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OY VEY! THE BERNSTEIN EXCEPTION: RETHINKING THE DOCTRINE IN THE WAKE OF CONSTITUTIONAL ABUSES, CORPORATE MALFEASANCE AND THE “WAR ON TERROR”

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Abstract

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The “Bernstein doctrine” is a classic example of the exception swallowing the rule. The Bernstein exception allows the Executive to intercede in act of state cases when it determines that adjudication would not harm U.S.-foreign relations. The Exception was initially intended solely to permit victims of Nazi war crimes to recover in United States courts. However, in the more than 50 years since its inception, the Bernstein doctrine has expanded far beyond its original intended purpose, and as a result, has created a host of constitutional and political dilemmas. The Bernstein exception violates the separation of powers doctrine by giving the Executive, through the State Department, unchecked power to determine the outcome of act of state cases brought in United States courts. This power has in turn been used by the Bush Administration to intercede on behalf of powerful, multi-national corporations in suits brought by individual plaintiffs, who are often the victims of international human rights abuses at the hands of these politically-connected corporations. Moreover, the Bernstein exception is another means by which the current Administration can further unconstitutionally expand its power in the purported “war on terror.” The Executive has succeeded in having cases dismissed simply by making an unsubstantiated observation that adjudication in a U.S. court might have a negative effect on the particular foreign government’s continued cooperation in the “war on terror.” Consequently, this article argues that the Bernstein exception should be abolished. The judiciary is quite capable of determining the applicability of the act of state doctrine without intervention by the Executive. While the Executive’s views regarding the impact of a particular case on U.S.-foreign relations may well be informative, its opinion cannot be dispositive.
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Introduction

Under the act of state doctrine, a United States court will abstain from adjudicating claim where the relief sought requires the court to declare invalid the official act of a foreign government committed within its own country.1 The “Bernstein exception,” however, gives the Executive Branch discretion to waive the act of state doctrine when the State Department issues a letter informing the court that “it has no objection on foreign relations grounds to adjudication of the validity of a given act of a foreign state.”2 In essence, a “Bernstein letter,” which takes its name from the 1954 case in which it was first used,3 is the Executive’s declaration that adjudicating the claim would not damage United States-foreign relations.4 In more recent cases, the use of Bernstein letters has largely been substituted with either a “statement of interest”5 or a brief submitted to the court by the Department of Justice.6

The argument in favor of the Bernstein exception is that the Executive is in the best position to judge the effect on foreign relations of adjudicating the validity of the act of a foreign sovereign in an American court.7 In fact, the United States Supreme Court has recognized that the Executive Branch has primary responsibility for the conduct of foreign affairs under the constitutional separation of powers.8 Additionally, the Court has recognized that the Executive Branch has superior institutional resources for examining and assessing diplomatic matters.9

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1 See generally 54 AM. JUR. 2d Monopolies and Restraints of Trade §353 (1996).
3 Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).
4 See id.
6 See 2 Bus. & Com. Litig. Fed. Cts. §18:78 (2d ed.) (2005) (“Today, the State Department is likely to forward requests for a Bernstein letter to the United States Department of Justice, which will then submit a brief to the court evaluating whether foreign policy concerns should preclude the court from adjudicating the case under the act of state doctrine.”).
7 See supra note 2.
9 See id.
court performs the same assessment, only less efficiently, by ascertaining executive policy through its own independent investigation.\footnote{See id.} Accordingly, once the Executive has assessed the possibility of interference with foreign relations caused by disposition of an act of state case, a Bernstein letter is the most efficient way for a court to gauge the Executive’s position on foreign policy.\footnote{See id. at 768.} Furthermore, allowing the Executive, rather than the Judiciary, to determine whether to adjudicate these cases avoids possible embarrassment to the Executive in its conduct of international affairs.\footnote{See Curtiss-Wright Corp., 299 U.S. at 320.}

On the other hand, application of the Bernstein exception creates a number of potentially serious problems. Although the Supreme Court has addressed the Bernstein exception in three separate cases, it has neither resolved the continuing validity of this exception, nor has a majority of the court ever endorsed the exception.\footnote{See supra note 1.} This has created uncertainty in the lower federal courts as to the weight, if any, to give to a Bernstein letter in a particular case. Some district courts have adopted the exception, treating a Bernstein letter as dispositive, while other courts have not.\footnote{See supra note 5.} Still other courts simply consider the letter from the State Department as merely one factor to be considered when determining whether to apply the act of state doctrine.\footnote{See id.} Some district courts even consider the \textit{absence} of a Bernstein letter as an implied mandate to apply the act of state doctrine.\footnote{See, e.g., Bank Tejarat v. Varsho-Saz, 723 F. Supp. 516, 520 (C.D. Cal. 1989) (noting absence of Bernstein letter in denying counterclaim by Iranian citizens based upon alleged misappropriation of assets in Iran).} This inconsistency in applying the Bernstein exception has at times resulted in contradictory, even absurd, results in comparable cases.\footnote{See, e.g., Michael J. Bazyler, \textit{Abolishing the Act of State Doctrine}, 134 U. PA. L. REV. 325, 375, n.309 (noting examples of two nearly identical cases before a Second Circuit panel in which the court allowed the first case to}
Even more troubling, the Bernstein exception violates the doctrine of separation of powers between the branches of government because it gives a degree of control over the outcome of cases to the Executive through the Department of State. When the district court relies upon a Bernstein letter to waive application of the act of state doctrine, it “allows the Executive in effect to replace the court as the decision maker in the case.”\(^\text{18}\) If, on the other hand, the court disregards a Bernstein letter and finds the act of state doctrine applicable despite the State Department’s views to the contrary, it could lead to serious embarrassment of the Executive in the arena of foreign affairs.\(^\text{19}\)

Unquestioning adherence to the views of the Executive in applying the act of state doctrine also politicizes the judicial branch by treating similarly situated litigants unequally. Justice Brennan pointed out that adopting the Bernstein exception would subject “the fate of the individual claimant . . . to the political considerations of the Executive Branch.”\(^\text{20}\) As a result, “similarly situated litigants would not be likely to obtain even-handed treatment,” depending upon the litigant’s relative influence with the Administration in power at the time.\(^\text{21}\)

In addition, the Bernstein exception has the potential to be used as a means for the Executive to further increase its power and expand its control over foreign affairs in its declared

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\(^{18}\) Id. at 375.
\(^{19}\) See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432-433 (1964) (“If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult. . . . Considerably more serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary. . . . In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided.”).
\(^{20}\) First Nat’l City Bank, 406 U.S. at 791-792 (Brennan, J., dissenting).
\(^{21}\) Id.
“war on terror.” For example, if a litigant brought suit in a United States court based on an official act of a foreign government which the Executive had deemed a “supporter of terrorism,” the Executive would have the power to influence the result by advocating waiver of the act of state doctrine in a Bernstein letter. Conversely, if a litigant brought suit against a favored sovereign, the Executive could potentially control the outcome by refusing to write a Bernstein letter or by actively urging the court to dismiss the case.

Because of the serious constitutional and political problems created by the Bernstein exception, the United States Supreme Court should directly address the issue and unequivocally eliminate it as an exception to the act of state doctrine. Declaring the Bernstein exception invalid would avoid some of the problems associated with United States courts sitting in judgment on the acts of foreign nations: inconsistent results, violation of the separation of powers doctrine, disparate treatment for similarly situated litigants and expansion of the Executive’s power in the “war on terror.” Furthermore, eliminating the Bernstein exception would help to revive the original principles behind the act of state doctrine: international comity, respect for other sovereign nations and avoidance of embarrassment to the Executive in the field of international relations.

If the Bernstein exception were abolished, there would remain alternative means available to the Executive that would not create the potentially dispositive effect that a Bernstein letter often has on a court’s decision whether to apply the act of state doctrine, such as an amicus

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22 See generally University of Michigan Documents Center, America’s War Against Terrorism - World Trade Center/Pentagon Terrorism and the Aftermath (visited March 10, 2008) <http://www.lib.umich.edu/govdocs/usterror.html>.
23 See, e.g., Beaty v. Republic of Iraq, 480 F.Supp.2d 60, 65 (D.D.C. March 26, 2007) (In suit against Iraq brought by children of Americans imprisoned and allegedly tortured by prior Iraq government, United States filed statement of interest that noted, inter alia, that adjudication might harm U.S. foreign relations because subjecting now-friendly government to potentially crippling liability would interfere with U.S. interest in promoting the reconstruction of Iraq).
curiae brief or statement of interest. The advantage of the Executive expressing its views in either of these ways is that they would not carry the weight of a Bernstein letter, and the court therefore would not view the opinion of the Executive as dispositive in deciding whether to apply the act of state doctrine.

Part I of this article discusses the history and background of the act of state doctrine and the Bernstein exception. Part II sets out the United States Supreme Court’s examination of the Bernstein exception in three separate cases and demonstrates how the Court’s inability to decide definitively the validity of the Bernstein exception has lead to confusion and uncertainty in the lower courts. Part III examines the serious problems created by the Bernstein exception, including producing inconsistent results, violating the separation of powers doctrine, treating similarly-situated litigants unequally, and unconstitutionally expanding the Executive’s foreign affairs power in the “war on terror.” Part IV urges the Supreme Court to grant certiorari to unequivocally address and abolish the Bernstein exception because there are various other ways by which the court may seek or the Executive may make known its views in a particular case.

