Washington Law Review

Volume 49 | Number 1

11-1-1973

International Law—Act of State Doctrine—First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972)

Jack E. Sands

INTERNATIONAL LAW—ACT OF STATE DOCTRINE—*First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

International comity demands that one sovereign ordinarily recognize the legitimacy of the acts of another, questioning their validity under neither internal nor international law. A challenge to the legality of the acts of another nation-state may entail serious international repercussions; such challenges thus have been considered grave matters of national diplomatic policy within the exclusive competency of the political branches of government. Judicial recognition of this fact is reflected in the act of state doctrine—the refusal of the courts of one nation-state to investigate the legality of official governmental acts performed in another. This doctrine, accepted in varying degrees by many nations,[1] had its origin in the United States in *Underhill v. Hernandez*.[2] *Underhill* held that the doctrine barred an action in American courts against the Venezuelan government for wrongful imprisonment, but the doctrine has been most commonly utilized in the area of foreign expropriations.[3] In that context, the United States Supreme Court reexamined the validity and scope of the doctrine in *First National City Bank v. Banco Nacional de Cuba*.[4]

First National City, a New York bank, had made a loan to a Cuban pre-Castro bank, secured by assets in the United States. Subsequently, as part of a general plan of nationalization of American-controlled corporations in Cuba, the Castro government seized substantial amounts of City Bank's Cuban property. City Bank retaliated by declaring the loan to the Cuban bank in default, selling the collateral and keeping those proceeds in excess of the amount due on the loan (some $1.8 million) as partial compensation for the expropriation. Banco Nacional de Cuba, successor to the Cuban bank, brought suit in federal district court to recover the excess on the sale;[5] City Bank counterclaimed for damages resulting from the uncompensated expropriation of its property, asserting seizure of the excess on

1. *See generally* F. MOONEY, FOREIGN SEIZURES (1967).
2. "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 another done within its own territory." 168 U.S. 250, 254 (1897).
3. *See generally* Oetjen v. Central Leather Co., 246 U.S. 297 (1918).
4. 406 U.S. 759 (1972).
5. Banco Nacional de Cuba v. First National City Bank, 270 F. Supp. 1004 (S.D.N.Y. 1967).

the sale as a set-off against its counterclaim. Banco Nacional asserted that the act of state doctrine barred inquiry into the legality of the Cuban government's expropriation, a governmental action which took place in Cuban territory by a government then existing and recognized by the United States.

Concluding that the Hickenlooper Amendment[6] had overruled the act of state doctrine in this factual context, the district court granted summary judgment for City Bank after the bank waived recovery on its counterclaim in excess of the amount obtained from foreclosing the collateral. On appeal, the Second Circuit held that the Hickenlooper amendment did not apply, and that the counterclaim was therefore barred in toto by the act of state doctrine.[7] After the Supreme Court had granted certiorari,[8] it received a letter from the State Department indicating that the Executive had no objection to the Court's ignoring the act of state doctrine and deciding the case on its merits. The Court remanded the case for reconsideration in view of the State Department's letter.[9] The Second Circuit adhered to its earlier decision,[10] and the Supreme Court again granted certiorari.[11]

Justice Rehnquist, joined by the Chief Justice and Justice White, concluded that the State Department letter was determinative and that the act of state doctrine therefore was no bar to the counterclaim.[12] Justice Douglas concurred in the result,[13] but relied on *National City Bank of New York v. Republic of China,*[14] which held that a sover-

6. 22 U.S.C. § 2370 (e) (2) (1970):
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 to property is asserted by any party including a foreign state [or a party claiming through such state] based upon [or traced through] a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law . . . .
Also referred to as the *Sabbatino* Amendment, since it was enacted in 1964 in response to the decision in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). *See, e.g.,* the letter from the State Department, reproduced in Banco Nacional de Cuba v. First National City Bank of New York, 442 F.2d 530, 536 n.3 (2d Cir. 1971).

7. Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394, 404 (2d Cir. 1970).

8. 400 U.S. 1019 (1971).

9. *Id.*

10. Banco Nacional de Cuba v. First National City Bank, 442 F.2d 530, 536 (2d Cir. 1971).

11. 404 U.S. 820 (1971).

12. 406 U.S. 759, 767-70 (1972).

13. *Id.* at 770-73.

