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Act of State and Sovereign Immunity: A Further Inquiry

CHRISTINE G. COOPER*

INTRODUCTION

The act of state doctrine and the sovereign immunity doctrine have caused considerable comment, controversy, and confusion in recent years, both in and outside the courtroom. Although courts have been called upon to consider the doctrines together, commentators have seldom done so. Yet the act of state doctrine and the

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2. One writer commented on both in Recent Developments, Doctrines of Sovereign Immunity and Act of State — Conflicting Consequences of State Department Intervention, 25 Vand. L. Rev. 167 (1972) [hereinafter cited as Conflicting Consequences of State Dep’t Intervention]. Of course there are many others, particularly if one includes those who incidentally consider the doctrines concurrently. Textbooks may or may not handle the doctrines together. See, e.g., W. FRIEDMANN, O. LISSITZYN, & R. PUGH, INTERNATIONAL LAW: CASES AND MATERIALS 100-52, 642-98 (1969) [hereinafter cited as FRIEDMANN, LISSITZYN, & PUGH], in which act of state is considered illustrative of the relationship between national and international law while sovereign immunity is discussed under the topic "jurisdictional immunities"; H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT 637-728 (1976) [hereinafter cited as STEINER & VAGTS], in which the authors treat both doctrines in the context of "Local Courts and Foreign Sovereignty." As to courts handling both doctrines in the same cases, see notes 55 and 56 infra. See also Timberg, Sover-
doctrine of sovereign immunity are strikingly similar in principle and in purpose. Briefly, "act of state" refers to the principle that the courts of one nation will not judge the validity of the acts of a foreign government committed within that foreign government's territory. Transnationally, sovereign immunity means that no sovereign will be subject to suit without its consent.

This article will trace the history of the cases in which both doctrines are rooted. The effect of differing rationales behind the two doctrines upon these decisions will be explored and the allocation of power among the three branches of United States government and its influence upon sovereign immunity and act of state will be considered. Finally, the article will discuss the tension between the concept of sovereignty and the concept of international law as it relates to the doctrine of sovereign immunity and act of state.

The Schooner Exchange

The earliest case in the United States involving the doctrine of sovereign immunity on an international level was The Schooner Exchange v. McFadden. This litigation provides a fascinating in-
roduction to the recurring themes contained in the doctrines of sovereign immunity and act of state. McFadden and Greetham filed a libel against The Exchange, a ship which the two men claimed they owned, but which had been taken from them on the high seas under Napoleon's orders. At the time of the lawsuit, the ship was in the port of Philadelphia.

The executive department filed a suggestion that the case be dismissed because (1) the ship had acted in conformity with international law in its conduct in the harbor, and (2) it was subject to the jurisdiction of France, not to that of the United States. The attorneys from the executive department argued that an assertion of jurisdiction by the Court would be tantamount to a "judicial declaration of war," as well as a judicial usurpation of executive and legislative functions.

The attorney for the libellant attempted to distinguish the private acts of a sovereign from the public acts of a sovereign, the latter being acknowledged by both sides as immune. Libellant's attorney further argued that sovereignty is purely local and cannot be exercised extraterritorially, so that Napoleon could not make any claims on a ship outside his territory. The Court agreed that territorial jurisdiction is an attribute of the sovereign, but found as a corollary of this principle that a foreign sovereign cannot be the object of jurisdiction of the domestic sovereign. The Court fur-
ther noted that *The Exchange*, as a public armed ship, was part of a foreign military force, "under the immediate and direct command of the sovereign." The armed ship was thus assimilated to the concept of territory; to attack the ship would be to attack the sovereign.

The arguments before the Court pointed to treaties on international law, but greatest stress was placed on the domestic analogues to sovereign immunity. Indeed, the Court placed primary reliance for its decision on domestic law, although it made allusions to international law. The issue, as framed by the Court, was "whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States." The Court held that the ship was not subject to the jurisdiction of the United States and dismissed the case.

Implicit in the Court's reasoning was reliance upon the nature of sovereignty: sovereigns are inherently equal; for one sovereign to attempt to assert jurisdiction over another would be an affront to the dignity of the sovereign. Comity among nations requires the

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15. *Id.* at 144.
16. A further argument presented by the libellant, but one without precedential authority, was that the sovereign of the foreign government is liable to his nationals for unlawful seizures, so it should likewise be liable to the United States citizens for unlawful seizures. To hold otherwise, continued the argument, would be to sacrifice individual rights to respect for a sovereign, "[y]our government not redressing their wrongs, but giving a sanction to their spoiliators." *Id.* at 128. The libellant then cited cases affirming the right of a court to examine the legality of this kind of act, but the argument did not prevail. *Id.* at 129. The cases cited by the libellant do not appear to be apposite to his argument. Interestingly, some of those cases contain incipient notions of the distinctions between public acts and commercial acts. See Hudson v. Guestier, 10 U.S. (6 Cranch) 281 (1810); Rose v. Himley, 8 U.S. (4 Cranch) 241 (1808); Glass v. The Sloop Betsy, 3 U.S. (3 Dall.) 6 (1794).
17. The libellant cited, *inter alia*, the treatises of Bynkershoek and Martins. This choice of scholars brought a scornful protest from his adversary, "[T]his case should not be decided upon the authority of the slovenly treatise of Bynkershoek, or the ravings of that sciolist Martins, but upon the broad principles of national law, and national independence." 11 U.S. at 135.
18. *Id.* at 136.
19. *Id.* at 135.
20. The Court stated:

[T]he Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms of which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise [from the American sovereign], that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

*Id.* at 147.
21. For a similar case in the British courts, see the Parlement Belge 5 P.D. 197 (Court of
doctrine of sovereign immunity. Thus, in this very early case the Court dealt with notions of sovereignty and the concepts flowing therefrom. First, the relations among sovereigns involves ideas of (a) comity, friendly relations, fairness, and dominance of the sovereign over its subjects, (b) territorial independence of sovereigns, and (c) some of the commercial activities performed by the sovereign being outside its sovereign character. 22 Second, the conduct of the American sovereign, being governed by the Constitutional principle of separation of powers requires that the political branches handle foreign affairs. The aspect of separation of powers subsumes the role and significance of suggestions made to the Court by the political branches of the government.

The Schooner Exchange also treated the tensions between international law and domestic law. The Court made allusions to, but did not rely on, international law. As will be discussed infra, domestic law continues to assert its own priority as a decisional basis in sovereign immunity and act of state cases.

Litigation involving either the act of state doctrine or the doctrine of sovereign immunity commonly involves a foreign confiscation or expropriation. This is true today and was forecast in the 1800’s: but for the fact that The Schooner Exchange involved a taking on the high seas, the case could have presented a question of act of state. It is in the arena of foreign confiscations that the strength of the doctrines’ unifying principles is most clearly discerned.

SOVEREIGNTY

Some basic explanation of sovereignty will be necessary as a point d’appui to this entire article. A sovereign is one who rules; the sovereign is a dominant, authoritative, public character. It has

22. These ideas could only be but rudimentary at a time when nations did not engage in purely commercial activities. However, governments did engage in business dealings; in such instances, they were not immune from suit. Mr. Chief Justice Marshall recognized that commercial activities were not the business of the sovereign qua sovereign:

It is, we think a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

dominion over a defined territory.\textsuperscript{23} It has the power to marshall forces — be they military, economic, political, whatever — against another sovereign, or hierarchically subordinate group.

The rationale supporting jurisdictional immunities\textsuperscript{24} is the maxim \textit{par in partem habet imperium}: an equal has no power over an equal.\textsuperscript{25} But, like "all men," sovereigns are equal in only one respect: before the law. Legal principles and rules are to be applied to all sovereigns equally.\textsuperscript{26} At the same time, sovereigns are acknowledged as differing in power.\textsuperscript{27} Politically then, sovereigns are unequal; legally, however, potentates must be treated alike. They are treated equally by the courts, not by other sovereigns. Thus, the doctrines of act of state and sovereign immunity affect the ways in which sovereigns interrelate.

In \textit{Banco Nacional de Cuba v. Sabbatino}\textsuperscript{28} Justice Harlan denied that the vitality of the act of state doctrine owed anything to notions of sovereign authority. However, when it is realized that the concept of sovereign authority includes the way in which this authority is exercised by a particular country, it can be seen that

\begin{itemize}
  \item \textsuperscript{23} Notice the similarity to the definition of a state: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." Convention on Rights and Duties of States, Dec. 26, 1933, arts. 1 & 2. 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19. 
  \item \textsuperscript{24} At this point, the term "jurisdictional immunities" is used rather loosely. It is employed by many scholars to encompass both sovereign immunity and act of state. \textit{See}, e.g., Lauterpacht, \textit{The Problem of Jurisdictional Immunities of Foreign States}, 28 BRIT. YRBK. INT'L L. 220 (1951) [hereinafter cited as Lauterpacht]; Dinstein, supra note 4, at 407. However, courts have been known to assert that act of state does not present a jurisdictional issue; instead the issue is one of justiciability. \textit{See}, e.g., First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773-74 (1972) (concurring opinion).
  \item \textsuperscript{25} Dinstein, supra note 4, at 407. According to Dinstein, this adage dates at least to the 12th century, when it was a principle of canon law that referred to the rule that successor popes had no authority over their predecessors. The term was given its "secular legal meaning" in the early 13th century by the Bologna Glossators, but it was not until the 14th century that the proverb was applied to concurrent, rather than only successive, sovereigns. \textit{Id.} at 408-09. \textit{Contra} Lowenfeld, \textit{Claims Against Foreign States—A Proposal for Reform of United States Law}, 44 N.Y.U.L. Rev. 901, n.85 (1969), wherein the maxim is simply attributed to Bartolus. Dinstein argues that the maxim does not provide a basis for jurisdictional immunities: "Subjection (to jurisdiction) and immunity alike (as long as they apply to all States on a reciprocal basis) are in keeping with the concept of 'sovereignty' . . . ." Dinstein, supra note 4, at 419.
  \item \textsuperscript{26} \textit{See} Schwarzenberger, \textit{Sovereignty: Ideology and Reality}, 4 YRBK. OF INT'L AFFAIRS 1 (1950) [hereinafter cited as Schwarzenberger].
  \item \textsuperscript{27} \textit{Id.}
  \item \textsuperscript{28} 376 U.S. 398, 421 (1964).
\end{itemize}
Harlan misstated the point. How the United States conducts itself in foreign affairs — the internal allocation of that power — is indeed an aspect of sovereign authority. The exercise of sovereign authority calls upon — perhaps compels — the doctrines of act of state and sovereign immunity just as strongly today as in the time of The Schooner Exchange.

Sovereign Immunity

In the Schooner Exchange, Chief Justice Marshall noted that each sovereign possesses “full and absolute territorial jurisdiction.” This attribute is consonant with the quality of sovereigns and with peaceful relations among nations. Without respect for this territorial independence, the dignity of the sovereign is offended and the result may well be war, as sovereigns vie for territory. Likewise, if one sovereign could sue another without the latter’s consent, the solemn dignity of the sovereign would be offended. The courts frequently voice this concern in granting sovereign immunity. It is not for the courts to make war; that function belongs to the political branches.