I. History and Background

The act of state doctrine bars U.S. courts from hearing claims based on acts of foreign governments. The Bernstein exception, however, gives the Executive Branch discretion to waive the act of state doctrine expressing its view that adjudicating the claim would not damage U.S.-foreign relations. Although the U.S. Supreme Court addressed the Bernstein exception on three separate occasions, it has never resolved the validity of this exception. First, in Sabbatino, the Court held that the Bernstein exception was not applicable because the State Department said

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25 See supra note 2.
26 See id. at cmt.h, n.8.
only that it did not wish “to make any statement bearing on [the] litigation.”27 Second, in First National City Bank, the Bernstein exception garnered only three votes,28 with the other justices of the majority deciding the case on other grounds.29 Third, in W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp. Intern.,30 the Court unanimously held that Bernstein exception was “unnecessary” in that case because the act of state doctrine does not apply to the motivations of a foreign sovereign’s act, but rather only applies when the validity of a foreign state’s actions are in question.31

A. History of the Act of State Doctrine

The act of state doctrine has traditionally provided that acts of a foreign sovereign within its own territory are not subject to judicial examination and must be presumed valid.32 The classic American statement of the act of state doctrine is found in Underhill v. Hernandez, where in an opinion for a unanimous Court, Chief Justice Fuller explained:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.33

The Supreme Court subsequently recognized this statement of the act of state doctrine as authoritative.34

The act of state doctrine prevents a court from applying customary international law, forum law, or even the sovereign's own law to judge the legality of an act of a foreign sovereign

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27 376 U.S. at 420.
28 406 U.S. at 776-77.
29 Id. at 773-76.
31 Id. at 405.
32 See Sabbatino, 376 U.S. at 401.
33 168 U.S. 250, 252 (1897).
performed within its own territory.\textsuperscript{35} The doctrine requires that courts exercise their jurisdiction and decide cases on the merits by according an irrebuttable presumption of legality to acts of a foreign state.\textsuperscript{36} Therefore, the act of state doctrine is a “rule of decision” and not a neutral principle of judicial abstention.\textsuperscript{37}

B. History of the Bernstein Exception

The Bernstein exception to the act of state doctrine originated in \textit{Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvart-Maatschappij} where the Court of Appeals for the Second Circuit allowed the plaintiff, Arnold Bernstein, a Jewish citizen and resident of Germany, to challenge the validity of the expropriation of his property by Nazi Germany in view of a letter from the Department of State.\textsuperscript{38} In 1937, Nazi officials imprisoned Bernstein and compelled him to transfer his shipping company to a Nazi agent.\textsuperscript{39} A Belgian company purchased one of the company’s ships from that agent.\textsuperscript{40} After World War II, Bernstein made a claim against the Belgian company, claiming damages for detention of the ship and the insurance proceeds on the ship that the Belgian company collected when the ship was sunk during the war.\textsuperscript{41} The Court of Appeals for the Second Circuit rejected two prior claims brought by Bernstein on the basis of the act of state doctrine because the Belgian company acquired title to the ship in Germany.\textsuperscript{42} In this third attempt to obtain compensation, Bernstein obtained a letter from the Acting Legal Adviser of the Department of State stating to the effect:

\begin{quote}
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
\end{quote}

\begin{footnotes}
\textsuperscript{35} See Sabbatino, 376 U.S. 398, 415 n.17, 438.
\textsuperscript{36} See id. at 438-39, 471-72.
\textsuperscript{37} See id. at 471-72; see also Kirkpatrick, 493 U.S. at 406.
\textsuperscript{38} 210 F.2d at 375.
\textsuperscript{39} See Bernstein v. N.V. Nederlandsche-Amerikaansche, 173 F.2d 71, 73 (2d Cir. 1949).
\textsuperscript{40} See id.
\textsuperscript{41} See id.
\textsuperscript{42} See Bernstein, 173 F.2d at 78; Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 249-51 (2d Cir. 1947), cert. denied, 332 U.S. 772 (1947).
\end{footnotes}
through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.\(^{43}\)

Based on this expression of the Executive’s will, the Court of Appeals for the Second Circuit amended its earlier decision and, in an opinion by Judge Learned Hand, held that the act of state doctrine did not bar Bernstein from challenging the validity of the expropriation of his property by Nazi Germany.\(^{44}\)

Most observers theorized at the time that Bernstein was an unusual case and thus unlikely to be of much precedential value because of its unique set of circumstances.\(^{45}\) Prior to First National City Bank, the Court of Appeals for the Second Circuit noted that a Bernstein letter had been issued only once -- in the Bernstein case itself.\(^{46}\) Further, the Second Circuit observed that the Bernstein case had “never been followed successfully; it ha[d] been relied upon only twice, and in both of those instances, by lower courts whose decisions were subsequently reversed.”\(^{47}\) Although “the result in Bernstein was considered by most an aberration limited to its facts,”\(^{48}\) the Supreme Court examined, but did not resolve, the Bernstein exception in three separate cases over the course of the following three decades.

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43 Bernstein, 210 F.2d at 376.
44 Id.
45 See First Nat’l City Bank, 406 U.S. at 789, n.12 (Brennan, J., dissenting) (quoting the Brief for the United States as Amicus Curiae in Sabbatino, “The governmental acts there [in the Bernstein case] were part of a monstrous program of crimes against humanity; the acts had been condemned by an international tribunal after a cataclysmic world war which was caused, at least in part, by acts such as those involved in the litigation, and the German State no longer existed at the time of [the] State Department’s letter.”).
47 Id.
II. The Supreme Court’s Review of the Bernstein Exception

A. Banco Nacional de Cuba v. Sabbatino

In Banco Nacional de Cuba v. Sabbatino, the U.S. Supreme Court expressly avoided ruling on the validity of the Bernstein exception, and held that the act of state doctrine was controlling.49 In an eight to one decision, the Court, in an opinion by Justice Harlan, concluded that the Bernstein exception was not applicable because the State Department said only that it did not wish “to make any statement bearing on [the] litigation.”50 Instead, Justice Harlan upheld the act of state doctrine in a narrow holding. Justice Harlan noted that the Court was not laying down or reaffirming an inflexible and all-encompassing rule, but only that under the act of state doctrine, courts of the United States would not inquire into the legality of an uncompensated taking of property by a foreign government within its own territory when there was no treaty or other unambiguous agreement to supply controlling legal principles, even if the taking allegedly violated customary international law.51

Justice Harlan also indicated that the act of state doctrine was a method of recognizing the separation of powers contained in the United States Constitution. Justice Harlan stated that while the United States Constitution does not explicitly require the act of state doctrine, it does have “constitutional underpinnings.”52 If the judiciary interferes in the foreign relations of the United States, the handling of which may be assigned more properly to the other governmental branches, serious consequences could result.53 Therefore, Justice Harlan concluded that the act of state doctrine’s application to international law required a balancing of such issues as the

49 376 U.S. at 423.
50 Id. at 420.
51 Id. at 428.
52 Id. at 419.
53 Id. at 433.
international consensus on the law in question, the importance of the national interest at stake, and the status of the government whose acts were in question.\textsuperscript{54}

\section*{B. \textit{First National City Bank v. Banco Nacional de Cuba}}

In \textit{First National City Bank v. Banco Nacional de Cuba}, the U.S. Supreme Court addressed, but did not resolve, the validity of the Bernstein exception.\textsuperscript{55} Under the authority of the Castro government, the Cuban militia forcibly nationalized all of First National City Bank's ("City Bank") eleven branch banks located in Cuba.\textsuperscript{56} City Bank retaliated by selling the collateral securing a $10 million loan which it had made to Cuba, which City Bank admitted yielded an excess of at least $1.8 million over what was owed on the loan.\textsuperscript{57} Banco Nacional, the financial arm of the Cuban government, sued to recover this excess, and City Bank defended by way of a setoff and counterclaim, asserting its loss as a result of the expropriation of its property in Cuba.\textsuperscript{58} The district court recognized the Supreme Court's decision in \textit{Sabbatino}, that generally "the courts of one nation will not sit in judgment of the acts of another nation within the latter's territory," but concluded that post-\textit{Sabbatino}, congressional enactments had overruled that decision.\textsuperscript{59} Therefore, the district court did not apply the act of state doctrine and held that Cuba's expropriation violated customary international law.\textsuperscript{60} The Court of Appeals for the Second Circuit reversed, holding that the congressional enactments relied on by the district court were not applicable to the facts of City Bank and that, therefore, \textit{Sabbatino}'s formulation of the act of state doctrine was controlling.\textsuperscript{61}

\begin{itemize}
\item \textsuperscript{54} \textit{Id.} at 428.
\item \textsuperscript{55} 406 U.S. 759 at 768.
\item \textsuperscript{56} \textit{Id.} at 761.
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} \textit{See} First Nat’l City Bank, 442 F.2d 530, 536 (2d Cir. 1971).
\end{itemize}
While a petition for *certiorari* was pending before the Supreme Court, the Legal Adviser to the Department of State submitted a letter advising the Court that the foreign policy interests of the United States did not require application of the act of state doctrine. The letter also explained the Department of State’s position that the act of state doctrine should not be applied to defeat City Bank's counterclaim by automatically validating the Cuban expropriation. The Supreme Court granted *certiorari*, vacated the judgment below, and without expressing any views on the merits, remanded the case to the court of appeals for reconsideration in light of the views of the Department of State. The court of appeals, however, adhered to its original decision that the act of state doctrine should be applied to City Bank's counterclaim, and awarded the $1.8 million to Banco Nacional. In reaching its holding, the court of appeals distinguished *Bernstein* on the fact that the State Department's letter in that case expressed a policy of compensating all victims of Nazi expropriations, not just those fortunate enough to be able to assert counterclaims, and the fact that the act of state in *Bernstein* was perpetrated by a foreign government that was no longer in existence. On *certiorari*, the Supreme Court reversed the judgment of the court of appeals, but no opinion commanded a majority of the Court, and six of the nine Justices agreed with the lower court that the Bernstein exception should be rejected.

1. **Justice Rehnquist’s Three-Justice Plurality Opinion**

Only Justice Rehnquist's three-Justice plurality opinion for the Court based its decision on the adoption and approval of the Bernstein exception. Justice Rehnquist, joined by Chief Justice Burger and Justice White, reasoned that the act of state doctrine is primarily justified “on

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62 First Nat’l City Bank, 406 U.S. at 761.  
63 See Banco Nacional, 442 F.2d at 536.  
64 First Nat’l City Bank, 406 U.S. at 761.  
65 Banco Nacional, 442 F.2d at 531.  
66 Id. at 535.  
67 First Nat’l City Bank, 406 U.S. at 759.  
68 Id. at 768.
the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government.”