14. 348 U.S. 356 (1955).

eign who voluntarily brings an action in a United States court waives sovereign immunity as to a permissive counterclaim to the extent of the set-off. Justice Powell concurred in the judgment, concluding that the lower court should have examined the validity of the expropriation under standards of international law.[15]

Justice Brennan in dissent, joined by Justices Stewart, Marshall and Blackmun, argued that the State Department letter was irrelevant; he would have affirmed the Second Circuit's decision that the act of state doctrine barred inquiry into the validity of the expropriation.[16] The Second Circuit's decision was therefore reversed, five to four.[17]

Because the three majority opinions sharply diverge in their reasoning, while the four dissenting justices firmly oppose allowing the executive branch to "waive" application of the act of state doctrine, *City Bank* seems to leave the future of that doctrine very unsettled. None of the four opinions seems well founded in logic or constitutional doctrine; none seems likely to result in desirable foreign or domestic policy. This note suggests a proposed legislative solution which would remove sensitive decisions on the legality of foreign expropriations from the courts and place them within the purview of an executive branch tribunal.

I. *CITY BANK:* A STUDY IN DOCTRINAL CONFUSION

Regrettably, the Court has never clearly articulated a rational foundation for the act of state doctrine. This failure to specify the basis of its reasoning has caused much of the confusion and uncertainty which surround the doctrine's application. Early cases found it based on

15. 406 U.S. at 773-76.

16. *Id.* at 776-96.

17. On remand, the Second Circuit affirmed the district court's judgment for City Bank on the counter claim, 478 F.2d 191 (2d Cir. 1973). Instructed by the Supreme Court to disregard the act of state doctrine and decide the merits of Banco Nacional's other defenses, the court of appeals held that Banco Nacional was the "alter ego" of the Cuban government, at least within the context of the nationalization and of this court action. The court of appeals refused to reexamine the legality of Cuba's nationalization program under international law. The Second Circuit had held previously:

> Since the Cuban decree[s] of expropriation not only [fail] to provide adequate compensation but also [involve] a retaliatory purpose and a discrimination against United States nationals . . . [such decrees are] in violation of international law.

Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 868 (2d Cir. 1962), *rev'd on other grounds,* 376 U.S. 398 (1964); Banco Nacional de Cuba v. Farr, 383 F.2d 166, 183 (1967), *cert. denied,* 390 U.S. 956 (1968).

concepts of international comity[18] and the principle of international law that each state is sovereign within its own borders.[19] In rejecting these traditional grounds in the former leading act of state doctrine case, *Banco Nacional de Cuba v. Sabbatino*,[20] the Court indicated that the inherent nature of sovereign authority and international law were mere guides as to the wisdom of employing the act of state doctrine. The Court did not fashion a new rationale for the doctrine, however. It stated rather vaguely that although the doctrine was not required by the text of the Constitution, it did have constitutional underpinnings in the principle of separation of powers.[21]

In *City Bank* Justice Rehnquist concluded that the act of state doctrine is not constitutionally compelled; although he found a basis for the doctrine in comity among independent sovereigns and among the respective branches of the federal government, he concluded that the doctrine is grounded rather on a judicial apprehension that applying customary principles of law to foreign sovereigns might frustrate the conduct of foreign relations by the political branches.[22]

> The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government.

18. Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918).
19. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).
20. 376 U.S. 398, 421 (1964).
21. *Id.* at 423.
22. 406 U.S. at 765. He observed that the doctrine did not have its roots in the Constitution. *Id. See Sabbatino*, 376 U.S. at 423:

> The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state. The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers.

Justice Rehnquist was no clearer than the *Sabbatino* court in his conclusion that the doctrine was based not on the constitution but on a comity between nations that is "buttressed" by judicial deference to the exclusive power of the Executive over foreign relations. Though both formulations are ambiguous, Justice Rehnquist's formulation appears fundamentally different from that of the eight-justice majority in *Sabbatino*. He seemed to return to the former rationale of international comity and reinforce this rationale with a concept of judicial deference to the Executive not found in any former case. He failed to explain why the concepts of separation of powers or exclusive executive control over foreign relations would ever allow judicial action in the realm of foreign relations, or why the Executive rather than the judiciary should be the branch of government to determine what judicial acts would interfere with the power to conduct foreign relations.

The Executive's statement that a judicial decision on the merits would not embarrass the conduct of foreign relations, however, removed the reason for the rule. In so concluding, Justice Rehnquist adopted the "*Bernstein* exception," a much-mooted exception to the doctrine which arose from the decision of a lower court concluding that a State Department letter purporting to relieve the courts of any restrictions in judging the validity of Nazi expropriations rendered the act of state doctrine inapplicable in cases involving those expropriations.[23] He distinguished *Sabbatino*[24] on the grounds that there the State Department had not sent a *Bernstein* letter and supported his conclusion by analogizing to sovereign immunity cases which had long recognized that the Executive has sole authority to grant or deny immunity to other sovereigns.[25]

