The Sabbatino Amendment: Congressional Modification of the American Act of State Doctrine

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By means of an amendment, known as the "Sabbatino Amendment"[1], to the Foreign Assistance Act of 1964[2]) the United States Congress has attempted to partially overrule the Supreme Court decision in *Banco Nacional de Cuba* v. *Sabbatino*[3]) by prohibiting the court from applying the judicially-developed act of state doctrine in certain cases involving foreign governmental expropriations of alien property. Immediately after its enactment the constitutionality of the Amendment was challenged in the courts upon several grounds. In the remand of the *Sabbatino* case, *Banco Nacional de Cuba* v. *Farr*, the Amendment's constitutionality was upheld, first, in the federal district court in 1965[4]) and then in the federal circuit court of appeals in 1967[5]). In the spring of the year 1968 the Supreme Court of the United States denied a writ of certiorari[6]), thereby ending the litigation in the *Farr* case and postponing a final determination on the constitutional questions presented. In the pause following this noncommittal Supreme

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[1]) The Amendment has also been called the "Hickenlooper Amendment", after its sponsor, Senator Hickenlooper from Iowa, and the "Rule of Law Amendment". The term "Hickenlooper Amendment", however, is normally used to refer to a different provision in the Foreign Assistance Act, a provision requiring the termination of foreign aid to countries expropriating American property. See 22 U.S.C. 2370 (e) (1) (1964).

[2]) Pub. L. 88–633, 78 Stat. 1009, 1013.

[3]) 376 US 398 (1964). See B a y e r , Die Enteignungen auf Kuba vor den Gerichten der Vereinigten Staaten, 25 ZaöRV 30 (1965).

[4]) 243 F. Supp. 957 (S.D. N.Y., 1965).

[5]) 383 F. 2d 166 (2d Cir., 1967).

[6]) 390 US 956 (1968).

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Court decision a thorough analysis of the Amendment and the related literature and court decisions would seem to be desirable. First of all, however, the act of state doctrine and the events leading up to the enactment of the Sabbatino Amendment should be briefly reviewed.

I

The classic formulation of the American act of state doctrine was made by the United States Supreme Court in the case of *Underhill* v. *Hernandez:*

> "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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves", 168 US 250, 252 (1897).

In 1964 this doctrine was reaffirmed but also basically reformulated in the highly controversial *Sabbatino* case. In that decision the U.S. Supreme Court delved into the history of the act of state doctrine and concluded that the doctrine had "constitutional underpinnings" in the concept of the separation of governmental powers, 376 U.S. at 423. In particular, the Court held that the decision whether or not to apply the act of state doctrine represented a determination of the "proper distribution of functions between the judiciary and the political branches", 376 US at 427–428. As the means for determining in the specific case this proper distribution of governmental functions, the Court developed a "balance of relevant considerations", which it described in the following manner:

> "... It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves that do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the Bernstein[7]) case, for

[7]) *Bernstein* v. *Van Heyghen Frères Société Anonyme*, 163 F. 2d 246 (2d Cir. 1947), cert. denied, 332 US 772 (1947). Also *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F. 2d 71 (2d Cir. 1949), mandate amended, 210 F. 2d 375 (2d Cir. 1954). These cases are discussed in Section II. C of this paper.

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the political interest of this country may, as a result, be measurably altered ...", 376 US at 428.

Applying this test to the expropriation situation presented in *Sabbatino*, the Court decided not only that a consensus was lacking as to the limitations under international law on a state's power to expropriate property of aliens but also that serious adverse consequences could result for the Executive Branch from an adjudication of this matter, 376 US at 428–437. The Court therefore held that:

"... the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absense of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law", 376 US at 428.