Justice Rehnquist contended that the “only reason for not deciding the case by use of otherwise applicable legal principles would be the fear that legal interpretation by the judiciary of the act of a foreign sovereign within its own territory might frustrate the conduct of this country’s foreign relations.”

Justice Rehnquist determined that because the State Department had advised the Court that its foreign interests would not be frustrated in the case, the act of state doctrine should not prevent the Court from examining the legal issues raised by the acts of the foreign sovereign within its own territory.

Justice Rehnquist concluded that when the Executive urges that the act of state doctrine not be applied, the rationale for application of the act is eliminated:

> It would be wholly illogical to insist that such a rule, fashioned because of fear that adjudication would interfere with the conduct of foreign relations, be applied in the face of an assurance from that branch of the Federal Government that conducts foreign relations that such a result would not obtain.

Accordingly, Justice Rehnquist “adopt[ed] and approve[d]” the Bernstein exception.

2. **Justice Douglas’ Concurrence**

Justice Douglas concurred in the result, but concluded that the principle of “fair dealing” discussed in *National City Bank v. Republic of China*, and not the Bernstein exception should be controlling. Justice Douglas argued that under the Bernstein exception, the Court would become “a mere errand boy for the Executive Branch which may choose to pick some people’s

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69 *Id.* at 765.
70 *Id.* at 768. (Justice Rehnquist’s plurality opinion significantly narrowed the policy bases for the act of state doctrine enunciated in *Sabbatino*).
71 *Id.*
72 *Id.*
73 *Id.* at 768.
75 *First Nat’l City Bank*, 406 U.S. at 772-73 (Douglas, J., concurring in the result).
chestnuts from the fire, but not others.” However, Justice Douglas pointed out that City Bank was making a counterclaim to offset its losses resulting from the nationalization of its eleven bank branches located in Cuba. Accordingly, Justice Douglas argued that “[i]t would offend our sensibilities if Cuba could collect the amount owed on liquidation of the collateral for the loan and not be required to account for any setoff.” To dismiss the counterclaim, Justice Douglas wrote, “would permit Cuba to have her cake and eat it too.” Therefore, Justice Douglas rested his decision on the holding in *National City Bank v. Republic of China*, that when a foreign sovereign brings suit in an American court under American laws, in fairness it waives its defense of sovereign immunity to counterclaims up to the amount of its claim.

Justice Douglas found City Bank's counterclaim for the amount of Banco Nacional's claim controlled by *Republic of China's* principle of “fair dealing.” Under this principle, Justice Douglas found the act of state doctrine inapplicable to cases in which the issue of the legality of an act of state has been raised in a counterclaim against a sovereign plaintiff for an amount not in excess of the sovereign's claim. He stated, however, that *Sabbatino* should continue to govern any amount by which a counterclaim exceeds a sovereign plaintiff's claim, as well as any claim challenging the legality of a foreign sovereign's act, which is not raised as a counterclaim against that sovereign. Therefore, under Justice Douglas conclusion, City Bank’s claim for set-off should be permitted, but a claim for affirmative relief would be barred by the act of state doctrine.

76 Id. at 773.
77 Id. at 772.
78 Id.
79 Id.
80 348 U.S. at 364.
81 See First Nat’l City Bank, 406 U.S. at 770-71.
82 Id. at 773.
83 Id.
84 Id. at 761.
3. Justice Powell’s Concurrence

Justice Powell also both concurred in the Court's judgment and rejected the Bernstein exception.\footnote{Id. at 773 (Powell, J., concurring in the result).} Justice Powell also rejected the specific holding in \textit{Sabbatino} itself.\footnote{Id.} He concurred with the lead opinion’s policy reading of \textit{Sabbatino}, but agreed with the dissent that \textit{Sabbatino}’s holding was inconsistent with the adoption of the Bernstein exception.\footnote{Id.} Even though the Bernstein exception had not been ruled upon in \textit{Sabbatino}, Justice Powell contended that the Bernstein exception violated \textit{Sabbatino}’s ruling based on the principle of separation of powers, because the exception “would require the judiciary to receive the executive’s permission before invoking its jurisdiction.”\footnote{Id. at 775.}

Justice Powell balanced the functions of the judicial and political branches in matters bearing upon foreign affairs as the Court had in \textit{Sabbatino}, but rejected \textit{Sabbatino}’s holding as overly broad.\footnote{Id. at 774.} Justice Powell wrote that to argue that the doctrine of separation of powers required the Court to stand aside in expropriation cases was “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.”\footnote{Id.} He concluded that American courts should not apply the act of state doctrine to a foreign expropriation unless judicial determination of the legality of such an expropriation would conflict with “delicate foreign relations” conducted by the political branches.\footnote{Id. at 775-76.} In particular, Justice Powell suggested that the judiciary should defer when an adjudication of an individual case would interfere with diplomatic efforts to obtain
comprehensive relief for all those suffering loss from the nationalization of private property by a
foreign sovereign.  

4. Justice Brennan’s Dissent

Justice Brennan, joined in his dissent by Justices Stewart, Marshall and Blackmun, rejected the Bernstein exception on the ground that, even with acquiescence by the Executive, adjudication of act of state cases violates the separation of powers doctrine. Justice Brennan contended that it would require the Court to “abdicate [its] judicial responsibility to define the contours of the act of state doctrine so that the Judiciary does not become embroiled in the politics of international relations to the damage not only of the courts and the Executive but of the rule of law.” Accordingly, Justice Brennan reasoned that Sabbatino required application of the act of state doctrine to City Bank's counterclaim.

Justice Brennan further contended that the act of state doctrine was the expression of a number of policies to which the Bernstein exception and Justice Douglas’ “fairness exception” were not responsive. Justice Brennan cited such policies as the preferability of comprehensive relief through diplomatic channels over piecemeal adjudications by the judiciary, and the inadvisability of national courts passing on the legality of an expropriation without accepted standards of decision supplied by a treaty or by customary international law. Finally, Justice Brennan argued that even if the only rationale for the act of state doctrine were avoiding judicial interference with Executive foreign policy, making an Executive opinion regarding the applicability of the doctrine dispositive did not eliminate the risk of conflict. Justice Brennan did acknowledge that a Bernstein letter should be a factor in the Court's application of the act of

92 Id. at 776.
93 Id. at 790-92 (Brennan, J., dissenting).
94 Id. at 778.
95 Id. at 785-90, 795-96.
state doctrine, but he contended that the Executive's suggestion should not be dispositive because "[t]he task of defining the contours of a political question such as the act of state doctrine is exclusively the function of this Court." Justice Brennan continued that the Executive's invitation to lift the act of state bar through the use of a Bernstein letter "can only be accepted at the expense of supplanting the political branch in its role as a constituent of the international law-making community." Accordingly, Justice Brennan determined that the Bernstein exception relinquished the function of the Court to the Executive by requiring the former to blindly adhere to the latter's requests that foreign acts of state be reviewed.

Justice Brennan also argued that the consequence of adopting the Bernstein exception would bring the courts and their decisions into disrespect because the exception's application would subject similarly situated litigants to unequal treatment on partisan grounds. Justice Brennan argued, "the fate of individual claimants would be subject to the political considerations of the Executive Branch." He stated that similarly situated litigants would not likely obtain even-handed treatment because the policies of the Executive Branch are guaranteed to vary as administrations change. Justice Brennan reasoned that "[r]esolution of so fundamental [an] issue" as the basic division of functions between the Executive and the Judicial Branches "cannot vary from day to day with the shifting winds at the State Department." Therefore, Justice Brennan concluded that the Bernstein exception violated the separation of powers doctrine.

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96 Id. at 782-85.
97 Id. at 790.
98 Id.
99 Id. at 790.
100 Id. at 791-92.
101 Id. at 792.
102 Id.
because it would bring the Executive’s domestic and international political considerations into the judicial process and thereby treat similar litigants unequally.\textsuperscript{104}

In sum, only the three-justice plurality opinion endorsed the Bernstein exception, while a majority of five justices expressly rejected it. Justice Douglas concurred in the result, but based his concurrence on the concept of fair dealing. The fifth member of the majority, Justice Powell, expressly rejected the Bernstein exception, and was joined by the four dissenting justices in repudiating the exception. The result of these disparate opinions in \textit{First National City Bank} is uncertainty regarding the continued validity of the Bernstein exception, as well as inconsistent application of the doctrine, as noted in Section III, infra.

\textbf{C. \textit{W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.}}

The Supreme Court’s decision in \textit{Kirkpatrick} not only failed to clarify the issue of the Bernstein exception’s validity but has clouded the issue even further. The Supreme Court noted in \textit{Kirkpatrick} that the Bernstein doctrine had been suggested as a “possible exception[] to application of the [act of state] doctrine.”\textsuperscript{105} Nevertheless, a unanimous Court found that the “factual predicate for application of the act of state doctrine simply [did] not exist”\textsuperscript{106} and therefore that it was unnecessary to consider the validity of any exception to the doctrine. Further, while \textit{Sabbatino} had been accepted as a directive to the courts to balance the relevant considerations in deciding whether to apply the act of state doctrine, \textit{Kirkpatrick} on the other hand, “caution[ed] that the balancing approach cannot be used to avoid a case which the court is under a duty to adjudicate.”\textsuperscript{107} The \textit{Kirkpatrick} case noted, for example, that the court may not abstain from deciding a case merely because adjudication might embarrass a foreign

\begin{itemize}
\item \textsuperscript{104} See \textit{id.} at 791-92.
\item \textsuperscript{105} \textit{Kirkpatrick}, 493 U.S. 400 at 404-405.
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} See 2 \textsc{Litig. of Int’l Disp. in U.S. Ct[s].} §13:26 (2007).
\end{itemize}
The ultimate result of the *Kirkpatrick* decision, however, is to provide little guidance to the lower federal courts in application of the Bernstein exception.

