The Cuba Triangle: Sovereign Immunity, Private Diplomacy, and State (In-)Action. Reverberations of the "Brothers to the Rescue" Case

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COMMENT

THE CUBA TRIANGLE: SOVEREIGN IMMUNITY, PRIVATE DIPLOMACY, AND STATE (IN-)ACTION. REVERBERATIONS OF THE “BROTHERS TO THE RESCUE” CASE.

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I. INTRODUCTION

Under the Foreign Sovereign Immunities Act ("FSIA"),¹ the Southern District of Florida realized jurisdiction over the Republic of Cuba in *Alejandre v. Cuba*² ("Alejandre") and held Cuba liable for the Cuban Air Force’s shoot-down of two U.S.-registered civilian planes over international waters, outside of Cuba’s twelve mile territorial sea.³ This comment looks at the three entities that framed *Alejandre* and asks first whether Cuban President Fidel Castro could be arrested or detained for the shoot-down upon his arrival at the United Nations Summit in September, 2000. This comment also probes whether the private, U.S. civilian group, Brothers to the Rescue ("BTTR"), violated U.S. law, and finally whether the inaction of the United States gave rise to liability for the shoot-down. The Cuba Triangle is formed by the interweaving legal and moral obligations radiating from each of its three corners: Cuba, the United States, and Brothers to the Rescue. The confusing and dangerous space defined by the friction between these entities enveloped the slain pilots, leaving a vacuum of responsibility only partially sealed by *Alejandre*.

The FSIA does not address the legal status of heads-of-state.⁴ The United States recognized Fidel Castro as the head of the Cuban government on January 7, 1959.⁵ Assuming *arguendo* that the line of *respondeat superior* that the district court used in assigning liability to the Republic of Cuba for the actions of the

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1. 28 U.S.C. § 1602-11; § 1605(a)(7) regards a claim: [In which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extra-judicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency]

See also *Alejandre v. Cuba*, 42 F. Supp. 2d 1317, 1321 (S.D. Fla. 1999). In 1996 Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which amended the FSIA “to provide an additional exception to the general rule that federal courts lack subject matter jurisdiction over a claim brought against a foreign state.” The AEDPA inserted § 1605(a)(7) to the FSIA in order to provide federal courts jurisdiction over claims within the parameters set forth in the statute. *Id.*


3. *Id.* at 1242-43.

4. *In re Doe*, 860 F.2d 40, 44 (2d Cir. 1988).

Cuban Air Force could be directly connected to Cuban President Fidel Castro, this comment concludes that the United States could not legally arrest or detain Castro for the shoot-down when he visited the United Nations as Cuba’s sitting head-of-state.

The exile Cuban-American group, BTTR most likely did not violate provisions of the Logan Act\(^6\) or the Neutrality Act,\(^7\) though the group’s actions were nearly violations of U.S. law preventing private interference with foreign policy.

Finally this comment presents analysis of the duty impugned to the United States for its inaction.\(^8\) Factual developments since Alejandre suggest that the United States may have prevented the shoot-down, yet the state was not obligated to act, and incurs no liability for its inaction.

II. BACKGROUND

On Saturday, January 13, 1996 thousands of pamphlets urging Cubans to resist Castro’s government burst from the skies of Havana.\(^9\) Jose Basulto,\(^10\) president of BTTR,\(^11\) stated that the group claimed responsibility for the leaflets, but would not disclose “technical” details of how the missives were delivered or distributed.\(^12\) BTTR was known as a group of Cuban exile pilots that flew numerous missions over the Florida Straits patrolling for rafters in need of rescue.\(^13\) The group claimed credit for giving

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9. Juan O. Tamayo & John Lantigua, A Political Deluge, MIAMI HERALD, Jan. 15, 1996. The pamphlets had messages such as “Fight for Your Rights,” “The People Own the Streets, The Government Has the Fear,” “Your Neighbors Feel the Same Way You Do,” “Change Things Now.” Id. The pamphlets also had a line from the United Nations Declaration on Human Rights printed on them. Id.
10. Andres Viglucci, From Guns to Leaflets Over Cuba Activist Seeks Peaceful Change, MIAMI HERALD, Jan. 20, 1996. Basulto is a native of Santiago de Cuba who took part in the Bay of Pigs invasion. The CIA trained Basulto in warfare, but in the time preceding the events of Cuba’s shooting down of the two BTTR planes, news accounts portrayed Basulto as a convert to the teachings of Gandhi and Dr. Martin Luther King. Id.
12. Tamayo & Lantigua, supra note 9.
13. Id. BTTR has had great success in attracting popular support and donations from sources such as American Airlines, and accolades from the U.S. Coast Guard for the
aid and rescue to over 4000 Cuban refugees between 1994 and 1995. Prior to the January 13, 1996 flight, the group conducted a similar demonstration, entering Cuban air space in violation of U.S. and Cuban law, and dropping 1000 fliers over Havana in conjunction with a protest flotilla. In regards to the alleged January 13th flight over Havana, the Federal Aviation Administration ("FAA") stated that BTTR had filed no flight plans for the weekend.

The Cuban government threatened to intercept or shoot down aircraft involved in future flights. The Cuban government also filed an official protest with the State Department over the flights, and in a diplomatic note to the U.S. Interests Section in Havana voiced concerns over the violations of Cuban airspace. Basulto in response had hinted at future flyovers, to follow that of January 13th.

On Saturday, February 24th, 1996, Cuban MiG jet fighters shot down two planes belonging to BTTR over the Straits of Florida. White House Press Secretary Mike McCurry stated

thousands of flight hours that resulted in rescues. President Clinton, however, enacted a policy of surer repatriation of rafters, thereby slowing the "business" of BTTR. Id. See also Viglucci, supra note 10. As noted above, BTTR had great success in attracting private support for their cause. Did the U.S. government support this anti-Castro effort? See chapter VIII infra.

14. See also Smikle, supra note 11.
15. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295. Both the United States and Cuba are parties to this treaty, which includes affirmation of a state's sovereignty over the airspace marked by its territorial boundaries.
16. Tamayo & Lantigua, supra note 9. Though the text does not expressly state the year of this demonstration, it seems to have been July 13, 1995. The FAA filed charges against Basulto, pending at the time of the article, which could lead to suspension of his license. Id.; See also John Lantigua & Elaine de Valle, Unraveling How it Happened Was Line Crossed and by Whom?, MIAMI HERALD, Feb. 26, 1996, at 1A. One regulation that Basulto may have violated is U.S. 19 C.F.R. § 122.153, dealing with flights to and from Cuba, requiring that a party "clear or obtain permission to depart from, or enter at, the Miami International Airport, Miami, Florida . . . unless otherwise authorized." BTTR operated from Opa-Locka Airport. Id.
17. Tamayo & Lantigua, supra note 9.
18. Juan O. Tamayo, Cuba Rounds up Journalists, Warns Against Future Flyovers, MIAMI HERALD, Jan. 16, 1996. A statement in the Cuban newspaper, TRABAJADORES, read "Cuba has the means necessary to guarantee the integrity of its national territory, and to interrupt unauthorized flights in its air space." Id.
20. Viglucci, supra note 10, at 1A.
that the two planes were engaged "near the territorial waters of Cuba." At that time, U.S. Coast Guard and Navy planes and helicopters joined a Navy cruiser and several other vessels to search for the crewmen, F-15 fighters scrambled from a Tampa air base to provide cover for the operation. The U.S. Coast Guard received word of the downing at 3:45 p.m. from the FAA. Cuban officials did not release a statement immediately.

Local FAA authorities had issued new advisories on Cuba, warning against crossing the 24th parallel, noting that Cuba had stated that it would not be responsible for personal security. Other articles stated that Cuba had warned that planes caught in Cuban airspace would be shot down. Cuba, after the shoot-down, claimed to have warned the BTTR planes not to cross the 24th Parallel.

Accounts of the events that day differed. A BTTR pilot not on the February 24th mission claimed, "At no time did they veer into Cuban airspace. It was a search-and-rescue mission. I guarantee you they were in international waters." A Pentagon official told The Associated Press that there were some signs that the planes were heading to Cuba, possibly to pick up persons and fly them out of the country. McCurry stated that the three planes had filed flight plans designating the Bahamas as their destination, and that flight plans with Cuba as a destination would have been denied. Basulto claimed that the planes had changed their mind in mid-flight and redirected to look for Cuban rafters. U.S. officials reported that the Cubans radioed the

22. Id.
23. Id.
24. Id.
25. Id. The 24th parallel divides the water between Key West and Cuba and marks the limits of Cuba’s air traffic control. Id.
28. Elaine de Valle, Downed at Cuba's Door MiGs Blast 2 Exile Planes Close to Cuba, MIAMI HERALD, Feb. 25, 1996, at 1A.
29. Id.
30. Id.
31. Id. Three BTTR aircraft “deviated from the route given in their [Visual Flight Rules] flight plans; they were flying within the [Danger area designated by Cuba] . . . within Havana [Flight Information Region] promulgated as being active on 24 February 1996.” Id.; see also ICAO Council Concludes Consideration of the Report on the 24 February 1996 Shootdown of Civil Aircraft Off Cuba, Attachment B, Conclusions ¶ 3.11,
three planes and warned that the area was dangerous, and demanded that they remain north of the 24th parallel. A senior U.S. administration official claimed that the MiGs made no effort to contact the three planes or escort them from the area before requesting permission to shoot them down. U.S. Secretary of State Warren Christopher called the shoot-down "a blatant violation of international law."