This holding of the Court, which in the instant case resulted in the proscription by the Court of all challenges to the validity of the Cuban expropriations, caused a storm of protest in the United States[8]). Critics argued that by removing all possibilities for judicial review of foreign expropriations by U.S. courts, the *Sabbatino* decision would deny the expropriation victim his "day in court". It was also suggested that the policy of not permitting challenges to the validity of the expropriation acts of the foreign government would, on the one hand, encourage expropriations by foreign governments and, on the other hand, turn the United States into a thieves' market for the sale of the expropriated goods. Finally, many felt that the Court, by refusing to judge the expropriations according to customary inter-

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[8]) Innumerable articles have been written about the Supreme Court's decision in *Sabbatino*. The following present the full spectrum of arguments. Generally supporting the Court's decision: Falk, The Complexity of Sabbatino, 58 American Journal of International Law (A.J.I.L.) 935 (1964), Friedmann, National Courts and the International Legal Order: Projections on the Implications of the Sabbatino Case, 34 George Washington Law Review 443 (1966), Metzger, Act-of-State Doctrine Refined: The Sabbatino Case, 1964 Supreme Court Review 223 (1964), and Reeves, The Act of State – Foreign Decisions Cited in the Sabbatino Case: A Rebuttal and Memorandum of Law, 33 Fordham Law Review 599 (1965); generally opposing the Court's decision: Folsom, The Sabbatino Case: Rule of Law or Rule of "No-Law"? 51 American Bar Association Journal 725 (1965) and Leigh; Atkeson, Due Process in the Emerging Foreign Relations Law of the United States, 21 Business Lawyer 853, 858–867 (1966). The dissenting opinion of Justice White in the *Sabbatino* case, 376 US at 439, also deserves careful study since it forms the basis for many of the arguments raised against the decision. But cf. "The Supreme Court and International Law: The Act of State Doctrine", an address given by Justice Stewart (who joined the majority opinion in the *Sabbatino* case) before the Egyptian Society of International Law (February 7, 1966), reprinted in 21 Revue Egyptienne de Droit International 121 (documents section) (1965).

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national law, had abandoned its traditional role in the development and promotion of international law through its interpretation and application in domestic court decisions.

Reacting swiftly to these protests, Congress enacted the Sabbatino Amendment intending to reverse in part the Court's decision[9]). The Amendment as enacted in 1964 was limited to one year; in 1965, however, it was re-enacted on a permanent basis with certain minor additions[10]). The Amendment (with the 1965 additions underlined) reads as follows:

> "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, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) 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".

II

For purpose of analysis the Amendment can be conveniently divided into three parts: the first containing the legislative command to the courts, the second describing the type of case in which the Amendment is to be applied and the third stating the express exceptions to its scope of application.

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[9]) See Senate Report No. 1188 *re* Foreign Assistance Act of 1964, 2 U.S. Code Cong. & Admin. News 3829 at 3852 (1964).

[10]) Pub. L. 89–171, 79 Stat. 653, 659, incorporated into U.S. Code at 22 U.S.C. § 2370 (e) (2) (1966 Supp.). For more on the background of the Amendment, see the working paper prepared by Falk and published in The Aftermath of Sabbatino: Background Papers and Proceedings of the Seventh Hammarskjöld Forum, ed. Lyman Tondel, Jr., 35–36 (1965) and Reeves, The Sabbatino Case and the Sabbatino Amendment: Comedy – or Tragedy – of Errors, 20 Vanderbilt Law Review 429 (1967). See also the statement of McDougal to the House Foreign Affairs Committee in support of the Sabbatino Amendment, reprinted in 21 Revue Egyptienne de Droit International 113 (documents section) (1965).

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A. The Command

"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 ...".

The Sabbatino Amendment's command is addressed to the "court(s) in the United States". By the selection of the geographical preposition "in" rather than the possessive preposition "of", Congress evidently intended to bind not just the federal courts (courts of the U.S.) but rather both the federal and state courts (all of the courts in the U.S.). Thus, Congress has apparently given its approval to the doctrine advanced by the Supreme Court in the *Sabbatino* case that:

"... an issue [the applicability of the act of state doctrine] concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law", 376 U.S. at 425. (Emphasis added).

In contrast to this assertion of broad jurisdictional competence as against the states, the actual assistance offered the expropriation victim by the Amendment is of rather limited value. The Amendment does restrict the application of the act of state doctrine, but other serious obstacles to recovery still remain. The sovereign immunity doctrine, for example, provides that U.S. courts will dismiss for lack of jurisdiction a suit brought against a sovereign state without that state's consent on the basis of its governmental (as opposed to commercial) activities. Since expropriation is considered to be a governmental activity for the purposes of this doctrine, a suit by the expropriation victim against the expropriating state must be dismissed by the courts for lack of jurisdiction (assuming that the U.S. State Department has filed a suggestion of immunity as is normally the case). The Sabbatino Amendment will not affect this result since it only commands the court not to decline a merits determination "on the ground of the federal act of state doctrine" [11]).

