A New Approach to the Act of State Doctrine: Turning Exceptions into the Rule

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A NEW APPROACH TO THE ACT OF STATE
DOCTRINE: TURNING EXCEPTIONS
INTO THE RULE

The status and scope of the Act of State doctrine in United States law is currently unsettled. The most recent Supreme Court attempt to define the doctrine, *First National City Bank v. Banco Nacional de Cuba (Citibank)*, produced opinions by four Justices, each advancing a distinctive interpretation of the role the doctrine should play in cases involving foreign expropriations of American-owned property. The Justices' divergence reflected an erosion of the consensus reached earlier in *Banco Nacional de Cuba v. Sabbatino*, where the Court had held that the Act of State doctrine barred American courts from questioning the validity of foreign expropriations, even though American property owners had not been compensated. Widespread criticism of the result in *Sabbatino* quickly led to congressional legislation intended to modify the Court's strict adherence to the Act of State bar. As revealed by *Citibank*, however, the Court still has not been able to synthesize this congressional directive with case precedent, constitutional considerations, and its own concern for justice, into a workable and acceptable Act of State doctrine.

After briefly tracing the history of the Act of State doctrine, this Note will maintain that judicial consideration of the validity of foreign expropriations is mandated by Congress, condoned by the executive branch, and compelled by the ambiguous procedures currently in force which jeopardize the preservation of judicial independence and the proper "separation of powers." The Note then proposes an available and eminently practical means by which the judiciary could involve itself in the evaluation of foreign expropriations: namely, by expanding the "penal and revenue exception" to the Act of State doctrine. This solution, which has long oriented inter-state relations within the United

4. The "penal and revenue exception," justifying the refusal of the courts of one sovereign to enforce the penal and revenue laws of a foreign sovereign, is discussed in detail in notes 42-63 infra and accompanying text.
States, would render the doctrine far less of an obstacle to judicial consideration of the validity of foreign expropriations and would provide for predictability in an area of law currently in chaos, without compromising the Constitution or foreign policy.

I

THE ACT OF STATE DOCTRINE: AN HISTORICAL SYNOPSIS

A. Evolution of the Doctrine

The Act of State doctrine was formulated less than a century ago to guide American judicial treatment of foreign governmental acts involved in domestic litigation. In Underhill v. Hernandez, the Supreme Court articulated the principle that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Although often termed the "classic" statement of the Act of State doctrine, the Underhill opinion is fraught with ambiguities. As one analyst has pointed out, the Court there failed to establish whether "the source of this rule was to be found in international law, comity, conflicts, or mere political expediency." Two decades later, however, the Supreme Court, in Oetjen v. Central Leather Co., identified "comity" as the source of the principle set down in Underhill:

To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."

That the Court's indisposition to evaluate the validity of foreign acts of state on this ground had crystallized into an established doctrine

6. 168 U.S. 250 (1897).
7. Id. at 252.
9. Delson, supra note 5, at 87. Another perplexing aspect of the Underhill decision is that it concerned an American citizen's tort action against a South American general who had become head of state at the time of suit. Therefore, the case would seem to turn on the issue of sovereign immunity rather than the nascent Act of State doctrine. Accord, Mann, The Sancrosanctity of the Foreign Act of State, 59 L.Q. Rev. 42, 49 (1943). See note 11 infra.
10. 246 U.S. 297, 303-304 (1918).
11. Oetjen, not Underhill, 168 U.S. 250 (1897), represents the first unambiguous judicial reliance upon the Act of State doctrine. Writes Zander, supra note 5, at 831: "[H]ere for the first time the Court allowed an immunity rationae materiae in a case where the doctrine of personal immunity was not available to the defendant."
The Act of State Doctrine

appeared certain when in Shepleigh v. Meir, the court subsequently refused to make such an evaluation, even though the plaintiff charged a foreign nation with having violated international law.