Leading into the facts of the shoot-down, United States, BTTR, and Cuba asserted three diverging versions of the events. The Cuban government claimed that the planes violated its territory twice that Saturday, with the planes reaching as close as five miles from the coast. The Cuban government claimed that at 3:15 p.m. the two planes were in the restricted zone of Cuban airspace, heading toward Havana.

The U.S. version showed the planes north of the limit at 3:20 p.m., though Basulto's plane had penetrated three miles into Cuban airspace by 3:22 p.m. Basulto claimed, "None of us were in Cuban airspace." Outside of the trial, Cuba made no claim of where the planes actually were when shot down, but a U.S. administration official offered: "When the two other planes were shot down they were not in Cuban airspace. I know they may have come close to being in Cuban airspace prior to this time, but I have no information to indicate that they actually entered Cuban airspace." A U.S. statement later noted "the lead U.S. plane that returned safely to Opa-Locka did enter Cuban airspace." A later testimonial from an American official speaking on the condition of anonymity included the comments: "We have radar tracks" and "[t]here's no ambiguity there."

32. Valle, supra note 28, at 1A.
34. Id.
35. Lantigua & de Valle, supra note 27, at 1A.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. Christopher Marquis & Martin Merzer, *America Agonizes Over Options Military Retaliation Unlikely, Officials Say*, MIAMI HERALD, Feb. 26, 1996, at 1A. Basulto vehemently denied the report, saying "That is a lie." Id.
U.S. officials decried as false the Cuban government claim that the downed planes were five and eight miles off the Cuban coast. Cuban air traffic controllers made mistakes in the past, incorrectly informing BTTR pilots that they were in Cuban airspace.

The Southern District of Florida accepted the factual account filed by the plaintiffs which was the International Civil Aviation Organization's ("ICAO") report to the United Nations on the shoot-down. The conclusions of the ICAO report include findings that Cuba notified U.S. authorities of multiple violations of Cuban territorial airspace on seven specific dates between May 15, 1994 to April 4th, 1995, demanding the U.S. adopt measures to end the violations, and making a public statement on July 14, 1995, warning that any aircraft intruding into Cuban territorial airspace may be shot down. The report further confirmed that at least one BTTR aircraft overflew Havana at a low altitude on July 13th, 1995, releasing leaflets and religious medals. Though the report commended BTTR for its volunteerism and rescue efforts, it concluded that "[t]here was evidence to indicate that some members of the group sought to influence the political situation in Cuba." Of the two planes shot down, neither was closer than nine nautical miles to the limit of Cuba's territorial airspace when attacked, in other words both planes were over international waters.

42. Id.
43. Id.
44. See infra note 58 and accompanying text.
46. Id. at ¶ 3.2. The aircraft was identified as BTTR's N2506. The report reported the statement of a BTTR pilot that on the flights of January 9th and 13th, half a million leaflets were released outside Cuba's twelve nautical mile territorial airspace. Id. at ¶ 3.4. The author watched testimony from a BTTR member in the alleged Cuban spy trial at the time of writing that indicated BTTR craft used global positioning system hardware to track their locations during these and other flights.
47. Id. at ¶ 3.7.
48. Id. at ¶ 3.17.
III. ALEJANDRE V. REPUBLIC OF CUBA

In December 1997, the United States District Court for the Southern District of Florida held that the Cuban government was liable for the deaths of the four pilots. The court stated that the pilots were conducting a routine humanitarian mission, searching for Cuban rafters in the Florida straits. The court also held that the killing was "without warning, reason, or provocation."

Of paramount significance in Alejandre is the fact that Cuba refused to make an appearance, and therefore presented no defense. The Southern District accepted the plaintiffs' uncontroverted factual allegations, the ICAO report. Under the FSIA, however, the plaintiffs were required to establish their right to relief for the court. The opinion did not mention BTTR's flights to Havana in the past, and the court simply accepted the contention that this particular mission was a humanitarian mission to the Florida straits. In at least one news account, Basulto claimed that the flight was originally set for Bahamas, but the planes changed direction, mid-way, heading for the straits instead. Though BTTR offered first the explanation that the flights were to Bermuda, the group had contacted Havana prior to leaving Opa-Locka Airport for notification that they would be crossing the 24th parallel.

The MiGs did not utilize any of the established means to warn or escort the two planes out of the area, the only warning came from the Havana air controller in the form of the warning not to dip below the 24th parallel. The court looked to the

50. Id.
51. Id.
52. Id.
54. 28 U.S.C. §1608(e) ("No judgment by default shall be entered by a court . . . unless the claimant establishes his right or claim to relief by evidence satisfactory to the court.") (West 1994).
55. See generally Alejandre, 996 F. Supp. 1239.
56. Valle, supra note 28, at 1A.
57. Alejandre, 996 F. Supp. at 1243.
58. Id. at 1246; see also ICAO Council, supra note 45.
Convention on International Civil Aviation, to which both the United States and Cuba are parties, for codification of the measures.

The United Nations Security Council, the European Union, U.S. politicians and legal scholars quickly declared that the murders were brutal and unjustified under international law as they were committed against civilian aircraft. The district court relied on the June 1996, extensive report by the International Civil Aviation Organization for several key pieces of evidence, produced during its detailed investigation.

District courts have original jurisdiction to hear suits against foreign states, provided that some exception to sovereign immunity applies to the case. Through the FSIA, Congress granted federal courts subject matter jurisdiction for a claim against a foreign state if the claim was one of several enumerated exceptions. The exception relied upon in was a product of the AEDPA, which, one month after the shoot-down, added suits in U.S. courts against states engaged in acts of terrorism to the FSIA's exceptions to foreign sovereign immunity. Specifically, the FSIA allows this new exception in a case where:


60. Alejandre, 996 F. Supp. at 1246, n.3.
61. David Lyons, International Law Experts: No Basis For Attack, MIAMI HERALD, Feb. 26, 1996, at 10A. Early critics of Cuba's acts were U.S. Secretary of State Warren Christopher, Professors Carl McKenry and Bernard Oxman from the University of Miami School of Law.

63. Id. at 1244-46 (evidence included the transcript of the Cuban Air Force pilots' communications).
64. Id. at 1247.
65. Id. (citing 28 U.S.C. § 1330 (1994)).
68. Id.; (citing AEDPA, Pub.L. No. 104-132, § 221, 110 Stat. 1214 (1996); see also, 22 U.S.C.A. § 6021 (14) (West 2000) ("The Castro government threatens international peace and security by engaging in acts of armed subversion and terrorism such as the training and supplying of groups dedicated to international violence.").
Money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.\(^\text{69}\)

The court also noted that the United States must have "designated the foreign state as a state sponsor of terrorism pursuant to section 6(j) of the Export Administration Act of 1979."\(^\text{70}\)

The court was satisfied that (1) the shoot-down was an "extra-judicial killing," (2) the Cuban Air Force was acting as an agent of the Republic of Cuba when shooting down the two planes, (3) Cuba was designated as a state sponsor of terrorism at the time, and (4) the shoot-down took place over international waters.\(^\text{71}\) The court stated that these four points satisfied the requirements for the exception to foreign sovereign immunity under the FSIA.\(^\text{72}\)

The plaintiffs made their substantive claim for damages based on another 1996 statute, the Civil Liability for Acts of

\(^{69}\) Alejandro, 996 F. Supp. at 1247 (citing 28 U.S.C.A. § 1605(a)(7)). The court noted that AEDPA's amendments to the FSIA applied retroactively in this case. \textit{Id.} at n.4.

\(^{70}\) \textit{Id.} at 1248.

\(^{71}\) See \textit{id.} (citing 28 U.S.C. § 1350, note (1994) (as defined by the Torture Victim Protection Act of 1991 stating "the term 'extra-judicial killing' means a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.").

\(^{72}\) 31 C.F.R. Part 596 (1996) (Cuba was one of seven states named a state sponsor of terrorism in the Export Administration Act of 1979).

\(^{73}\) Alejandro, 996 F. Supp. at 1248. Plaintiffs were able to bring in "undisputed and competent evidence" that the shoot-down was over international waters. \textit{Id.} The crew and passengers of a cruise ship and a private fishing vessel gave evidence that the planes were flying away from Cuba, and were in international air space when attacked. \textit{Id.} Additionally, the court looked to the ICAO Report to support these assertions. The twelve mile permissible boundary that Cuba may claim as territorial sea finds its establishment in the United Nations Convention on the Law of the Sea, Oct. 7, 1982, art. 3, U.N. Doc. A/CONF 62/122 (1981), reprinted in 21 I.L.M. 1261 (1982). \textit{Id.} at n.7.

\(^{74}\) Alejandro, 996 F. Supp. at 1248.
State Sponsored Terrorism ("Civil Liability Act"). The Civil Liability Act creates, in this case, a cause of action against the Cuban Air Force, and the Republic of Cuba, through the doctrine of respondeat superior. There was no cause for discussion of whether Castro or any other Cuban official could be arrested or detained for the acts of the Cuban Air Force.

The court awarded the plaintiffs compensatory and punitive damages, totaling $187,627,911, against the Cuban Air Force and Cuba and "against any of their assets wherever situated." President Clinton had used frozen Cuban assets to make a humanitarian gesture of $300,000 to each of the plaintiffs' families. But in October 1998, President Clinton, citing "national security concerns . . . invoked a waiver blocking the families from collecting their judgments from frozen assets," even though he had charged Congress to "pass legislation that would provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the United States." Deputy Treasury Secretary Stuart E. Eizenstat stated that Clinton had not envisioned the legislation would finally pass.

