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COMMENTS

CONGRESS ANSWERS THE SUPREME COURT: IS *SABBITINO* STILL LAW?

. . . [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . even if the complaint alleges that the taking violates customary international law.¹ (Emphasis added.)

So spoke the Supreme Court of the United States in its decision in *Banco Nacional de Cuba v. Sabbatino*.² The Court thus refused to question the validity of expropriations of the property of American citizens by the Castro government.³ This holding extends the American act of state doctrine to litigation involving alleged violations of international law and, if allowed to stand, will impede the growth and development of international law in the area of alien property rights and sanction, by judicial abdication, the illegal acts of foreign nations.

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state . . . based upon . . . a confiscation or other taking . . . by an act of that state in violation of the principles of international law. . . . *Provided*, that this subparagraph shall not be applicable . . . in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court. . . .⁴

1. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

2. 376 U.S. 398 (1964). Petitioner's claim in this action, brought originally in the federal district court of New York, was based on a decree of the Cuban Government expropriating certain property, the right to the proceeds of which were in controversy. For a detailed study of the facts and lower court decisions in *Sabbatino*, see Lillich, *Ay Pyrrhic Victory at Foley Square: The Second Circuit and Sabbatino*, 8 VILL. L. REV. 155 (1962).

3. For a discussion of the doctrine as applied specifically to expropriations of the Castro Government, see Comment, 75 HARV. L. REV. 1607 (1962). Another very important holding of the Supreme Court in this case is that the act of state doctrine is a principle of federal common law binding on federal and state courts alike. This decision of the Court, extending the concept of federal common law, will not be treated in this comment. For an analysis of this aspect of the *Sabbatino* decision, see Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 65 COLUM. L. REV. 806 (1964); Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325 (1964).

4. H.R. REP. No. 1925, 88th Cong., 2d Sess. 3 (1964).

So answered the United States Congress in an Amendment to the Foreign Assistance Act of 1964, thus lifting from the courts a self-imposed restraint. It is the purpose of this comment to trace briefly the development of the American act of state doctrine⁵ and to analyze the Congressional change with regard to this doctrine.

I.

THE DEVELOPMENT OF THE ACT OF STATE DOCTRINE

The landmark case defining the doctrine is *Underhill v. Hernandez*,⁶ decided by the Supreme Court in 1897, in which Chief Justice Fullen stated:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.⁷

The Court reasoned that inquiry by one state into the acts of another violated state sovereignty and was therefore not within the powers of the court. The holding in the *Hernandez* case was applied in 1918 in *Oetjen v. Central Leather Co.*,⁸ a case involving a dispute over the title to consignments of hide. The claim of title by the defendant was based upon a confiscation by the Mexican government. The Supreme Court refused to question the validity of the acts of the Mexican government because of a strong reluctance to risk endangering our foreign relations with the Mexican government.

In *Ricaud v. American Metal Co.*,⁹ also decided in 1918, a suit in equity was brought to settle the title to lead bullion, one of the claimant's titles having been derived from a confiscation by the Mexican government. The Court again refused to question the validity of the confiscations. Referring to the doctrine as defined in *Hernandez* the Court said:

This last rule, however, does not deprive the courts of jurisdiction once acquired over a case. It requires only that when it is made to appear that the foreign government has acted in a way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.¹⁰

5. For a comparison of the British act of state doctrine with the American doctrine, see Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959).

6. 168 U.S. 250 (1897). The case involved an action by a United States citizen against an official of the revolutionary government of Venezuela for detention within that country.

7. *Id.* at 252.

8. 246 U.S. 297 (1918).

9. 246 U.S. 304 (1918).

10. *Id.* at 309.

It should be observed that these three cases, on which the Supreme Court and other lower federal courts have relied for almost fifty years, were decided in the early 1900's when the idea of international law as a meaningful force in the world was an absurdity and did not involve alleged violations of international law.¹¹ The alleged illegality of the acts was based upon national law, and the Court merely refused to measure the acts of a foreign state against the laws of that state.¹² Also, these cases did not involve a question of *jurisdiction*, but of *decision*. The Court, by precluding itself from questioning the validity of the acts, assumed their validity and thus according to the act of State doctrine the merits of each case were decided as if the act were valid.¹³ Applying the doctrine as developed in *Hernandez*, *Oetjen*, and *Ricaud*, the Supreme Court said in later cases that "so long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws,"¹⁴ and "a foreign sovereign power must, in our courts, be assumed to be acting lawfully."¹⁵

This was the status of the doctrine¹⁶ until *Sabbitino* when the Court, faced with an alleged violation of international law, saw fit to extend the doctrine to that situation although not bound by precedent to do so.