The Act of State doctrine did not, however, prove to be an absolute bar to American courts adjudicating the legitimacy of foreign governmental acts. In 1954, in Bernstein v. Nederlandsche-Amerikaansche Stoomvart-Maatschappij, the Second Circuit Court of Appeals considered the attempt of a German Jew to recover insurance proceeds for property which had been confiscated by the Nazi government. In the course of litigation, the State Department communicated to the court that it would not object if the court were to rule on the validity of the confiscation in order to decide the state of the title to the property. The Second Circuit thereafter held that the Executive communiqué had effectively lifted the Act of State bar, and allowed the court to consider the merits of Bernstein's claim that the court should invalidate the Nazi confiscation decree and award him title to the property. Some observers have interpreted Bernstein as holding that the Executive possesses the prerogative to waive the Act of State doctrine at will, other analysts have read Bernstein more narrowly, emphasizing that the court's apparent deference to the State Department's suggestion was limited to the exceptional facts of the case.

B. THE SABBATINO INTERLUDE

Fidel Castro's communization of Cuba thrust the Act of State doctrine into the legal limelight once again during the 1960's. When the United States responded to the deterioration of its relations with Cuba by reducing the Cuban sugar import quota, Castro immediately expropriated American property and commercial interests in Cuba. The

13. 210 F.2d 375 (2d Cir. 1954).
14. The "Bernstein letter" was prompted by a unique concurrence of circumstances. First, the United States government had committed itself to the policy of restitution of property to the victims of Nazi expropriations. This policy would have been frustrated in Bernstein by the application of the Act of State doctrine. Moreover, in Bernstein the State Department was seeking judicial waiver of the Act of State doctrine where the sovereign act at issue was that of a government no longer in existence. For an excellent analysis of Bernstein, see Metzger, The State Department's Role in the Judicial Administration of the Act of State Doctrine, 66 Am. J. Int'l L. 94 (1972); see also Delson, supra note 5, at 82 passim.
15. See note 14 supra. Metzger embraces the narrow interpretation of Bernstein, rejecting "[a]ny conception of Bernstein as a general-purpose license to the Executive to turn off the judicial act of state doctrine at a twist of the wrist. . . ." Metzger, supra note 14, at 98.
first case challenging these expropriations to reach the Supreme Court was \textit{Banco Nacional de Cuba v. Sabbatino}.\footnote{16} The case involved Cuba's nationalization of Compania-Azucarera Vertientes-Camaguey (C.A.V.), a sugar producing enterprise owned principally by United States citizens. Prior to the expropriation, an importer, Farr, Whitlock, and Company, had contracted with C.A.V. for sugar to be shipped to Farr, Whitlock's customers in North Africa. As the sugar was being loaded onto the exporting vessel, however, Castro nationalized C.A.V. In order to ensure delivery of the sugar to its customers, Farr, Whitlock was compelled to enter into a separate purchase contract with the Cuban authorities. Thus it happened that both Cuba, through its national bank, Banco Nacional de Cuba, and the New York court-appointed receiver for the assets of C.A.V., Sabbatino, claimed the proceeds of the shipment of sugar from Farr, Whitlock.

The suit was begun when Banco Nacional sued Sabbatino and Farr, Whitlock in a New York Federal District Court alleging illegal conversion of the proceeds of the shipment\footnote{17} and requesting an injunction preventing defendants from exercising dominion over the proceeds. The District Court denied the relief requested, holding that the discriminatory, retaliatory, and confiscatory expropriations that had befallen C.A.V. were violations of international law\footnote{18} which, since international law is incorporated into United States law,\footnote{19} must not be implemented by American courts.\footnote{20} After the decision was affirmed on appeal,\footnote{21} the Supreme Court reversed, holding that American courts must defer to the Act of State doctrine and may not question the acts of

\begin{footnotes}
\item[17] More precisely, Banco Nacional's suit alleged that Farr, Whitlock had converted the bill of lading which entitled Banco Nacional to payment for the sugar shipment. Banco's agent had presented the bill of lading to Farr, Whitlock, who accepted this document without tendering payment to the agent. Once in possession of the bill of lading, Farr, Whitlock was persuaded by the C.A.V. not to surrender the bill of lading, nor to pay the proceeds of the sugar shipment to Banco Nacional, and C.A.V. agreed to indemnify Farr, Whitlock for any losses which it might sustain in the ensuing litigation. Thus, the bill of lading became a focal point of the suit. \textit{Id.}, 307 F.2d 845, 850-51 (2d Cir. 1962).
\item[18] \textit{Id.}, 193 F. Supp. 375 (S.D.N.Y. 1961).
\item[19] The District Court cited \textit{The Paquete Habana}, 175 U.S. 677, 700 (1900) as establishing the proposition that international law is incorporated into United States law.
\item[20] For a critical analysis of the lower court opinion, see R. Falk, \textit{The Role of Domestic Courts in the International Legal Order} 64-114 (1964). For support of the argument advanced by the lower court, see Brief for the American Bar Association as Amicus Curiae, \textit{Banco Nacional de Cuba v. Sabbatino}, 376 U.S. 398 (1964).
\item[21] 307 F.2d 845 (2d Cir. 1962).
\end{footnotes}
a foreign sovereign carried out within its own territory. Writing for the majority, Justice Harlan explained that the Act of State doctrine was conclusive in such situations, but not because of any inherent notions of sovereignty, nor even because of the dictates of international law. Instead, Harlan described the Act of State doctrine as having:

... "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

In short, the Court's continued adherence to the Act of State doctrine derived from its fear of impinging on the Executive's prerogatives in the area of foreign relations and its concern for preserving a proper separation of powers.

Many observers were upset, not only because the Supreme Court had apparently left American investors so vulnerable to foreign expropriations, but because, moreover, Cuba was allowed to use an American court as the vehicle to obtain the proceeds from the very property it had taken from United States citizens. While the case was being considered on remand from the Supreme Court, Congress swiftly passed the Hickenlooper Amendment, expressing therein its intent to reverse the Sabbatino result in future Sabbatino-like situations. The Amendment directs American courts to ignore the Act of State doctrine when the foreign act under consideration violates international law, providing the Executive does not explicitly advise that American foreign interests mandate the application of the Act of State doctrine. In accordance with this directive, the district court hearing Sabbatino on remand waited sixty days for a possible Presidential communication.

22. "Thus, the Court disavowed the previous rationale stated in the Oetjen and Ricaud cases which said that the doctrine was based upon principles of international law and comity." Note, The Confusing State of the Act of State Doctrine, 22 J. Pub. L. 203, 207-208 (1973).


24. Emphasizing this theme, Harlan declared in Sabbatino that the "continuing vitality" of the Act of State doctrine "... depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." Id., at 427-28.

When none was forthcoming, the court applied the Hickenlooper Amendment and rendered judgment in favor of the American sugar owners. In affirming this decision, however, the Second Circuit Court of Appeals greatly limited the application of the Hickenlooper Amendment, finding that it pertained only to situations in which property expropriated from American citizens is actually brought into the United States.

C. BEYOND SABBATINO: FIRST NATIONAL CITY BANK AND CONFUSION

First National City Bank v. Banco Nacional de Cuba, (Citibank), also arising as a consequence of Castro's nationalizations, presented the Supreme Court with an opportunity to re-examine its treatment in Sabbatino of the Act of State doctrine. When the Cuban government expropriated property belonging to Citibank, the bank responded by declaring a loan it had made to Cuba to be in default. By selling the loan collateral, Citibank realized $1.8 million in excess of the amount due on the loan. Cuba, again through Banco Nacional de Cuba, sued Citibank to recover the excess collateral. Citibank counterclaimed for the value of the property expropriated by Cuba, arguing that the $1.8 million should be set-off against the damages in the counterclaim.

When the case reached the Supreme Court, the complexity and uncertainty of precedent relating to the Act of State doctrine had already been underscored by contradictory lower court rulings, with Banco Nacional prevailing in the Court of Appeals. Moreover, while


27. Banco Nacional de Cuba v. Farr, 383 F.2d 166, 172 passim (2d Cir. 1967). See also French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 295 N.Y.2d 433, 242 N.E.2d 704 (1966), in which the Hickenlooper Amendment was held not to bar the application of the Act of State doctrine since the plaintiff's loss was due to an alleged breach of promise, and the Hickenlooper Amendment was construed by the court only to cover confiscations and other takings.


