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NOTES

JUDICIAL AUTHORITY AND PRESIDENTIAL COMPETENCE: CONFLICTING POWERS AFFECTING CLAIMS AGAINST FOREIGN STATES

INTRODUCTION

The courts of the United States are empowered to decide "cases" and "controversies."¹ A review of those cases which have involved claims against foreign states reveals, however, that often the courts have either chosen, or felt compelled, not to decide the case or to accept disposal of the claim by the Executive. The decision not to adjudicate has often been based on judicial deference to the position,² suggestion,³ or perceived basis and necessity for actions of the Executive Branch.⁴ At other times the courts have designated cases "political

1. U.S. CONST. art. III, § 2.

2. See, e.g., *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977) [hereinafter cited as *Hunt (Mobil)*]. In this case, where the plaintiff's anti-trust suit against the defendant was defeated by an act of state defense, the court stated that the government of the United States had already found the act to be one of a political nature and, consequently, that the court was precluded from deciding the case.

In sum, the United States has officially characterized the motivation of the Libyan government, the very issue which *Hunt* now seeks to adjudicate here. . . . [T]he American judiciary is being asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far reaching national concern.

Id. at 77.

3. See, e.g., *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961), a case where the court accepted a State Department suggestion and granted immunity after jurisdiction was obtained over a Cuban ship which had been hijacked to the United States. "The certification and suggestion of immunity, however, which has been made by the State Department in this matter affecting our foreign relations, withdraws it from the sphere of litigation." *Id.* at 26.

4. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In this recent and complicated case arising out of the Iranian hostage situation, the Court held that the questioned presidential actions were supported by both the nature of the situation and by congressional acquiescence.

But where, as here, the settlement of claims has been deter-

questions" and, therefore, nonjusticiable.⁵

The courts, in arriving at their decisions in these cases, try to balance the competing public policy demands of the concerned parties.⁶ This balancing process has required that the courts harmonize the demands and expectations of the parties to the controversy with those of the community, both national and world, as a whole.⁷ The most evident demands are made by the plaintiff; these demands are that his claim be adjudicated on the merits and that a remedy be granted. As claimant he has the expectation that he will be accorded due process of law, and that his rights, which have arisen under the rule of law, will be protected. The concept of the rule of law,⁸ and the accompanying expectation that an injured party can find remedy under law, pervades the common law. This has been clearly articulated in great foundation documents such as the Magna Carta⁹ and the Declaration of Indepen-

mined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

Id. at 688.

5. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *cert. denied*, 409 U.S. 950 (1972) [hereinafter cited as *Buttes Gas & Oil*]. The plaintiffs brought an antitrust suit against the defendants regarding a Middle-Eastern concession agreement. The court, before arriving at a decision based on an act of state rationale, discussed the impact of a political question. "In our system, the questions of what are a country's boundaries, or of what nation has sovereignty over a certain piece of territory, are not for the judiciary to decide; they are political questions, upon which the courts must be guided and bound by the pronouncements of the executive." *Id.* at 103.

6. The concept of a balancing test was succinctly articulated by Justice White in a footnote to the Court's opinion in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 705 n.18 (1976). See *infra* note 219 and accompanying text.

7. The influence of the policy oriented jurisprudence of Myres McDougal and Harold Lasswell will be seen throughout this note. The basic concepts of this school are discussed in Lasswell & McDougal, *Criteria for Theory About Law*, 44 S. CAL. L. REV. 362 (1971).

8. BLACK'S LAW DICTIONARY 1196 (5th ed. 1979) defines the rule of law as follows: "The rule of law, sometimes called 'the supremacy of law', provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application." *Id.*

9. The Magna Carta (G.B. 1215), *reprinted in* L. B. WRIGHT, *MAGNA CARTA AND THE TRADITION OF LIBERTY* 54-58 (1976), stating the rights of free men:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

dence,¹⁰ and supported by decisions of the Supreme Court.¹¹

The defendant also demands and expects that his rights under law will be protected. Some defendants believe that their status requires that they be granted an increased measure of respect, and perhaps even deference, to the extent of freedom from suit.¹² This expectation of preferential treatment has been demanded, and to an extent recognized, in domestic situations in which the President has been a party.¹³ The demand for respect, perhaps more commonly described as

To no one will we sell, to no one deny or delay right or justice.

Id. at 56.

10. The Declaration of Independence (U.S. 1776) describing the transgressions of the King. "He has obstructed the administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers." *Id.* para. 10. "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." *Id.* para. 11.

11. The Supreme Court, in its early years, clearly stated its respect for the rule of law. In *Marbury v. Madison* the Court stated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The Supreme Court has reaffirmed the rule of law and the Court's primacy in its interpretation in *United States v. Nixon*, 418 U.S. 683 (1974).

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. *The Federalist*, No. 47, p. 313 (S. Mittell ed. 1938). We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case.