On the other hand, if the expropriation victim sues a purchaser of the expropriated goods, the sovereign immunity doctrine will not be applicable, and the Sabbatino Amendment will lessen the act of state problem. However, although the expropriation victim will probably thus be able to obtain a

[11]) *American Hawaiian Ventures* v. *M.V.J. Latuharhary*, 257 F. Supp. 622, 626–627 (D.N.J. 1966). For more on the interrelationship between the act of state and sovereign immunity doctrines, see Maier, Sovereign Immunity and Act of State: Correlative or Conflicting Policies? 35 Univ. of Cincinnati Law Review 556 (1966).

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determination on the merits, his recovery is by no means guaranteed. What would be the legal situation, for example, if a state had expropriated certain property *(e.g.* sugar) but had also acquired similar property in a lawful manner *(e.g.* as produce from state-owned farms)? If the sugar from the one source was commingled with that from the other and if a portion of this sugar were then sold to a third party, it would be in most cases impossible to prove whether or not the third party had purchased even a portion of the sugar actually expropriated. Thus, in these cases the court's determination as to which party had to bear the burden of proof on the issue would decide the litigation. A factor in the court's decision would undoubtedly be the presence or absence of good faith on the part of the purchaser. What degree of good faith, however, should be required here: ignorance that an expropriation has taken place, ignorance that the expropriation violated international legal standards, or ignorance that the goods purchased were expropriated? The answers to these and similar questions are at present uncertain[12]); yet they may well be crucial to the victim's chances for success. None, however, have been dealt with in the Sabbatino Amendment.

The additional problems arising out of the Amendment's requirement that the court make a determination on the merits "giving effect to the principles of international law" will be treated in a later section of this article. See below, section II.B.3.

B. The Applicable Case

"... 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, including the principles of compensation and the other standards set out in this subsection ...".

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[12]) The problems of tracing commingled goods and proving *bona fide* purchase are considered in Lowenfeld, The Sabbatino Amendment – International Law Meets Civil Procedure, 59 A.J.I.L. 899, 900–902 (1965). For lessons drawn from the Anglo-Iranian oil expropriations with regard to *bona fide* purchase, see Coerper, The Act of State Doctrine in the Light of the Sabbatino Case, 56 A.J.I.L. 143, 145–146 (1962). For a survey of the legal literature regarding the *bona fide* purchase question, see Casenote, 5 Columbia Journal of Transnational Law 298, 306 note 43 (1966). The following statement in the majority opinion of the *Sabbatino* case should also be noted:

"... Perhaps the most typical act of state case involves the original owner or his assignee suing one not in association with the expropriating state who has had 'title' transferred to him. But it is difficult to regard the claim of the original owner, who otherwise may be recompensed through diplomatic channels, as more demanding of judicial cognizance than the claim of title by the innocent third party purchaser, who, if the property is taken from him, is without any remedy", 376 US at 435.

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The Sabbatino Amendment is not applicable to all cases involving foreign acts of state but only to those where certain claims based upon a certain type of confiscation have been asserted by "any party".

1. The Claim: The Amendment is applicable "in a case in which a claim of title or other right to property is asserted ...". At the outset it should be noted that the Amendment only refers to property claims, thus excluding claims based upon personal injuries or upon contractual rights. By the use of the wording "right to property" Congress intended, in particular, to make clear that:

> "... the law does not prevent banks, insurance companies, and other financial institutions from using the act of state doctrine as a defense to multiple liability upon any contract or deposit or insurance policy in any case where such liability has been taken over or expropriated by a foreign state" [13]).

