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## Lawless Intervention: United States Foreign Policy in El Salvador and Nicaragua

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# LAWLESS INTERVENTION: UNITED STATES FOREIGN POLICY IN EL SALVADOR AND NICARAGUA

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## I. INTRODUCTION

As United States military and paramilitary involvement in the political affairs of Central America escalates, legal commentators continue to question the legality of United States intervention in Central America based on violations of recognized principles of international law. Essentially, these articles discuss whether U.S. actions in Central America violate United Nations Charter Articles 2(4) and 51, and the Charter of the Organization of American States.<sup>1</sup> An examination of the legality of U.S. intervention using United States domestic legislation and case law has, however, been ignored. This Note will show that the United States military and paramilitary intervention in the affairs of El Salvador and Nicaragua is illegal under domestic law, specifically the War Powers Resolution, the Foreign Assistance Act, the Neutrality Act, the United States Constitution, and the Boland Amendment to the House Appropriations Bill of 1982.<sup>2</sup> Accordingly, this Note is divided into two principal sections, the first explores the situation in El Salvador, the second the situation in Nicaragua.

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<sup>1</sup> For studies of the legality of United States intervention in Central America from an international law perspective, see generally, Rowles, *The United States, the OAS and the Dilemma of Undesirable Regime*, 13 GA. J. INT'L & COMP. L. 385 (1983); Szasz, *The Role of the United Nations in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 344 (1983); *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. OF INT'L L. 642 (1984); Beres, *Ignoring International Law: United States Policy on Insurgency and Intervention in Central America*, 14 DEN. J. INT'L & POL'Y 76 (1986); Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 620 (1985).

<sup>2</sup> For good introductory discussions of the current political situations in other Central American countries see R. IMMERMANN, *THE C.I.A. IN GUATEMALA* (1982); Weitz, *Insurgency and Counterinsurgency in Central America*, 101 POL. SCI. Q. 397 (1986); J. BELL, *CRISIS IN COSTA RICA* (1971); J. FRIED, *GUATEMALA IN REBELLION: UNFINISHED HISTORY* (1983); W. LAFEVER, *INEVITABLE REVOLUTION: THE UNITED STATES IN CENTRAL AMERICA* (1983); T. ANDERSON, *POLITICS IN CENTRAL AMERICA* (1982); R. NYROP, ED., *PANAMA: A COUNTRY STUDY* (1981); G. EDWARDS & W. BUTLER, *GUATEMALA: A NEW BEGINNING* (1987).

The United States presence in Nicaragua is predicated on the belief that the Sandinista government there is assisting in the training of the rebels in El Salvador<sup>3</sup> that are currently fighting against the U.S.-backed government of Jose Napoleon Duarte.<sup>4</sup> Therefore, the U.S. actions in those two countries are inextricably linked and must be explored together. For example, former Secretary of State Alexander Haig has claimed that the entire El Salvadoran guerrilla movement was "run from Managua", the capital of Nicaragua.<sup>5</sup> His successor, George Shultz, has been equally outspoken in voicing the view that Nicaragua is actively coordinating the Salvadoran rebels.<sup>6</sup> President Reagan has said:

The Sandinistas have been engaged for some time in spreading their Communist revolution beyond their borders. They're providing arms, training, and a headquarters to the Communist guerrillas who are attempting to overthrow the democratically elected Duarte government of El Salvador.<sup>7</sup>

However, the Nicaraguan Government has repeatedly denied that it is involved in the training of El Salvadoran rebels in any way.<sup>8</sup> Furthermore, David C. McMichael, a former C.I.A. employee who monitored arms traffic in Nicaragua from 1981-83, has noted:

The whole picture that the Administration has presented of Salvadoran insurgent operations being planned, directed, and supplied from Nicaragua

<sup>3</sup> President Reagan has repeatedly voiced his belief that covert aid to the contras in Nicaragua would be used to help stop the flow from the Nicaraguan government to the rebels in El Salvador. See T. BERRY & D. PREUSCH, *THE CENTRAL AMERICAN FACT BOOK* 277 (1986). See also, Taubman, *U.S. Said to Expand Central American Intelligence Operations*, N.Y. Times, Mar. 20, 1983, at A16, col. 1.

<sup>4</sup> The United States commitment to El Salvador's Duarte regime continues to increase. Support for 1987 should be in the \$400-500 million range, about 65% of which is in direct military aid. That sum represents over 50% of El Salvador's total budget for the year. See Spektor, *Remember El Salvador?*, *UTNE READER*, November 1986, at 11.

<sup>5</sup> See Brecher, *Taking Aim at Nicaragua*, *NEWSWEEK*, March 22, 1982, at 20-22; Statement by Alexander Haig, Secretary of State, before the Senate Foreign Relations Committee (Feb. 2, 1982), reprinted in 82 DEP'T ST. BULL. 27, 28-29 (1982).

<sup>6</sup> See e.g., Interview with George Schultz, Secretary of State, on "Meet the Press" (Aug. 7, 1983), reprinted in 83 DEP'T ST. BULL. 47, 48 (1983). See also Address by George Schultz, Secretary of State, to the World Affairs Council (Apr. 15, 1983), reprinted in 83 DEP'T ST. BULL. 10, 12 (1983).

<sup>7</sup> R. Reagan, *President Reagan's View of Nicaragua*, in P. ROSSET & J. VANDERMEER, *NICARAGUA: UNFINISHED REVOLUTION* 11, 13 (1987).

<sup>8</sup> In a case before the International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (Merits of Judgment of June 27), Miguel D'Escoto Brockmann, the Foreign Minister of the Republic of Nicaragua, stated in his Affidavit:

I am aware of the allegations made by the Government of the United States that my Government is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the Government of El Salvador. Such allegations are false, and constitute nothing more than a pretext for the U.S. to continue its unlawful military and paramilitary activities against Nicaragua intended to overthrow my Government. In truth, my Government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 1, 4 (Request for the Indication of Provisional Measures of May 10) (separately printed dissent of Schwebel, J.), reprinted in 23 I.L.M. 468, 480 (1984).

is simply not true . . . [T]he Administration and the C.I.A. have systematically misrepresented Nicaraguan involvement in the supply of arms to the Salvadoran guerrillas to justify its efforts to overthrow the Nicaraguan government.<sup>9</sup>

This difference of opinion regarding alleged Nicaraguan assistance to EL Salvadoran rebels is representative of the controversy surrounding United States involvement in these two countries.<sup>10</sup> As a result, this note frequently presents conflicting evidence concerning the extent of United States intervention in both El Salvador and Nicaragua. Nonetheless, analysis of both domestic law and the evidence of U.S. intervention in El Salvador and Nicaragua demonstrates conclusively that this intervention is illegal.

## II. THE HISTORY OF UNITED STATES INVOLVEMENT IN EL SALVADOR

In order to understand the contemporary state of affairs in El Salvador, it is first necessary to understand the history of the country and of the United States presence there.<sup>11</sup> United States military, economic, and political involvement in El Salvador began many years ago.

American involvement in the affairs of El Salvador began in the early twentieth century, when the United States replaced England as the principal foreign influence in the country, primarily through financial deals arranged by men such as Minor Keith, a wealthy American entrepreneur.<sup>12</sup> In 1923, Keith arranged for a long-term loan from American banks to the Salvadoran government of over \$16.5 million. The terms of the loan were novel because they provided that if El Salvador defaulted, the U.S. bankers and the State Department would manage the country's international trade through a type of receivership.<sup>13</sup> The loans were then principally used to pay off El Salvador's debts to Keith.<sup>14</sup> Unfortunately, some of the money also found its way to powerful families in El Salvador. These people became the wealthy plantation owners known as the "fourteen families."<sup>15</sup> Consequently, the distribution of income became so inequitable that an inordinate amount of tension developed between the peasant class and the

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<sup>9</sup> N.Y. Times, June 11, 1984, at B6, col. 3. McMichael has also said that much of the evidence on which the United States bases its assertion is "unreliable, some of it is suspect, and I believe it has been presented in a deliberately misleading fashion on many occasions." See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, I.C.J. Verbatim Record, CR 85/21, at 22 (Sept. 16, 1985).

<sup>10</sup> It is important to note at this point that because the situation in Central America is volatile and constantly changing, the best way to document the situation is through newspaper accounts, even though "such evidence may be considered hearsay and even contrary to official findings made by the Executive Branch and the State Department." See *Orantes-Hernandez v. Smith*, 541 F. Supp 351, 355-56 n. 4 (N.D. CA. 1982).

<sup>11</sup> One commentator has written that "the whole political labyrinth of El Salvador can be explained only in reference to its traumatic history." See T. ANDERSON, *MATANZA* 159 (1971)

<sup>12</sup> See MARC HEROLD, *FROM RICHES TO "RAGS": FINANZKAPITAL IN EL SALVADOR, 1900-1980* (1980) (unpublished manuscript available in the University of New Hampshire Library).

<sup>13</sup> BERRY & PREUSCH, *supra* note 3, at 198.

<sup>14</sup> *Id.* at 199.

<sup>15</sup> The "fourteen families" (*catorce grande*) included some of El Salvador's richest citizens. In 1931, these families, composed of coffee plantation owners, produced 95.5% of the country's export earnings. They paid the country's taxes, and financed the construction of roads, ports and railroads. Simply put, "they owned the country." D. BROWNING, *EL SALVADOR* 365 (1975).

wealthy.<sup>16</sup> This tension erupted in 1932 in the massacre known as the *matanza*. The political problems that caused the *matanza* were complex, and must be examined in detail.

By the early 1930's, the Indians indigenous to the western and central areas of El Salvador were displaced by government soldiers. As a result, the Indians were forced to abandon farming and find jobs picking coffee beans on the large plantations run by the "fourteen families." Unfortunately, as coffee prices dropped on the world market due to the Great Depression, many Indian workers were fired by the plantation owners. Consequently in 1932, the unemployed and displaced Indians staged an uprising against the growers in the Izalco area of El Salvador.<sup>17</sup>

Simultaneously, political and social unrest was building in the larger cities of El Salvador. Revolutionary leader Augustin Farabundo Marti led a worker's revolt because the military government had refused to seat members of the Communist Party, despite the fact that they had been popularly elected in the January 1932 elections.<sup>18</sup> Determined to abort a coup attempt, the government captured and executed Marti and also crushed the Indian revolt. Subsequently, in order to avoid future unrest, the government massacred over 30,000 civilians in an event that has come to be known as the *matanza*.<sup>19</sup>

The legacy of the *matanza* continues today.<sup>20</sup> The chief Salvadoran guerilla army, which opposes the U.S.-backed Duarte regime, is known as FMLN, or the Farabundo Marti Liberation Front, after the revolutionary leader executed in the uprising.<sup>21</sup> Similarly, one of its battalions is named after Jose Feliciano Ama, who led the Indian rebellion of 1932.<sup>22</sup> The FMLN is not alone in memorializing *matanza* fighters, as the Salvadoran government has also retained vestiges of the massacre. General Maximiliano Hernandez Martinez, the government leader of the massacre and the country's dictator until 1944, lent his name to one of the most notorious of the conservative, government-controlled "death squads."<sup>23</sup>

<sup>16</sup> In fact, the differences between the poor and rich were so pronounced that a United States army officer visiting San Salvador in 1931 noted that "there seems to be nothing between the high priced cars and the oxcart with its barefoot attendant. There is no middle class. [A few] families own nearly everything in the country and live in regal style, the rest of the population has practically nothing." See Grieb, *The United States and the Rise of General Maximiliano Hernandez Martinez* 18 J. LAT. AM. STUD. 152 (1971).

<sup>17</sup> BERRY & PREUSCH, *supra* note 3, at 200.

<sup>18</sup> *Id.*

<sup>19</sup> Estimates of the dead vary. Anderson, in *MATANZA*, *supra* note 11, at 159, claims that the army did not have enough ammunition to kill more than 10,000 people. Others estimate the number of dead at 30,000. Regardless of the number of dead that one accepts, it is universally believed that the level of human destruction was vast. Most of the victims were shot in the head, after their thumbs had been tied behind their backs, a technique used by the "death squads" today. See T. ANDERSON, *THE WAR OF THE DISPOSSESSED: HONDURAS AND EL SALVADOR* 24 (1981); Chomsky, *Banana Empire: How America Controls the Caribbean*, *UTNE READER*, February 1987, at 67.

<sup>20</sup> Anderson has stated that the *Matanza* is yet another part of El Salvador's history that must be understood if one is to sort out the 1980's quagmire. See ANDERSON, *supra* note 11, at 159-60.

<sup>21</sup> The FMLN is composed of five smaller armies. These are: The Popular Liberation Force (FPL), People's Revolutionary Army (ERP), Armed Forces of National Resistance (FARN), Central American Revolutionary Worker's Party (PRTC), and Armed Forces of Liberation (FAL). See generally P. RUSSELL, *EL SALVADOR IN CRISIS* (1984).

<sup>22</sup> This battalion is stationed in the area of Izalco. BERRY & PREUSCH, *supra* note 3, at 200.

<sup>23</sup> The Maximiliano Hernandez Martinez Brigade first surfaced in the late 1970's.

These death squads, organized for the purpose of terrorizing civilians, began in 1968 as an official organ of the Ministry of Defense known as ORDEN (National Democratic Organization). They were set up in part by the C.I.A. and General Jose Alberto Medrano.<sup>24</sup> This single original death squad has since splintered into several distinct groups, each with varying degrees of governmental support. In addition to the Martinez Brigade, these groups include The White Warriors Union, the White Hand, Anti-Communist Forces for Liberation (Felange), the Organization for the Liberation from Communism (OLC), and the Secret Anti-Communist Army (ESA).<sup>25</sup>

The activities of the death squads are infamous, and it has been estimated that they have murdered several thousand civilians since their inception.<sup>26</sup> At one point it was estimated that the death squads murdered 300-500 civilians each month.<sup>27</sup> On December 2, 1980, the death squad rape and murder of four United States churchwomen forced the U.S. government to take notice of the human rights violations committed by the death squads.<sup>28</sup> In the wake of those murders, the United States suspended military and economic aid to El Salvador, but resumed it one month later.<sup>29</sup>

Despite the continued activities of the death squads, American aid has increased steadily since its resumption in 1981. In the 1984 Salvadoran general elections, for example, the United States spent over \$10 million to bring Jose Napoleon Duarte and his Christian Democratic Party to power.<sup>30</sup> By 1985, the U.S. was providing \$1.5 million a day to El Salvador in military and economic aid.<sup>31</sup> Total aid since the 1981 resumption is in excess of \$2 billion.<sup>32</sup> United States aid to El Salvador has become so extensive in fact that Alberto Bonilla, president of the Salvadoran Central Bank, noted that without the aid his country would have 20% negative economic growth.<sup>33</sup> He has further noted that El Salvador needs at least a billion dollars a year from the United States to maintain even a "relatively stable economy."<sup>34</sup> This aid has today reached the point that the United States even pays the salaries of some Salvadoran civil servants.<sup>35</sup>

### III. THE ILLEGALITY OF UNITED STATES INTERVENTION IN EL SALVADOR

This section will examine the legality of U.S. intervention in El Salvador under two domestic laws, the War Powers Resolution (Resolution), and the Foreign Assistance Act.

<sup>24</sup> See R. ARMSTRONG & P. WHEATON, *REFORM AND REPRESSION: U.S. POLICY IN EL SALVADOR 1950-1981*, at 4 (1982).

<sup>25</sup> See generally *id.*

<sup>26</sup> BERRY & PREUSCH, *supra* note 3, at 205.

<sup>27</sup> LaFeber, *Reagan and Revolution in Central America*, in *THE PRESIDENT'S WAR POWERS: FROM THE FEDERALISTS TO REAGAN* 190 (D. Caraley ed. 1986).

<sup>28</sup> BERRY & PREUSCH, *supra* note 3, at 207.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 208.

<sup>31</sup> *Id.* at 213.

<sup>32</sup> United States military aid was \$6 million in 1980, and this grew to \$35.5 million in 1981 and \$82 million in 1982. In addition, economic aid tripled from \$58.5 million to \$189 million in 1982. In fact, the U.S. sent more aid to El Salvador in 1981 and 1982 than to any other Latin American nation. However, that money still did not offset the \$1.5 billion of capital that left that country for Swiss bank accounts during those years, allegedly through Salvadoran government corruption. LaFeber, *supra* note 27, at 191.

<sup>33</sup> BERRY & PREUSCH, *supra* note 3, at 213.

<sup>34</sup> LATIN AMERICA REGIONAL REPORTS, 38 (July 13, 1984).

<sup>35</sup> BERRY & PREUSCH, *supra* note 3, at 214.

