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SEPARATION OF POWERS-UNAUTHORIZED EXECUTIVE SEIZURE OF FOREIGN LAND (Ramirez v. Weinberger)

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COMMENTS

Separation of Powers—Unauthorized Executive Seizure of Foreign Land—Ramirez v. Weinberger — The decision of the U.S. Court of Appeals for the District of Columbia Circuit in Ramirez v. Weinberger\(^1\) represents a potentially crucial precedent in determining the scope of judicial authority when fundamental constitutional rights of citizens are impinged upon by Executive decisions in the furtherance of United States military and foreign policy.

In a strongly worded opinion by Judge Wilkey,\(^2\) the court held that, provided a plaintiff shows that the United States took his land without constitutional or statutory authority, it is within the power of the courts to order the government to vacate the land,\(^3\) regardless that the location of the plaintiff's land is in a foreign sovereign nation\(^4\) and that monetary relief is available.\(^5\) The application of this rule to the instant case would require the removal of an important military training facility in Central America\(^6\) to a new and perhaps strategically defi-

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1. 745 F.2d 1500 (D.C. Cir. 1984). See No. 83-1950, slip op. (D.C. Cir. Oct. 5, 1984) (en banc), wherein dissenting opinions of Judges Scalia and Starr can be found. It should be noted that the United States District Court for the District of Columbia initially dismissed the Ramirez complaint. 568 F. Supp. 1236. On appeal, the Court of Appeals affirmed. 724 F.2d 143. On rehearing en banc, the Court of Appeals reversed and remanded. 745 F.2d at 1505.

2. 745 F.2d 1500 (D.C. Cir. 1984). Judge Wilkey was the author of the only dissent to the panel decision vacated by the District of Columbia Circuit Court (en banc). Ramirez de Arellano v. Weinberger, 724 F.2d 143 (D.C. Cir. 1983).

3. 745 F.2d at 1543.

4. Id. at 1506. The land in question is located in the independent sovereign nation of Honduras, see also infra note 14.

5. Id. at 1527. The plaintiffs have since filed a claim under the Tucker Act in the Court of Claims, but no further action has been taken in that proceeding. Id. at 1556 n.9. The Tucker Act provides that the Court of Claims shall have jurisdiction over claims against the United States that are in excess of $10,000 and founded upon contracts or the Constitution or statutes of the United States. 28 U.S.C. §§ 1346, 1491 (1982). It is not clear that the Tucker Act would permit Ramirez to recover damages because the Supreme Court has held that monetary relief for unauthorized Executive seizures is not available in the Court of Claims. See 745 F.2d at 1552, and also infra note 47.

6. 745 F.2d at 1561. See Id. at 1561. See also infra note 7. The Regional Military Training Center (RMTC) is located on a private cattle ranch in Honduras. The facility was used by more than 100 soldiers of the United States Army Special Forces to train over 1,000 Salvadoran soldiers. Id. at 1507.
cient site. This gives rise to new concerns regarding the political question doctrine and the constitutional doctrine of separation of powers.

Sparked by an increase in military and political tensions in Central America and the unwillingness of Congress to increase the number of United States military personnel in El Salvador, the United States Department of Defense, in March of 1983, decided to establish a Regional Military Training Center (RMTC) in a neighboring country.

In April, 1983, a tract of land suitable for the construction and operation of the RMTC was chosen by the United States Department of Defense in an area known as the Department of Colon, Honduras. The land chosen was the property of a United States citizen, plaintiff Ramirez, and the location of his multimillion dollar cattle ranch, meat packing, and shrimp processing enterprise. Ramirez, a successful United States entrepreneur, resided with his family and employees on the 14,000 acre estate which he had carved out of the Honduran jungle and developed into a successful business over the past twenty years.

7. Id. at 1561. Judge Scalia argued that the location of the RMTC was a decision based on military strategy. He points out that if the location of the base had been an integral factor in the success of the United States military invasion into Grenada, the injunction sought by the plaintiffs might have caused "incalculable harm."

8. United States newspapers carried stories reflecting the Honduran government's resistance to United States military presence within their borders. See, e.g., Honduras Balks at Hosting Salvador Army Training Center, Miami Herald, Apr. 12, 1983, § A, at 17. The court noted that one newspaper account quoted a United States Army spokesman as saying that, in his opinion, Honduras did not have anywhere suitable to locate the training center. See 745 F.2d at 1507. See also Boston Globe, Mar. 27, 1983, § A at 15.

9. 745 F.2d at 1507.
10. There are discrepancies regarding at whose discretion and according to what process Ramirez's land was actually chosen as the site for the RMTC. Compare 745 F.2d at 1507 with 724 F.2d at 146 and Arellano [sic] v. Weinberger, 568 F. Supp. 1236, 1237 (D.C. 1983).
11. 745 F.2d at 1507.
12. Id. See also supra note 6.
13. 745 F.2d at 1507.
14. Id. at 1507. Honduras has undergone dramatic militarization under current United States policy in Central America. See supra note 8 and accompanying text. The map reprinted supra at indicates the bases built at the same time the RMTC was built on Ramirez's property. The specific RMTC in question is identified as such on the map.
15. 745 F.2d at 1506. Actual ownership of the property is through Ramirez's two Honduran corporations. This fact forms the basis of the "lack of standing" argument of the dissent. See infra note 117 and accompanying text.
16. 745 F.2d at 1506. Ramirez's estimated investment in the facility has been put at thirteen million dollars. Id.
17. 745 F.2d at 1506. Ramirez transformed the site from raw, undeveloped jungle into
years.\textsuperscript{18} The entire enterprise consisted of a conglomerate of Honduran and United States corporations owned and operated exclusively by Ramirez.\textsuperscript{19}

In late May, 1983,\textsuperscript{20} Ramirez was casually informed by a United States Embassy official that a military center was to be built "in the area."\textsuperscript{21} Upon further inquiry, Ramirez was told in early June, 1983,\textsuperscript{22} that the Honduran government planned the expropriation of about 2,000 acres of his land for military use.\textsuperscript{23} Construction of the military facility started immediately\textsuperscript{24} on the proposed 2,000 acre site\textsuperscript{25} known as the Designated Area.\textsuperscript{26} An official expropriation proceeding for the tract was never commenced by either the Honduran or United States governments, nor was any compensation for the land ever discussed or paid.\textsuperscript{27}

During construction, the camp expanded beyond the Designated Area.\textsuperscript{28} On November 18, 1983,\textsuperscript{29} four United States tanks, accompanied by supporting infantrymen, invaded the plant premises.\textsuperscript{30} The

productive grazing land. \textit{Id.}

18. \textit{Id.} Ramirez also invested time and money in the surrounding community. He is a founding member of the local Lions' Club, as well as the founder of the Association for the Defense of the Free Enterprise System in Honduras, among other civic and community services. \textit{Id.}

19. 745 F.2d at 1506 n.4. The complaint states that "[t]he six corporate plaintiffs . . . are and at all material times have been owned and controlled by Ramirez." \textit{Id.}

20. \textit{Id.} at 1507.