A problem arises, however, with regard to the wording "in a case in which (such a claim is asserted) ...". Does this mean that if a property claim is asserted, the Amendment will then be applicable to all claims joined in that suit, even if they are not property claims? Assume for example that state X confiscates a farm owned by Y, who is an American national. Assume further that at the time of the confiscation Y was on the farm and was ejected by soldiers of state X. If Y then were to come to the United States and sue state X, first, for compensation for the expropriated farm property and, second, for injuries resulting from his forceable ejection [14]), would the Sabbatino Amendment only be applicable to the first claim because it would be the only property claim, or would the Amendment be applicable to both claims since both would be included "in a case in which a claim of title or other right to property" had been asserted [15])? Although the language quoted would seem to favour the latter result, such an interpretation could lead to

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[13]) Conference Report No. 811 *re* Foreign Assistance Act of 1965, 2 U.S. Cong. & Admin. News 3002 (1965). In *Present* v. *United States Life Insurance Co.*, 232 At. 2d 863 (New Jersey Superior Court 1967), the court held the Sabbatino Amendment inapplicable to claims on a life insurance policy issued by a subsequently nationalized branch of a New York corporation. *Trujillo-M* v. *Bank of Nova Scotia*, 273 N.Y.S. 2d 700 (N.Y. Supreme Ct. 1966).

[14]) See Rule 18 (a), Federal Rules of Civil Procedure (F.R.C.P.) incorporated into the U.S. Code as an appendix to Title 28, regarding joinder of claims.

[15]) Similar – but more complex – questions regarding the Amendment's scope of applicability would be presented (1) if a property claim against one defendent were joined with a contractual claim against a second defendent (see Rules 19 and 20 (a), F.R.C.P., regarding necessary and permissive joinder of parties) or (2) if a third party with a property claim intervened in a suit upon a contractual claim (see Rule 24, F.R.C.P., regarding intervention); in both of these instances the property and contractual claims could also be considered within the same "case".

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a result blatantly contradicting Congressional intent: Congress expressly declared that multiple liability suits against banks, etc., based upon contracts of deposit were intended to be excluded from the scope of application of the Amendment, but under the above interpretation the Amendment could be made applicable to such suits by joinder with a property claim[16]). Since Congress could hardly have desired such a result, it would seem highly probable that the Amendment was intended to be applicable only to the property claims in a particular case.

2. The Party: This property claim may be asserted "by any party including a foreign state [or a party claiming through such state] . . .". The breadth of this language guarantees that the Amendment will be applicable whenever the necessary property claim has been asserted, regardless whether the person asserting such claim is (a) the plaintiff, the defendent, or a third party *(e.g.* an intervenor) or (b) the expropriating state or a third party purchaser from that state or (c) an American national, an alien[17]), or a foreign state. In particular, it should be noted that the Amendment does not require that an American financial interest be involved in the case. Thus, if state X has expropriated property owned by A, a national of state Y, and has sold such property to B, a national of state Z, then the Sabbatino Amendment would be applicable to a suit by A against B brought in a U.S. court (assuming jurisdiction over the property involved could be acquired).

3. The Confiscation: The above-described property claim must be based upon a specific type of "confiscation or other taking" by the foreign government. The taking must, first of all, have occurred "after January 1, 1959", the date of the coming to power of the Castro forces in Cuba[18]). The application of the Amendment is not, however, expressly or impliedly limited to the expropriations carried out by that government.

The taking by the foreign government must, secondly, have been:

> "... by an act of that state in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection ...".

The reference to an act "in violation of the principles of international law" has been interpreted by the courts as excluding from the coverage of

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[16]) The possibility of such application is increased by the court's very broad interpretation of the requirements in the above-cited Federal Rules regarding joinder of claims, joinder of parties and intervention.

[17]) The Amendment is not applicable, however, to a suit by a national of the expropriating state against that state. See the discussion in the following section regarding the requirement that the act of expropriation violate international law.

[18]) See statement by Senator Hickenlooper, 110 Cong. Rec. 18946 (Aug. 14, 1964).

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the Amendment confiscations by an expropriating state of property of its own nationals since "acts of a state directed against its own nationals do not give rise to questions of international law" [19]). The additional phrase in the Amendment "including the principles of compensation and other standards set out in this subsection" is a reference to paragraph 1 of the subsection which provides for the termination of United States foreign aid to a foreign country when that country has, *inter alia,* expropriated property owned or controlled by American nationals and has failed within a reasonable period of time to take:

> "... appropriate steps ... to discharge its obligations under international law toward such citizen [the expropriation victim] ... including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law" [20]).