From a doctrinal standpoint, Justice Rehnquist's opinion is not completely persuasive. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*,[26] a lower court decision, can clearly be distinguished: In *Bernstein*, for example, the expropriating government no longer existed when the suit was brought; in *City Bank* it did. Therefore, deciding the case in *Bernstein* could have had no adverse effects on relations with a foreign government. Also, the acts complained of in *Bernstein* occurred while the United States was at war with the expropriating government. Furthermore, the Executive's attempt to avoid American sanction of official Nazi governmental acts was but one expression of a long standing United States policy and international consensus, acceptance of which transcended the particular issue before the court; hearing the case, therefore, did not

23. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954), Bernstein sued to recover property that had been taken forcibly from him by the Nazi government and conveyed to the defendant's predecessor. The State Department released a letter indicating that it had been a long-standing policy of the United States not to recognize Nazi expropriations, and stating that it was the government's policy to waive the act of state doctrine in judging the validity of such expropriations. The Second Circuit remanded the case to the district court for trial. Before *City Bank*, the Supreme Court had never ruled on the exception. *See generally* Note, *Executive Suggestion and the Act of State Cases: Implications of the Stevenson Letter in the Citibank Case*, 12 HARV. INT'L L.J. 557 (1971).

24. 376 U.S. 398 (1964).

25. *See* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 145-46 (1812), in which Chief Justice Marshall found such immunity to be an implied limitation to the otherwise complete territorial sovereignty of a nation, a limitation which might be destroyed only by the express will of the sovereign. Paraphrases by Justice Rehnquist, 406 U.S. at 762.

26. 210 F.2d 375 (2d Cir. 1954).

politicize the judiciary. In short, application of the *Bernstein* exception in *City Bank* was not compelled by precedent; Justice Rehnquist's opinion represents an extension, not an application of prior law.

Nor does this adoption of the *Bernstein* exception by the Court appear warranted by the logic of precedents. Past decisions applying the act of state doctrine did not indicate that its application should depend on executive prerogative. In its first application of the doctrine, the Court indicated it was applying an absolute, judicially-created rule.[27] In *Sabbatino,* the Solicitor General expressed the opinion as amicus curiae that the *Bernstein* exception should not be applied since the government had taken no position in the case, and in that case the Court merely refused to regard as determinative executive failure to interpose affirmatively the doctrine. Justice Rehnquist's attempt to distinguish *Sabbatino* by arguing that an affirmative executive waiver of the doctrine is decisive while neutrality is not[28] seems to emphasize the strict holding of *Sabbatino* but ignore the clear implications of that case.[29]

Although the Court expressly refused to decide the *Berstein* question in *Sabbatino,* its reasoning in that case seems inconsistent with the view that application of the act of state doctrine depends on executive option.[30] The Court in *Sabbatino* said that the doctrine "expresses the strong sense of the *Judicial Branch* that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals . . . ."[31] The Court rejected the notion that the Executive could accurately predict when judicial involvement would not be embarrassing:[32]

27. *See* note 2 *supra.*

28. [A]ny exception to the act of state doctrine based on a mere silence or neutrality on the part of the Executive might well lead to a conflict between the Executive and Judicial Branches. Here, however, the Executive Branch has expressly stated that an inflexible application of the act of state doctrine by this Court would not serve the interests of American foreign policy.

City Bank, 406 U.S. at 767.

29. *Cf.* Zschernig v. Miller, 389 U.S. 429, 432 (1967), in which the Justice Department argued as amicus curiae that application of the Oregon escheat statute to heirs in Communist Bloc countries would not unduly interfere with the Executive's conduct of foreign affairs. The Court refused to accept this statement as determinative and held that the statute as applied constituted such an intrusion into foreign policy.

30. *See generally* Delson, *The Act of State Doctrine—Judicial Deference or Abstention?* 66 AM. J. INT'L L. 82 (1972).

31. 376. U.S. at 423 (emphasis added).

32. *Id.* at 433.

> Even if the [Court] avoided [determining difficult questions of international law], either by presuming the validity of an act of state whenever the international law standard was thought unclear or by following the State Department declaration in such a situation, the very expression of jucicial uncertainty might provide embarrassment to the Executive Branch.

The Court enumerated three factors to be considered when deciding whether application of the act of state doctrine is appropriate:[33] (1) The extent to which an international law codification or consensus exists regarding the legality of the particular act in issue; (2) how sharply the allegedly invalid acts touch on the state's national interests and (3) whether the foreign government exists at the time the action is brought to trial. A balancing of interests such as these has traditionally been a judicial task, and it seems clear that was what the *Sabbatino* Court intended. Finally, speaking more directly to the point, the Court concluded:[34]

> It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to the probable result and, at any rate, should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries.

Thus, in past cases the Court has regarded the act of state doctrine as a judicial device and has been disinclined to adopt the *Bernstein* exception. Furthermore, because of the sensitive nature of such cases, they quite possibly should be characterized as political questions. Executive consent cannot make a political question justiciable.[35] Although the political branches are supreme in foreign relations, that supremacy does not compel judicial deference in such cases.