Because the concept of the character of the sovereign has changed, the doctrine of sovereign immunity has been shaded accordingly. The idea of the divine right of the sovereign has been

29. 11 U.S. at 137.
30. It is often said that in the United States it is the people who are sovereign. See, e.g., Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6, 13 (1794), where the attorney for the libellant noted that in European parlance the term “sovereign” included the executive, the judiciary, and the legislature; but in the United States, the term refers to the power vested in the people, who have entrusted sovereignty to the three branches of government. See also J. Brierly, The Law of Nations 14 (6th ed. 1963) [hereinafter cited as Brierly]. Locke and Rousseau posited that it is the people who are sovereign. In The Schooner Exchange, however, Chief Justice Marshall spoke of the sovereign in individual terms. Perhaps this was simply more convenient than distinguishing between sovereignty and the responsibilities delegated to the sovereign; perhaps the reason was that Justice Marshall was dealing with Napoleon. Furthermore, Chief Justice Marshall spoke of the immunity of foreign ministers and diplomatic immunity; against that background, it is easy to see why Marshall did not discuss the distinctions raised in the Sloop Betsey.
31. But see Ex Parte Republic of Peru, 318 U.S. 578, 602 (1943). Justice Frankfurter, in his dissenting opinion, found that there could be no affront to the dignity of a sovereign by denying sovereign immunity, since the courts have great authority. Because of the legitimacy of the judicial action, there can be no affront to the foreign sovereign. See also Din-stein, supra note 4, at 407. Nonetheless, courts are still concerned with offending the foreign sovereign, as well as fearful of embarrassing the executive (the domestic sovereign) in its conduct of foreign relations. See, e.g., National City Bank v. Republic of China, 348 U.S. 356, 361 (1955).
32. See Lauterpacht, supra note 24.
abandoned for centuries.\textsuperscript{33} The transformation relevant to the modification of the doctrine of sovereign immunity concerns the participation of governments in commercial activities and the rise of state trading agencies. This fact of twentieth century life has caused the abandonment of the absolute theory of sovereign immunity in favor of a restrictive theory, which has been codified by the Foreign Sovereign Immunities Act of 1976.\textsuperscript{34} The absolute theory of sovereign immunity asserts that a sovereign cannot be sued without its consent, while the restrictive theory limits application of the doctrine to instances in which the sovereign was acting in its public capacity.

Although the Tate Letter was the first formal executive adoption of the restrictive theory of sovereign immunity, courts have long recognized the distinction to be made between private and public acts of a sovereign.\textsuperscript{35} And while The Schooner Exchange suggested a distinction to be made between commercial acts and public acts, during that time merchant ships were not owned by governments. The question of whether a government-owned merchant ship should be entitled to sovereign immunity was first presented in 1925. In granting immunity in the case of Berizzi Bros. Co. v. S.S. Pesaro,\textsuperscript{36} Justice Van Devanter relied on the principles announced in The Schooner Exchange:

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.\textsuperscript{37}

\begin{footnotes}
\item[33] In an earlier day, the sovereign personified the state and could do no wrong. Dinstein, \textit{supra} note 4, at 410.
\item[34] 28 U.S.C. §§ 1602-11 (1976) [hereinafter cited as Immunities Act].
\item[35] The attorney for Berizzi cited dozens of cases in support of his argument that such distinctions have been made "from the earliest times." Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 563 (1926). Although The Schooner Exchange suggested a distinction to be made between commercial acts and public acts, during that time merchant ships were not owned by governments.
\item[36] 271 U.S. 562 (1926).
\item[37] \textit{Id.} at 574. Van Devanter did recognize that The Schooner Exchange did not specifically deal with the question of government-owned merchant ships because at that time governments did not own merchant ships. \textit{Id.} at 573. For the proposition that a government-
This reasoning was followed in *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*. The Supreme Court concluded that a vessel in the possession and service of a friendly government is a public vessel, even though it is carrying merchandise for hire. Then in 1940, the Appellate Division of the New York Supreme Court distinguished between acts of a private nature and acts of a public nature, ruling that a state-owned corporation could be granted immunity only if it were operated for governmental or public purposes.

In 1952, the restrictive theory of sovereign immunity was given executive approval in what has become known as the Tate Letter. This doctrine accords immunity to a sovereign only when it is acting in a public capacity. The reasons for this shift in U.S. policy were stated as: (1) the trend in other countries toward the restrictive theory of sovereign immunity; (2) principles of reciprocity — since the United States did not claim immunity in foreign courts in contract or tort, the U.S. should deny immunity to foreign sovereigns in similar instances; (3) the erosion of sovereign immunity in domestic courts; (4) the need of individuals who enter commercial undertakings with a government for a forum for resolution of disputes; and (5) "[t]he reasons which obviously motivate state trading countries in adhering to the [absolute] theory with perhaps increasing rigidity are most persuasive that the United States should [adopt the restrictive theory] . . . . "

owned ship that was not a war ship was nonetheless engaged in a public purpose, the Court cited *Briggs v. Light Boats*, 11 Allen 157. *Id.* at 574. In that early case, the United States had acquired boats which were used to provide light to aid navigation. This function was considered by that Court to be a public purpose: although the vessels were not instruments of war, they were instruments of sovereignty. Note the implication that the earlier cases emphasized war as a public purpose.

38. 303 U.S. 68 (1938).

39. *Id.* at 74. Because there was no suggestion made by the executive on the question of sovereign immunity, the Court required proof that the vessel was in the possession of the Spanish government. *Id.* at 76. See the discussion of executive suggestions in text accompanying notes 66-92 infra.


41. Letter of Acting Legal Advisor, Jack B. Tate, to Dep't of Justice, May 19, 1952, in 26 DEP'T STATE BULL. 984 (1952) [hereinafter cited as Tate Letter].


43. Tate Letter, *supra* note 41, at 984-85. Number five hints at an attempt by the American government to impose a kind of economic and political sanction on Communist countries. The State Department placed great emphasis on the practices of other nations, as
Subsequently, the courts attempted to derive the principles upon which the Tate Letter was based. In *Victory Transport, Inc. v. Comisaria General,* the court catalogued those acts that should be considered public, with the qualification that the list could be changed by the executive department. The list of public acts and the qualifications consisted of: (1) internal administrative acts, such as expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic immunity; and (5) public loans . . . . The court believed that individual litigants should not have to sacrifice their interests to notions of comity in any but these limited areas. The *Victory Transport* classifications were followed in some cases and criticized in others.

In *Amkor Corp. v. Bank of Korea* the State Department elaborated on its own Tate standards. The refusal to grant immunity involved an action against the Bank of Korea for breach of con-

evidenced by court decisions, and placed some importance on the views of scholars. Was the Acting Legal Adviser trying to sort out international law, or was he merely concerned with principles of reciprocity or, more baldly, politics? According to Article 38 of the Statute of the International Court of Justice, the sources of international law are:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

44. 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).
45. Id. at 360. The court stated: "Should diplomacy require enlargement of these categories, the State Department can file a suggestion of immunity with the court. Should diplomacy require contraction of these categories, the State Department can issue a new or clarifying policy pronouncement." Id.
46. Id. The court apparently indicated that the individual should be subordinate to the sovereign only when the sovereign acts in a sovereign capacity.
47. Ocean Transport v. Ivory Coast, 269 F. Supp. 703, 705 (E.D. La. 1967), applied the *Victory Transport* standards, while Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1200 (2d Cir. 1971), found the distinctions to be "unworkable." *Isbrandtsen* accepted Lauterpacht's and Fitzmaurice's conclusions that the distinctions between *jure imperii* and *jure gestionis* are not "adequately defined." Id. at n.4. See Luterpacht, *supra* note 24, at 225-26, wherein the author vigorously opposes the doctrine of sovereign immunity in its absolute form; Fitzmaurice, *State Immunity from Proceedings in Foreign Courts,* 14 Brit. Y.B. 101, 123-24 (1933), wherein the author finds the distinctions difficult and even arbitrary. The *Isbrandtsen* court observed that a contract with a private commercial interest "does not automatically render the acts of the foreign government private and commercial." 446 F.2d at 1200. However, the court did not reach the question of whether the act was public or private; the court abided by the executive suggestion of immunity.
tract and breach of warranty of authority. The transaction concerned the sale of equipment by Amkor Corporation for use in the construction of a caustic soda plant by a Korean corporation. The State Department found that the essence of the transaction was commercial, even though the parties or the purposes were public. The State Department noted that the Tate standards emphasized the nature of the transaction rather than the identity of the parties: The ultimate goal of the transaction to serve a public purpose would be of no avail when the transaction was essentially commercial.

The Foreign Sovereign Immunities Act of 1976 recognizes that sovereign immunity does not apply to states with respect to their commercial activities. Anticipating the difficulty of determining the boundaries of public activities in socialist countries, Congress defined "commercial activity" as: "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." This definition conforms to those judicial decisions that distinguish public from commercial acts, as well as to the guidelines expressed in the Tate Letter. The statute recognized that the sovereign loses its attributes of sovereignty insofar as its commercial activities are concerned.

**Act of State**

The act of state doctrine was established in the United States by *Underhill v. Hernandez.* General Hernandez was the commander
of revolutionary forces in Venezuela. Underhill, a United States citizen, was denied exit papers by Hernandez. He was detained in Venezuela and subjected to forced labor. The United States subsequently recognized the revolutionary party as the legitimate government of Venezuela. When Underhill brought an action against Hernandez for unlawful detention, confinement, and assault, the court refused to adjudicate the claim on its merits because the actions of Hernandez constituted an act of state. Thus, the Court implied that the doctrine was compelled by the nature of sovereignty.

Two elements of the act of state doctrine are easily discernible: the doctrine relates to the public acts of a sovereign, and it re-

sovereign powers as between themselves.

Id. at 252. Note the resemblance of the Court's language to the following British case which the Court did not cite:

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 . . . .

Duke of Brunswick v. King of Hanover (1848) 2 H.L. Cas. 1. (emphasis added). In Underhill, the Court noted that the principle of the act of state doctrine could not be confined to "lawful or recognized governments" since the United States should not judge the merits of a civil war. 168 U.S. at 252-53. Query: what would the result have been if Hernandez's forces had been defeated by a competing faction? The Court indicated that the act of state doctrine would nonetheless apply: "acts of legitimate warfare cannot be made the basis of individual liability." Id. at 253. The Court thought it was answering the question posed. According to the Court, any official knowledge of the existence of a civil war may require application of the doctrine to any acts arising therefrom. Id.

53. See Brief for the United States as Amicus Curiae at 15-40, Alfred Dunhill of London, Inc., v. Republic of Cuba, No. 73-1288 (Supreme Court of the United States, filed Dec., 1975). Contra, Dinstein, supra note 4, at 412, where the author presents Kelson's view that a sovereign act "of whatever nature" is immune from the judgment of a foreign court. Dinstein himself disputes this view; claiming that it has been repudiated by many countries. However, Dinstein does not speak of the public-private distinctions used in this paper. Rather, he is concerned with proper public acts and the limitations imposed by international law. For example, he notes that Israel, in its conduct of the Eichmann trial, has rejected the view that any kind of an act by a sovereign cannot be challenged.