1. **Background and Holding**

Plaintiff Environmental Tectonics Corporation International (“Environmental Tectonics”) alleged that the defendant W.S. Kirkpatrick & Co., Inc. (“Kirkpatrick”) obtained a Nigerian military contract by bribing Nigerian officials. Environmental Tectonics brought its claim under several Anti-Racketeering Acts after Kirkpatrick and Harry Carpenter, Kirkpatrick’s Chairman of the Board and Chief Executive Officer, both pled guilty to violations of the Foreign Corrupt Practices Act. The district court requested and received a Bernstein letter from the Legal Adviser to the United States Department of State. The letter stated that judicial inquiry into a foreign sovereign’s motivation would not produce the “unique embarrassment and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign’s acts are invalid.” Despite the State Department’s Bernstein letter, the district court dismissed the action against Kirkpatrick, concluding that the act of state doctrine precluded judicial determinations of motivations of sovereign acts that “would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States.”

The Court of Appeals for the Third Circuit reversed the lower court’s decision primarily on the basis of the State Department’s letter to the district court. Although the court of appeals conceded that the comments of the Legal Adviser for the State Department were not dispositive,

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111 See *Kirkpatrick*, 493 U.S. at 402.
it nevertheless found that “the Department’s factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation [was] entitled to substantial respect.”\textsuperscript{114} The court of appeals reversed the judgment of the district court and remanded the case for trial. The United States Supreme Court granted certiorari, affirming the decision of the court of appeals, although on different grounds.

Justice Scalia, writing for a unanimous Court, affirmed the judgment of the Court of Appeals for the Third Circuit finding that “the factual predicate for application of the act of state doctrine does not exist.”\textsuperscript{115} Justice Scalia stated that, unlike previous Supreme Court act of state decisions, this litigation did not require a judicial determination of the validity of the foreign sovereign’s act performed within it territorial sovereignty.\textsuperscript{116} Kirkpatrick argued that the facts necessary to establish Environmental Tectonics’ claim would also establish that the contract was unlawful.\textsuperscript{117} Justice Scalia replied that “[t]he act of state doctrine is not some vague doctrine of abstention but a ‘principle of decision binding on federal and state courts alike.’”\textsuperscript{118} Justice Scalia continued that “[a]ct of state issues only arise when a court must decide – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign.”\textsuperscript{119} Accordingly, Justice Scalia determined that because the legality of the Nigerian government’s action was not before the court, the act of state doctrine was inapplicable.\textsuperscript{120}

Kirkpatrick also argued that the policies underlying the act of state doctrine were implicated, including “international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct

\textsuperscript{114} Id. at 1062.
\textsuperscript{115} Kirkpatrick, 493 U.S. at 405.
\textsuperscript{116} Id.
\textsuperscript{117} See id. at 406.
\textsuperscript{118} Id. quoting Sabbatino, 376 U.S. at 472.
\textsuperscript{119} Id.
\textsuperscript{120}
of foreign relations.” The United States, as *amicus curiae*, favored the same approach to the act of state doctrine, but disagreed with Kirkpatrick as to the outcome it would produce in the case. Accordingly, the United States argued that the Court should “resolve this case on the narrowest possible ground, viz., that the letter from the legal adviser to the District Court gives sufficient indication that, ‘in the setting of this case,’ the act of state doctrine poses no bar to adjudication.”

However, Justice Scalia concluded, “that Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.” Accordingly, Justice Scalia held that “[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.” As a result, Justice Scalia concluded that the act of state doctrine had “no application to the present case because the validity of no foreign sovereign act [was] at issue.”

2. The Effect of *Kirkpatrick* on the Bernstein Exception

In *Kirkpatrick*, Justice Scalia created a threshold test for application of the act of state doctrine: the validity of the foreign government’s actions must be called into question. Justice Scalia stated that the rule does not, however, require consideration of the relevant policy considerations supporting the act of state doctrine, which were expressed in *Sabbatino*. Rather, Justice Scalia stated that if there is no question of validity, the doctrine is automatically

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120 *Id.*
121 *Id.* at 408.
122 *Id.*
123 *Id.*
124 *Id.* at 409.
125 *Id.*
126 *Id.* at 409-10.
127 See *id.*
128 *Id.*
inapplicable no matter how seriously those policy concerns are implicated.\textsuperscript{129} Furthermore, the Kirkpatrick decision is also important for what it does not say. Even though the Court expressly avoided ruling on the validity of the Bernstein exception in Kirkpatrick, there are three indications that the Court may have intentionally limited the Executive Branch’s discretion over act of state cases.

First, the Court could have applied the Bernstein exception to the facts in Kirkpatrick. The Legal Adviser’s Office advised that the act of state doctrine should not preclude the court’s adjudication.\textsuperscript{130} However, Justice Scalia refused to consider the Bernstein exception, arguing that “the factual predicate questioning validity for application of the act of state doctrine does not exist.”\textsuperscript{131} Accordingly, the Court’s unanimous refusal to consider the Bernstein exception in Kirkpatrick may indicate its desire to limit the Bernstein principle’s application.

Second, Justice Scalia was hostile to the United States suggestion, as amicus curiae, that the Court should allow review in the Kirkpatrick case itself, but that it should make no general holding as to the permissibility of inquiry into the motivations behind sovereign acts. Justice Scalia explicitly rejected the United States attempt to reserve discretion as to suits where the “motivation for a sovereign act,” and not only the “validity of a foreign sovereign act” was at issue.\textsuperscript{132} Consequently, the Court’s unanimous rejection of the Executive’s attempt to prevent a limitation on its broad discretion over act of state cases may have indicated the Court’s desire to remove some of this discretion.

\textsuperscript{129} Id.
\textsuperscript{130} See Environmental Tectonics Corp., 659 F.Supp. at 1402.
\textsuperscript{131} Kirkpatrick, 493 U.S. at 405.
\textsuperscript{132} Id. at 409.
Third, even though Justice Scalia expressly avoided ruling on the validity of the Bernstein exception, he may have limited the Executive Branch’s discretion over act of state cases by stating, “[t]he act of state doctrine is not some vague doctrine of abstention but a ‘principle of decision binding on federal and state courts alike.’”\footnote{Id.} If this statement is read as part of the holding of the Kirkpatrick case, then it would seriously call into question the Bernstein exception’s validity because the act of state doctrine would be less a standard and more an absolute rule. If the act of state doctrine is not a “doctrine of abstention,” but a “principle of decision,” then not only would Bernstein letters not be given dispositive weight, but even granting deference to the Executive Branch would be substantially limited. If on the other hand, the statement is simply read as dictum, then the Bernstein exception would still be applicable when the validity of foreign sovereign acts are at issue.

III. Critique of the Bernstein Exception

A. The Bernstein Exception Produces Uncertainty and Inconsistent Results.

Since Kirkpatrick was decided in 1990, the Supreme Court has neither directly addressed nor further examined the Bernstein exception, which has resulted in confusion in the lower federal courts regarding the continuing validity of the exception. Further, the uncertainty regarding the Bernstein exception’s viability has led to inconsistent, sometimes even absurd, results in the lower courts. Confusion about the role of the Executive in cases involving the act of state doctrine has been compounded by dicta in two recent Supreme Court cases that appear to endorse case-specific deference to the Executive in certain cases where the claim is based on the act of a foreign government committed within its own territory.\footnote{See Republic of Austria v. Altmann, 541 U.S. 677, 701-702 (2004); Sosa v. Alvarez-Machain, 542 U.S. 692, 733, fn. 21 (2004).} This in turn makes it even
more critical that the Supreme Court squarely address the Bernstein doctrine and definitively eliminate it as an exception to the act of state doctrine.

1. Uncertainty Regarding the Bernstein Exception’s Validity Has Created Disparity in Its Application.

The following cases plainly illustrate how the Supreme Court’s failure to squarely address the Bernstein exception has resulted in confusion regarding the exception’s continuing viability.\(^{135}\) It has also lead to a hodgepodge of results, depending upon the particular court’s attitude toward the Bernstein doctrine. Some lower courts seem to “have adopted the Bernstein exception, while others have not.”\(^{136}\) While not explicitly adopting or rejecting the exception, “still other courts have recognized the issuance of ‘Bernstein letters,’ but have stated that such letters are not a dispositive factor in determining whether to apply the act of state doctrine.”\(^{137}\) Still other courts have deemed the mere absence of a Bernstein letter from the Department of State to be an implied mandate to apply the act of state doctrine.

a. Some Courts Have Adopted the Bernstein Exception.

Some courts have followed the First National City Bank plurality’s adoption of the Bernstein exception and applied it in a variety of contexts. For example, in Riggs Nat. Corp. & Subsidiaries v. C.I.R.,\(^ {138}\) a taxpayer bank brought suit in U.S. Tax Court, challenging the Internal Revenue Service’s denial of foreign tax credits for taxes paid to the Brazilian government.\(^ {139}\) The U.S. Tax Court denied the taxpayer’s challenge and the taxpayer appealed.\(^ {140}\) The Court of Appeals for the District of Columbia Circuit reversed the decision by applying the act of state

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135 See e.g., Millen Industries, Inc. v. Coordination Council for North American Affairs, 855 F.2d 879, 882-883 (D.C. Cir. 1988) (in a breach of contract case brought by American corporation against trade instrumentality of Taiwan, in which the State Department had issued a Bernstein letter, the appellate court remanded the case based in part on the “the uncertainty of the status of the Bernstein exception….”).
137 See id.
138 163 F.3d 1363, 1367, n.6 (D.C.Cir. 1999).
139 Id. at 1365.
doctrine to the Brazilian Minister of Finance’s ruling regarding the taxpayer’s obligation to pay the taxes to the Brazilian government. In doing so, the court recognized the existence of the Bernstein exception, particularly noting that “while not yet endorsed by a majority of the Supreme Court, some justices have suggested an exception to the doctrine for cases in which the executive branch has represented in a so-called ‘Bernstein’ letter that it has no objection to denying validity to the foreign sovereign act.”