In October 1998 pursuing Cuban commercial assets in the United States, the plaintiffs had filed a writ of execution of final judgment against AT&T. In November 1998, plaintiffs filed writs of garnishment against eleven U.S. telecommunication carriers for payments directed to Empresa de Telecomunicaciones ("ETECSA"). The district court ruled that a

75. Id. at 1249 (The Civil Liability Act, Pub.L. 104-208, § 589, 110 Stat. 3009, supported this claim. 28 U.S.C. § 1605 note on CIVIL LIABILITY FOR ACTS OF STATE SPONSORED TERRORISM (West. Supp. 1997)).

76. Alejandre, 996 F. Supp. at 1249; see also, Alejandre, 42 F. Supp. 2d 1317, 1321, n.3 (S.D. Fla. 1999) ("The FSIA defines an 'agency or instrumentality of a foreign state' as an entity 'which is a separate and legal person, corporate or otherwise.' An agent can also be an official of a foreign state.); see also, Skeen v. Federative Republic of Brazil, 566 F. Supp. 1414, 1417 (D.D.C. 1983) ("[A] respondeat superior statute, providing an employer (the foreign state) with liability for certain tortuous acts of its employees.").

77. Alejandre, 996 F. Supp. at 1253-54.


79. Id.

80. Id.

81. Alejandre, 42 F. Supp. 2d at 1325.

1998 amendment to the FSIA allowed the plaintiffs to garnish the assets without a license from the U.S. Office of Foreign Assets Control.\(^{83}\) The court also held that ETECSA was an "agency or instrumentality of a foreign state" under the FSIA sufficient to satisfy the intention of Congress.\(^{84}\) The Eleventh Circuit vacated this judgment and remanded the case with instructions to dissolve the writs of garnishment directed at amounts owed to ETECSA.\(^{85}\)

On October 11, 2000, the Senate unanimously passed The Justice of Victims of Terrorism Act,\(^{86}\) enabling the plaintiffs to collect approximately ninety-seven million dollars including compensatory damages from the judgment, and sanctions from non-diplomatic Cuban holdings in the United States.\(^{87}\) The funds came specifically from revenue paid by AT&T for Emtel Cuba, held in Chase Manhattan Bank.\(^{88}\)

IV. OPERACION ESCORPION\(^{89}\)

The legal proceedings in the Alejandre cases served only to identify one corner of the Cuba Triangle. Before legal analysis of the part played by the United States or BTTR, this comment must present the facts that came to light following Alejandre.

On Friday, February 23, 1996, the day before Cuba shot down the two BTTR planes, Juan Pablo Roque disappeared with his best suits, leaving behind a car, a wallet, and a wife.\(^{90}\) In

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83. Id. The telecommunications carriers and the U.S. had attempted to quash the writs. Id.
84. Alejandre, 42 F. Supp. 2d at 1336, 1343; see also Murphy, supra note 82, at 120-24.
86. Murphy, supra note 82, at 121. Senators Connie Mack and Frank Lautenberg introduced the bill, which "sought to allow the attachment of, and execution against, any assets of a foreign terrorist state, including moneys due from, or payable by, the United States, even if held by a subdivision or instrumentality of the state. Id. The President could waive the provision only with respect to execution against premises of a foreign diplomatic mission, or funds held in the name of the mission necessary to meet its operating expenses." Id.
89. LAROUSSE SPANISH-ENGLISH DICTIONARY 496 & 300 (1994) (In English: "Operation Scorpion.")
90. William Booth, Defector's Return Baffles Exile Community; Many Suspect Pilot
1992, Roque defected to the United States from Cuba by swimming across Guantanamo Bay to the U.S. naval base. Roque's defection followed eighteen years of service in the Cuban Air Force as a Soviet-trained fighter pilot. When Roque arrived in Miami, the Cuban exile community welcomed him. The conservative Cuban American National Foundation even published his book, "Defector," which included a foreword by Basulto. The Federal Bureau of Investigation ("FBI"), the CIA and other intelligence officials debriefed Roque at the time of his defection; Roque maintained a link to the FBI, occasionally offering up information on BTTR or other exile groups in active opposition to Castro. Roque surfaced the weekend of the shoot-down, on Cuban television, denouncing BTTR as "CIA dupes and terrorist provocateurs," plotting the assassination of Castro.

On May 7, 1999, a grand jury in the Southern District of Florida produced an indictment against alleged Cuban agents, including Roque. The May indictment followed an earlier indictment, September 1998, and brought the total to fourteen alleged Cuban agents. The group was engaged in what was code-named "Operation Scorpion," an assignment to goad BTTR into the shoot-down. The indictment charged that the agents received a warning six weeks earlier not to fly with BTTR, which
they were to convey the warning to other Cuban agents.99 Richard Nuccio, a former member of the Clinton administration and advisor on Cuba, suggested that the shoot-down was an incident intended to interfere with Cuba-U.S. relations.100

In the context of Alejandre, the indictment charged that the attack on BTTR was set in motion on January 29, 1996, when the Cuban Directorate of Intelligence gave its Miami-area spies notice of the expected confrontation between the Cuban Air Force and BTTR.101 One of the agents had infiltrated BTTR by February 13, 1996, and was leaking information about the group’s flight plans to other agents.102 The mole was instructed to avoid the upcoming flights, but if he was not able to avoid the flights, he was instructed to use “specific phrases” over the air to supposedly ensure his safety.103 Based on the information gathered by the mole, the Cuban Directorate of Intelligence ordered its agents not to fly with BTTR from February 24-27, 1996.104

Federal prosecutors struck deals with five of the alleged spies, who plead guilty to charges of not registering as foreign agents.105 Four others are believed to be in Cuba, and the remaining five are on trial at the time of writing.106

While these facts lend de facto support to the plaintiffs’ case against Cuba, the interactions between the United States and the alleged agents raise questions. What was the duty of the United States to act or intervene in the interest of the pilots’ safety? How much did the United States know of the impending attack? If the knowledge that can be imputed to the United States is quantifiable, is the value of that knowledge sufficient to charge the United States with failure to fulfill a duty to the citizens murdered by Cuba? Basulto thought so, and brought his case to the House of Representatives.107

99. Id.
100. Id. Nuccio’s role and actions are discussed below, see infra, chapter VIII.
101. Calvo, Weaver, & Yanez, supra note 96.
102. Id.
103. Id.
104. Id.
106. Id.; see also United States v. Hernandez, 106 F. Supp. 2d 1317 (S.D. Fla. 2000) (the court ruled that pretrial publicity was not sufficient to warrant a change of venue).
107. See Gibson, infra note 116 and accompanying text.
V. THE UNITED NATIONS MILLENNIUM SUMMIT

In New York City, just days before the United Nations ("U.N.") Millennium Summit in 2000, President Castro's plan to attend or to not attend the conference became a matter of popular speculation.\textsuperscript{108} Earlier, Castro had elected not to attend the 1999 World Trade Organization ministerial conference in Seattle when Cuba received indications that the United States would not grant the necessary travel visas.\textsuperscript{109} Cuban exiles in Miami had called for Castro's arrest before the Seattle conference.\textsuperscript{110} The United States had denied a visa for Ricardo Alarcon, President of the National Assembly of the People's Power of the Republic of Cuba.\textsuperscript{111} Before the Millennium Summit, however, the Cuban Foreign Ministry announced that the Cuban Personal Security Directorate, the U.S. Secret Service and the New York Police had drafted a program of activities.\textsuperscript{112}

The United States has never arrested a head of state attending a meeting of the U.N.\textsuperscript{113} Even so, prior to the Millennium Summit politicians and some Cuban exiles called on the federal government to arrest Castro upon his arrival in New York City.\textsuperscript{114}

Since the shoot-down, politicians have attempted to seize upon the public outrage. In 1996, less than one month after the shoot-down, "Congress urge[d] the President to seek, in the International Court of Justice, indictment for this act of terrorism by Fidel Castro."\textsuperscript{115} Three years later, Florida Representative Bill McCollum stated: "After a review of the evidence by the Subcommittee on Crime, I have reached the view that Fidel Castro should be indicted for his role in the Brothers


\textsuperscript{109} Id.

\textsuperscript{110} Id.


\textsuperscript{112} Grogg, supra note 108.

\textsuperscript{113} Summit is Not About Castro, SUN-SENTINEL (Ft. Lauderdale), Sept. 6, 2000, available at 2000 WL 2219599.