54. 168 U.S. at 253. See also Note, Bernstein Exception Applied to Restrict Role of Act of State Doctrine—First National City Bank v. Banco Nacional de Cuba, 14 HARV. INT'L L.J. 131, 132-33 (1973) [hereinafter cited as Bernstein Exception Restricts Act of State]; Jurisdictional Immunities, supra note 1, at 1225 n.4. When a foreign state tries to exercise its sovereignty extraterritorially, the United States courts will not apply the act of state doctrine. In Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966), Judge Friendly refused to invoke the act of state doctrine to a situation where the property was in the United States at the time the property was confiscated, for then United States federal law and policy governs. Applying the fifth and fourteenth amendments, as well as article I, the court dismissed the complaint. In that case, the State Department said it was uninterested in the litigation—it should be handled by the
pects the sovereign's right to self-government within its own territory.56

Although a Supreme Court plurality in *Dunhill v. Republic of Cuba*56 opined that a state's conduct related to its commercial endeavors is not immunized by the act of state doctrine, the question remains unsettled.57 However, such a requirement is a natural conclusion flowing from the purposes of the doctrine.58 Act of state is

courts since it involved administration of estates and rights in property found in the United States. *Id.* at 52 n.5. Accord, Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972), where the court refused to give effect to the Cuban expropriation concerning trademarks having an American situs. The court reasoned that an extraterritorial decree conflicts with a foreign country's sovereignty. Interestingly, that decision spoke of a "pragmatic view" of the act of state doctrine, *i.e.*, it is employed because the United States can effectively do little else. *Id.* at 1027. See also *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973).


57. *See generally* Brief for the United States as *Amicus Curiae* at 15-40, Alfred Dunhill of London, Inc. v. Republic of Cuba, No. 73-1288 (Supreme Court of the United States, filed Dec. 1975). Mr. Justice White has concluded that the act of state doctrine required a "governmental act in which the sovereign's interest qua sovereign is involved." Banco Nacional de Cuba v. Sabattino, 376 U.S. 398, 445 n.3. (dissenting opinion).

58. Ricaud v. American Metal Co., 246 U.S. 304 (1918)(confiscation for purposes of equipping a revolutionary army); Oetjen v. Central Leather Co., 246 U.S. 297 (1918)(seizure of property to satisfy assessment made to equip a revolutionary Mexican army); Underhill v. Hernandez, 168 U.S. 250 (1897) (denial of exit papers to Underhill and coercing him to operate waterworks for the benefit of Venezuela); Freres Societe Anonyme, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947). However, in the *Bernstein* litigations the public purpose of the acts was tainted by the gross denial of human rights that was explicit in the conveyance. Thus the purpose could not be seen as proper. Yet the court in the first *Bernstein* litigation did not consider this argument relevant. It could be questioned whether the confiscations of property belonging to Jews, seen in the *Bernstein* litigations, could be considered public acts; however, an analogy could be made to the Mexican and Venezuelan revolutionary cases.
meant to respect and protect the sovereign character, but when a sovereign performs acts that can be assumed by a private person, its actions no longer have a sovereign character or need of protection. The earlier cases decided on an act of state grounds were certainly based on public acts.\(^\text{59}\)

When the act of state doctrine is invoked, a sovereign can act within its own boundaries with impunity in foreign courts. The act may have extraterritorial effect; for example, a foreign confiscation of property may affect the rights of a non-resident who owned the property before the confiscation. Even if the property confiscated eventually makes its way into a foreign country, the foreign owner's rights have been frozen by the act of the foreign sovereign within its own territory with respect to the property that was then located in the foreign country.\(^\text{60}\) Under the act of state doctrine, it is unnecessary that the acts of the foreign government be legal under its own laws. It is merely necessary for the acts to have been committed by the foreign government.\(^\text{61}\) No court can apply any

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59. This is what happened in Ricaud v. American Metal Co., 246 U.S. 304 (1918). During the Mexican Revolution, General Pereya bought bullion from a Mexican mining company and promised to pay "on the triumph of the revolution." Pereya thereafter sold the bullion to the defendant Ricaud who sold the bullion to another. American Metal Company, who claimed to have purchased the bullion from the Mexican mining company before it was taken by General Pereya, sought to recover the bullion when it reached the United States. American could not recover; the act of state doctrine was applied. The act of the foreign government was effective as to the bullion because of the bullion's situs at the time of the act. That an American corporation claimed ownership did not affect the confiscation, nor the act of state doctrine. This territorial principle has come under attack, with its opponents proposing instead a test that requires the "predominant jurisdictional contacts" to be outside the United States, so that under conflict-of-laws principles the substantive law of the foreign state will be applied; if the predominant jurisdictional contacts are within the United States, then the substantive law of the United States will govern. See Restatement (Second) of Foreign Relations Law of the United States § 41, comment (j) (1965); Brief for the United States as Amicus Curiae at 31, Alfred Dunhill of London, Inc. v. Republic of Cuba, No. 73-1288 (Supreme Court of the United States, filed Dec. 1975).

60. In the first Bernstein litigation, 163 F.2d 246, the court was faced with the argument presented in the amicus brief of the American Jewish Congress that the taking was unlawful because it had been effected before the passage of the German laws legalizing the confiscation of property belonging to Jews. The court considered it irrelevant that a German court should have found the act unlawful had the case been presented to a German court. This principle of judicial restraint, reasoned Judge Learned Hand, is a corollary of Underhill and Oetjen. Id. at 249. Nor did the court consider it material that the rights arising under German law would be abhorrent to the moral notions of the United States. If the actions complained of had been undertaken by private individuals, then the court admitted that it would rely on conflict-of-laws principles and invalidate the taking. But because the atrocities were committed by officials, the court could not inquire into the validity of the taking.

61. Consider the ramifications of this statement to the municipal application of international law. Under this principle, it would be necessary for international law to be reinstitu-
law except that of its own government.\textsuperscript{62}

**Comparison**

It is apparent that both the doctrines of sovereign immunity and act of state originated from notions of sovereignty\textsuperscript{63} and particularly, sovereign equality. The persistence of these doctrines is less attributable to notions of simple respect for the dignity of the sovereign.\textsuperscript{64} Rather, it is the process by which the United States conducts international relations that plays the central role in the continued vitality of both doctrines, as will be discussed below. But in an earlier era, the need for friendly sovereign intercourse was well understood. It was felt that these doctrines provided a partial answer to these needs.

As the nature of governmental functions expanded to include commercial activities, the sovereign became answerable for its commercial acts. The distinctions made between public and private acts of a sovereign speak to the nature of sovereignty and to when, in effect, the sovereign sheds its sovereign cloak. When a state corporation acts as a private citizen, it cannot invoke sovereign immunity: it can no longer claim the nature of a sovereign. This is certainly so under the restrictive theory of sovereign immu-

\textsuperscript{62} Justice Harlan acknowledged that the act of state doctrine was originally based on notions of sovereign authority. However, he denied that the persistence of the doctrine owed anything to such concepts. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964).

\textsuperscript{63} The Court reasoned that since American or Chinese individuals could sue the Republic of China in Chinese courts, then there could be no affront to the dignity of the Republic for the United States to subject China to a counterclaim.
Both doctrines recognize sovereigns as being territorially independent of one another; a sovereign may act within its own territory and escape any judgment by a foreign court. The sovereign is dominant within its own land and it may not be made to answer for its acts performed in its country. A notion concomitant to the dignity and respect accorded sovereigns is the requirement of a certain amount of fair dealing among sovereigns. Traditionally, sovereigns were subject only to God. Presumably, the latter would demand fair dealing. A further property of sovereignty is that the sovereign is superordinate to his subjects. Thus, by the invocation act of state or sovereign immunity, the individual litigant is denied his day in court.

The act of state doctrine professes to favor the security of title and the predictability of international trade, whereas cases dealing with sovereign immunity seldom mention international commercial stability as a goal. However, implicit in the restrictive theory of sovereign immunity is that commercial transactions should follow


66. Justice Rehnquist, in his Citibank plurality opinion, admitted that individuals would have to forego adjudication of their controversies because of the judicially self-imposed doctrine of act of state. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 769 (1972). Justice Brennan, however, voiced concern for this result. Id. at 792 (dissenting opinion). It is, easy of course, to speak of the need for an individual's requirements to be subordinated to the needs of the greater society. This would be true if adjudication of individual claims in such cases actually did result in greater harm than not adjudicating.

67. In National City Bank v. Republic of China, 348 U.S. 356, 372 (1955), the dissenting Justices feared that to let foreign-owned assets found in the United States be subject to a counterclaim would be adverse to our mercantile interests.

68. The Sabbatino majority felt that not to invoke the act of state doctrine in that Cuban expropriation case would render titles in international commerce uncertain, as well as involve the court in the difficulties of determining who held title. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). However, Justice White disagreed with the majority that self-restraint would in any way serve that purpose, because the taking in Sabbatino was a violation of international law: "The very act of a foreign state against aliens which contravenes rules of international law, the purpose of which is to support and foster an order upon which people can rely, is at odds with the achievement of stability and predictability in international transactions." Id. at 459. As to Justice White's argument that a judicial invalidation of a taking in violation of international law is necessary to render titles secure, the Court found its role too small to be of help. Rather, measures taken by the political branches would be much more effective; such measures include foreign aid restrictions, embargo, and the freezing of assets. Id. at 435. Justice White agreed with the majority that these kinds of cases in the United States are rare, but he found no reason for the Court's ruling. The minimal effect of the decision should not affect the law.
their natural course, unhampered by restrictions based on the identity of the actor. This commercial purpose is certainly a subsidiary purpose; no widespread agreement exists as to the ability of the court to foster international commercial stability by applying the doctrines.69

Thus, it can be seen that sovereign immunity and act of state are rooted in the same policy considerations flowing from the concept of sovereignty. A sovereign is a dominant, authoritative, public character with dominion over a defined territory. It shall be respected by, and respect in return, other sovereigns. When this respect is in any way compromised, there is the threat of hostility among nations. This threat should not come from the courts. The doctrines of act of state and sovereign immunity heed this foreboding and accord the sovereign the legal respect that is due its sovereign nature. There are of course divergences in the doctrines. Act of state speaks to the concern for stability in international commercial transactions, whereas sovereign immunity shows such a concern only peripherally. The sovereign immunity cases in particular sort out the public versus the private characteristics of the governmental activity. This is understandable, since an act of state *ipso facto* is a public act.70 Perhaps the nature of the doctrines was best summarized by Justice Rehnquist: both "are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government."71 It is to the latter that we now turn.