II.

THE THEORETICAL BASIS OF THE ACT OF STATE DOCTRINE

There are three possible bases for the act of state doctrine: state sovereignty, conflicts of laws, and judicial self-restraint because of a political question.¹⁷

State sovereignty¹⁸ has traditionally meant that one independent country is supreme over its own territory and people and not subject to the laws of any other country. The sovereign state is law unto itself and therefore no other state can challenge the validity of its acts. This theory is a valid

11. Mention was made in *Oetjen* of violations of the Hague Convention. This Convention, however, dealt only with international warfare and was not applicable to acts of a state during a civil war. Therefore, the Court did not consider the Convention applicable to the acts of the Mexican Government.

12. The 1960 Restatement clearly indicates that the doctrine does not apply to alleged violations of international law. RESTATEMENT, FOREIGN RELATIONS § 28d(2) (Tent. Draft No. 4, 1960). In the 1962 Draft the institute takes no position with regard to the question of applicability of the doctrine to alleged violations of international law. RESTATEMENT, FOREIGN RELATIONS § 43, caveat (Proposed Official Draft 1962). For a discussion of, and disagreement with, the Restatement view see Metzger, *The Act of State Doctrine and Foreign Relations*, 23 U. PITT. L. REV. 881 (1962).

13. Zander, *supra* note 5, n.30.

14. *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 444 (2d Cir. 1940).

15. *Eastern State Petroleum Co. v. Asiatic Petroleum Corp.*, 28 F. Supp. 279, 281 (1936).

16. The so-called "Bernstein Exception" will be considered later in this comment.

17. It is also suggested that the doctrine is itself a principle of international law. However, as the Court said in *Sabbatino*, "no international arbitral or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign governments. . . ." 376 U.S. 398, 421-22 (1964).

18. For an analysis of state sovereignty see BRIERLY, *THE LAW OF NATIONS* ch. 1 (5th ed. 1955).

basis for the act of state doctrine as applied to acts alleged to be in conflict either with the domestic law of the acting state or with the public policy of the forum. Certainly, in the reality of the state system,¹⁹ one nation could not be expected to accept the interpretation of its own laws by another country or to accept an adjudication of its acts according to the laws of another state. However, state sovereignty is not synonymous with lawlessness, and in modern times, when sovereign states are politically and economically interrelated, there is a growing recognition of the need for a workable system of international law to direct the dealings between sovereign states and their citizens. If a state can disregard international law and have this lawlessness validated by other countries, international law will become meaningless. The growth of international law is dependent upon the recognition given to it by all nations as a binding force by applying it in their courts.²⁰

The second theoretical basis of the doctrine is that of a conflicts of laws approach. As such, it provides a solution to the question of what law will be applied to test the validity of an act of a foreign state in the domestic forum. However, as was previously indicated, this doctrine does not involve a choice of law by the court; it is a determination by the court that a certain act is valid and will be enforced as valid without inquiry.

Finally, the doctrine is considered one of self-imposed judicial restraint out of deference to the political branches of the government, particularly the executive department which has been entrusted with primary responsibility for the conduct of our foreign affairs.²¹ The judiciary has felt that inquiry by it into the acts of foreign states presents the possibility of embarrassment to the executive department by a decision contrary to its policies²² or by interference with the executive department's efforts at lump sum settlements at the diplomatic level.²³ This then is a self-imposed restraint because it touches a political question. "Questions touching the external relations of the United States are 'political' in nature and therefore not subject to judicial review."²⁴

As long as the acts of a foreign state did not violate international law the "political question" doctrine, as a basis for judicial deference to its co-ordinate branches of government, may have been a valid justification for the act of state doctrine. However, it is questionable whether an alleged violation of international law should be considered political. Since the decision of *Baker v. Carr*,²⁵ it is obvious that what is considered a political

19. For an analysis of the state system see BRIERLY, *THE LAW OF NATIONS* ch. 1 (5th ed. 1955).

20. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (dissenting opinion). See generally Franck, *International Law: Through National or International Courts?*, 8 VILL. L. REV. 139 (1962).

21. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

22. For a full discussion of the domestic reasons behind the doctrine see Snyder, *Banco Nacional de Cuba v. Sabbatino: The Supreme Court Speaks*, 16 SYRACUSE L. REV. 15 (1964).

23. *Ibid.*

24. Note, 62 COLUM. L. REV. 1278, 1283 (1962).

25. 369 U.S. 186 (1962).

question in one decade does not always remain so.²⁶ Thus when international law is available to be applied to an act of a foreign state, it may be outmoded to hold this to be a political question. Political and legal questions should not be made indistinguishable. The Constitution has given the Executive the power to recognize countries and this presents a political question;²⁷ however, this power is not automatically accompanied by a political validation of acts of the recognized country,²⁸ for that is a *legal* question to be decided by the courts.

Of the three underlying justifications for the act of state doctrine, the political question doctrine is the most vital to the reasoning of the Supreme Court, primarily because of a fear of embarrassing the executive department by contradicting executive policy.²⁹ The courts do not want to risk conflict with such executive policy. Therefore, it would seem that if the policy of the executive department were that adjudication would not interfere with executive decisions, the reason for judicial restraint would be lacking. This proposition was in fact recognized by the Court in the so-called "Bernstein Exception." In *Bernstein v. Van Heyghen Freres, Societe Anonyme*,³⁰ the Circuit Court sought direction from the Executive as to whether or not it should apply the act of state doctrine. Since he said nothing the court applied the doctrine. However, in a subsequent case on the same facts,³¹ the State Department released a statement condemning acts of Nazi officials and stating that the policy of the Executive "is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."³² The circuit court, therefore, acting under the Executive expression of policy, disregarded the act of state doctrine and proceeded to an adjudication on the merits.

The "Bernstein Exception" was applied by the Circuit Court in *Sabbatino*.³³ In that decision Judge Waterman found that communiques from the State Department expressing our government's displeasure with the acts of the Cuban government warranted invoking the "Bernstein Exception." The Supreme Court, however, rejected this proposition on the grounds that the communiques were not sufficient evidence of State Department desire to lift the restriction on judicial inquiry. The "Bernstein Exception" was deemed not applicable in *Sabbatino*, the Court reserving opinion on the exception for a proper case. Thus the act of state doctrine after *Sabbatino* precluded the courts of the United States from adjudicating

26. Metzger, *Act of State Doctrine Refined: The Sabbatino Case*, in *THE SUPREME COURT REVIEW* 223 (1964).

27. *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 138 (1938).

28. *Supra* note 24, at 1285.

29. Contrary to the beliefs of American courts Sir Wilfred Green commented in *Kawasaki Kisen Kaishiki Kaisha of Kobe v. Bantam Steamship Co.*, [1939] 2 K.B. 544, 552 (C.A.): "I do not myself find the fear of the embarrassment of the Executive a very attractive basis upon which to build a rule of English Law."

30. *Bernstein v. Van Heyghen Freres, Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947).

31. *Bernstein v. N. V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954).

32. *Id.* at 376.

33. 307 F.2d 845 (2d Cir. 1962).

the merits of an act of another state performed within its territory affecting the property of foreigners even if the act is an alleged violation of international law unless the Executive makes known unequivocally that such an adjudication would not embarrass the Executive Branch of the government. The presumption is that an adjudication will embarrass the Executive unless he notifies the Judiciary to the contrary. As was stated earlier, Congress has reacted to this position by the passage of an amendment which suspends the application of the act of state doctrine unless the Executive notifies the Judiciary that such an adjudication would be detrimental to our foreign policy. The presumption is, therefore, reversed and the burden is placed upon the Executive to object to the adjudication on the merits. The amendment thus adopts a "Reverse-Bernstein Policy."⁸⁴

III.

THE STATUTORY CHANGE: ITS PURPOSE

The statutory provision applies to the American act of state doctrine as applied to expropriations of property owned by foreigners within the expropriating country. The statute relieves the courts of this restraint when these expropriations are an alleged violation of international law and when the President makes no suggestion that the doctrine should be applied. In application, the statutory change will accomplish two goals: first, it will provide a remedy at law for the victims of illegal expropriations, and secondly, it will remove an obstacle to the development of international law in this area.

