Act of State — Executive Determination

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The United States "act of state" doctrine has traditionally provided that a foreign sovereign's acts within its own territory are not subject to judicial examination and must be presumed valid [1]). The act of state doctrine has prevented U.S. courts from applying any body of law — customary international law, forum law, or even the sovereign's own law — to judge the legality of such acts [2]). The doctrine requires that courts exercise their jurisdiction to decide cases on the merits by according an irrebuttable presumption of legality to acts of a foreign state [3]). The act of state doctrine is thus "a rule of decision" and not a neutral principle of judicial abstention [4]). In *Banco Nacional de Cuba* v. *Sabbatino* [5]), the United States Supreme Court reaffirmed the applicability of the doctrine by holding that courts of the United States may not inquire into the legality of an uncompensated taking of property by a foreign government within its own territory, absent a treaty or other unambiguous agreement of controlling legal principles, even if the taking allegedly violated customary international law [6]). An important basis for the *Sabbatino* decision, indeed for the doc-

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[1]) *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). See notes 13 and 14 *infra* and accompanying text.

[2]) See *Banco Nacional* de *Cuba* v. *Sabbatino*, 376 U.S. 398, 415 note 17, 438 (1964).

[3]) *Id.* at 438—39, 471—72.

[4]) *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 309 (1918); see also, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 471—72 (1964).

[5]) 376 U.S. 398 (1964).

[6]) *Id.* at 428.

trine itself, is the constitutionally required separation of powers. The Executive Branch of government is charged with conducting foreign relations; judicial decisions on matters involving foreign affairs risk embarrassment to the Executive. Thus, in *Sabbatino*, Justice Harlan found the "continuing vitality" of the doctrine to depend "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" [7]). This separation of powers thus provides the "constitutional underpinnings" of the doctrine [8]).

The Supreme Court's recent decision in *First National City Bank* v. *Banco Nacional de Cuba* [9]) has weakened the "constitutional underpinnings" of the doctrine and as a result substantially broadened the circumstances in which the Executive Branch of government may act to relieve the Judicial Branch of the restraint of the doctrine. A five-Justice majority [10]) held that the act of state doctrine does not preclude judicial inquiry into the validity of a foreign sovereign's confiscation of property of United States citizens where the Executive Branch of government expressly represents to the Court that the doctrine would not advance the interests of American foreign policy and therefore should not be applied by the Court. In so holding, the Court adopted the so-called "*Bernstein* exception" [11]) to the act of state doctrine.

As stated in *Sabbatino*, it is fundamental to the act of state doctrine that the proper distribution of power between the Executive and the Judiciary be maintained. The Supreme Court appears to have altered this balance basically with the possible result that future judicial decisions on the act of state doctrine will be subject to political considerations rather than judicial definition.

This paper will examine the origin of the Executive's role in act of state cases. It will then briefly discuss the *Citibank* decision and its rationale and finally it will analyze recent draft legislation submitted by the State Department which evidences a major shift in the Executive's policy on sovereign immunity and likewise evidences policy considerations which should have been considered by the Court in *Citibank*.

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[7]) *Id.* at 427—28.

[8]) *Id.* at 423.

[9]) 406 U.S. 759 (1972).

[10]) Justice Rehnquist announced the judgment of the Court in an opinion in which Chief Justice Burger and Justice White joined. Justice Douglas and Justice Powell each wrote a separate concurring opinion. Justice Brennan dissented in an opinion in which Justices Stewart, Marshall and Blackmun joined.

[11]) *Bernstein* v. *N.N. Nederlandsche-Amerikaansche Stoomvaart-Maatshappj*, 210 F.2d 375 (2d Cir. 1954).

Act of State and Bernstein

The United States Constitution vests the power to conduct foreign affairs in the Executive and Legislative branches of the Federal government [12]). However, the origin of the act of state doctrine lies in the Supreme Court's decision in *Underhill* v. *Hernandez* [13]) in which the Court held:

> "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" [14]).

This doctrine was consistently followed until, in 1954, an exception to the doctrine was carved out in *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatshappj* [15]).