Justice Rehnquist's view probably will not prevail: it lacks persuasive support in past cases, fails to articulate a clearly logical foundation and had the opposition of six justices who concluded that the *Bernstein* exception should be rejected.

Justice Powell, in a separate concurring opinion, rejected the *Bernstein* exception but concluded that unless the court determined that its hearing the case would interfere with delicate foreign relations con-

33. *Id.* at 427-28.
34. *Id.* at 436.
35. *Cf.* Muskrat v. United States, 219 U.S. 346 (1911).

ducted by the political branches, it would have an obligation to render a decision in accordance with standards of international law.[36] He found no judicial conflict with the foreign relations power in this case and thus would have remanded. His view, too, is unlikely to prevail in future cases. Although he attempted to distinguish *Sabbatino* by showing that the Court in that case did not purport to lay down an inflexible rule, he offered no explanation of how *Sabbatino's* balancing test, fairly applied in *City Bank,* would have indicated any different result. He obviously disagreed, however, with the *Sabattino* holding itself; in fact, he candidly admitted that, had he been on the *Sabbatino* Court, he would have joined Justice White's dissent. An earlier case, moreover, had specifically rejected Justice Powell's suggested deference to international law,[37] as did portions of *Sabbatino.*[38] His opinion attracted no support from other members of the Court, gave at most token support to stare decisis, provided no indication of how courts might determine applicable international law and therefore should not be relied on as indicating a future trend which the Court might follow.

Justice Douglas also rejected the *Bernstein* exception in a separate concurring opinion. He concluded that the case should be heard on its merits because the Cuban government had voluntarily entered an American court as a plaintiff, and "fair dealing" required that the counterclaim be allowed to the extent of Cuba's claim.[39] This reasoning is unpersuasive; the rationale of a voluntary entry as a consent to suit traditionally has been a basis for conferring jurisdiction on a court, not for waiving the act of state doctrine as a defense to a counterclaim.[40] Justice Douglas relied on the *Republic of China* case,[41] but

36. For a general discussion of the policy of deciding cases by international law standards, see R. FAULK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER ch. 5 (1964).

37. In Shapleigh v. Mier, 299 U.S. 468, 471 (1937), the Court stated:

> The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law, though valid under the law of the situs of the land. For wrongs of that order the remedy to be followed is along the channels of diplomacy.

38. "[T]he public law of nations can hardly dictate to a country which in theory is wronged how to treat that wrong within its own borders." 376 U.S. at 423. The *Sabbatino* Court stated that the act of state doctrine is applicable even if international law is violated. *Id.* at 428.

39. 406 U.S. at 772.

40. *Id.* at 773-74 (Powell, J., concurring).

41. National City Bank of New York v. Republic of China, 348 U.S. 356 (1955).

that case decided only that a foreign nation waived sovereign immunity when it brought a claim in United States courts. A sovereign state which seeks a remedy under American law expects application of the act of state doctrine as a part of that law. The state, therefore, should not be deemed to have consented to a waiver of that doctrine. Moreover, in *Sabbatino,* as in *City Bank,* Cuba was the plaintiff; the Court specifically denied in that case that the state's status as plaintiff was relevant to application of the act of state doctrine.[42] Furthermore, Justice Douglas relied on an especially ambiguous basis for the doctrine: "fair dealing." The uncertainty inherent in this foundation makes legal analysis and prediction most difficult—a further reason for not following his opinion in future cases.

The fragmented state of the majority leaves the act of state doctrine in confusion. The doctrine does not apply when the Executive indicates that it should not (Rehnquist, Burger and White), when the foreign sovereign is the plaintiff (Douglas) and when the judiciary decides that a hearing would not interfere with delicate foreign relations (Powell). Because the other four justices held that the doctrine is applicable in any event, if any of these three ingredients is lacking, a majority of the Court would hold that the act of state doctrine applies. Under this analysis, *City Bank's* holding seems restricted almost to its facts.[43]

II. POLICY OBJECTIONS TO A HEARING ON THE MERITS

Although each of the three majority opinions agreeing to a remand sustains serious doctrinal objections, policy reasons for rejecting a decision on the merits are even more compelling.