As another example, in a dispute involving conflicting claims of ownership of an oil field in the Persian Gulf, a holder of a concession to drill for oil brought a conversion action against the holder of a concession granted by another sovereign claiming the same territory. The Fifth Circuit dismissed the action based in part on deference to a statement of interest filed by the Department of State, which declared that it “would be contrary to the foreign relations interests of the United States if [the] domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here.” The Fifth Circuit cited First National City Bank and Bernstein with approval: “In determining whether to abstain or dismiss because of conflicting executive interest, federal courts are becoming more amenable to receiving opinion by the executive branch…. [I]t is… clear that whether the state department believes that judicial action would interfere with its foreign relations is germane to whether a court may decide actions involving foreign relations.”

\[140\] *Id.* 
\[141\] *Id.* at 1368. 
\[142\] *Id.* at 1368, n.6. 
\[143\] *See Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis, 577 F.2d 1196 (5th Cir. 1978).* 
\[144\] *Id.* at 1204. 
\[145\] *Id.* at 1204, fn.14.
b. Some Courts Have Not Adopted the Bernstein Exception.

While some lower federal courts appear to follow the *First National City Bank* plurality opinion’s endorsement of the Bernstein exception, other courts have refused to recognize the Bernstein exception. In *Braniff Airways, Inc. v. C.A.B.*, for example, the court held that it did not have authority to review an order of the Civil Aeronautics Board awarding an airline authority to operate between Chicago and Montreal, despite the President’s characterization of the order as not involving defense or foreign policy considerations.\(^{146}\) Interestingly, in a case decided in the same year as *Occidental*, the *Braniff* court cited the *First National City Bank* dissent in rejecting the Executive’s recommendation that the court review the Civil Aeronautics Board order: “If we were to permit the President to determine the appropriateness of judicial review, we would abdicate our constitutional function, and contribute to the politicization of the judiciary.”\(^{147}\)

Still other courts have expressed strong doubts as to the validity of the exception but have not expressly rejected its possible application. For instance, the Court of Appeals for the District of Columbia was also critical of the Bernstein exception in *Millen Industries, Inc., v. Coordination Council for North American Affairs.*\(^{148}\) In *Millen*, an American corporation brought a breach of contract, promissory estoppel and misrepresentation suit against a trade instrumentality of Taiwan.\(^{149}\) The United States entered the case as *amicus curiae*, and the Legal Adviser wrote a Bernstein letter to the court stating that “there are no foreign policy interests of the United States in our present relations in the Far East that should bar adjudication of the present suit.”\(^{150}\) After noting that the act of state doctrine applied with reference to Taiwan, the

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\(^{146}\) 581 F.2d 846, 852 (D.C. Cir. 1978).

\(^{147}\) *Id.* at 851.

\(^{148}\) 855 F.2d at 879.

\(^{149}\) *Id.*

\(^{150}\) *Id.* at 882.
court held that “uncertainty of the status of the Bernstein exception” required a remand of the case for further development of the jurisdictional facts and questions.\textsuperscript{151}

Similarly, in \textit{De Blake v. Republic of Argentina}, the United States District Court for the Central District of California characterized the Bernstein exception as “very limited.”\textsuperscript{152} In that case, plaintiffs filed an action against the Republic of Argentina and various individuals, claiming they had been tortured and their property seized by the Argentinean government.\textsuperscript{153} The court determined that it had subject matter jurisdiction over the claims for torture, but that the act of state doctrine applied to bar the claims regarding the taking of property.\textsuperscript{154} The plaintiffs filed a motion for reconsideration regarding the court’s order on the applicability of the act of state doctrine by arguing that the Bernstein exception should apply.\textsuperscript{155} The court acknowledged a letter sent to the court from the State Department.\textsuperscript{156} However, the court held that “assuming the viability of the Bernstein exception,” it did not apply in \textit{De Blake} because the State Department did not take a position on the litigation.\textsuperscript{157}

c. Some Courts Recognize Bernstein Letters as Simply One Factor in Determining Whether to Apply the Act of State Doctrine.

Perhaps attempting to strike a middle ground amidst the uncertainty surrounding the Bernstein exception, some lower federal courts have viewed Bernstein letters as merely one factor to consider when determining whether to apply the act of state doctrine. In \textit{Environmental Tectonics}, the Third Circuit noted that the opinion of the Executive regarding the application of the act of state doctrine, while not “controlling on the courts,” was still “entitled to substantial

\begin{footnotesize}
\begin{enumerate}
\item Id. at 883.
\item 1984 WL 9080 (C.D.Cal. 1984) (not reported in F.Supp.).
\item Id. at 3.
\item Id. at 2.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
Similarly, in an action brought by the Republic of Philippines against former president Marcos and others, the Republic sought an injunction to prevent defendants from transferring certain properties in New York, which were alleged to have been purchased with money illegally taken from the Philippines. The United States had filed a Bernstein letter with the court in which the State Department claimed that “it d[id] not fear embarrassment if the courts of [the United States] were to take jurisdiction of this and other disputes between The Republic and ex-President Marcos.” In holding that the act of state doctrine did not bar adjudication of the case, the court declared: “While the position taken by the Executive is a relevant factor, it is not dispositive.”


Despite the fact that the Executive’s refusal to submit a Bernstein letter in a particular case does not indicate the Executive’s position on application of the act of state doctrine, some federal courts have, nevertheless, interpreted it as an implied mandate to apply the doctrine. For example, in Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., the Cuban government brought an action against an American sugar broker for money owed on a contract for sugar imported from Cuba. The sugar broker claimed a setoff of the money owed based on the Cuban government’s seizure of the company's Havana offices and bank account during the Cuban revolution. However, even though the sugar broker sought only a setoff and there was no showing that adjudication of the counterclaim would interfere with delicate foreign

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157 Id; see also National Coalition Gov’t of Burma, 176 F.R.D. at 355 (noting that the validity of the Bernstein exception was “highly questionable,” but accepting the Statement of Interest submitted by the Executive as a Bernstein letter”).
158 847 F.2d at 1062.
159 See Republic of Philippines v. Marcos, 806 F.2d 344, 346 (2d Cir. 1986).
160 Id. at 356.
161 Id. at 358 (citing with approval Justice Douglas and Justice Powell’s concurrences in First Nat’l City Bank).
162 652 F.2d 231, 233 (2d Cir. 1981).
relations, Lamborn had not obtained a Bernstein letter, and the Executive Branch had expressed no view as to the applicability of the act of state doctrine in that case.164 Accordingly, the court held that the sugar broker was barred by the act of state doctrine from raising the Cuban government's seizure of its Havana assets as a counterclaim or setoff against the sugar broker's debt owed on the contract.165

Similarly, in a case brought by an Ethiopian corporation against an American corporation to recover for spices sold and delivered, the district court denied the American corporation’s counterclaim, which arose out of expropriation of its interest in the Ethiopian corporation by the Ethiopian government.166 Applying the reasoning in Empresa Cubana, the district court rejected the American corporation’s claim for offset, noting, *inter alia*, the absence of a Bernstein letter.167 In a similar case, a California district court also declined to permit a counterclaim by Iranian citizens based upon alleged misappropriation of assets in Iran, based in part on the court’s observation that the State Department had not provided a Bernstein letter.168

2. Recent Supreme Court Cases Hint at Case-Specific Deference.

In addition to the confusion in the lower federal courts and a hodgepodge of conflicting results, two recent Supreme Court decisions, in which the Court appears to implicitly endorse case-specific deference to the Executive in foreign policy, have further compounded the uncertainty of the Bernstein exception.

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163 *Id.* at 234.
164 *Id.* at 237-38.
165 *Id.*
167 *Id.* at 1229. (“It is clear that there has been no statement by the Executive Branch which would invoke the Bernstein exception….”).
168 See Bank Tejarat, 723 F. Supp. at 520 (noting the absence of a Bernstein letter and concluding that “there is no evidence that the Executive branch believes the act of state doctrine should not apply in this case”).
a. **Republic of Austria v. Altmann**

In *Altmann*, the heir of the original owner of several valuable Klimt paintings sued the Republic of Austria and its state-owned Austrian Gallery, seeking return of the paintings, which she alleged had been illegally seized by the Nazis or expropriated by Austria after World War II in violation of international law.\(^{169}\) Austria moved to dismiss based in part on the claim that it would have enjoyed absolute sovereign immunity from suit in United States courts when much of its wrongdoing actually took place in 1948.\(^{170}\) The United States Supreme Court granted *certiorari* and held that the Foreign Sovereign Immunities Act ("FSIA") applied to conduct that occurred prior to its enactment, including Austria’s alleged illegal acts committed in 1948.\(^{171}\)

In its opinion, the Supreme Court noted that the views of the State Department might be entitled to deference in certain case-specific situations.\(^{172}\) The State Department as *amicus curiae* had recommended barring application of the FSIA to claims based on pre-enactment conduct.\(^{173}\) Although the Supreme Court rejected the State Department’s recommendation, it specifically noted that “nothing in [its] holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases involving foreign sovereign immunity.”\(^{174}\) Although *Altmann* concerned the FSIA, rather than the act of state doctrine, nevertheless the Court somewhat cryptically stated that “should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be

\(^{169}\) 541 U.S. at 680-681.

\(^{170}\) *Id*.

\(^{171}\) *Id* at 700.

\(^{172}\) *Id* at 702.

\(^{173}\) *Id* at 701.