21. \textit{Id.} The First Secretary of the United States Embassy in Honduras was visiting Ramirez's home and "casually mentioned" the training base, pointing out property (owned by Ramirez) across the bay as its location. \textit{Id.}

22. \textit{Id.} at 1508.

23. \textit{Id.} See also 724 F.2d at 146.

24. 745 F.2d at 1507. In June, 1983, Litton Industries, a United States corporation under contract with the United States Army Corps of Engineers, began construction. \textit{Id.}


27. \textit{Id.} at 1237-38. See 745 F.2d at 1508-09. Two resolutions were passed by the Honduran government regarding the establishment of a military training center, neither of which specifically mentions the expropriation of Ramirez's property. \textit{See id.} at 1536. The court did not accept these resolutions as evidence that official expropriation of Ramirez's ranch was initiated by the Honduran government. \textit{See also infra} note 138 and accompanying text.

28. 724 F.2d at 146. The base initially was constructed on 5,300 acres (more than twice the size of the "Designated Area"). The November "invasion" expanded it further. 568 F. Supp. at 1237. \textit{See infra} note 30 and accompanying text.

29. 745 F.2d at 1509.

30. \textit{Id.} at 1509-10. Ramirez contacted the United States Ambassador to Honduras by
United States Tank Commander approached Ramirez and demanded access to the gates of all the other areas within the ranch. Ramirez refused the Tank Commander entry, and the tanks proceeded to their destination within the ranch by force.\textsuperscript{31}

The base, originally to have been contained within the Designated Area of 2,000 acres, had now been expanded to over half the ranch’s 14,000 acres and nearly ninety percent of the year-round grazing land.\textsuperscript{32}

As a consequence of the construction of the base and the conduct of its activities, prime grazing land and fences were bulldozed, the flow of water to the meat packing plant was interrupted, cattle were shot by stray bullets, the animals in the occupied area became undernourished, and ranch employees refused to work in areas where training was taking place.\textsuperscript{33}

The plaintiffs, Ramirez and his Honduran and United States corporations, filed a complaint in the United States District Court for the District of Columbia. They alleged that their property had been seized and damaged by officials of the United States without statutory or constitutional authority, and that they had been deprived of property without due process of law. In addition, Ramirez alleged that a tort had been committed against his Honduran corporations, giving rise to courier during the dramatic seige of his property. The text of Ramirez’s letter highlights the intrusive nature of the military action.

\textbf{Dear Mr. Ambassador:}

With utmost urgency I am informing you by hand courier that United States Armed Personnel with Tanks have invaded our Plant Premises at Puerto Castilla this afternoon . . . . At 15.40 hours OST when I am dictating this letter we have reports that there are four Tanks inside with supporting infantrymen. The Tank Commander came to our Office Gate inside the yard and demanded the keys to the gates of all other areas. He was told to leave and that no keys were to be given to him. He then gave orders to his company to proceed and go through our property. At this time we have no reports from our ranch.

Inasmuch as the United States government had been forewarned and foretold not to go into my properties and its Diplomatic and Military Representatives had assured no United States Troops would violate my rights and property I hereby advise you that we hold all those responsible Legally and Morally Liable.

Sincerely

/s/
Temistocles Ramirez de Arellano

\textit{Id.}

\textsuperscript{31} See 745 F.2d at 1509-10.
\textsuperscript{32} \textit{Id.} at 1508.
\textsuperscript{33} See \textit{id.} at 1507-08. The court notes that the plaintiff’s family and employees have been frightened by the “large numbers of armed soldiers and trainees in the area of the meat packing plant.” \textit{Id.}
a claim under the Alien Tort Statute.\textsuperscript{34} Plaintiffs asked the district court to use its extraordinary injunctive power to order United States military operations taking place on the plaintiffs' Honduran property to cease and to declare that no Honduran or United States military advisors had the right to be on his land. Plaintiffs sought no monetary relief.\textsuperscript{35} The United States defendants sought dismissal for failure to state a claim upon which relief can be granted under 12(b)(6) of the Federal Rules of Civil Procedure. The district court dismissed Ramirez's complaint.

First, the district court found that "the heart of this matter would necessarily involve sensitive and confidential communications between the highest members of the Executive branch and officials of a foreign power that are not judicially discoverable."\textsuperscript{36} Citing the Supreme Court's decision in \textit{Baker v. Carr},\textsuperscript{37} the district court held that the subject matter of Ramirez's claim was "inappropriate"\textsuperscript{38} for judicial consideration and dismissed the claim on the ground of "non-justiciability."\textsuperscript{39}

The district court rejected the straightforward manner in which the plaintiffs framed the issue, labeling it "simplistic."\textsuperscript{40} Rather than addressing the plaintiff's question, "whether the defendants, each a United States official, have unlawfully seized a United States citizen's property,"\textsuperscript{41} the court held that the plaintiff's case involved "judicial intervention in a sensitive military, diplomatic and foreign policy case reaching the highest levels of a coordinate branch of government" which must be dismissed because of prudential considerations.\textsuperscript{42}

Second, noting the President's publicly stated commitment to fur-

\textsuperscript{34} \textit{Id.} at 1511 n. 32. The third claim charges the defendants with violating the Law of Nations and is brought under 28 U.S.C. § 1350 (1982) (Alien Tort Claims Act). The act provides that district courts have jurisdiction over claims brought by aliens against the United States for tort damages. \textit{Id.} at 1500.