A primary objection to a hearing on the merits in this case is that a decision against Banco Nacional on the counterclaim would be prejudicial to the interests of other American claimants against Cuba. City Bank had a security interest in the collateral which it quite legitimately foreclosed when the loan was not paid. However, City Bank had no secured interest beyond the value of the loan; it had no

42. 376 U.S. at 437.
43. *See* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 461 F.2d 1261 n.1. (1972).

more claim to the excess collateral than did any of the numerous other claimants against the Cuban government. City Bank's recovery would give City Bank a preference over other legitimate American claimants merely because of its fortuitous possession of the excess collateral. This preference would frustrate Congress's intent with respect to international claims, as expressed in the Act establishing the Foreign Claims Settlement Commission, that small claimants should have priority to any lump sum dispositions by the Commission.[44] Congress' intent would be furthered if the Court had held that the act of state doctrine barred the counterclaim. In that event, the funds in issue (those in excess of the amount of City Bank's loan) would not have reverted to Cuba; the Trading with the Enemy Act would have required that they be turned over to the Foreign Claims Settlement Commission for apportionment to creditors.[45]

Past applications of the act of state doctrine raised complaints that such refusals to decide issues over which the courts had jurisdiction had the effect of legitimizing wrongful acts committed against United States citizens and their property, thereby encouraging expropriations by foreign states. Moral outrage was expressed that an American citizen should have to watch helplessly while his expropriated property might come and go and be bought and sold with impunity in this country. In the Trading with the Enemy Act, however, Congress has provided an adequate and just remedy outside the courts. Therefore, the argument that application of the act of state doctrine would promote a thieves' market is unfounded in this case.[46]

44. *See* 22 U.S.C. §§ 1627(c), (e) (1970). The Foreign Claims Settlement Commission was established by the International Claims Settlement Act of 1949. 22 U.S.C. §§ 1621–27 (1970). Cuban claims are assigned to the Commission by 22 U.S.C. § 1643b(a) (1970). It should be observed that Congress chose not to authorize payment of Cuban claims; the claims are adjudicated and the result certified, payment to await a settlement with the Cuban government. *See* 22 U.S.C. § 1643 (1970); *cf.* 22 U.S.C. § 1627(c) (1970).*See generally* Re, *The Foreign Claims Settlement Commission: Its Functions and Jurisdiction*, 60 MICH. L. REV. 1079 (1962); Re, *The Foreign Claims Settlement Commission and the Cuban Claims Program*, 1 INT'L LAW. 81 (1966).

45. *See* 50 U.S.C. APP. §§ 5(b)(1), 6 & 7(c) (1970).

The Executive has continuing powers under the Trading with the Enemy Act by virtue of a proclamation on December 16, 1950, declaring a state of national emergency. Presidential Proclamation 2914, 64 Stat. A454 (1950). *See* Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 109 (2d Cir. 1966); 42 OP. ATT'Y GEN. (1968).

46. *See generally* Comment, *The State Department's Role in the Judicial Administration of the Act of State Doctrine*, 66 AM. J. INT'L L. 94 (1972).

Moreover, the dissent's argument that the rationale of *City Bank* will entangle the Court in political decisions has some validity. It seems likely that the Executive will consider political consequences in deciding whether to allow the judiciary to hear a case and decisions based on these considerations will vary with changes in administrations.[47] Furthermore, the Court's inability to articulate in concrete terms the rationale of the act of state doctrine will make it especially easy to decide a case on the basis of its own view of the political merits of the controversy. It seems incongruous that the judiciary may be turned on and off for political reasons by a statement from the State Department in the name of separation of powers.

The practical impact of *City Bank* is lessened, however, by the fact that *Sabbatino* and prior cases had indicated that the act of state doctrine has many at least arguable exceptions. Support exists in varying degrees for assertions that the doctrine should not apply when (1) the foreign state is at war with the United States,[48] (2) the foreign state is not recognized by the United States,[49] (3) the suit is brought to enforce a foreign state's penal or revenue laws,[50] (4) the act was not performed within the territory of the foreign state,[51] (5) the foreign government is not in existence at the time of suit,[52] (6) the act was not fully executed,[53] (7) the act is illegal under the law of the foreign state,[54] (8) a treaty or other unambiguous agreement covers the controversy[55] or (9) there is a "clear" violation of international law.[56]

47. In Pons v. Republic of Cuba, 294 F.2d 925 (D.C. Cir. 1961), the State Department had been invited to submit a *Bernstein*-type letter, and had declined to do so. The difference might well have been because of the change in administrations; nonetheless, the State Department's differing treatment of the similar cases is unexplained. *See also* Delson, *The Act of State Doctrine—Judicial Deference or Abstention?*, 66 AM. J. INT'L L. 82, 93 (1972).

48. *Sabbatino*, 376 U.S. at 410.

49. *Id.* at 410 (distinguished from a simple breaking of diplomatic relations). *But see* authors cited *id.* at 411 n.12.

50. *Id.* at 414.

51. *Id.* at 413, 424-25, 428.

52. *See City Bank*, 406 U.S. at 788-89 n.12 (Brennan, J., dissenting).

53. *Sabbatino*, 376 U.S. at 414 (inferred from negative implication).