29. At the trial level, id., 270 F. Supp. 1004 (S.D.N.Y. 1967), the district court acknowledged the Act of State doctrine, but ruled that the Hickenlooper Amendment controlled so that the doctrine did not bar the court from evaluating the validity of the Cuban expropriation. The Second Circuit reversed, id., 431 F.2d 394 (2d Cir. 1970), thereby following its decision in Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1966), and holding that the Hickenlooper Amendment applied only where the actual property expropriated had entered the United States and was the subject of the suit.
the Supreme Court considered Citibank, the Legal Advisor to the State Department informed the Court that the Executive would not object if the Court were to ignore the Act of State doctrine and decide the case on its merits.\textsuperscript{30} The State Department's action prompted the Court to vacate the judgment below and remand Citibank to the Second Circuit for reconsideration.\textsuperscript{31} The Second Circuit adhered to its earlier position, however, refusing to let the so-called “Bernstein exception” control.\textsuperscript{32} On reappeal, the Supreme Court reversed and held for Citibank, although the three opinions written by members of the majority premised this result on differing rationales.\textsuperscript{33} Indeed, the three majority opinions and the opinion of the four dissenter left many questions pertaining to the Act of State doctrine in doubt. Most significantly, perhaps, six of the nine Justices rejected the notion that the Act of State doctrine could be waived by the Executive, thereby enabling courts to pass judgment on the validity of foreign expropriations in certain cases. But no other concrete legal guidelines are discernible from Citibank due to the lack of any further consensus. As one commentator has appropriately remarked: “The effect of the Court’s ruling is about the same as if it had denied certiorari.”\textsuperscript{34} Undoubtedly, future judicial treatment of foreign expropriations has been rendered unpredictable by the uncertainty of the Citibank holding.\textsuperscript{35}

\textsuperscript{30} This letter is reprinted in an appendix to the second opinion of the Court of Appeals in Citibank, 422 F.2d 530, 536 (2d Cir. 1971). See also Note, Executive Suggestion and Act of State Cases: Implications of the Stevenson Letter in the Citibank Case, 12 Harv. Int’l L.J. 557 (1971).

\textsuperscript{31} 400 U.S. 1019 (1971).

\textsuperscript{32} See notes 14-15 supra and accompanying text.

\textsuperscript{33} Briefly stated, Chief Justice Burger and Justices White and Rehnquist took the position that application of the Act of State doctrine is justified only as a tool to protect the executive branch from being embarrassed by judicial review of the acts of a foreign sovereign. Where the Executive advises a court that judicial review would not be embarrassing, as was done in Citibank, then the Act of State doctrine does not prohibit judicial consideration of the foreign act in question insofar as set-offs or counterclaims are concerned. Justice Douglas based his opinion on National City Bank of New York v. Republic of China, 348 U.S. 356 (1955), in which the Court had allowed the defendant to counterclaim against a sovereign plaintiff despite the latter's assertion of sovereign immunity. Justice Powell, on the other hand, premised his opinion on the contention that Sabbatino should be overruled. Powell denied that official acts of foreign states deserve mechanical exemptions from judicial review. Rather, he posited the Executive should be made to satisfy a heavy burden of proof that judicial consideration of an act in question would jeopardize its foreign policy interests. For a more detailed summary of the three majority opinions in Citibank, see Lowenfeld, Act of State and Department of State: First National City Bank v. Banco Nacional de Cuba, 66 Am. J. Int'l L. 795, 799-803 (1972).

\textsuperscript{34} Lowenfeld, id., at 803.

\textsuperscript{35} In trying to piece together some concrete holding with precedential value in Citibank, one observer has concluded that the case permits judicial evaluations of the
II

THE ARGUMENT FOR JUDICIAL DETERMINATION OF THE VALIDITY OF FOREIGN EXPROPRIATIONS

A. THE MANDATE TO DEPART FROM SABBATINO

The Justices in the Citibank majority made efforts, albeit unconcerted ones, to mitigate the strict Act of State barrier that was set down in Sabbatino. The majority’s disaffection with the Sabbatino approach was surely warranted. In the intervening period since Sabbatino, Congress had emphatically expressed its desire that the judiciary pass judgment on the validity of foreign expropriations, first by speedily enacting the Hickenlooper Amendment in 1964, and later by reaffirming its support for the policy expressed therein in 1970. Certainly, these legislative directives to the courts were legitimate exercises of Congressional power. Moreover, the Act of State doctrine has itself long been riddled with “exceptions.” One commentator has counted nine loopholes which might enable a court to sidestep the Act of State doctrine in certain situations. That the Act of State barrier was never
The Act of State Doctrine absolute is suggested by the very existence of these exceptions. They have never been logically articulated from the bench, however, and their haphazard application has contributed to the confusion currently generated by the uncertain status of the doctrine. Most importantly, the Executive Branch has at times been willing to let American courts pass judgment on the validity of foreign expropriations, as evidenced by the State Department letters in Bernstein and Citibank, and by other official policy pronouncements. Indeed, Justice Rehnquist's opinion in Citibank, endorsed by two other Justices, ascribes to the Executive the power to decree whether an expropriation will be adjudicated on its merits or be unconditionally legitimated by the Act of State doctrine. This last procedure is an intolerable encroachment of the judicial domain, which can be corrected only if the courts recognize their legitimate authority to pass judgment on the validity of foreign expropriations without first obtaining Executive permission.