**CONDUCT OF THE SOVEREIGN UNITED STATES: SEPARATION OF POWERS**

The continued strength of the doctrines of act of state and sovereign immunity is due to a multitude of factors that can be classified under the "separation of powers" rubric. This subject deals with the proper role of the three branches of the federal government in the areas of foreign relations. The most forceful aspect of this problem involves the significance of executive suggestion to the court; it is in this context that the internal allocation of sovereign power is defined.

Executive Influence on Sovereign Immunity

The eleventh amendment accords immunity to the several United States, but "the privileged position of a foreign state is not an explicit command of the Constitution."\(^7\) Granted, the doctrine finds a constitutional footing,\(^7\) but it is more a matter of policy than leans heavily on the distinct role of the executive in its conduct of international relations. Accordingly, prior to the adoption of the Immunities Act of 1976, the courts would defer to an executive suggestion to grant or deny sovereign immunity. These executive suggestions were often express communications to the court stating the position of the executive branch on questions of sovereign immunity. Even the absence of an express communication was seen to have significance.

In *Berizzi Bros. Co. v. S.S. Pesaro,*\(^7\) a case involving a merchant vessel owned and operated by the Italian government, the State Department refused to take a position on sovereign immunity. Although a lower court made much of this refusal in its decision to deny immunity,\(^7\) the Supreme Court ignored the refusal and instead granted immunity.\(^7\) Greater deference to executive absti-

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73. 271 U.S. 562 (1926).
74. The Pesaro, 277 F. 473, 481-83 (S.D.N.Y. 1921). Judge Mack ruled that the Pesaro, as a merchant ship, should not be immune from United States jurisdiction "especially as no exemption has been claimed for her, by reason of her sovereign or political character, through the official channels of the United States." *Id.* at 482.
75. The attorneys before the highest Court did not argue the issue of executive suggestion. 271 U.S. at 562-69. Nor did the Court discuss the significance of the absence of executive suggestion. In granting immunity, Justice Van Devanter relied on the principles announced in *The Schooner Exchange*; the Court found that the vessel was advancing a public purpose and thus should be given immunity. *Id.* at 574. This case is frequently referred to as the only case in which the Supreme Court did not follow an executive suggestion. *See, e.g., Decision of the State Dep't, supra* note 5, at 216 n.11. However, it seems that an important distinction should be made between direct executive suggestions and executive silence. It is straining the point to say that the Court declined to follow the executive suggestion when none was made.
76. 324 U.S. 30 (1945). The State Department acknowledged that the Mexican government was claiming that it was in ownership and possession of the *Baja California.* However, the State Department took no position on the claim, other than citing *Compania Espanola de Navegacion Maritima* v. The Navemar, 303 U.S. 68 (1938)(immunity denied because the foreign government did not show that the vessel was in the possession and service of the government) and Ervin v. Quintanilla, 99 F.2d 935 (5th Cir. 1938)(immunity allowed because the vessel was in the possession and service of the foreign government). This position of the State Department was stated at the District Court level, where the court denied immunity relying on the *Navemar* standards. When the Supreme Court denied immunity, it distinguished the case from *Berizzi Bros. Co. v. S.S. Pesaro,* 271 U.S. 562 (1926), where "this
nence was shown in *Republic of Mexico v. Hoffman.* There the Court found that, irrespective of the absence of an executive direction in a specific case, a grant of immunity could be made only on grounds already recognized by the State Department. If the State Department wanted to expand or contract the principles of sovereign immunity, it could do so, and the courts must abide. In *Ex parte Republic of Peru,* the Court exercised judicial restraint to prevent embarrassment to the executive in its conduct of foreign relations. Accordingly, the State Department suggestion of immunity was followed. Because of the role of the executive in the conduct of foreign relations, sovereign immunity was to be granted by the executive, with the judiciary serving only as a check.

In 1952, the State Department propounded a new policy. The Tate Letter set forth prospective standards for the granting of sovereign immunity: from that time forward, the United States Government was to adhere to the restrictive theory of sovereign immunity. According to this restrictive theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis)." The Tate Letter, however, did not delineate parame-

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77. The Court stated: "[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize." 324 U.S. at 38. This quoted portion should not be read so as to place great emphasis on "although often asked." In the instant case, the State Department was not repeatedly asked for its position. The Court is presumably referring to the long-standing policy of the State Department. For a criticism of this case, see Jessup, *Has the Supreme Court Abdicated One of Its Functions?* 40 Am. J. Int'l L. 168 (1946) [hereinafter cited as Jessup].

78. 324 U.S. at 36-37.

79. 318 U.S. 578 (1943). One interpretation of this decision is that the State Department recommendation is invoked as a decisional basis superior to that of comity. Because of the judicial duty to defer to the executive, the Court found it unnecessary to invoke the principle of comity. *Conflicting Consequences of State Dep't Intervention,* supra note 2, at 168.

80. The Court, however, did not abdicate all to the executive; it deferred to the political branch because Peru had not waived immunity. The Court purposely did not decide what would follow if the sovereign had "unqualifiedly assented" to jurisdiction and then the State Department had suggested immunity. 318 U.S. at 590.

81. See note 41 supra. The Tate Letter was a response to *Republic of Mexico v. Hoffman,* 324 U.S. 578 (1945).

82. Tate Letter, supra note 41, at 984.

83. It is realized that a shift in policy by the executive cannot control the courts but
ters for distinguishing between *jus imperii* and *jus gestionis*.

Following the Tate Letter, the courts were required to apply as well as elucidate its standards. Yet the letter left unsettled the effect of executive suggestion. Indeed, at least one court believed that a portion of the letter\(^\text{84}\) signaled a change in the previous practice of deference to the executive.\(^\text{85}\) However, the *Victory Transport* court, in distinguishing between public and private acts, added the crucial qualification that it was up to the Executive Department to modify the distinction if it saw fit. The court explained that any judicial elaboration of standards applying to the doctrine of sovereign immunity were subject to review by the executive, in that the executive could suggest immunity in any case, or inform the judicial branch of its preference for a different policy.\(^\text{86}\)

Although executive suggestion could be dispositive of the issue, many courts refused to be a mere courier of executive determination. Courts remained active in sovereign immunity cases; judicial doctrine continued to develop. In the absence of executive suggestion, the Supreme Court, in *National City Bank v. Republic of China*, found an implied waiver of immunity because the foreign government had subjected itself to United States jurisdiction by initiating the action. Relying on Tate's reluctance to grant immunity, the Court found that equitable principles required a denial of immunity. In *Ocean Transport Co. v. Ivory Coast*,\(^\text{87}\) the executive's

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\(\text{id. at 985.}\)

\(\text{84. Chemical Natural Resources v. Republic of Venezuela, 420 Pa. 134, 159, 215 A.2d 864, 876 (1966). The court held that an executive suggestion is binding on the courts only in the absence of a waiver of immunity or in the instance of consent to immunity. The existence of these facts, apparently, is to be determined by the court. Id. at 155, 215 A.2d at 869. One could conclude, from a reading of this case, that, in the absence of executive suggestion in a particular case, the courts are not bound by prior executive pronouncements; rather, the courts are free to grant or deny immunity according to their own standards.}\)

\(\text{85. 348 U.S. 356 (1955). However, the significance of the Tate standards to this case is not clear.}\)

\(\text{86. For the oft-quoted lines from the case: "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." Id. at 361-62 (citations omitted).}\)

\(\text{87. 269 F. Supp. 703 (E.D. La. 1967). This case, which involved a contract for the delivery of a fishing vessel, explains certain distinctions between immunity from jurisdiction and immunity from attachment and execution, those distinctions being generally beyond the}\)
refusal to suggest immunity was considered to be “highly persuasive” but not binding. Although the State Department found that the transaction involved was of a private rather than public nature, the court made its own, independent finding on this point; it relied on the Victory Transport standards and reached the same conclusion as did the State Department. Accordingly, immunity was denied. In Amkor Corp. v. Bank of Korea, the executive refusal to suggest immunity was considered binding on the court. And in that case, the executive was abiding by its own Tate standards.

The supremacy of the executive in the area of sovereign immunity was affirmed when the State Department retreated from its own Tate standards, a retreat which was accepted by the courts. In Rich v. Naviera Vacuba, S.A., a case that involved private acts and in which immunity had been contractually waived by the Cuban government, the State Department nonetheless suggested application of the doctrine of sovereign immunity. The State Department’s purpose was to secure performance of Cuba’s agreement to return a hijacked Eastern Airlines plane.

The court in Chemical Natural Resources, Inc. v. Republic of Venezuela acknowledged that the State Department had “silently abandoned” the restrictive theory of sovereign immunity in favor of a case-by-case determination based on foreign policy. In

scope of this paper. Ocean Transport explained that shortly after the Tate Letter was published, the State Department announced that the doctrine of absolute immunity still applied with respect to the attachment or seizure of a foreign state’s property. However, the State Department subsequently issued a letter retracting this provision and allowing for attachment in cases in which the government is not entitled to immunity from suit. The State Department noted that, without this provision, it usually would be impossible to obtain jurisdiction. Id. at 705. However, the court found it unnecessary to decide whether the Louisiana corporation could execute on Ivory Coast’s attached property. Id. at 706. The Foreign Sovereign Immunities Act, supra note 34, at § 1610(a) allows attachment and execution in cases in which the government is not entitled to immunity.

88. 298 F. Supp. 143 (S.D.N.Y. 1969). However, the court attempted to cover itself. After finding that the executive determination that the acts involved were commercial was binding on the court, Judge Bryan, ruled that “[i]n any event,” the acts were commercial and private, so sovereign immunity did not apply. Id. at 144. In other words, although the court thought that the executive determination was binding on the court, the court independently made the same finding. In considering the effect of the executive determination, the court relied on Hoffman and Victory Transport to conclude that the executive determination was binding.

89. 295 F.2d 24 (4th Cir. 1961). However, the court did not expressly base its holding on the Eastern plane exchange. Rather, it found the State Department suggestion to be absolutely binding. Id. at 26.

90. 45 DEP’T STATE BULL. 407 (1961).

Isbrandtsen Tankers, Inc. v. President of India, where the court admitted that the acts complained of might be of a private nature, the court nonetheless considered it irrelevant that India had waived immunity in its contract; the State Department had recommended immunity and it must be granted. The court followed the State Department in order to avoid embarrassing the United States in its foreign relations. A further step toward absolute judicial deference to executive suggestion was made in Spacil v. Crowe. Even where the restrictive view of sovereign immunity would preclude such a grant, the court held that an executive determination of immunity is not reviewable under the Administrative Procedure Act.

The Foreign Sovereign Immunities Act of 1976 mandated the reversal of the judicial policy of following the executive's suggestion on the granting of sovereign immunity. This bill was intended to "facilitate and depoliticize litigation against foreign states . . . [and toward that end to] entrust the resolution of questions of sovereign immunity to the judicial branch of the Government . . . ." The standards underlying the Act are based on the restrictive theory of sovereign immunity. The Act eliminates judicial deference to suggestions of immunity from the executive. Moreover, a judicial determination must incorporate standards of international law. Notwithstanding the history of executive assertion of its own priority in this field, the bill had the support of the Departments of State and Justice. The question of the applicability of sovereign immunity is now firmly in the hands of the courts.