\textsuperscript{114} The Downing of Brothers to the Rescue Aircraft by Castro's MiGs, at http://www.hermanos.org/feb24/feb24index.html.

to the Rescue shoot-down.\footnote{116. William E. Gibson, Exile Group's Leader Says U.S. Allowed Shootdown Brothers to the Rescue Chief Wants Castro Indicted for Murder of 4 Men, SUN SENTINEL (Ft. Lauderdale), July 16, 1999 at 16A. Former Rep. McCollum's quote was made while he chaired the House Subcommittee on Crime. \textit{Id}. Basulto had traveled to Washington to present a dossier of purported evidence that demonstrated that the Clinton administration "had prior knowledge of Castro's intentions. It also [questioned] certain actions and omissions, such as the interruption of defense mechanisms precisely during the time that the shootdown occurred." \textit{Id}.} Representative McCollum pressured the Clinton administration to consider Basulto's plea and evidence in support of an indictment against Castro from the U.S. Attorney for the Southern District of Florida.\footnote{117. \textit{Id}.} In 2000, Representative Lincoln Diaz-Balart, a Miami Republican of Cuban descent, called on the Justice Department to indict Castro for ordering the Cuban Air Force to shoot down the two BTTR planes.\footnote{118. \textit{Id}. Diaz-Balart drew on the International Convention Against Torture, ratified by the United States on October 20, 1994, in asking President Clinton and Attorney-General Janet Reno to arrest Castro.\footnote{119. \textit{Id}. In New York, Mayor Rudolph Giuliani revealed that BTTR had consulted with a mayoral aide, pushing the city to file murder charges against Castro for shooting down the aircraft.\footnote{119. Grogg, supra note 108. Scholars have debated the merits of further amending the FSIA to include human rights violations. See Stephen J. Schnably, Bernard H. Oxman, ed., \textit{International Decisions: Alejandro v. Cuba}, 92 AM. J. INT'L L. 751, 773 (October 1998); but see Ismael Diaz, Comment, A Critique of Proposals to Amend the Foreign Sovereign Immunities Act to Allow Suits Against Foreign Sovereigns for Human Rights Violations, 32 U. MIAMI INTER-AM. L. REV. 137 (2001).} Giuliani recommended that BTTR take the case to the Federal Bureau of Investigation.\footnote{121.}}

It is important to note that the United States observes the principles of customary international law.\footnote{122. The Paquete Habana, 175 U.S. 677, 700 (1900) (describing the role and influence of customary norms of international law, concluding "[i]nternational law is part of our law").} A critical component of customary international law for the purpose of this article concerns the degree to which the United States respects sovereign and diplomatic immunity within its borders. There is not a standard in customary international law for determining the degree of head-of-state immunity that applies to U.S.
Notwithstanding the maze of notions of diplomatic or head-of-state immunity, both federal and New York state officials are bound by the direct guidelines of the United Nations' 1947 Headquarters Agreement ("1947 Treaty") with the United States. The 1947 Treaty reads, in pertinent part:

The headquarters district shall be inviolable. Federal, state or local officers or officials of the United States, whether administrative, judicial, military or police, shall not enter the headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary-General. The service of legal process, including the seizure of private property, may take place within the headquarters district only with the consent of and under conditions approved by the Secretary-General.

The above Section 9 precludes the service of process or action against Castro on the grounds of the United Nations site. The protection is extended in Section 11:

The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of: (1) representatives of Members or officials of the United Nations. . . (5) other persons invited to the headquarters district by the United Nations or by such specialized agency on official business.

Finally, Section 12 precludes the intervention of domestic public policy built on the events of Alejandre: "The provisions of Section 11 shall be applicable irrespective of the relations existing between the Governments of the persons referred to in that section and the Government of the United States." The language of Section 12 disfavors the molestation of any of the
described officials by a private cause of action. Consequently, in a 1997 incident between a Russian Federation diplomat and New York City police officer, the United Nations affirmed the importance of the host country's securing and observing diplomatic immunity.128 Without even considering Castro's status as the sitting Cuban head-of-state, the 1947 Treaty precludes the arrest of the Cuban leader and the service of process upon him.

VI. THE U.S. ACTION AGAINST NORIEGA

The notion of detaining or arresting, or serving Cuban President Fidel Castro during his stay in New York for the U.N. Millennium Summit raises notable contrasts with the actual U.S. action against General Manuel Antonio Noriega. Noriega was the dictator of Panama until a U.S. invasion pulled him from power.129 The United States justified the action as legal and necessary to halt Noriega's illegal drug trafficking in the United States, which amounted to more than $700 million.130 The U.S. action against Noriega is relevant because it provides a contrast for the rare situation where the United States will pursue and seek to justify an action against a head of state.

Protestors responding to the BTTR shoot-down raised the comparison to the Noriega case in the media, demanding a stronger response to the shoot-down than the U.S. action against Noriega.131 The facts of United States v. Noriega132 ("Noriega"), however, are significantly distinguishable from Alejandre. Further, the controlling law, as set forth by the Eleventh Circuit, does not support an effort to arrest or detain Castro in the United States, or even from Cuba, for the shoot-down.

In Noriega, the Eleventh Circuit Court of Appeals held that Noriega could be extradited through military force to the United States to stand trial on various domestic criminal charges.133 Yet Noriega does not establish a precedent sufficient to enact a

130. Id.
131. Fabiola Santiago, Exiles Demand Tough U.S. Action; Carnaval Canceled, MIAMI HERALD, Feb. 26, 1996, at 1A; see also, Gibson supra note 116.
133. Id.
similar seizure of Castro, either in the United States or from Cuba. Noriega challenged his drug trafficking convictions on five grounds. Noriega's assertion of head-of-state immunity is significant here.

The Eleventh Circuit dismissed Noriega's assertion of head-of-state immunity for several reasons. Noriega argued that he was the de facto, if not de jure head-of-state for Panama. But the Eleventh Circuit, like the district court below, dismissed Noriega's claim to head-of-state immunity in part because the United States never recognized Noriega as the "legitimate, constitutional ruler" of Panama. In contrast, Castro seems to benefit from official recognition as Cuba's head-of-state from the United States.

The Eleventh Circuit discussed The Schooner Exchange v. McFaddon, in which the Supreme Court held that nations, including the United States, "had agreed implicitly to accept certain limitations on their individual territorial jurisdiction based on the 'common interest impelling [sovereign nations] to mutual intercourse, and an interchange of good offices with each other.' The Court in The Schooner Exchange stated that one of the most significant exceptions to jurisdiction was "the exemption of the person of the sovereign from arrest or detention within a foreign territory." The Eleventh Circuit traced the principles of international comity and elements of the doctrine of foreign sovereign immunity to The Schooner Exchange. The asserted power of the U.S. courts led foreign sovereigns to follow a course of procedure and representations to the U.S. State Department, clarifying their claim of immunity. As a result of this trend, the courts looked, generally, to the Executive Branch in determining whether to exercise jurisdiction over foreign sovereigns and their respective instrumentalities.

134. Noriega, 117 F.3d at 1211.
135. Id.
136. Id.
139. Noriega, 117 F.3d at 1211; citing The Schooner Exchange, at 137.
140. Id. (alteration in original).
141. Noriega, 117 F.3d at 1211.
The passage of the FSIA in 1976 "codified the State Department's general criteria for making suggestions of immunity, and transferred the responsibility for case-by-case application of these principles from the Executive Branch to the Judicial Branch." However, the FSIA addresses neither the notion of head-of-state immunity, nor sovereign immunity from criminal prosecution, so the Eleventh Circuit chose to base its determination regarding Noriega's claim of immunity on the Executive Branch's direction. The court discussed the three forms of the guidance: the Executive Branch (1) expressly endorses immunity, (2) expressly declines to suggest immunity, (3) or offers no guidance at all. Where the Executive Branch offers no guidance, the court noted that it has been held that the purported head of state should not receive immunity. In between the two extremes, the Fifth Circuit held that the court should make an independent determination of immunity.

The Eleventh Circuit in *Noriega* observed that "[t]he Executive Branch by pursuing Noriega's capture and this prosecution has manifested its clear sentiment that Noriega should be denied head-of-state immunity." The court also looked to the record, and observed "Noriega never served as the constitutional leader of Panama, that Panama has not sought immunity for Noriega and that the charged acts relate to Noriega's private pursuit of personal enrichment." Finally, the court drew on *In re Doe*, which states that there is "respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts."

The Second Circuit's holding in *In re Doe* concerns criminal charges under federal law against Ferdinand Marcos, the former president of the Philippines. Similar to the situation of *Noriega*, the foreign state did not call for the defendant's head-of-state immunity, in fact the Philippine government issued a
diplomatic note waiving "any residual sovereign, head of state, or diplomatic immunity that former Philippine President Marcos and his wife . . . may enjoy under international and U.S. law, including, but not limited to, Article 39(2) of the Vienna Convention on Diplomatic Relations,\textsuperscript{153} by virtue of their former offices . . . ."\textsuperscript{154}

The Second Circuit held that a state can waive sovereign immunity, and the Philippines did so in that diplomatic note.\textsuperscript{155} In coming to this determination, the Second Circuit considered the general international rule of the head-of-state immunity doctrine, and drew from several scholars.\textsuperscript{156} The court observed that "absolute foreign sovereign immunity" was recognized until 1952 when the U.S. State Department announced in a letter that it would suggest immunity for public acts, but would withhold suggestion in cases involving private acts.\textsuperscript{157}

Without guidance from the Executive Branch, the Second Circuit held that a court is left to determine whether a head-of-state enjoys immunity.\textsuperscript{158} The court, however, conceded that the Judicial Branch "is not the most appropriate one to define the scope of immunity for heads-of-state," because the Constitution\textsuperscript{159} invests in Congress the power "to define and punish . . . . Offenses against the Law of Nations."\textsuperscript{160} The court further noted that Article II of the Constitution grants the President the general field of foreign relations, and in the Executive Branch greater expertise has crystallized into a Branch of government better equipped to react and adapt to "conflict between individual private rights and interests of international comity . . . ."\textsuperscript{161}

The respective separation of powers is illustrated by this tension in \textit{Alejandre}, when President Clinton subsequently moved to prevent the plaintiffs' families from collecting a

\begin{itemize}
\item \textsuperscript{154} \textit{In re Doe}, 860 F.2d at 43.
\item \textsuperscript{155} Id. at 45.
\item \textsuperscript{156} Id. at 44. \textit{See e.g.} Mallory, \textit{supra} note 123.
\item \textsuperscript{157} \textit{In re Doe}, 860 F.2d at 44.
\item \textsuperscript{158} Id. at 45 (citing \textit{Mexico v. Hoffman}, 324 U.S. 30, 34-35 (1945); \textit{Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes}, 336 F.2d 354, 358-359 (2d Cir. 1964), \textit{cert. denied}, 381 U.S. 934 (1965)).
\item \textsuperscript{159} U.S. Constitution, art. I, § 8, cl. 10.
\item \textsuperscript{160} \textit{In re Doe}, 860 F.2d at 45.
\item \textsuperscript{161} Id.
\end{itemize}
judgment against Cuban holdings. As the power of the Legislature to define the scope of immunity concerns the problem considered here, In re Doe fails to give a certain answer, for the holding is limited to former heads-of-state, where the foreign state has posited an affirmative waiver of immunity for that person.