\(^{174}\) *Id*.
entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”

b. Sosa v. Alvarez-Machain

In Sosa v. Alvarez-Machain, respondent, a Mexican national acquitted of murder after being abducted and transported to the United States to face prosecution, brought an action under the Alien Tort Statute (“ATS”) and the Federal Tort Claims Act (“FTCA”) against the United States, DEA agents, and various Mexican citizens, including petitioner, alleging that the abduction violated his civil rights. The United States Supreme Court held that respondent was not entitled to recovery under either the ATS or the FTCA, based in part on the conclusion that respondent’s illegal detention of less than one day did not violate any well defined norms of customary international law.

In a case decided approximately three weeks after Altmann, the Supreme Court again acknowledged a possible case-specific deference to the Executive in certain cases brought in federal courts involving violations of international law. The Court noted that the “requirement of clear definition” of international norms sufficient to support a cause of action “is not meant to be the only principle limiting the availability of relief in the federal courts for violation of customary international law…. The Court went on to identify various limitations upon the availability of relief in federal court, including, “another possible limitation that we need not apply here is a policy of case-specific deference to the political branches.” As an example of such case-specific deference, the Court noted that there were “now pending in Federal District

175 Id. at 702 (emphasis in original).
176 See 542 U.S. at 697-698.
177 Id. at 697, 738.
178 Id. at 733, fn. 21.
179 Id.
180 Id.
Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa.”¹⁸¹ The Government of South Africa had stated that these class actions were interfering with the official policies of its Truth and Reconciliation Commission, with which the United States had agreed by means of a letter from the State Department’s Legal Adviser.¹⁸² The Court stated that “[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”¹⁸³

It is not yet clear what the impact of Altmann and Sosa may be on the continued use of the Bernstein exception, although some district courts have been citing these cases with approval. For example, in Doe v. Qi,¹⁸⁴ practitioners of Falun Gong, a spiritual movement in China, brought suit against local Chinese government officials, alleging that the defendants’ acts had violated the ATCA and the Torture Victims Protection Act (“TVPA”). The court held that the act of state doctrine barred the plaintiff’s claims against Chinese local government officials for damages and injunctive relief, but not their claim for declaratory relief.¹⁸⁵

Upon the district court’s request, the State Department filed multiple statements of interest in the case, in which it urged against adjudication of the lawsuits.¹⁸⁶ The Executive first claimed that it had “many tools at its disposal to promote adherence to human rights in China,”¹⁸⁷ and that therefore, suits such as those brought by the Falun Gong practitioners would hinder the Executive’s case for human rights. Instead, the State Department argued, that hearing a case in which a United States court is required to sit in judgment on acts of foreign officials

¹⁸¹ Id.
¹⁸² Id.
¹⁸³ Id.
¹⁸⁴ 349 F.Supp.2d 1258 (N.D. Cal. 2004).
¹⁸⁵ Id. at 1303.
¹⁸⁶ Id. at 1270.
¹⁸⁷ Id. at 1271.
within their own country would only “serve to detract from, or interfere with, the Executive Branch’s conduct of foreign policy.”\textsuperscript{188} In its opinion, the court extensively quoted Sosa’s recognition of a possible “policy of case-specific deference to the political branches.”\textsuperscript{189} The court went on to state that, in matters of U.S.-foreign relations, the “views of the State Department, while not ‘conclusive’ are entitled to respectful consideration.”\textsuperscript{190}

Similarly, in \textit{Presbyterian Church of Sudan v. Talisman Energy, Inc.}, plaintiffs, current and former residents of southern Sudan, alleged, pursuant to the ATS, that they were victims of genocide, crimes against humanity, and other violations of international law perpetrated by the Government of Sudan and a Canadian energy company.\textsuperscript{191} The United States submitted a statement of interest, which included as attachments a letter from the State Department and a diplomatic note from the Canadian Embassy to the State Department, both expressing concern regarding the impact of the litigation on the conduct of foreign affairs.\textsuperscript{192} The statement of interest also noted that the lawsuit could interfere with Canada’s “conduct of its foreign policy in pursuit of goals that the United States shares [i.e., working with the government of Sudan to end the genocide in Darfur].”\textsuperscript{193} The court noted that “there [was] comparatively little guidance regarding the appropriate weight to assign to statements of interest made by foreign governments . . . that accompany a United States Government statement of interest,” but because the weight to give the statement of interest did not affect the outcome, “assumed, without deciding, that ‘serious weight’ should be assigned” to the statement.\textsuperscript{194}

\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{See id.} at 1291.
\textsuperscript{190} \textit{Id.} at 1296.
\textsuperscript{192} \textit{Id.} at 1.
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.} at 4, quoting Sosa, 542 U.S. at 733, n.21.
Rather than squarely addressing the validity of the Bernstein doctrine, the Supreme Court’s cryptic statements in Altmann and Sosa regarding possible case-specific deference to the Executive have confounded the confusion regarding the continuing validity of the exception.\footnote{See, e.g., Beaty, 480 F. Supp. 2d at 78 (noting that because the Supreme Court’s discussion of case-specific deference “was unnecessary to resolve the issue in both Altmann and Sosa, the Supreme Court did not flesh out the level of deference owed or indicate just what submissions of the Executive Branch were entitled to heightened deference”); see also Presbyterian Church of Sudan, 2005 WL 2082846 at 3 (“Courts have assigned varying weight to statements of interest by the United States Government according to the circumstances.”).} Moreover, even though a majority of the Supreme Court has never endorsed the Bernstein exception, Altmann and Sosa’s invitation to the Executive to file Statements of Interest urging the court to either adjudicate or dismiss particular claims is akin to an implicit endorsement of the Bernstein exception.\footnote{See Benjamin E. Pollack, Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims, 43 Hous. L. Rev. 193, 223 (2006).} This makes it even more imperative that the Supreme Court address the validity of the Bernstein doctrine directly to avoid further confusion and inconsistent results.

**B. The Bernstein Exception Violates the Separation of Powers Doctrine.**

Another grave problem created by adherence to the Bernstein exception is that it violates the doctrine of separation of powers by giving a degree of control to the Executive in act of state cases.\footnote{See supra note 108 at 662 (“It is evident that the Bernstein exception cannot genuinely be supported in the name of separation of powers, because the operation of the exception itself creates grave separation of powers problems.”).} Under the separation of powers doctrine, “[t]he task of defining the contours of a political question such as the act of state doctrine should be exclusively the function of [the judiciary].”\footnote{First Nat’l City Bank at 790; see also Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 725 (1976) (Marshall, J., dissenting) (noting that six members of the Court had disapproved the Bernstein exception because “the task of defining the role of the judiciary is for this court, not the Executive Branch”).} The separation of powers doctrine mandates that the judiciary decide cases independently and without direction or influence from the Executive or Legislative Branches.\footnote{See supra note 17 at 376.}
However, when a court defers to a Bernstein letter, it abdicates this independence and discretion to the Executive.\textsuperscript{200}

The Bernstein exception only makes sense if the primary rationale for the act of state doctrine is comity in international relations and between the branches of government.\textsuperscript{201} In fact, Justice Rehnquist’s three-justice plurality opinion’s endorsement of the Bernstein exception in \textit{First National City Bank} depended heavily upon principles of international comity and judicial deference to the exclusive power of the Executive in the field of foreign relations.\textsuperscript{202} However, in its more recent application of the act of state doctrine, there has been a “shift by the Court away from the international comity rationale in favor of a rationale grounded in separation of powers.”\textsuperscript{203} Thus, because of the Supreme Court’s emphasis on separation of powers considerations, rather than principles of comity, “ceding the decision to the Executive by way of a Bernstein letter would alter the power allocation among the branches . . . .”\textsuperscript{204}

While the opinion of the Executive in act of state cases may well be informative, lower federal courts are often “unduly sensitive”\textsuperscript{205} to the Executive’s opinion regarding application of the act of state doctrine. Because a federal judge may be unfamiliar with international law and policy, the court may defer to the Executive’s estimation of the suit’s impact on United States foreign affairs.\textsuperscript{206} A letter from the State Department to a court urging adjudication of a certain case “may be quite persuasive in providing the court a reason to avoid application of the [act of

\textsuperscript{202} See First Nat’l City Bank, 406 U.S. at 762, 765.
\textsuperscript{203} See supra note 200 at 1024.
\textsuperscript{204} Id.
\textsuperscript{205} See supra note 17 at 368.
\textsuperscript{206} See, e.g., Michael J. O’Donnell, \textit{A Turn for the Worse: Foreign Relations, Corporate Human Rights Abuse, and the Courts}, 24 BOSTON COL. THIRD WLD LAW J. 223, 256, fn.235 (“[P]rominent cases reveal a breathtaking record of deference shown by judges to the executive branch.”).
state] doctrine.” In fact, “lower courts have tended to follow the Executive’s act of state recommendations automatically; indeed, many courts mechanically apply the doctrine unless the Executive issues a Bernstein letter.” Numerous cases illustrate that the lower federal courts often completely defer to the views of the Executive in determining whether to apply the act of state doctrine when a Bernstein letter has been submitted to the court. Most notably, the Court of Appeals for the Second Circuit has generally continued to adhere to the Bernstein principle, even though six of the nine Supreme Court Justices in First National City Bank rejected the exception.