A. *United States Intervention in El Salvador is Illegal Under the War Powers Resolution*

In 1973, Congress passed the War Powers Resolution.<sup>36</sup> The Resolution was intended to "prevent secret, unauthorized military support activities and to prevent a repetition of many of the most controversial and regrettable actions in Indo-China" in the wake of Vietnam.<sup>37</sup> Furthermore, it was intended to reaffirm Congressional will to follow the "necessary and proper" clause of Article I section 8 of the Constitution.<sup>38</sup>

The Resolution has a number of important provisions. First, it requires the President to consult with Congress before "introducing United States Armed Forces into hostilities."<sup>39</sup> In addition to this "consultation" requirement, the resolution contains a much stronger "reporting" requirement.<sup>40</sup> This "reporting" provision requires that, in the absence of a declaration of war, in any instance in which United States Armed Forces are introduced into hostilities, or in situations where "imminent involvement in hostilities is clearly indicated by the circumstances", the President must "submit a written report to the Speaker of the House and President pro tempore of the Senate within 48 hours."<sup>41</sup> Furthermore, the report must set forth three things: the circumstances necessitating the introduction of troops, the Constitutional and legislative authority under which such introduction took place, and finally the estimated scope and duration of the hostilities or involvement.<sup>42</sup> If the President fails to comply with the reporting requirement, the troops must be withdrawn within 60 days.<sup>43</sup> This time limitation is waived only if Congress has declared war or granted an extension beyond the 60 day limit.<sup>44</sup>

Since President Reagan has failed to notify Congress of the extent of United States military and paramilitary support to the Salvadoran government, it seems that the War Powers Resolution is applicable to events surrounding United States intervention in El Salvador. However, the Reagan Administration argues that the Resolution does not apply based on two contentions.<sup>45</sup>

<sup>36</sup> 50 U.S.C. § 1541 *et seq.*, enacted Nov. 7, 1973. For good discussions of the War Powers Resolution, and the circumstances surrounding its passage see King & Leavens, *Curbing the Dog of War: The War Powers Resolution*, 18 HARVARD INT'L L.J. 55 (1977); Note, *Presidential Power to Make War*, 7 IND. L. REV. 900 (1974); Franck, *After the Fall: The New Presidential Framework for Congressional Control Over the War Power*, 71 AM. J. INT'L LAW 605 (1977).

<sup>37</sup> S.Rep. No. 220, 93d Cong., 1st Sess. 25, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2346.

<sup>38</sup> "It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure the collective judgments of both the Congress and 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." 50 U.S.C. § 1541(a) (1983). "Under Article I, section 8, of the Constitution, it is specifically provided that the Congress shall make all laws necessary and proper for carrying into execution, not only its own powers but also the other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof." 50 U.S.C. § 1541(b) (1983).

<sup>39</sup> 50 U.S.C. § 1542(1983).

<sup>40</sup> 50 U.S.C. § 1543(1983).

<sup>41</sup> 50 U.S.C. § 1543(d) (1983).

<sup>42</sup> 50 U.S.C. § 1543(a)(1) (1983).

<sup>43</sup> 50 U.S.C. § 1544(b) (1983).

<sup>44</sup> *Id.*

<sup>45</sup> Lobel & Ratner, *Is U.S. Military Intervention in Central America Legal?*, 12 HUMAN RIGHTS 22, 24 (Fall 1984).

First, the Administration contends that as a threshold matter, the Resolution simply does not apply to the general situation in Central America, or to El Salvador in particular.<sup>46</sup> Secondly, the Reagan Administration maintains that the troops stationed in El Salvador are not "involved in hostilities" or "facing imminent hostilities" as defined by the Resolution because the troops are not equipped for combat, do not go on patrol with Salvadoran forces, and remain in places of safety in San Salvador, El Salvador's capital.<sup>47</sup>

There is evidence that the Administration view of the War Powers Resolution is flawed. In 1984, eleven years after the original enactment of the Resolution, Congress issued a statement entitled *Congressional Feelings on the Introduction of the United States Armed Forces into Central America*.<sup>48</sup> Congress found that United States troops should not be introduced into the countries of Central America, and furthermore that any such introduction would have to comply with all of the terms of the War Powers Resolution.<sup>49</sup>

In addition, there are other problems with the Administration's assessment that the United States Armed Forces are not engaged in hostilities. First, the narrow interpretation of the Resolution urged by the President is not warranted. Legislative history, for example, defines the words "hostilities and imminent hostilities" to include any situation where troops could possibly be subject to the hostile acts of enemy troops.<sup>50</sup> Using this Congressional definition, U.S. troops in El Salvador are presently involved in "hostilities and imminent hostilities."

United States troops are on occasion engaged in combat and related activities in El Salvador. United States soldiers have been observed in the field, dressed and prepared for combat. For example, on February 2, 1983 the Administration admitted that an American soldier was shot in the leg while accompanying Salvadoran troops in a combat helicopter.<sup>51</sup> In addition, three U.S. servicemen were found to be "working directly" with a Salvadoran unit on a tactical operation.<sup>52</sup> There has also been at least one American soldier killed in combat in El Salvador. On March 31, 1987, Salvadoran guerrillas raided the army base at El Paraiso, killing 43 Salvadoran soldiers and one American adviser.<sup>53</sup> The American, Sgt. Gregory A. Fronius, was killed by mortar fire in the attack, and was the first U.S. military adviser to die in battle in El Salvador.<sup>54</sup>

Moreover, American soldiers have also been killed while not in battle in El Salvador. On May 25, 1983, Lt. Commander Albert A. Schaufelberger, Deputy Commander of the Military Assistance Group in El Salvador, was shot to death.<sup>55</sup> In addition, on June

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Act of Oct. 12, 1984. Pub. L. No. 98-473, Title 7, Sec 101 (b) in part, 98 Stat. 1942.

<sup>49</sup> *Id.* at (b)(1) and (b)(2).

<sup>50</sup> The word "hostilities" was substituted for the phrase "armed conflict" because it was considered broader in scope. It includes the danger of armed conflict. "Imminent hostilities" denotes a situation in which there is a clear potential either for such a state of armed conflict or actual armed conflict. See Lobel & Ratner, *supra* note 45, at 25.

<sup>51</sup> N.Y. Times, Feb. 20, 1983, § 6 (Magazine), at 35.

<sup>52</sup> *Id.*

<sup>53</sup> Aleman, *Salvador Raid Kills U.S. Aide, 43 Soldiers*, Boston Globe, April 1, 1987, at A1, col. 6; LeMoyné, *Rebels Kill 43 Salvador Troops and US Adviser*, N.Y. Times, April 1, 1987, at A1, col. 1; Cushman, Jr., *Hundreds of Trainers Stationed Around Globe*, N.Y. Times, April 5, 1987, at E2, col. 6; *Salvador's Rebels: Alive and Deadly*, NEWSWEEK, April 13, 1987, at 32.

<sup>54</sup> *Id.*

<sup>55</sup> Aleman, *supra* note 53, at A8, col 6. It is interesting to note that no one was ever convicted



19, 1985, guerrillas killed four U.S. Marines while they ate at a cafe in San Salvador.<sup>56</sup> Most recently, on March 26, 1987, a CIA agent was killed along with four Salvadoran soldiers when his American-made combat helicopter crashed on a training mission.<sup>57</sup> While these events may seem anecdotal, they are in fact evidence of extensive U.S. troop involvement in hostilities in El Salvador.

A second difficulty with the Reagan assertion that United States troops are not "involved in hostilities" in El Salvador is the fact that the Administration itself has previously gone on record with an opposite determination. A report by the Comptroller General of the United States, entitled *The Applicability of Certain Laws That Pertain to United States Military Involvement in El Salvador*, indicates that American military personnel currently stationed in that country are drawing special "hostile fire pay."<sup>58</sup> In order to receive such pay, a soldier must sign a monthly statement certifying that "[he] was subjected to hostile fire."<sup>59</sup> This fact, like the documented attacks on U.S. servicemen in El Salvador, supports the proposition that U.S. troops are indeed "involved in hostilities" under the Resolution.

In recognizing the foregoing inconsistencies in the Administration's Central American policy, Congress has expressed disdain for the apparent disregard of the War Powers Resolution. On May 1, 1981, 29 members of Congress, in *Crockett v. Reagan*, brought suit against the President and other United States government officials challenging "the legality of the U.S. presence in, and military assistance to, El Salvador."<sup>60</sup>

The principal contention of the plaintiffs was that the United States military has been introduced into situations in El Salvador where "imminent involvement in hostilities" has been, and continues to be, "indicated by the circumstances."<sup>61</sup> Consequently, President Reagan's failure to report to Congress is a violation of the War Powers Resolution, and also of the "necessary and proper clause" of the Constitution.<sup>62</sup> Plaintiffs sought an injunction directing the U.S. government to withdraw all members of the

of the killing. Originally a Salvadoran, Pedro Daniel Alvarado, was arrested in the murder. He was finally released, after he was tortured, on the basis that he was not involved. See generally Tyler, *U.S. Faults Arrest of Salvadoran*, Wash. Post, Nov. 12, 1983 at A1, col. 2; *Salvador Suspect is Defended*, N.Y. Times, Nov. 13, 1983 at A13, col. 5.

<sup>56</sup> Aleman, *supra* note 53, at A8, col. 6.

<sup>57</sup> See *Former Scituate Man Dies in Crash of Salvadoran Military Helicopter*, Boston Globe, Mar. 31, 1987 at A78, col. 1; *American Dies in Copter Crash*, N.Y. Times, April 1, 1987, at A10, col. 6.

<sup>58</sup> COMPTROLLER GENERAL OF THE UNITED STATES, *APPLICABILITY OF CERTAIN LAWS THAT PERTAIN TO UNITED STATES MILITARY INVOLVEMENT IN EL SALVADOR*, (1982); COMPTROLLER GENERAL OF THE UNITED STATES, *APPLICABILITY OF CERTAIN LAWS THAT PERTAIN TO UNITED STATES MILITARY INVOLVEMENT IN EL SALVADOR* (1984).

<sup>59</sup> *Id.*

<sup>60</sup> *Crockett v. Reagan*, 558 F. Supp. 893 (D. D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983). Similarly, *taxpayers* have also sought to challenge U.S. troop involvement in El Salvador. It has been held that they have no standing on which to challenge the Administration's Central American policies. *Clark v. U.S.*, 609 F. Supp. 1249 (D. Md. 1985).

<sup>61</sup> 558 F. Supp. at 816.

<sup>62</sup> *Id.* at 896. Though it was ancillary to their major argument in *Crockett*, plaintiffs also alleged that violations of human rights by the Government of El Salvador are widespread, and that U.S. military assistance consequently violates the Foreign Assistance Act of 1961. *Id.* at 902. For a more complete discussion of the Foreign Assistance Act and its effect on U.S. military intervention in El Salvador, see *infra* notes 74-115 and accompanying text.

United States Armed Forces, weapons, military equipment and aid for El Salvador and to prohibit any future aid.<sup>63</sup>

The district court dismissed all of the plaintiffs' claims, without discussing the merits of the suit.<sup>64</sup> The court held that the issues presented by the plaintiffs constituted non-justiciable political questions.<sup>65</sup> The court also held that the equitable discretion doctrine, which advocates "strict judicial constraint in suits brought by members of Congress concerning matters of State," applied.<sup>66</sup> The decision of the court in *Crockett* was upheld on appeal.<sup>67</sup>

Although plaintiffs' claims were dismissed, it is important to note that the court in *Crockett* indicated that its decision would not necessarily preclude future judicial review in similar cases.<sup>68</sup> The *Crockett* case simply presented too many "subtleties of fact-finding" regarding the involvement of U.S. troops in hostilities, and as such was not conducive to judicial scrutiny.<sup>69</sup> Other cases, the court noted, might present a clearer set of facts that the court could investigate easier.<sup>70</sup> The *Crockett* court cited the war in Indo-China as one example of the type of conflict that was "less elusive."<sup>71</sup> U.S. involvement in the Vietnam conflict "had cost \$100 billion and 1 million lives."<sup>72</sup> Thus, it would be "absurd" for a court to deny, given these facts, that U.S. armed forces were involved in "hostilities," as defined by the War Powers Resolution.<sup>73</sup>

While the *Crockett* court felt that the situation in El Salvador presented too many "subtleties of fact-finding," in *Orantes-Hernandez v. Smith*,<sup>74</sup> a district court took judicial notice of the atrocities in El Salvador, noting:

. . . [T]he violent conditions in El Salvador are a matter of public record and are corroborated by all available accounts. The Court therefore believes that it can take judicial notice of the following facts without having to "second guess" the Executive Branch's analysis of events in El Salvador . . . (1) El Salvador is currently in the midst of a widespread civil war; (2) the continuing military actions . . . create a substantial danger of violence to civilians residing in El Salvador; (3) both governmental forces and guerrillas have been responsible for political persecution and human rights violations in the form of unexplained disappearances, arbitrary arrests, torture, and murder.<sup>75</sup>

<sup>63</sup> *Id.* at 897.

<sup>64</sup> *Id.* at 903.

<sup>65</sup> *Id.* at 898.

<sup>66</sup> *Id.* at 903. The equitable discretion doctrine was articulated in *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881-82 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981).

<sup>67</sup> 720 F. Supp. 1355.

<sup>68</sup> 558 F. Supp. at 899.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 898.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 898-99.

<sup>73</sup> *Id.*

<sup>74</sup> *Orantes v. Smith*, *supra* note 10 at 351. (Plaintiff brought suit against the Immigration and Naturalization Service (INS) regarding the INS's alleged detention, processing and deportation of Salvadoran aliens, based on the failure of the INS to grant them political asylum. The court held that the Salvadorans were entitled to a preliminary injunction prohibiting the INS from engaging in those practices.)

<sup>75</sup> *Id.* at 358. The ability of courts to take judicial notice of repression in foreign countries is well-established. *Id.* at 358-59, n.8.

In sum, it is clear that U.S. troops are involved in hostilities in El Salvador, and that this involvement runs afoul of the War Powers Resolution. The Resolution was intended to force the President to notify Congress of any U.S. troop involvement so as to prevent covert military actions, and Congress defined "hostilities" broadly enough to include the situation in El Salvador. However, the Administration argues that U.S. troops are not involved in hostilities in El Salvador, though officials have repeatedly contradicted themselves. This has included admitting in the past that troops are under enemy fire. In addition, American troops have died in battle in El Salvador. Clearly, under the withdrawal provision of the War Powers Resolution, United States troops, including advisers, must be withdrawn from El Salvador.

B. *United States Intervention in El Salvador is Illegal Based on the Human Rights Violations of the Duarte Regime*

In 1961, Congress passed the Foreign Assistance Act, and the 1973 amendments added section 502b. The Foreign Assistance Act was designed to prevent the United States government from providing "security assistance" to foreign countries that "engage in the violation of human rights."<sup>76</sup> Section 502b currently reads "[n]o security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."<sup>77</sup>

Under the current 502b criteria, El Salvador should not receive aid from the United States. The "security assistance" currently provided by the U.S. to El Salvador, in the form of weapons and personnel, is against the spirit of 502b.<sup>78</sup> Furthermore, this assistance to El Salvador continues despite the fact that section 502b is being violated due to the continued human rights violations by the El Salvadoran government.

The Salvadoran government, officially through the use of the armed forces and unofficially through the death squads, engages in a "consistent pattern of gross violations of internationally recognized human rights."<sup>79</sup> For example, the government has recently

<sup>76</sup> 22 U.S.C. § 2304 *et seq.* (1982). 502(b) was added to the Foreign Assistance Act of 1961 in 1973 (Pub. L. No. 93-189, § 32, 87 Stat. 714, 733 (1973)), has been codified as amended in scattered sections of 22 U.S.C.). By stating that the promotion of human rights should be "a principal goal of the foreign policy of the United States," this provision elevates the protection of human rights to a level heretofore unattained in United States foreign policy. 22 U.S.C. § 2304(a)(1). The provision has been amended twice since 1974, and each time Congress strengthened the language of 502(b). In 1976, the "sense of Congress" standard was replaced by the words "the policy of the United States," which still did not amount to a binding legal requirement. Int'l Sec. Ass. and Arms Export Act of 1976, Pub. L. No. 94-329, § 301, 90 Stat. 729, 748 (1976). So, in 1979 Congress deleted the newly added "it is the policy of the United States" language.

<sup>77</sup> 22 U.S.C. 2304 (a)(2) (Supp. V 1981).

<sup>78</sup> The definitions for § 502(b) are provided in 22 U.S.C. § 2304(d). According to that provision in the Code, "gross violations of internationally recognized human rights" includes "torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the rights to life, liberty or the security of the person." *Id.* In addition, the term "security assistance" means "military assistance, education or training, or economic assistance." For a discussion of the extent of the current assistance provided by the United States to the Government of El Salvador, see *supra* notes 32-35, and accompanying text.

<sup>79</sup> According to interviews with released prisoners, the Salvadoran government tortures civilians using electric shock, rape, murder, sleep deprivation of a week or more, the use of a torture hood called a *capucha*, lit cigarettes and the twisting of limbs. See R. HILLER, PRELIMINARY REPORT TO THE

begun strafing civilians in areas believed to be rebel strongholds in attacks that have brought international condemnation.<sup>80</sup> This is part of the "drying up" strategy of the Salvadoran military, a technique that is designed to end peasant support for the insurgents by first bombing civilian areas, then "rescuing" the victims by ferrying them out and interrogating them.<sup>81</sup> Indeed, large groups of civilians seem to be the most frequent target of the Salvadoran Army.<sup>82</sup>

In *Orantes-Hernandez v. Smith*, the court discussed some of the Salvadoran military attacks on civilians in detail.<sup>83</sup> For example, one plaintiff in the suit recounted the murders of her uncles, and the torture of her parents.<sup>84</sup> Another witnessed the murder of seven friends.<sup>85</sup> The court noted that this testimony was both "credible" and "well-corroborated"<sup>86</sup> and that the "pervasive and arbitrary violence in El Salvador has been amply documented."<sup>87</sup>

However, the Salvadoran government's litany of human rights abuses does not end with attacks on Salvadoran civilians.<sup>88</sup> The government also terrorizes non-Salvadoran citizens.<sup>89</sup> These actions, including rape, torture, and murder, like the attacks on groups

LAWYER'S COMMITTEE FOR HUMAN RIGHTS 8 (1985). It has been estimated by a Central American human rights organization, *Tutela Legal*, that in 1985 there were more than 240 murders and 81 kidnappings committed by the government armed forces and death squads. In addition, there were 371 civilian victims of indiscriminate attacks by the armed forces and another 1,045 victims of miscellaneous attacks. See WATCH COMMITTEES, CRITIQUE: REVIEW OF THE UNITED STATES DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1985 24, 25 (1986). See also *El Salvador*, 30 I.C.J. REVIEW 11, 13 (July 1983); LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, FREE FIRE: A REPORT ON HUMAN RIGHTS IN EL SALVADOR (1984). Ahlberg, *El Salvador's Duarte is a Prisoner of War*, UTNE READER, April 1987, at 13. LeMoyné, *In Salvador Village, Can There be Peace of Mind?*, N.Y. Times, Mar. 20, 1987, at A6, col. 3.

