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REFLECTIONS ON THE ACT OF STATE DOCTRINE: A FIFTH WHEEL IN CONFLICTS OF LAWS

Joseph Jude Norton*

When Chief Justice Fuld of the New York Court of Appeals commented in *French v. Banco Nacional de Cuba*¹ that "the courts in the United States will not inquire into the validity of the acts of a foreign government done within its own territory,"² he was but further expressing misgivings of the American judiciary in coping with the elusive function of the act of state doctrine. Recently, the whole question of the act of state doctrine descended upon the courts once more in *First National City Bank v. Banco Nacional de Cuba*.³ In light of that decision, it seems appropriate to reexamine both the act of state doctrine itself and the implications of the *First National City Bank* case. The purpose of this article, therefore, is to ascertain not only the exact nature of the act of state doctrine but also its necessity as a viable judicial concept.

I. ORIGINS OF THE DOCTRINE IN AMERICAN COURTS

It has been somewhat curiously suggested that the "classic American statement of the act of state doctrine . . . appears to have taken root in England as early as 1674"⁴ in the case of *Blad v. Bamfield*.⁵ Though the

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1. 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968).

2. 242 N.E.2d at 708, 295 N.Y.S. at 440. For a discussion of the *Sabbatino* decision refer to text at notes 29-55 *infra*.

3. 92 S. Ct. 1808 (1972).

4. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964). It is curious that having established this lineage of the act of state doctrine, Mr. Justice Harlan severed the chain with prior cases by adding, "We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority . . . or by some principle of international law." *Id.* at 421. It has been noted that "the Court too readily gave up the original rationale of the classical doctrine and its roots in international law and international comity." Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 819-20 (1964).

5. 36 Eng. Rep. 992 (Ch. 1674). In *Blad* goods belonging to Bamfield, an En-

substance of this statement is rather suspect, the *Blad* case does appear to be a logical point of reference in considering the development of the doctrine. *Blad* expounded a theory in its incipient form that is quite close to that of the act of state concept. Even more important, *Blad* shows the genesis of the act of state doctrine as actually a contrived product of the peculiar notion of national sovereignty as accepted in the seventeenth and eighteenth centuries.⁶ The significance of *Blad* rests in its portrayal of the growing caution and reluctance of the English courts to adjudicate matters that touched upon foreign and international law or those that were thought to complicate the conduct of foreign affairs.⁷

The 1848 case of the *Duke of Brunswick v. King of Hanover*⁸ is, however, the case most cited in American decisions as establishing the roots of the act of state doctrine. In that case the appellant, the once reigning Duke of Brunswick, had been placed under the guardianship of the King of Hanover, who happened to be an English peer. The question involved the instrument that had deprived the appellant of management of his property, and he accordingly sought to have the instrument declared void and to have the King of Hanover held accountable. The lower court held against the appellant because of the concept of the personal sovereign immunity of the King.⁹ The House of Lords affirmed the lower court, but its deci-

glish subject and established trader with natives of Iceland (then a Danish territory), were seized by Blad acting upon letters patent from the King of Denmark that granted Blad exclusive rights in Iceland. The seized goods were sentenced and executed according to Danish law in Iceland. Bamfield instituted suit in England in trespass and trover asserting that the peace treaty between England and Denmark gave him the right to trade in Iceland and that the granting of the letters was contrary to this freedom of trade. Blad in turn went before the Chancery Court to seek a perpetual injunction to restrain the proceedings against him, claiming the seizure had been sanctioned by the Danish authorities.

6. *Id.* at 992. The Chancellor, Lord Nottingham, equivocated, brushing aside the rather thorny problem of the articles of peace:

Ergo, to come now to the present case, certainly no case was ever better proved . . . Now, after all this, to send it to a trial at law, where either the Court must pretend to judge of the validity of the king's letters patent in *Denmark*, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the *English* have a right to trade in *Iceland*, is monstrous and absurd.

Id. at 993. For a critical analysis of the roots of the act of state doctrine refer to Mann, *The Sacrosanctity of the Foreign Act of State*, 59 L.Q. REV. 42 (1943). For a brief, but lucid, consideration of the notion of national sovereignty as developed in the seventeenth and eighteenth centuries refer to J. BRIERLY, *THE LAW OF NATIONS* 1-40 (6th ed. 1963).

7. It has been correctly noted that "[a]lready at this stage, . . . the courts had the gravest misgivings as to the propriety of an action against a foreigner who maintained a defense based on a foreign act of state." Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826, 827 (1959).

8. 9 Eng. Rep. 993 (1848).

9. *Duke of Brunswick v. King of Hanover*, 49 Eng. Rep. 724, 747 (Ch. 1844), *aff'd*, 9 Eng. Rep. 993 (1848). Lord Langdale stated that justice in some cases should be subordinate to the sovereign immunity of the prince:

[E]ven the failure of justice in some particular cases, would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the

sion rested not so much on the doctrine of sovereign immunity as upon what would later be called the act of state doctrine.¹⁰

Though the rationale of the *Duke of Brunswick* decision arguably was open to question, the trial court in *Underhill v. Hernandez*¹¹ unequivocally concluded that the English decision did not rest "upon the personal immunity of the sovereign from suit."¹² The suit in *Underhill* was brought by an American citizen against a general of a revolutionary government in Venezuela, which the United States recognized at that time as the legitimate government. The American sought to recover damages incurred by the refusal to grant him a passport to leave Venezuela, for alleged unlawful confinement, and for alleged assaults and affronts committed against him by the general's soldiers. Both the trial court and court of appeals held for the defendant, and the Supreme Court affirmed the judgment, somehow equating a judgment against the defendant with one against the Venezuelan Government.¹³ Speaking in very broad language, Chief Justice Fuller stated for the Court:

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.¹⁴

independence of princes and nations, I think that, on the whole, it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince, resident in the dominions of another, is exempt from the jurisdiction of the courts there.

49 Eng. Rep. at 743.

10. *Duke of Brunswick v. King of Hanover*, 9 Eng. Rep. 993, 998-99 (1848). Lord Cottenham summarized the issue:

The whole question seems to me to turn upon this . . . , that a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign.

Id. For a further discussion of the English ancestry of the act of state doctrine refer to Holdsworth, *The History of Acts of State in English Law*, 41 *COLUM. L. REV.* 1313 (1941).

11. 65 F. 577 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897).

12. 65 F. at 580. There appear to be several earlier American cases that introduced a notion of the act of state doctrine. *E.g.*, *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293, 294-96 (1808); *Waters v. Collot*, 2 U.S. (2 Dall.) 247, 248 (1796); *Hatch v. Baez*, 7 Hun 596 (N.Y. Sup. Ct. 1876). The *Underhill* case, however, as finally determined by the Supreme Court, has come to be the landmark American case. Refer to text at notes 13-15 *infra*.

13. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

14. *Id.*

This language of Chief Justice Fuller in *Underhill* has become the rationale for subsequent courts that have adopted the act of state doctrine.¹⁵

In two 1918 cases the Supreme Court once again considered the act of state doctrine.¹⁶ First, in *Oetjen v. Central Leather Co.*,¹⁷ the Court, citing *Underhill*, extended the scope of the doctrine to encompass a situation that involved private parties, one of whom had relied upon the act of state doctrine as an affirmative defense.¹⁸ In *Ricaud v. American Metal Co.*,¹⁹ the second 1918 case, the Court again relied on *Underhill* and refused to question the validity of a foreign confiscation of American property. In reaching its decision, the Court cited considerations of international comity and the very dubious interrelation between municipal court decisions, in essentially private suits, and the shiftings of foreign relations.²⁰ The Court in *Ricaud* did insert one limitation on the act of state doctrine, stating that although the doctrine did not deprive a court of jurisdiction once it was acquired, it did require a court considering the merits of a case to regard as

15. See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357-58 (1909). Mr. Justice Holmes solidified the tone set by *Underhill*:

[I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. . . . It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.

Id. at 358.