\textsuperscript{35} 724 F.2d 143.

\textsuperscript{36} 568 F. Supp. at 1239.

\textsuperscript{37} 369 U.S. 186 (1962).

\textsuperscript{38} 568 F. Supp. at 1239.

\textsuperscript{39} \textit{Id.} at 1238. The district court noted that the conduct of foreign affairs is reserved to the Executive and Legislative branches pursuant to article I, section 8, and article II, section 2 of the Constitution. Thus, the court concluded, the issue was non-justiciable because the conflict involved several governments of Central America.

\textsuperscript{40} \textit{Id.} at 1239. The district court disagreed and stated that "[t]o reach the heart of the matter would necessarily involve sensitive and confidential communications between the highest members of the Executive branch and officials of a foreign power that are not judicially discoverable." \textit{Id.}

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.}
nish aid to a Central American country, the district court found that "relief through issuance of an injunction ordering United States military personnel from the area would have the potential of embarrassment from multifarious pronouncements by various departments on one question."

On appeal, the circuit court panel decision affirmed the district court's dismissal on "prudential considerations" and acknowledged that monetary relief ought to be sought in the court of claims under the Tucker Act. In a rehearing en banc, judgment was vacated. The en banc decision reversed and remanded to the district court for further development of the facts. Most significantly, the Court of Appeals also held that "even if the district court finds that the officials of the United States acted wrongfully (although pursuant to constitutional and statutory authority to take property in a foreign country), triggering the availability of monetary relief in the court of claims for unauthorized seizures of private property by United States officials, injunctive relief might still be a proper remedy for the stated claims."

The majority's lengthy opinion is primarily based on the Supreme Court's decision in Youngstown Sheet and Tube Co. v. Sawyer, the

43. Id. at 1240.
44. Id.
45. 724 F.2d 143. The author of the panel decision was Judge Scalia, who also wrote the most vehement of the dissents to the en banc decision. Id.
46. Id. at 150. The circuit court held that "where the practical effect of the constitutional guarantee in question is no more than a waiver of sovereign immunity [regarding a violation of the plaintiff's property rights by government officers under Honduran law]; we deem the propriety of our intervention by injunction no greater than it would be in a similar suit against a private individual subject to our jurisdiction. [Thus,] our intervention by injunction is inappropriate." Id.
47. Id. at 150-54. See also Scalia dissent, 745 F.2d at 1551. The Tucker Act creates a cause of action for a valid claim for monetary relief for a fifth amendment taking without just compensation. 745 F.2d at 150. A Tucker Act remedy is generally available if a taking occurs while a government officer is acting within the normal scope of his duties. Id. at 151. The circuit court held that a Tucker Act suit would exist if there was a taking effected by Defense Department officials acting within the scope of their ordinary responsibilities when they deployed United States military forces and established a training facility for the forces of a friendly country. Id. at 153. See supra note 5.
49. 745 F.2d at 1545.
50. Id. at 1524. Injunctive relief is available when the owner proves that government officials acted wrongfully and money damages would be insufficient. Id. See also infra note 122 and accompanying text.
51. 343 U.S. 579 (1952).
political question doctrine, and the equitable discretion of the court.

Four dissenters attacked this analysis with three alternative arguments centered on the separation of powers doctrine, the unavailability of the requested relief and the lack of jurisdiction of the Court. Concerned with the controversial nature of the majority's view, the dissent criticized, as an exercise of misplaced authority by the judiciary, the majority's permitting the issuance of an injunction in the event plaintiffs were able to prove their case. The four judges in the minority submitted three substantial and sometimes hostile dissenting opinions which characterize the majority's view as "a breathtaking novelty."

In his opinion for the circuit court in Ramirez v. Weinberger, Judge Wilkey embarks on an extensive review of early case history with respect to each issue raised by the plaintiffs. Considering first the validity of the plaintiffs' claims and then proceeding to a political question analysis, the court concludes with a complex discussion of its determination that equitable relief might be available in the district court in the form of an injunction removing the military center from Ramirez's land. Through a series of lengthy footnotes, Judge Wilkey discredits the attacks launched against the majority's decision by the four dissenters.

52. The historical development of the political question doctrine is discussed at length in Henkin, Is There a "Political Question" Doctrine?, 85 YALE L. J. 597 (1976).
53. 745 F.2d at 1521.
54. Each of the three Reagan appointees to the District of Columbia Circuit Court of Appeals, Judges Scalia, Bork and Starr dissented. Judges Tamm, Scalia and Starr wrote separate dissenting opinions. See id. at 1545, 1550, and 1566.
55. Id. at 1546-48, 1566-74.
56. Id. at 1549-50, 1561-66.
57. Id. at 1551-61.
58. 745 F.2d at 1552; while discussing the majority's holding that "money alone may not constitute just compensation," id. at 1528 for purposes of the plaintiff's due process claims, Judge Scalia refers to the court's rationale as stemming from a "principle of breathtaking novelty." Id.
59. Id. at 1508. The 86-page opinion (not including the three full-blown dissenting opinions) is divided into seven sections, five of which pertain to issues raised by the plaintiffs, defendants and dissenting opinions. For the purposes of this comment, detailed discussion has been limited to the three decisive issues, namely, the validity of the plaintiff's claims, justiciability of the issues, and whether equitable relief is appropriate. The majority opinion, primarily rebutting arguments raised in the dissent, also dealt with the issues of standing and the act of state doctrine. These are considered summarily. See infra notes 158 and 117 and accompanying text.
60. See id. at 1510-45.
61. See id. at 1510 n.29, 1515 n.59, 1516 n.60, 1516-17 no.63, 1519 n.75, 1520-21 n.79, 1524 n.95, 1529 n.124, 1513 n.135, 1532 n.136, 1535-36 n.154, 1535 n.163, 1538 n.165, 1539 n.170, 1541-42 n.180.
I. SEIZURE

Historically, cases involving the seizure of private property by officials of the United States arose in time of war.62 Prize courts determined whether or not "enemy property" seized by government officials was subject to capture according to principles of international law.63 Privately owned land and coastal fishing vessels were traditionally exempt from such seizure without a showing of specific cause.64

The Supreme Court in The Paquette Habana65 held that Congressional authorization was necessary prior to the confiscation of any enemy property by government officials regardless of its nature. In that case, fishing vessels privately owned by Spaniards were seized by the United States Navy off the Gulf of Mexico during the Spanish-Ameri-

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62. The power to requisition private property during time of war is recognized as an essential right of sovereignty. U.S. v. Walker, 64 F. Supp. 135 (Ct. Cl. 1946). Because this power is so extreme, however, it is urged that its use be conditioned by necessity or emergency. U.S. v. Russell, 13 Wall. 623 (1871).

