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Act of State Doctrine: First National City Bank v. Banco Nacional de Cuba [406 U.S. 759 (1972)]

It seems unlikely that it occurred to Chief Justice Fuller when he first gave clear expression to the act of state doctrine in *Underhill v. Hernandez*¹ that his text would be almost as productive of exegesis as the most perplexing verse from ancient scripture. However, commencing in earnest with the *Sabbatino*² case, the courts and commentators—not to mention the legislators³—have provided an uninterrupted flow of explanation, criticism and justification of the doctrine.

Perhaps the analysis of the policy and rationale underlying this rule of judicial abstention reached a new stage, and an even greater degree of disparity than heretofore, in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 92 S.Ct. 1808 (1972) (discussed, at an earlier stage in the proceedings, in 5 THE INTERNATIONAL LAWYER 180 (1971)).

The latest decision of the United States Supreme Court in this case reversed, by a 5-4 vote, the decision of the Court of Appeals for the Second Circuit, which had applied the act-of-state doctrine, to preclude consideration of First National City Bank's counterclaim against Cuba, despite a communication from the Department of State indicating the view that the doctrine should not be so applied. The Supreme Court majority arrived at the reversal by three different routes and in three separate opinions by, respectively, Justice Rehnquist (joined by Chief Justice Burger and Justice White), Justice Douglas and Justice Powell.

The dissenting Justices (Brennan, Stewart, Marshall and Blackmun)

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¹168 U.S. 250, 252: "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."

²*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

³The so-called Hickenlooper or Rule of Law Amendment to the Foreign Assistance Act of 1964 [78 Stat. 1013, *as amended*, 22 U.S.C. § 2370(e)(2)] had the effect of overruling by legislative mandate the Supreme Court's *Sabbatino* decision.

joined in the conclusion that the courts of the United States should not attempt to determine the legality, under international law, of Cuba's confiscation of First National City Bank's Cuban properties, stressing the belief that there are differing views in the world today, as to the legal standards that govern the expropriation of foreign property by a sovereign state.

The facts and previous holdings of the case were concisely stated in Justice Rehnquist's opinion as follows:

In July 1958, petitioner [First National City Bank] loaned the sum of \$15 million to a predecessor of respondent [Banco Nacional de Cuba]. The loan was secured by a pledge of United States Government bonds. The loan was renewed the following year, and in 1960 \$5 million was repaid, the \$10 million balance was renewed for one year, and collateral equal to the value of the portion repaid was released by petitioner.

Meanwhile, on January 1, 1959, the Castro government came to power in Cuba. On September 16, 1960, the Cuban militia, allegedly pursuant to decrees of the Castro government, seized all of the branches of petitioner located in Cuba. A week later the bank retaliated by selling the collateral securing the loan, and applying the proceeds of the sale to repayment of the principal and unpaid interest. Petitioner concedes that an excess of at least \$1.8 million over and above principal and unpaid interest was realized from the sale of the collateral. Respondent sued petitioner in the Federal District Court to recover this excess, and petitioner, by way of set-off and counterclaim asserted the right to recover damages as a result of the expropriation of its property in Cuba.

The District Court recognized that our decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), holding that generally the courts of one nation will not sit in judgment on the acts of another nation within its own territory would bar the assertion of the counterclaim, but it further held that congressional enactments since the decision in *Sabbatino* had 'for all practical purposes' overruled that case. Following summary judgment in favor of the petitioner in the District Court on all issues except the amount by which the proceeds of the sale of collateral exceeded the amount which could properly be applied to the loan by petitioner, the parties stipulated that in any event this difference was less than the damages which petitioner could prove in support of its expropriation claim if that claim were allowed. Petitioner then waived any recovery on its counterclaim over and above the amount recoverable by respondent on its complaint, and the District Court then rendered judgment dismissing respondent's complaint on the merits.

On appeal, the Court of Appeals for the Second Circuit held that the congressional enactments relied upon by the District Court did not govern this case, and that our decision in *Sabbatino* barred the assertion of petitioner's counterclaim. We granted certiorari and vacated the judgment of the Court of Appeals for consideration of the views of the Department of State which had been furnished to us following the filing of the petition for certiorari. 400 U.S. 1019, 91 S.Ct. 581, 27 L.Ed.2d 630 (1971). Upon reconsideration, the Court of Appeals by a divided vote adhered to its earlier decision. We again granted certiorari, *First National City Bank v. Banco Nacional de Cuba*, 404 U.S. 820, 92 S.Ct. 79, 30 L.Ed.2d 48. (92 S.Ct. at 1810)