54. *See* Canada Southern Ry. v. Gebhard, 109 U.S. 527 (1833); *accord*, Kohn v. American Metal Climax, Inc., 458 F.2d 255, 269 (3d Cir. 1972) (dicta). The weight of authority, however, is decidedly *contra*. *See Sabbatino*, 376 U.S. at 415 n.17.

55. *Sabbatino*, 376 U.S. at 428 (negative implication).

56. Possible implication from *Sabbatino*, *id.* at 430 n.34. *But see City Bank*, 406 U.S. at 784-85 (Brennan, J., dissenting).

In addition to these many judicial exceptions to the doctrine, Congress has created its own major exception, the Hickenlooper Amendment, which provides that the courts shall not decline to decide the merits of a case because of the act of state doctrine "in a case in which a claim of title or other right to property is asserted by any party . . . based upon [or traced through] a confiscation or other taking after January 1, 1959."[57] The Amendment further requires that the court evaluate the expropriation under rules of international law. The Court of Appeals in *City Bank* construed the Amendment to apply only "when some other entity attempted to market the American firms' expropriated property and some aspect of such an attempted transaction took place in this country."[58] Since the property in issue in *City Bank* had never been outside the United States, and had never, therefore, been expropriated by a foreign government, the Hickenlooper Amendment did not apply.[59] The applicability of the Amendment was not questioned on appeal to the Supreme Court.

Very little then remains of the act of state doctrine in the expropriation context. Numerous judicially-created exceptions have narrowed the opportunities for the doctrine's use, and the Hickenlooper Amendment has prohibited its application to goods expropriated in foreign countries and subsequently brought into the United States. *City Bank* now has limited the use of the doctrine still further by concluding that it may not be applied to bar seizures of a foreign government's property found in the United States when the foreign state sues as plaintiff, when the judiciary determines that a judicial decision would not interfere with foreign relations and when the Executive sends a *Bernstein* letter.[60] This renders the number of cases still subject to application of

57. *See* 22 U.S.C. § 2370(e)(2), *supra* note 6.

58. 431 F.2d at 402.

59. *Id.* The court there stated:

> We cannot believe that through the same language Congress intended to create a self-help seizure remedy for those few American firms fortunate enough to hold or have access to some assets of a foreign state at the time that state nationalizes American property.

See also id. n.14.

60. Even if the act of state doctrine bars the suit in court, the foreign government property may still be seized by the Foreign Claims Settlement Commission.

The act of state doctrine has also been used to bar tort actions by United States citizens allegedly wronged by official foreign governmental action. *See* United States v. Hernandez, 168 U.S. 250 (1897), where an American sued for wrongful imprisonment. That field has not been an important one in the doctrine's application and is unlikely to become so.

the act of state doctrine so small that its ambiguities might seem best cured by allowing the doctrine to die of disuse. However, the Court's recent extensive discussion of the doctrine in *Sabbatino* and *City Bank* gives it a prominence which probably precludes such a solution, and so other approaches to clarifying the scope of its application must be examined.

III. SUGGESTED FUTURE APPROACHES

One possible approach would be to accept the position of the dissent that the Court should determine the contours of the foreign relations power, that the *Bernstein* exception should be rejected because it results in judicial subservience to the other branches in violation of separation of powers concepts and that the positions of Justices Powell and Douglas are inconsistent with prior cases. In adhering to the reasoning of *Sabbatino,* the dissent has more doctrinal persuasiveness than do the positions of the other opinions and preserves the spirit of stare decisis. Furthermore, the dissent commands the support of the greatest number of justices. The dissent's opinion fails, however, to reach beyond a doctrinaire adherence to *Sabbatino* in dealing with the underlying problems. It adheres to *Sabbatino's* "constitutional underpinnings" basis and thereby accepts the same weak doctrinal foundation. It fails to explain what component of the "constitutional underpinnings" is federal common law, to what extent, if at all, use of the doctrine is constitutionally required and by what authority the judiciary may decide a case by use of a doctrine based on a separation of powers analysis without that decision being constitutionally compelled.[61] Because of this uncertainty, the dissent's position fails to articulate a policy whereby courts can predict future cases.

A second possible judicial solution would be to conclude that the doctrine is founded in the constitutional requirement of separation of powers. This solution would provide a concrete basis for the doctrine. Courts could then analyze cases to determine whether adjudication

61. This paradox recalls the Court's use of the political question doctrine, similarly based on the separation of powers. Controversy has raged over whether this doctrine is constitutionally compelled or merely expresses a deferential policy of the Court in light of the separation of powers. *Compare* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959) *with* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

would infringe on the foreign relations power of the political branches. The courts have some expertise in deciding such questions, and they could be expected to provide more manageable and predictable guidelines. Since this determination would be a constitutional question to be decided by the Court, it would not involve the *Bernstein* exception.