Although the compensation standard emphasized in the quote above is referred to as being "required by international law", the obligation imposed upon the expropriating state is in fact much more onerous than that which most authorities on international law now recognize [21]). Nonetheless, in light of the broad powers given by the Constitution to Congress to regulate foreign commerce [22]) and "to define and punish ... offenses against the law of nations" [23]), the courts in the United States would appear to be bound by this Congressional interpretation of international law [24]).

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[19]) *F. Palicio y Compania, S. A.* v. *Brush,* 256 F. Supp. 481, 487 (1966), *Present* v. *United States Life Insurance Co.,* 232 At. 2d 863, 872–873 (New Jersey Superior Court 1967). In 3 Texas International Law Forum 152, 159–164 (1967), however, this view is strongly criticized.

[20]) 22 U.S.C. § 2370 (e) (1) (1964). (Emphasis added).

[21]) Although full compensation used to be the generally recognized standard, it has given way in recent years even among Western nations to the concept of "adequate, effective and prompt compensation" or "just and reasonable compensation". See the discussion in Dahm, Völkerrecht, vol. 1, 515–517 (1958). Even this lesser standard has been put in question of late, see Dawson; Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation? 30 Fordham Law Review 727–758 (1962), Friedmann, National Courts and the International Legal Order, *op. cit. supra* (note 8), at 452–454, and the statement of the U.S. Supreme Court in *Sabbatino, supra* (note 3), 376 U.S. at 429–430.

[22]) U.S. Const., Art. I § 8 Cl. 3 and 18.

[23]) U.S. Const., Art. I § 8 Cl. 10.

[24]) See *Banco Nacional de Cuba* v. *First National City Bank of New York,* 270 F. Supp. 1004, 1008 (S.D. N.Y., 1967) and Sabbatino Doctrine Modified in Foreign Assistance Act of 1964, 63 Michigan Law Review 1310 (1965). Cf., however, Bleicher, The Sabbatino Amendment in Court: Bitter Fruit, 20 Stanford Law Review 858 (1968).

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C. The Exceptions

"... Provided, That this subparagraph shall not be applicable

1) in any case in which an act of a foreign state is not contrary to international law or with respect to which a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking or

2) 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".

The international law exception and the letter of credit exception are clear and require little explanation. The former simply restates the international law qualification already discussed in the preceding section. The latter exempts from the coverage of the Amendment a particular type of good faith purchaser. Both exceptions were added in 1964 by the Conference Committee on the urging of the House of Representatives in order to "pinpoint" the limitations on the scope of the Amendment[25]).

The third exception concerning the Presidential suggestion requires a fuller analysis in light of its interesting historical background. Until the late 1940's the applicability of the act of state doctrine was determined exclusively by the Judicial Branch; the courts had developed the doctrine themselves and neither the Legislative nor the Executive Branch had attempted to interfere with its operation – either through legislation or through Executive suggestion. Then the first *Bernstein* case[26]) came before the courts. Bernstein, a man of Jewish faith, had been arrested and imprisoned in 1937 in Germany by officials of the National Socialist government. During this period of imprisonment he was forced by such officials upon the threat of bodily harm to convey certain property to one Marius Boeger, who then transferred the property to a Belgian corporation. That corporation acquired the property for less than fair compensation and with knowledge of the preceding events. After the end of the war Bernstein sued the corporation on the theory of conversion, alleging that the transfer of the property was invalid due to duress on the part of the German government officials. The courts, however, dismissed the complaint holding that the act of state doctrine precluded an adjudication by the court of the validity of the acts of

[25]) See Conference Report No. 1925 *re* Foreign Assistance Act of 1964, 2 U.S. Code Cong. & Admin. News 3880 at 3890 (1964).

[26]) *Bernstein* v. *Van Heyghen Frères Société Anonyme*, 163 F. 2d 246 (2d Cir. 1947), certiorari denied 332 U.S. 772 (1947).