The key element distinguishing this case from *Sabbatino* was the posture adopted by the Department of State, whose position in *Sabbatino* had been somewhat ambiguous. The Rehnquist opinion continues:

In the case now before us, the Executive Branch has taken a quite different position. The Legal Adviser of the Department of State advised this 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 legal issues raised by the act of a foreign sovereign within its own territory, as it would any other legal question before it. His letter refers to the decision of the Court below in *Bernstein v. N.V.Nederlandsche Amerikaansche, etc.*, 210 F.2d 375 (CA 2 1954), as representing a judicial recognition of such a principle, and suggests that the applicability of the principle was not limited to the *Bernstein* case. The Legal Adviser's letter then goes on to state:

"The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set off against the government of Cuba in this or like cases."

The question which we must now decide is whether the so-called *Bernstein* exception to the act of state doctrine should be recognized in the context of the facts before the Court. (92 S. Ct. at 1811-12)

The issue thus posed was whether the judiciary's self-imposed restraint in litigation involving foreign acts of state is lifted by an expression from the Executive Department of the view that foreign policy considerations do not require judicial abstention in a given case or class of cases. The answer depends in large part upon the correct interpretation of the conceptual underpinning of the act of state doctrine and its logical consequences.

Justice Rehnquist's opinion states the basis of the doctrine as follows:

We think that the examination of the foregoing cases indicates that this Court has recognized the primacy of the Executive in the conduct of foreign relations quite as emphatically as it has recognized the act of state doctrine. The Court in *Sabbatino* throughout its opinion emphasized the lead role of the executive in foreign policy, particularly in seeking redress for American nationals who had been the victims of foreign expropriation, and concluded that any exception to the act of state doctrine based on a mere silence or neutrality on the part of the executive might well lead to a conflict between the executive and judicial branches. Here, however, the Executive Branch has expressly stated that an inflexible application of the act of state doctrine by this Court would not serve the interests of American foreign policy.

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 ceases' (BLACK'S LAW DICTIONARY, p. 288). (92 S. Ct. at 1813).

Justice Brennan's dissenting opinion takes the view that the act of state doctrine is more than a mere deference by the courts to the plenary power of the Executive Branch in the area of foreign affairs similar, for example, to the rule of deference to the Executive on the question of sovereign immunity. In concluding, apparently upon the basis of uncertainty as to the international law regarding expropriation, that the issues presented in the instant case were political in character and not cognizable by the courts, the dissenting opinion states in part:

Sabbatino itself explained why in these circumstances the representation of the Executive in favor of removing the act of state bar cannot be followed: "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." *Id.*, at 436, 84 S. Ct. at 944. Should the Court of Appeals on remand uphold the Cuban expropriation in this case, the Government would not only be embarrassed but find its extensive efforts to secure the property of United States citizens abroad seriously compromised.

Nor can it be argued that this risk is insubstantial because the substantive law controlling petitioner's claims is clear. The Court in *Sabbatino* observed that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." *Id.*, at 428, 84 S. Ct., at 940. And this observation, if anything, has more force in this case than in *Sabbatino*, since respondent argues with some substance that the Cuban nationalization of petitioner's properties, unlike the expropriation at issue in *Sabbatino*, was not discriminatory against United States citizens.

Thus, the assumption that the Legal Adviser's letter removes the possibility of interference with the Executive in the conduct of foreign affairs is plainly mistaken.

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That, however, is not the crux of my disagreement with my colleagues who would uphold the '*Bernstein*' exception. My Brother REHNQUIST'S opinion asserts that the act of state doctrine is designed primarily, and perhaps even entirely, to avoid embarrassment to the political branch. Even a cursory reading of *Sabbatino*, this Court's most recent and most exhaustive treatment of the act of state doctrine, belies this contention. Writing for a majority of eight in *Sabbatino*, Mr. Justice Harlan laid bare the foundations of the doctrine as follows, *id.*, at 427-428, 84 S. Ct., at 940:

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

justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justifications for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case for the political interest of this country may, as a result, be measurably altered."

In short, *Sabbatino* held that the validity of a foreign act of state in certain circumstances is a 'political question' not cognizable in our courts. Only one—and not necessarily the most important—of those circumstances concerned the possible impairment of the Executive's conduct of foreign affairs. Even if this factor were absent in this case because of the Legal Adviser's statement of position, it would hardly follow that the act of state doctrine should not foreclose judicial review of the expropriation of petitioner's properties. To the contrary, the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed all point toward the existence of a "political question". The Legal Adviser's letter does not purport to affect these considerations at all. In any event, when coupled with the possible consequences to the conduct of our foreign relations explored above, these considerations compel application of the act of state doctrine, notwithstanding the Legal Adviser's suggestion to the contrary. The Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim. (93 S.Ct. at 1823–24)

Going further, the dissenting opinion expresses the view that the "'*Bernstein*' approach is calculated only to undermine regard for international law". (92 S. Ct. at 1826).