Similar to Noriega, In re Doe involved the Executive Branch pushing for prosecution, indicating willingness by the State Department and Executive Branch to find an exception to head-of-state immunity. In contrast to Noriega, in In re Doe, the defendants were not seized from a foreign state by the federal government, but were residing in the United States of their own volition. This circumstance provides a better comparison to the event of Castro voluntarily visiting the United States for the U.N. Millennium Summit. However, In re Doe is still distinguishable, because Marcos was a former head-of-state residing in the United States, while Castro visited the United States not only as a sitting head-of-state, but while in the course of performing his duties as Cuba's head-of-state.

As the Second Circuit noted, Congress has a stake in defining the immunity of a head-of-state, but it has been held, as noted above, that the FSIA does not determine the immunity or the subsequent liability of sitting heads-of-state.

Though the federal government has not paused in decrying the rule of Castro and though the United States has supported, and may continue to facilitate attempts at overthrow of his rule, the United States did not move to seize Castro from Cuba in a retaliation that would have matched the conviction of President Clinton's words of reaction to the shoot-down. To the contrary, both the Executive Branch and the Legislative Branch facilitated Castro's visit: one member of Congress and the U.S.
Secret Service cooperated with Cuba in forming the program for Castro’s visit to the U.N.\textsuperscript{169} Castro suspected that the United States would deny a travel visa for him, as was the case for Ricardo Alarcon, president of the Cuban National Assembly, who also had planned to visit the U.N. Summit.\textsuperscript{170}

As previously noted, efforts were made to compel New York authorities to arrest Castro upon his arrival for the U.N. summit.\textsuperscript{171} An arrest of Castro by New York State authorities would have been unconstitutional, for the state would be acting in either (1) the span of inaction by the federal government, which indicated no willingness to arrest Castro, or (2) in contravention of the federal government’s facilitation of Castro’s presence and inclusion in the U.N. Summit. In either case, the unconstitutionality of such intervention arises where the state authority usurps the President’s constitutional authority to receive foreign diplomats under Article II, Section 2 of the Constitution.

President Clinton justified his waiver of the requirements to comply with the Alejandre plaintiffs’ judgment with this same constitutional clause.\textsuperscript{172} The Eleventh Circuit, in this phase of the case, discussed the Executive’s claim that interference with any Cuban property in the United States would adversely affect his ability to conduct diplomatic relations with states sponsoring terrorism.\textsuperscript{173} The Eleventh Circuit declined to rule whether 28 U.S.C. § 1610(f)(1)\textsuperscript{174} was constitutional, in part because the plaintiffs in Alejandre were not attempting to attach diplomatic or consular property, and therefore not creating an impediment to the President’s Article II, Section 2 powers.\textsuperscript{175}

\textsuperscript{169} Grogg, supra note 108. Washington Congressman Jim McDermott was in direct contact with Castro and promoted the visit. Id.
\textsuperscript{170} Id.
\textsuperscript{171} Ikimulisa Sockwell-Mason et al., The Day Whole World Came to New York City, N.Y. POST, Sept. 6, 2000, available at 2000 WL 25111243.
\textsuperscript{172} Alejandre, 42 F. Supp. 2d at 1324.
\textsuperscript{173} Id.
\textsuperscript{174} This section of the FSIA potentially allows attachment of certain diplomatic property to a judgment.
\textsuperscript{175} Alejandre, 42 F. Supp. 2d at 1332 n.17.
VII. BROTHERS TO THE RESCUE: PRIVATE INTERFERENCE WITH U.S. FOREIGN POLICY

Since Castro's rise to power, the U.S. government has strictly controlled U.S. citizens' ability to travel to Cuba. In United States v. Laub, a group of students organized a trip to Cuba, with a plan to circumvent the U.S. State Department's restriction on travel to Cuba by following a circuitous travel route. The district court held first that the "national emergency" barring travel to Cuba had not expired; second, that the trip did not constitute a criminal act under 8 U.S.C. § 1185(b); and third, that the legislature had the duty to fill gap.

In addition to restrictions on the U.S. citizens' travel to Cuba, there exist flight regulations. The United States has regulated private intercourse with Cuba in its push for democratic reform. The flights by BTTR bypassed the U.S.-made insulation, piercing the veil between private parties and Cuba, thereby wrinkling U.S. foreign policy. Basulto himself has described the BTTR flights as "civil disobedience," similar to the actions of Dr. Martin Luther King, Jr.

In order to determine the legal repercussions of BTTR's interference with U.S. foreign policy, this portion of the comment looks specifically at the Logan Act and the Neutrality Act.

A. The Logan Act

In 1799, amid a power struggle between the Federalist and Republican parties, the Logan Act was born. The Logan Act

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176. See Zemel v. Rusk, 381 U.S. 1, reh'g denied, 382 U.S. 873 (1965). (Court held that due process was not violated where the Secretary of State denied travel to Cuba based on "foreign policy considerations affecting all citizens." Id. at 13.).
178. Id. at 434, 436.
179. Id. at 460.
180. See 31 C.F.R. § 515.420(a) (restricting U.S. citizens' travel and transactions in and with Cuba).
181. See 14 C.F.R. § 91.709 (restricting operations to Cuba).
182. David Cazares, Defense Blasts Cuban Exiles, Feb. 2, 2001, SUN-SENTINEL (Ft. Lauderdale), at 3B. On a tape made by South Florida television station WTVJ, Basulto is seen dropping flares near Havana stating, "This is an act of civil disobedience," and "We realize what we're doing. All we're doing is signaling out to the Cuban people that civil disobedience is possible." Id.
184. Kevin M. Kearney, Comment, Private Citizens in Foreign Affairs: A
prohibits private correspondence with foreign governments. The act reads as follows:

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both.

This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.\(^\text{185}\)

As late as 1987, one article noted that throughout the history of the Logan Act, there has been only one indictment and no prosecutions.\(^\text{186}\) The one indictment under the Logan Act was never tried; it was against a Kentucky farmer, who wrote a newspaper article advocating the western territory of the United States "form a new nation allied to France."\(^\text{187}\)

The Logan Act has been bandied about in dicta by U.S. courts\(^\text{188}\) and by embattled politicians.\(^\text{189}\) The specter of the act

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\(^\text{185}\) U.S.C.A. § 953 (West 1994). In 1994, Congress amended the act, taking out the monetary fine of $5000, which had been a part of the statute since its inception, though the maximum imprisonment term remained three years. Id.

\(^\text{186}\) Kearney, supra note 184, at 287.

\(^\text{187}\) Id. at 303 (citing Vagts, The Logan Act: Paper Tiger or Sleeping Giant? 60 AM. J. OF INT. L 268, 292 (1982)).

\(^\text{188}\) See id. at 303-06.

\(^\text{189}\) Id. at 285. In 1984, President Reagan commented to the press that Reverend Jesse Jackson's meetings with Castro, the Sandinista Government in Nicaragua, and with Syrian officials to free a U.S. pilot may have been violations of the Logan Act. Id. at 285 (citing Reagan Contends Jackson's Missions May Violate Law, N.Y. TIMES, July 5, 1984, at 1, col. 6.).
vanishes upon the political alignment of such factors as "popular and official opinion" of the private party's activities, and success in those activities.\(^{190}\)

Case law on the actual application of the Logan Act is particularly slim.\(^{191}\) To investigate this matter, it is necessary to first set aside Kearney's argument against the validity of the Logan Act,\(^{192}\) in order to assume that the act is valid and prosecutable.

The Logan Act is to be enforced with lenity because of the vagueness of its terms.\(^{193}\) The elements of the Logan Act may be paraphrased as follows: (1) the person must be a U.S. citizen, (2) acting without U.S. authority, (3) directly or indirectly corresponding with any foreign government, (4) intending to influence the conduct of that government, (5) in relation to any dispute or controversy with the United States.

Several members of BTTR are or were U.S. citizens. Further, they were not acting under the authority of the United States. Yet BTTR was not necessarily communicating with Cuban officials, but rather with the people of Cuba. This effort could constitute an indirect communication with the government of Cuba. There is not enough evidence to demonstrate that BTTR intended to influence the conduct of Cuba. At the most, it can be argued that the actions of BTTR did promote a disruption between the United States and Cuba.

The first element of the Logan Act is its application to the conduct of U.S. citizens overseas, or "wherever he may be."\(^{194}\) In *United States v. Peace Info. Ctr.*,\(^{195}\) the district court of the District of Columbia cited the Logan Act in dicta, supporting its

\[^{190}\] Kearney, *supra* note 184, at 286.

\[^{191}\] See id. at 287.

\[^{192}\] See id. at 303; see also, Waldron v. British Petroleum Co., Ltd., et al., 231 F. Supp. 72 (S.D.N.Y. 1964) (deciding not to rule on the issue of the Logan Act's constitutionality based on the act's tension with the Sixth Amendment for its vague and indefinite language).


\[^{194}\] United States v. Harvey, 2 F.3d 1318, 1329 (3rd Cir. 1993); see also United States v. Mitchell, 553 F.2d 996, 1001 (5th Cir.1977) ("the legislative authority of the United States over its own citizens extends to conduct by Americans on the high seas and even within the territory of other sovereigns.").

decision to deny a motion to dismiss an indictment under the Foreign Agents Registration Act of 1938 ("FARA"). According to the court, Congress' inherent power to regulate external affairs included the power to enact FARA.