Bernstein involved the alleged confiscation of property of a Jewish German national by the Nazi German government between 1937 and 1939. The plaintiff alleged that he was compelled by officials of the German government, through threats of bodily harm, indefinite imprisonment and death for him and his family to assign his property to the German government. In 1946 plaintiff Bernstein sought to attach and recover some of the proceeds of his former property in a suit brought in a New York State Court, later removed to the Federal District Court. In the first Bernstein case, *Bernstein* v. *Heyghen Frères Société Anonyme* [16]), it was held that the act of state doctrine prevented the court from inquiring into the validity of the confiscation of the plaintiff's property. However, in that opinion, Judge Hand said that it was a relevant question:

> "[W]hether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine [act of state] which we have just mentioned does not apply" [17]).

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[12]) *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); see U.S. Constitution art. I, Section 8 and art. II, Section 2.

[13]) 168 U.S. 250 (1897).

[14]) *Id.* at 252.

[15]) 210 F.2d 375 (2d Cir. 1954).

[16]) 163 F.2d 246 (2d Cir. 1947); cert. denied 322 U.S. 772 (1947).

[17]) *Id.* at 249. The court in that case determined, however, after a review of the Charter and Judgment of the Nuremberg Trials, that the executive had not removed the act of state barrier and that the claim should be adjudicated along with all other such claims as part of the final peace settlement with Germany. *Id.* at 252.

In the second *Bernstein* case, the same plaintiff brought a conversion action against another defendant, a Dutch corporation. The Court reaffirmed its holding in the first *Bernstein* case that, in the absence of a definitive expression of Executive policy, the act of state doctrine prevented judicial examination of official acts of the Nazi government [18]). Following this decision, the State Department issued a letter from its Acting Legal Advisor which in essence set forth the Executive's policy to undo the forced transfers of property and restore property to victims of the Nazi government wrongfully deprived of such property. This policy, therefore, relieved American courts from restraint in the exercise of their jurisdiction to judge the validity of the acts of the Nazi government.

When the case came before the Court of Appeals, again they stated:

> "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" [19]).

Thus, the *Bernstein* case was the first case that suggested that the Executive branch of government could intervene to relieve the courts from the act of state doctrine's restraint.

Only two cases have relied on this so-called *Bernstein* exception: *Kane* v. *National Institute of Agrarian Reform* [20]) and *Banco Nacional de Cuba* v. *Sabbatino* [21]). Both cases were reversed on appeal.

In *Sabbatino* the Supreme Court concluded that Executive statements "were intended to reflect no more than the Department's then wish not to make any statement bearing on this litigation" [22]) and the Court therefore decided that it was not called upon to face the *Bernstein* issue. However, the manner in which the Court stated the basis of the act of state doctrine was indicative of its feelings towards the exception itself and statements by Justice Harlan seemed to limit if not preclude further use of the *Bernstein* exception. Justice Harlan observed first as to the basis of the act of state doctrine:

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[18]) *Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatshappj*, 173 F.2d 71 (2d Cir. 1949).

[19]) *Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatshappj*, 210 F.2d 375, 376 (2d Cir. 1954).

[20]) 18 Fla. Sup. 116 (Cir. Ct. 1961), rev'd, 153 So. 2d 40 (Fla. Dist. Ct. App. 1963).

[21]) 307 F.2d 845 (2d Cir. 1962), aff'd 193 F.Supp. 375 (S.D.N.Y. 1961), rev'd 376 U.S. 398 (1964).

[22]) 376 U.S. at 420.

"If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matter bearing upon foreign affairs" [23]). (Emphasis added).

Justice Harlan then pointed out, regarding the wisdom of Executive suggestions:

"It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to probable result and, at any rate, should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries. We do not now pass on the Bernstein exception, but even if it were deemed valid, its suggested extension is unwarranted" [24]).

After the decision in *Sabbatino* many thought that the *Bernstein* exception, if not dead, was severely limited. This conclusion seemed justified based on the *dicta* of *Sabbatino* and the distinctive factual context [25]) in which the *Bernstein* exception arose. The exception was not to be so limited, however.