16. *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918). It has been pointed out that these decisions could have been founded on a previously recognized theory:

These decisions laid down the "act of state" doctrine, which has since been followed in American courts, without any real examination of the policies involved. They could as well have been founded on a theory previously recognized by the Supreme Court that, in time of civil war, property in enemy territory is subject to seizure or destruction by a belligerent.

Comment, *International Conflict of Laws—Title to Chattels—"Act of State" Doctrine*, 58 MICH. L. REV. 100, 104 (1959).

17. 246 U.S. 297 (1918). The main issue in *Oetjen* concerned title to certain consignments of hides. Defendant's title was based on a confiscation order by the Mexican Government. The Court refused to question the validity of the acts of the Mexican Government: "To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Id.* at 304.

18. *Id.* at 303.

19. 246 U.S. 304 (1918).

20. *Id.* at 310. *Ricaud* was a suit in equity originally commenced in the Federal District Court for the Western District of Texas. Plaintiff asserted that he was owner of and entitled to a consignment of lead bullion that was derived from a confiscation by the Mexican Government. The consignment was being held in bond by the collector of customs at El Paso pursuant to an injunction temporarily restraining the collector from delivering the bullion.

valid the act of a foreign government.²¹ As in the other American cases already discussed, therefore, the issue in *Ricaud* was never the validity of the governmental acts, since the contrived act of state doctrine precluded examination of such acts.

II. UNCRITICAL APPLICATIONS OF THE DOCTRINE

A. *The Bernstein Affair*

During the 1920s and 1930s there arose as a consequence of the Russian Revolution a series of "seizure cases" that involved unquestioning application of the act of state doctrine.²² In addition to the "seizure cases," perhaps the most extreme example of a blanket use of the doctrine came in the *Bernstein* cases, which began in 1947.²³ The plaintiff, a German Jew and resident of New York at the time of suit, brought an action for the conversion of one of his ships by the Nazi Government. His suit also included claims for damages to the ship because of its detention and for proceeds of insurance paid for loss of the ship at sea. The action eventually was removed to federal court and dismissed on grounds of the act of state doctrine. The court stated that because the Nazi Government was duly recognized by the United States at the time of the appropriation, the validity of acts by that government would have to be upheld in an American court.²⁴

21. *Id.* at 309. The Court stated that acts of a foreign government cannot be questioned:

[The act of state doctrine] does not deprive the courts of jurisdiction once acquired over a case. It requires only that when it is made to appear that the foreign government has acted in a given way on the subject-matter of litigation, the details . . . cannot be questioned but must be accepted by our courts as a rule for their decision.

Id.

22. See, e.g., *Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933). This case involved the seizure and passing of title of certain oil lands in Russia. Judge Pound, after concluding in near summary fashion that the belated recognition of the Soviet Government by the United States had a retroactive effect in validating all such governmental actions from the commencement of its defacto existence, stated that the *Underhill* version of the act of state doctrine was applicable "even when such government seizes and sells the property of an American citizen within its boundaries." 186 N.E. at 681. A better basis upon which the decision could have rested is the situs rule of conflicts of law. Judge Pound recognized that when the Soviet Government confiscated oil lands in Russia owned by Russian nationals, "recovery in conversion is dependent upon the laws of Russia." *Id.* at 682. See also *Dougherty v. Equitable Life Assurance Soc'y*, 266 N.Y. 71, 193 N.E. 897 (1923). *Dougherty* also is a Russian "seizure case." For further discussion refer to E. MOONEY, *FOREIGN SEIZURES* 37-72 (1967).

23. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949), modified on rehearing, 210 F.2d 375 (2d Cir. 1954); *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947).

24. *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 250 (2d Cir.), cert. denied, 332 U.S. 772 (1947). The court applied the doctrine of *Underhill* and *Oetjen* because "no court will exercise its jurisdiction to adjudicate the validity of official acts of another state." 163 F.2d at 249-50. The court made this statement even though it assumed that a German court would have held the transfer unlawful at the time it was made. *Id.* at 252. The disposition of such claims for restitution were held to

Bernstein, however, brought a second suit, this time against another shipping line that he formerly had owned, which the Nazis had transferred to Dutch American owners who knew of the confiscation. More pointedly than in any other previous case, the second *Bernstein* decision presented facts that so violated minimum concepts of law and justice as to require some deviation from a strict and uncritical use of the act of state doctrine. The court, however, held firm in its refusal to question the validity of the Nazi acts, and this action was affirmed in 1949 by the Second Circuit.²⁵

It was not until the issuance of a press release²⁶ by the State Department relieving American courts from any restraint in passing upon the validity of acts of Nazi officials that a turnabout in the policy of the courts toward Bernstein was precipitated. Because of the action of the executive branch in issuing the press release, the Second Circuit granted a rehearing and allowed Bernstein to recover.²⁷ This decision has given rise to the so-called "*Bernstein* exception" to the act of state doctrine. Under the *Bernstein* exception judicial examination of the legality of foreign property seizures becomes contingent in any specific case upon State Department approval.²⁸ This ultimate involvement of the executive branch with an essentially legal problem perhaps can be viewed as the logical conclusion to an illogical and questionable approach by the courts to the whole question of

be "obviously matters of international cognizance and must be left wholly within the control of our own Executive." *Id.* at 251. The only consolation given by Judge Learned Hand was that "if we have been mistaken, the Supreme Court must correct it." *Id.* at 249. For a discussion of this case refer to House, *The Law Gone Awry: Bernstein v. Van Heyghen Freres*, 37 CALIF. L. REV. 38 (1949).

25. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 70 F. Supp. 335, 340 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 71 (2d Cir. 1949), *modified on rehearing*, 210 F.2d 375 (2d Cir. 1954). For a further consideration of the *Bernstein* cases refer to Note, *Acts of State and the Conflict of Laws*, 35 N.Y.U.L. REV. 234, 238-47 (1960).

26. U.S. Dep't of State, *Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers*, 20 DEP'T STATE BULL. 592 (1949). This press release stated the policy of the executive:

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.

Id. at 593.

27. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954).

28. *Id.* It has been suggested, however, that this limited extension may be short lived:

The case was thereupon settled. The "Tate Letter" and the Supreme Court's decision in *Republic of Mexico v. Hoffman* (which, although not relating to the act of state doctrine, did deal with sovereign immunity, a concept often viewed as having some parallels with the act of state doctrine) gave the impression that American courts would reverse their former policies and extend only a limited immunity in both. The impression was short lived.

Goldie, *The Sabbatino Case: International Law Versus the Act of State*, 12 U.C.L.A.L. REV. 107, 126 (1964). For an argument advocating a general extension of the *Bernstein* exception refer to Hyde, *The Act of State Doctrine and the Rule of Law*, 53 AM. J. INT'L L. 635 (1959). For a rebuttal refer to Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 AM. J. INT'L L. 141 (1960).

acts of state.

B. *The Sabbatino Case*

One scholar offered the following observation in regard to the act of state doctrine:

In none of the principal American decisions did any question of the invalidity of the act of state ever arise, and therefore remarks addressed to the subject were merely *obiter*; but, seized upon and reiterated by judges in countless subsequent cases, the principle is now, it must be admitted, taken by many to be a separate rule which goes further toward clothing in sanctity the foreign act of state than the normal conflicts rules would allow.²⁹

This observation foreshadowed by five years the decision of the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*.³⁰ That case reaffirmed the continuing vitality of the act of state doctrine and compelled the Court to reexamine the purpose and policy of the doctrine.³¹

The plaintiff in *Sabbatino*, the Bank of Cuba, had sued the defendant for an alleged conversion of certain bills of lading, while the defendant had filed a counterclaim against the bank for the proceeds of a sale of sugar confiscated by the Cuban Government.³² Going directly to the relevance of

29. Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826, 835 (1959).

30. 376 U.S. 398 (1964).