93. 489 F.2d 614 (5th Cir. 1974). See generally Decision of the State Dep't, supra note 5; Recent Decision, The State Department's Decision to Recognize and Allow the Claim of Sovereign Immunity is Binding Upon The Courts and Is Not Subject to Review Under the Administrative Procedure Act, 4 GA. J. INT'L & COMP. L. 488 (1974).


96. Id. As to the power of Congress to enact such legislation, authority can be derived from several constitutional provisions: Congress' power to prescribe the jurisdiction of federal courts, to define offenses against the law of nations, to regulate commerce with foreign nations, and from the necessary and proper clause, U.S. CONST., art. I, § 8, cl. 9; art. III, § 2, cl. 1, cited in foreign Sovereign Immunities Act of 1975, Section-by-Section Analysis 2, attached to letter from Ingersoll, supra note 95. It must always be borne in mind that the Congress is one of the political branches of the American government.
Executive Influence on Act of State

Since the late nineteenth century, when the act of state doctrine was first announced in this country, and until recent decades the doctrine had been developed exclusively by the judiciary. The executive first became involved in the application of the act of state doctrine in the late 1940's. In 1947, the Second Circuit heard a case in which a German Jewish immigrant sought to recover certain damages as well as the insurance proceeds of a sunken ship which agents of the German government had compelled Bernstein (the immigrant) to transfer to a Nazi sympathizer. Because the alleged acts were committed by agents of the German government, the court refused to adjudicate the claim, even though the court acknowledged that the acts may have been unlawful under German law in effect at the time of the conveyance. The court considered the coerced conveyance to be an act of state. Judge Learned Hand noted, however, that the executive branch is the final authority in such matters; in fact, Judge Hand considered the "critical issue" to be whether the executive had removed the act of state barrier. Accordingly, the court questioned whether the executive had declared that the act of state doctrine should not apply. Finding no

97. As early as Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918), the Court recognized that foreign relations were to be handled exclusively by the executive and legislative branches. In Oetjen, recognition of a foreign sovereign, which operated retroactively, was found to be for executive determination only. Thus the seed was planted for the Bernstein Exception. See also Delson, The Act of State Doctrine—Judicial Deference or Abstention? 66 Am. J. Int'l L. 82, 83 (1972). Justice Rehnquist cited Oetjen for a similar proposition.

98. See Conflicting Consequences of State Dep't Intervention, supra note 2, at 172.

99. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947). Jurisdiction was based on a writ of attachment on the proceeds of the insurance policy held on the ship, the proceeds being in New York. The defendant in the action was a Belgian corporation, which was the transferee from the Nazi agent who had forced the ship from Bernstein.

100. Id. at 250.

101. Id. The court second-guessed the executive silence as resting on its concern for reparations and the peace treaty. Since the defendant had acted in reliance on the validity of the Nazi taking, the defendant would have a claim against the Reich if he lost in this action. This claim would figure in the reparations. The court did note that an institution was envisaged but not yet devised to effect restitution in similar cases.

Bernstein had argued that since the victorious powers had repealed Hitler's laws, then they should not be considered still viable. Id. The argument did not prevail. The repeals were given only prospective effect. The court also rejected the argument that the Charter and the Judgment on which the Nuremberg Trial was based should require civil as well as
such declaration, the court applied the act of state doctrine and refused to rule on the claim.

In a related proceeding, involving different ships and defendants, but still involving the plaintiff Bernstein, the court in a per curiam opinion recognized what has come to be known as the Bernstein Exception. This exception resulted in a reversal of policy, which was prompted by a communication from the State Department. In a letter to the attorneys for the plaintiff, the State Department set forth its opinion that the courts should not be constrained by the act of state doctrine in determining the validity of Nazi confiscations. The court referred to the executive proposal as a "supervening expression of Executive Policy." In later developments, executive policy continued to be superordinate to judicial standards.

Perhaps the two most important cases for considering the complementary roles of the three branches of the federal government in cases involving act of state are Banco Nacional de Cuba v. Sabbatino and First National City Bank v. Banco Nacional de Cuba. Although these opinions struggle with the issue of the proper roles of the executive, legislative, and judicial branches, and while it is difficult to find uniformity in the reasonings of these cases, the opinions are the most significant rulings to date on the status of act of state.

*criminal sanctions. Id. at 252. In his dissent, Justice Clark argued that the American prosecutor at Nuremberg could surely be seen as representing the wishes of the executive. Id. at 255.
103. Letter of Acting Legal Adviser, Jack B. Tate, to the Attorney for the Plaintiff, April 13, 1949, in 210 F.2d at 376.
104. The reasons behind the executive policy were expressed in the letter:
This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or people subject to their control. 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 the 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.
105. 210 F.2d at 376.
1. *Banco Nacional de Cuba v. Sabbatino*\(^\text{108}\)

The *Sabbatino* case arose out of the Cuban nationalization of the assets of C.A.V., a subsidiary of a corporation organized under Cuban law but principally owned by American nationals. The nationalization, in 1960, was pursuant to a Cuban decree that was enacted to retaliate against the United States’ reduction of Cuba’s sugar quota. The Cuban law provided for the forced expropriation of properties owned by nationals of the United States. A system was established for compensation, but the promise of compensation was patently illusory. Prior to the expropriation, Farr, Whitlock, an American commodity broker, had contracted with C.A.V. to buy sugar. After the nationalization had been effected, Farr, Whitlock contracted with Banco Exterior, a Cuban bank and governmental instrumentality; this latter contract was necessary so that Farr, Whitlock could get permission for the ship that was holding the sugar to leave the Cuban port. Subsequently, Banco Exterior assigned the contract to Banco Nacional de Cuba, also an instrumentality of the Cuban government. The shareholders of C.A.V. brought an action under a New York statute providing for a court-appointed receiver in cases of nationalized corporations. Sabbatino was appointed the receiver. Then C.A.V. and Farr, Whitlock entered into an agreement whereby C.A.V. agreed to indemnify Farr, Whitlock for any losses, and Farr, Whitlock agreed not to turn over any funds to Banco Nacional or its New York agent, Societe Generale. Farr, Whitlock got possession of the sugar, sold the sugar to its customers, and received payments from its customers. These payments were turned over to Sabbatino to await judicial determination of their disposition. Banco National brought an action in federal district court against Farr, Whitlock for conversion and sought an injunction against Sabbatino’s exercise of dominion over the funds in his hands.

The court in the Southern District of New York refused to enforce the Cuban expropriation decrees because the taking, being retaliatory, discriminatory, and without adequate compensation, violated international law.\(^\text{109}\) While appeal was pending, the State Department sent two letters to the attorney for *amici* in which the State Department refused to comment on the case, feeling instead


\(^{109}\) 376 U.S. at 420 n.19. The Legal Adviser also noted that State Department comments are easily misconstrued, so it may be best to remain silent. See also Brief for the United States in Banco Nacional de Cuba v. Sabbatio in 2 Int'l Leg. Mat'ls. 1009 (1963).
that the issue was for judicial determination. The district court judgment was affirmed by Judge Waterman writing for the Second Circuit. After explaining the rationale of the act of state doctrine, Judge Waterman found that the doctrine did not apply to the case. The court declined to resolve the "difficult question" of whether failure to pay adequate compensation for taken property is, in all events, a breach of international responsibility. Rather, the court narrowed the issue and focused upon the retaliatory nature of the seizure against a particular class of aliens. The court held that in this factual context a violation of international law had occurred.

The Supreme Court granted certiorari because the issue in the case could influence not only the United States' conduct in foreign relations, but also the role of the judicial branch in this area. In view of the principles underlying the act of state doctrine — respect for the international allocation of power among the three branches of the federal government — the court applied that doctrine and thus upheld the Cuban expropriation.

111. Judge Waterman interpreted the executive communication as indicating that the act of state bar should be lifted. The second time the case was before Waterman, he recognized his error. Banco Nacional de Cuba v. Farr, 383 F.2d 166, 171 n.4 (2d Cir. 1967). But by then, that error became irrelevant because of the application of the Hickenlooper Amendment to the case.
112. The issue as framed by the court was: Is it a violation of international law for a country to fail to pay adequate compensation for the property it seizes from a particular class of aliens, when the purpose for the seizure of the property is to retaliate against the homeland of those aliens and when the result of such seizure is to discriminate against them only. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 864 (2d Cir. 1962).
113. The court relied on a time delay between the nationalization aimed at Americans and one aimed at Cubans as indicating discriminatory intent. Id. at 867.
115. The court stated: [W]e decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law. Id. at 428. The case was remanded for proceedings consistent with the opinion.
Congress, enraged by this ruling which appeared contrary to American interests, quickly enacted the Sabbatino Amendment, also known as the Hickenlooper Amendment.\footnote{The Act sets forth certain standards of international law. See text accompanying note 179 infra.} This amendment directs the courts to ignore the act of state doctrine if the act complained of is violative of international law,\footnote{The Amendment states that act of state be applied if “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.” 78 Stat. 1012-13, as amended, 22 U.S.C. § 2370(e)(2)(1970).} unless the President directs otherwise.\footnote{Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965). The name of Farr was substituted for Sabbatino’s because Sabbatino was discharged as receiver. The Sabbatino remand appears to be the only instance of application of the Hickenlooper Amendment.} The amendment thus reversed the presumption of nonjusticiability on act of state grounds in uncompensated property cases. The new presumption is that the act of expropriation is justiciable unless the President directs that an adjudication would interfere with United States foreign policy.

On remand, the federal district court found that the Hickenlooper Amendment applied to the case.\footnote{272 F. Supp. 836 (S.D.N.Y. 1965) (memo.). The court felt bound by the first Court of Appeals decision: “The Court of Appeals has already determined that absent the bar of the act of state doctrine the Cuban decree in this case on which plaintiff’s claim is founded violated international law, that plaintiff’s title, therefore, is invalid, and that defendants are entitled to judgment dismissing the complaint.” Id. at 838.} Following a communication by the executive that it would remain silent in the case, i.e., not invoke the exception contained in the amendment, the court ruled that the Cuban decree violated international law and the Banco Nacional’s title was therefore invalid.\footnote{383 F.2d at 183.} On appeal the Second Circuit found no reason to change its earlier ruling and reaffirmed that discussion.\footnote{376 U.S. at 423. This stand was reiterated by Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 974-77 (S.D.N.Y. 1965). Because this area involves problems “uniquely federal” in nature, the Court emphasized: “an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.” 376 U.S. at 425. The Court noted that Erie R.R. v. Tompkins, 304 U.S. 64 (1938), did not have act of state considerations in mind. Relying on the writings of Jessup, the Sabbatino majority concluded that international law requires uniformity, and that uniformity can be achieved federally, but not through the states. But, since the Court refused to apply international law in this case, did they not slip when they spoke of the uniformity requirement of international law? Would it not have been better for them to speak of international relations? They could have found that international relations, to flow smoothly and with some predictability, require that there be a uniform national voice.} A taking that is retaliatory, discrimina-
tory, and without adequate compensation is a violation of international law and will not be given effect by United States courts, so long as the Hickenlooper Amendment could be made applicable to the case.