The Citibank Decision

Banco Nacional de Cuba (Banco) brought suit against *First National City Bank of New York (Citibank)* in the Federal District Court for the Southern District of New York after Citibank sold collateral securing a ten million dollar loan it had made to Banco before the present Cuban regime came into power. Citibank sold the collateral as a result of the Castro government's expropriation of Citibank's properties in Cuba. From the sale, Citibank received an amount substantially in excess of that required to discharge the ten million dollar principal sum and the interest thereon. Banco sued to recover the excess realized on the sale. The District Court granted summary judgment for Citibank [26]).

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[23]) *Id.* at 427—28.

[24]) *Id.* at 436. See also Justice Powell's separate concurring opinion, 406 U.S. at 773.

[25]) In *Bernstein,* for example, the expropriating government no longer existed when the suit was brought and the acts complained of in Bernstein occurred while the United States was at war with the expropriating government.

[26]) *Banco Nacional de Cuba* v. *First Nat'l. City Bank,* 270 F. Supp. 1004 (S.D.N.Y. 1967). The court relying on the Hickenlooper Amendment to the Foreign Assistance Act of 1964 (Section 620 (e) (2), 22 U.S.C. Section 2370 (e) (2) (1970)), which was designed to overrule *Sabbatino,* refused to apply the act of state doctrine and held that Cuba's expropriation violated customary international law.

The decision of the District Court was reversed by the Court of Appeals [27]) which held that Cuba's confiscation of Citibank's property was an act of state and that under *Banco Nacional de Cuba* v. *Sabbatino* [28]), the act of state doctrine foreclosed judicial inquiry into the validity of that confiscation under international law.

Citibank petitioned for a writ of certiorari on October 13, 1970. The Legal Adviser of the Department of State advised the Supreme Court on November 17, 1970 that, as a matter of principle, where the Executive publicly advises the Court that the act of state doctrine need not be applied, the Court should proceed to examine the issues raised by the act of a foreign sovereign within its own territory as it would any other legal question before it [29]). The Supreme Court granted certiorari and remanded the case to the Court of Appeals "... for reconsideration in light of the views of the Department of State ..." [30]). On remand, the majority of the Court of Appeals stated "... we see no reason to change our initial decision on the appeal ..." [31]) and again reversed and remanded the case. The Supreme Court again granted certiorari on October 12, 1971.

The Supreme Court in thereafter overturning the Court of Appeals found the act of state doctrine to be grounded in judicial concern that the application of customary principles of law to the acts of a foreign sovereign might frustrate the conduct of foreign relations by the Executive branch of the United States government. With this doctrinal basis, Justice Rehnquist wrote, it would be "wholly illogical" [32]) to apply the act of state doctrine to bar the judicial process after the Court has been assured by the Executive branch that no such result would obtain.

Act of State and Sovereign Immunity

The opinion in *Citibank* did not address itself to the distinguishing facts in *Bernstein* and it likewise ignored the *Sabbatino* language which seemed to limit the further use of the exception; rather it seized upon the fact that the *Sabbatino* court did not pass upon the *Bernstein* exception [33]). To sup-

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[27]) *Banco Nacional de Cuba* v. *First Nat'l. City Bank*, 431 F.2d 394 (2 Cir. 1970).
[28]) 376 U.S. 398 (1964).
[29]) The State Department's letter is contained in the appendix to 442 F.2d 530 at 536—538 (2d Cir. 1971).
[30]) 400 U.S. 1019 (1971).
[31]) 442 F.2d 530 at 532 (1971).
[32]) 406 U.S. at 769.
[33]) *Id.* at 764.

port its conclusion that the *Bernstein* exception in fact applied, the opinion drew an analogy between the act of state doctrine and the rule of deference to the Executive in the area of sovereign immunity. The opinion reasoned that both doctrines were based upon similar policy considerations and both derived from the case of *The Schooner Exchange* v. *M'Faddon* [34]), in which it was stated:

> "The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decision in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention" [35]).

The *Citibank* court then went on to reason that it would be foolish for it not to decide the case before it when the prime reason for abstaining — interference in a policy area that might embarrass the Executive — was stated by the Executive to be absent.