Reverting to the opinions of the majority of the Court, Justice Douglas concurred in the reversal of the Circuit Court of Appeals but did so strictly on the strength of *National City Bank v. Republic of China*, 348, U.S. 356 (1955) in which the Court held that a claim by a sovereign in the courts of the United States may be reduced by a counter-claim or set off. The opinion in that case includes the familiar "We have a foreign government invoking our law but resisting a claim against it which fairly will curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." (348 U.S. at 365) Thus, in Justice Douglas' view, the question is simply one of fair dealing.

Justice Powell's concurring opinion states that, although he is attracted by the justness of the result reached by Justice Douglas, he does not find *National City Bank v. Republic of China* to be dispositive since the Court there dealt specifically with a question of jurisdiction over the parties and not with the justiciability of the claim against the sovereign. Justice Powell

then proceeds to express reservations with respect to the sweeping articulation of the act of state doctrine in *Sabbatino*:

I nevertheless concur in the judgment of the Court because I believe that the broad holding of *Sabbatino* was not compelled by the principles, as expressed therein, which underly the act of state doctrine. As Mr. Justice Harlan stated in *Sabbatino*, the act of state doctrine is not dictated either by "international law [or] the Constitution," but is based on a judgment as to "the proper distribution of functions between the judicial and the political branches of the Government on matters bearing upon foreign affairs." 376 U.S., at 427-428, 84 S. Ct., at 940. Moreover, as noted in *Sabbatino*, there was no intention of "laying down or reaffirming an inflexible and all-encompassing rule. . . ." *Id.*, at 428, 84 S. Ct., at 940. (92 S. Ct. at 1816)

Having refused to accept the Rehnquist opinion's substantial deference to the Executive and the Brennan opinion's substantial renunciation of the judicial power, the Powell opinion concludes with an interpretation of the act of state doctrine and the responsibilities of the courts in respect of international adjudications that at least commends itself to common sense:

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. I do not agree, however, that balancing the functions of the judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary's responsibility to persons who seek to resolve their grievances by the judicial process.

Nor do I think the doctrine of separation of powers dictates such an abdication. To so argue is to assume that there is no such thing as international law but only international political disputes that can be resolved only by the exercise of power. Admittedly, international legal disputes are not as separable from politics as are domestic legal disputes, but I am not prepared to say that international law may never be determined and applied by the judiciary where there has been an "act of state." Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law. There is less hope for progress in this long neglected area if the resolution of all disputes involving "an act of state" is relegated to political rather than judicial processes.

Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to hear cases such as this. This view is not inconsistent with the basic notion of the act of state doctrine which requires a balancing of the roles of the judiciary and the political branches. When it is shown that a conflict in those roles exists, I believe that the judiciary should defer because, as the Court suggested in *Sabbatino*, the resolution of one dispute by the judiciary may be outweighed by the potential resolution of multiple disputes by the political branches.

In this case where no such conflict has been shown, I think the courts have a duty to determine and apply the applicable international law. I therefore join in the Court's decision to remand the case for further proceedings. (92 S. Ct. at 1816-17)

* * *

The dissenting opinion's argument that the adjudication by United States municipal courts of disputes involving actions taken by foreign governments would "undermine regard for international law" displays an unwonted diffidence that does not seem to be universally shared by the courts of other nations. The dissenting opinion likewise states (92 S. Ct. at 1824) that "blind adherence" by the Court to the Executive's suggestions that foreign acts of state be reviewed "politicizes the Judiciary" and that the "'Bernstein' exception, nevertheless, assigns the task of advocacy to the Judiciary by calling for a judgment where consensus on controlling legal principles is absent." (*Id.*).

One wonders whether the common law could have evolved if preexisting "consensus" had been considered a prerequisite to the decision of cases, and it is submitted that even in the civil law jurisdictions the courts are reluctant to abdicate their function on the ground that the problem at hand is not covered by the codes.

Because of the divergence of the views expressed by various members of the Court in this case, the act-of-state issues seem to be more clearly drawn than previously. Whether the views of the majority will, in the long run, prevail, or whether the reluctance of the dissenting justices to enunciate international legal principles will finally win out may well determine whether progress, even of a halting nature, is to be made in the establishment of a meaningful and effective system of international law.