31. For a sampling of the literature written on *Sabbatino* refer to THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE AFTERMATH OF SABBATINO (Hammarskjöld Forum No. 7, 1965); Coerper, *The Act of State Doctrine in the Light of the Sabbatino Case*, 56 AM. J. INT'L L. 143 (1962); Collinson, *Sabbatino: The Treatment of International Law in United States Courts*, 3 COLUM. J. TRANSNAT'L L. 27 (1964); Metzger, *Act-of-State Doctrine Refined: The Sabbatino Case*, 1964 SUP. CT. REV. 223; Reeves, *The Sabbatino Case: The Supreme Court of the United States Rejects a Proposed New Theory of Sovereign Relations and Restores the Act of State Doctrine*, 32 FORD. L. REV. 631 (1964); Stevenson, *The State Department and Sabbatino—"Ev'n Victors Are By Victories Undone,"* 58 AM. J. INT'L L. 707 (1964).

32. The *Sabbatino* case involved a lengthy and complex fact situation. In February and July of 1960, respondent Farr, Whitlock & Co. (an American commodity broker) contracted to purchase Cuban sugar upon presentation in New York of the shipping documents and a sight draft from a wholly owned subsidiary of C.A.V. (a Cuban corporation whose capital stock was principally owned by United States residents). On July 6, 1960, however, in direct response to the American reduction of the sugar quota from Cuba, the Cuban Council of Ministers adopted a law that set out discretionary power for the nationalization of property or enterprises in which Americans had an interest. Subsequently, the sugar in question was confiscated while awaiting delivery to New York. In order to secure the release of the sugar, respondent had to enter into contracts, identical to those made with C.A.V., with the Banco Para el Comercio Exterior de Cuba, an instrumentality of the Cuban Government. In turn Banco Exterior assigned the bills of lading to petitioner Banco Nacional, also an instrumentality of the Cuban Government. The bills of lading instructed its agent in New York to deliver the bills and sight draft to respondent in return for payment. In exchange for a promise not to turn the funds over to the petitioner or its agent, however, C.A.V. agreed to indemnify respondent for any loss. Accordingly, respondent, after accepting the shipping documents, negotiating the bills of lading to its customer, and receiving payment for the sugar, refused to hand over the proceeds to petitioner's agent. Shortly thereafter, the New York Supreme Court, which had appointed Sabbatino as temporary receiver of C.A.V.'s New York assets, enjoined respondent from taking any action in regard to

the act of state doctrine, the trial court attempted a sharp qualification of *Underhill*.³³ Judge Dimock saw the act of state doctrine neither as unqualified judicial deference to the sovereignty of a state nor as a tenet of international law, but purely as a technique of "self-imposed restraint" employed by courts in accord with conflict of law rules.³⁴ Under the rationale of the trial court, one exception to the act of state doctrine involved the power of the court to weigh the validity of the foreign act in light of international law. Discussing the court's conclusion, Judge Dimock saw national sovereignty as limited by international law:

There is an end to the right of national sovereignty when the sovereign's acts impinge on international law. . . . [The court has] the obligation to respect and enforce international law not only by virtue of this country's status and membership in the community of nations but also because international law is a part of the law of the United States.³⁵

In examining the validity of the Cuban nationalization decree, however, the trial court could not free itself from concern for the wishes of the executive, attempting to equate a separate and general statement by the State Department to the Cuban Government with a *Bernstein*-type communique.³⁶ With this contrived support behind it, the court found the Cuban decree to be "retaliatory, discriminatory and providing inadequate compensation," and as such to be "a patent violation of international law,"

money claimed by C.A.V. that might be removed from the state. Pursuant to this injunction, respondent transferred the funds to Sabbatino pending a judicial determination of ownership.

33. *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375, 380 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd and remanded*, 376 U.S. 398 (1964). Despite dicta in a few cases, the court treated the issue as novel: "The crucial question remains, however, whether this court can examine the validity of the Cuban act if it is in violation of international law. Apparently, no court in this country has passed on the question." 193 F. Supp. at 380.

34. 193 F. Supp. at 381. The court regarded the act of state doctrine as a self-imposed restraint:

The doctrine that courts of this country will not examine the validity of an act of a foreign state insofar as it purports to be effective within the territory of the acting state has its source in our conflict of laws principles. The rule is thus a self-imposed restraint. . . . Probably the basic reason for judicial refusal to examine the validity of acts of foreign states is a wise recognition of and respect for the sovereignty of each state within its own territory, the right of each state to conduct its own internal affairs as it wishes.

Id.

35. *Id.* at 381-82.

36. *Id.* at 381. Noting that a desire to avoid embarrassment to the executive contributed to the refusal of courts to inquire into the validity of an act of a foreign state, the court believed that such reasoning was not applicable here in light of the State Department's note to the Cuban Government:

The United States State Department has, however, delivered a note to the Cuban Government declaring the very nationalization law which plaintiff seeks to enforce to be in violation of international law. It can scarcely be believed therefore that judicial examination of the decree in light of international law would embarrass the Executive.

Id.

which the court would not enforce.³⁷ The court dismissed the Bank of Cuba's motion for summary judgment, instead ordering summary judgment for the defendants.

The court of appeals affirmed the ruling of the trial court, although on a substantially different basis.³⁸ The appellate court found an explicit invocation of the *Bernstein* exception, drawn from a dubious interpretation of two State Department letters issued pursuant to the district court's decision.³⁹ Taking a cautious view of the trial court's formulation of an international law exception to the act of state doctrine,⁴⁰ Judge Waterman permitted an examination into the validity of the Cuban decree, not because the Cuban action was a violation of international law, but rather because of the initial applicability of the *Bernstein* exception.⁴¹ One commentator rightly stated of this approach:

37. *Id.* at 386.

38. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 858 (2d Cir. 1962), *rev'd and remanded*, 376 U.S. 398 (1964).

39. 307 F.2d at 858. Examination of the validity of the Cuban decree was permitted not because it was a violation of international law, but because of the initial applicability of the *Bernstein* exception. Judge Waterman's resort to this exception is highly questionable. The first State Department letter, as released by the court, stated in part:

Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine. Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time.

Id. The second letter from the Under Secretary of State for Economic Affairs stated, "Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts." *Id.* It seems clear that these letters denoted only an unwillingness by the Department to comment on the case.

40. *Id.* at 859-61. Judge Waterman appeared far from amenable to the application of international standards, referring to international law as a "hazy concept." *Id.* at 859. The court conceded that "municipal courts must be the custodians of the concepts of international law, and they must expound, apply and develop that law whenever they are called upon to do so." *Id.* at 861. Concluding that the decree failed to provide adequate compensation, had a retaliatory purpose and a discriminatory nature, and made available no other redress through normal diplomatic channels, the court held that the decree was violative of international law and was therefore invalid and unenforceable in the forum. *Id.* at 868.

41. It should be noted that the court did not hesitate to consider the proposition that a forum court should not enforce a decree contrary to local public policy. *Id.* at 859. The court found that expropriation of property without adequate compensation would be contrary to the public policy of the forum. *Id.* This finding was based on the definition of public policy that Judge Cardozo formulated in *Loucks v. Standard Oil Co.*:

The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.

Id., quoting *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198, 202 (1918). Once establishing this standard, however, the court based its decision on an alternative ground:

But we are aware of the admonition that public policy is an "unruly horse."
 . . . [I]nasmuch as the decision in the present case is reachable by taking advantage of an exception to the long-established act of state doctrine, we find it wiser, when given the opportunity of relying upon alternative grounds for decision, to base our result on the ground which appears to us to be the narrower exception to that doctrine.

Id.