<sup>80</sup> Spektor, *supra* note 4, at 11. See also Jensen, *The Bombing of El Salvador*, UTNE READER, November 1986 at 85; LeMoyné, *Salvadoran Air Raid Reported in Town*, N.Y. Times, Feb. 1, 1987, at A11, col. 1; *El Salvador*, 37 I.C.J. REVIEW 9, 10 (Dec. 1986).

<sup>81</sup> *Id.* See also AMNESTY INTERNATIONAL STATEMENT FOR HEARINGS ON CENTRAL AMERICAN COUNTER-TERRORISM ACT OF 1985, before the House Foreign Affairs Comm. 99th Cong., 1st Sess. (Nov. 19, 1985) at 10-11.

<sup>82</sup> Ambassador Deane R. Hinton has noted "since 1979 perhaps as many as 30,000 Salvadorans have been killed illegally, that is, not in battle. Less than 1500 of these 'crimes against the person,' that is homicide, assault and battery, kidnapping, rape, torture, have been prosecuted . . . . Most striking of all, there have been less than 200 convictions for the crimes." UNITED STATES DEPARTMENT OF STATE, REPORT ON THE SITUATION IN EL SALVADOR WITH RESPECT OF THE SUBJECTS COVERED IN SECTION 728 OF THE INTERNAL SECURITY AND DEVELOPMENT COOPERATION ACT OF 1981, Pub. L. No. 97-113, Jan. 21, 1983, Appendix D at 4. Other estimates put the number of civilians murdered at 40,000. *El Salvador*, *supra* note 80, at 10. For a thorough discussion of attacks by Salvadoran troops on civilians, see LAWYER'S WATCH COMMITTEE, HUMAN RIGHTS DISMISSED (1986).

<sup>83</sup> 541 F. Supp. at 356-58.

<sup>84</sup> *Id.* at 356.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 357.

<sup>87</sup> *Id.* at 358.

<sup>88</sup> In addition to harassing civilians, the Salvadoran Army has kidnapped 30 mayors who supported the guerrillas, though there is no evidence that they were harmed. *El Salvador*, *supra* note 80, at 11.

<sup>89</sup> For good general discussions of human rights violations in El Salvador, see LAWYER'S COMMITTEE FOR HUMAN RIGHTS, CRITIQUE: REVIEW OF THE DEPT. OF STATE'S COUNTRY REPORTS OF HUMAN RIGHTS PRACTICES FOR 1985 24-30 (1986); THE REAGAN ADMINISTRATION RECORD ON HUMAN RIGHTS IN 1985, 53-60 (1986); SUPPLEMENTARY INFORMATION ON THE NOVEMBER 1985 UNITED NATIONS REPORT ON THE SITUATION OF HUMAN RIGHTS IN EL SALVADOR (1986).

of civilians, often go unpunished.<sup>90</sup> For example, four Dutch journalists were murdered in 1982.<sup>91</sup> Three American labor advisors were shot to death in 1981.<sup>92</sup> Clergy have been tortured and murdered.<sup>93</sup> Recently, a United States embassy employee was raped and tortured by Salvadoran Treasury police.<sup>94</sup> The most notorious attack on U.S. citizens was the torture and murder of four United States churchwomen.

The four nuns, Maura Clarke, Ita Ford, Dorothy Kazel and Jean Donovan were tortured and murdered on December 2, 1980. An investigation began almost immediately and on April 29, 1981, after intense pressure from the U.S. embassy, the Salvadoran government arrested six National Guardsmen.<sup>95</sup> The men were found guilty by a Salvadoran jury of aggravated homicide, robbery, and destruction of property at the conclusion of the five hour trial, even though the chief defense lawyer later revealed that

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<sup>90</sup> For the best account of the crimes that resulted in no convictions, see HUMAN RIGHTS DISMISSED, *supra* note 82, which is devoted entirely to an analysis of unresolved cases. The International Court of Justice has noted that "[o]ne of the factors contributing to the flourishing of human rights abuses in El Salvador is the continuing failure of the judicial system to prosecute and punish criminal acts by members of the Salvadoran Armed Forces." *El Salvador*, *supra* note 80, at 10.

<sup>91</sup> The four Dutch journalists, Jacobus Koster, Jan Kuiper, Han ter Laag, and Johannes Wilamson, were shot to death on March 17, 1982 by Salvadoran army troops as they travelled to rebel-controlled territory to film a television documentary on life in rural El Salvador for the Dutch Interchurch Broadcasting Co. (IKON). See R. BONNER, WEAKNESS AND DECEIT: U.S. POLICY AND EL SALVADOR (1984); Simons, *Dutch Gov't Report Questions El Salvador's Account of Killings*, Wash. Post, April 15, 1982, at A35, col. 1.

<sup>92</sup> On January 3, 1981, 3 members of the American Institute for Free Labor Development (AIFLD), Michael Hammer, Mark David Pearlman and Jose Rudolfo Viera, were shot to death at the San Salvador Sheraton as they ate dinner. Suspects were arrested in February 1986, and have been convicted and sentenced to 30 years in prison. However, the men identified by the "triggermen" as the intellectual authors of the crime, Capt. Ernesto Alfonso Avila and Lt. Isidrio Lopez Sibirian of the Salvadoran Armed Forces, have not been prosecuted for any crime. It is widely known, however, that Salvadoran military officials took part in the crimes. See *e.g.*, *El Salvador Promotes Officers Tied to Killings*, N.Y. Times, Jan. 16, 1986, at A7, col. 1; *Salvador Arrest Reported in Killing of Americans*, N.Y. Times, December 20, 1983, at A9, col. 1.

<sup>93</sup> On November 21, 1984, Rev. David Ernesto Fernandez, a Lutheran Minister, was shot to death after having been tortured. See *Salvadoran Suspect Minister Slain by Death Squad*, Dallas Morning News, Nov. 25, 1984, at A1, col. 1. Another clergyman, the Archbishop of San Salvador, Oscar Arnesto Romero, was assassinated on March 24, 1980. One of the most outspoken and respected Salvadoran church leaders, Archbishop Romero was shot in the head as he said mass in the Divine Providence Hospital in San Salvador. The murderer has since been identified as Walter Antonio Alvarez, a Salvadoran National Guardsman who claimed that he acted on instructions from Roberto d'Aubuisson, President of the Arena Party. Unfortunately for investigators, Alvarez was shot to death while watching a soccer game in September 1981, and his assailant escaped unharmed. The case concerning the Archbishop's murder was subsequently closed. See generally Pyes, *Who Killed Archbishop Romero: D'Aubuisson's Role*, NATION, Oct. 13, 1984, at 337; Bennett, *Duarte Ties d'Aubuisson to Archbishop's Murder*, Boston Globe, Nov. 24, 1987, at A1, col. 1.

<sup>94</sup> On September 16, 1985 Graciela Menedez de Iglesias, a Salvadoran employee of the United States embassy in San Salvador, and an agriculture specialist for the Agency for International Development, was abducted, raped and tortured by Salvadoran Treasury police. There has been no investigation of Ms. Iglesia's mistreatment. See McCartney, *Ex U.S. Employee Alleges Torture*, Wash. Post, March 11, 1986, at A16, col. 1.

<sup>95</sup> Colindres Aleman, Daniel Ramirez, Salvador Franco, Francisco Recinos, Carlos Palacios, and Jose Canjura were charged with the crime. The United States withheld \$19 million, 1/3 of that year's package, until a verdict was reached. HUMAN RIGHTS DISMISSED, *supra* note 82, at 63.

he was part of a conspiracy to protect high ranking military and government officials from being implicated in the murders.<sup>96</sup>

In the wake of the murders and the growing awareness and interest concerning Salvadoran human rights violations in general, Congress sought to further strengthen section 502b by making it directly applicable to the situation in El Salvador.<sup>97</sup> Congress found that the Executive Branch had failed to apply section 502b to a single foreign government engaged in "gross violations of human rights," and thus country-specific legislation was the only way that Congress could gain cooperation from the President.<sup>98</sup> Consequently, in the Internal Security and Development Cooperation Act of 1981, Congress included several sections that formulated specific guidelines for continuing aid to El Salvador.<sup>99</sup> Most important of these is the section 728 certification provision, which mandates a semi-annual review of El Salvador's human rights record.<sup>100</sup>

Under section 728 of the Act, the President can extend military assistance to El Salvador only if he certifies in writing to the Speaker of the House of Representatives and to the Chairman of the Senate Committee on Foreign Relations every six months that the Salvadoran government is taking steps to remedy the human rights situation.<sup>101</sup> These steps include controlling the armed forces so as to stop torture, implementing land reform, and allowing all significant political parties to participate in the political process through free elections.<sup>102</sup> Section 728 differed significantly from the broader

<sup>96</sup> The lawyer, Salvador Antonio Ibarra, was tortured when he first threatened to go public with the conspiracy information. A classified report prepared for the State Department in 1983 by former Federal District Judge Harold E. Tyler found that the Salvadoran government had sought to "conceal the perpetrators from justice" through a pair of "sham" investigations that would "create a written record absolving the Salvadoran security forces of responsibility for the murders." *Salvadoran Lawyer Charges Cover-up in Slaying of U.S. Nuns*, N.Y. Times, May 6, 1985, at A1, col. 5.

<sup>97</sup> See SALVADORAN REFUGEES IN HONDURAS: HEARINGS BEFORE THE SUBCOMM. ON INTER-AMERICAN AFFAIRS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 97th Cong., 1st Sess. (1981); U.S. POLICY OPTIONS IN EL SALVADOR: HEARINGS AND MARKUP ON H. CON. RES. 197 AND H. CON. RES. 212 BEFORE THE HOUSE COMM. ON FOREIGN AFFAIRS AND ITS SUBCOMM. ON INTER-AMERICAN AFFAIRS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 97th Cong., 1st Sess. (1981).

<sup>98</sup> See Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 256 (1982).

<sup>99</sup> The intent of 728 was to tighten Congressional control over U.S. policy in El Salvador, presumably because of concern about the human rights situation. 39 CONG. Q. WEEKLY REP. 2497 (Dec. 19, 1981); 22 U.S.C. § 2370 (1982) and 22 U.S.C. § 2370 (note)(1982).

<sup>100</sup> The provision directed the President to determine whether the government in El Salvador:

- (1) is making a concerted and significant effort to comply with internationally recognized human rights;
- (2) is achieving substantial control over all elements of its own armed forces, so as to bring an end to the indiscriminate torture and murder of Salvadoran citizens by these forces;
- (3) is making continued progress in implementing essential economic and political reforms, including the land reform program;
- (4) is committed to the holding of free elections at an early date and to that end has demonstrated its good faith efforts to begin discussions with all major political factions in El Salvador which have declared their willingness to find and implement an equitable political solution to the conflict, with such solution to involve a commitment to:
  - (A) a renouncement of further military and paramilitary activity; and
  - (B) the electoral process with internationally recognized observers.

728 (d), codified at 22 U.S.C. § 2370 (note) (1982).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

provisions of section 502b. First, it applied specifically to one country, El Salvador. Second, it prohibited aid until a positive certification of human rights advancements was made. It thus presumed that human rights violations do exist in El Salvador, and placed the burden on the President to demonstrate that he was complying with the provisions of section 502b by forcing the Salvadoran government to adhere to the restrictions of section 728. Unfortunately, just as the President has failed to meet the criteria of 502b, so has he failed to meet the criteria of 728.

First, the President failed to comply procedurally with section 728. Some of the recent certifications have been inadequate under the statute because they were made by Secretary of State George Schultz, rather than by the President as required by law.<sup>103</sup> Secretary of State Schultz signed the report, and transmitted it "under the President's authority" to the Speaker of the House.<sup>104</sup> However, the effect of this is uncertain, since the statute does not specify whether or not the certification is invalid if it is in fact made, but not by the President.<sup>105</sup>

Second, the President has failed to comply substantively with section 728. Although the President has continued to certify that human rights conditions in El Salvador are improving, in fact they are not.<sup>106</sup> In short, the certifications are false.<sup>107</sup> Patricia Derian, former Assistant Secretary of State for Human Rights under President Carter, after visiting El Salvador recently, wrote that "every six months the President certifies that progress is being made on human rights in El Salvador. Progress is not being made."<sup>108</sup>

Derian is not alone in her assessment of the situation. Senator Christopher Dodd, the author of section 728, declared that President Reagan's certifications are "unwarranted" and that "the Administration will certify regardless of the circumstances."<sup>109</sup> He further noted "certification is a farce, it's irrelevant. We've spent \$748 million there in three years . . . and what do we have to show for it? The military and political situations aren't improving at all."<sup>110</sup>

Thus, it is clear that the Reagan Administration considers the certification provision of section 728 unimportant.<sup>111</sup> For example, Alexander Haig, while Secretary of State,

<sup>103</sup> "The *President* shall certify . . . (emphasis added). *Id.*

<sup>104</sup> N.Y. Times, Jan. 22, 1983, at A1, col. 1.

<sup>105</sup> 22 U.S.C. § 2370 (note)(1982).

<sup>106</sup> The United Nations has found that "cruel, inhuman and degrading treatment continues, especially in the illegal interrogations of political prisoners, often giving rise to confessions which do not reflect the truth." U.N. Doc. A/40/818 at paragraph 169. Furthermore, the on-going "human rights nightmare is likely to continue." LAWYER'S COMMITTEE FOR HUMAN RIGHTS, SITUATION OF HUMAN RIGHTS IN EL SALVADOR, 3 (1985).

<sup>107</sup> As recently as 1985, death squads still killed over 30 people a month. LAWYER'S COMMITTEE FOR HUMAN RIGHTS, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1985, 54 (1986). For other criticisms of the Reagan Administration's certifications see e.g., *Certifying Evil*, NATION, Jan. 22, 1983 at 67; Cohn, *U.S. Group Cites Torture, Starvation: Salvadoran Health Abuses Reported*, Wash. Post, January 21, 1983, at A24, col. 1; Dickey, *Expected Certification for El Salvador Based on Mixed Record*, Wash. Post, Jan. 21, 1983, at A19, col. 1; Marcus, *A.C.L.U. Disputes Reagan Assessment of Conditions in El Salvador*, Wash. Post, July 9, 1982, at A4, col. 1.

<sup>108</sup> Derian, *El Salvador: This is Progress?*, Wash. Post, Feb. 6, 1983, at B7, col. 3.

<sup>109</sup> 41 CONG. Q. WEEKLY REP. 217 (Jan. 29, 1983).

<sup>110</sup> N.Y. Times, Feb. 29, 1983, § 6 (Magazine) at 34-36. See also Moody, *El Salvador: Riddled with Fear*, NEWSWEEK, Nov. 16, 1987, at 44; Bennett, *New Salvadoran Killings Fuel Fears of Death Squads' Return*, Boston Globe, Nov. 15, 1987, at A1, col. 5.

<sup>111</sup> Amb. Deane R. Hinton, admits that "when national interests are thought to be at stake, the

noted that human rights issues in Central America were "sissy stuff, fancy pants stuff."<sup>112</sup> Assistant Secretary of State Elliot Abrams also sought to downplay the importance of human rights violations in El Salvador, saying "it is a tactic every time there is a battle and a significant number of people are killed to say that they're victims of human rights abuses."<sup>113</sup> President Reagan himself thinks that the semi-annual human rights certifications are "unnecessary"<sup>114</sup>, and has consistently told the U.S. Ambassador to the United Nations to veto resolutions of the U.N. Commission on Human Rights condemning human rights violations in El Salvador.<sup>115</sup>

Therefore, as a result of his long-standing dislike of the section 728 certification provision, President Reagan refused to sign a bill, H.R. 4042, continuing section 728 when it expired on November 30, 1983, invoking a "pocket veto."<sup>116</sup> Consequently, the sponsor of the reenactment bill, Rep. Michael Barnes, along with 38 other members of Congress, filed suit in *Barnes v. Carmen* challenging the validity of the President's use of a pocket veto during a congressional recess.<sup>117</sup>

Plaintiffs sought a declaratory judgment that H.R. 4042, which was passed by both houses of Congress but not signed by President Reagan, became a validly enacted law.<sup>118</sup> They also sought a writ of mandamus or a permanent injunction directing the Executive Clerk of the White House to publish H.R. 4042 as a public law.<sup>119</sup>

In *Barnes v. Carmen*, the district court concluded that defendants were entitled to summary judgment because the pocket veto made during the congressional recess was a valid exercise of Presidential power under the Constitution.<sup>120</sup> Relying on the Supreme Court decision in *The Pocket Veto Case*, the court found that a pocket veto is a permissible political tool of the President.<sup>121</sup> Furthermore, the Court rejected the plaintiffs' claims that recent lower court decisions "so attenuated *Pocket Veto* as to deprive it of controlling force."<sup>122</sup>

The plaintiffs appealed the lower court's decision.<sup>123</sup> The appellate court held first that plaintiffs alleged an injury sufficient to create standing, namely an injury to the law-making powers of the two houses of Congress.<sup>124</sup> Second, the court held that the dispute was not beyond the court's authority and that the court should not shirk its duties simply because the parties in the lawsuit were from coordinate branches of government.<sup>125</sup>

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Reagan Administration is less likely to make a finding of no progress in El Salvador, even if that means ignoring obvious human rights abuses." See Wash. Post, Jan. 19, 1983, at A1, col. 1.

<sup>112</sup> N.Y. Times, Oct. 19, 1982, at A22, col. 3.