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the German government officials done within German territory, 163 F. 2d at 249. In a second suit initiated at approximately the same time Bernstein attempted to avoid this holding by alleging duress only in very general terms, not mentioning the source. This complaint, however, was held insufficient. *Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F. 2d 71, 76 (2d Cir. 1949). Bernstein then requested assistance from the State Department. In response to this request the State Department issued a press release referring to a letter written to Bernstein's attorneys by the Acting Legal Advisor stating the opposition of the United States government to the confiscatory acts of the National Socialist government and declaring that:

> "... [the] policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, 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"[27]).

Bernstein submitted both the letter and press release to the Federal Circuit Court upon petition to amend its prior mandate. After quoting both documents, this court held as follows:

> "In view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question ... This will permit the district court to accept the [Press] Release in evidence and conduct the trial of this case without regard to the restraint [the act of state doctrine] we previously placed upon it", *Bernstein* v. *Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375, 376 (2d Cir. 1954).

In enacting the Presidential exception to the Sabbatino Amendment, Congress has established what has been commonly called a "Reverse-*Bernstein*" exception. This term of reference, however, is somewhat misleading since the Presidential exception does not completely reverse the Bernstein doctrine. Whereas in the *Bernstein* situation a suggestion by the President caused the court to declare the act of state doctrine inapplicable, the Presidential suggestion in the Sabbatino Amendment will not automatically cause the court to apply the act of state doctrine. Such a suggestion only renders the Sabbatino Amendment inapplicable; since the effect of the Sabbatino Amendment was only to suspend – rather than to invalidate – the *Sabbatino* decision[28]), the inapplicability of the Amendment would reinstate

[27]) Press Release No. 296, issued on April 27, 1949.

[28]) "By enacting this exception to the act of state doctrine, Congress may have given legislation sanction to what formerly was judge-made law, to the extent that it did not suspend it".

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that decision as controlling precedent. As has been mentioned earlier, that decision requires the court to apply a "balancing" test; in particular the court must weigh the "relevant considerations", including the degree of consensus concerning the legal issue under international law and the sensitivity of the issue with regard to United States foreign relations[29]). In most situations this determination by the court would undoubtedly concur with that of the Executive. However, one could imagine situations where the court might decide to adjudicate the issue despite a plea by the Executive for the application of the act of state doctrine: for example, if a consensus should develop regarding the standard of compensation required by international law in expropriation cases *(e. g.*, through an international convention adopted by the United States) and should the President nevertheless request the application of the act of state doctrine, the court might well decide that the "balancing" test required the adjudication of the case on the theory that the application of international law standards already adopted by the United States could not possibly endanger that nation's foreign policy interests.

III

Numerous attacks have been leveled against the constitutionality of the Sabbatino Amendment[30]); the one following, however, seems to the present

Restatement of the Law Second Foreign Relations Law of the United States § 40 at 124 (1965).

[29]) See the discussion of this test in Part I of this article, *supra.*

[30]) See The Aftermath of Sabbatino, *supra* (note 10), 38–42, and Reeves, The Sabbatino Case, *op. cit. supra* (note 10), 487–532. Some of these constitutional attacks were considered and rejected in *Banco Nacional de Cuba* v. *Farr* first by the federal district court, *supra* (note 4), 243 F. Supp. at 971–979, and then by the federal circuit court of appeals, *supra* (note 5), 383 F. 2d at 178–183. It is important to note, however, that the United States Supreme Court did not affirm the lower court decisions in *Farr* but rather merely denied a petition for writ of certiorari, 390 US 956 (1968). The denial of such a petition should not be considered as evidence that the Court approved of the lower court decisions. The following statement by Supreme Court Justice Frankfurter in *Maryland* v. *Baltimore Radio Show, Inc.*, 338 US 912 at 917–919 (1950) regarding the meaning of such a denial must be kept in mind:

"This Court now declines to review the decision of the Maryland Court of Appeals... [The denial of a petition for writ of certiorari] simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion'. Rule 38, paragraph 5 ... A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials ... A decision may satisfy all these technical requirements [enumerated in the opinion] and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may

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author to be the most serious. The argument is that Congress, by requiring the court to abstain from applying the act of state doctrine, has infringed upon the powers reserved by the Constitution to the Judicial Branch.

The federal circuit court of appeals in the *Farr* case[31]) found no such constitutional objection to the Amendment. That court stated:

> "... As the Constitution did not require the exact result reached there (in the Sabbatino case) the Court must have exercised its discretion, based upon 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", 383 F. 2d at 181.