The courts are similarly deferential when the Executive requests that the court avoid adjudication because of a claimed interference with foreign relations. The Restatement, after reviewing cases in which the State Department had stated a position on application of the act of state doctrine, concludes: “It seems that if the State Department issues a letter requesting that the courts not review the validity of a particular act, such a letter will be highly persuasive if not binding.” Additionally, there has not been “a single case in which a court permitted a lawsuit

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207 See 2 INTERNATIONAL BUSINESS TRANSACTIONS §33.35 (2d ed.) (2005).
208 Id.
209 See Doe v. Qi, 349 F.3d at 1300 (noting various examples of such deference, including Republic of the Philippines v. Marcos, 862 F.2d 1355 (en banc) (State Department argued that act of state doctrine not a defense in RICO action against former president of Philippines, Ninth Circuit ruled that the act of state did not bar the suit); Allied Bank v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir.1985) (Second Circuit reversed both its own earlier ruling and that of the district court after State Department filed brief recommending that the act of state doctrine did not bar suit); Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 884-85 (2d Cir.1981) (act of state doctrine held not to apply when Bernstein letter obtained); Banco Nacional de Cuba v. Chemical Bank, 658 F.2d 903, 911 (2d Cir.1981) (act of state doctrine defense recognized when Bernstein letter not obtained); First Nat'l Bank of Boston (Int'l) v. Banco Nacional De Cuba, 658 F.2d 895, 902 (2d Cir.1981) (act of state doctrine defense recognized when Bernstein letter not obtained)).
210 See supra note 208 for examples.
211 See supra note 205 at 257, fn. 236 (“Since First National City Bank, the Court has clarified that courts need not take the executive’s recommendation, but the case history suggests that courts still attach great significance to the executive’s opinion.”).
212 See supra note 2 at n.9.
to proceed in the face of an expression of concern” by the Executive regarding the effect of the
adjudication of the case on foreign relations.213

Further, when a Bernstein letter is accorded dispositive effect, a court must pass on the
legality of an act of state under international law regardless of the sensitivity of the subject to
national or ideological goals, the lack of accepted standards of decision, and the possibility of
embarrassment among the three coordinate branches of the national government.214 For
example, when the legality of a particular act is a politically sensitive issue, such as was the
expropriation of American property during the Cuban revolution, and when the Executive and/or
Congress has taken a strong position, a court attempting to decide the issue would be under
pressure to reach a particular result.215 In such a case, either way the court decided, it would face
undesirable consequences. If it concluded that an expropriation without compensation was legal
under customary international law, there would be a serious risk of embarrassment to both the
court and its coordinate branches.216 If it reached a result harmonious with the position of the
political branches and held the nationalization illegal, the court would risk appearing to have
compromised its position as an impartial tribunal.217 Further, the Executive’s determination that
adjudication would not interfere with foreign relations is “often short-sighted and . . . usually
based on an ‘educated guess’ . . . as to the probable outcome.”218

2002).
215 See, e.g., id. at 783 (Brennan, J., dissenting) (noting that “[t]he very terms of the Legal Advisor’s communication
to this Court . . . anticipate a favorable ruling that the Cuban expropriation of petitioner’s property was invalid”).
216 See id. at 784 (“It is highly questionable whether the examination of validity by the judiciary should depend upon
an educated guess by the Executive as to probable result and, at any rate, should a prediction be wrong, the
Executive might be embarrassed in its dealings with other countries.”).
217 See id. at 793.
218 See supra note 108 at 663, citing Sabbatino.
Application of the Bernstein exception in act of state cases produces “grave separation of powers problems”\textsuperscript{219} by giving the Executive the “authority to pick and choose what cases the judiciary hears.”\textsuperscript{220} Application of the Bernstein exception threatens the integrity of the constitutional separation of powers because it brings the changing domestic and international political considerations of the Executive into the judicial process on a case-by-case basis.\textsuperscript{221} Further, unquestioning and absolute deference to the Executive in act of state cases “tarnishes the image of the American judiciary as an independent branch of the government”\textsuperscript{222} and threatens to turn the judiciary into a “mere errand boy for the Executive Branch.”\textsuperscript{223}

C. The Bernstein Exception Politicizes the Judiciary by Treating Similarly-Situated Litigants Unequally.

Application of the Bernstein exception also improperly politicizes the judiciary by allowing the Executive to make binding political decisions through the courts.\textsuperscript{224} The exception can be used by the Executive to assist favored claimants by influencing the court’s decision to apply the act of state doctrine.\textsuperscript{225} As a result, depending upon the Executive’s intervention in a particular act of state case, similarly-situated litigants may receive unequal treatment in the courts.\textsuperscript{226} In fact, a litigant with the power and means to request intercession from the Executive on its behalf, such as a large corporation, would be much more likely to obtain a favorable ruling

\textsuperscript{219} Id. at 662.
\textsuperscript{220} See supra note 200 at 1024.
\textsuperscript{221} See First Nat’l City Bank, 406 U.S. at 792 (Brennan, J., dissenting).
\textsuperscript{222} See supra note 17 at 328.
\textsuperscript{223} See First Nat’l City Bank, 406 U.S. 759, 773 (Douglas, J., concurring in the result).
\textsuperscript{224} See supra note 108 at 663. (“The fundamental nature of the Bernstein exception dictates that the Executive may recommend review when it is perceived to be politically prudent to do so.”).
\textsuperscript{225} See First Nat’l City Bank, 406 U.S. at 790-93 (Brennan, J., dissenting) (Justice Brennan pointed out how the Bernstein exception would inject the political concerns of the Executive into the judicial decision-making process to the detriment of certain litigants: “[T]he fate of the individual claimant would be subject to the political considerations of the Executive Branch. Since those considerations change as surely as administrations change, similarly situated litigants would not be likely to obtain even-handed treatment.”).
\textsuperscript{226} See id. at 792 (The exception has been criticized as politicizing the judiciary, as well as relegating “the fate of the individual claimant . . . to the political considerations of the Executive Branch.”).
than an otherwise identical litigant without such sway.\textsuperscript{227} Deferring to the Executive in act of state cases “enables a litigant with political influence to enlist the Executive to intercede on its behalf.”\textsuperscript{228}

The current administration has particularly utilized Bernstein letters and Statements of Interest in act of state cases as a means to intercede on behalf of favored claimants. The policy of past administrations has generally been to submit Bernstein letters or other statements of interest only in limited circumstances.\textsuperscript{229} However, the Bush Administration has greatly increased the use of Statements of Interest in order to further a primary goal of protecting the interests of politically-connected litigants, especially large multi-national corporations who are often defendants raising the act of state doctrine as a defense.\textsuperscript{230}

The State Department has increasingly been providing Statements of Interest in a variety of cases for defendant corporations with political connections to the Bush Administration.\textsuperscript{231} These corporations have even actively urged the State Department’s Legal Adviser to draft Statements of Interest that recommend dismissal because adjudication of the case would have a harmful effect on U.S.-foreign relations.\textsuperscript{232} These Statements of Interest generally assert some vague, often speculative, effect of adjudication on U.S. foreign policy, such as hostility with the

\textsuperscript{227} See \textit{e.g.}, supra note 47; see also Derek Baxter, \textit{Protecting the Power of the Judiciary: Why the Use of State Department “Statements of Interest” in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns}, 37 \textit{Rutgers L. J.} 807, 841 (2006).
\textsuperscript{228} See supra note 17 at 328.
\textsuperscript{229} See supra note 226 at 812.
\textsuperscript{230} See, \textit{e.g.}, supra note 205 at 264 (noting that the current administration has started a “new trend of executive-corporate collusion to dismiss diplomatically sensitive corporate human rights lawsuits”).
\textsuperscript{231} See supra note 226 at 831 (stating that corporate defendants “with the ear of the Bush Administration have sought State Department statements of interest objecting to lawsuits and have even lobbied the State Department to ensure that the statements express their concerns”).
\textsuperscript{232} \textit{Id.} (“Businesses with clout appear able to convince foreign governments and the State Department that a private lawsuit – likely not on any foreign country’s radar screen – would cause geo-political, diplomatic, and financial calamities . . . .”)
foreign sovereign and/or loss of opportunity for foreign investment by American corporations. And some federal courts, unfamiliar with international law and foreign policy, are giving unquestioning deference to these Statements of Interest, to the benefit of corporate defendants and the detriment of plaintiffs, most notably in human rights cases.

An illustrative, particularly egregious example of the Bush Administration’s intercession on behalf of a powerful multi-national corporation is the case of Doe I v. Exxon Mobil Corp. The plaintiffs filed suit against Exxon Mobil and its subsidiaries under the ATS, alleging that Exxon’s paid security forces committed various human rights abuses, including executions, torture and sexual assault against those living within the security perimeter of the company’s natural gas facility in Aceh, Indonesia. The plaintiffs further alleged that Exxon had actual knowledge of the human rights violations, but rather than taking action to stop the abuses, Exxon continued to fund the security forces. In 2002, three major business associations, each of which included Exxon Mobil as a member, met with the Legal Advisor to the State Department and lobbied intensely for a statement of interest urging that the case be dismissed because it might have a negative effect the conduct of foreign policy toward Indonesia as well as American corporate investment in Indonesia.

Accordingly, the State Department’s statement of interest claimed that “adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States . . .”. The statement claimed that the lawsuit could harm American corporations because Indonesia had objected to the lawsuit and might disfavor

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233 See id. at 835; see also supra note 199 (noting that the “predictions [contained in these Statements of Interest] about the impact of litigation seem far more subjective than factual, more designed to protect powerful defendants than to protect U.S. foreign policy.”).
235 Id. at 22.
236 Id.
237 See supra note 226 at 838-839.
American investment in Indonesia as a result. It also predicted the deterioration of U.S. relations with Indonesia as a result of the suit, particularly in Indonesia’s refusal to cooperate with the United States in the “on-going struggle against international terrorism.” In October 2005, the Exxon Mobil Corp. court dismissed plaintiffs’ federal claims, citing justiciability concerns. Rather than applying specific justiciability tests, such as the act of state doctrine, the court instead appeared to rely heavily upon the State Department’s unsubstantiated claims of interference with foreign investment and policy in Indonesia. This case quite clearly illustrates the ability of the Executive to advance the interests of politically powerful litigants to the detriment of plaintiffs, such as those tortured in Aceh, Indonesia.

Accordingly, the Bernstein exception unconstitutionally politicizes the judiciary by bringing the changing domestic and international political considerations of the Executive into the judicial process on a case-by-case basis. This is because the policy of the Department of State regarding the submission of Bernstein letters is likely to vary not only with changes in the international political climate, but also with changes in administration. Nevertheless, even if the Department's decision to submit a Bernstein letter is motivated not by domestic political considerations but by foreign policy concerns, the effect of giving some degree of control over the outcome of cases to the Department of State is to politicize the judiciary by treating similarly-situated claimants unequally.