<sup>113</sup> *Nightline*, (ABC Television broadcast, Feb. 18, 1985) (transcription on file at Third World Law Journal office).

<sup>114</sup> 16 WEEKLY COMP. RES. DOC. 1627 (Nov. 30, 1983).

<sup>115</sup> See M. CRAHAN, HUMAN RIGHTS AND BASIC NEEDS IN THE AMERICAS, 334 (1982).

<sup>116</sup> H.R. 4042, 98th Cong., 1st Sess., 129 CONG. REC. H7777 (daily ed. Sept. 30, 1984).

<sup>117</sup> *Barnes v. Carmen*, 582 F. Supp. 163 (D. D.C. 1984), *rev.*, 743 F.2d 45, *announced*, 759 F.2d 21 (D.C. Cir. 1985).

<sup>118</sup> *Id.* at 164.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 168.

<sup>121</sup> *Id.* at 166-68, citing *The Pocket Veto Case*, 279 U.S. 655 (1929).

<sup>122</sup> *Id.* at 167-68, citing *Wright v. United States*, 302 U.S. 583 (1938), *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

<sup>123</sup> *Barnes v. Kline*, 743 F.2d 45, *announced* 759 F.2d 21 (D.C. Cir. 1985).

<sup>124</sup> 759 F.2d at 26.

<sup>125</sup> *Id.* at 28-30.



Third, the court held that the adjournment of the Ninety-Eighth Congress at the end of the first session did not prevent the return of H.R. 4042 to Congress, so the circumstances needed for the Constitutional use of a pocket veto were not present.<sup>126</sup>

Citing those three factors, the appellate court reversed the lower court's decision, and issued an order to the district court to enter judgment for appellants.<sup>127</sup> Thus, despite President Reagan's attempted veto, H.R. 4042 became law, and the certification provisions of section 702b of the Foreign Assistance Act were reinstated, and remain in force.<sup>128</sup> The *Barnes* decision is significant because the court did not hesitate in rendering a decision that could be seen as anti-Administration. The appellate court in *Barnes* could have applied the equitable discretion doctrine, as the *Crockett* court had done, and thus avoided addressing the issues presented altogether. However, the court did not "shirk its duties", and so provided the plaintiffs with the relief sought.

There is no remedy under Section 728 if the certifications are proven to be unwarranted. However, if the President fails to make "a certification at the specified time" then the statute dictates the procedures to be followed.<sup>129</sup> The President shall immediately:

- (1) Suspend all expenditures of funds and other deliveries of assistance to El Salvador . . . .
- (2) Withhold all approvals for use of credits and guarantees for El Salvador . . . .
- (3) Suspend all deliveries of defense articles, defense services, and design and construction services to El Salvador . . . .
- (4) Order the prompt withdrawal from El Salvador of all members of the Armed Forces performing defense services, conducting international military education and training activities, or performing management functions under . . . the Foreign Assistance Act . . . .<sup>130</sup>

Congress clearly intended that U.S. aid to El Salvador be severed in the event that any Section 728 human rights certification was not forthcoming. It may be argued that a false certification would also trigger those provisions, and that because the weight of the evidence indicates that the current certifications are indeed false, that all U.S. aid to El Salvador should be stopped, pending Congressional investigation. If aid was stopped pursuant to section 728, at least the government of El Salvador would be forced to prove affirmatively that it was making a "concerted and significant effort to comply with internationally recognized human rights."<sup>131</sup> In short, until the Duarte regime has proven conclusively that it is complying with section 728, U.S. aid to El Salvador should cease in accordance with domestic United States law.

#### IV. THE HISTORY OF UNITED STATES INVOLVEMENT IN NICARAGUA

United States involvement in the affairs of Nicaragua began in the mid-1830's. In 1837 President Martin Van Buren sent an emissary to Nicaragua to negotiate a U.S. right-of-way across a proposed interoceanic canal through that country. However, the

<sup>126</sup> *Id.* at 30-41.

<sup>127</sup> *Id.* at 41.

<sup>128</sup> *Id.*

<sup>129</sup> 22 U.S.C. § 2370 (note) at (c)(1)-(4).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at (d)(1).

talks collapsed and the canal project was never completed.<sup>132</sup> After the failure of the canal, the United States had little contact with Nicaragua until the 1850's. In 1854, after a group of Nicaraguans attacked the United States Foreign Ministry in San Juan del Norte, the U.S. warship *Cayne* shelled that city. In addition, the U.S. military invaded Nicaragua four times in the 1850's.<sup>133</sup>

In 1912, United States Marines once again invaded Nicaragua, this time to support a Conservative Party revolt against President Jose Santos Zelaya, whose political stance was anti-United States. The Marines occupied Nicaragua for 21 years.<sup>134</sup> It was this occupation by the U.S. that bred the current political tensions between the United States and Nicaragua.

In 1931, finding the U.S. intervention unbearable, Augusto Cesar Sandino organized an army of peasants and farmers that had the support of many Nicaraguans.<sup>135</sup> His army, known as the Defensive Army of National Sovereignty, eventually defeated the United States Marines.<sup>136</sup> However, before the Marines left in 1933, they established the Nicaraguan National Guard as a "watchdog", and handpicked Anastasio Somoza Garcia as its leader.<sup>137</sup> Somoza saw himself as a representative of the U.S. government, and was considered a close ally of Washington.<sup>138</sup> Somoza subsequently ousted the President of Nicaragua, Juan Baustista Secasa in 1936, and appointed himself dictator. Establishing a regime that became known for its ruthlessness, Somoza ruled the country for twenty years until his assassination in 1956.<sup>139</sup> Somoza's eldest son, Luis Somoza Debayle, became dictator and held that position until his death in 1967. At that point, his brother Anastasio Somoza Debayle became the Nicaraguan head of state.

By 1967, the Somoza family had become Nicaragua's largest landholder. Agrarian reforms were nonexistent, with only 7% of the country's surface farmed, and over one-half of that land was owned by Somoza.<sup>140</sup> In addition, in a country where the average

<sup>132</sup> See BERRY & PREUSCH, *supra* note 3, at 271.

<sup>133</sup> The years were 1850, 1853, 1854 and 1857. In addition, U.S. Marines landed in Nicaragua in 1894, 1896, 1898, 1899 and 1910. Chomsky, *supra* note 19, at 72.

<sup>134</sup> The United States also supplied financial advisors to manage Nicaragua's fiscal affairs during the time that troops were there. *Id.*

<sup>135</sup> For a general discussion of the life and times of Sandino, see G. SELSER, SANDINO, (1981). For a critical discussion of Sandino and his followers, and their impact on the current unrest in Nicaragua, see D. HODGES, INTELLECTUAL FOUNDATIONS OF THE NICARAGUAN REVOLUTION, (1987).

<sup>136</sup> Sandino became known as the "General of Free Men," in honor of his role in the "liberation of Nicaragua from the imperialist United States." Y. DILLING & P. WHEATON, NICARAGUA: A PEOPLE'S REVOLUTION, 1-3 (1980).

<sup>137</sup> See E. CRAWLEY, OLD DICTATORS NEVER DIE: A PORTRAIT OF NICARAGUA AND THE SOMOZA DYNASTY (1979); R. MILLETT, THE GUARDIANS OF THE DYNASTY: A HISTORY OF THE U.S.-CREATED GUARDIA NACIONAL DE NICARAGUA AND THE SOMOZA FAMILY, (1977).

<sup>138</sup> President Franklin D. Roosevelt once said about Somoza: "He's a sonofabitch, but he's ours." TIME, November 15, 1948, at 43. Somoza said in 1934:

I have come from the United States Embassy where I have had a conference with Ambassador Arturo Bliss, who has assured me that the government in Washington supports and recommends the elimination of Augusto Cesar Sandino for considering him a disturber of the peace of the country.

BERRY & PREUSCH, *supra* note 3, at 269. Somoza saw this as a call to action. Shortly after Somoza's 1934 statement, Sandino was assassinated while returning home from dinner at the Presidential palace. Many think that Somoza ordered the killing. CRAWLEY, *supra* note 137, at 86.

<sup>139</sup> CRAWLEY, *supra* note 137, at 120; R. ELMAN, COCKTAILS AT SOMOZA'S (1981).

<sup>140</sup> CRAWLEY, *supra* note 137, at 138, 141.

yearly per capita income was \$350, the Somoza family had wealth estimated at over one billion dollars by 1977.<sup>141</sup> Political corruption and graft were prevalent.<sup>142</sup> In fact, the only way of staying in business in Nicaragua was to "make a contribution to the Somoza family."<sup>143</sup> Somoza was the State.<sup>144</sup> His dictatorship has been termed "the longest, most corrupt dictatorship in Latin America, a dictatorship continually supplied and supported by the United States".<sup>145</sup>

In 1961, various guerilla forces joined together under the banner of the Frente Sandinista de Liberacion Nacional (FSLN, or Sandinistas) to fight against the Somoza regime.<sup>146</sup> Their goal was to "wage war on the Somoza family" and to defeat "yankee imperialism"<sup>147</sup> However, by the mid-1970's, because of internal conflict, the FSLN found itself divided into three political factions. As a result, in January 1979, the FSLN elected a nine person directorate to unite the three different groups.<sup>148</sup>

On July 19, 1979, the Sandinistas overthrew the United States-backed Somoza regime.<sup>149</sup> In the aftermath of the coup, fearing death at the hands of the Sandinistas, thousands of soldiers in Somoza's National Guard fled Nicaragua to begin civilian lives in the United States. However, a group of approximately sixty of the former guardsmen formed a terrorist guerilla group to fight the Sandinista Government.<sup>150</sup>

In late 1981, the C.I.A. organized the ex-guardsmen, labeling them the Nicaraguan Democratic Force (FDN), or "contras."<sup>151</sup> The C.I.A. initially created two plans of op-

<sup>141</sup> *Id.* at 138, 141, 158. In addition, the Somoza family had a monopoly on many of the country's most important industries. These included the airline, television station, newspaper, cement plant, textile mill, sugar refinery and distillery. BERRY & PREUSCH, *supra* note 3, at 272.

<sup>142</sup> *Id.* at 87-167.

<sup>143</sup> CRAWLEY, *supra* note 137, at 96.

<sup>144</sup> *Id.* at 130. In addition, it should be noted that Somoza's regime harmed the farmers and peasants of Nicaragua as well as the political and merchant class. Seven of every ten Nicaraguans could not read or write under Somoza, and three of every 1000 attended college. Infant mortality was high, and malnutrition was widespread. More murders occurred every year in Nicaragua than anywhere else in the world. *Id.* at 167.

<sup>145</sup> Janquin & Barneto, *A Dictatorship Made in the U.S.A.*, in P. ROSSET & J. VANDERMEER, NICA-RAGUA: UNFINISHED REVOLUTION, *supra* note 7, at 161.

<sup>146</sup> The FSLN was organized to renew the struggle of Augusto Sandino, and in fact borrowed his name to become known as the "Sandinistas." *Id.* at 159-68; BERRY & PREUSCH, *supra* note 3, at 273.

<sup>147</sup> CRAWLEY, *supra* note 137, at 128.

<sup>148</sup> The three groups are the Proletarios (Proletariats), Guerra Popular Prolongada (GPP-The Prolonged People's War), Tercistas (Third Force). For a good look at this aspect of the FSLN, see J. BOOTH, THE END AND THE BEGINNING: THE NICARAGUAN REVOLUTION, 140-150 (1982).

<sup>149</sup> SELSER, *supra* note 135, at 206.

<sup>150</sup> Forty-six of the forty-eight contra leaders had been leaders in the Somoza guard. BERRY & PREUSCH, *supra* note 3, at 277. For discussions of the transition from the Somoza National Guard to the C.I.A.-organized anti-Sandinista terrorist group, see *Honor Prevented Us From Serving the New Regime: Conversation with Isaias Cuadra Espinoza, The End Justifies the Means: Conversation with Jorge Zelaya*, in D. EICH & C. RINCON, THE CONTRAS: INTERVIEWS WITH ANTI-SANDINISTAS, 3-10, 30-42 (1986). For a good general history of the Reagan Administration's contra aid program since its inception in 1981 until the present see Engelberg, *U.S. and the Nicaraguan Rebels: Six Years of Questions and Contradictions*, N.Y. Times, May 3, 1987, at A14, col. 1.

<sup>151</sup> EICH & RINCON, *supra* note 150, at iii, 11-15; McManus & Toth, *The Contras: How the U.S. Got Entangled*, L.A. Times, March 4, 1985, at A3, col. 2; Oberdorfer & Tyler, *U.S. Backed Nicaraguan Army Swells to 7,000 Men*, Wash. Post, May 8, 1983 at A1, col. 3; Oberdorfer, *C.I.A. Planning to Back More Nicaraguan Rebels*, Wash. Post July 14, 1983, at A1, col. 3

The contras are now technically composed of three separate groups, the Nicaraguas Democratic

eration for the contras.<sup>152</sup> The first, called Plan C, called for the FDN troops to attack Nicaragua from Honduran base camps, with the goal of establishing a "liberated territory."<sup>153</sup> However, the contras were unsuccessful in their attempt, and Plan C failed.<sup>154</sup> In its place, the C.I.A. instituted a second plan, Operation M83. This plan had a number of goals, including severing supply and communication lines between the contras.<sup>155</sup> The Sandinistas answered the contra attack with a change in tactics. Instead of trying to stop contra units at the Honduran border, the Sandinistas let them penetrate deep into the country where they were cut off from supplies of weapons, food and clothing. Thus Operation M83 also failed.<sup>156</sup>

In September 1983, President Reagan authorized a shift in contra training tactics, emphasizing the destruction of "vital economic targets."<sup>157</sup> In answer to that order, the United States Armed Forces and the C.I.A. mined Nicaragua's three main ports in early 1984.<sup>158</sup> At least eight ships were destroyed or damaged.<sup>159</sup> Furthermore, President Reagan said that through such actions, he wanted to force the Nicaraguan government to "say Uncle."<sup>160</sup> Finally, both Secretary of State Schultz and President Reagan have indicated that, if necessary, U.S. troops will intervene directly.<sup>161</sup>

Today, six years after they were formed, the United States government continues to support the contras. This is despite the fact that their sole goal is to use whatever means possible to reestablish a Somoza-like dictatorship, and once again engage in a systematic pattern of human rights violations and political corruption.<sup>162</sup>

The level of U.S. support to the contras is staggering. Currently, more than 700 contra leaders are trained yearly in the United States in intensive six week sessions that

Force (FDN), the United Nicaraguan Opposition (UNO), and the Misurasta. The FDN is the largest faction in the contras; UNO is the next largest. *The Contras: Key Leaders*, N.Y. Times, Feb. 13, 1987, at A6 col. 2.

<sup>152</sup> EICH & RINCON, *supra* note 150, at 11.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 13.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 13-14.

<sup>157</sup> Wall St. J., Mar. 6, 1985, at A20, col. 1.

<sup>158</sup> These ports were: Corinto, Puerto Sandino, and El Bluff. Wall St. J., Mar. 6, 1985, at A1, col. 1. It is chiefly the mining of these harbors that led to the suit before the International Court of Justice, discussed *supra* at note 8 and *infra* at note 168.

<sup>159</sup> See, TIME, April 23, 1984, at 19-20.

<sup>160</sup> President's News Conference of Feb. 21, 1985, 21 WEEKLY COMP. PRES. DOC. 213 (Feb. 21, 1985).

<sup>161</sup> A Presidential report to Congress on April 3, 1985 stated: "Direct application of United States Military force, . . . must realistically be recognized as an eventual option in the region, if other policy alternatives fail.", ROSSET & VANDERMEER, *supra* note 7, at 273. In addition, Secretary of State Schultz has warned Congress that if they did not approve aid for the contras, they would be "hastening the day when the threat will grow, and we will be faced with an agonizing choice about the use of U.S. combat troops." *Id.*

<sup>162</sup> Sen. Thomas Harkin has noted that the contras "have promised to bring Managua a reign of terror that will make the French Revolution look like a Labor Day picnic. Their methods are like those of the Marquis de Sade." Speech by Sen. Thomas Harkin, "Contras or Contradora: Military Solution or Negotiated Settlement," March 26, 1985, cited in WASHINGTON REPORT ON THE HEMISPHERE, April 16, 1985.

Edgar Chamorro, a former leader of the FDN's civilian directorate, has noted that the contras have no concrete political agenda. "The contras just want to return to the way things were before," and to "settle accounts with the Sandinistas." NEWSWEEK, April 29, 1985, at 26.

teach them basic military techniques and related specialized skills.<sup>163</sup> The C.I.A. has even prepared two warfare manuals for the contras to use in planning their attacks on the Sandinistas.<sup>164</sup> In addition to direct military training, the contras will receive \$100 million in United States aid in 1987, and the President, hoping that United States aid to the contras will continue, has requested \$105 million for 1988.<sup>165</sup>

## V. THE ILLEGALITY OF UNITED STATES INTERVENTION IN NICARAGUA

This section will examine the legality of intervention in Nicaragua under two laws, the Neutrality Act, and the Boland Amendment to the House Appropriations Bill of 1982 (the Boland Amendment). An analysis of these laws will show that the United States intervention in Nicaragua is illegal.

### A. *United States Intervention in Nicaragua is Illegal Under the Neutrality Act*

In 1794, following the suggestion of President George Washington, Congress enacted the Neutrality Act in an attempt to better preserve "American relations with foreign powers with which it was at peace", and to prevent United States citizens from becoming embroiled in "entangling alliances and hostile conflicts with other nations."<sup>166</sup> The text of the Act is as follows:

*Whoever, within the United States knowingly begins or sets on foot or provides or prepares a means for or furnishes 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 3 years, or both. (emphasis added)<sup>167</sup>*

<sup>163</sup> LeMoyné, *With the Rebels in Nicaragua: Battle Ready*, N.Y. Times, Mar. 3, 1987, at A8, col. 6.