The act of state doctrine and the sovereign immunity doctrine were judicially created principles of "self-restraint" arising out of the judicial recognition that disputes involving foreign sovereigns are "political questions" [36]) best resolved by the political branches of government. Nevertheless, the doctrines are not predicated on executive mandate; the courts have the power to adjudicate, but also are aware that the constitutionally-mandated separation of powers doctrine restrains them from exercising their jurisdiction.

The court's reliance in *Citibank* on the act of state/sovereign immunity analogy is not entirely persuasive on a factual level [37]). Under the doctrine of sovereign immunity the judiciary is not called upon to assess a claim under international law; furthermore, there is no presumption in favor of

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[34]) 11 U.S. (7 Cranch) 116 (1812).

[35]) *Id.* at 146.

[36]) See generally, *Baker* v. *Carr*, 369 U.S. 186 (1962).

[37]) See dissent at 406 U.S. 789 note 13; see also, Delson, The Act of State Doctrine — Judicial Deference or Abstention? 66 A.J.I.L. 82 at 91—92. The act of state doctrine is usually asserted in suits between private parties where the rights of one depend upon an act of a foreign state done within its own territory. The immunity principle applies when a private plaintiff brings suit directly against a foreign sovereign. See Maier, Sovereign Immunity and Act of State: Correlative or Conflicting Policies? 35 University of Cincinnati Law Review 556 (1966).

sovereign immunity and thus the supposed desirability of following executive suggestions in this area [38]). On a strict policy level, however, the analogy has more force and is particularly significant in light of recent draft legislation proposed by the State Department in the area of sovereign immunity [39]). This legislation, if adopted, will drastically alter the judicial branches policy of deference to the Executive and undercut a portion of the policy rationale used by the court in the *Citibank* case as well.

Senate Bill 566, as proposed, is designed to eliminate the traditional deference of the judicial branch in the area of sovereign immunity. The bill codifies the circumstances "in which foreign states are immune from the jurisdiction of the United States courts and in which execution may not be levied on their assets . . ." [40]). Important to this discussion, however, are the possible effects of this draft legislation which embodies significant policy changes — the State Department is attempting to divest itself of its adjudication role in sovereign immunity cases. The bill would, *inter alia*, transfer the task of determining whether a foreign state is entitled to immunity wholly to the courts. The Department of State would no longer express itself on requests for immunity directed to it by the courts or by foreign states [41]). Thus, the principle effect of the bill would be to make the question of a foreign state's entitlement to immunity an issue justiciable by the courts without participation by the Executive; as a beneficial corollary, the Executive would no longer be in the awkward position of determining whether a plaintiff has his day in court. Former Secretary of State William P. Rogers has discussed this important aspect of Senate Bill 566:

> "[I]t is not satisfactory that a department, acting through administrative procedures, should in the generality of cases determine whether the plaintiff will or will not be permitted to pursue his cause of action. Questions of such moment appear particularly appropriate for resolution by the courts, rather than by an executive department" [42]).

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[38]) Delson, *id.*

[39]) On January 26, 1973, the Secretary of State introduced to the Senate a draft bill, S. 566 (S. 566, 93 Cong., 1st Sess. (1973)); in the House of Representatives the companion bill is H.R. 3483, 93d Cong., 1st Sess. (1973) "[t]o define the circumstances in which foreign states are immune from the jurisdiction of United States courts and in which execution may be levied on them . . .". However, as of the date of this article, the Senate has not taken any action on the Bill. 12 Int'l. Legal Materials 118 (1973).

[40]) Letter from then Secretary of State William P. Rogers and then Attorney General Richard G. Kleindienst to the President of the Senate, transmitting draft bill S. 566, January 26, 1973, in 12 Int'l. Legal Materials 118—22 (1973).

[41]) *Id.*

[42]) *Id.*

Furthermore, the transfer of this function to the courts will "free the [State] Department from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity" [43]).