Congress had the authority to requisition private property by statute, and this power extends not only to property directly related to war, but also to property useful to war-related activities. Richmond Fairfield Ry. Co. v. Llewellyn, 157 S.E. 809 (Va. 1931). The President, in his capacity as commander-in-chief, may, during time of war, exercise the power to seize private property. U.S. v. Gordin, 287 F. 565 (D.C. Ohio 1922). In perhaps the most famous seizure case, however, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1962), the Supreme Court found that the President lacked the power to seize the majority of the nation's steel mills during the Korean War. In Youngstown, the Supreme Court stressed that the power to seize is a lawmaking power, which according to the Constitution was vested "in Congress alone in both good times and bad." Id. at 588-89. The Court also noted that even if other presidents had used seizures as a means of settling labor disputes, this did not mean that congress had "lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution." Id.

63. Prize in admiralty signifies any goods that are the subject of marine capture and any property taken from the enemy (jure belli). The Siren, 13 Wall. 389, 395 (1871). In order to constitute a complete capture, conduct of the parties should indicate one party in complete compliance and the other party intending to take the former's possessions as prize. Ling v. 1,689 Tons of Coal Lying Aboard S.S. Wilhelmina in Harbor of Seattle, 78 F. Supp. 57 (D.C. Cir. 1942).

A prize court is instituted for the purpose of trying judicially the lawfulness of captures at sea. Cushing v. Laird, 107 U.S. 69 (1882). In the United States, federal district courts have the jurisdiction in cases of prize. 28 U.S.C. § 1333(2) (1982).

Enemy property is a term applied to any illegal intercourse with the enemy or property belonging to an enemy of the country. The Benito Estenger, 176 U.S. 568, 571 (1900). Because international law is limited in scope to questions involving relations between nations, it governs prize cases only to the extent of determining how prizes will be taken. The law of the country of the parties capturing the prize will govern disposition of the sums gained as a result of capture. The Active, F. Case No. 14420 (D.C. Miss. 1814).

64. 745 F.2d at 1510 (citing The Paquette Habana, 175 U.S. 677, 710 (1986)).

65. 175 U.S. at 677.
can War. Without executive order backed by Congressional statute, the court found that the seizure was illegal, and, therefore, not within the jurisdiction of the private court to determine whether the property seized was of a kind subject to capture.66

The seizure of private property by officials of the United States government in order to comply with Executive policy decisions was the subject of the landmark Supreme Court decision Youngstown Sheet and Tube v. Sawyer.67 In that case, President Truman attempted to avert a nationwide strike of steel workers by issuing an Executive Order which directed the Secretary of Commerce to seize and operate most of the nation’s steel mills.68

The President assumed authority to issue the Order based upon the implied “aggregate powers” which he derived from the powers of the Executive and as Commander-in-Chief of the armed forces, as these powers are enumerated in the Constitution.69 There was no statute that provided for the President to take possession of the mills or any other property in order to avert a strike.70

The rationale underlying the issuance of the Order was the President’s ability to conduct foreign affairs and his concern for the security of the nation.71 Truman argued that United States involvement in the Korean Conflict and the dependency of the national defense on the domestic production of steel were sufficient to justify the executive action. The Court found that no such “aggregate powers” could be implied from the Constitution. The Executive Order issued by the President, without constitutional or statutory authority, could not stand.72

The circuit court in Ramirez found that the plaintiffs’ set of facts gave rise to cognizable causes of action against the named defendant, an official of the United States government.73

66. Id. at 711.
67. 343 U.S. 579 (1952).
68. Id. at 585-86.
69. Id. The President’s military power as Commander-in-Chief was found not to grant “the ultimate power as such to take possession of private property . . . ” in order to avert the strike and to implement executive policy. Id. at 587. The Court further stated “The President’s order does not direct that a Congressional policy be executed in a manner prescribed by Congress - it directs that a presidential policy be executed in a manner prescribed by the President . . . . ” Id.
70. Id. at 585.
71. Id. at 587.
72. Id. at 585.
73. The Ramirez Court’s analysis of the plaintiff’s claims presents a thorough evaluation of each of the substantive and procedural issues raised by both the plaintiffs and the defendants, as well as those raised sua sponte by the vacated panel decision.

The Court first noted that when, as here, a case is before the court on a 12(b)(6) motion to dismiss for failure to state a claim, Fed. R. Civ. P. 12(b)(6), all material allega-
Considering Ramirez's claim that the establishment of the RMTC on his land, the occupation and destruction of his property, and the deprivation of the use and enjoyment of his property "are beyond the defendants' express or implied authority under the law or treaties of the United States and the United States Constitution," the court held that "[w]hen there is no authorization by an act of Congress or the Constitution for the Executive to take private property, an effective taking by the Executive is unlawful because it usurps Congress's constitutionally granted powers of lawmaking and appropriation."

The court relied on *Youngstown* which upheld a district court's injunction prohibiting Executive officials from seizing the steel mills despite exigent circumstances. Although acknowledging the ability of the federal district court to adjudicate such a claim, however, Judge Wilkey was careful to note that the court was not deciding the merits of the case, but only that "the plaintiffs have succeeded in stating a claim against the defendants for an unauthorized and unconstitutional deprivation of the use and enjoyment of their property." In the Ramirez case, Judge Tamm's dissent does not accept Judge Wilkey's undertaking of the plaintiff's claim. He suggests that the Youngstown case does not at all support the validity of the plaintiff's first contention. Judge Tamm states, "The circumstances in Youngstown differ significantly from those in the instant case. Although the seizure of the privately owned steel mills may have been related to military operations abroad, its primary effect was on domestic, not foreign affairs . . . . The Court has long emphasized that the
executive's discretion to manage foreign affairs is considerably greater than his power to control domestic matters."