B. THE LOOPHOLE: THE NON-ENFORCEABILITY OF FOREIGN PENAL AND REVENUE LAWS

There is a ready and practical means available by which to involve the judiciary in evaluating the validity of foreign expropriations without any undue affront to the Executive. It arises from the long-standing Anglo-American rule that courts need not enforce the penal or revenue laws of foreign sovereigns. A major influence in the determination of interstate relations within the United States, this rule has been acknowledged as well at the international level by American
courts. However, although at times identified as an "exception" to the Act of State doctrine, this basis of non-enforceability has generally been ineffectual in the disposition of cases involving the doctrine. By expanding this exception to encompass Act of State situations, courts would render the doctrine far less of an obstacle to consistent judicial consideration of the validity of foreign expropriations.

In Huntington v. Attrill, the Supreme Court first established the proposition that a forum state need not grant full faith and credit to judgments rendered by the courts of sister states which were based on statutes essentially "penal" in character. The Court in that case set down the still-prevailing test for state courts to follow in determining whether a particular statute is "penal" and therefore unenforceable outside the enacting state's borders:

The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.

43. See note 38, supra.
46. Huntington v. Attrill, supra note 44, at 673-74 (emphasis added). Accord, Loucks v. Standard Oil Co., 224 N.Y. 99, 103, 120 N.E. 198, 199 (1918). In a comprehensive article, Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 HARV. L. REV. 193, 197 (1932), Professor Leflar lists a variety of statutes at times deemed penal, including: statutes making delinquent corporate officers liable for corporate debts (e.g. Nesbitt v. Clark, 272 Pa. 161, 116 A. 404 (1922)), wrongful-death acts prescribing minimums of recovery regardless of the actual loss sustained (e.g. Cristally v. Warner, 87 Conn. 461, 88 A. 711 (1915)), and even common law exemplary damages (e.g. Grinestaff v. N.Y. Central R.R., 253 Ill. App. 589 (1929)). A recent example of a state court's refusal to enforce a sister state's penal statute is found in Carter v. Department of Public Safety, 290 A.2d 652 (Del. Super. 1972) where the court ruled that a Delaware court could not revoke the driver's license of a Delaware citizen when informed by Maryland authorities that the citizen had been convicted in Maryland for a driving infraction, since the conviction was based on a penal law.

It should be noted, however, that there is a trend away from such broad constructions of what constitutes non-enforceable penal and revenue laws, precipitated in large part by
The Supreme Court also formerly suggested that sister state revenue or tax laws should be accorded similar treatment by state courts. While the Court subsequently modified this latter position, it has left open the question of whether a court need enforce the tax claims of sister states that have not been reduced to judgment. In any event, the principle that state penal and revenue laws may not be enforced by the courts of sister states has played an important role in ordering inter-state relations.

At the international level, the rule that foreign penal and revenue laws need not be enforced by American courts has been recognized by courts and legal scholars alike. Banco do Brasil v. A.C. Israel Commodity

Professor Leflar's ultimate conclusions condemning "the absolute exclusion of extrastate claims on account of their penal or governmental nature...." Leflar, supra, at 225. See, e.g., James-Dickinson Farm Mortgage Co. v. Harry, 275 U.S. 119 (1927), in which the Supreme Court held that a state statute providing for exemplary damages was non-penal and therefore enforceable in the courts of a sister state. See also Holbein v. Rigot, 245 So. 2d 57 (Fla. 1971). This trend is discussed fully at note 50, infra.

47. The Court held:

The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue. . . .