<sup>164</sup> These two manuals are C.I.A., *PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE* (Cong. Research Service trans. 1984); *THE FREEDOM FIGHTER'S MANUAL* (1984). For a more complete discussion of these manuals, and of U.S. military training and support of the contras, see *infra* notes 168, 243-255, and accompanying text.

<sup>165</sup> See Robinson, *House Votes to Delay \$40 million in Contra Aid*, Boston Globe, Mar. 12, 1987, at A1, col. 6; Greenhouse, *House in Vote to Block Funds for the Contras*, N.Y. Times, Mar. 12, 1987, at A1, col. 5.

<sup>166</sup> *United States v. Lumsden*, 26 F. Cas. 1013, 1019 (DC Ohio, 1856), (No. 15641). Lumsden was a preliminary hearing in the case of Samuel Lumsden and 12 other Irish expatriates who were charged with planning a military expedition to Great Britain in violation of the Neutrality Act. *Id.* at 1014. See also *Charge to Grand Jury—Neutrality Laws*, 30 F. Cas. 1021, 1022 (CC Ohio, 1851) (No. 18267).

There is an indication that President Washington saw the Neutrality Act as one of the most important laws that the United States could enact. On April 22, 1793, he issued a proclamation stating that it is "in the interest of the United States to conduct foreign policy impartially, with sincerity and good faith", and that a Neutrality Act was essential to "achieving that goal." *Charge to Grand Jury—Neutrality Laws and Treason*, 30 F. Cas. 1024, 1025 (CC Mass., 1851) (No. 18,269). In December 1793, Washington told both Houses of Congress that "where individuals shall, within the United States, enter upon military expeditions and enterprises the offense cannot receive too early or close an attention."*Id.*

<sup>167</sup> 18 U.S.C. § 960 (1982). The Supreme Court has held that the purpose of the Neutrality Act is, in general, to "secure neutrality in wars between two nations, or between contending parties recognized as belligerents . . ." *Wiborg v. United States*, 16 S. Ct. 1127, 1133 (1896). (Wiborg and two others were accused of violating the Neutrality Act based on their positions as captains and

Based on the past mining of Nicaraguan ports, and the present financial and military assistance to the contras, the Neutrality Act prohibits U.S. intervention in Nicaragua.<sup>168</sup> However, the Reagan Administration argues that the Act does not apply to this situa-

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mates, respectively, aboard the steamer *Horsa*, which ferried arms to men who intended to invade Cuba. The Court upheld the conviction of *Wiborg*, and reversed those of the mates.) *Id.* at 1138.

In addition, a federal district judge in the 1850's, Judge Huntington, saw the Neutrality Act as a significant step in the development of man's morals:

In the ages of barbarism, private war was tolerated. Physical power was the arbiter of right, and a dexterous use of the instruments of death was the prevailing logic. But this has been long since exploded among civilized nations . . . Every government is responsible for the acts of its citizens. They must be restrained from violating the rights of other nations; and any government which has not the power or disposition to do this subjects itself to a declaration of war by the injured party. *Charge to Grand Jury—Neutrality Laws*, 30 F. Cas. 1020, 1021 (CC Ind., 1851)(No. 18,266).

<sup>168</sup> As discussed *supra* at notes 1 and 2, and accompanying text, this Note is concerned with domestic violations of United States law through the implementation of current Reagan Administration policies in Nicaragua and El Salvador. However, it is important at this point to discuss the judgement of the International Court of Justice in *Nicaragua v. United States*, *supra* note 8.

In 1984, the Nicaraguan government sought an injunction from the International Court of Justice in an attempt to force the United States to stop the mining of Nicaraguan ports. In addition, Nicaragua filed suit at that time against the United States, seeking compensation for economic and property damage related to the mining. *See Nicar. v. U.S.*, 1984 I.C.J. 169 (Request for the Indication of Provisional Measures of May 10), *reprinted in* 23 I.L.M. 468, (May 1984). The United States then argued that the I.C.J. did not have jurisdiction to hear the case. The Court rejected that argument. *Nicar. v. U.S.*, 1984 I.C.J. 392 (Jurisdiction and Admissibility Order of Nov. 26, 1984). Subsequently, on January 18, 1985, the United States, maintaining that the I.C.J. was without jurisdiction to hear the suit, withdrew from the proceedings. *See Text of U.S. Statement in Withdrawal from the Case before the World Court*, *N.Y. Times*, Jan. 19, 1984, at A4, col. 1.

On June 27, 1986, the I.C.J. issued a communique containing the Judgment of the Court. I.C.J., *Communique: Judgment of the Court in Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, June 27, 1986. The relevant portions of the decision are as follows:

THE COURT:

. . . (3) Decides that the United States of America, by training, arming, equipping, financing, and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to interfere in the affairs of another state; . . .

(4) Decides that the United States of America, by certain attacks on Nicaraguan Territory in 1983–1984, namely attacks in Puerto Sandino on 13 September and 14 October 1983; an attack on Corinto on 16 October 1983; an attack on Potosi Naval Base on 4–5 January 1984; an attack on San Juan del Sur on 7 March 1984; attacks on border patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 3 April 1984 . . . has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another state; . . .

(6) Decides that, by laying mines in the . . . waters of the Republic of Nicaragua . . . the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another state, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce; . . .

(9) Finds that the United States of America, by producing in 1983 a manual entitled *Psychological Guerrilla Warfare*, and by disseminating it to the contra forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law; . . .

(12) Decides that the United States of America is under a duty immediately to

tion.<sup>169</sup> Thus, this portion of the note is devoted to a phrase-by-phrase analysis of the relevant portions of the Neutrality Act and subsequent judicial opinions interpreting it.

The statute begins with the word "whoever."<sup>170</sup> President Reagan contends that "whoever" does not include high ranking members of the Executive branch, such as the President and his associates.<sup>171</sup> In addition, the Administration contends that the President's powers and duties as "commander-in-chief of the Army and Navy of the United States" override any such statutory limitations on his authority.<sup>172</sup> In support of the President's position, the Justice Department has prepared a memorandum noting that high ranking Administration officials are immune from prosecution under the Neutrality Act.<sup>173</sup> The memorandum reached the conclusion that the Act "is not applicable to the official conduct of the Executive Branch of Government."<sup>174</sup>

The Judicial branch, however, has reached a different conclusion. Judicial decisions since 1806 have held that the Neutrality Act is applicable to the President and thus limits the scope of his activities in peacetime. In 1806, in *United States v. Smith*,<sup>175</sup> two civilians were indicted and tried for aiding an attempt to launch an "expedition" against the "dominions of Spain in South America, the United States and Spain being at peace at the time." The defendants attempted to introduce evidence that their actions were sanctioned by President James Madison.<sup>176</sup> In ruling that the evidence was "wholly immaterial", Judge Tallmadge noted that "the previous knowledge or approbation of the President to the illegal acts of a citizen can afford him no justification for the breach of a constitutional law. The President's duty is to faithfully execute the laws, and [he] has no such dispensing power."<sup>177</sup> Similarly, in an earlier preliminary hearing relating to the same trial, Supreme Court Justice Paterson, sitting in the lower court by designation, noted:

The President of the United States cannot control the Statute, nor dispense with its execution, and still less can authorize a person to do what the law forbids. If he could, it would render the execution of the laws

cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations; . . .

(13) Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above; . . .

*Id.* at 2-6. For a good critical discussion of all of the many aspects of the case and the decision, see Rowles, *Nicaragua v. United States: Issues of Law and Policy*, 20 INT'L LAWYER 1245 (1987). For an analysis of the United States rejection of ICJ jurisdiction in the case, see Ullman, *World Court Evasion*, N.Y. Times, April 11, 1984 at A7, col. 4.

<sup>169</sup> See generally, *Dellums v. Smith*, 577 F. Supp 1449 (N.D.Ca. 1984). See also, National Emergency Civil Liberties Committee, Memorandum of the National Emergency Civil Liberties Committee on the United States, Nicaragua and the World Court, 6 (April 15, 1985).

<sup>170</sup> 18 U.S.C. § 960 (1982).

<sup>171</sup> *Dellums v. Smith*, 577 F. Supp at 1452.

<sup>172</sup> *Id.* at 1453.

<sup>173</sup> Off. Legal Counsel, Memorandum for Phillip B. Hetman re Applicability of the Neutrality Act to Activities of the Central Intelligence Agency, (Oct. 10, 1977) cited in *Dellums* at 1454.

<sup>174</sup> *Id.*

<sup>175</sup> *United States v. Smith*, 27 F. Cas. 1233 (CC NY 1806)(No. 16,342a). See also, W. PACIUMA, INTERVENTION IN SPANISH FLORIDA 1801-1813: A STUDY IN JEFFERSONIAN FOREIGN POLICY, 290-91 (1976); J. PRATT, EXPANSIONISTS OF 1812, 133 (1967).

<sup>176</sup> *United States v. Smith*, *supra* note 175, at 1234.

<sup>177</sup> *Id.* at 1243.

dependent on his will and pleasure, which is a doctrine that has not been set up . . . . The law is paramount."<sup>178</sup>

Since *Smith*, the Neutrality Act has provided substantial protection against the President involving the United States in an undeclared war.<sup>179</sup> In 1838, President Martin Van Buren spoke of the protections afforded by the Neutrality Act when he pointed out that "whether the interest or honor of the United States requires that they should be made a party to any such struggle, and by inevitable consequence to the war which is waged in its support, is a question which by our Constitution is wisely left to Congress alone to decide."<sup>180</sup> In the same year, in charging the grand jury in a case concerning the Neutrality Act, Judge McLean noted that every citizen must obey the Act:

An obedience to the laws is the first duty of every citizen . . . . If there be any one line of policy in which all political parties agree, it is that we should keep aloof from the agitations of other governments. That we shall not intermingle our national concerns with theirs. And much more, that our citizens shall abstain from acts which lead the subjects of other governments to violence and bloodshed.<sup>181</sup>

Despite the Judicial and Presidential pronouncements to the contrary, some members of Congress thought that the Neutrality Act unfairly limited the ability of the President to declare war. For example, Senator John Slidell introduced a resolution in 1854 that would have allowed the President to suspend the operation of the Act when, "in his opinion, the public interest required it."<sup>182</sup> When Sen. Slidell's proposed 1854 amendment failed due to a lack of support among his colleagues, he proposed a similar amendment in 1858. That amendment would have permitted Presidential suspension of the Act during Congressional recesses.<sup>183</sup> That proposal also failed, and the Act remains the same today as when it was originally enacted in 1794.<sup>184</sup>

After Sen. Slidell's attempts to alter the scope of the original Neutrality Act in the 1850's, Judge Shipman of the Northern District of New York noted in his 1866 Grand Jury charge concerning the Neutrality Act:

Were individuals, however numerous or respectable, by whatever motives actuated, permitted, upon their own motion, to organize warlike enter-

<sup>178</sup> *United States v. Smith*, 27 F. Cas. 1192 (CC NY 1806)(No. 16,342). This was a preliminary hearing on motions presented by both sides in F. Cas. 16,342a, including a defense motion to subpoena President Madison. Justice Paterson of the United States Supreme Court and a participant in the Constitutional Convention, presided over the hearing by designation. Other judges also have held specifically that the Neutrality Act applies to all citizens, regardless of government or social rank. See, e.g., *Charge to Grand Jury-Neutrality Laws*, 30 F. Cas. 1017, 1018 (CC NY 1866)(No. 18,264).

<sup>179</sup> See generally, Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J., 31-33 (1983). See also, SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER, 315-16 (1976).

<sup>180</sup> President Martin Van Buren, Second Annual Message to Congress (Dec. 3, 1838), reprinted in 3 MESSAGES AND PAPERS OF THE PRESIDENTS 483, 487. See also, Inaugural Address of President John Adams (March 4, 1797), reprinted in 1 MESSAGES AND PAPERS OF THE PRESIDENTS at 231.

<sup>181</sup> *Charge to Grand Jury-Neutrality Laws*, 30 F. Cas. 1018, 1019 (CC Ohio, 1838)(No. 18,265).

<sup>182</sup> CONG. GLOBE, 33d Cong., 1st Sess. 1021, 1023-24 (1854).

<sup>183</sup> CONG. GLOBE, 35th Cong., 1st Sess. 217, 462 (1858).

<sup>184</sup> The Neutrality Act that exists today is a March 4, 1909 reenactment of Act June 5, 1794 § 5, the original Neutrality Act.



prises in their native country, and engage in incursions into the territory of neighboring friendly nations, governments would no longer have control of the momentous questions of war and peace . . . . A country which should permit such a flagrant violation of its national obligations, would soon become a theatre from which hostile expeditions would issue . . . . The honor and dignity of the U.S. . . . demand that this act of congress [sic] shall be obeyed, or, if violated, that the offender shall be promptly punished.<sup>185</sup>

More recently, courts have upheld the applicability of the Neutrality Act to actions of the President specifically, and to the Executive Branch in general. In January 1983, Congressman Richard Dellums sent a letter to Attorney General William French Smith containing detailed allegations about the United States activities in Nicaragua and against the Nicaraguan government. The letter indicated that at least several high level Administration members had violated the Neutrality Act.<sup>186</sup>

The letter requested the Attorney General to conduct a preliminary investigation under the Ethics in Government Act<sup>187</sup> to determine whether to apply for the appointment of independent counsel to investigate the activities of the officials.<sup>188</sup> In March 1983, the Attorney General responded to Congressman Dellums' letter, but refused his request to appoint a special investigator.<sup>189</sup> Dellums then went to court to force the Attorney General to conduct the requested investigation.<sup>190</sup>

In the resulting lawsuit, *Dellums v. Smith*, Congressman Dellums was joined by Myrna Cunningham, a physician and resident of Nicaragua who was kidnapped and raped by contra soldiers. He was also joined by Eleanor Ginsburg, a resident of Dade County, Florida, who asserted that contras were trained near her property by the U.S. Army, and as such presented a threat to her.<sup>191</sup> The specific allegations were that the United States has:

- (1) provided at least \$19 million as of 1981 to finance covert paramilitary operations against the people and property of Nicaragua;
- (2) financed the training of invasionary forces in the United States and Honduras, including former Somoza National Guardsman, and others;

<sup>185</sup> Charge to Grand Jury-Neutrality Laws, *supra* note 28, at 1018.

<sup>186</sup> *Dellums v. Smith*, 575 F. Supp. 1489 (N.D. Cal. 1983), motion to alter judgment denied, 577 F. Supp. 1449 (N.D. Cal. 1984), 797 F. 2d 817 (7th Cir. 1986).

<sup>187</sup> Ethics in Government Act, 28 U.S.C. §§ 591-598 (1986). The portions of Section 592 of the Ethics in Government Act relevant to this note state:

(a)(1) Upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate that any person covered by this Act has engaged in [a violation of law], the Attorney General shall conduct . . . a preliminary investigation of the matter . . . . In determining whether grounds to investigate exist, the Attorney General shall consider:

- (A) the degree of specificity of the information received, and
- (B) the credibility of the source of the information . . . .

(f) The Attorney General's determination under . . . this section to apply to the division of the court for the appointment of [an] independent counsel shall not be reviewable in any court. *Id.*

<sup>188</sup> 797 F.2d 817, 818.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 818.

- (3) conducted intelligence activities by the C.I.A. to determine specific targets for anti-Nicaraguan terrorist forces;
- (4) used Honduras as a base for invasionary forces;
- (5) supported Nicaraguan exiles based in the United States who in turn train and support invasionary forces on United States soil, and;
- (6) sent hundreds of C.I.A. officers and agents and other U.S. government agents to Honduras and Costa Rica to participate and assist in covert military operations against the people and government of Nicaragua.<sup>192</sup>

The district court concluded that the plaintiffs had the necessary standing to seek a review of the Attorney General's action, and were thus entitled to summary judgment compelling the Attorney General to conduct the requested investigation of possible Neutrality Act and Boland Amendment violations by the Executive Branch.<sup>193</sup> The court concluded that the plaintiffs had met the three prong standing test set forth by the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State*.<sup>194</sup> In order to establish standing under the *Valley Forge* standard, a plaintiff must show: (1) that "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant;" (2) that "the injury 'fairly can be traced to the challenged action';" and (3) that the injury "is likely to be redressed by a favorable decision."<sup>195</sup>

The court held that the first prong was satisfied by the refusal of the Attorney General to conduct a preliminary investigation.<sup>196</sup> The plaintiffs had a procedural right to have an investigation made if they provided specific information concerning the illegality of an Executive Branch official's actions. The denial of that right constituted an injury that is sufficient for standing.<sup>197</sup>

Curiously, the court ignored the second prong of the *Valley Forge* test, that the injury can be traced to the challenged action, and proceeded directly from the first factor of the test to an examination of the third, that the injury is "likely to be redressed by a favorable decision."<sup>198</sup> However, after finding that the plaintiffs' injuries satisfied the third prong, the court bifurcated this prong into two further tests.<sup>199</sup> These two other tests, originally set out by the Supreme Court in *Simon v. Eastern Kentucky Welfare Rights Organization*, must both be satisfied if the court is to order the Attorney General to conduct a preliminary investigation.<sup>200</sup> A court could grant such relief if (1) the decision not to conduct a preliminary investigation is subject to judicial review and (2) if the remedy of mandamus to the Attorney General is permissible.<sup>201</sup> The court held that both of these conditions were satisfied in *Dellums*.<sup>202</sup>

The court held that because the Attorney General's decision not to conduct a preliminary investigation injured the plaintiffs' interests, the decision was subject to

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<sup>192</sup> 573 F. Supp. at 1482.