The majority answers Judge Tamm's argument, explaining that in both Youngstown and Ramirez, the "primary effect" of the seizure is on the property of United States citizens, not on domestic or foreign affairs. The court did not explain its "primary effect" rationale, but instead relied on the assertion that the location of the property in question had no bearing on the constitutionally protected rights of United States citizens in relation to their property.

II. Political Question Doctrine

The political question doctrine embraces two principles: separation of powers and prudential considerations. In deciding whether an issue is a nonjusticiable political question, the court is "determin[ing] whether constitutional provisions which litigants would have judges enforce do in fact lend themselves to interpretation as guarantees of enforceable rights." The Supreme Court articulated the factors for determining the nonjusticiability of political questions in Baker v. Carr. In Baker, the Court identified four circumstances in which prudential considerations may bar adjudication of a claim. These are:

[T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements on one question.

80. See id. at 1545 (Tamm, J., dissenting).
81. Id.
82. Id. at 1549.
83. 745 F.2d at 1510 n.29. Ramirez at 1549. Judge Tamm's dissent asserts that foreign affairs, in which the President has "largely uncontrolled" power, are not affected by the government action in Youngstown but rather that domestic affairs felt the effect. He attempts to distinguish Youngstown from Ramirez by asserting that in Ramirez the effect is in the area of foreign affairs. Id.
84. See L. Tribe, American Constitutional Law's 71-79 (1978), for a discussion of the underlying principles of the political question doctrine. For a discussion of the doctrine's historical development see Henkin supra note 52.
85. Tribe, supra note 76, at 79.
86. 369 U.S. 186 (1962).
87. Id. at 217.
Under these principles, executive action related to issues of foreign affairs has generally been found not to be subject to judicial scrutiny. For example, the Court prevented the adjudication of a claim challenging the President's authority to terminate treaties without congressional approval in *Goldwater v. Carter.*

United States military action abroad, initiated by the President as Commander-in-Chief, was held not to be subject to judicial scrutiny in *Johnson v. Eisentrager.* The facts of *Johnson* involved claims by enemy aliens against the United States challenging the propriety of United States military activities in China, during World War II. The Supreme Court held that "it is not the function of the Judiciary to entertain private litigation . . . which challenges the legality, the wisdom or the propriety of the Commander-in-Chief in sending our armed forces abroad to any particular region."

In his opinion concurring with *Goldwater v. Carter,* however, Justice Rehnquist suggested a different view. He implied there may be justification for challenging domestic action taken by the Executive under this war power authority. Justice Rehnquist pointed out that *Youngstown* did not involve a non-justiciable political question because "[i]n *Youngstown,* private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry . . . ."

The political question doctrine, however, is not clearly defined and cannot be applied easily to every issue which relates to foreign affairs. The Supreme Court in *Youngstown* prevented Executive seizure of most of the nations steel mills even though the President's claim was grounded in his power to conduct foreign affairs. Recent commentators suggest that "there may be no doctrine requiring abstention from judicial review of 'political questions' . . . [but] only . . . the ordinary respect by the courts for the political domain." Even the Supreme Court in *Baker v. Carr* noted that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."

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90. *Id.* at 788.
91. *Id.* at 789.
92. 444 U.S. 996, 1004 (Rehnquist, J., concurring).
94. *Id.* at 600-01.
95. 369 U.S. 186 (1962).
96. *Id.* at 211.
The Ramirez court systematically applied a Baker v. Carr analysis to the circumstances presented by the plaintiffs' facts in order to determine if the case presented any non-justiciable political question. In agreement with the panel decision, the court held that the district court erred in finding that all of the Baker criteria were met.98

In determining whether the text of the Constitution implicitly or explicitly commits the stated claim to the political branches, the court considered whether the claims challenged the Executive's conduct of foreign relations.99 The court first distinguished Johnson v. Eisentrager and found that, unlike the claims presented in Johnson, Ramirez's claims did not seek to adjudicate military presence abroad.100 The court stated that, when properly understood, the plaintiffs' claims were narrowly focused on the lawfulness of the defendants' occupation and use of the plaintiffs' land.101 As such, the case presented issues which are not "sweeping challenges to the Executive's foreign policy" but rather issues "typically adjudicated by the courts because they do not involve judicial usurpation of the Executive's constitutional powers to manage foreign affairs."102

The next question considered by the circuit court was whether resolution of the case requires the court to move outside its area of expertise.104 The circuit court rejected the district court's characterization of the issues of the case as dependent upon an intrusion into the "communications between the highest members of the Executive branch and officials of a foreign power" which would preclude discovery by the judiciary.105 The majority referred to a 1982 District of Columbia Circuit Court case which held that dismissal of a complaint is not proper "when information which 'might' be relevant to a claim is unavailable for discovery." The circuit court stated that the claims presented by Ramirez required the interpretation of the Constitution and federal statutes in order to ascertain the validity of the defend-
pants' asserted authority for seizure of the plaintiffs' land. In this way, the plaintiffs required the court to undertake the "quintessential tasks of the federal judiciary."\(^{108}\)

Finally, the court found no persuasive prudential concerns for an unquestioning adherence to a political decision. Ramirez's dispute with the United States military over land in Honduras, therefore, was held not to require dismissal.\(^{109}\) The court stated "The Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry."\(^{110}\)

Judge Tamm, in his dissent, focused his analysis on "[t]he critical importance of preserving the proper allocation of power among the three branches of government . . . ."\(^{111}\) The majority view, from Tamm's perspective, is that cases that appear to involve sensitive matters of foreign relations in fact turn out to be susceptible to adjudication. Tamm flatly rejected this concept.\(^{112}\) Not satisfied that the plaintiff's allegations do not directly call into question matters reserved to other branches of government, Tamm feared the use of protest to bring disguised political questions into the judicial forum. He maintained that "[i]mpermissible judicial encroachment upon the power of the political branches can occur not only from the act of resolving a question whose nature is political but also from the consequences that flow from judicial action."\(^{113}\) To support his position, Tamm only cites a district court decision in which it was held that the consequence of resolving a controversy involving foreign affairs was found to be "of paramount concern in determining justiciability."\(^{114}\) This concern, by his interpretation, is more in accordance with *Baker* than the majority's obfuscating argument.\(^{115}\)

Judge Scalia's dissent would relegate the plaintiffs' case to the Court of Claims for possible resolution under the Tucker Act, ignoring the majority's concern that such monetary relief may neither be available, nor sufficient, on the facts of the plaintiffs' case.\(^{116}\)

\(^{108}\) 745 F.2d at 1513.