The Executive also has the power to regulate the private individual, even from afar. In *Haig v. Agee*, Chief Justice Burger held that the U.S. Secretary of State has the extended authority of the U.S. President to revoke a passport on the ground that the holder's activities in foreign countries are causing or are likely to cause serious damage to the national security or U.S. foreign policy. *Haig* defines the public policy concerns of the Executive Branch necessary to enforce the Logan Act against BTTR.

The second question of relevance is whether BTTR communicated with the Cuban government. It may matter that BTTR's communications were directed toward Cuban citizens, as opposed to taking the form of efforts to intervene in traditional, diplomatic arteries of communication. As suggested above, this communication may be found to constitute an indirect communication between BTTR and Cuba. Cuba indeed "got the message." This assertion is evidenced from Cuba's call for U.S. intervention to control the group.

Where the acts of a group of private citizens prompted Cuba to demand action by the United States, it seems that BTTR

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196. 22 U.S.C.A. § 611 et seq.; see also Peace Info. Ctr., 97 F. Supp. at 258. FARA "requires every agent of a foreign principal to file a registration statement with the Attorney General setting forth certain information specified in the statute." *Id.*

197. Peace Info. Ctr., 97 F. Supp. at 261. The defendants were indicted for their failure to register under the Foreign Agents Registration Act of 1938 their agency for a foreign principal. *Id.* at 258. The citation to the Logan Act followed in the court's doctrinal rationalization. *Id.* at 261.


199. *Id.* at 286.

200. *Id.* at 296. This policy support has its roots set as far back as President Theodore Roosevelt, who in 1903 empowered the Secretary of State with the discretion to refuse to issue passports to persons "likely to embarrass the United States," or who were "disturbing, or endeavoring to disturb, the relations of this country with the representatives of foreign countries." *Id.* In 1918, Congress followed this rule with a travel control statute, though it was concerned with the "transference of important military information." *Id.* at 296-97.

201. The slippery slope argument on this issue may pose the question, "Would a mass-sending of electronic mail from a private party in the United States to citizens in another state likewise constitute a violation of the Logan Act?"

202. ICAO Council, supra note 45.
affected Cuba's conduct in relation to the United States. Arguably, U.S. response was inaction, but the manner and degree to which BTTR's private acts precipitated intercourse between the two states goes past the concern of the Logan Act and speaks to the question of interference by BTTR with foreign policy.\footnote{Of course, taken to the extreme this line of argument would support the conclusion that any extradition case, where two states must engage one another, possibly as the result of a public act, may be a violation of the Logan Act. So there must be a threshold where the effect of private actions rises to a level of degree sufficient to irritate the relations of two states. That level is not determined in this comment.}

There is simply not enough evidence to conclude that BTTR intended to affect relations between the United States and Cuba. Without this element, the BTTR activities did not constitute a violation of the Logan Act. The group, however, may have interfered with U.S. foreign policy.\footnote{Assuming that BTTR was ideologically aligned with the United States against Cuba, the degree to which BTTR "interfered" with U.S. foreign policy is reduced. So synchronized, and with U.S. acquiescence, BTTR's acts actually assumed the color of U.S. foreign policy. \textit{See} chapter VIII \textit{infra}.} To investigate another legal restriction on private diplomacy this comment next considers the Neutrality Act.

\textbf{B. The Neutrality Act}

The initial U.S. Neutrality Act, "enacted in 1794, outlawed private warfare, and gave the President and Congress (rather than private citizens) the power to make foreign policy."\footnote{Montgomery Sapone, \textit{Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence}, 30 \textit{CAL. W. INT'L L.J.} 1, 29 (Fall 1999).} Congress repealed the original act in 1918, but U.S. citizens' involvement with the Spanish Civil War prompted today's Neutrality Act.\footnote{Sapone, \textit{supra} note 205, at n. 165.} The purpose of the Neutrality Act of 1939 sought to regulate private exportation of arms and ammunition and other materials intended for foreign war efforts during periods of national emergency.\footnote{United States v. One N. Am. Airplane et al, 197 F.2d 635, 636-37 (3rd Cir. 1952).} The Neutrality Act reads, in pertinent part:

\begin{quote}
Expedition against friendly nation:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a
\end{quote}
means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.\textsuperscript{208}

Application of the last element requires a determination of whether the United States is "at peace" with Cuba. Under one scholar's reading of the treatment of this "at peace" element by U.S. courts, the U.S. embargo of Cuba may preclude a finding that the United States and Cuba are "at peace" for the purpose of this provision.\textsuperscript{209} Those remaining elements demand that (1) the action commenced in the United States, (2) was knowingly conducted or organized, and (3) had a military or naval character.

BTTR's action did commence in the United States, so the first element is satisfied. Further, BTTR publicly demonstrated the intention of committing acts of "civil disobedience" in relation to the Cuban government, thereby satisfying the second element that action be knowingly conducted or organized. The third element presents a more difficult problem, in that the action must be military or naval in order to rise to the level of a violation of the Neutrality Act.

Prosecutions under the Neutrality Act include a botched attempt to export an airplane to Europe,\textsuperscript{210} a conspiracy to dynamite the Welland Canal in Canada,\textsuperscript{211} inducing and recruiting persons to participate in the Spanish Civil War,\textsuperscript{212} and a private action under the Ethics in Government Act\textsuperscript{213} for the U.S. Attorney General to investigate President Reagan for an alleged violation of the Neutrality Act in \textit{Dellums v. Smith}.\textsuperscript{214} In dicta of \textit{Dellums v. Smith}, the court adopted the conclusion from a memorandum from the U.S. Department of Justice\textsuperscript{215} that a

\textsuperscript{208} 18 U.S.C. § 960 (West 1994).
\textsuperscript{209} Sapone, \textit{supra} note 205, at 33-36.
\textsuperscript{210} \textit{One N. Am. Airplane}, 197 F.2d at 635-36.
\textsuperscript{211} United States v. Tauscher, 233 F. 597, 598 (D.C.N.Y. 1916).
\textsuperscript{215} \textit{Id}. at 1452 n.2; The memorandum for Phillip B. Heymann re Applicability of the Neutrality Act to Activities of the Central Intelligence Agency (Oct. 10, 1979) was
 provision of the Neutrality Act is not violated when "CIA agents serve as troops in the employ of a foreign military service." In United States v. Johnson, defendants were charged with conspiracy to injure the property of a foreign government, British helicopters, under Title 18, U.S.C. 956. Title 18 U.S.C. 956 had originally been "part of the Neutrality Act of 1917.... The stated purpose of the Act of 1917 was to punish acts of interference with the foreign relations... of the United States." The two defendants in United States v. Ramirez were prosecuted for conspiracy to violate and actual violation of the Neutrality Act. The two men were of a group of thirteen soldiers training for a takeover of Haiti. A federal informant, holding himself out as a Texas millionaire looking for favorable treatment from a new Haitian government, entered an agreement with the defendants to supply weapons, locate a training site, and provide logistical support and funds. The defendants argued that they were victim to selective prosecution on the basis of their Haitian origin and their political views, namely favoring revolution in Haiti. In contrast, the defendants argued, "regular violations of the Neutrality Act take place both at the behest of the present administration and through private individuals and groups. The defendants argued that those alleged Neutrality Act violations are not prosecuted because those violations comport with the foreign policy of the present administration." The sort of private group to which the defendants in Ramirez were alluding could include the BTTR.

From the outset of the Havana flights, BTTR promoted human rights, democracy, but also advocated a revolution in Cuba, albeit a peaceful one. The elements of a violation of the Neutrality Act are present in BTTR's activity up to the question

submitted by the defendants in Dellum. Id.
216. Id.
218. Id.
219. Id. at 592.
221. Id. at n.1.
222. Id.
223. Id.
224. Id. at 438.
225. Id.
226. See ICAO Council, supra note 45 at ¶ 3.7. See also Tamayo & Lantigua, supra note 9 and accompanying text.
of whether the absence or presence of armament determines if the expedition assumes a "military or naval" character. The pertinent part of the Neutrality Act in this respect reads: "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."\(^{228}\)

In *United States v. O'Sullivan*,\(^{229}\) a case involving an expedition to Cuba, the Southern District Court of New York held that for the "enterprise" to take on a "military or naval" character, there must be the intent to conduct or aid hostile efforts against a foreign sovereign or state, and that intent manifests the commencement of the act. Another case involving an expedition to Cuba, *United States v. Hart*,\(^{230}\) set forth further criteria\(^{231}\) defining what constitutes a "military expedition" under the Neutrality Act:\(^{232}\)

For the purposes of this case it is sufficient to say that any combination of men, organized in this country, to go to Cuba and make war upon its government, provided with means, — with arms and ammunition, — (this country being at peace with Cuba,) constitutes a military expedition. It is not necessary that the men shall have been drilled, or put in uniform, or prepared for efficient service, nor that they shall have been organized according to the regulations which ordinarily govern armies. It is sufficient that they shall have combined and organized in this country as a body, to go abroad, and as such make war on the foreign government, having provided themselves with means to do so. If they have thus combined and organized it is not necessary that the arms shall be carried upon their

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\(^{228}\) Id.