Id. at 704-05.

12. *See, e.g., Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978).

13. *Nixon*, 418 U.S. at 704-05.

Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Id. at 705-06.

comity,¹⁴ has been strongly asserted when the defendant is a nation state or an entity which is an extension of a nation state.¹⁵ The protection of its "sovereignty," and of its sovereign rights implicit in the demand for respect, is of great concern to a nation state and has been often and strongly articulated.¹⁶ This demand for respect by foreign states has been both recognized and granted by the Supreme Court.¹⁷

In addition to the parties in a suit, others are concerned with the adjudicatory process and make demands on the courts. Primary among these other actors¹⁸ is the Executive Branch of the government of the United States.

The Executive, which has a significant, if not dominant, role to play in the foreign affairs of this country,¹⁹ has often suggested to the courts that it stands in a uniquely delicate position.²⁰ This position, it

14. BLACK'S LAW DICTIONARY 334 (4th ed. 1968) describes comity of nations as: "[t]he most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. . . . That body of rules which states observe towards one another from courtesy or mutual convenience, although they do not form part of international law." *Id.*

15. See, e.g., *Novosti*, 443 F. Supp. 849 (S.D.N.Y. 1978) where the defense of sovereign immunity was strongly asserted, and recognized, when a Soviet press instrumentality was sued for libel.

16. In *Novosti*, the Soviet Union not only pressed its claim for immunity in court, but also sought an affirmative Department of State position on the same issue. *Id.* at 851 n.1. See Department of State correspondence and commentary in 1977 DIG. U.S. PRAC. INT'L L. 515.

17. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign stations, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect quality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 137.

18. Other actors include the Legislative Branch, commentators and other interested third parties.

19. The Court has recognized the Executive's role in, for example, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). See also *infra* notes 71-90 and accompanying text.

20. In *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo*, 577 F.2d 1196

has been suggested, requires that a free hand be given to the Executive when it is dealing with other nations, a free hand which should remain unfettered by judicial action.²¹ In short, the Executive is demanding that the Judiciary recognize its claims for power to operate in foreign affairs and for respect and deference to this proper exercise of power.²²

The Legislative Branch is also an interested, although often silent, actor in these dramas. The Congress, concerned with the "interests of justice and . . . the rights of both foreign states and litigants in United States courts,"²³ has enacted various pieces of legislation reflecting congressional demands. The Legislative Branch has attempted to communicate to the Judicial Branch its belief and demand that the Executive should not be allowed solely to establish the foreign policy of the United States through influence on the Judiciary;²⁴ that the claimants should, to a significant extent, have their claims adjudicated on the merits;²⁵ that the Judiciary should, if possible, function freely;²⁶ and implicitly, that they, the Congress, should be afforded recognition of their power, and respect for their right, to influence some of the foreign affairs of the nation.²⁷

(5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979) [hereinafter cited as *Umm al Qaywayn*], the court of appeals quoted a Department of State letter, contained in an amicus brief:

We believe that the political sensitivity of territorial issues, the need for unquestionable U.S. neutrality and the harm to our foreign relations which may otherwise ensue, as well as the evidentiary and jurisprudential difficulties for a U.S. court to determine such issues, are compelling grounds for judicial abstention.

Id. at 1204 n.13.

21. *Id.*

22. The response of the Court to these executive demands in the area of sovereign immunity is discussed *infra* text accompanying notes 124-45.

23. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1602-1611 (1976) [hereinafter cited as F.S.I.A.].

24. See F.S.I.A., *supra* note 23; Foreign Assistance Act of 1964, § 301(d)(4), 22 U.S.C. § 2370(e)(2) (1976) [hereinafter cited as Sabbatino Amendment]; see also discussion *infra* text accompanying notes 196-99.

25. H.R. REP. No. 94-1487, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604 [hereinafter cited as HOUSE REPORT].

A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

Id. at 6606.

26. *Id.*

27. *Id.* at 6611.

The Judicial Branch also has expectations with regard to its own function within the legal process. The courts, while recognizing the roles of the other actors and the conflicting demands made on them, have often stated the primacy of their position in determining the law and have demanded respect for this position.²⁸

This note will examine the relationships among the Executive, Legislative and Judicial Branches when a claim against a foreign state is litigated. There will be a close examination of the demands and expectations of all the actors involved in this process. This examination will focus on past judicial decisions, on legislative and executive actions, and on the current status of the relationship between the three branches of government. This note will examine the demands made on the courts by the various actors, the courts' reactions to these demands, the rationale offered for these reactions, and the effect of these decisions. Finally, attention will be given to that almost unacknowledged demand and expectation, one which is the common demand of the American community, that, except in the most extraordinary of circumstances, the courts should decide claims which are properly brought before them.²⁹ This may be stated as the demand for the rule of law. The absence of attention to this demand in past decisions, and the current uncertainty regarding the courts' ability or willingness³⁰ to decide claims against foreign states, will be reviewed. This analysis is divided into:

1. **The Problem: The uncertainty of authoritative decision when the Executive and Judiciary collide.**
2. **The Roles of the Judicial, Executive and Legislative Branches: An overview of the nature and source of judicial authority, an examination of the role of the Executive in foreign af-**

28. See e.g., *Marbury*, 5 U.S. (1 Cranch) 137 (1803). "It is . . . the . . . duty of the judicial department, to say what the law is." *Id.* at 177. See also *infra* notes 65-68 and accompanying text.