2. The Supreme Court Analysis in Sabbatino

The Supreme Court in *Sabbatino* refused to acknowledge that the Constitution compelled the act of state doctrine. Yet the Court, in reaching the conclusion that the act of state doctrine should be determined by federal rather than state law, found that the doctrine did have "'constitutional' underpinnings... [arising] out of the basic relationship between branches of government in a system of separation of powers."123 According to the court, the purpose of the act of state doctrine was to reflect an appropriate delegation of functions between the judicial and political branches on foreign affairs matters.124 Thus, the court used the constitutional underpinnings of the act of state doctrine to support delegation of appropriate functions to the executive branch.

The *Sabbatino* Court, while finding it unnecessary to pass on the validity of the Bernstein Exception,125 did refuse to construct a rule requiring the executive to suggest application of the act of state doctrine in cases involving violations of international law; i.e., courts could apply act of state even when the executive did not suggest it. This refusal was not based on a belief that the executive had no such power, but rather it was based on a sensitivity to the way in which the executive conducts its business. The Court believed that the executive often would not want to take a public stand; the role of secrecy in foreign relations and negotiations with foreign governments would make such an "unwarranted" extension

123. 376 U.S. at 427-28.
125. However, Justice White, in his dissent, vouched for a procedure whereby the State Department would make a determination as to whether the acts in each case should be reviewed by the courts; but even then, the executive suggestion would be highly persuasive but not binding. 376 U.S. at 462, 468. Justice White would respect an executive declaration that for the courts to adjudicate would interfere with its conduct of foreign relations. He would then, if the act appeared to violate international law, dismiss the proceedings or stay litigation until the executive bar is lifted. But as in this case, absent such an executive determination, Justice White wanted no presumption that the courts should not consider a case according to international law.
of the Bernstein Exception impracticable.\textsuperscript{126}

The majority did not want to rule on the merits because if the judiciary disagreed with the executive as to whether or not the takings were invalid, this could constitute a serious interference with the executive role. If the Court were to fashion a rule of international law, it was feared that the rule would interfere with the unique position of the executive in the development of international law.\textsuperscript{127}

In contrast to the majority, Justice White in his dissent emphasized the limits to the executive reach in foreign affairs. Foreign affairs are exclusively the domain of the executive only when "there are no available standards or . . . [the issues] are textually committed by the Constitution to the executive."\textsuperscript{128} Justice White believed that the case should be decided on its merits by the Court. He reasoned that the Constitution gave the courts power to decide controversies between aliens, citizens, and states. Accordingly, the Court should decide the case and in so doing, apply international law. Justice White wondered why the majority spoke of embarrassment to the executive when in this case it should be seen as embarrassing to the executive that the Court did not invalidate what the executive saw as invalid. The result of the Court's abstention was to render the Cuban taking valid. Justice White further noted in this case there was no possibility of further harm to United States-Cuban relations from Court action. There were no formal diplomatic relations between the two countries as it was, and the State Department had notified Cuba that it considered the taking a violation of international law.

The majority countered that a judicial resolution would in general affect our relations with all expropriating nations.\textsuperscript{129} Appar-

\textsuperscript{126} The court stated:

When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns. . . . [T]he possibility of conflict between the Judicial and Executive Branches could hardly be avoided.

\textsuperscript{127} Id. at 432-33.

\textsuperscript{128} Id. at 461. The Court seems to be mixing the concepts of international relations and international law. Does the Court believe that international relations are to be handled by the executive, or that international law is to be developed by the executive, or some combination of both?

\textsuperscript{129} Id. at 432. That invalidation would offend the taker acknowledges sovereignty.

\textsuperscript{129} 406 U.S. 759 (1972).
ently, then, an \textit{ad hoc} determination by the executive on the validity of a taking is within the executive role, but a reasoned determination by the courts is not within the judicial function.


The \textit{Citibank} case involved a loan by First National City Bank (Citibank) to the predecessor of Banco Nacional that was secured by a pledge of United States Government bonds. After Castro's rise to power, Citibank's branches in Cuba were seized. Citibank retaliated by selling Cuba's collateral and recovering almost two million dollars in excess of the amount Cuba owed Citibank on account of the loan. Banco Nacional then sued the American bank to recover that excess. Citibank asserted by way of set-off and counterclaim its right to recover out of that excess its losses incurred from the expropriation. In a plurality opinion, the Supreme Court held that Citibank could litigate the counterclaim on the merits.

4. \textit{The Supreme Court's Analysis in Citibank}

The Supreme Court distinguished this case from \textit{Sabbatino} in two respects. First, the Hickenlooper Amendment did not apply to this case because the expropriated property remained in Cuba.\footnote{Id. The Legal Adviser wrote: \begin{quote} 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 setoff 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. \end{quote}} Second, in \textit{Sabbatino} the State Department remained silent, whereas in \textit{Citibank} the executive asked that the act of state bar be lifted and that the courts decide the case on its merits.\footnote{Banco Nacional de Cuba v. First Nat'l City Bank, 442 F.2d 530, 537 (2d Cir. 1971). The complete text of Stevenson's letter is found at 536-38.} Thus, the State Department urged an extension of the Bernstein Exception so that upon executive suggestion, the act of state doctrine should not preclude consideration of defendant's counterclaim.
against the Government of Cuba. Rehnquist, in his plurality opinion, found that the Bernstein Exception should apply to the case because the act of state doctrine exists primarily to prevent embarrassment to the executive in its conduct of foreign affairs. If the executive states that there will be no embarrassment or interference, then there is no reason to apply act of state. Justice Rehnquist insisted that his holding did not constitute an “abdic- tion of the judicial function to the Executive Branch,” inasmuch as the courts are free to decide these kinds of cases once the act of state bar is lifted.

In Justice Douglas’ concurring opinion, he disfavored the extension of the Bernstein Exception contemplated by Rehnquist because, with such an extension, “the Court becomes a mere errand boy for the Executive Branch which may choose to pick some people’s chestnuts from the fire, but not others.” Justice Douglas cited with approval Delson’s analysis of the purpose of the act of state doctrine, which “is not to effect unquestioning judicial deference to the Executive, but to achieve a result under which diplomatic rather than judicial channels are used in the disposition of controversies between sovereigns.” Under the extension of the Bernstein Exception, however, it is judicial channels rather than diplomatic channels that are used to resolve controversies between sovereigns. For the executive to throw the controversy to the courts serves to confuse the proper allocation of functions within our national government.

In a separate concurring opinion Justice Powell set forth his conclusion that Sabbatino implicitly rejected any extension of the

133. 406 U.S. at 765. Rehnquist jumped from comity to embarrassment.
134. Justice Rehnquist stated:
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 application of 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.

406 U.S. at 767-68.
135. Id. at 768.
136. Id. at 773.
138. 406 U.S. at 773. See also Metzger, supra note 124.
Bernstein Exception.\(^{139}\) Separation of powers mandates that the courts make an independent determination concerning justiciability.\(^{140}\) Rather, the balancing of functions and interests required by the doctrine requires the courts to examine the facts of each case, including the position of the political branches of the government.\(^{141}\) But Powell conceded that the courts should defer to the executive, “if hearing the case would interfere with delicate foreign relations conducted by the political branches.” When a conflict in the roles of the judicial and political branches is evident, the courts should defer because “the resolution of one dispute by the judiciary may be outweighed by the potential resolution of multiple disputes by the political branches.”\(^{142}\) But without such evidence, the courts have the duty to apply the applicable international law.\(^{143}\)

Is a Political Question At Issue?

Justice Brennan took exception to the Citibank majority’s reasoning concerning a potential conflict between the judiciary and executive. According to Justice Brennan, such conflict can occur only when the political branch is interested in the outcome of a case. Only then is there the possibility of embarrassment to the ex-

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139. 406 U.S. at 773. In the passages referred to, Justice Powell is confusing jurisdiction and justiciability. However, he immediately corrects himself and notes the distinction between jurisdiction and justiciability. Id. at 773-74. It is possible that Justice Powell is setting up a dichotomy based on whose direction is followed: if the executive tells the courts what to do, it is a question of jurisdiction; if the courts act independently, the question then is one of justiciability.

140. Id. at 774-75. “I do not agree . . . 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.” Id. Justice Powell strictly confines the State Department position of removing the act of state bar from “this or like cases” to cases involving the validity of an expropriation under principles of customary international law.

141. Id. at 775-76.

142. Id. at 776. Justice Powell is moving from the role of the executive in international affairs to the application of international law by the courts. Once it is determined that the executive will not be confined by a judicial determination, the courts may apply international law. In other words, international law is subordinate to national interests.

It must be emphasized, as was done in the dissent, that only three Justices in Citibank agreed to an expansion of the Bernstein Exception. Id. at 777. Justices Brennan, Stewart, Marshall, and Blackmun expressly rejected the extension of the Bernstein Exception, as did Justices Powell and Douglas in their concurring opinions. The dissenting opinion called attention to the fact that the Bernstein Exception can and should have but limited application. Before the Citibank case, the Bernstein type of letter had been issued only in the Bernstein case. Id. at n.1.

143. Id. at 783-84 n.7.
executive because of the judicial determination. And in those cases, 
the act of state bar should not be lifted by the executive; to pre-
vent executive embarrassment, the courts must exercise self-re-
straint. Justice Brennan noted that the political branch had clearly 
taken a position in this case: the Legal Adviser believed that 
American corporations were entitled to counterclaim for the value 
of their expropriated property, and the United States had pro-
tested the takings to the Cuban government and had broken diplo-
matic relations with Cuba. Because the executive had a view, for 
the courts to act could constitute interference with a political 
branch of the government. Brennan listed the circumstances in 
the case that pointed to a political question. According to the 
Justice, the task of determining the parameters of a political ques-
tion falls exclusively with the court, not the executive. Thus, ac-
ceptance of the executive dictate to adjudicate would contravene 
separation of power policies.

Like the Sabbatino majority, the Citibank dissenters acknowl-
edged the legitimacy of the executive taking the role of an advoca-
te in the development of international law. The Court should not 
be transformed into an advocate, yet that would happen if it ac-
cepted the preferences of the executive department and adjudi-
cated "where consensus on controlling legal principles is 
absent."

On the appeal from the Sabbatino remand, Banco Nacional con-
tended that the court should consider the issue to be a political 
question within the standards of Baker v. Carr on non-jus-

144. Id. at 785.
145. These circumstances were:
   [P]ossible impairment of the Executive’s conduct of foreign affairs, . . . 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 Gov-
ernment, 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. . . .
   Id. at 788.