Under the pre-statute doctrine the injured property owner, having been precluded from an adjudication of his cause of action according to principles of international law, could look for a remedy either through the enforcement of bilateral treaties⁸⁵ or through political negotiations leading to lump sum settlements.⁸⁶ The interests of the individual are subordinated to political considerations and these remedies have, therefore, proved inadequate.

This situation serves to defeat the efforts being made by the United States government⁸⁷ in encouraging private investment abroad, particularly in the underdeveloped nations where expropriations are highly probable because of political instability. Developing countries and capital coun-

34. The adoption of this "Reverse Bernstein" approach was recommended in 1959 by the Committee on International Law of the New York Bar Association. 14 *THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK* 228 (1959).

35. Out of the 114 members of the United Nations 19 have bilateral treaties with the United States which provide just compensation for confiscations of the property of American corporations. Metzger, *supra* note 26, at 235.

36. *Id.* at 236. Also see Lillich, *supra* note 2, at 168.

37. For a statement on the needs and desires of private investors for protection of their investments in foreign countries in an effort to cooperate with the United States Government in its foreign assistance program, see *Statement by Henry J. Clay, Hearings Before the Committee on Foreign Relations of the United States Senate, 88th Cong., 2d Sess.* 481 (1964).

tries need foreign investment; however, the investors also require some guarantee of protection for their property rights.³⁸ If private investors cannot look to independent judicial decisions respecting their rights under international law but must, "even when there is a flagrant violation of international law,"³⁹ look to the "tortious, unpredictable, sensitive, and sometimes amateurist diplomatic channels of the executive"⁴⁰ they will not invest.

Prior to this amendment, the party seeking redress under international law sustained the burden of seeking an executive expression of policy in favor of lifting the act of state doctrine. Under the amendment, he no longer has this burden.

The act of state doctrine as extended by *Sabbitino* is a serious impediment to the growth and development of international law in the area of alien property rights. International law will develop by continued application in national courts.⁴¹ It has been recognized in this country that the Law of Nations is part of our law and that the courts of the United States are charged with the obligation of enforcing international, as well as national, law.⁴² Thus during the debates from which our Constitution emerged the "convention was in substantial agreement that there must be a national judiciary and that it must have, at least in the last resort, a paramount authority with respect to the Law of Nations. . . ."⁴³

The application of international law by one national court will necessarily reflect the values and policies of that nation.⁴⁴ This is precisely why sovereign states are reluctant to accept adjudication of their rights by the courts of another state. Appeal is available to countries or individuals whose causes are espoused by their countries to the International Court of Justice.⁴⁵ But, unless parties are first allowed recourse in national courts, they cannot reach the International Court of Justice. This court will apply international law as it has been developed by national courts;⁴⁶ therefore,

38. Snyder, *supra* note 22.

39. *Id.* at 37.

40. *Ibid.*

41. Franck, *supra* note 20. One of the principal objections to the lifting of the act of state doctrine in this area of expropriations is that different countries have conflicting views on the importance of private property rights and consequently on the legality of confiscations. It is feared that since there is not sufficient consensus, national courts will merely be applying national policy rather than accepted general principles. See Remarks by Wolfgang Friedmann, *Columbia Journal of Transnational Law* 103, Meeting of the Columbia Society of International Law, May 1964. However, it is submitted that this is one effective way of having principles supplied that can, by application and acceptance, be developed into international law. See generally, FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964).

42. U.S. CONST. art. I, § 8.

43. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 38 (1952).

44. Reeves, *The Sabbatino Case: The Supreme Court of the United States Rejects A Proposed New Theory of Sovereign Relations and Restores the Act of State Doctrine*, 32 *FORDHAM L. REV.* 631 (1964). Reeves, *Act of State Doctrine and the Rule of Law — A Reply*, 54 *AM. J. INT'L L.* 141 (1960).

45. Hyde, *The Act of State Doctrine And the Rule of Law*, 53 *AM. J. INT'L L.* 635 (1959).

46. Franck, *supra* note 20.

individual nations must be willing to adjudicate issues of international law and allow appeal from its decision. This is the only way in which a nation can succeed in having its interpretation of international law and justice "aired" in an international forum. Only by applying international law can a nation hope to have it developed. It is a matter of great importance today to realize that subjection to international law, although a step back from state sovereignty, is a step toward international accord and cooperation. If the United States as a nation seeks a world of law and order in international dealings, it must allow itself to be committed to the development of international law. Furthermore, if application of international law depends upon a prior political authorization it undermines international law and shows a lack of commitment to it.⁴⁷ By relieving the courts of the act of state doctrine in the area of expropriations, Congress has indicated its willingness to recognize and apply international law in this area and is thus taking a step toward a national commitment to international law.