<sup>193</sup> *Id.* at 1494-1501.

<sup>194</sup> 454 U.S. 464, 472 (1982).

<sup>195</sup> *Dellums*, 573 F. Supp. at 1494 (quoting *Valley Forge*, 454 U.S. 464, 472 (1981)).

<sup>196</sup> *Id.* at 1494-95.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 1497.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* (citing *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)).

<sup>201</sup> *Id.* at 1498.

<sup>202</sup> *Id.*

review under the Administrative Procedure Act (A.P.A.), satisfying the first prong of the *Simons* test.<sup>203</sup> Section 702 of the A.P.A. provides that “a person suffering a legal wrong because of agency action . . . is entitled to judicial review thereof.”<sup>204</sup>

The court also found that the second prong of the *Simon* test was satisfied. “When the claim of a plaintiff is clear and the duty of an officer is ministerial, mandamus is traditionally the proper remedy.”<sup>205</sup> Thus, because both of the *Simon* tests, and all of the *Valley Forge* criteria were satisfied, the *Dellums* court granted summary judgment for the plaintiffs.<sup>206</sup>

The Attorney General subsequently filed a Rule 59(e) motion to alter or amend judgment, arguing that (1) the Justice Department had a policy of non-prosecution for violations of the Neutrality Act and (2) that the Act did not apply to expeditions authorized by the President.<sup>207</sup> The district court disagreed, ruling that a policy of non-prosecution of federal officials was not legitimate under the Ethics in Government Act.<sup>208</sup> In addition, the court reviewed the language, legislative history, judicial and executive interpretations of the Neutrality Act and concluded that it prohibited even Presidentially-sponsored expeditions against a government with whom the United States was at peace.<sup>209</sup> The motion to alter judgment was thus denied.<sup>210</sup>

The Attorney General appealed the decision.<sup>211</sup> The appellate court held that the district court erred in exercising jurisdiction over the suit, because the three prong *Valley Forge* standing test was in fact not satisfied.<sup>212</sup> Specifically, the appellate court found that the plaintiffs “had not suffered an injury significant enough to satisfy the first prong of the test.”<sup>213</sup> Judicial creation of a procedural right, and the injury resulting from an infringement of that right was seen by the appellate court to “be too much.”<sup>214</sup> Judicial inference of Congressionally created procedural rights may be permissible, but not in the absence of compelling evidence that such a right is implied by the statutory language, statement of purpose, or legislative history of a statute.<sup>215</sup> In this case, there was no evidence that Congress intended to allow the creation of a procedural right of review of the Attorney General’s actions concerning the Ethics in Government Act.<sup>216</sup> Thus an injury could not result from the breach of an alleged procedural right, because that

<sup>203</sup> 5 U.S.C. §§ 701–706 (1985). See, e.g., *id.* at 1498.

<sup>204</sup> 5 U.S.C. § 702 (1985). In addition, the court found that the Attorney General is an “agency” subject to review under the A.P.A., relying on *Proietti v. Levi*, 530 F.2d 836, 838 (9th Cir. 1976). It also held that “agency action” includes a failure to act, citing *City of Chicago v. United States*, 396 U.S. 162, 166–67. See *Dellums*, 573 F. Supp. at 1498.

<sup>205</sup> *Id.* at 1500, citing *Elliot v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir. 1977), rev’d in part on other grounds, 442 U.S. 682 (1979).

<sup>206</sup> *Id.* at 1505.

<sup>207</sup> 577 F. Supp. at 1454. Rule 59(e) states that: “[a] motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment.” FED. R. CIV. P. 59 (e).

<sup>208</sup> 577 F. Supp. at 1454.

<sup>209</sup> *Id.* at 1452–54.

<sup>210</sup> *Id.*

<sup>211</sup> *Dellums v. Smith*, 797 F.2d 817 (1986).

<sup>212</sup> *Id.* at 821.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 821–23.

<sup>216</sup> *Id.*

procedural right did not in fact exist.<sup>217</sup> Furthermore, since Congress precluded private citizens from seeking review under the Ethics in Government Act, plaintiffs Cunningham and Ginsburg also lacked standing to bring suit against the Attorney General for his failure to investigate their charges.<sup>218</sup> Thus, because members of Congress lack the standing necessary to seek review of the Attorney General's refusal to act, and because his refusal is not reviewable at the behest of the public, the district court decisions were reversed on procedural grounds.<sup>219</sup>

The appellate court was emphatic, however, in noting that it did not reach the merits of the district court's ruling concerning the Neutrality Act.<sup>220</sup> In fact, the court suggested that members of the Judiciary Committee might have the standing necessary to challenge the Attorney General's decision when it noted that "... enforcement by members of congressional judiciary committees would be effective in preventing the Attorney General from refusing to obey the law."<sup>221</sup>

The impact of the *Dellums* decision upon the applicability of the Neutrality Act to the actions of the President is uncertain due to the reversal of *Dellums* by the appellate court.<sup>222</sup> However, because the appellate court did not overturn the reasoning of the district court regarding the rule 59(e) decision, it seems that the appellate court concurs with the district court's view that the Neutrality Act is applicable to the President. Furthermore, it is unlikely that the appeals court would overrule 180 years of consistent judicial interpretation without issuing a lengthy, well-reasoned opinion.

Congress is uncertain about the impact of the *Dellums* reversal. Consequently, eleven members of the Judiciary Committee have submitted a new request to the Attorney General for a special prosecutor under the Ethics in Government Act.<sup>223</sup> A *Dellums*-type suit is likely if the Attorney General refuses to grant the request.<sup>224</sup> Since there is a likelihood of further legal action and Congressional debate on the applicability of the Neutrality Act to the actions of the President and other Executive Branch officials, it is important to evaluate other key phrases of the Act to determine whether or not they are applicable to current United States involvement in Nicaragua.

The second significant phrase of the Neutrality Act is "within the United States."<sup>225</sup> It has been argued that since contra aid is provided in Nicaragua, it is not covered by the Neutrality Act because it is not "within the United States." This argument is without merit.

First, there is substantial evidence that the Administration, through the Army and the C.I.A., trains contras on military bases in the United States.<sup>226</sup> Contra leaders<sup>227</sup>, the

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 822-23.

<sup>219</sup> *Id.* at 823.

<sup>220</sup> *Id.* at 820.

<sup>221</sup> *Id.* at 823.

<sup>222</sup> Riley, *Controversy Looms on Enforcement: Neutrality Act Violated in Nicaragua?*, Nat'l L. J. Nov. 3, 1986, at A3, col. 3.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> 18 U.S.C. § 960 (1983).

<sup>226</sup> LeMoyné, *First Group of Contras Completes Fla Training*, N.Y. Times, Jan. 9, 1987, at A10, col. 1. See also, LeMoyné, *supra* note 163.

<sup>227</sup> *Id.* See also, EICH & RINCON, *supra* note 150, at 2-3.

International Court of Justice,<sup>228</sup> and the Reagan Administration<sup>229</sup> have all expressly substantiated this belief.<sup>230</sup>

The contra training is comprehensive. They are taught basic military tactics, map reading, weapons use, and command techniques for twelve hours a day under the supervision of American military trainers.<sup>231</sup> According to Aristides Sanchez, the contra leader in charge of logistics, in addition to the basic military skills, the training includes specialized courses in the use of explosives and anti-aircraft missiles, and intelligence and psychological warfare.<sup>232</sup>

The Administration has downplayed the importance of the secret contra training camps by saying that the contras are trained in "small" groups of 60-200 soldiers each.<sup>233</sup> They argue that since the contra soldiers are not being trained *en masse* on United States soil, their military training is permissible. However, although the contras are trained in small groups, over the years the numbers accumulate. An estimated 700 contra troops will be trained in the U.S. this year alone.<sup>234</sup> However, even if that estimate were incorrect, and only a small number of contras were actually trained on U.S. soil, the Act would still apply. Even if only small numbers of contras are trained in the U.S., the Act is not circumvented.

The Neutrality Act applies even if only a small group of contras actually train in the United States with the Armed Forces.<sup>235</sup> Moreover, the Act applies even if only the organizer of the prohibited aid, here President Reagan, is "within the United States."<sup>236</sup> It was noted in *Jacobsen v. United States* that "it is sufficient to prove a violation of the Neutrality Act to show that the plan was made here, and that funds were collected in this country for carrying it out."<sup>237</sup> Clearly that is what is taking place with respect to the contras. The plans have been made in the United States.<sup>238</sup> The funds are also collected here.<sup>239</sup> Simply put, contra aid provided by the United States meets, and violates, the "within the U.S." language of the Neutrality Act.

The third phrase in the Neutrality Act to be examined here is "... begins or sets on foot or provides or prepares for or furnishes the money for, or takes part in, any

<sup>228</sup> See, ICJ Communique, *supra* note 168, at page 2, count 3.

<sup>229</sup> Treaster, *Secrecy on Contras' Training Sets Off Dispute*, N.Y. Times, Feb. 3, 1987, at A14, col. 1.

<sup>230</sup> It is widely believed that the training takes place at either Eglin Air Force Base in Florida, or at Forts Benning & Stewart in Georgia. *Id.*

<sup>231</sup> See LeMoyne, *supra* note 163.

<sup>232</sup> *Id.* See also, Palmer, *Witness Says C.I.A. Trained Contras During Ban on Aid*, Boston Globe, Mar. 24, 1987, at A1, col. 3.

<sup>233</sup> *Id.*

<sup>234</sup> LeMoyne, *supra* note 163.

<sup>235</sup> "It is not necessary that all of the persons composing the military enterprise shall be brought into personal contact with each other within the limits of the United States." *United States v. Murphy*, 84 F. 609 (DC Del. 1898). (The defendant was charged with violating the Neutrality Act based on his part in planning a military expedition to Spanish Cuba while the United States was at peace with Spain. Defendant was convicted, and that conviction was upheld.)

<sup>236</sup> *Jacobsen v. United States*, 272 F. 399 (CA Ill. 1920). (Defendant, a German national, was accused of organizing an insurrection in India that would discredit Great Britain during World War I, using Chicago as his headquarters).

<sup>237</sup> *Id.* at 400-02.

<sup>238</sup> See *infra* notes 247-48, 250-56.

<sup>239</sup> See *infra* notes 245-46.

military or naval expedition or enterprise . . . .”<sup>240</sup> This phrase has been construed broadly by courts, so as not to be limited to the direct and overt invasion of a country “with which the United States is at peace.”<sup>241</sup> The Act covers “taking the incipient steps in the enterprise. [It means] to provide the means for the expedition, as the enlistment of men, the munitions of war, money, in short, anything and everything that is necessary to the commencement and prosecution of the enterprise.”<sup>242</sup>

The United States is currently engaging in activities of that sort in Nicaragua. In fact, the United States exercises “direction and control at every level of the contras’ activities, from the most minute details of the behavior and performance of individuals, to the broadest issues of deciding what goals to pursue, and how best to achieve them.”<sup>243</sup> This aid continues despite the fact that the Administration, through Assistant Secretary of State Elliot Abrams, has indicated that C.I.A. aid to the contras may violate the Neutrality Act.<sup>244</sup> Simply put, the Administration funds the contras. The latest appropriations bill, signed into law by President Reagan on October 24, 1986, provides \$100 million in aid for 1987, and the administration is said to be seeking an additional \$105 million in aid for 1988.<sup>245</sup> In addition, it has been revealed that the United States paid \$276,186 for a contra public relations drive, which included the lobbying of Senators and Congressmen.<sup>246</sup>

At the command level, the United States government carefully chooses the contra leaders, and dismisses those that displease it.<sup>247</sup> For example, in December, 1982, the State Department decided that the contras needed new leadership.<sup>248</sup> The Administration subsequently interviewed candidates, selected the new leaders, and presented them to the American public at a Miami press conference.<sup>249</sup>

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<sup>240</sup> 18 U.S.C. § 960 (1985).

<sup>241</sup> Charge to Grand Jury-Neutrality Laws, 30 F. Cas. 1020, 1021 (DC Ind., 1851)(No. 18,266).

<sup>242</sup> Furthermore, a “military expedition” as defined by courts covers not only direct aid by the United States, but also the acts of a U.S.-aided group like the contras. Groups of individuals “need not comprise a highly trained military organization in order to fall within the phrase military expedition or enterprise.” *United States v. Tauscher*, 233 F. 597, 600 (DC NY, 1916). Any group with a “preconcerted plan of operations, with leadership, and a coordination of men, supplies and munitions . . . is a military expedition within the terms of the statute.” *Id.*

<sup>243</sup> Bernheim, *United States Armed Intervention in Nicaragua and Article 2 (4) of the United Nations Charter*, 11 YALE J. INT’L L. 104, 120 (1985).

<sup>244</sup> PRESIDENT’S SPECIAL REVIEW BOARD, REPORT OF THE PRESIDENT’S SPECIAL REVIEW BOARD, Feb. 26, 1987, B-125 (hereinafter TOWER COMMISSION REPORT); *C.I.A. Sends the Contras a New Battle Plan*, N.Y. Times, Mar. 22, 1987, at E2, col. 1.

<sup>245</sup> See *supra* note 165 and accompanying text.

<sup>246</sup> See *State Dept. Said to Pay \$276,186 for Contra Public Relations Drive*, N.Y. Times, Feb. 7, 1987, at A4, col. 5.

<sup>247</sup> See generally, LeMoyné, *Cruz, Contra Leader Who Quit, Says Aim is to Force Changes*, N.Y. Times, Mar. 11, 1987, at A1, col. 4; *The Contras Shake-Up*, N.Y. Times, Feb. 18, 1987, at A1, col. 3; *Top Contra Quits, Saying March 10, 1987 Changes Were Blocked*, N.Y. Times, at A1, col. 3; Greenhouse, *Cruz Resignation: Effect Disputed*, N.Y. Times, Mar. 11, 1987, at A1, col. 3; Dibble & Chardy, *Key Contra Leader Quits U.S.-Backed Rebel Organization*, Boston Globe, Mar. 10, 1987, at A8, col. 4; Treaster, *Leading Contra Quits Alliance Amid Disputes*, N.Y. Times, Feb. 17, 1987, at A1, col. 5; *Contra Controversy*, Wash. Post, Nov. 27, 1984, at A14, col. 4; Sciolono, *Contras Won’t Change*, NEWSWEEK, April 13, 1987; Bernheim, *supra* note 229, at 120–25.

<sup>248</sup> It was time to “repackage the leadership.” See Wall St. J., Mar. 5, 1985, at A1, col. 1.

<sup>249</sup> *Id.* Concerning the contra leadership, former contra leader Edgar Chamorro has stated that “[t]hose Nicaraguans who were chosen [by the C.I.A.] for leadership positions within the organization . . . were those who best demonstrated their willingness to unquestioningly follow the instruc-

The United States government, through the Armed Forces and the C.I.A., also supports the contras at the operational and tactical level, instructing and directing the contras' training.<sup>250</sup> The C.I.A. has written two manuals for the contras, *The Freedom Fighter's Manual*, and *Operaciones Sicologicas en Guerra de Guerrillas (Psychological Warfare Manual)*.<sup>251</sup> These manuals contain advice on the use of weapons, psychological warfare, and terrorist tactics.<sup>252</sup> The extent of C.I.A. control of the contras is best expressed in former contra leader Edgar Chamorro's testimony before the International Court of Justice:

[When I joined . . . the contras], I hoped that it would be an organization of Nicaraguans, controlled by Nicaraguans, and dedicated to our own objectives which we ourselves would determine. I joined on the understanding that the United States Government would supply us [with] the means necessary to defeat the Sandinistas and replace them as a government . . . [The contras] turned out to be an instrument of the United States Government, and specifically the C.I.A. It was created by the C.I.A., it was supplied, equipped, armed and trained by the C.I.A. . . . [I]ts activities—both political and military—[are] directed and controlled by the C.I.A.<sup>253</sup>

In addition to providing tactical and training assistance to the contras, the U.S. also supplies arms to the contras, with the most recent shipment consisting of AK-47 rifles, grenade launchers, M-60 machine guns, anti-tank rockets, mortars, and shoulder-fired SAM missiles.<sup>254</sup> In short, the United States provides the contras with both the "means for the expedition" and "anything else necessary to the commencement and prosecution of enterprise",<sup>255</sup> and that violates the Neutrality Act. A high-ranking member of the contras, Jorge Ramirez Zelaya noted that "[we are] kept functional by the financial and military support of the U.S. government. Every revolution is supported by a foreign power. [We are supported] with comprehensive financial aid, with weapons, and with

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tions of the C.I.A. They, like the organization itself, became nothing more than executioners of the C.I.A.'s orders." Deposition of Edgar Chamorro before the International Court of Justice, Sept. 5, 1985 in P. ROSSET & J. VANDERMEER, *supra* note 7 at 246.

<sup>250</sup> See ICJ Communique, *supra* note 154; LeMoyné, *C.I.A. Said to Guide Contras' Military Despite Ban on Aid*, N.Y. Times, Jan. 11, 1987, at A1, col. 1; Palmer, *Crewmen Say C.I.A. Aided Contra Airlift*, Boston Globe, Mar. 11, 1987, at A1, col. 3; TOWER COMMISSION REPORT, *supra* note 244, at C10-14; Shenon, *Grand Jurors Said to Explore Wide U.S. Role in Nicaragua*, N.Y. Times, Mar. 30, 1987, at A6, col. 3; Brinkley, *C.I.A. Gives Contras Detailed Profiles of Civil Targets: Raids Planned in Spring*, N.Y. Times, Mar. 18, 1987, at A1, col. 1; Palmer, *supra* note 232; Bennett, *Contras Gird for Spring Offensive*, Boston Globe, Mar. 29, 1987, at A22, col. 3.