50. This Note advocates the expanded application of the non-enforceability principle between international sovereigns, the legitimacy of which is little affected by reconsiderations of the rule as applied among the fifty United States. The state experience with the principle of non-enforceability is presented primarily as an example of how this rule can and should be applied by the United States courts when encountering a case involving the penal or tax laws of a foreign nation.

51. Significantly, it has been argued by a number of judges and scholars that this principle is more appropriate to international sovereign relationships than to those among the states of the Union. See e.g., State ex rel. Oklahoma Tax Commission v. Rodgers, 238 Mo. App. 1115, 1127-28, 193 S.W.2d 919, 927 (1946), in which the court remarked that the non-enforceability principle was justified solely as between wholly sovereign states. It has no place in a union of states such as the United States, where the interests of both the state and the taxpayer will be protected from arbitrary power by the provisions of the federal constitution (emphasis added).

See also R. CRAMTON & D. CURRIE, supra note 49, at 121-38; W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW 54 (1966); P. ADRIAANSE, CONFISCATIONS IN PRIVATE INTERNATIONAL LAW 85 (1956).
Company illustrates how courts have at times applied this principle when considering claims involving foreign revenue laws. In that case, the court rejected Brazil's claim that it had been defrauded by the defendant's circumvention of Brazilian currency regulations. The court stated:

Plaintiff is an instrumentality of the Government of Brazil and is seeking, by use of an action for conspiracy to defraud, to enforce what is clearly a revenue law . . . . It is well established since the day of Lord Mansfield (citations omitted) that one state does not enforce the revenue laws of another.

In a more recent decision, Menendez v. Saks and Co., the Second Circuit Court of Appeals boldly affirmed this principle, relying in part upon Banco do Brasil. By characterizing the foreign statutes at issue as revenue laws, American courts have thus been able to rule against plaintiffs with causes of action founded on otherwise proper and operative foreign laws.

Despite the clarity of reasoning and results in Banco do Brasil and Menendez, the penal and revenue exception has had little influence on how American courts treat foreign expropriations. The majority in Sabbatino gave some consideration to the defendants' contention that "a court need not give effect to the penal or revenue laws of foreign countries or sister states." While the Court specifically refused to resolve the general status of the "penal and revenue exception" to the Act of State doctrine, however, it rejected the defendants' argument on the ground that it found "no authority which suggests that the doctrine reaches a public law which, as here, has been fully executed within the foreign state." In a strong dissent, Justice White criticized

53. Id. at 377, 239 N.Y.S.2d at 875, 190 N.E.2d at 237.
54. "Currency laws are but a species of revenue laws, c.f. Banco do Brasil . . . . As a general rule, one nation will not enforce the revenue laws of another, see Colorado v. Harbeck, 232 N.Y. 71, 133 N.E. 357 (1921) . . . ." Menendez v. Saks and Co., 485 F.2d 1355, 1366 (2d Cir. 1973). Like Banco do Brasil, Menendez also concerned the attempt of a foreign litigant to convince an American court to compel compliance with foreign currency regulations by United States businessmen. In addition, Menendez presented an Act of State issue, the resolution of which, however, did not involve the application of the principle of non-enforceability of foreign fiscal laws.
56. The Court's refusal to resolve definitely the status of the penal and revenue laws argument vis-à-vis the Act of State doctrine in Sabbatino is reflected in the statement in id. at 414: "The extent to which this doctrine [the non-enforceability of foreign penal and revenue laws] may apply to other kinds of public laws, though perhaps still an open question, need not be decided in this case." Because of the cursory manner by which the majority disposed of the defendants' argument, analysts have been left with little to guide their judgments regarding application of the penal or revenue exceptions. See e.g., Note, Adherence of the U.S.S.R. to the Universal Copyright Convention, 8 Cornell Int'l L.J. 71, 82
this conclusion, proposing instead that foreign confiscations should be treated as penal or revenue laws which bar the application of the Act of State doctrine.57 Expressing confidence that such an alternative to the Act of State doctrine would protect the Executive from being embarrassed by judicial interference in foreign affairs, White sternly chided the majority for failing to apply what he considered to be a well established and appropriate legal principle.58

