Testimony of Peter Weiss, Vice President, Center for Constitutional Rights, on the Nomination of Judge Antonin Scalia to the Supreme Court of the United States

My name is Peter Weiss. I am a senior partner in the New York law firm of Weiss, Dawid, Fross, Zelnick and Lehrman, which counsels a number of major corporations in the field of industrial property. I am also a Vice President and volunteer attorney of the Center for Constitutional Rights and I appear before you today in that capacity.

The fact that my grandfather and several other members of my family died in Nazi gas chambers has left me with a lifelong passion for human rights and for using the law to resist or seek redress for the commission of atrocities, or crimes against humanity, by governments of whatever political stripe. I am here today because of my conviction that Judge Scalia does not share that passion and that this raises serious questions about his qualifications to sit on the Supreme Court of the United States.

In 1982, the Center for Constitutional Rights brought a case in the United States District Court for the District of Columbia, Sanchez-Espinoza v. Reagan, on behalf of nine citizens of Nicaragua, two citizens of Germany and one of France, alleging that they or their deceased relatives had been victims of atrocities committed by the contras, as well as on behalf of twelve members of Congress who claimed that U.S. support for the contras violated the Boland Amendment and the War Powers clause of the Constitution. The defendants were various executive officials, including the President, the Secretaries of State and Defense and the Director of the Central Intelligence Agency.

The complaint, supported by extremely detailed affidavits, alleged that the foreign plaintiffs or their relatives had been subjected to summary execution, murder, abduction, torture and rape, all as part of a plan authorized, financed and directed by the federal defendants to terrorize the civilian population of Nicaragua and foreign volunteers working in that country.

In the District Court, Judge Corcoran granted the government's motion to dismiss on the ground that the complaint presented a nonjusticiable political question. I argued the appeal on May 24, 1984 before a panel of the Circuit Court consisting of Judges Scalia, Tamm and Ginsburg. At the hearing Judge Scalia was, as is his custom, courteous and interested in the issues. He let it be known that he was not a devotee of the political question doctrine, a point on which I found myself in agreement with him, since, as a student of comparative law, I have never understood this doctrine, peculiar to United States jurisprudence, which holds that certain cases charged with political interest are not appropriate for judicial resolution even though they may involve violations of law.

There then ensued a very long silence. Finally, on August 13, 1985, nearly fifteen months after the argument, the Circuit upheld the dismissal of the suit in an opinion written by Judge Scalia, 770 F.2d 202.

It is a curious opinion. It begins by reciting the facts alleged by the plaintiffs concerning the atrocities committed by the contras and the responsibility of the defendants for those atrocities and by stating, as required by the Federal Rules, that, "for purposes of this appeal from a pretrial dismissal, we must accept as true the factual assertions made in the complaint". It states, as foreshadowed by Judge Scalia's comments at the Hearing, that, without necessarily disapproving the District Court's reliance on the political question doctrine, he chooses "not to resort to that doctrine for most of the claims". It then goes on to dismiss the various claims, one by one, in considerable detail. I shall deal here only with the claims of the foreign plaintiffs.

One such claim was based on the Alien Tort Statute, 28 U.S.C. §1350, which grants federal jurisdiction to aliens suing for a tort "in violation of the law of nations or a treaty of the United States". As to this, Judge Scalia holds that, insofar as the defendants are being sued in their private

capacity, international law does not apply; a questionable holding, but let that pass. Insofar as the defendants are being sued in their official capacity, Judge Scalia concedes that, at least as to nonmonetary relief, i.e. relief by way of injunction, mandamus or declaratory judgment, the court has discretion to grant or withold such relief. But, he goes on to say, concerning "so sensitive a foreign affairs matter as this . . . it would be an abuse of our discretion to provide discretionary relief". Another reason for withholding the relief requested is that "[t]he support for military operations that we are asked to terminate has . . . received the attention and approval of the President, the Secretary of State, the Secretary of Defense and the Director of the CIA, and involves the conduct of our diplomatic relations with at least four foreign states".

Now this is a truly astounding, as well as alarming, statement. In the first place, the foreign plaintiffs never asked that "support for military operations" be discontinued, only that such operations be conducted without resort to rape, summary execution, torture and other gross human rights violations. Indeed, we said in our briefs and at oral argument that this was a case of international police brutality and should be judged by principles similar to domestic police brutality cases.