\(^{109}\) *Id.* at 1515.

\(^{110}\) *Id.*

\(^{111}\) *Id.* at 1546-47 (Tamm, J., dissenting).

\(^{112}\) 745 F.2d at 1547 (Tamm, J., dissenting).

\(^{113}\) *Id.*


\(^{115}\) 745 F.2d at 1547.

\(^{116}\) *Id.* at 1551-56 (Scalia, J., dissenting).
III. Equitable Discretion Of The Court

The court next evaluated the standing issues raised by the defendants and found them to be without merit. The court turned its intention instead to an intricate analysis of the equitable discretion of the court to grant the requested relief.

The ability of a court to grant injunctive relief has been discussed in several Supreme Court cases within the last decade. Implicit in these decisions is the general rule that two conditions must be met before equitable relief is deemed proper. These are: first, that the plaintiff lack an adequate remedy at law, and, second, that a balancing of the rights and interests involved as well as other prudential considerations permit injunctive or declaratory relief.

In claims against the United States, private citizens may seek monetary relief in the Court of Claims as provided for by Congress in

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117. *Id.* at 1515. The question of standing was originally raised *sua sponte* by the vacated panel opinion. The United States defendants subsequently injected the question into the instant case by raising the argument that Ramirez did not have a "constitutionally protected interest in the property in question." *Id.* This was based on the argument that he did not own the land "directly," but rather "derivatively." *Id.* at 1516. Ramirez's two United States corporations it was argued, owned and controlled the land by virtue of legal title held by their wholly owned Honduran corporations. Defendants contended that the United States plaintiffs (Ramirez and the two United States corporations) had no "constitutionally protected interest" in the land and property, and therefore lacked standing to bring the asserted claims against the United States.

Wilkey seizes the opportunity to attack the United States defendants and quickly dispenses with the issue. He labels the arguments "bizarre," *id.* at 1515, "preposterous," *id.* at 1516, "astonishing," *id.* at 1520, "disingenuous," *id.* evasive," *id.* and "a most extreme form of fanciful thinking" *id.* at 1515.

Wilkey maintains that the crucial issue revolves around the plaintiff's exclusive control, possession, and ownership of the properties and businesses seized, and not whether the alien Honduran corporations also have constitutional rights to judicial relief for the alleged violations.

After a rather lengthy and tedious history of the question of corporate ownership in relation to standing, Wilkey abruptly concludes: "Prior to the defendants' alleged invasion of this cattle ranch, Ramirez had full control and possession of the ranch's pastures and business operations . . . . Ramirez's possessory interest is constitutionally protected for the purpose of the claims here." *Id.* at 1520.

118. *Id.* at 1516-20.


120. See Developments in the Law—Injunctions, 78 HARV. L. REV. 994, 996-1045 (1965) for an in-depth discussion of these requirements for equitable relief and the principles upon which they are based.
the Tucker Act. In order for such claims to come within the jurisdiction of the Court of Claims, the act requires that the claims be in excess of $10,000 and founded upon contracts, or the Constitution, or statutes of the United States.\textsuperscript{121}

The Supreme Court, in \textit{The Regional Rail Reorganization Act Cases},\textsuperscript{122} ruled that in order for monetary relief to be granted in the Claims Court, the allegedly harmful activity of the government must have been explicitly authorized.\textsuperscript{123} The Court stated:

"The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government," and hence recovery is not available in the Court of Claims.\textsuperscript{124}

The Court had applied this reasoning in an earlier case, \textit{Hooe v. United States},\textsuperscript{125} in which a plaintiff whose basement was seized by United States officers for military use was denied compensation in the Court of Claims because the acts of the officers were not authorized by the Constitution or any federal statute.\textsuperscript{126}

When an injunction is sought by a private individual against government action, the Supreme Court, in \textit{Larson v. Domestic and Foreign Commerce Corp.},\textsuperscript{127} cautioned, "The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."\textsuperscript{128} The Court recognized, however, that in cases in which fundamental constitutional rights of citizens were at stake and when "such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions."\textsuperscript{129} This requires the court to balance the intrusiveness of the injunction into the function of the government against "the possible disadvantage to the citizen in being relegated to the recovery of money damages after [the government action is complete]."\textsuperscript{130}

Exercising its equitable discretion to determine the availability of

\begin{itemize}
\item \textsuperscript{121} 28 U.S.C. §§ 1346, 1491 (1982).
\item \textsuperscript{122} 419 U.S. 102 (1974).
\item \textsuperscript{123} Id. at 126-27.
\item \textsuperscript{124} Id. at 127 n.16.
\item \textsuperscript{125} 218 U.S. 322 (1910).
\item \textsuperscript{126} Id. at 335.
\item \textsuperscript{127} 337 U.S. 682, \textit{reh'g denied}, 338 U.S. 840 (1949).
\item \textsuperscript{128} 337 U.S. at 704.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id.
\end{itemize}
injunctive relief, the Ramirez court found that both conditions necessary in order to grant equitable relief had been met by the plaintiffs.\textsuperscript{131}

Regarding the availability of monetary relief, the circuit court recognized that if the actions of the federal officials were found to be unlawful because these actions were unauthorized, no relief could be obtained by plaintiffs in the court of claims.\textsuperscript{132} The Supreme Court in The Regional Rail Reorganization Act Cases\textsuperscript{133} specifically required the harmful action to be "expressly or by necessary implication" the action of the government as authorized by Congress or the Constitution for relief under the Tucker Act.\textsuperscript{134} Because the plaintiffs deny the existence of any such authority behind the government seizure of the cattle ranch,\textsuperscript{135} it is likely that such an act will not be remedied in the court of claims.