White's dissent in Sabbatino, endorsed by Powell in Citibank,59 focuses on what is judicially defined and conventionally recognized as a penal law. As Justice (then Judge) Cardozo once declared, a penal statute "within the rules of private international law . . . is one that awards a penalty to the state . . . . The purpose must be not reparation to one aggrieved, but vindication of the public justice."60 Clearly, the Cuban expropriation decrees which generated the disputes in Sabbatino and

58. White maintained that a mechanical presumption of invalidity regarding foreign confiscatory decrees would adequately protect the executive branch from judicial interference in foreign relations. He reasoned (Id. at 450 n.11) that all foreign revenue laws are irrebuttably presumed invalid to avoid embarrassing the Executive, so that it would only be natural to accord similar treatment to expropriatory laws. Moreover, White highlighted the majority's acknowledgement of the conventional rule that United States courts need not enforce foreign penal and revenue laws, asserting that this principle is operative despite the politically charged nature of the disputes in which it is often applied. Therefore, courts should deny effect to confiscatory laws, even though the issue is suffused in politics and the "enacting country has a large stake in the decision . . . ."

White concluded that the Court should have remedied the logical inconsistency of denying enforcement of foreign tax judgments on one hand, while simultaneously giving effect to foreign expropriations on the other:

[1]It is difficult, conceptually or otherwise, to distinguish between the situation where a tax judgment secured in a foreign country against one who is in the country at the time of the judgment is presented to an American court, and the situation where a confiscatory decree is sought to be enforced in American courts.

Id.

60. 224 N.Y. 99, 102-3, 120 N.E. 198, 199 (1918).
Citibank were conceived of and executed as "vindications of the public justice."\(^{61}\) Cuba was protecting public, not private, rights through the nationalizations and, as such, the decrees implementing them should have been categorized as penal laws.\(^{62}\) Moreover, scholarly writing tends to support Justice White's conclusion. One commentator, analyzing the district and appellate courts' original treatment of Sabbatino, has suggested that the courts might have relied upon the retaliatory and discriminatory features of the Cuban decree in order to apply the well known conflicts rule that the courts of one jurisdiction will not enforce foreign penal or fiscal laws. The characterization of the Cuban laws as "penal" might have been reached alternatively by a demonstration of its confiscatory nature.\(^{63}\)

C. DISTINGUISHING THE PENAL EXCEPTION FROM "PUBLIC POLICY" IN ACT OF STATE CASES: THE ADVANTAGES OF UTILIZING THE PENAL EXCEPTION

Probably the most widely recognized of all the so-called exceptions to the Act of State doctrine is that based on public policy. Generally, if the enforcement of the foreign act of state would be repugnant to a sovereign's public policy, courts of that sovereign may refuse to enforce or give effect to such state action.\(^{64}\) A British scholar has concluded that the British public policy exception subsumes the penal exception, depriving the latter of its own independent vitality and force.\(^{65}\) While acknowledging that both exceptions do share some of the same policy justifications, important differences exist which underscore the value of perceiving the penal exception as a distinct concept.

American courts are likely to regard case by case determination of public policy as an "unruly horse,"\(^{66}\) as, in fact, it may well be. Public

\(^{61}\) That Castro conceived the program of expropriation of American interests in Cuba as a "vindication of the public justice" is evident in his public statements responding to the American reduction of the Cuban sugar import quota. Vowing "Cuba cannot be brought to its knees by economic aggression," N.Y. Times, July 8, 1960, at 2, col. 3, Castro proceeded to expropriate United States sugar interests as a response to what was viewed as an American threat to the welfare of the Cuban people.

\(^{62}\) Alternatively, it would be by no means implausible if such expropriatory decrees were characterized as revenue laws, since they prescribe the surrender of private property to the public treasury or for public use. See the discussion of Banco do Brasil, notes 52-55 supra and accompanying text.

\(^{63}\) Falk, supra note 20, at 85 (emphasis in original).

\(^{64}\) Adriaanse, supra note 51, at 81.