   The dissenters then stated that: “the Executive Branch . . . cannot by simple stipulation 
change a political question into a cognizable claim.” Id. at 788-89. Nonetheless, Justice 
Brennan found some redeeming value in the State Department pronouncements “for the 
light they shed on the permutation and combination of factors underlying the act of state 
doctrine.” Id. at 790. But he would not give them conclusive weight.
147. Id. at 791.
148. 383 F.2d 166, 180 (1967).
ticiability, since no manageable standards exist in international law respecting compensation on expropriation. The court, however, asserted that no political question was presented, pointing out that the lack of standards made the issue for the Sabbatino Court politically sensitive, considering the functions of the executive in foreign relations. But in the instant case the lack of standards did not render the issue a political question and therefore non-justiciable. The court retained the ability to "resolve the international law issue if it felt itself called upon to do so," as it was by then because of the Hickenlooper Amendment. According to this view, the act of state doctrine does not present the question of justiciability. The doctrine is rather a policy of self-imposed judicial restraint based on sensitivity to separation of powers.

**Jurisdictional or Justiciable?**

A persistent question in act of state cases is whether the doctrine renders the courts impotent or, whether by that doctrine the courts exercise power. In *Ricaud v. American Metal Co.*, the Court implied that to invoke the act of state doctrine is to exercise a judicial power: in the court's opinion, "To accept a ruling authority [i.e., the laws or acts of a foreign government], and to decide

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149. Recalling the *Sabbatino* decision, the court explained:

The Supreme Court addressed itself not so much to the actual difficulty of reaching a determination upon the merits as it did to a weighing of the political effect of its making the determination it could have made in light of the divided views of different authorities as to the relevant international law standards. . . . This language cannot be taken as an indication that the Court felt it was dealing with a non-justiciable political question; the Court specifically stated that its result was not constitutionally required, and indicated that the result was reached through the utilization of an abstention policy grounded upon the exercise of judicial discretion.

*Id.*

150. *Id.*

151. Before the case was decided in the Southern District of New York, the Justice Department took the position that the Hickenlooper Amendment did not apply to the case, since the case was pending when the legislation was passed. 243 F. Supp. at 962. Bryan, J. withheld judgment for sixty days to await any executive suggestion that might be forthcoming, since he believed that one of the purposes of the Hickenlooper Amendment was to allow the executive to be heard. *Id.* at 981. That the executive had made no suggestion in this case was not sufficient, because of the erroneous view of the State Department as to the applicability of the Hickenlooper Amendment. The court wanted to be sure that that erroneous view had not influenced the executive silence. Following a communication that the executive would remain silent, the court applied international law to the Cuban decree, and found it invalid.

152. 246 U.S. 304, 309 (1918).

153. *Id.* at 309.
accordingly is not a surrender of jurisdiction but an exercise of it."154

The act of state doctrine is not commonly considered to involve questions of jurisdiction.155 Rather, the question is one of justiciability and who has the power to decide whether or not an issue is justiciable. Occasionally, however, the concepts are somewhat confused. For example, Justice Powell stated in his concurring Citibank opinion156 "I would be uncomfortable with a doctrine [extending the Bernstein Exception to all act of state cases] which would require the judiciary to receive the Executive's permission before invoking its jurisdiction."157 But then Justice Powell went on to explain the distinctions between jurisdiction and justiciability: jurisdiction "concerns the court's power over the parties," while justiciability "concerns the appropriateness of the subject matter for judicial resolution."158

In speaking for the plurality in Citibank, Justice Rehnquist considered the act of state doctrine to be an exception to the rule that the United States courts will decide cases according to appropriate rules.159 Justice Rehnquist apparently did not believe that the act of state doctrine constitutes a rule of law which the courts may choose to apply. The act of state doctrine, coupled with the Bernstein Exception, then becomes not a rule of law but a tool of executive manipulation. In the same opinion, however, Justice Rehnquist stated that the Court has jurisdiction in the case, but can choose not to decide the case.160

The Sabbatino majority spoke around the issue of justiciability.

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154. See, e.g., First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773-74 (1971) (concurring opinion); Brief for Laylin et al as amici curiae at 6, Alfred Dunhill of London, Inc. v. Republic of Cuba, No. 73-1288 (Supreme Court of the United States, motion to file and proposed brief submitted Jan. 6, 1976); STEINER & VAGTS, supra note 2, at 672-73. Sovereign immunity can be characterized not only as a question of jurisdiction but also as an affirmative defense whereby the court is required to relinquish jurisdiction. Chemical Natural Resources v. Republic of Venezuela, 420 Pa. 134, 143, 215 A.2d 864, 867-68 (1966).

155. 406 U.S. at 773.

156. Id.

157. Id. at 774. In Banco Nacional de Cuba v. Farr the court found that the exception contained in the Hickenlooper Amendment giving the President the power to ask the courts to apply the act of state doctrine did not "oust the court of jurisdiction." 243 F. Supp. at 976.

158. 406 U.S. at 763.

159. Id. at 768.

160. 376 U.S. at 428. The Court noted parenthetically that the use of the Bernstein Exception in the Bernstein case made sense since the Nazi government was no longer in existence. There could be no embarrassment to our foreign relations in such a situation.
It admitted that cases could be presented where it would be appropriate for the courts to apply international law to judge a foreign act. Such cases, however, must involve agreed-upon principles of international law. Moreover, if these cases were important to United States foreign policy considerations, they would be handled by the executive branch.\textsuperscript{161}

\textit{Characterization As Sovereign Immunity vs. Act of State.}

The determination of the status of a foreign government in our courts is no longer the prerogative of the executive. The Sovereign Immunities Act of 1976 requires the court to adjudicate claims of sovereign immunity. Insofar as acts of a commercial nature are concerned, a state cannot successfully claim sovereign immunity; where the act is public, the doctrine applies. However, if the acts are public, the issue may well be one of act of state. Then, under the extension of the Bernstein Exception, the executive could lift the act of state bar so that, effectively, immunity would be denied. The public acts of a foreign sovereign could be scrutinized by American courts. Of course, this would require that the court characterize the issue as one of the act of state and not sovereign immunity. Because of the confusion surrounding the distinctions between act of state and sovereign immunity,\textsuperscript{162} the executive could press for the characterization of the issue as one of act of state. Then, it is not unlikely that the court could be persuaded to apply the Bernstein Exception. Consequently, notwithstanding the Foreign Sovereign Immunities Act of 1976, the executive’s role in foreign affairs still reaches into the American courts.

\textbf{INTERNATIONAL LAW}

The tension between the concept of sovereignty and the concept of international law is instinct in the doctrines of sovereign immu-

\begin{itemize}
\item \textsuperscript{161} See, in particular, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).
\item \textsuperscript{162} U.N. CHARTER art. 2, para. 1: “The Organization is based on the principle of the sovereign equality of all its Members.”

Further, the Convention on Rights and Duties of States, Dec. 26, 1933, art. 4, 49 Stat. 3097 (1935), T.S. No. 881, 165 L.N.T.S. 19 reads:

States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.

\end{itemize}
... and act of state. According to the traditional view, sovereigns are equal and subject to no greater authority.\(^{163}\) At the same time contemporary international law asserts that its own character is or must become that of a supra-national authority.\(^{164}\) Thus, it places limits on sovereign behavior. However, serious doubts arise whether sovereigns will relinquish their sovereignty to a body of supra-national law when that law conflicts with prominent national interests.\(^{165}\) Regardless of one's view as to the legitimacy of inter-

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163. BRIERLY, supra note 30, at 101. It is particularly interesting that the doctrine of equality of sovereigns or states is a principle of international law.

164. See, e.g., Friedmann, The Role of International Law in the Conduct of International Affairs, 20 Int'l J. 158 (1965) in FRIEDMANN, LISITZYN, & PUGH, supra note 2, at 14, in which the author provides examples of the supremacy of national policies over international law. The author, however, maintains that "the meaning of 'national interest' " now encompasses the interests of the international community: "'Co-operate or perish' is a stark fact, not an evangelistic aspiration. . . ." Id. at 17. It is nonetheless clear that not all nations view their national interests in that light. See also 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW xii (M.C. Bassiouni & V. Nanda eds. 1973) [hereinafter cited as Bassiouni & Nanda]. Bassiouni and Nanda discuss the obstacles to the effective establishment of an international criminal law, but their observations are pertinent to the nature of public international law in general. The major problems are "the adamant refusal of nation-states to surrender or share their power with an international organization. . . [and] the apparent impossibility of nation-states to agree on common goals. . . ." Id. See also Schwarzenberger, supra note 26.

165. Of course there are those who dismiss the idea of international law as hopelessly theoretical. In response to those who question the legitimacy of international law because they think it has no sanctions, Brierly retorts that international law does have sanctions, i.e., means for securing its observance, but the sanctions, not being centralized, "are precarious in their operation." BRIERLY, supra note 30, at 101-02. Those who accept the existence of international law generally fall into two camps. According to the monist view, "law" is a discrete, unitary entity, and international law occupies a higher strata than does municipal law. The dualist perspective, on the other hand, maintains that international law and national law constitute two separate and distinct systems. See, e.g., McDougal, The Impact of International Law Upon National Law: A Policy-Oriented Perspective, 4 S. Dak. L. Rev. 25 (1959), in Steiner & Vagts, supra note 2, at 635; Sinha, The Position of the Individual in an International Criminal Law, in Bassiouni & Nanda, supra note 164, at 122, 130.

For an anthropological attempt at understanding international law, see Bohannan, The Differing Realms of the Law, 67 (6 pt.2) AMERICAN ANTHROPOLOGIST (Special Publication: The Ethnography of Law) 33 (1965). Bohannan posits that "it is the essence of 'law' to present a double institutionalization of norms." Id. at 37. The norms of a society or community must be reinstitutionalized within a legal institution to constitute law. In his view, law need not be associated with an unicentric power system. International law, representing a multicentric and multicultural system, can be effective only in its compatibility with the cultural norms of the world community. He notes that international law requires not mere double institutionalization but treble institutionalization: "once at the level of custom, once at the level of the legal institutions of states, and again at the level of bicentric, bicultural 'international' accord." Id. at 41. (The statement makes better sense if "multi-" is substituted for "bi-.") This version of international law seems to stand somewhere between the monist and dualist views of international law. In discussing the definition of international law and questioning its existence, perhaps it is worthwhile to consider Bohannan's lesson:
national law qua law, the relationship of sovereignty and international law is put to the test in the doctrines of sovereign immunity and act of state. It will be seen that international law scores poorly.

American courts have felt generally competent to apply international law. Canons of construction require that a domestic law be interpreted as consistent with international law. But if there is appropriate domestic legislation that conflicts with customary international law, the latter takes a back seat.

According to Lauterpacht, the theory of absolute sovereign immunity is not a part of customary international law. However, the restrictive theory of absolute immunity may form a part of international law. The question is quite academic since the doctrine of sovereign immunity is entrenched in United States law. The Immunities Act of 1976 refers to international law, without citation for the proposition that foreign states cannot claim juris-

"The most sophisticated scholars . . . have been driven to realize that, in relation to a noetic unity like law, which is not represented by anything except man's ideas about it, definition can mean no more than a set of mnemonics to remind the reader what has been talked about." *Id.* at 33. Functional explanations are more useful than mere definition.

166. *The Paquete Habana*, 175 U.S. 677, 700 (1900), provides some authority: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

167. "If a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a court in the United States will interpret it in a manner that is consistent with international law." *Restatement (Second) of Foreign Relations Law of the United States* § 3(3) (1965).