IV.

THE STATUTORY CHANGE: ITS VALIDITY

The Amendment to the Foreign Assistance Act is not a complete commitment to international law. It recognizes that in some situations the national interest of the United States in our foreign relations would be injured by judicial inquiry into the legality of the acts of a foreign nation. In such a situation the statute will not apply if the President "determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court. . . ."⁴⁸ On the filing of such a suggestion by the President it is the intent of the legislature that the act of state doctrine as defined by the Court would then apply. Since the burden is on the President to call for the application of the doctrine, it is likely that he will say nothing except in cases "deemed to be fraught with the most severe consequences diplomatically."⁴⁹

This amendment, introduced into the Senate by Senator Hickenlooper, was debated in the Senate but not in the House of Representatives. At the time of its adoption, the House managers stated: "The managers on the part of the House regretted that there has not been an opportunity for thorough study and full hearings on the subject."⁵⁰ The application of the amendment was limited to cases in which proceedings are commenced before January 1, 1966. "This limitation was approved with the understanding that the Congressional Committees concerned will make a full review and study of the matter during the next Congress and make a determina-

47. Lillich, *supra* note 2, at 167.

48. *Supra* note 4.

49. Metzger, *supra* note 26, at 243.

50. H.R. REP. No. 1925, 88th Cong., 2d Sess. 16 (1964).

tion on the need for permanent legislation."⁵¹ Thus, during the next year much debate is expected as to the policy and validity of the amendment. It is submitted that while the purposes and policies of the amendment are laudatory, the amendment itself is constitutionally questionable.

The act of state doctrine is a self-imposed judicial rule of restraint. It is a rule of *decision* and can only be lifted by the Court itself.

The judicial power of the United States is posited by the Constitution in United States Courts⁵² and this power encompasses adjudication, which is "the power of a court to decide and pronounce a judgment. . . ."⁵³ When the courts apply the act of state doctrine they are pronouncing a judgment on the act of another state. The doctrine dictates a specific result: that the act is valid. Only the court itself can decide when to apply this rule of decision. The amendment, in effect, gives the President the power and the duty to suggest to the courts that in certain cases they are to find acts of foreign states valid. This power is beyond the power of Congress to delegate to the President and beyond the power of the President to execute if the suggestion is to be considered binding on the court. ". . . [O]ur courts are obliged to determine controversies on their merits, in accordance with the applicable law . . ."⁵⁴ unless the court itself feels obliged to restrain its inquiry because the issue in litigation is a political question, but "what is or is not a political question is for the court to decide in each case. . . ."⁵⁵

In the area of executive suggestion of sovereign immunity the courts have felt themselves bound to follow the executive suggestion;⁵⁶ however, sovereign immunity involves a duty on the court to decline jurisdiction in a particular case and not to decide a particular way. A recent opinion of the New York Supreme Court held that while it would consider itself bound by an executive suggestion of immunity so that the "resultant effect is an instantaneous end of further judicial proceedings" it would not accept an executive suggestion presented in such a way as to "prescribe a method for judicial resolution. . . ."⁵⁷ This decision could indicate that the courts would not consider the Presidential suggestion filed pursuant to the amendment to the Foreign Assistance Act binding. However, because of the willingness of the Judiciary to defer to the Executive questions touching foreign relations when the President files such a suggestion, the court will undoubtedly honor it by considering the issue political and invoking the act of state doctrine itself.

51. *Ibid.*

52. U.S. CONST. art. III, § 1.

53. FORKOSCH, CONSTITUTIONAL LAW 109 (1963).

54. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 450-51 (1964) (dissenting opinion).

55. FORKOSCH, CONSTITUTIONAL LAW 60 (1963).

56. A sovereign nation can claim immunity to a suit in our courts either by directly asking the State Department for a suggestion of immunity, or by raising immunity as a defense in which case the court will ask the State Department if it should be granted. When the State Department allows immunity the courts decline jurisdiction. *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961).

57. *Stephen v. Zivnostenska Banka, National Corp.*, 213 N.Y.S.2d 396, 402 (1961).