However sympathetic one may be to the ultimate objective of examining foreign acts against the standards of international law, the use of *Bernstein* as an avenue of approach to that objective is fraught with danger. . . . [It provides] no long-term answer to the type of problem before the Court in *Sabbatino*⁴²

While it has often been suggested that a failure to defer to the wishes of the executive branch in matters involving foreign acts of states could impede the fluidity and certainty of international trade and business transactions, the real danger in such deference seems to be the ensuing uncertainty of justice if the ultimate definition of the matter is left with the executive.⁴³

The final determination in *Sabbatino* was made by the Supreme Court, which in an eight to one decision overturned the holding of the lower court and remanded the case to the district court.⁴⁴ Writing for the majority, Mr. Justice Harlan observed that, while the act of state doctrine does have "constitutional underpinnings," it "arises out of basic relationships between branches of government in a system of separation of powers,"⁴⁵ with judicial deference being given to the executive branch in matters that touch on the conduct of foreign relations.⁴⁶ Furthermore, the Court did not consider the act of state doctrine to be a result of requirements of international law, of the inherent nature of sovereign authority, or of the Constitution.⁴⁷ Mr. Justice Harlan's opinion for the majority⁴⁸ has been construed by some

42. Simmonds, *The Sabbatino Case and the Act of State Doctrine*, 14 INT'L & COMP. L.Q. 452, 469-70 (1965).

43. It has been predicted that the Second Circuit's decision in *Sabbatino* will be considered a costly victory:

The reintroduction of the executive into the picture, moreover, virtually forecloses the hope, raised by Judge Dimock's opinion, that a forum for the litigation of one type of international law case might be available on a regular basis. Thus, while the Second Circuit did refuse to apply the act of state doctrine in *Sabbatino* and did hold that the Cuban nationalization decree violated international law, its decision, in the view of many international lawyers, will be considered a pyrrhic victory.

Lillich, *A Pyrrhic Victory at Foley Square: The Second Circuit and Sabbatino*, 8 VILL. L. REV. 155, 176 (1963).

44. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964).

45. *Id.* at 423.

46. *Id.* The Court observed that the act of state doctrine "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Id.*

47. *Id.* at 423-37. The Court reasoned that the vitality of the act of state doctrine depends upon the proper separation of power:

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 matters bearing upon foreign affairs.

Id. at 427-28.

48. *Id.* at 436-37. At first glance, Mr. Justice Harlan appears to rigidly embrace the doctrine "however offensive to the public policy of this country and its constituent States an expropriation of this kind may be." *Id.* at 436. Considering the international law exception, Mr. Justice Harlan expressed doubt that such an approach would be effective:

Their basic contention is that United States courts could make a significant

commentators as rigidly adopting the act of state doctrine.⁴⁹ Ultimately, however, the opinion cannot be viewed as approximating the unqualified adherence to the doctrine espoused in *Underhill*, either in its basis or in its application.

In the final analysis, Mr. Justice Harlan did not consider the act of state doctrine to completely preclude the courts from considering the validity of a foreign decree. To the contrary, he held that final discretion for examination of a foreign decree rested with the Court itself.⁵⁰ In addition, Mr. Justice Harlan did not reject entirely the international law exception to the act of state doctrine that Mr. Justice White advocated in his vigorous dissent.⁵¹ Mr. Justice Harlan's mistake in regard to the dissent occurred, however, when he erroneously delimited the content of international law:

[The Court] 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 absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.⁵²

Though validly distinguishing between various sources of international law, Mr. Justice Harlan in effect disregarded a basic premise of international law—whether a law is positive or customary, it remains valid law.⁵³

contribution to the growth of international law But given the fluidity of present world conditions, the effectiveness of such a patchwork approach toward the formulation of an acceptable body of law concerning state responsibility for expropriations is, to say the least, highly conjectural.

Id. at 434.

49. See, e.g., Friedmann, *National Courts and the International Legal Order: Projections on the Implications of the Sabbatino Case*, 34 GEO. WASH. L. REV. 443, 448-49 (1966). Friedmann interprets the majority decision in *Sabbatino* as adopting the act of state doctrine as formulated in *Underhill*: "The 'act of state' doctrine, as formulated in *Underhill v. Hernandez* . . . must be held to be a principle of decision binding on federal and state courts alike." *Id.*

50. 376 U.S. at 423. Mr. Justice Harlan emphatically stated that the act of state doctrine "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." *Id.*

51. *Id.* In his dissenting opinion, Mr. Justice White argues that other countries do not need to apply rigidly the act of state doctrine in order to protect the executive: No other civilized country has found such a rigid rule necessary for the survival of the executive branch of its government; the executive of no other government seems to require such insulation from internal law adjudications in its courts; and no other judiciary is apparently so incompetent to ascertain and apply international law.

Id. at 440. For a comparative analysis of the treatment of the acts of foreign states refer to L. OPPENHEIM, *INTERNATIONAL LAW* 267-70 (8th ed. 1955).

52. 376 U.S. at 428.

53. For a consideration of custom as a source of international law refer to A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); Wright, *Custom as a Basis for International Law in the Post-War World*, 2 TEXAS INT'L L.F. 147 (1966). It should be noted that *Sabbatino* left unanswered the question of whether the expropriation in question was in fact a violation of international law. The majority impliedly refused to accept the concept of full, prompt, and adequate compensation as a general principle of international law. 376 U.S. at 433. This refusal seems to be consistent with

Finally, in discussing the *Bernstein* exception, the *Sabbatino* Court did some further equivocating. After having justified the act of state doctrine on the basis of deference to the executive, the Court then seemed to imply that even the executive may be incompetent to deal with some aspects of foreign relations. Declaring that judicial examination should not depend on "an educated guess by the Executive,"⁵⁴ the Court, while never passing on the continuing validity of the *Bernstein* exception, pointed out that even if *Bernstein* were valid its application would be unwarranted in the present case.⁵⁵

III. POST-*Sabbatino* HAPPENINGS

A. A Legislative Twist: The Hickenlooper Amendment

The *Sabbatino* decision marked only one more chapter in the drama of the act of state doctrine. After the Court's decision, it was the turn of Congress:

The ink was hardly dry on *Sabbatino* before some oil companies and others joined in securing the submission of an amendment to the 1964 foreign aid legislation by Senator Hickenlooper, which was adopted by the Senate Foreign Relations Committee in early July without an opportunity for the executive to present its views. The effect of this amendment would have been the adoption of the reverse-twist *Bernstein* exception that was specifically rejected by the Court.⁵⁶

The stage was now set for a direct legislative challenge to *Sabbatino*.

Taking the unfortunate position that *Sabbatino* was nothing more than a strict refinement of *Underhill* and that the international law exception to the act of state doctrine had been erased totally by the language in *Sabba-*

current international law practice. It has been noted that "there seems no clear agreement internationally today as to whether a state is, or is not, obligated by international law to pay adequate compensation to aliens whose property is taken by the state for public purposes . . ." W. BISHOP, *INTERNATIONAL LAW* 866 (3d ed. 1971). See also Doman, *New Developments in the Field of Nationalization*, 3 N.Y.U.J. INT'L L. & POL. 306, 313-15 (1970).

54. 376 U.S. at 436.

55. *Id.* The Court did look at the suggestion posed by the Committee on International Law of the City of New York Bar Association that if the act of state doctrine is applicable to violations of international law, it should be so only when the executive expressly stipulates that it does not wish the courts to pass on the question of validity—a reverse *Bernstein* principle. Finding, however, that a judicial examination should not rest on a prediction by the executive, the Court observed, "We do not now pass on the *Bernstein* exception, but even if it were deemed valid, its suggested extension is unwarranted." *Id.*

56. Metzger, *Act-of-State Doctrine Refined: The Sabbatino Case*, 1964 SUP. CT. REV. 223, 242.

tino,⁵⁷ Senator Hickenlooper sought to insure that the courts would not be barred from applying concepts of international law to suits brought by private litigants.⁵⁸ The legal effect of the Hickenlooper amendment was to reverse judicial policy mandated by the act of state doctrine. Under the amendment the courts would proceed to adjudicate the merits unless the President stated that such action would hinder the conduct of foreign policy.⁵⁹

The amendment in its final form was tacked onto the Foreign Assistance Act of 1964,⁶⁰ even though there was a question as to whether Congress had given it enough study.⁶¹ When the amendment was reconsidered in the spring of 1965 by the House Committee on Foreign Affairs, however, it could not again be charged that extensive hearings were not held since a number of international law scholars were called to testify.⁶²

57. Senator Hickenlooper made clear that "the amendment is intended to reverse in part the recent decision of the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*." 2 U.S. CODE CONG. & AD. NEWS 3852 (1964). He was referring to the part that was thought to "preclude U.S. courts from inquiring into acts of foreign states, even though these acts had been denounced by the State Department as contrary to international law." *Id.*

58. 110 CONG. REC. 19547 (1964) (remarks of Senator Hickenlooper).