168. Most countries will apply customary international law unless there is conflicting and controlling municipal law. *Friedmann, Lisitzyn, & Pugh*, supra note 2, at 104 n.2. Since there is no treaty or convention to which the United States is a party that concerns act of state, it is unnecessary to deal with the rule of Missouri v. Holland, 252 U.S. 416 (1920), that a treaty can overrule a prior federal statute, and the variations on that theme. But note the regional convention on sovereign immunity, *The European Convention on State Immunity*, n 11 *Int'l Lec. Mat'l* 470 (1972). *See also Competence of Courts in Regard to Foreign States*, 26 (Supp.) *Am. J. Int'l L*. 451 (1932).

169. *See Lauterpacht, supra note 24.*

170. *See R. Falk, The Role of Domestic Courts in the International Legal Order* 166 (1964) [hereinafter cited as *Falk*].

171. Immunities Act, *supra* note 34, at § 1602. The Immunities Act even contains a Hickenlooper analogue, denying immunity where property in the United States was expropriated contrary to international law. However, there is an important qualification to this provision: it pertains only to commercial activities. *Id.* at § 1605(a)(3). Some courts will interpret international law in the sovereign immunities context. *See IAM v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979).
dictional immunity with respect to their commercial activities.\textsuperscript{172} The courts draw on doctrine as part of domestic law and are generally oblivious to the possibility that sovereign immunity is required by international law. The same could be said for the act of state doctrine. The \textit{Sabbatino} majority emphatically proclaimed that the act of state doctrine is not a principle of international law: it is grounded neither in state practice\textsuperscript{178} nor in the rules followed by international tribunals. And even if the doctrine were a principle of international law, it would be irrelevant, since the doctrine could not be enforced effectively by domestic courts: an American court could not compel compliance within a foreign country.\textsuperscript{174}

When the \textit{Sabbatino} Court considered the competence of the Court to apply international law, it attached particular significance to the lack of consensus in the world community concerning the responsibility of states concerning rights of expropriation and duties of compensation. However, Justice White thought the Court had not rigorously examined the question. He wanted the inquiry to center on whether or not there is a consensus on the law of expropriations with respect to a taking based on race, religion, or nationality.\textsuperscript{176} But because of the lack of consensus that the majority found, it believed that this area was particularly ill suited for the domestic judicial development. Any decision would be considered biased, given the well-known political and economic interests of the United States. Further, the Court characterized the municipal development of international law as a “patchwork approach.”\textsuperscript{176} Nonetheless, the majority believed that its ruling would further the “rule of law among nations.” There is, then, a distinction between “international law” and the “rule of law among nations.”\textsuperscript{177} Justice White correctly perceived that the majority opinion denied the role of international law “in ordering the relations between nations” and thus questioned the very existence of international law, the nature of which is to place limits on the power of the sovereign.\textsuperscript{178}

\textsuperscript{172} But the \textit{Sabbatino} Court also admitted that the act of state doctrine is not forbidden by international law. 376 U.S. at 422.
\textsuperscript{173} \textit{Id.} at 423.
\textsuperscript{174} Justice White has pressed his point too hard. The Cuban expropriation was not based on race or religion, although the forced conveyance in \textit{Bernstein} was. \textit{Id.} at 440.
\textsuperscript{175} \textit{Id.} at 434.
\textsuperscript{176} \textit{Id.} at 437.
\textsuperscript{177} \textit{Id.} at 457-58.
\textsuperscript{178} Banco Nacional de Cuba v. Farr, 243 F. Supp. 967, 965 (S.D.N.Y. 1965), \textit{citing} 110
In proposing the Sabbatino Amendment, Senator Hickenlooper foresaw that domestic courts would be free to enforce international law. The foreign state would thus be subject to international law at the hands of American courts. It is important to note that the Sabbatino Amendment itself sets forth some of the standards of international law. The Congressional view, as expressed in the Amendment, is that obligations under international law include "speedy compensation . . . in convertible foreign exchange, [equal to the full value of the taking]." It is particularly noteworthy that the Act appoints the Foreign Claims Settlement Commission of the United States to valuate the expropriated property. In that respect, then, the United States is the sole decision-maker unless, of course, the courts are not utilized and the question is settled by political negotiations. In discussing the relationship between these domestic statutory standards interpretive of international law and a discrete body of international law, Judge Waterman noted that the statutory standards were more exacting. Since on the first appeal Judge Waterman found the taking to be violative of international law under less exacting standards, he found it unnecessary to decide the import of any divergence between the statutory standards and the international law standards. Thus the court expressly avoided the question of whether Congress could determine how United States courts should decide questions of international law. The upshot of the Sabbatino litigation and the Sabbatino Amendment is that a taking that is retaliatory, discriminatory, and without adequate compensation is a violation of international law. But without the Congressional directive of the Hickenlooper Amendment, the courts would have been unable to rule on international law in act of state cases, unless the Bernstein Exception were invoked.

In Citibank, where the Court was asked to rule on the applicability of the Bernstein Exception, Mr. Justice Powell indicated

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180. Id.
183. Id.
184. 406 U.S. at 775.
that the judiciary should not abdicate to executive recommendations in act of state cases. To do so would be 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.”\textsuperscript{185} In other words, if these disputes are only appropriate for diplomatic resolution, which is an essentially political means of resolution, the role of law in settling these disputes is dismissed. But Justice Powell hoped that the courts would contribute to the growth of international law. Given the current impotence of international tribunals, Justice Powell considered national courts as “afford[ing] the best means for the development of a respected international law.”\textsuperscript{186}

The reliance on the \textit{Sabbatino} holding, where applicable, or the invocation of the Bernstein Exception, minimizes the effect of and impedes the growth of international law. These rules may show respect for the role the political branches — particularly the executive — play in conducting external affairs and trying to maintain peace among nations. But they do not speak well for the development of an international legal order that regulates relations among nations. Furthermore, these current practices represent an adherence to the traditional view of international law, which deals with relations between states and requires individuals to seek redress through the sovereign.

The critical question is whether it is more important and/or practical to show this kind of respect for the executive role, or whether the executive should allow the courts to develop international law. It is submitted that the choice should be — and it is — respect for the executive. This is not because the executive inherently deserves that respect, but because of the inefficacy of the alternate solution. International law will not grow if the United States alone will abide by it. Until all sovereigns will respect (\textit{i.e.}, self-enforce) international rules fashioned by informed domestic courts, little would come of such court decisions. What is disturbing is that the contours of “respect” for the role of the United States political branches has not been defined more clearly by the courts.

\textbf{Act of State as Auxiliary to Sovereign Immunity}

Cases involving the confiscation or expropriation of American-
owned property by a foreign government (notably Cuba) commonly raise questions of both act of state and sovereign immunity. Sabbatino distinguished act of state from sovereign immunity in this way:

[I]mmunity relates to the prerogative right not to have sovereign property subject to suit; fairness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it. The act of state doctrine, however, although it shares with the immunity doctrine a respect for sovereign states, concerns the limits for determining the validity of an otherwise applicable law. 187

Although this distinction appears direct enough, it is not so clear in the cases. Sovereign immunity cases often involve acts of state. As mentioned earlier, were it not for the fact that The Exchange were seized on the high seas, the case could have presented an act of state issue: the taking was done under Napoleon's orders. The Navemar188 involved a Presidential decree by the Republic of Spain. The District Court examined the validity of the passage of title. The Court of Appeals, however, disagreed with this finding, and concluded that the vessel was in the possession of the Spanish government, and thus immunity should be granted. In National City Bank v. Republic of China189 a claim was made by China that the default for which the bank counterclaimed was a result of fiscal management and thus jure imperii. But, once it is admitted that an act is jure imperii, is it not then an act of state? Recall that in this case the Court did not explore the public-private distinction, relying instead on notions of fair play. And according to the Victory Transport standards, an act involving the public debt is a public act. In Rich v. Naviera Vacuba S.A.,190 at least one of the plaintiffs was contesting an act of state — the Cuban expropriation of its sugar.191 Chemical Natural Resources, Inc. v. Republic of Venezuela192 involved a Venezuelan confiscation of property. Isbrandtsen Tankers, Inc. v. President of India193 may have in-

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187. 303 U.S. 68 (1938).
189. 295 F.2d 24 (4th Cir. 1961).
190. See Falk, supra note 170, at 145.
192. 446 F.2d 1198 (2d Cir. 1971).
193. Justice Douglas did not use the term "sovereign immunity," but the implication is clear. Justice Brennan chided this "strange result that application of the act of state doctrine depends upon the dollar value of a litigant's counterclaim." 406 U.S. at 778 (dissenting
volved an act of state — the delay in unloading the grain (the grain contract was the commercial aspect) was caused by an act of state done for public safety. The court, however, indicated that, if pressed, it would consider the transaction commercial in nature.

It appears, then, that the doctrine of sovereign immunity takes some priority over the act of state doctrine. If the status of the litigant is that of a government or governmental agency, the issue is sovereign immunity. This is shown by Justice Douglas' concurrence in *Citibank*. He felt the case involved sovereign immunity considerations (fair dealing because Cuba was the plaintiff) up to the amount that the setoff asserted by the bank equalled the amount of Cuba's claim; but beyond that, he felt the case presented an issue of act of state.¹⁹⁴ Perhaps the cases that involve both doctrines have rested on sovereign immunity because its application is more mechanical in nature,¹⁹⁵ as well as more obvious.

**CONCLUSION**

The doctrines of sovereign immunity and act of state are based on the same historical and political considerations. Perhaps because of this commonality of background, the doctrines are often confused in application. At bottom, both doctrines are compelled by the nature of sovereignty, with its internal allocation of power. Although the Foreign Sovereign Immunities Act of 1976 places with the judiciary the determination of the applicability of sovereign immunity, it remains clear that the immunity doctrine is compelled by concepts of separation of powers. Although courts will apply or deny sovereign immunity, unaided by executive suggestion, the overriding consideration is that the executive department is charged with the conduct of foreign relations. Thus, when immunity does apply, the situation can be addressed only by the executive. When immunity is denied, the situation is one that is outside the domain of public international relations. Similarly, act of state

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194. Falk believes that the act of state doctrine is more mechanical in nature and application. Accordingly, he argues for the abolition of the doctrine of sovereign immunity and the retention of the act of state doctrine, because he believes this scheme leaves judicial functions intact. *Falk*, supra note 170, at 144.

195. The difficulty arises in determining whether the acts complained of were commercial in nature. This obstacle must be confronted under the commercial exception to the act of state doctrine.
recognizes that the public acts of foreign sovereigns are appropriate for political, rather than judicial, resolution.

The emphasis that both doctrines place on sovereignty and the concommitant political resolution of disputes will persist until there is international consensus concerning the proper development and application of international law. Until that time, the internal allocation of power mandating that foreign policy be conducted and directed by the executive branch is the most efficacious manner of conducting international relations. The hope is that responsible exercise of political functions will promote world peace.