<sup>251</sup> These manuals have since been published in paperback form in the United States. See J. OMANG & A. NEIER, *THE C.I.A.'S NICARAGUA MANUAL: PSYCHOLOGICAL OPERATIONS IN GUERRILLA WARFARE*, (1985); *THE FREEDOM FIGHTER'S MANUAL* (1985).

<sup>252</sup> See *supra* note 164; ICJ Communique *supra* note 168, at 4, count 9. The C.I.A. publications advocated the use of murder, kidnapping, robbery and torture, "explicit and implicit terror" against the Sandinistas and surrounding civilian populations. See, Affidavit of Edgar Chamorro, *supra* note 249, at 244-245. The C.I.A. is reportedly still teaching psychological warfare to the contras. See Brinkley, *supra* note 250, at A 10, col. 3.

<sup>253</sup> Affidavit of Edgar Chamorro, *supra* note 249, at 245. In addition, one of the aides to former C.I.A. Director William Casey stated in 1982 that the C.I.A. had "firm control" over the contra operation, and that it was "Casey's war." See Wash. Post, Dec. 16, 1984, at A1, col. 1; Wash. Post, May 8, 1983, at A11, col. 1.

<sup>254</sup> LeMoyné, *supra* note 163, at A8, col. 5-6.

<sup>255</sup> See Charge to Grand Jury-Neutrality Laws, *supra* note 60.

war materiel, in sufficient quantities since 1982. This support is channeled through the C.I.A..”<sup>256</sup>

The last phrase of the Neutrality Act to be analyzed in this note is “with whom the United States is at peace.” The Reagan Administration has argued that the Act does not apply to the situation in Nicaragua because the United States is not “at peace” with that country.<sup>257</sup> The Administration maintains that the “continued state of paramilitary activities has destroyed the state of peace which had existed between the two countries.”<sup>258</sup> This argument fails on constitutional grounds.

Under Article I, section 8 of the Constitution, only Congress has the power to declare war.<sup>259</sup> Congress has failed to declare war against Nicaragua, and the United States has not been invaded by Nicaragua so as to render that declaration unnecessary under the Neutrality Act. Courts dealing with the Neutrality Act have reiterated this concept. In *United States v. Smith*, Judge Tallmadge noted that “the United States cannot be constitutionally at war but when war is authorised by congress [sic], or is rendered an act of necessity by the invasion of a foreign enemy.”<sup>260</sup> The United States remains officially at peace with Nicaragua.<sup>261</sup> In addition, the United States government recognizes the present government of Nicaragua in a diplomatic sense, and the two countries maintain full diplomatic relations. This fact, when coupled with the paramilitary and military activities described above, shows that the Neutrality Act is being violated by the United States government in Nicaragua.

It is unclear what remedy should be undertaken to satisfy the provisions of the Neutrality Act. The Act itself requires that violators be fined and imprisoned.<sup>262</sup> It does not, however, explicitly require that the illegal aid be stopped. So, while it is clear that the Neutrality Act applies to individuals assisting in U.S. aid to the contras in Nicaragua, it is necessary to examine other domestic statutes that would actually force violators to stop any proscribed aid being given illegally to the contras.

<sup>256</sup> EICH & RINCON, *supra* note 150, at 39. Another contra leader, Orlando Wayland, noted that the “olive green helicopter from the gringos landed on a small slope at the camp and brought weapons and uniforms.” *Id.* at 128. See also, Rosenbaum, *Casey is Termed the Mastermind of Efforts to Resupply the Contras*, N.Y. Times, Mar. 25, 1987, at A1, col. 5; McManus, *Casey Directed North, Rebel Aid*, *Sources Say*, Boston Globe, Mar. 28, 1987, at A1, col. 1.

<sup>257</sup> Dellums *supra* note 186, F. Supp. 877, at 1454.

<sup>258</sup> *Id.*

<sup>259</sup> Article I, § 8, the clause of the Constitution relevant here, states that:  
Congress shall have the power:

To declare war . . . ;

To raise and support Armies . . . ;

To provide and maintain a Navy . . . ;

To make rules for the Government and Regulation of the Land and naval forces . . . ;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organization, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States . . . .

<sup>260</sup> *United States v. Smith*, *supra* note 175, at 1243.

<sup>261</sup> In fact, there is still a binding treaty of friendship between the two countries, The Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua, Nicaragua on January 21, 1956. See ICJ Communique, *supra* note 168, at 4.

<sup>262</sup> See *supra* note 167 and accompanying text.



B. *United States Intervention in Nicaragua is Illegal Under the Boland Amendment*

On December 21, 1982 Congress enacted the Boland Amendment to the House Appropriations Bill of 1982.<sup>263</sup> This amendment, which was intended to bar any military or economic aid to the contras, reads as follows:

None of the funds provided in the 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. (emphasis added)<sup>264</sup>

The passage of the Boland Amendment created a ban on military aid to Nicaragua that lasted from December 31, 1982 until October 23, 1986.<sup>265</sup> Any aid proscribed by the statute that was given during that period would violate the law.<sup>266</sup> However, the Reagan Administration indicated soon after the passage of the Boland Amendment that it might not be able to avoid violating it. In fact, the House Permanent Select Committee on Intelligence, which oversees the covert activities against Nicaragua, reported in 1983 that it was unwilling to assure the House that the Administration could meet the terms of the Boland Amendment.<sup>267</sup>

In order for the Boland Amendment to apply to United States aid that has been given to the contras, that aid must have been given for the purpose of "overthrowing the Government of Nicaragua."<sup>268</sup> Evidence indicates that such an overthrow is in fact the goal of Administration policy. The House Permanent Select Committee on Intelligence found that "the purpose and the mission of the [contra] operation is to overthrow the government in Nicaragua."<sup>269</sup> In addition, President Reagan has personally indicated his desire to overthrow the Nicaraguan government. During a February 21, 1985 press conference, the President was asked whether the removal of the Sandinista government was a goal of his policy. He replied, "Well, remove in the sense of its present structure."<sup>270</sup> When asked "[A]ren't you advocating the overthrow of the present government?," the President replied, "Not if the present government would turn around and say, all right, if they'd say 'Uncle.'"<sup>271</sup>

Thus, because it seems as a threshold matter that the United States aid to the contras is intended to help overthrow the government of Nicaragua, the Boland Amendment is applicable to that aid. The Administration has violated the Boland Amendment in three separate ways, through: (1) the conversion of allowable non-lethal humanitarian aid into

<sup>263</sup> Pub. L. 97-377 § 793, 96 Stat. 1865 (1982).

<sup>264</sup> *Id.*

<sup>265</sup> Gelb, *Contra Aid: Who Are the Planners?*, N.Y. Times, Oct. 23, 1986, at A3, col. 1. *See also*, SEN. KERRY, "PRIVATE ASSISTANCE" AND THE CONTRAS: A STAFF REPORT, 2, Oct. 14, 1986.

<sup>266</sup> Pertman, *Records Link Iran Receipts to Contras*, Boston Globe, Apr. 24, 1987, at A1, col. 1; Butterfield, *Contra Supplies Reportedly Got U.S. Military Help*, N.Y. Times, Apr. 25, 1987, at A1, col. 6.

<sup>267</sup> *See* Lobel & Rantner, *supra* note 45, at 40.

<sup>268</sup> Pub. L. 97-377, § 793, 96 Stat. 1865 (1982).

<sup>269</sup> 129 CONG. REC. H5748 (daily ed. July 27, 1983).

<sup>270</sup> *See* President's News Conference *supra* note 160, at 212.

<sup>271</sup> *Id.* at 212-13.

lethal supplies, (2) official aid given covertly during the period the Boland Amendment was in effect, and (3) the unofficial sponsoring of contra aid while it was banned, through the establishment of a "private" aid network, the latter two being part of the so-called "Iran-contra affair."<sup>272</sup>

First, during the period that the Boland Amendment was in effect, Congress, alarmed by the lack of, for example, medical supplies in Nicaragua, authorized \$27 million in non-lethal aid for the contras.<sup>273</sup> Despite the fact that the aid was intended for items such as a medical evacuation helicopter and trucks, it now seems that at least part of this non-lethal humanitarian aid was converted into lethal supplies.<sup>274</sup> Of the \$27 million in non-lethal aid that was authorized by Congress, approximately one-half was actually used for such aid, and the rest cannot be accounted for.<sup>275</sup> False vouchers allegedly have been submitted indicating that the money was spent on food and clothing. Moreover, documentation exists showing that, for example, at least \$15 thousand in humanitarian aid was used to buy bullets.<sup>276</sup> The State Department also solicited \$10 million in non-lethal aid from the Sultan of Brunei, and that money has now disappeared.<sup>277</sup> The Administration cannot account for it, though some Congressional investigators believe that it is possible that the money was used for non-humanitarian aid, in violation of the Boland Amendment.<sup>278</sup>

<sup>272</sup> See generally, Rosenbaum, *Secord Says High Officials Helped Him Supply Contras Despite Ban on U.S. Arms Aid*, N.Y. Times, May 6, 1987, at A1, col. 6; *Secord Recounts Being Told Reagan Knew of His Work*, N.Y. Times, May 7, 1987, at A1, col. 6; Pertman, *Boland Grills Secord on "Little" Amendment*, Boston Globe, May 9, 1987, at A4, col. 4; Butterfield, *Aide Tells How He and North Armed the Contras*, N.Y. Times, May 20, 1987, at A1, col. 3.

It is interesting to note that President Reagan feels that the Boland Amendment is not applicable to the actions of the President. See, *Reagan Says He Did Not Violate Contra-Aid Ban: Believes Boland Measure Does Not Apply to Him*, Toledo Blade, May 17, 1987, at A1, col. 5. This is similar to his view that the Neutrality Act is inapplicable to the actions of the President concerning the aid to the contras. See *supra* notes 170–222 and accompanying text. The joint congressional committee investigates the Iran-contra affair has noted the attitude of the Reagan Administration concerning the Boland Amendment was one in which "[o]fficials viewed the law not as a boundary for their actions but as an impediment to their goals. When the goals and law collided, the law gave way." Shenon, *Reagan Backed 'Inverted Values,' Iran Panel Says in Tougher Draft*, N.Y. Times, Oct. 25, 1987, at A1, col. 3.

<sup>273</sup> LeMoyné, *supra* note 163; TOWER COMMISSION REPORT, *supra* note 244, at C6.

<sup>274</sup> *Id.*, see also, Engelberg, *Report Says U.S. Lost Track of Sultan's Cash*, N.Y. Times, January 7, 1987, at A1, col. 3; *Ex-Crewman Says C.I.A. Delivered Explosives to Contras*, Boston Globe, April 3, 1987, at A17, col. 3.

<sup>275</sup> The House of Representatives, alarmed at the apparent misappropriation of funds, has indicated that it will not approve additional contra funding until a full accounting is made of all missing funds. See *supra* note 165. See also, Gerth, *Cash for Contras Far Exceeds Sum They Had Thought*, N.Y. Times, April 8, 1987; *Millions Raised for Contras Missing*, Boston Globe, April 9, 1987, at A10, col. 4. In addition, some Congressmen suspect that illegal drug sales may have been part of the Iran-Contra affair. Kurkjian, *U.S. Probing Drug Links to C.I.A. Flights*, Boston Globe, April 26, 1987, at A1, col. 6.

<sup>276</sup> *Reagan Certifies that Contras can get U.S. Aid; Reforms Cited*, Boston Globe, Oct. 25, 1986, at A6, col. 4.

<sup>277</sup> See Engelberg, *supra* note 274; TOWER COMMISSION REPORT, *supra* note 244, at B123–26. See generally *supra* note 165.

<sup>278</sup> See Engelberg, *supra* note 274; Kranish, *U.S. Solicitations for Contras Cited*, Boston Globe, Mar. 6, 1987, at A1, col. 6.

The second way in which the Administration has violated the Boland Amendment has been revealed through the ever-broadening scope of the "Iran-contra affair."<sup>279</sup> The affair, at its most basic level, seems to have involved two steps: the U.S. government sold arms to Iran and the money was deposited into Swiss bank accounts.<sup>280</sup> Then, the money was withdrawn and used to pay the Defense Department for the arms, with the excess money, or profit, going to the contras.<sup>281</sup> Even though the Boland Amendment was effectively repealed by the passage of a new contra appropriations bill for \$100 million dollars in aid on October 23, 1986, the Administration still violated U.S. laws by aiding the contras, because the events of the "affair" allegedly took place during the time in which the Amendment was in effect.<sup>282</sup>

By the fall of 1985, Lt. Col. Oliver North was actively engaged in resupplying the contras with lethal weapons.<sup>283</sup> He obtained elaborate encryption devices from the National Security Council (NSC) and "established a communications network between himself, the contras, the NSC, and private aid groups outside the purview of Congress."<sup>284</sup>

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<sup>279</sup> See generally, TOWER COMMISSION REPORT, *supra* note 244, at III 19–24, IV 5–10, B121–127, C1–17.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> The new aid package was passed on Oct. 23, 1986, after President Reagan certified that the contras are making human rights reforms. The aid package consisted of \$70 million in military aid and \$30 million in non-lethal aid. \$60 million was to be provided immediately, the other \$40 million was to be awarded in Spring 1987, contingent upon Congressional approval. See *Reagan Certifies that Contras can get U.S. Aid; Reforms Cited*, *supra* note 276.

It is important to note here that, much like the human rights certifications in El Salvador, discussed *supra* at notes 79–113 and accompanying text, those that the President makes to Congress concerning the contras are grossly inadequate. The contras are engaging in gross violations of human rights. However, because the aid is not to a "government," the Foreign Assistance Act of 1961, discussed *supra* at notes 76–116, is not applicable to the situation in Nicaragua. For an analysis of human rights abuses by the contras in Nicaragua, including the rape, murder, torture and forced relocation of civilians, see EICH & RINCON, *supra* note 150, at 12, 38, 64–65, 126; Kinzer, *Contras Raid Civilian Targets*, N.Y. Times, Mar. 10, 1987, at A1, col. 5; Sciolino, *U.S. Group Finds No Improvement in Contras' Human Rights Record*, N.Y. Times, Feb. 10, 1987, at A10, col. 2; LAWYER'S COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, COMMENTS ON THE NICARAGUAN GOVERNMENT'S REPORT TO THE U.N. HUMAN RIGHTS COMMITTEE, (1983); Brinkley, *supra* note 250, at A10, col. 3; Aleman, *Nicaragua Says Rebels Killed 6 in 4 Raids*, Boston Globe, Mar. 22, 1987, at A10, col. 6; Bennett, *Conflict Hits Civilians Hard in Nicaragua*, Boston Globe, Mar. 27, 1987, at A1, col. 4; R. BRODY, *CONTRA TERROR IN NICARAGUA: REPORT OF A FACT-FINDING MISSION* (1985); T. CABESTRERO, *BLOOD OF THE INNOCENT: VICTIMS OF THE CONTRAS' WAR IN NICARAGUA* (1985).

On April 28, 1987, the U.S.-backed contras murdered an American Engineer, Benjamin Linder, who was doing volunteer work in Nicaragua. Hirshson & Gaines, *Among Slain Engineer's Friends, Anger at U.S. Role in Nicaragua*, Boston Globe, April 30, 1987, at A1, col. 4; Kinzer, *American Died in Rebel Ambush, Nicaragua Says*, N.Y. Times, April 30, 1987, at A12, col. 2; Sciolino, *U.S. Agencies Lay Blame for Volunteer's Death on Administration*, N.Y. Times, April 30, 1987, at A12, col. 2; *Path to Nicaragua and Death*, N.Y. Times, April 30, 1987, at A12, col. 2.

When the latest contra aid package of \$100 million was approved by Congress in 1986, an important "string" was attached: \$3 million would have to be used to insure that the contras showed a more enlightened attitude toward human rights. The Reagan Administration asked the Association for Human Rights to monitor the contras. In a report released July 30, 1987, the group noted abuses ranging from the murder of civilians and prisoners to the burning of a church health clinic. A State Department spokesman said the number of "breaches" was "rather small for the time period." *Report Describes Contra Violations*, N.Y. Times, Aug. 2, 1987, at E2, col. 2.

<sup>283</sup> TOWER COMMISSION REPORT, *supra* note 244, at C7.

<sup>284</sup> *Id.* at C7–8.

Using this system, North coordinated at least nine shipments of munitions to the contras from March to June 1986.<sup>285</sup>

In the summer of 1986, North organized a new contra management structure called Project Democracy (PRODEM), a network of secret bank accounts and individuals "deeply involved in contra resupply activities—including the building of a secret airstrip for use by the contras in northern Costa Rica."<sup>286</sup> At one point, the assets of PRODEM included six aircraft, warehouses, supplies, maintenance facilities, ships, leased houses, vehicles, munitions, communications equipment, and the airstrip in Costa Rica. PRODEM's assets were worth over \$4.5 million.<sup>287</sup> In short, North coordinated a wide variety of contra aid activities during the time that the Boland Amendment was in effect. The commission of any of these activities would be enough to violate the Boland Amendment.