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238 Exxon Mobil, 393 F.Supp.2d at 22.
239 See supra note 226 at 838-839.
240 Exxon Mobil, 393 F.Supp.2d at 22.
241 See First Nat’l City Bank, 406 U.S. at 791-92 (Brennan, J., dissenting).
242 See, e.g., id. at 759 (Banco Nacional concluded in its brief for certiorari that the reason for different positions taken by the Executive regarding Cuban litigation was the different policy adopted by the new Administration.).
243 See id. at 794.
D. The Bernstein Exception Has Been Used by the Executive as a Means to Unconstitutionally Expand Its Power in the “War on Terror.”

In addition, the Bernstein exception has the potential to be used as a means for the Executive to further increase its power and expand its control over foreign affairs in its declared "war on terror." As an example, if a litigant brought suit in a United States court based on an official act of a disfavored foreign government which the Executive had deemed a "supporter of terrorism," such as Sudan, the Executive has the power to influence the result by advocating waiver of the act of state doctrine in a Bernstein letter. Conversely, if a litigant brought suit against a favored sovereign, the Executive could control the outcome by refusing to write a Bernstein letter or by actively urging the court to dismiss the case.244

The current administration’s zealous intervention in act of state cases by means of statements of interest is fueled in part by the desire to expand its control over all aspects of foreign affairs.245 The Bush Administration, particularly since September 11th, 2001, has sought to expand its executive power by claiming that various lawsuits might have some negative impact on foreign affairs.246 One of the most common arguments made in these act of state cases is that adjudication would cause the foreign sovereign to cease cooperating with the U.S. in the "war on terror."247 The Bush Administration particularly opposes individual human rights cases “because they may be brought not only against individuals from countries that the

\[\text{\footnotesize \[244 \text{See, e.g., Beaty, 480 F.Supp.2d at 65.} \text{\]}}\]
\[\text{\footnotesize \[245 \text{See supra note 226 at 816 ("One of the hallmarks of the Bush Administration has been its efforts to ensure that the executive branch has expansive, virtually unreviewable control over foreign affairs issues (defined broadly), and that these executive branch powers may trump civil rights and human rights concerns if required.").} \text{\]}}\]
\[\text{\footnotesize \[246 \text{See, e.g., L. Kathleen Roberts, Student Article, The United States and the World: Changing Approaches to Human Rights Diplomacy Under the Bush Administration, 21 BERKELEY J. INT’L L 631, 658-659 (noting the Bush Administration’s attempts after 9/11 to fight jurisdiction of certain cases in U.S. courts brought against allies in the “war on terror”).} \text{\]}}\]
\[\text{\footnotesize \[247 \text{For example, in the Exxon Mobil Corp. case, supra notes 231-236, the State Department argued that litigation would cause Indonesia to cease cooperating with the U.S. in the “war on terror.” Plaintiffs, diplomats, human rights activists and others all agreed that private litigation in U.S. courts was highly unlikely to cause Indonesia to refuse to further cooperate in the fight against terrorism.} \text{\]}}\]
Administration disfavors, but also against ‘this Nation’s allies, including those supporting this Nation’s fight against terrorism.’”  

For example, in *Owens v. Republic of Sudan*, several victims of the United States embassy bombings in Tanzania and Kenya sued the Republic of Iran, the Republic of Sudan and two of their respective ministries pursuant to the state-sponsored terrorism exception to the FSIA, alleging that Iran and Sudan provided material support to the terrorist organizations that carried out the attacks.  

Sudan had previously been placed on a list of state sponsors of terrorism by the Secretary of State.  

The Republic of Sudan requested that the court dismiss the complaint, based in part on application of the act of state doctrine. Sudan argued that, because it was now a “willing participant in the war on terror . . . a decision in [the] case [would] complicate the delicate relationship between Sudan and the United States.” The district court rejected Sudan’s argument, noting that, even though Sudan was currently involved in counter-terrorism efforts, the Executive had specifically chosen not to remove Sudan from its official list of state sponsors of terrorism.  

In *Beaty*, the children of two American men who were detained and allegedly held as hostages by the former Iraqi regime in the 1990’s, brought suit against Iraq for the emotional distress they allegedly suffered during their fathers’ captivity. The plaintiffs sought damages against Iraq under the state-sponsored terrorism exception to the FSIA. At the time that the plaintiffs’ fathers were held hostage, the United States had designated Iraq as a “state sponsor of terrorism.”

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250 *See id.*
251 *Id.* at 26.
252 *See id.* at 28, fn.27.
253 *Id.*
254 480 F.Supp.2d at 62.
255 *Id.*
terrorism.” The district court invited submission by the State Department of Statements of Interest in the case.

The government of Iraq argued, inter alia, that the act of state doctrine should apply because “the regime that perpetrated the acts underlying plaintiffs' claims [was] no longer in power, and ha[d] been replaced with a new government whose stability and success [were] a major foreign-policy objective of the United States.” In denying Iraq’s request for dismissal on act of state grounds, the court explicitly noted that, “despite the President's publicly expressed desire to shield Iraq from liability,” the Executive not only did not raise the doctrine in its Statements of Interest, but also expressly declined to support Iraq's invocation of the doctrine.

The Beaty court, therefore, placed significant, if not dispositive, weight on the Executive’s refusal to support Iraq’s request for dismissal on act of state grounds. Consequently, if the Executive had instead directly advocated for dismissal based on the act of state doctrine in its statement of interest, the court may well have granted Iraq’s motion to dismiss. This illustrates how the Bernstein exception can be used by the Executive as a further means to greatly expand its power over foreign affairs in the declared “war on terror.” This unconstitutional expansion of executive power provides yet another salient reason for the Bernstein exception to be abolished.

IV. Abolishing the Bernstein Exception

The Bernstein exception should be abolished because significant foreign policy considerations should not be evaluated by the judiciary on a case-by-case basis; it is simply too risky for the judicial branch to declare foreign acts of state unlawful. The judiciary has

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256 See id. at 69.
257 Id. at 65-66.
recognized the peril in declaring illegal the actions of foreign sovereigns taken within its own territory:

When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world.260

If the Bernstein exception were disallowed, the judiciary would independently determine whether to apply the act of state doctrine, rather than depending upon a pronouncement (or lack thereof) from the Executive.

Furthermore, eliminating the Bernstein exception would help to revive the original principles behind the act of state doctrine: international comity, respect for other sovereign nations and avoidance of embarrassment to the Executive in the field of international relations.261

Declaring the Bernstein exception invalid would also avoid some of the problems associated with United States courts sitting in judgment upon the acts of foreign nations: inconsistent results, violation of the separation of powers doctrine, disparate treatment for similarly situated litigants and unconstitutional expansion of the Executive’s power in the “war on terror.”

This is not to say that the view of the Executive in act of state cases is irrelevant. To the contrary, as the political branch of government charged with foreign policy, the opinion of the Executive may be highly informative in determining application of the act of state doctrine in a particular case. For example, the Third Circuit Court of Appeals, while acknowledging that the “[State] Department's legal conclusions as to the reach of the act of state doctrine are not controlling on the courts,” nevertheless concluded that “the Department's factual assessment of

258 Id. at 89.
259 Id. at 90.
260 See, e.g., IAM v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981).
whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect.” 262 And the Supreme Court in Kirkpatrick “did not reject any role for the executive,” but rather only “rejected the Circuit Court’s giving ‘full, faith and credit’ to the letter” from the State Department. 263

If the Bernstein exception were abolished, there would still be alternative means available to the Executive that would not create the potentially dispositive effect that a Bernstein letter often has on a court’s decision whether to apply the act of state doctrine. For example, a federal district court may “properly request and consider . . . the [State] Department’s opinion as to whether the act of state doctrine should be applied in a particular case.” 264 Alternatively, the Executive Branch is free in any case to submit its views to the court, for example in a brief as amicus curiae. 265 An amicus curiae brief submitted by the Executive may be informative and persuasive, but most importantly, it is not binding in and of itself. As noted in In re Tobacco Litigation,

[T]o the extent that the United States government is concerned about potential adverse foreign relations consequences from the resolution of . . . lawsuits, the Executive Branch possesses the competence, capacity and incentive to make its view known either to this Court or the state courts in which the suits [are] brought. The Executive Branch is responsible for the conduct of foreign affairs and may address any potential foreign relations issues that may arise in these cases. 266

The benefit of the Executive expressing its views by means of a statement of interest or amicus curiae brief is that it would not carry the same weight of a Bernstein letter, and the court

261 See supra note 23.
262 See 847 F.2d at 1062.
263 See supra note 206.
264 See supra note 1.
265 See e.g., Patrickson v. Dole Food Co., Inc., 251 F.3d 795, 803 (9th Cir. 2001) (observing that the federal government can always express its interest in a case involving a foreign country in “whatever way [it] deems appropriate, up to and including passing litigation”).
therefore would not view the opinion of the Executive as dispositive in applying the act of state doctrine. In fact, the court should carefully review these State Department letters and briefs, especially in cases in which the defendant is a powerful multi-national corporation and/or when the Executive has made a specious claim that litigation of the suit would have some negative impact on foreign relations, most notably the foreign sovereign’s cooperation in the “war on terror.” As Justice Brennan aptly noted in First National City Bank: “[T]he representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine. But they cannot be determinative.”

V. Conclusion

Because of the multitude of serious constitutional problems caused by the Bernstein exception to the act of state doctrine, the United States Supreme Court should abolish the doctrine. There are various means by which the Executive can express its views on the impact of a particular case on United States foreign relations without the negative implications caused by a Bernstein letter.

267 First Nat’l City Bank, 406 U.S. at 790 (Brennan, J., dissenting).