The court's premise would seem to be faulty. To be sure, the Constitution does not require the automatic application of the act of state doctrine in all cases. It is suggested, however, that the decision in the *Sabbatino* case must be interpreted as holding that the Constitution does require a determination by the courts, on the basis of the factual situation in the particular case, whether or not the act of state doctrine should in that particular case be applied. The attempt by Congress to substitute, by

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be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.

... [Justice Frankfurter then pointed out that practical considerations, in particular, the heavy case load of the court, precluded the court from indicating its reasons for denial]. The time that would be required is prohibitive, apart from the fact as already indicated that different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable. It becomes relevant here to note that failure to record a dissent from a denial of a petition for writ of certiorari in nowise implies that only the member of the Court who notes his dissent thought the petition should be granted.

Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

The one thing that can be said with certainty about the Court's denial of Maryland's petition in this case is that it does not remotely imply approval or disapproval of what was said by the ... [lower court]".

Thus, it would be premature to contend that the constitutional issues regarding the Sabbatino Amendment have now been conclusively answered simply on the basis of the Supreme Court's denial of the petition for writ of certiorari in the *Farr* case. For this reason the following constitutionality discussion has been included in this article.

[31]) *Supra* (note 5).

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means of the Sabbatino Amendment, a Congressional determination for that of the courts on the question of the applicability of the act of state doctrine therefore contradicts the holding in *Sabbatino*. Since the *Sabbatino* decision purported to interpret the scope of the constitutional doctrine of separation of governmental powers and since the Supreme Court has held that it has ultimate power to interpret the Constitution, the Sabbatino Amendment would thus, according to the Court's own holdings, represent an unconstitutional interference with the power of the Court.

The key to this argument is the *Sabbatino* decision. In order to fully understand the implications of that decision, it is necessary to compare it with the Supreme Court's recent landmark decision in *Baker* v. *Carr*[32]) regarding the "political question" doctrine. In that latter case the court stated:

> "... The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court [the Supreme Court] as ultimate interpreter of the Constitution", 369 US at 210–211.

In substance, the *Sabbatino* decision is a reiteration of this holding. In *Sabbatino* the Court rejected the automatic application of the act of state doctrine to all cases[33]), adopting instead the already-described[34]) "balancing" test. This test is the equivalent of the "case-by-case inquiry" required by *Baker* v. *Carr*, as can be seen from a comparison of the considerations declared to be relevant to the question in the two cases. In *Baker* v. *Carr* these considerations were described in the following quotation from *Coleman* v. *Miller*[35]):

> "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations", 369 US at 210. (Emphasis added).

But the "appropriateness" consideration here is exactly what the court in *Sabbatino* was describing when it defined one factor in the "balancing" test as follows:

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[32]) 369 US 186 (1962).
[33]) 376 US at 428.
[34]) See the discussion in Part I of this article, *supra*.
[35]) 307 US 433 at 454–455 (1939).

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"... It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches", 376 US at 428.

And the "lack of satisfactory criteria" consideration underlies the other factor in the "balancing" test:

"... It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice", 376 US at 428.

Also as in the *Baker* v. *Carr* case, the Supreme Court in *Sabbatino* anchored its opinion in the separation of powers concept. In particular, the *Sabbatino* court stated:

"... [the act of state doctrine's] continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs", 376 US at 427–428.

The determination of the proper distribution of governmental functions is, however, according to the *Baker* v. *Carr* court, "... a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution", 369 US at 211. The statement by the federal circuit court, quoted at the beginning of this discussion, that the Sabbatino Amendment was a "constitutionally permissible alternative" to the act of state doctrine would seem to be incompatible with this holding in *Baker* v. *Carr*. If the Supreme Court is the ultimate interpreter of the Constitution, then once the Court has balanced the factors in a particular case and decided that an adjudication in that particular case would not reflect the proper distribution of governmental functions, that court decision would then become the only "constitutionally permissible" decision; a contrary decision imposed upon the courts by Congress might not violate an express constitutional provision but it would violate the implied separation of powers concept: in particular, it would represent a legislative infringement on the judiciary's power to act as the ultimate interpreter of the Constitution.

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