In addition to the government's role in "actively" resupplying the contras, the NSC and North significantly assisted private contra aid groups.<sup>288</sup> The Tower Commission, the Presidential Panel investigating the affair, found that the NSC in general, and specifically Lt. Col. North, actively aided private groups that were supporting the contras in two areas: operations and fundraising.<sup>289</sup> He solicited materiel such as helicopters from U.S. allies, and provided military advice to contra leaders during the period in which the Boland Amendment was in effect.<sup>290</sup> He actively solicited monetary aid for the contras from third party countries.<sup>291</sup> He arranged for shipments of munitions to the contras via third party countries, disguising the flow of arms from the United States.<sup>292</sup> North also set up an elaborate network of shell and tax-exempt corporations to disguise the flow of arms.<sup>293</sup> A Washington lobbyist and fundraiser, Carl Channell, pleaded guilty to a charge of fraud relating to his role in setting up the tax-exempt funds with North.<sup>294</sup> Channell admits raising \$2 million for humanitarian aid during the time the Boland Amendment was in effect, and then, with North's assistance, using it to purchase military supplies for the contras.<sup>295</sup> This is the first criminal prosecution resulting from the Iran-contra affair.<sup>296</sup>

Moreover, in addition to the private assistance network established by the NSC and North, the Administration violated the Boland Amendment by aiding other private groups supplying arms to the contras. These groups, like those that North established, formed when official U.S. aid to the contras was cut off by the Boland Amendment. As one Administration official said, the U.S. government helped the system "readjust" by

<sup>285</sup> *Id.* at C8. For a photographic essay of the covert resupply mission, see Palmer, *Contra Aid Scrapbook*, Boston Globe, Mar. 29, 1987, at A24, col 1.

<sup>286</sup> *Id.* at C11.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> TOWER COMMISSION REPORT, *supra* note 244, at C2; Kranish, *North's Contra Funds Offered Tax Breaks to Donors*, Boston Globe, Mar. 29, 1987, at A1, col. 2.

<sup>290</sup> TOWER COMMISSION REPORT, *supra* note 244.

<sup>291</sup> *Id.* at C4-5.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* The complex network of private citizens and shell corporations was traced by Lt. Col. North in an elaborate diagram. *Id.* at C15-16.

<sup>294</sup> Kranish, *Fund-Raiser Pleads Guilty on Contra Aid: Implicates North in Conspiracy*, Boston Globe, April 30, 1987, at A1, col. 6.

<sup>295</sup> Berke, *Key Figure Admits Fraud Conspiracy on Contra Funds*, N.Y. Times, April 30, 1987 at A1, col. 1.

<sup>296</sup> *Id.*

doing three things: devising a plan to get aid to the contras, "helping to open the doors and gather the funds," and keeping up contact with the contras.<sup>297</sup> Another official noted that "White House and Pentagon officials had been instrumental in advising the various private efforts to arm the contras."<sup>298</sup> Congressional investigators also "have clear indications" that former C.I.A. director William Casey and other C.I.A. officers coordinated the Reagan Administration's efforts to assist the contras in obtaining military, or lethal aid, through private groups in foreign countries during the time the Boland Amendment was in effect.<sup>299</sup>

Attention began to focus on the activities of the private groups when a Southern Air Transport plane was shot down in Nicaragua on October 7, 1986.<sup>300</sup> The plane, carrying Eugene Hasenfus, William Cooper and two contra soldiers, was shot down by the Sandinistas when it attempted to drop guns and ammunition to the contras.<sup>301</sup> President Reagan, defending the actions of Hasenfus and Cooper, noted that "[w]e're in a free country where private citizens have a great many freedoms", and that the flight was "quite in line with what has been a pretty well-established tradition in our country" and furthermore that he would "not be inclined to interfere."<sup>302</sup>

Circumstantial evidence indicates that this group had at least the "tacit approval of the U.S. government."<sup>303</sup> First, the company that provided the plane, Southern Air Transport, has close ties with the C.I.A..<sup>304</sup> Second, the plane took off from the Ilopango air base in El Salvador, which is financed totally by the United States, and the U.S. frequently uses it as a staging base for contra missions.<sup>305</sup> Third, Hasenfus has since admitted that the C.I.A. supervised the missions that he flew into Nicaragua, and further indicated that the flight was connected to an agency said to be providing only non-lethal aid.<sup>306</sup> Finally, it has been revealed that the crewmen involved in the operation, including the pilot William Cooper, were required to sign a "secrecy agreement" stating that they had been exposed to classified information and were responsible to the United States

<sup>297</sup> Gelb, *supra* note 265. Others have noted that the aid to Nicaraguan contras was provided by a "vast" private network with at least tacit U.S. administration approval. *Private Pipeline to the Contras*, N.Y. Times, Oct. 22, 1986, at A1, col. 4.

<sup>298</sup> Engelberg, *U.S. Officials Said to Have Aided Private Suppliers of Contra Units*, N.Y. Times, Oct. 11, 1986, at A1, col. 1.

<sup>299</sup> One of the Congressmen investigating the affair has stated that "Casey's fingerprints are everywhere." See, McManus, *supra* note 256; Kranish, *Witness says C.I.A. Got Authorization to Train Contras*, Boston Globe, Mar. 29, 1987, at A23, col. 1.

<sup>300</sup> Halloran, *American is Captured After Plane is Downed in Nicaraguan Territory*, N.Y. Times, Oct. 8, 1986, at A1, col. 1.

<sup>301</sup> *Nicaragua Charges Flight Carried Arms*, Boston Globe, October 8, 1986, at A1, col. 4.

<sup>302</sup> King, *Private Role Increasing in Foreign War Actions*, N.Y. Times, Oct. 12, 1986, at A18, col. 1.

<sup>303</sup> See *supra* note 298.

<sup>304</sup> Halloran, *Reagan Calls Plane's Crew a New Lincoln Brigade*, N.Y. Times, Oct. 9, 1986, at A8, col. 1. For a discussion of the establishment by the C.I.A. of a similar air transport company linked to the contra resupply effort, see Palmer, *Firm With Contra Links Had U.S. Contact*, Boston Globe, April 5, 1987, at A9, col. 1.

<sup>305</sup> LeMoyné, *Nicaragua Shows Reporter Man it Says is Flier*, N.Y. Times, Oct. 8, 1986, at A8, col. 3; Engleberg, *U.S. Says Contras Got More Supplies*, N.Y. Times, Oct. 12, 1986, at A19, col. 1. See also, TOWER COMMISSION REPORT, *supra* note 244, at B125.

<sup>306</sup> LeMoyné, *U.S. Prisoner in Nicaragua Says C.I.A. Ran Contra Supply Flights*, N.Y. Times Oct. 10, 1986, at A1, col. 2; *Captive Cites C.I.A. Role in Rebel Airdrops*, Boston Globe, October 10, 1986, at A1, col. 3.

government to remain silent about it.<sup>307</sup> According to this document, failure to do so would "result in prosecution by the United States government."<sup>308</sup>

Much of the current controversy surrounding the establishment of the private contra aid groups centers on how far up the chain of government the knowledge went.<sup>309</sup> The argument is that since the President did not order the covert operations directly, the Boland Amendment does not apply. However, this argument fails. The extent and timing of the direct knowledge of the President is immaterial because the Boland Amendment is only concerned with aid provided by the C.I.A. or the Department of Defense, and not the person who authorized the aid.<sup>310</sup> In other words, the knowledge of covert aid to the contras during the time in which the Boland Amendment was in effect by even one Executive Branch official is sufficient to violate the law. Thus, while it is only alleged that the President may have known about the affair from the beginning,<sup>311</sup> the Tower Commission found conclusively that other Administration officials did indeed have the requisite knowledge concerning the Iran-Contra affair to constitute a violation of the Boland Amendment. For example, as previously discussed, it was found that Lt. Col. Oliver L. North helped to administer the covert contra aid program and set up Swiss bank accounts.<sup>312</sup> In addition, former National Security Adviser Robert McFarlane, Vice Admiral John Poindexter, former C.I.A. director William Casey, and Richard V. Secord, a retired Air Force Major General, were found to have known about the affair from its

<sup>307</sup> The statement contains multiple references to the United States government, including the following:

... I further acknowledge and agree that I have a continuing individual responsibility to the United States government for the protection of such information and that termination from this relationship with CAS Ltd., and/or the United States government does not release me of my obligations or any other previously executed Secrecy Agreements.

... I understand that I will not be relieved of these obligations except when specifically advised in writing by the sponsoring activity of the United States government.

... I understand that this agreement may be retained by the United States government for its future use in any manner.

Palmer, *Contra Suppliers Signed Secrecy Accord*, Boston Globe, Feb. 12, 1987, at A1, col. 1. (A copy of the document is on file with the THIRD WORLD LAW JOURNAL).

<sup>308</sup> *Id.*

<sup>309</sup> TOWER COMMISSION REPORT, *supra* note 244, at C14, III 24, IV 12-13. See also, Boyd, *North Falsified Iran Information, White House Says*, N.Y. Times, Mar. 6, 1987, at A1, col. 6; Gordon, *White House Knew of a Shift on Iran, C.I.A. Officials Say*, N.Y. Times, Mar. 20, 1987, at A1, col. 3.

<sup>310</sup> See *supra* note 264 and accompanying text.

<sup>311</sup> Rosenbaum, *A Senator Asserts that Reagan Knew of Arming Contras*, N.Y. Times, May 4, 1987, at A1, col. 6; Pertman, *Panelists: Reagan Knew of Aid Effort*, Boston Globe, May 4, 1987, at A1, col. 6.

The joint Congressional committee investigating the Iran-contra affair noted that "[t]he President created or at least tolerated an environment where those who knew of the diversion believed with absolute certainty that they were carrying out the President's policies." Shenon, *supra* note 272.

<sup>312</sup> See Engelberg, *Contra Aid: Loose Law?*, N.Y. Times, Jan. 15, 1987, at A12, col. 1; North Implicated in *Contra Supply Through Portugal*, N.Y. Times, Jan. 10, 1987, at A1, col. 6; LeMoyne, *Contra Chief Says North Arranged Four Payments*, N.Y. Times, Feb. 21, 1987, at B4, col. 5; *Contra Cash Linked to North*, N.Y. Times, Jan. 9, 1987, at A8, col. 4; LeMoyne, *Contras Say Cash Came From Associate of North*, N.Y. Times, Jan. 10, 1987, at A5, col. 5; Diamond, *Files From Contras' Banks Show Payments During Ban*, N.Y. Times, Mar. 3, 1987, at A9, col. 5; Fritz & McManus, *Rudman: Arms Deal Funneled Contras Millions*, L.A. Times, Mar. 7, 1987, at A1, col. 6. See also *supra* notes 283-95 and accompanying text.

inception.<sup>313</sup> Furthermore, in a memorandum to the President regarding the covert action, Poindexter noted that the C.I.A. was the conduit between the Department of Defense and Iran:

Therefore it is proposed that Israel make the necessary arrangements for the sale of 4,000 TOW weapons to Iran. Sufficient funds to cover the sale will be transferred to an agent of the C.I.A.

The C.I.A. will then purchase the weapons from the Department of Defense and deliver the weapons to Iran.<sup>314</sup>

In addition to assisting in the flow of arms from the U.S. to Iran, the C.I.A. was also actively involved in the Central American portion of the Iran-contra affair. The Tower Report noted that Thomas Castillo, the C.I.A. station chief in Costa Rica, was instrumental in arranging for military supplies to be dropped to the contras during the Boland Amendment ban on such aid.<sup>315</sup>

Thus, through the findings of the Tower Commission and White House documents made public in its wake, it is evident that members of both the Central Intelligence Agency and the Department of Defense were instrumental in providing funds to the Nicaraguan contras in violation of the Boland Amendment.

## VI. CONCLUSION

This note has pointed out the severe inadequacies that exist in current United States policy in El Salvador and Nicaragua. Through violations of the War Powers Resolution and the Foreign Assistance Act in El Salvador; and the Neutrality Act, the U.S. Constitution, and Boland Amendment in Nicaragua, this note has shown that the United States is illegally interfering in the affairs of both of those countries. The violations of the statutes discussed in this note are not simply technical matters, nor do they injure only the unfortunate citizens of El Salvador and Nicaragua. The sponsoring of the government of a foreign country such as El Salvador, or the anti-government "rebels" in a country like Nicaragua in violation of domestic U.S. law, undermines the democratic decision-making process in general. The War Powers Resolution, the Foreign Assistance Act, the Neutrality Act, the Constitution, and the Boland Amendment all reflect the same basic premise, that the United States government should support groups with questionable goals only after significant and meaningful public discussion and debate, and with the agreement of both the President and Congress. Thus, presidential circumvention of those laws by allowing illegal intervention in the affairs of El Salvador and Nicaragua must not be tolerated by either Congress or the American people.

The problem presented in this note is a difficult one to solve. The aim of the Central American policy of the Reagan Administration is a noble one — to stop the spread of

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<sup>313</sup> See Diamond & Blumenthal, *Two U.S. Colonels Linked to Efforts to Sell U.S. Arms*, N.Y. Times, Jan. 11, 1987, at A1, col. 6; Boyd, *Two Key Documents on Iran Policy Are Made Public by White House*, N.Y. Times, Jan. 10, 1987, at A1, col. 4; *Texts of Order by Reagan and Memo*, N.Y. Times, Jan. 10, 1987, at A5, col. 1.

<sup>314</sup> *Texts of Order by Reagan and Memo*, *supra* note 313, at col. 4.

<sup>315</sup> Rosenbaum, *supra* note 256, at A6, col. 1.

communism.<sup>316</sup> It is difficult to argue that such a goal should not be a primary thrust of U.S. foreign policy.<sup>317</sup> However, there must be a solution that stops short of violating domestic law.<sup>318</sup> In order to achieve that goal, Congress must be given more control over the process of providing aid to El Salvador and Nicaragua. Accordingly, two new bipartisan committees should be established, one for El Salvador, and one for Nicaragua.

The first, called the "Congressional Human Rights Committee", would be assigned the task of verifying the requisite human rights advancements in El Salvador under the Foreign Assistance Act. By establishing such a committee, the semi-annual certifications made by the President would not be made blindly, as is now the case. Furthermore, public testimony and debate could be presented and considered before aid to the Salvadoran government would be allowed to continue. In addition, the committee could function in a similar way in the evaluation of human rights-contingent laws in other countries, thus guaranteeing that United States policy towards human rights violations in all countries would be uniform and well-considered.

The second bipartisan Congressional committee that must be established could be called the "Congressional Contra Aid Committee." Hearings before this committee would take two forms. First, the committee would require semi-annual testimony from selected cabinet members and advisors describing any contra aid given during the previous six months, and certifying that it is not illegal. Those required to testify would include the President, Secretary of State, White House Chief of Staff, Attorney General, Secretaries of the Army and Navy, and the Directors of the CIA and the NSC. Those hearings, conducted under oath, would create a permanent record of testimony on which to base

<sup>316</sup> The subject of a Communist threat or lack thereof in Central America is beyond the scope of this note. However, it is interesting to note that American Presidents have long considered Central America a threat to the United States. In 1927, Calvin Coolidge spoke of what he viewed as a communist threat in Nicaragua:

I have the most conclusive evidence that arms and munitions in large quantities . . . have been shipped to the revolutionists . . . . The United States cannot fail to view with deep concern any serious threat to stability and constitutional government . . . tending toward anarchy and jeopardizing American interest, especially if such a state of affairs is contributed to or brought about by outside influence or by a foreign power.

See O'Malley, *Play it Again*, in ROSSET & VANDERMEER, *supra* note 6, at 155.

<sup>317</sup> It is unfortunate that this issue tends to force people to defensively assume a "liberal" or "conservative" posture. In order to avoid that definitional conflict, this Note has taken a decidedly neutral stand. The point that is being stressed is not whether the United States should become involved in Central American politics. Rather, the point here is that the current level of U.S. involvement in El Salvador and Nicaragua is illegal, based on violations of domestic law. As such, that intervention cannot be tolerated. As the Supreme Court noted in *Mapp v. Ohio*, 367 U.S. 643, 648 (1961), "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." In addition, as Justice Brandeis, dissenting, wrote in *Olmstead v. United States*, 277 U.S. 438, 485 (1928), [o]ur government is the potent, the omnipresent teacher. For good or for ill, it teaches the people by its example . . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself. It invites anarchy."

<sup>318</sup> Edgar Chamorro, the former director of the contra organization known as the Nicaraguan Democratic Force, resigned in 1984 in protest of contra atrocities. He has noted that "rather than engage itself further, economically or militarily, the best course for the United States is to distance itself from the conflict, encourage political dialogue, and support Latin American countries in their effort to prevent a regional war." See *How the United States Should Handle Nicaragua*, in ROSSET & VANDERMEER, *supra* note 7, at 39.



further prosecutions relating to, for example, perjury or even impeachment if the participants were later shown to have lied about the legality of United States intervention in Nicaragua. In addition, the requirement of testimony at regular intervals would force government officials to be accountable and responsible to Congress and to the American people. *The Tower Commission Report* leaves the impression that the officials involved in the Iran-contra affair felt no such accountability, and it was this lack of restraint that contributed to the extent of the affair.

A second function of the committee would be to conduct hearings on the Neutrality Act. It is clear that there is a difference of opinion surrounding the applicability of the Act to the actions of the President and the Executive Branch, at least as far as the Reagan Administration is concerned. Hearings must be conducted, and testimony given, regarding the redrafting of this law. Congress should reenact the Neutrality Act with more precise statutory language. Currently the Neutrality Act drafted in the 1700's and buttressed with hundreds of years of presidential, congressional, and judicial interpretation, can only become more ambiguous with time.

By way of summary, this Note closes with a portion of an 1859 Grand Jury Charge by Judge McCale concerning the applicability of the Neutrality Act to one of the United States' 1850's excursions into Nicaragua, which is relevant to current U.S. intervention in Central America, and the failure of the Administration to take note of domestic law restrictions on that intervention.

We know, gentlemen of the grand jury, that peaceful relations exist between this country and Nicaragua . . . .

. . . Surely it may be urged as an argument, to show the humanity of the law, that its faithful and rigid enforcement, whether by the government or the courts, may be instrumental in saving deluded persons from the perils into which they would blindly rush under the guidance of their leaders . . . .<sup>319</sup>

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<sup>319</sup> Charge to Grand Jury-Neutrality Laws, 30 F. Cas. 1023, 1024 (CC La., 1859) (No. 18,268).