59. 2 U.S. CODE CONG. & AD. NEWS 3852 (1964).

60. The amendment presently provides

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 rights 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.

22 U.S.C. § 2370(e)(2) (1970). For commentary on this amendment refer to Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178-83 (1967); Lowenfeld, *The Sabbatino Amendment—International Law Meets Civil Procedure*, 59 AM. J. INT'L L. 899 (1965).

61. 2 U.S. CODE CONG. & AD. NEWS 3890 (1964).

62. See *Hearings on the Foreign Assistance Act of 1965 Before the House Comm. on Foreign Affairs*, 89th Cong., 1st Sess. (1965). On one side stood Attorney General Katzenbach, who strongly argued that any weakening of *Sabbatino* would be tantamount to weakening the negotiating power of the executive. He argued also that it could well embarrass the executive in its attempts to gain lump settlements from foreign governments. *Id.* at 1234-71. Professor Metzger of the Georgetown University Law Center, while conceding the constitutional power of Congress to pass such an amendment, emphasized that the matter was essentially a political question because it related to the conduct of foreign affairs by the executive. He argued further that congressional interference would hamper greatly executive flexibility in such matters. *Id.* at 991-1032.

On the other side stood men such as Professor Myres McDougal of the Yale Law School and Professor Cecil J. Olmstead, who spoke for such prestigious entities as Aluminum Co. of America, International Telephone & Telegraph Corp., Standard Oil Co., United States Steel Corp., Ford Motor Co., and Chase Manhattan Bank.

Notable among those supporting the amendment were Professors Olmstead and McDougal. While Professor Olmstead spoke in a highly practical tone stressing the importance to American foreign policy of protecting private foreign investments,⁶³ Professor McDougal struck a more legal note, assessing *Sabbatino* and the Hickenlooper amendment in the context of the overall involvement of international law.⁶⁴ When the legislative process was completed on August 24, 1965, the Foreign Assistance Act of 1965 had made the Hickenlooper amendment a permanent part of American policy. Because of the Hickenlooper amendment, the rule of *Sabbatino* was thought to be unalterably changed.⁶⁵

B. Further Problems

It appeared inherent in the interaction between the act of state doctrine, *Sabbatino*, and the subsequent Hickenlooper amendment that ambiguities and uncertainties would create irreconcilable difficulties. A case illustrating the confusion was *F. Palicio y. Compania S.A. v. Brush*.⁶⁶

The controversy in *Brush* resulted from the Castro Government's seizure of five cigar manufacturing businesses located in Cuba.⁶⁷ In discussing the validity of the taking by the Cuban Government, the court emphasized that "acts of a state directed against its own nationals do not give rise to questions of international law."⁶⁸ Accordingly, the court found the Hickenlooper amendment to be inapplicable. The court went further, however, and noted the continued vitality of *Sabbatino*:

63. *Id.* at 570-620. Professor Olmstead, citing various incentives the Government had set up to encourage foreign investments in developing countries, argued that the Hickenlooper amendment was consistent with this aim and could serve as a deterrent to foreign seizures. *Id.* at 591.

64. *Id.* at 1033-60. Arguing that international law was akin to the common law and that the question of the validity of a foreign act of state was primarily a legal, not political, question, Professor McDougal concluded that our municipal courts should as they have in the past by model behavior in applying international law continue to further the clarification and advancement of international law. He felt that the Hickenlooper amendment served this purpose. *Id.* at 1041.

65. The constitutionality of the Hickenlooper amendment has been upheld. *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 974-75 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968). After withholding final judgment for sixty days to permit the executive time to determine whether to intervene, the district court entered final judgment on November 13, 1965. The court applied the amendment and dismissed the Cuban bank's complaint. For further comment on the amendment refer to Reeves, *The Sabbatino Case and the Sabbatino Amendment: Comedy—or Tragedy—of Errors*, 20 VAND. L. REV. 429 (1967).

66. 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967).

67. The dispute involved the respective rights of the intervenors who took possession of the firm on behalf of the Cuban Government and the former owner. At issue were certain trademark infringements and the purchase of Cuban cigars that were sold and delivered to American importers by the intervenors. The action sought to restrain defendants from continuing their suit on behalf of the former owners. Both sides sought summary judgment. As noted by Judge Bryan, the "ultimate resolution of this question turns upon the legal effect of the intervention by the government of Cuba of the five entities who are named as plaintiffs." 256 F. Supp. at 486.

68. *Id.* at 487, quoting *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 801 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964).

Except insofar as the validity of the *Sabbatino* decision has been overruled by the Hickenlooper amendment it is still valid and controlling. Under *Sabbatino* the act of state doctrine is plainly applicable here and proscribes this court from questioning the validity of the Cuban decree. . . .⁶⁹

This dicta demonstrated a limited reading of the Hickenlooper amendment by the courts. At least to the judiciary, *Brush* signified that *Sabbatino* had not been obliterated by Congress.

As if to compound the confusion already left by the meandering of the act of state doctrine, the New York Court of Appeals considered the doctrine and the Hickenlooper amendment in *French v. Banco Nacional de Cuba*.⁷⁰ The pivotal question before the court was whether the plaintiff's claim was barred by the act of state doctrine. The claim stemmed from a regulation of the Castro Government that prevented foreign investors from converting their Cuban assets into any currency other than Cuban pesos.⁷¹ The court found that the Hickenlooper amendment was applicable only to title claims or other property rights, and then only if the claim was based on a confiscation or other taking of the property involved.⁷² Judge Fuld split legal hairs by finding that the Hickenlooper amendment was inapplicable because the loss in question was "due not to a taking of property,

69. 256 F. Supp. at 487. It should be noted that after rejecting the applicability of the Hickenlooper amendment and paying reverence to *Sabbatino*, Judge Bryan added a touch of suspense by weighing the act of a foreign state against local public policy. He based this examination on a statement by the Second Circuit where the court set forth the position of United States courts when considering public policy in applying the act of state doctrine:

[T]he principle of judicial refusal of examination applies only to a taking by a foreign sovereign of property within its own territory . . . ; when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state "only if they are consistent with the policy and law of the United States."

Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), quoting RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 46 (Proposed Official Draft 1962) (now RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 43 (1965)). In *Brush*, Judge Bryan stated that the confiscation in question was against public policy because it was without compensation. By finding, however, that the issue involved only those finished products sold in the United States subsequent to the intervention, the court strictly applied the ruling in *Sabbatino*. 256 F. Supp. at 489.

70. 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968).

71. Alexander Ritter, an American citizen who was a Cuban resident at the time of the events from which this case arose, was caught by the Cuban regulation. Six months after the Castro takeover, Ritter purchased certificates of tax exemption in the amount of \$150,000. Each certificate guaranteed that the owner would receive from defendant bank "the appropriate" amount of American dollars. When Ritter tried to redeem the certificates, the bank refused, claiming that the processing of the certificates had been temporarily suspended by the regulation. By attaching a bank account maintained by the Cuban bank in the United States, Ritter's assignee brought action for breach of contract and obtained a judgment against defendant bank for \$150,000, plus interest. The New York Supreme Court, Appellate Division, affirmed the judgment by a closely divided vote. *French v. Banco Nacional de Cuba*, 27 App. Div. 2d 530, 275 N.Y.S.2d 567, 568 (1966), *rev'd*, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968).

72. 242 N.E.2d at 712, 295 N.Y.S.2d at 445.

but rather, to the breach of a promise upon which he had relied."⁷³ Thus another twist of the pen was added to the Hickenlooper amendment, leaving once more the distinct impression that *Sabbatino* was still very much good law.⁷⁴

IV. THE *First National City Bank* CASE: A WAY OUT OF THE WOODS?

The most recent example of the myriad dilemmas bred by the act of state doctrine is that of *Banco Nacional de Cuba v. First National City Bank*.⁷⁵ This case has now made the rounds of the Supreme Court on two occasions, leaving in its wake a badly divided and troubled Court. It will undoubtedly provide a basis for renewed and heated debate among scholars as to what the act of state doctrine actually means.