\(^{229}\) United States v. O'Sullivan, 27 F.Cas. 380, 381, 384 (S.D.N.Y. 1851).


\(^{231}\) Id. at 869. (The conviction seemed to rest on the prosecution satisfying two prongs: "To justify a conviction it must be proved that a military expedition was organized in this country; and that the defendant provided means here, in Pennsylvania, for assisting it on the way to Cuba, as charged, with knowledge that it was such an expedition." Id.

persons here, or on their way; it is sufficient that arms have been provided for their use when occasion requires.\textsuperscript{233}

The strict test for a "military expedition" proposed in United States \textit{v. Hart} does not, when applied to the known facts regarding BTTR's flights over Havana, indicate that any of the excursions were military expeditions. Of course, this conclusion rests on the element of the standard that requires the presence of arms at some point in the activity. Evidence on this matter is limited to allegations that BTTR was developing makeshift weapons in an effort to support an overthrow of the government in Cuba.\textsuperscript{234}

The absence of arms may not preclude violation under the Neutrality Act. The intention of the flights and the flyers was to advocate an uprising against the Republic of Cuba, albeit "democratic" and "peaceful."\textsuperscript{235} To find BTTR in violation of the Neutrality Act would require a broad interpretation of the act.

\textbf{VIII. Rounding out the Triangle: The (In-)Action of the United States}

Discussion of U.S. action or inaction completes the triangle. The motivating questions behind this discussion flare up from the hints that the White House and U.S. military had notice that (1) Cuba was preparing to fire upon subsequent BTTR flights below the 24th parallel; (2) BTTR intended to make another flight over Havana;\textsuperscript{236} (3) in flight, the BTTR pilots were straying from their declared course; and finally, (4) the United States had the opportunity to warn BTTR or intercept the Cuban MiGs, and

\footnotesize
\begin{itemize}
\item \textsuperscript{233} \textit{Hart}, 78 F. at 869-70.
\item \textsuperscript{234} This allegation was made by the defense in United States \textit{v. Hernandez}, 106 F. Supp. 2d 1317 (S.D. Fla. 2000) (the alleged Cuban spy trial taking place at the time of writing). \textit{See also} David Cazares, \textit{Defense Blasts Pilots' Motives Rescue Mission Was Political, Attorney Says Pilots Accused of Inciting Cuba}, Feb. 6, 2001, \textit{SUN-SENTINEL} (Ft. Lauderdale), at 3B. Counsel for the defense drew testimony from a member of BTTR indicating that around the time of the shoot-down, the group was developing flares from plastic pipes which would be dropped to rafters. \textit{Id.} The witness also stated that BTTR was experimenting with 12-gauge ammunition, firing it from the pipes. \textit{Id.}
\item \textsuperscript{235} \textit{See} Tamayo & Lantigua, \textit{supra} note 9; \textit{see also} Cynthia Corzo, \textit{'Brothers' Gives Money to Democratic Groups in Cuba}, \textit{MIAMI HERALD}, Feb. 14, 1996, at 2B. BTTR also has attempted to send money to Concilio Cubano, an association of pro-democracy organizations. \textit{Id.}
\item \textsuperscript{236} \textit{ICAO Council}, \textit{supra} note 45, at ¶¶ 3.3, 3.9, 3.10.
\end{itemize}
failed to do either.

The evidence available, in particular the evidence asserted by BTTR, addresses the four questions above and imputes the U.S. military and administration with sufficient knowledge to have anticipated the shoot-down.\(^{237}\) The U.S. government certainly had notice, knowledge, and should have expected the shoot-down. Yet assuming the United States had the ability to intervene at some point, when, if ever, did the United States have a duty to act, and what would be the extent of the action?

While a FAA investigation of Basulto and BTTR was grinding on,\(^{238}\) the group was scheduling more flights, and hinting at another trespass into Cuba,\(^{239}\) the flight which brought the confrontation. Only after the shoot-down, the FAA announced stricter punishments for U.S. pilots penetrating Cuban airspace.\(^{240}\) The FAA claimed it would use "all available government radar sources" to monitor violations of Cuban airspace, violators would be met upon landing and their licenses would be revoked.\(^{241}\) One editorial charged that BTTR had been filing "phony" flight plans for two years and the U.S. government had not reacted.\(^{242}\)

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\(^{237}\) The Downing of Brothers to the Rescue Aircraft on February 24, 1996: Summary of Unanswered Questions Prepared by Brothers to the Rescue (BTTR) (BTTR asserts, specifically, 11 questions) at http://www.hermanos.org/feb24/questions.html.

\(^{238}\) Don Phillips, FAA Cracks Down on Airspace Violators; Pilots Who Penetrate Cuba Limits Can Forfeit Licenses and Aircraft, WASH. POST, Mar. 9, 1996 at A04. Cuban authorities had cited nine instances in which BTTR had violated its airspace between May, 1994 and January of 1996. Id.; See also Jefferson Morley, FAA Asked To Restrict Airspace at O’s Game; Flyover Feared As Cubans Play, WASH. POST, April 24, 1999 at B01. Three years after the shoot-down, Major League Baseball made a request to the FAA that it not allow BTTR to do a flyover of Oriole Park in Baltimore during a game featuring the Cuban national team. Id. BTTR’s attempt to drop leaflets near the Mar. 28, 1999 game in Havana was disrupted by an unscheduled FAA inspection that recalled BTTR’s planes and inspected the two planes’ cargo: half of a million leaflets. Id.

\(^{239}\) Viglucci, supra note 11.

\(^{240}\) Don Phillips, FAA Cracks Down on Airspace Violators; Pilots Who Penetrate Cuba Limits Can Forfeit Licenses and Aircraft, WASH. POST, Mar. 9, 1996 at A04. The announcement came 13 days after the shoot-down. Id.

\(^{241}\) Id. This new measure was announced in a letter to 33,225 pilots in South Florida. Id. The FAA letter stated: “Airmen should be aware that if the evidence obtained from any source establishes a violation of Cuban airspace, their airmen certificates will be revoked on an emergency basis. In addition, maximum civil penalties, seizure of aircraft and judicial remedies will be pursued in appropriate cases.” Id. Flying without a license opens the pilot up to criminal penalties that threaten up to three years in prison and a $100,000 fine. Id.

The FAA proclaimed that it would use every governmental radar source.\textsuperscript{243} This claim implies cooperation and even orchestration with the U.S. military if it possesses any applicable radar sources. If the U.S. military's resources could later be utilized to monitor the activities of U.S. pilots, why were they not used before the shoot-down, when the FAA was aware of the threat to BTTR?

The United States may have been able to prevent the shoot-down. Prevention could have taken the form of radiobroadcast warnings, or at the extreme,\textsuperscript{244} actual intervention or interception by U.S. military aircraft. Though extreme, intervention would constructively impress the U.S. military into defending Cuban airspace, but where the lives of U.S. citizens are at stake, would this not be an acceptable form of policing should the situation require a severe U.S. response?

The lament of "too little, too late" describes the U.S. response to Alejandre. Although a policing administrative agency, the FAA, should not be held responsible for the tragic choices of BTTR or for the extra-judicial killing by the Cuban Air Force, the fact that the FAA knew of the past trespasses of Cuban airspace, and had been warned of future flyovers, should have hastened the investigation into Basulto's flights, or at the least led to a temporary grounding of BTTR. The complacency of the FAA and the remedial measures taken after the shoot-down betray a seeming governmental acquiescence towards the trespasses of BTTR. Additionally, the FBI may have deciphered missives to the Cuban spies alluding to the impending shoot-down.\textsuperscript{245} The State Department and the Defense Intelligence Agency received a warning from a delegation of retired U.S. military officers who met with members of the Cuban general staff that the next BTTR violation would lead to a shoot-down.\textsuperscript{246} Where the transgression is in line with administrative leanings, and those private parties seem willing to independently advance the more subversive aspects of aggressive foreign policy, the United States may be more inclined towards acquiescence than enforcement of its laws.

\textsuperscript{243} See Phillips, supra note 240.
\textsuperscript{244} The extreme situation would be one similar to that of Alejandre, where the U.S. military is imputed with knowledge of the scrambling of Cuban fighter craft.
\textsuperscript{245} See Smith, supra note 241.
\textsuperscript{246} Gail Epstein Nieves, Admiral: Cuba hinted of attack on Brothers, March 7, 2001, MIAMI HERALD at 1B.
The evidence asserted by BTTR does not demonstrate that the United States intended for BTTR to engage in their flights or that it directly supported BTTR trespasses into Cuba. The purported history of U.S. covert activity in Cuba would, however, support such a contention. Consider Sullivan v. C.I.A., a daughter brought an action against the CIA to disclose records concerning the disappearance of her father, presumably in the course of a flight over Cuba to drop anti-Castro propaganda. Similarly, in United States v. Lopez-Lima, the defendant fought against a charge of aircraft piracy, where he had hijacked a plane at gunpoint and forced it to Cuba, claiming his actions were under the authority of the CIA as part of its continuing efforts to gather intelligence of Castro's activities. Additionally, history reveals that U.S. foreign policy towards Castro's Cuba has utilized similar subversive tactics. The tone and intent of U.S. relations towards Cuba has been acutely hostile.

