.\textsuperscript{139} Judge Scalia declared that “the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly uncon-
stitutional treatment of foreign subjects causing injury abroad.' The court feared "'embarrassment . . . abroad' through 'multifarious pronouncements,' " and elected to leave to Congress the decision whether a damage remedy should exist.

E. Other Issues

In resolving the question whether the appellants were entitled to damage remedies under the War Powers Resolution, the Hughes-Ryan Amendment and the National Security Act of 1947, the court of appeals focused on whether Congress intended to create a remedy when enacting those statutes. When dealing with statutes, the court may not fashion a remedy that Congress did not intend. Private damage actions are inappropriate with regard to these statutes because Congress did not identify any class to which benefits are intended. These statutes exist for the protection of the general public. This proposition is supported by Cannon v. University of Chicago, the language of the acts themselves, and the legislative history of the statutes.

The last statute considered by the court was the Neutrality

140. Id. at 209.
141. Id. (quoting Baker, 369 U.S. at 217).
142. Id.
143. Id.
144. Id. See California v. Sierra Club, 451 U.S. 287, 297 (1981) (no private action may be implied under § 10 of the Rivers and Harbors Appropriations Act of 1899 because neither congressional intent nor legislative history support a finding that private actions are allowed or that § 10 was created for the special benefit of a particular class).
145. Sanchez-Espinoza, 770 F.2d at 209.
146. Id. (quoting Cannon v. University of Chicago, 441 U.S. 677, 690 (1979)).
147. 441 U.S. 677 (1979). A private party may maintain a lawsuit based on federal statutes only if the statute expressly authorizes private action or, in the absence of such authorization, if Congress intended to make a remedy available to a special class of litigants. In determining congressional intent, the four-part test of Cort v. Ash, 422 U.S. 66 (1975) is applied and the court must consider: 1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member, 2) whether there is any indication of legislative intent to create a private remedy, 3) whether implication of such a remedy is consistent with the underlying purposes of the legislative scheme, and 4) whether inferring a federal remedy is inappropriate because the subject matter involves an area basically of concern to the states. 422 U.S. at 78.
Act, a section of the Criminal Code that prohibits preparations for 'any military or naval expedition or enterprise . . . against the territory or dominion of any foreign prince or state.' The Neutrality Act provides penalties in terms of a fine of up to $3,000 and imprisonment of up to three years. The court of appeals, however, was skeptical about the proposition that a private right of action could be derived from a criminal statute. Judge Scalia stated:

It would be doubly difficult to find a private damage action within the Neutrality Act, since this would have the practical effect of eliminating prosecutorial discretion in an area where the normal desirability of such discretion is vastly augmented by the broad leeway traditionally accorded to the Executive in matters of foreign affairs.

The court of appeals did not ignore the claims of the congressional plaintiffs alleging violations of the Boland Amendment and the congressional right to participate in the decision to declare war. The cause of action relating to the Boland Amendment was dismissed as moot because the Amendment’s appropriations, and thus its operating effect, had expired at the close of the fiscal year (September 30, 1983). Dismissal of the constitutional portion of the congressional plaintiffs’ allegations was based on the political question doctrine and Crockett v. Regan, as it had been in the district court’s opinion.

Finally, the circuit court addressed the issue of pendent jurisdiction and the state law claims of the Florida residents. Like the district court, the court of appeals found that the claims had no independent basis for jurisdiction. Because all other federal claims were dismissed, the state claims, too, must be dismissed as per the Supreme Court’s holding in United Mine Workers v. Gibbs.

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149. Id. (quoting 18 U.S.C. § 960 (1960)).
150. Id. at 210.
151. Id.
152. Id.
153. Id. See supra notes 64-73 and accompanying text.
CONCLUSION

The decision of both the district court and the court of appeals are prudent and legally well founded. The courts, however, could have gone further in setting down precedent with regard to judicial review of international questions. Through dictum, the courts could have expressly stated that the plaintiffs (particularly the Nicaraguan residents) presented meaningful claims which, if proven, would have displayed violations of international norms. Furthermore, the courts should have made it clear that such actions are subject to judicial determination in United States federal courts.

Other political organizations in the world community have for over one hundred years recognized the need to achieve high standards in terms of protection of fundamental human rights. In the early part of this century, the League of Nations was designed to protect the "minority rights, labor rights and the rights of individuals in mandated territories."

The more recent Charter of the United Nations, which has been called a "global constitution," guarantees rights of human dignity and was drafted primarily as a reaction against nazi aggression and genocide. Current authoritative decision makers, including states and international organizations, have followed a trend which promotes human rights, in their pursuit of economic and political policies, and hundreds of treaties, agreements and resolutions have been written and accepted in the international community.