A. Background: The Lower Courts At Odds

First National City Bank involved the validity of an offset claim by the defendant, First National City Bank, against the plaintiff, Bank of Cuba, for the confiscation of certain of the defendant's property in Cuba without compensation.⁷⁶ In the district court, Judge Bryan considered *Sabbatino* to have been overruled by the Hickenlooper amendment. Based on that interpretation, he found the Hickenlooper amendment to be controlling. Since Judge Bryan found the taking by the Cuban Government to be contrary to the principles of international law, he granted summary judgment for the defendant, First National City Bank.⁷⁷

73. *Id.* at 713, 295 N.Y.S. at 446.

74. For further discussion of this twist refer to Comment, *Sabbatino Property: A French Twist*, 57 GEO. L.J. 1299 (1969).

75. 92 S. Ct. 1808 (1972).

76. In 1958, First National, a New York bank having branches in Cuba, loaned \$15 million, secured by bonds of the World Bank, to an agency of the Cuban Government. After Castro came to power, the Cuban Government nationalized all of First National's branches in Cuba, acting pursuant to the same law that was at issue in *Sabbatino*. Considering the loan repudiated by this action, First National sold the bonds it held as security, leaving a surplus of nearly \$2 million. The Cuban bank brought action to recover the surplus; First National filed a counterclaim for the value of the expropriated branches in Cuba. In defense of this counterclaim, the Cuban Government pled the act of state doctrine. *Banco Nacional de Cuba v. First Nat'l City Bank*, 270 F. Supp. 1004, 1006 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970), *vacated and remanded*, 400 U.S. 1019 (1971).

77. 270 F. Supp. at 1007, 1011. Judge Bryan held that notwithstanding the act of state doctrine, the Hickenlooper amendment directed him to determine "the merits in cases involving a confiscation after January 1, 1959, by an act of a foreign state 'in violation of the principles of international law, including the principles of compensation.'" *Id.* at 1007, quoting the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2) (1970). Proceeding to the merits of the case, Judge Bryan held that the confiscation of First National's branches in Cuba violated international law because adequate compensation was not provided and because the confiscation was a reprisal discriminating against American nationals. 270 F. Supp. at 1007-10. He concluded that First National was entitled to a setoff against Banco Nacional's claim. *Id.* at 1010. It should be noted that Judge Bryan shifted his interpretation of the Hickenlooper amendment from his

On appeal, however, the Second Circuit refused to accept such a broad extension of the Hickenlooper amendment, instead finding it to be inapplicable to the facts before it. The court strictly construed the act of state doctrine and reversed the district court's ruling.⁷⁸

The Supreme Court, without commenting on the merits, vacated the appellate court's ruling and remanded the case for reconsideration in light of a subsequent *Bernstein*-type communique issued by the State Department.⁷⁹ Once again, the appellate court applied the act of state doctrine and concluded that "*Bernstein* is best left narrowly limited to its own peculiar facts."⁸⁰

findings in *French*. Refer to text at notes 70-74 *supra*. For further discussion refer to Bleicher, *The Sabbatino Amendment in Court: Bitter Fruit*, 20 STAN. L. REV. 858 (1968).

78. *Banco Nacional de Cuba v. First Nat'l City Bank*, 431 F.2d 394, 402 (2d Cir. 1970), *vacated and remanded*, 400 U.S. 1019 (1971). Judge Lumbard stated, "[W]e can find no basis for holding that the present case is one 'in which a claim of title or other right to property is . . . based upon (or traced through) a confiscation or other taking'." 431 F.2d at 402, *quoting* the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2) (1970). Judge Lumbard further stated that such a holding would be contrary to the legislative intent of the Hickenlooper amendment:

To do so would stand the statute on end. . . . 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. 431 F.2d at 402. The court concluded that First National had no special claim to the excess sale proceeds:

We do not believe that First National City has any special claim to the excess proceeds of the sale of the collateral. Any judgment rendered in favor of Banco Nacional on its first cause of action would, after deduction of attorney's fees, become a blocked Cuban asset.

Id. at 404.

79. *First Nat'l City Bank v. Banco Nacional de Cuba*, 400 U.S. 1019 (1971). For the text of the State Department letter refer to 10 INT'L LEGAL MATERIALS 89-93 (1971). The letter states in part:

Recent events, in our view, make appropriate a determination by the Department of State that the act of state doctrine need not be applied when it is raised to bar adjudication of a counterclaim or set-off when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine.

In this case, the Cuban government's claim arose from a banking relationship with the defendant existing at the time the act of state—expropriation of defendant's Cuban property—occurred, and defendant's counterclaim is limited to the amount of the Cuban government's claim. We find, moreover, that the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.

Id. at 92-93. For a discussion of this letter refer to Note, *Executive Suggestion and Act of State Cases: Implications of the Stevenson Letter in the Citibank Case*, 12 HARV. INT'L L.J. 557 (1971).

80. *Banco Nacional de Cuba v. First Nat'l City Bank*, 442 F.2d 530, 535 (2d Cir. 1971), *rev'd and remanded*, 92 S. Ct. 1808 (1972). The court concluded that *Bernstein* should be limited to its facts:

[W]e conclude that *Bernstein* is best left narrowly limited to its own peculiar facts and that, despite the State Department's letter of November 17, 1970, the exception to the act of state doctrine created by that case is inapplicable to the case at bar. Rather, we still find persuasive those cogent policy reasons for

Since the *Bernstein* exception was not relevant, the court refused to alter its original decision in the case.⁸¹

B. *The Supreme Court: One More Time*

Because of the action of the court of appeals, the Supreme Court again granted certiorari and reversed and remanded the appellate court's judgment in a five to four decision.⁸² The strange paradox of this decision is that the dissenting opinion may well become the precedent.

1. *A Divided Majority*—Delivering the judgment of the Court, Mr. Justice Rehnquist, joined by Chief Justice Burger and Mr. Justice White, based reversal of the court of appeals decision squarely on acceptance of the *Bernstein* exception to the act of state doctrine. In an uncritical analysis of the development of the act of state doctrine, Mr. Justice Rehnquist posited a continuous line of cases from *Underhill* to *Sabbatino* that supported his position.⁸³ With much bravado, he chose to "adopt and approve the so-called *Bernstein* exception to the act of state doctrine."⁸⁴

Mr. Justice Rehnquist, however, failed to do his homework properly. In no way can *Sabbatino* be used to justify an embrace of the *Bernstein* exception. While it is true that the Court in *Sabbatino* never directly ruled on the continuing validity of the *Bernstein* exception, the clear implication was

applying the doctrine which were articulated by Mr. Justice Harlan in *Sabbatino* and set forth in our prior opinion Since we hold that the State Department's letter here does not bring this case within the narrow *Bernstein* exception, it is plain that that letter does not relieve us from applying the act of state doctrine to bar examination of the validity of the Cuban expropriation of First National City's property there.

442 F.2d at 535.

81. *Id.* at 536. For further discussion refer to Note, *Sabbatino Comes Full Circle: A Reconsideration in Light of Recent Decisions*, 4 N.Y.U.J. INT'L L. & POL. 260 (1971).

82. *First Nat'l City Bank v. Banco Nacional de Cuba*, 92 S. Ct. 1808 (1972).

83. *Id.* at 1814. Mr. Justice Rehnquist analyzed the doctrine as an accepted limitation to normal redress for wrongs:

The act of state doctrine, as reflected in cases culminating in *Sabbatino*, is a judicially accepted limitation on the normal adjudicative processes of the courts, springing from the thoroughly sound principle that on occasion individual litigants may have to forego decision on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy.

Id.