Acceptance of this constitutional foundation should be accompanied in practice by an almost automatic judicial application of the act of state doctrine as a matter of judicial policy. Such a policy would enable appropriate cases to be handled by the Foreign Claims Settlement Commission, which is a more specialized, expert and flexible body than a court. This solution might seem a first glance to conflict with the spirit, although not the letter, of the Hickenlooper Amendment.[62] The Amendment requires that the act of state doctrine not be applied when property expropriated from American citizens is brought within the jurisdiction of the United States courts and its title contested; this proposal, on the other hand, would state that the doctrine must be applied in situations not covered by the Amendment where a foreign state's creditors seize its American assets, as in *City Bank*. This apparent conflict between legislative intent and proposed judicial policy, however, is largely illusory. Property covered by the Hickenlooper Amendment usually has passed into private hands by the time it is brought into the United States and thus is not subject to seizure without compensation under the Trading with the Enemy Act;[63] court action is the injured party's only remedy, and the Amendment protects him by blocking application of the act of state doctrine.

62. If the act of state doctrine were based on a constitutional foundation, the Hickenlooper Amendment might appear to be an unconstitutional order by Congress that the courts should adjudicate non-judiciable cases. *See* Muskrat v. United States, 219 U.S. 346 (1911). But the Hickenlooper Amendment is itself an instrument of foreign policy, announcing Congress' intention that, in a defined group of cases, American courts will examine the legality of foreign actions. Since this policy is applied in all cases coming under it rather than on an ad hoc basis, the courts do not interfere with foreign policy but act in pursuance of it. *Cf.* City Bank, 406 U.S. at 788 n.12 (Brennan, J., dissenting).

63. See 50 U.S.C. APP. § 9(a) (1970) concerning claim by a non-enemy for compensation of seized property. *See* United States v. Broverman, 180 F. Supp. 631, 635 (S.D.N.Y. 1959), which raises the fifth amendment question of the "taking of property of friendly aliens without just compensation." The *Broverman* court mentioned the possible constitutional problem but stated that its ruling avoided the constitutional question. The following cases were cited as ones in which the fifth amendment "taking" question was discussed, *id.* at 635 n.11: Guessefeld v. McGrath, 342 U.S. 308, 318 (1952); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931).

Court action in these cases should not interfere with broad-scale negotiations, consistent with the proposal here, since it would normally occur infrequently and normally affect private owners rather than foreign states directly. Assets owned by the expropriating government, on the other hand, such as the excess collateral in *City Bank,* are subject to seizure under the Trading with the Enemy Act, and to eventual allocation to parties with cerified claims.[64] Although this procedure is applicable only to property belonging to "enemy" states,[65] any state may be so designated at the discretion of the President.[66] Leaving such decisions to executive officers and tribunals would give the executive branch both leverage and flexibility in dealing with a foreign power. Under this proposal, independent and piecemeal remedies by courts could not interfere with the broad-scale negotiations conducted by the political branches.

A third possible approach to defining the scope of the act of state doctrine would be for Congress to legislate on the subject.[67] One effort in this direction was the Hickenlooper Amendment, the constitutionality of which was upheld in *Banco Nacional de Cuba v. Farr.*[68] In that case, the Second Circuit concluded that the Amendment did not violate due process since new liabilities were not created; the act of state doctrine, in the court's view, was merely a judicial policy of abstention analogous to a statute of limitation.[69] The *Farr* court further concluded that the Amendment was not an improper legislative interference with the judicial power.[70] Under the Amendment the

64. *See* notes 44 and 45 *supra.*

65. Only seized property belonging to an enemy or ally of an enemy may be distributed to creditors. 50 U.S.C. APP. §§ 6, 7(c) (1970).

66. 50 U.S.C. APP. § 2(c) (1970).

67. A detailed analysis of legislative-executive conflicts and other possible constitutional issues engendered by congressional action in this area is beyond the scope of this note.

68. 383 F.2d 166 (2d Cir. 1967, *cert. denied,* 390 U.S. 956 (1968).

69. 383 F.2d at 179.

70. [A]s the Constitution did not require the exact result reached there, the Court must have exercised its discretion, based on its own judgment of the situation, to choose from among a number of constitutionally permissible alternative rules as to the applicability of the act of state doctrine. Therefore the political branches of our national government should be able to modify the Court's decision, choosing another constitutionally permissible alternative . . . especially as the factor upon which the choice is based, the effect on our foreign relations, is admittedly more within the competence of the political branches of the government than the competence of the Court.