The United States engaged in hundreds of sabotage missions; its covert operations to stifle Cuba's economy and contribute to an ousting of Castro demanded an annual budget of as much as $100 million. In December, 1961, President Kennedy commenced "Operation Mongoose," an escalation of the "secret war" against Cuba. Operation Mongoose saw a command post set up in Miami under the guise of the radio station, (JM-WAVE), from which a 300-person staff handled the activities of 2000 Cuban agents with a budget over fifty million dollars. The United States sponsored assassination attempts, including efforts to place a bomb in a location at which Castro regularly went skin-diving, giving Castro a "contaminated" diving suit, and providing one would-be assassin with some sort of weapon disguised as a pen.

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248. Id. at 1251.
250. Id. at 1406.
252. Id. at 147. The efforts involved included acts of economic sabotage, such as burning sugar cane, and even assassination attempts. Id. at 148.
253. Id. at 149.
254. Id. at 149-50. Operation Mongoose tasks were more aggressive than the previous acts of sabotage and included the destruction of Cuban infrastructure, bridges, oil refineries, sugar mills, and fowl stock. Id.
255. Id. at 154. This "would-be" assassin, Rolando Cubela, a Cuban army major, was eventually cut off from support in June, 1965, for what may have been Cuban intelligence
The failed Bay of Pigs Invasion was only the first bubble in the broth of U.S. aggression against Castro. At the resolution of the Cuban Missile Crisis in October, 1962, President Kennedy vowed to “Soviet Premier Nikita Khrushchev that the United States would not invade Cuba,” however, the United States devised further attempts to assassinate or overthrow Castro. When the U.S. Defense Department released approximately 1500 declassified documents, sealed due to the Kennedy assassination, an abandoned U.S. plan to invade Cuba lay bare.

The Pentagon’s schemes included relatively subversive tactics. Past these subversive measures, the Pentagon entertained “Operation Bingo,” which was comprised of a set of recommendations received by the Joint Chiefs of Staff on March 9, 1962, and intended to fabricate the pretext for a U.S. invasion of Cuba. The recommendations proposed “A Remember the Maine” incident, staging a terrorist attack by sinking a boat carrying Cuban refugees fleeing to Florida, or the “downing of a U.S. military plane or even a crowded civilian airliner by Cuban fighter jets.”

The similarity between these “Operation Bingo” recommendations and the actual transgressions by Cuba is frighteningly ironic. The degree of similarity also scores interference or simply ineffectiveness. The Johnson Administration curtailed covert activity in Cuba. See id. at 147, 151-55.

256. See id. at 135-46.

257. Christopher Marquis, Pentagon Hatched Plots, Cuba Invasion Plan, MIAMI HERALD, Nov. 19, 1997, at lA.

258. Id.

259. Id. Examples include: “Operation Good Times,” a plan to airdrop “doctored” photographs “of an obese Castro with two beauties in any situation desired . . . a table brimming over with the most delectable Cuban food with an underlying caption . . . such as ‘My ration is different.”’ Id. Others included “Operation Free Ride” “aimed at creating unrest by airdropping valid one-way airline tickets in Cuba,” with destinations to Mexico, Caracas, etc., but not the United States; “Operation True Blue,” the use of Florida-based transmitters to cut into Cuban radio and television broadcasts to berate Castro and others in an effort win the minds of the Cuban people. Id.

260. Id.

261. Id. (“Under this ruse, the Pentagon would blow up a U.S. ship in Cuban waters and blame Cuba, mirroring the incident that ignited the 1898 Spanish-American War.”)


263. Marquis, supra note 257.
provocative the alleged U.S. acquiescence, begging the question of what benefit the United States could gain from such "Cuban" acts before the *Alejandre* shoot-down. For example, the post-"Operation Bingo" benefit of strong domestic and strong international disfavor towards Cuba may have served as the prelude to the national state of mind necessary for the passage and adoption of the Helms-Burton Act.\(^\text{264}\) Similarly, the shoot-down may have opened the door for a U.S. military strike. According to the former advisor to President Clinton on Cuba, Richard Nuccio, two days after the shoot-down, Clinton considered a retaliatory strike against Cuban airfields.\(^\text{265}\) John Shalikashvili, Chairman of the Joint Chiefs, could not guarantee zero U.S. casualties and the plan was abandoned.\(^\text{266}\)

Three days earlier, the White House received independent notice of the Cuban threat to BTTR, as well as BTTR's plan to make another flight toward or to Havana. On February 23, 1996, the night before the shoot-down, Nuccio sent a memo to the White House warning of a possible confrontation between BTTR and Cuban forces.\(^\text{267}\) Nuccio did not believe a shoot-down was imminent, but his concerns were raised by the FAA's inability to keep Basulto from flying.\(^\text{268}\) The U.S. State Department had informed the FAA on February 23, 1996 that BTTR might soon mount another flight into Cuban airspace, and warned of the likelihood of Cuban military response.\(^\text{269}\) Then the FAA

\(^{264.}\) The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785. The extraterritorial provisions of the Helms-Burton act "spurred formal protests from the international community, which condemned the Act as violating both customary international jurisdictional rules and the GATT. Canada, Mexico and the European Union adopted ‘blocking’ and ‘clawback’ legislation, barring their companies from complying with Helms-Burton, prohibiting the enforcement of judgments entered under the Act, and authorizing companies to counterclaim for any damages resulting from the U.S. sanctions measure. The OAS Inter-American Juridical Committee unanimously condemned Helms-Burton as an international law violation in a decision which the U.S. member joined. Canada and Mexico pursued dispute resolution mechanisms under NAFTA, and the European Community formally initiated dispute resolution proceedings in the WTO." Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *YALE J. INT'L L.* 1, 60 (2001) (footnotes omitted).


\(^{266.}\) Id.

\(^{267.}\) *Ex-Aide: White House Warned Before Shootdowns By Cuba*, CHICAGO TRIBUNE, Feb. 22, 1999. The memo was sent via electronic mail at 6:44 p.m. but the recipient, Sandy Berger, did not read it that evening. *Id.*

\(^{268.}\) Id.

\(^{269.}\) William Branigin, *Pilot Says U.S. Knew of Cuban MiGs; Lack of Aid Irks Leader*
requested that the U.S. Customs Service monitor flights out of Florida, paying careful attention to possible violations of Cuban airspace.

A Customs radar operator testified at a National Transportation Safety Board hearing that at 3:15 p.m. he identified two high-speed aircraft, the Cuban MiGs, breaking into international airspace in the direction of the United States. The radar operator, Jeffrey Houlihan, contacted the Southeast Air Defense Sector, located at Florida's Tyndall Air Force Base, and was told, "We're handling it, don't worry." Houlihan testified that U.S. jets could scramble and intercept within five to ten minutes, but no craft were launched. Houlihan further testified, "The United States military has told me specifically that anything that appears in that area heading toward the U.S., they're going to launch on immediately." Colonel Samuel Baptiste, the vice commander of the Southeast Air Defense Sector, fielded inquiries from the press, stating that "day-in and day-out procedures" were followed, and operational decisions from that day had nothing to do with BTTR.

The United States had no duty to prevent BTTR's flights, and neither the pilots nor BTTR would have had a viable cause of action against the United States for its inaction. Under the Court's unanimous decision in Collins v. Harker Heights, in order for a plaintiff to state a constitutional cause of action against government-as-government, that government must demonstrate "deliberate indifference" towards the plaintiff. Where rights are defined as negative liberties, government has no affirmative constitutional duty to take any action. In the...
instant case, all agents of the United States are insulated from a private action under Title 42 U.S.C. § 1983 by the Court's decision in *Rizzo v. Goode*, which "does not, as a substantive matter of law, require public actors to account for injuries directly caused by other public individuals simply because the injuries could have been prevented.

The United States is further protected by the Court's decision in *Deshaney v. Winnebago County Dep't of Soc. Serv.*, where county social service workers, acting under state law, took an injured child away from the custody of his abusive father. The county department soon after returned the child to his abusive father, and the child subsequently sustained a permanent injury. The Court held that although the decision to return the child to his abusive father was discretionary, the county was not the cause of the child's specific injuries. The Court reasoned that constitutional rights are negative orders to the government not to do certain acts, thereby limiting the doctrine of due process to "wrongs of intentional and strict causation." Furthermore, the intervention of a subsequent actor relieves the state of responsibility. Similarly in *Alejandre*, the shoot-down by the Cuban Air Force actually relieved the United States of any affirmative duty to the pilots or BTTR. Ironically, once the Cuban Air Force attacked the planes, the United States was in the clear. State inaction in this case did not constitute the state action necessary in a claim for violation of due process.

**IX. CONCLUSION**

Cuba's attack was unjustified under international law. Even so, Castro could not be arrested when he visited the United States as Cuba's sitting head-of-state to address the United Nations. The private diplomacy of BTTR and the flights over Havana did not violate the Logan Act or the Neutrality Act, despite affecting the relationship between the United States and

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right because the defendants did not engage in arbitrary conduct intentionally designed to punish someone).

279. *Casebeer*, *supra* note 276, at 276.
281. *Id.* at 203.
283. *Id.* at 298.
Cuba.

Viewed in light of the history of U.S. activity directed against the rule of Castro, the current prosecution of the remaining five alleged Cuban agents effectively redirects the attention from BTTR's assertion of U.S. responsibility to Cuban espionage. If the United States had some part in supporting the flights by BTTR, directly or indirectly, or if the United States seeks to obfuscate the state's failure to intervene on behalf of the murdered U.S. citizens and resident, the United States escapes liability, but should not escape criticism.

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284. Similarly if the policy thrust driving the current prosecution of the alleged Cuban spies is to further damn Cuba in the international forum to muster international support for the Helms-Burton Act.

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