In support of its finding, the circuit court quoted an opinion by the court of claims denying plaintiff monetary relief for an unauthorized taking by government officials. "Ordinarily," the court of claims stated "whenever there is no authority for a taking or intrusion, the claimant, although unable to obtain compensation, can seek an injunction or a declaratory judgment against the unauthorized governmental activities."\textsuperscript{136}

The Ramirez court did not preclude injunctive relief in the event that the district court should find that the defendants acted wrongfully and pursuant to constitutional and statutory authority to take property in a foreign country.\textsuperscript{137} This would allow for relief under the Tucker Act in the court of claims but if money damages alone would not adequately redress the plaintiffs' injury, injunctive relief might still be available.\textsuperscript{138}

Judge Scalia, in his dissent, rejects the majority's view that injunctive relief would be proper under such circumstances, and offers a different interpretation of the Tucker Act provision for relief in the court

\textsuperscript{131} 745 F.2d at 1522. The two conditions met were (1) plaintiffs lacked an adequate remedy at law and (2) a balancing of the rights and interests involved as well as other prudential considerations permitted injunctive or declaratory relief. \textit{Id}.

\textsuperscript{132} \textit{Id} at 1520.

\textsuperscript{133} 419 U.S. 102 (1974).

\textsuperscript{134} \textit{Id} at 127 n.16.

\textsuperscript{135} 745 F.2d at 1522. The court held "When government officials seize private property without statutory authority, the trial court must apply general equitable principles to determine whether injunctive relief is proper." \textit{Id}.

\textsuperscript{136} \textit{Id} at 1523 (quoting, Southern California Financial Corp. v. United States, 634 F.2d 521, 526 n.8 (Ct. Cl. 1980), \textit{cert. denied}, 451 U.S. 937 (1981)).

\textsuperscript{137} 745 F.2d at 1524.

\textsuperscript{138} \textit{Id} at 1524.
of claims. He argues that the only forum for Ramirez is in the court of claims. The Tucker Act, in his view, not only provides monetary relief for plaintiffs like Ramirez who have been injured by authorized governmental activity, but it also serves to bar the grant of specific relief against a United States official under the doctrine of sovereign immunity.

The majority disagrees with Scalia's analysis, relying on the principles of due process set forth by the Supreme Court in United States v. Lee.

The Tucker Act is silent on the question of government immunity. It only provides that plaintiffs seeking monetary relief from the United States for injury caused by the authorized action of its officials, may bring suit against the United States in the court of claims, and does not expressly preclude other available forms of relief.

In Lee the Supreme Court held that claims against the United States for illegal seizures of private property, if barred by sovereign immunity, would violate due process. That case involved an action for ejectment by a plaintiff who sought to redress the unauthorized seizure and occupation of his property by the government under the pretext of nonpayment of taxes. The Lee Court rejected the defendant United States attempt to raise the sovereign immunity defense, and allowed the plaintiff's desired relief against the United States.

The Ramirez court also cited to a recent District of Columbia Circuit Court opinion in which Judge Scalia joined unreservedly in the holding that "the United States and its officers . . . are not insulated from suit for injunctive relief by the doctrine of sovereign immunity." The majority attempted to weaken Judge Scalia's analysis by raising an inconsistency in his overall approach and application of this point of law. In doing so, the majority seemed to oversimplify a complicated doctrine which has undergone a protracted historical develop-

139. See id. at 1551-56.
140. Id. at 1554-56.
141. 106 U.S. 196 (1882).
143. 106 U.S. at 218.
144. Id. at 197-200.
145. Id. at 204, 218-23.
146. 745 F.2d at 1524 (quoting Dronenburg v. Zeck, 741 F.2d 1388, 1390 (D.C. Cir. 1984)). In Dronenburg, a member of the armed forces sought to overturn his discharge by challenging the constitutionality of the regulations under which he had been discharged. The government argued that the action was essentially one for money damages (i.e., backpay) and that recovery of money damages was precluded by the assertedly exclusive Tucker Act remedy in claims court. 741 F.2d at 1389-90.
147. Id. at 1524-25.
ment. Judge Scalia, not to be outdone, labeled the majority's response "confusing," claiming the majority ignored the limitations that Larson v. Foreign & Domestic Corp. placed on cases such as United States v. Lee which attempt to "stop the government in its tracks" with a claim of property right.

The majority considers the second condition for equitable relief, a showing of the inadequacy of monetary relief, in terms of the uniqueness of land. The court notes that Ramirez's land is allegedly the only land available in Honduras capable of sustaining his cattle ranch and business enterprise due to the topography and transportation routes of that country. The court stated its concerns that "Ramirez's claimed loss of a unique parcel of land may prove to be immeasurable in monetary terms and irremediable at law."

In response, Scalia states, "[i]f the majority's new interpretation of the taking clause prevails, one must hope that the security of the nation never depends upon the government's ability to seize property, such as Mr. Ramirez's ranch . . . " because, in the majority's view, "money alone" could never asuage its loss. Scalia flatly rejects the majority's reliance on Youngstown, finding it "inapposite" under the circumstances.

Prior to summarizing the holding of the court, Judge Wilkey disposes of yet another of the defendants' arguments raised at the suggestion of the vacated panel decision. Probing the possibility that the Honduran government might have acted on its own in expropriating Ramirez's land, the United States defendants invoked the act of state doctrine. Wilkey finds that the defendants' argument is weak.