Id. at 181. "Thus a total prohibition upon the courts, declaring that they might never

Executive was required to act in order to allow, rather than to prevent, application of the doctrine, and therefore the Hickenlooper Amendment had only modified the doctrine by effecting a reversal of presumptions.[71] Furthermore, since the Court had characterized the doctrine as not constitutionally compelled, but only having constitutional underpinnings, Congress had not attempted to force the Court to adjudicate nonjusticiable questions.[72]

Thus, *Farr* indicates that Congress has some power to shape the act of state doctrine. One comentator has reached the same conclusion:[73]

> Under the power 'to regulate commerce with foreign Nations, and among the several States,' Congress has no less authority over foreign commerce than it has over interstate commerce . . . . [U]nder the commerce power Congress can reach all interstate or foreign 'intercourse'; it can reach matters precedent to or subsequent to interstate or foreign commerce.

This approach to shaping the act of state doctrine would probably be best since legislative action could better integrate application of the doctrine within the framework of existing statutory programs, such as that establishing the Foreign Claims Settlement Commission, and the certainty of a legislative solution may discourage expropriation by foreign states.

In devising a legislative approach, one should begin with the observation that the act of state doctrine has at present a very restricted scope and that under any scheme it would probably be infrequently applied.[74] However, if expropriations of United States property in foreign nations should continue to increase, such a doctrine might assume much greater importance. A desirable congressional scheme would strive to (1) avoid conflicts among the three branches of gov-

---

resort to the act of state doctrine, might well be unconstitutional as violative of the separation of powers doctrine." *Id. But see* note 62 *supra* for a proposed answer to this objection.

Although it did not decide the question, the court did indicate that there might be constitutional limitations on Congress' power to completely abolish the doctrine.

71. *Id.*

72. *See* Muskrat v. United States, 219 U.S. 346 (1911).

73. Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations,* 107 U. PA. L. REV. 903, 915 (1957). "The power of Congress over foreign commerce would then, of itself, support legislation equivalent to a large part of the law 'enacted' by treaty." Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino,* 64 COLUM. L. REV. 805, 821 (1964).

74. *See* text accompanying note 60 *supra.*

ernment, (2) provide a uniform scheme integrated with present congressional programs, (3) provide flexibility and leverage in the executive and legislative branches to enable them to deal forcefully and effectively with foreign governments, (4) insure adequate protection of the interests of American citizens, (5) provide a forum with expertise in resolving the special issues involved and (6) avoid unnecessary insults to the governmental integrity of other nations.

One solution which would meet most of these criteria would be for Congress to provide that the act of state doctrine be applied across the board in every situation. This would of course eliminate the *Bernstein* exception and would require a repeal of the Hickenlooper Amendment. In place of the Hickenlooper Amendment, Congress could declare property expropriated by "enemy"[75] governments to be contraband, prohibit its import into the United States and seize any property subsequently imported.[76]

This solution would not deprive the Judicial Branch of much jurisdiction, since application of the act of state doctrine had been the rule rather than the exception prior to passage of the Hickenlooper Amendment and last Term's decision in *City Bank*. The Second Circuit concluded that the Hickenlooper Amendment was constitutional since it only effected a "reversal of presumptions;" to require application of the doctrine in all cases should even more clearly be constitutional, since it makes conclusive the presumption of the doctrine's applicability.[77] Such a step would be consistent with separation of power concepts (criterion 1), since it would prevent the courts from dealing in foreign relations and political questions. By removing the possibility of a *Bernstein* exception, it would insure that the courts would not become an "errand boy of the Executive,"[78] thus furthering separation of power objectives. By providing a single forum, it would eliminate the overlaps, conflicts and inconsistencies presently existing between the respective jurisdictions of the courts and of the Foreign Claims Settlement Commission (criterion 2) and thereby would better utilize and develop the expertise of the Commission (criterion 5).

75. *See* text accompanying note 66 *supra*.
76. By making importation of such property unlawful, its seizure could be justified as a penal measure, thus escaping invalidation as an uncompensated taking. *Cf.* note 63 *supra*.
77. *See* text accompanying notes 70 & 71 *supra*. *See* Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).
78. *City Bank*, 406 U.S. at 773 (Douglas, J., concurring).

In addition, this legislative solution would enable the Executive to deal more effectively with expropriating nations (criteria 3 and 4). The expropriating government's market for its expropriated goods could be impaired if those goods were subject to seizure as contraband in the United States regardless of ownership at the time seized. This remedy could be extended to provide affirmative action against *any* property whose title was obtained from an expropriating nation. Of course these are drastic remedies which could have a significant impact on innocent parties and governments. They might, however, put the United States into a more favorable bargaining position with expropriating nations. Presumably, abuses could be controlled by devising adequate standards for the utilization of this machinery and by the exercise of responsible restraint by Congress and the Executive. The fact that such standards and machinery would make a remedy readily available would clarify the position of claimants and possibly would act as a deterrent to foreign expropriations.

Jack E. Sands