The restrictive theory of sovereign immunity [44]), which in effect made a legal distinction between commercial and governmental activities dispositive of sovereign immunity, has allowed continued intervention by the Executive and traditional deference by the courts. Although intervention is premised on the Executive's responsibility for foreign affairs [45]), the fact that the availability of sovereign immunity turns on a legal distinction makes executive action paradoxical. Senate Bill 566 does not on its face recognize or seek to deal with this paradox. However, it would at least in part resolve it.

Just as the State Department recognizes that the task of determining the contours of the doctrine of sovereign immunity is better handled by the courts, it should also be apparent that the task of defining the contours of a political question such as the act of state doctrine is exclusively the function of the court [46]). However, by a blanket adoption of the *Bernstein* exception the Court relinquished its function of independently evaluating whether the facts necessary for the use of the *Bernstein* exception are present in a particular case.

Furthermore, the *Bernstein* exception violates the doctrine of separation of powers — not only by forcing the courts into a position in which they appear to be the executive's "errand boy", but also by giving the executive virtual control over judicial resolution of individual cases [47]).

Conclusion

Just as in the area of sovereign immunity it is not satisfactory to determine through administrative procedures whether or not a plaintiff will have his day in court, it is equally unsatisfactory in the area of the act of state doctrine to have the fate of a claimant subject to these same admin-

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[43]) *Id.* at 120.

[44]) The State Department's restrictive immunity policy came about in 1952 in the so-called Tate Letter (26 Dep't State Bull. 984 [1952]), in which it was announced that it would henceforth recognize immunity only for governmental acts *(jure imperii)* and not for acts by governments which were private or commercial in nature *(jure gestionis)*.

[45]) See note 12, *supra*, and accompanying text.

[46]) See note 34, *supra*, and accompanying text.

[47]) See 406 U.S. at 790—93 (Brennan, J., dissenting).

istrative procedures, as well as the ever-present political considerations of the Executive Branch. Since those considerations (and procedures) change [48]) as administrations change, similarly situated litigants will not likely obtain even-handed treatment. Given the common policy basis for the doctrines of sovereign immunity and act of state, the rationale for the Executive's wish to turn the sovereign immunity question over to the judicial branch is instructive since the basic policy consideration — the primacy of the Executive in the area of foreign policy — is common to both doctrines. Additionally, the doctrine of the separation of powers requires the judicial branch to define the contours of legal questions without intervention by the Executive. The adoption of the *Bernstein* exception in the *Citibank* case results in an exchange of roles by the Judiciary and the Executive contrary to *Sabbatino*'s warning that the vitality of the act of state doctrine depends on its capacity to reflect the proper distribution of functions between the two branches of government on matters bearing upon foreign affairs. If the Executive obtains unbridled discretion to decide whether a question involving the act of a foreign sovereign is within the competence of the Judiciary, judicial independence is unavoidably compromised. The courts must determine issues of justiciability. Senate Bill 566 supports the proposition that the Executive should remove itself from this issue in sovereign immunity cases. It is equally desirable notwithstanding *Citibank*, that the Executive retire from this role in act of state claims.

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[48]) This change is readily evident and is illustrated by an English case, *Luther* v. *Sagor* [1921] 1 K.B. 456, relied on by Justice Rehnquist in *Citibank*. In Sagor, the English court had to consider the validity of acts of the Soviet government before it was recognized by the British government. The court felt bound to apply the act of state doctrine, but only if the Soviets were the r e a l government of Russia. The proper source of information in such a matter was the Foreign Office, and the judge resolutely announced that he intended "to deal with the case upon the information furnished by His Majesty's Secretary of State for Foreign Affairs". *Id.* at 473. His Majesty's Secretary was to have the last word, not subject to rebuttal, the judge decided. The Soviets were not recognized as the r e a l government at the time, and the judge consequently deemed them not entitled to the benefit of the act of state doctrine.

On appeal several months later, [1921] 3 K.B. 532, the court again turned to the Foreign Office for guidance, but by this time Whitehall had recognized the Soviet government. Since the court found that recognition operated rectroactively, and the Soviets had been the rightful government all along, the act of state doctrine prevented questioning official acts and the previous decision was reversed.