In particular, the right of persons to be free from torture has received significant attention recently. The Universal Decla-

155. D. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 4 (1983). The first Geneva Convention for victims of armed conflict was signed in 1864 and provided for the neutral treatment of medical personnel so that sick and wounded soldiers receive medical care. Id.
156. Id. at 5-6.
157. Id. at 7.
158. Id. at 8. See U.N. CHARTER art. 55 (1945).
ration of Human Rights provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." 161 The Geneva Convention, 162 The International Covenant on Civil and Political Rights, 163 and the United Nations Declaration on the Protection of Persons From Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 164 all join in the proscription of torture and are supported by various regional commitments and special international codes of conduct. 165

In 1972, Amnesty International launched a "major campaign for the abolition of torture" and, in 1973, published its first "report on torture." 166 This campaign has created significant achievements, including a petition to the United Nations bearing over one million signatures calling for an anti-torture resolution, involvement by several intergovernmental and non-governmental organizations in the development of international

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162. Protection of War Victims (armed forces in the field) Convention, August 12, 1949, art. 3, 6 U.S.T. 3118, T.I.A.S. No. 3364.
165. See [European] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 Nov. 1950, art. 3, Europ. T.S. No. 5 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); American Convention on Human Rights, art. 5(2), Nov. 22, 1969, O.A.S.T.S. No. 36 ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."); African (Banjul) Charter on Human and Peoples' Rights, part II, art. 5, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, not yet in force ("All forms of exploitation and degradation of man, particularly . . . torture, cruel, inhuman, or degrading punishment or treatment shall be prohibited."); U.N. Standard Minimum Rules for the Treatment of Prisoners, art. 31 (1957) ("Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offenses."); G.A. Res. 33/179, U.N. GAOR Supp. (No. 45) at 162, U.N. Doc. A/33/45 (1979) ("No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances . . . as a justification of torture or other cruel, inhuman or degrading treatment or punishment."); G.A. Res. 33/194, U.N. GAOR Supp. (No. 51) at 210, U.N. Doc. A/37/51 (1983) ("It is a gross contravention of medical ethics, as well as an offense under applicable international instruments, for health personnel, especially physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitements to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.").
standards against torture, increased coverage by the news media of torture and other human rights abuses, and the development of the Urgent Action Network (a direct assistance mechanism which provides cables and express letters from participants around the world on behalf of potential victims of torture.)

Despite the widespread rejection of torture in the international community and the increasing efforts to deal with it, torture continues to thrive as an institutional cog in the "state controlled machinery to suppress dissent" in many countries. It has been justified as an efficient method of fulfilling a state's obligation "to defeat terrorists and insurgents who have put innocent lives at risk and who endanger both civil society and the state itself." It has been alleged and forcefully argued that the United States has played a significant role in the continued existence of institutionalized torture. The Reagan administration has been accused of promoting torture and other human rights abuses through its policies toward, and covert operations in, many third world nations, particularly, Nicaragua.

The United States is, at the same time, a leading force in the international commitment to eliminate human rights abuses. It has recognized that abuses are often due to political instability abroad which is the result of economic realities in the third world, and it has proved its commitment to human rights

167. Id. See also id. at 249. Amnesty International, in 1983, adopted a "12-Point Program for the Prevention of Torture" which includes; 1) official condemnation of torture; 2) limits on incommunicado detention; 3) no secret detention; 4) safeguards during interrogation and custody; 5) independent investigation of reports of torture; 6) no use of statements extracted under torture; 7) prohibition of torture in law; 8) prosecution of alleged torturers; 9) training procedures; 10) compensation and rehabilitation; 11) international response; and 12) ratification of international instruments.

168. Id. at 4.

169. Id. at 6.


172. Economic rights rank higher than political and civil liberties in the third world. The Department of State has assessed that the major obstacles to the achievement of economic rights (limited natural resources, high population growth rates, unequal distribution of income and land, inefficient management of human and natural resources, insufficient trained manpower, civil strife and armed conflict and, in some countries, corruption) must be overcome. Country Reports on Human Rights Practices, supra note 7, at 3.
through such mechanisms as the Foreign Assistance Act.\textsuperscript{173}

The American judicial system has demonstrated a limited willingness to participate in the movement to abolish the use of torture in the international arena. In \textit{Filartiga},\textsuperscript{174} Judge Kaufman, writing for the Second Circuit, stated that “for purposes of civil liability, the torturer has become . . . \textit{hostis humanis generis}, an enemy to all mankind.”\textsuperscript{175} The Second Circuit further held that “official torture is now prohibited by the law of nations.”\textsuperscript{176} The Alien Tort Statute was used to assert jurisdiction, indicating that federal courts are valid forums for resolving international disputes when torture is alleged.

Not all of the circuits have followed the Second Circuit’s lead in asserting jurisdiction over foreign cases involving torture and other human rights abuses. In \textit{Tel-Oren},\textsuperscript{177} the District of Columbia Circuit, in its per curiam decision, dismissed an action for lack of subject matter jurisdiction in which survivors and representatives of deceased victims of an armed attack of a civilian bus alleged multiple tortious acts by members of the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.\textsuperscript{178}

The circuit court, in \textit{Sanchez-Espinoza}, dismissed an opportunity to clarify the law regarding federal jurisdiction over international claims involving torture and other violations of fundamental human rights. The court should have issued a warning to the coordinate branches of the government that vio-


\textsuperscript{174} 630 F.2d 876.

\textsuperscript{175} Id. at 890.

\textsuperscript{176} Id. at 884.

\textsuperscript{177} 726 F.2d 774.

lations of treaties and the law of nations will not be tolerated in American courts. International law regarding torture is an emerging area of law which requires authoritative interpretation and judicial decision to aid in the development of binding international norms.

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