84. *Id.* at 1813. Mr. Justice Rehnquist invoked the common law maxim of *cessante ratione legis, cessat et ipsa lex*:

The act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government. We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called *Bernstein* exception to the act of state doctrine. We believe this to be no more than an application of the classical common-law maxim that "the reason of the law ceasing, the law itself also ceases."

Id., quoting BLACK'S LAW DICTIONARY 288 (4th ed. 1951).

that it was to be rejected.⁸⁵ In fact, Mr. Justice White in his dissenting opinion in *Sabbatino* went so far as to state that the majority explicitly had rejected the *Bernstein* exception.⁸⁶ One of the salient points raised by the majority in *Sabbatino* was that final discretion for review of acts of state remained with the judiciary and not the executive branch. Somehow, Mr. Justice Rehnquist missed the mark.

Although he concurred in the judgment of the Court, Mr. Justice Powell rejected arguments in favor of the continuing validity of the *Bernstein* exception. Finding the reasoning in *Sabbatino* to implicitly reject *Bernstein*, he further added that he "would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction."⁸⁷

Mr. Justice Powell apparently concurred in the judgment of the Court only because he believed "that the broad holding of *Sabbatino* was not compelled by the principles, as expressed therein, which underlie the act of state doctrine."⁸⁸ In his view *Sabbatino* was not meant to be "an inflexible and all encompassing rule."⁸⁹ Instead, Mr. Justice Powell advocated a "balancing of interests" between the judicial and the executive branches in each case. Where an exercise of jurisdiction would disrupt the delicate foreign relations conducted by the executive branch, he thought that the courts should defer. Where there was no conflict, however, as Mr. Justice Powell felt there was none in *First National City Bank*, he argued that the courts should apply relevant domestic and international law. Most important, he stressed that the final "balancing of interests" must be done by the courts.⁹⁰

Mr. Justice Douglas in a separate concurring opinion also vigorously rejected application of the *Bernstein* exception. He viewed it as a means of reducing the Court to "a mere errand boy for the Executive which may

85. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1964).

86. *Id.* at 469. Mr. Justice White indicated that he favored *Bernstein*:
If my view had prevailed I would have stayed further resolution of the issues in this Court to afford the Department of State reasonable time to clarify its views in light of the opinion. In the absence of a specific objection to an examination of the validity of Cuba's law under international law, I would have proceeded to determine the issue and resolve this litigation on the merits.

Id. at 472 (White, J., dissenting).

87. *First Nat'l City Bank v. Banco Nacional de Cuba*, 92 S. Ct. 1808, 1816 (1972) (Powell, J., concurring).

88. *Id.*

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

Mr. Justice Powell disagreed with the broad application by *Sabbatino* of the principles underlying the act of state doctrine:

I do not disagree with these principles, only with the broad way in which *Sabbatino* applied them. Had I been a member of the *Sabbatino* Court, I probably would have joined the dissenting opinion of Mr. Justice White. The balancing of interests, recognized as appropriate by *Sabbatino*, requires a careful examination of the facts in each case and of the position, if any, taken by the political branches of government.

92 S. Ct. at 1816.

90. 92 S. Ct. at 1817.

choose to pick some people's chestnuts from the fire, but not others."⁹¹ Through a peculiar mathematical process⁹² and a strong concern for equity,⁹³ however, Mr. Justice Douglas did not find *Sabbatino* to be controlling. Because the amount of the setoff sought by First National City Bank did not exceed the claim of the Bank of Cuba, he felt the case to be governed by *National City Bank v. Republic of China*.⁹⁴

As Mr. Justice Powell noted, however, *Republic of China* dealt with the "question of jurisdiction over the parties to hear a counterclaim asserted against a foreign State seeking redress in our courts,"⁹⁵ while *First National City Bank* involved the justiciability of the claim itself.⁹⁶ Moreover, the decision in *Republic of China* was based solely on the question of sovereign immunity. In *First National City Bank* the Bank of Cuba clearly invoked the act of state doctrine against the counterclaim asserted by the defendant.⁹⁷ The four dissenting Justices joined Mr. Justice Powell in finding *Republic of China* to be inapplicable.⁹⁸

91. *Id.* at 1816 (Douglas, J., concurring).

92. *Id.* at 1815. Mr. Justice Douglas made the application of the act of state doctrine dependent on the monetary amount of the counterclaim: "If the amount of the setoff exceeds the asserted claim, then we would have a *Sabbatino* type of case." *Id.*

93. *Id.* Adding that fairness also precluded the application of the act of state doctrine, Mr. Justice Douglas stated that the setoff should be allowed:

It would offend the sensibilities of nations if one country, not at war with us, had our courthouse door closed to it. It would also offend our sensibilities if Cuba could collect the amount owed on liquidation of the collateral for the loan and not be required to account for any setoff. To allow recovery without more would permit Cuba to have her cake and eat it too. Fair dealing requires allowance of the setoff to the amount of the claim on which this suit is brought—a precept that should satisfy any so-called rational decision.

Id.

94. 348 U.S. 356 (1955), *rev'g* 208 F.2d 627 (2d Cir. 1953). In this case the Republic of China brought suit in federal district court to recover \$200,000 deposited by one of its agencies in defendant bank. Defendant filed two counterclaims seeking affirmative relief on defaulted treasury notes of plaintiff sovereign. The amount of the counterclaims exceeded the deposit in question. Upon a plea of sovereign immunity, the district court dismissed the counterclaims. *Republic of China v. National City Bank*, 108 F. Supp. 766, 768 (S.D.N.Y. 1952). Defendant appealed and, while the appeal was pending, sought leave of the district court to amend the counterclaims by denominating them setoffs. The district court denied leave. *Republic of China v. National City Bank*, 14 F.R.D. 186, 187 (S.D.N.Y. 1953). The Second Circuit affirmed the dismissal of the counterclaims and the denial of leave to denominate the counterclaims setoffs. *Republic of China v. National City Bank*, 208 F.2d 627, 631 (2d Cir. 1953). On certiorari, defendant dropped its demand for affirmative relief and reduced its counterclaims to mere demands for setoffs. By a four to three decision, Mr. Justice Douglas not participating, the Supreme Court reinstated the counterclaims. *National City Bank v. Republic of China*, 348 U.S. 356, 366 (1955). Recognizing that counterclaims based on the subject matter of a sovereign's suit are not barred by the doctrine of immunity, the Court concluded that the "limitation of 'based on the subject matter' is too indeterminate, indeed too capricious, to mark the bounds of the limitations on the doctrine of sovereign immunity." *Id.* at 364.

95. *First Nat'l City Bank v. Banco Nacional de Cuba*, 92 S. Ct. 1808, 1816 (1972) (Powell, J., concurring).

96. *Id.*

97. Although the sovereign immunity concept and the act of state doctrine have much in common, they are two distinct legal notions serving distinct objectives.

98. *First Nat'l City Bank v. Banco Nacional de Cuba*, 92 S. Ct. 1808, 1818 (1972) (Brennan, Stewart, Marshall & Blackmun, JJ., dissenting).

The most important aspect of Mr. Justice Douglas's opinion is that for the first time a member of the Court has formally equated the holding in *Sabbatino* with the "political question" rule. As noted by Mr. Justice Douglas:

Sabbatino held that the issue of who was the rightful claimant was a "political question," as its resolution would result in ideological and political clashes between nations which must be resolved by the other branches of government.⁹⁹

2. *The Dissenting Opinion: Reshaping Sabbatino*—The four dissenting Justices, led by Mr. Justice Brennan, began with the premise that *Sabbatino* remained sound and controlled the present case.¹⁰⁰ In this light, Mr. Justice Brennan specifically rejected the *Bernstein* exception to the act of state doctrine because "[t]o find room for the *Bernstein* exception in *Sabbatino* does more than disservice to precedent . . . [and] would only be to bring the rule of law both here at home and in the relations of nations into disrespect."¹⁰¹

In supporting the holding in *Sabbatino*, Mr. Justice Brennan redefined and added a new perspective to the act of state doctrine. He interpreted *Sabbatino* as holding that "the validity of a foreign act of state in certain circumstances is a 'political question' not cognizable in our courts."¹⁰² Considering the act of state doctrine as a species of the "political question" rule, he went on to point out the factors of *First National City Bank* that suggested the existence of a "political question":

[1] the possible impairment of the executive's conduct of foreign affairs; [2] the absence of consensus as to the applicable international rules;¹⁰³ [3] the unavailability of standards from a treaty or other agreement; [4] the existence and recognition of the Cuban Government; [5] the sensitivity of the issues to national concerns; and [6] the power of the executive alone to effect a fair remedy for all United States citizens who have been harmed.¹⁰⁴

In determining the existence of a "political question," Mr. Justice Brennan further noted that the executive branch "however extensive its powers

99. *Id.* at 1815.