148. 745 F.2d at 1552 (Scalia, J., dissenting).
149. Id.
150. Id.
151. Id. at 1527.
152. Id. at 1528.
153. Id. at 1552-53 (Scalia, J., dissenting).
154. 343 U.S. 579 (1952); see also 745 F.2d at 1510 and text accompanying note 70.
155. 745 F.2d at 1552.
156. Id. at 1534-39.
157. 745 F.2d at 1533.
158. See, e.g., Underhill v. Hernandez, 168 U.S. 250 (1897). "Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Id. at 252. See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) in which the Supreme Court reaffirmed the act of state doctrine and refused to probe the validity of a foreign act in its own territory.
and the proof offered is insufficient.\textsuperscript{159} Judge Wilkey, writing for the court, notes that the defendants' argument tends to show still another dispute in crucial facts which merits development through further proceedings and not dismissal.\textsuperscript{160}

In concluding the majority opinion, Judge Wilkey states again the principles of \textit{Youngstown} and \textit{Lee} which "continue to guide the judicial conscience" in matters of controversy between citizens and their government.\textsuperscript{161} Quoting extensively from Justice Frankfurter's opinion in \textit{Youngstown}, Wilkey states for the court that "with every desire to avoid judicial inquiry into the powers and duties of the other two branches of government," inquiry into the issues of Executive power raised by the instant case is necessary to redress Ramirez's grievances and "vindicate individual rights overridden by specific unconstitutional military actions."\textsuperscript{162}

\textbf{CONCLUSION}

The District of Columbia Circuit Court's battle over \textit{Ramirez} illustrates the current increase in tension among the three branches of government as the United States grows increasingly politically conservative. The division in the court is clear. Reagan appointees on the right build a dissent suggesting a new era of imperial presidency, going so far as to invoke the divine right of kings.\textsuperscript{163} Taken together, the dissents express the view that the individual's rights pale in contrast to considerations of overall world concerns professed in Executive policy.

The majority, with vehement attacks on the priorities espoused by the vacated panel decision (whose three members form part of the present minority) is no less extreme in its judicial activism. Characterizing the United States defendants' argument as, "How dare the citizen's nose get in the way of the governmental fist?"\textsuperscript{164} it approaches Ramirez's case predisposed to take action.

Ramirez and his United States and Honduran corporations are

\begin{itemize}
  \item 159. \textit{Id.} at 1538-39.
  \item 160. 745 F.2d 1534.
  \item 161. \textit{Id.} at 1544.
  \item 162. \textit{Id.} at 1543-45.
  \item 163. \textit{See e.g., Id.} at 1551 n.1 (Scalia, J. dissenting). Scalia condemns the majority's attempt to "order a halt to military operations in foreign lands" by reference to the rise of the monarchies and the decline of the ruler-judges in ancient Israel. He quotes liberally from the Book of Samuel, "now appoint for us a king to govern us like all the nations . . . We will have a king over us; that we also may be like all the nations, and that our king may govern us, and go out before us, and fight our battles." \textit{Id.} (quoting 1 Samuel 8:5)
  \item 164. \textit{Id.} at 1529 n.124.
\end{itemize}
caught in the middle of an ideological battle within the court. Despite its seemingly broad-based approach to the plight of a United States citizen and businessman at the hands of a ruthless Department of Defense, the Ramirez court ignores fundamental judicial principles of decisionmaking, and creates a no-win situation for a citizen like Ramirez.

If the court were pitting the constitutional rights of the individual against the intrusive practices of the Executive, it failed in its attempt to present specific criteria for balancing the two equally important concerns.

What choice is left for the district court on remand? Regardless of its findings, it has been handed a hot potato destined for the Supreme Court. Will an injunction issue against the Executive, ordering the removal of a military base from citizen Ramirez's property? The consequences of such an action seem hardly worth the effort to arrive at the correct result through flagrant disregard of the risks involved. Among those risks, the possibility of disobedience by the Executive of such an order may weaken the credibility of the court more seriously than the current scandalous and open battle between right and left. Finally, one cannot help but wonder if judicial name calling serves Ramirez's case, or perpetuates the frustration of citizens caught in the governmental machine.165

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165. On October 12, 1984, one week after Ramirez was decided, the Legislature passed the Foreign Assistance and Related Programs Appropriations Act (the "Act") and dealt with the issue of the RMTC and compensation for Ramirez as follows:

Provided further, That none of the funds made available by this paragraph may be obligated or expended for the construction or operation of a Regional Military Training Center in Honduras except as provided through the regular notification process of the Committees on Appropriations and until the President provides to the Committees on Appropriations of the Senate and the House of Representatives (1) a report that the Government of Honduras has provided a site for such a center and assumed responsibility for any competing claims to rights of use or ownership of such site, and has provided written assurances to make that site available on a long-term basis for training by the armed forces of other friendly countries in the region as well as those of Honduras; (2) a detailed plan, with specific cost estimates, for the construction of such a Center at the site provided by the Government of Honduras; and (3) a determination that the Government of Honduras recognizes the need to compensate as required by international law the United States citizen who claims injury from the establishment and operation of the existing Center, and that it is taking appropriate steps to discharge its obligations under international law, in particular the Treaty of Friendship, Commerce and Consular Rights with the United States, as well as its letter of December 14, 1983, to the United States Trade Representative:
In view of the Act, the United States petitioned the court of appeals for a second rehearing *en banc*, which was subsequently denied. On appeal, the Supreme Court granted the government's petition for writ of certiorari, vacated the *en banc* judgment and remanded the matter to the court of appeals for reconsideration of its opinion in light of the Act and other events occurring since October 5, 1984. *Weinberger v. Ramirez*, 105 S. Ct. 2353 (1985).

On remand, while this publication was being printed, the court of appeals noted that the Act authorized funds for a United States financed RMTC in Honduras subject to certain conditions. *Ramirez v. Weinberger*, 788 F.2d 762, 763 (1986). The United States government failed to meet the Act's requirements concerning the operation of a RMTC and decided to discontinue participation in the former RMTC situated on Ramirez's land. *Id.* at 763. Since November 27, 1985, all United States military personnel and all United States owned facilities have been removed from the land. *Id.* at 763-64. Therefore, the court concluded that dismissal of the complaint, seeking relief against wrongful use and occupation by the United States government, "should be upheld on the narrow ground that the controversy has now become too attenuated to justify the extraordinary relief sought through equity's intervention." *Id.* at 764. The court noted that the intervening withdrawal of all United States military personnel and facilities had fundamentally altered the balance of equities, that equitable relief would not halt an ongoing violation and that it was no longer "clear that a favorable disposition of plaintiffs claims on the merits would warrant equitable relief that intruded into the conduct of foreign and military affairs." *Id.* The district court was instructed to modify its judgment and effect dismissal without prejudice to reinstate if the challenged activity resumed. *Id.*