The Act of State Doctrine

Policy arguments often involve courts in political and ideological debates outside the normal domain of the judiciary, as well as beyond the general expertise of most judges. Faced with these possibilities, courts may understandably opt to define public policy regarding expropriations according to established principles of international law. Indeed, writers who argue that “public policy” should render justiciable the validity of expropriation without compensation adopt this approach. Such arguments usually assert that the Cuban expropriations were discriminatory, retaliatory, and confiscatory, and as such were contrary to international law and should not have been enforced by the courts. However, as was duly noted by the Supreme Court in Sabbatino: “There are few, if any, issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens.” Therefore, a party’s assertion of the failure of the expropriating state to compensate him for a taking can no longer establish a per se violation of international law.

Unlike the public policy approach which invites extensive judicial discretion and operates within an unsettled area of international law, the penal and revenue exception would provide American courts with an essentially mechanical rule with which to evaluate foreign expropriations. A foreign expropriatory decree would be deemed penal if “its purpose is to punish an offense against the public justice.” Expropriatory decrees shown to be “discriminatory, retaliatory, or confiscatory”...
"tory" would easily be categorized as penal under this standard.\textsuperscript{72} The consistent application of this rule would minimize the need for judges to make discretionary rulings which might offend foreign sovereigns or embarrass the Executive.\textsuperscript{73} One need only examine the extensive experience among the several states in administering the penal and revenue rule to be convinced that this approach is not a disguised moral judgment by one sovereign of another sovereign's policies; nor is it likely to be interpreted as such.

CONCLUSION: UNWINDING THE TWISTED STATUS QUO

The rule that a court need not enforce the penal or revenue laws of a sister state provides an available and practical means by which the judiciary can involve itself in the consideration of the validity of foreign expropriations. This principle has played an important role in interstate relations within the United States, and has been recognized by the United States at the international level as well.\textsuperscript{74} The rule has not been extended, however, to apply to questions relating to the justiciability of foreign expropriations because of the influence of the Act of State doctrine in that area. Current conceptions of the Act of State doctrine which purport to legitimate Executive involvement in the adjudicatory process undermine our system of separation of powers and compel the reassertion of judicial independence in this field. Executive involve-

\textsuperscript{72} See note 63 \textit{supra} and accompanying text.

\textsuperscript{73} See note 58, \textit{supra}, for Justice White's explanation that the penal approach would not embarrass the Executive.

\textsuperscript{74} Surely, relying upon the penal and revenue exception would hardly shock or insult other nations, since it merely represents the incorporation into our own law of principles most nations recognize. Although the Supreme Court ruled in \textit{Sabbatino} that there is no established international law regarding the duty to compensate victims of expropriations, Professor Mann has argued that such a duty is nevertheless recognized, even among Communist nations. He wrote:

Almost all recent confiscators have framed their legislation so as to contemplate the payment of compensation . . . What these confiscators have failed to do is to pay compensation, to implement the promise made and the obligation assumed by their own legislation, to comply with the duty they recognized . . . [(T)here is no reason why other States should not take the text of the confiscators' legislation at face value and should impute to them the intention to deny the international rule, when they merely intend to break it.

ment is by no means required by the Act of State doctrine. By recognizing the penal and revenue exception, courts could consistently and impartially apply a standardized rule when evaluating the validity of foreign acts of state, thereby restoring desirable predictability to an area of the law regrettably subject to the dictates of political expediency.

This is not to say that the Executive, in its desire to further the nation's foreign policy interests, would be rendered powerless to affect the outcome of specific expropriation cases. If the Executive branch wished to guarantee a certain result, a treaty or executive agreement could be negotiated to establish the validity of particular foreign acts of state, which American courts would then have to recognize as the "supreme law of the land." This suggested procedure would merely ensure that each branch of government would operate within its own constitutionally prescribed domain, and would prevent the Executive from undermining judicial independence by involving itself in the adjudicatory process.

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75. As Delson, *supra* note 5, at 82, has observed:
[I]f the act of state doctrine is interpreted as merely mandating judicial deference to Executive suggestions, the major purpose of the doctrine—securing the separation of powers of the judicial and political branches of government—would be defeated . . . Thus, to construe the act of state doctrine as compelling such judicial deference to political decisions [i.e., letting the act of state doctrine only serve to further our policy interests] would be to ignore the purpose of the doctrine in securing the separation of powers.

76. As one writer put it, "[A]s courts are able to deal with established guidelines for resolving a controversy, they are less likely to defer to the political branches for the settlement of a controversy." *Indications of Justiciability, supra* note 67, at 886.