100. *Id.* at 1818. The dissent regarded *Sabbatino* as both valid and controlling; Finally, Mr. Justice Powell acknowledges that *Sabbatino*, not *National City Bank* controls this case, but, nonetheless, votes to remand on the ground that *Sabbatino* was wrongly decided. In my view, nothing has intervened in the eight years since that decision to put its authority in question.

Id.

101. *Id.* at 1824-25.

102. *Id.* at 1823.

103. The dissenting Justices accepted the premise that the determination of whether international law applies to the case is a relevant factor in assessing the existence of a "political question." The Justices, however, had the same difficulty as the *Sabbatino* Court in accepting that customary international law, if proven to exist, is valid and should be applied. *Id.* at 1822-26.

104. *Id.* at 1823.

in the area of foreign affairs, cannot by simple stipulation, change a political question into a cognizable claim."¹⁰⁵ The representations of the State Department should be given weight in assessing the presence of a "political question," but they should not be the sole determinative factor. Mr. Justice Brennan stressed that it was the function of the courts to define "the contours of a political question such as the act of state doctrine."¹⁰⁶

3. *Observations*—The Court's decision creates a very strange anomaly. On the one hand the appellate court's decision, which refused to recognize the *Bernstein* exception, is reversed, but on the other hand six members of the Court emphatically reject *Bernstein*. Mr. Justice Rehnquist's opinion for the Court certainly cannot be seen as setting any firm precedent or as providing the court of appeals with any compelling reason for altering its earlier decision.

It is the dissenting opinion that must be given the major weight in *First National City Bank*. *Bernstein* is clearly rejected, and *Sabbatino* is redefined. The act of state doctrine is to be equated with the concept of the "political question" as set forth in *Baker v. Carr*.¹⁰⁷ Mr. Justice Douglas concurred in this view, and Mr. Justice Powell's emphasis on the "balancing of interests" appears to be nothing more than the "political question" concept. The task facing the appellate court on remand is basically to determine whether in the present case a "political question" exists.

The assimilation of the act of state doctrine under the "political question" concept is the first step toward a more rational and flexible approach

105. *Id.* at 1824.

106. *Id.*

107. 369 U.S. 186 (1962). Noting that "appropriateness under our system of government of attributing finality to the action of the political departments" and "the lack of satisfactory criteria for a judicial determination" are dominant considerations underlying the determination of a political question, the Court explained its role in making such a delicate determination:

The nonjusticiability of a political question is primarily a function of the separation of powers. . . . 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 as ultimate interpreter of the Constitution. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.

Id. at 210-11. The Court then set out the bases for the political question doctrine: Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. . . . Unless one of these formulations is extractable . . . there should be no dismissal for non-justiciability on the ground of a political question's presence.

Id. at 217.

to the justiciability of acts of state. It is, however, unfortunate that the dissenting Justices chose to sustain the remnants of the act of state doctrine by fitting it within a more respectable legal concept. Undoubtedly, equating the act of state doctrine with the "political question" rule will create many ambiguities.¹⁰⁸ The sounder course would have been to have abandoned all vestiges of the act of state doctrine as a legal technique and to embrace completely the "political question" rule as the applicable legal concept in *First National City Bank*.

V. CONCLUDING COMMENTS: THE ACT OF STATE DOCTRINE AS A FIFTH WHEEL

Accepting the premise of the Supreme Court in *Sabbatino*,¹⁰⁹ it becomes clear that the act of state doctrine is neither necessary nor desirable. If the doctrine is meant as a judicial technique of self-restraint to maintain a certain distribution of governmental functions between the judiciary and the executive, then the doctrine is nothing more than an offshoot of the "political question" rule extended to foreign affairs.¹¹⁰ The only addition made by the act of state doctrine to the flexible and relational criteria of the "political question" rule as set out in *Baker v. Carr* is a large degree of distortion.¹¹¹

Under *Baker v. Carr*, however, not every act of state would be a "political question" (as the dissenting Justices in *First National City Bank* seem to imply). If questioning the validity of an act of a foreign government would either irreparably impair the governmental processes or unduly embarrass the executive, then the real issue is not judicial examination of the

108. For example, the act of state doctrine simply goes to the justiciability of the act in question and not the case itself. Additionally, the political question concept is far more flexible and has not been tainted with the host of ambiguities that burden the act of state doctrine.

109. Refer to text at note 45 *supra*.

110. *But see* Metzger, *The Act of State Doctrine and Foreign Relations*, 23 U. PA. L. REV. 881, 889 (1962). Noting the analogy between the act of state doctrine and the political question concept, Metzger favored the retention of the act of state doctrine: [T]here is a striking analogy between the Act of State doctrine and the "political" question as we know it in domestic law. . . . But even were this latter aspect less clear, the continued need for the doctrine for foreign relations reasons is apparent in an era when the security and well-being of the people of the United States requires delicate international political judgment and action in order to secure these objectives.

Id. The analogy between the act of state doctrine and the political question concept is found as far back as 1918. Comment, *The Act of State Doctrine Applied to Acts of Mexican Revolutionists*, 27 YALE L.J. 812, 813-14 (1918). For further consideration of the relationship of the political question to the area of foreign affairs refer to Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451 (1956); Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168, 168-69 (1946).

111. Refer to note 107 *supra*.

act of state, but only whether under the "political question" rule the court should entertain the case or controversy at all.¹¹² Once the court, however, does decide to hear the case, then the question should be treated purely as a legal one, with no difference of treatment being shown to foreign judgments or to foreign legislative and executive acts. The court should be able to look into the validity of the foreign act both in terms of its extraterritorial effect and the quality of the act itself, as measured against some minimum standards of fairness in the act's execution and application.¹¹³ Should the act in question purport to have extraterritorial effect in the forum state or district, then the forum court should decide after a thorough interest analysis whether to accept the act as valid as applied to the parties before it.¹¹⁴

If a minimum concept of fairness is precluded by the act, or if the act is adverse to the public policy of the forum, then the court should not be compelled to uphold the act. If the act violates international law, the court should be allowed to carry out its obligation to apply and enforce international law, whether such international law is positive or customary. In all cases it should be left entirely to the court to determine whether the case should be entertained, without either legislative or executive interference.¹¹⁵

Through its very history, the act of state doctrine must be seen both as a very pretentious term, as its name implies, and as a distorted, rigid, and uncritical judicial technique of dealing with what are essentially flexible considerations. Today the doctrine adds very little except confusion to what a straightforward application of the "political question" rule would achieve. To abandon the torturous act of state doctrine in favor of the "political question" rule would be a far more workable and equitable approach to the whole problem of foreign acts of states. Continuing use of the act of state doctrine can only heighten the distortions already brought out over the years in judicial decisions. The doctrine as such is but a worn and unworkable technique—truly a fifth wheel in the rules of conflicts of laws.

112. See Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 519-38 (1966); Tollett, *Political Questions and the Law*, 42 U. DET. L.J. 439, 449-59 (1965).

113. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971). The Restatement's approach to the act of state doctrine itself is neutral.

114. Once the court entertains a case involving an act of state, the act should then be treated according to accepted conflicts principles. Refer to F. SCOLES & R. WEINTRAUB, CONFLICT OF LAWS 210-75 (1967).

115. This premise is the core of the *Sabbatino* decision. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). Refer to text at note 50 *supra*.