Everyone, myself included, agrees that, if Judge Scalia is to be faulted on any score, it is not on his intelligence. Why, then, this glaring analytical failure at a critical juncture of the case? It is, after all, not too difficult to distinguish between atrocities attendant upon an operation and the operation itself or to draw a line between war and war crimes. It is almost as if, by the time he reached page 208 of his opinion (as reported), the atrocities "accepted as true" on page 205 - "summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities" -

had slipped his normally alert mind. Could it be that Judge Scalia simply could not bring himself to conceive that the highest officials of our government might be guilty of crimes against humanity? Yet the atrocities committed against unarmed civilians by the contras and other surrogates of American policy abroad are a well known fact; at least one member of this Committee, Senator Kennedy, has played a leading role in exposing and documenting them. As recently as July 31, Anthony Lewis, in a New York Times column entitled "Don't We Care?", discussed the terror tactics of the contras in Nicaragua and another U.S. ally, Jonas Savimbi, in Angola, and suggested that "if Americans were asked whether any political cause could justify the deliberate maiming and killing of innocent civilians, most would surely reject the idea."

It is not likely that Judge Scalia refused outright to believe the allegations of the complaint. He is, in any case, too good a judge to reject factual allegations before a trial on the merits. No, it is more likely, and more in tune with Judge Scalia's view of the executive as the predominant branch of government, that he simply does not regard the courts as an appropriate instrument for curbing executive abuse, no matter how shocking to the conscience. But if so, why did he not, like Judge Corcoran below, resort to the time honored political question doctrine which so many judges before him have used to avoid dealing with troubling questions of legal limits on executive action? As I said, it is a curious decision.

There are other curious aspects to it. In footnote 5, Judge Scalia felt it necessary to explain why, in a previous case brought by the Center for Constitutional Rights, Filartiga v. Peña-Irala, 680 F.2d 876 (2d Cir. 1980), damages for torture were held to be recoverable from a Paraguayan police official, while, in Sanchez, sovereign immunity was held to bar such recovery from officials of the United States. The explanation: "The doctrine of foreign sovereign immunity is quite distinct from the doctrine of domestic sovereign immunity that we apply

here, being based upon consideration of international comity, . . . rather than separation of powers". A strange message, it seems to me, to send to the world: a Paraguayan can sue for money damages in an American court for the death by torture of his son in Paraguay, but a Nicaraguan cannot bring such an action in an American court against American officials responsible for torture in Nicaragua.

One further aspect of the rather long and complex decision deserves attention in the current context. The foreign plaintiffs also sought damages for violation of their rights under the fourth and fifth amendments to the Constitution of the United States. Without reaching the question whether the protection of the Constitution extends to noncitizens abroad, on which there appear to be conflicting precedents, Judge Scalia found this portion of the complaint barred because "the foreign affairs implications of suits such as this cannot be ignored" and "the danger of foreign citizens using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist".

Again, the message is clear. In its starkest terms, it is this: Nuremberg never happened, and even though the most grievous atrocities may be committed abroad, as part of a regular pattern of conduct, by forces trained, financed, supervised and even directed by the United States, foreigners need not apply for relief to American courts.

I would like to end on a note of fairness to Judge Scalia. The Sanchez opinion which he wrote was unanimous. Our Petititon for Rehearing en Banc was denied. Nor has the Congress, in approving aid to the contras, shown any great sensitivity to American responsibility for the contras' crimes. It may be also, that we have not progressed very far since Judge Wyzanski, in a case in which a Vietnam draft resister was invoking the Nuremberg defense, said, in a moment of unusual candor, that you couldn't really expect a judge whose salary was being paid by

the executive to consider whether the President was guilty of war crimes.

Nevertheless, it would be nice, if, at a time when terrorism and counterterrorism are increasingly becoming preferred instruments of foreign policy, the next appointee to the Supreme Court were one who had the courage to apply the law in favor of the victims, even where the perpetrators or their accomplices are high officials of the government of the United States. What is troubling about Judge Scalia, in this respect, is that, not content with the old-fashioned, sometimes even slightly embarrassed, "political question" evasion, he chooses to mount an elaborate, aggressive and superficially convincing defense of judicial abstention in an area which cries out for judicial intervention. Not judicial intervention, mind you, to make or unmake policy, but to redress and put an end to the most ancient, most direct and most universally condemned wrongs: assault, battery, torture, the slaughter of the innocent. As to all of this, Judge Scalia, in his finely crafted opinion, has said "Even if true, it's not the business of the courts". It was a difficult decision to explain to our plaintiffs, who included a woman doctor kidnapped by the contras and beaten, assaulted and subjected to multiple rapes, at a time when the CIA was intimately involved with contra operations.