29. The belief that the courts should extend their authority to cases properly before them is expressed in THE FEDERALIST Nos. 78 and 81 (A. Hamilton) and in the HOUSE REPORT, *supra* note 25.

30. See the confused case of *Int'l Ass'n of Machinists (I.A.M.) v. Org. of Petroleum Exporting Countries (O.P.E.C.)*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981) [hereinafter cited as *I.A.M. v. O.P.E.C.*], where, in an antitrust action against O.P.E.C., the district court entered judgment for the defendants on the basis of sovereign immunity, and the court of appeals affirmed, not on the grounds of sovereign immunity, but on act of state.

fairs, and the nature and effect of legislative action.

3. Acts of executive suggestion and judicial deference in the areas of sovereign immunity, act of state, political question, and the removal from the courts, or settlement of claims, by presidential action.

1. The Problem

The most basic statement of the problem which arises from the intervention of the Executive in the judicial process when a claim against a foreign state is litigated is that there have been unjust decisions, that is, cases where the courts have not decided a claim on its merits, but on other considerations, or have found the case to be non-justiciable. This intervention has resulted in an absence of authoritative decision, a result which has been both highly praised³¹ and harshly criticized.³²

Two controversial cases which have been criticized for the unfairness of their result illustrate this point.³³ In *Banco Nacional de Cuba v. Sabbatino*³⁴ the Supreme Court held that the act of state doctrine³⁵ precluded an examination of the validity of the taking of property of an American corporation by the Cuban government, even where the taking was alleged to be without substantive compensation, and, therefore, in violation of international law.³⁶ This decision had the result of ensuring that the corporation would have to endure the loss of its property without compensation and without any remedy at law.³⁷

31. See, e.g., Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L.Q. 461 (1963).

32. See, e.g., Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168 (1946).

33. Other controversial cases criticized for their holdings, their reasoning, or both, include *Mexico v. Hoffman*, 324 U.S. 30 (1945), discussed *infra* notes 128-131 and accompanying text; *Rich*, 295 F.2d 24 (4th Cir. 1961), discussed *infra* notes 140-145 and accompanying text; *Hunt v. Coastal States Gas Producing Co.*, 583 S.W.2d 322 (Tex.), *cert. denied*, 444 U.S. 992, *reh'g denied*, 444 U.S. 1103 (1979) [hereinafter cited as *Hunt (Coastal States)*], discussed *infra* text accompanying notes 227-31.

34. 376 U.S. 398 (1964).

35. The act of state doctrine, whereby the courts of the United States will not judge an act of a foreign state taken within its own boundaries, is fully examined *infra* text accompanying notes 157-249.

36. *Sabbatino*, 376 U.S. at 428.

37. This case has been the subject of extensive analysis, and both positive and negative commentary. In the latter vein, see McDougal & Jasper, *The Foreign Sovereign Immunities Act of 1976; Some Suggested Amendments*, in PRIVATE INVESTORS ABROAD 1,

In *Dames & Moore v. Regan*³⁸ the Supreme Court upheld the President's competence to suspend claims against Iran which were pending in American courts³⁹ in order to effectuate the Iranian Agreements.⁴⁰ The effect of this decision was that a judgment rendered by a court of the United States⁴¹ was suspended, and the claim was transferred to a settlement tribunal⁴² without any certainty of success or satisfaction. Although the assets, which had been frozen, were recognized by the Court to be a "bargaining chip"⁴³ in the bilateral negotiations, the Court found that the nullification of the attachment and the transfer of the assets did not constitute a taking under the fifth amendment.⁴⁴

As significant as these unjust decisions are, the problem arising from this practice of nonadjudication has broader dimensions. Its most significant aspects are that there is uncertainty as to when the courts will apply a particular doctrine, the manner in which such doctrine will be applied and the effect of executive intervention in this process.⁴⁵

It is true that at least a partial consensus has developed around the meaning of certain key concepts.⁴⁶ Act of state has been described as a doctrine whereby the courts of one nation will not judge those acts taken by another country within its own territory.⁴⁷ Sovereign immunity, on the other hand, affects the jurisdiction of the court; when sovereign immunity is found, the court lacks jurisdiction to decide the case.⁴⁸ A political question goes to neither choice of law nor jurisdiction. Rather, a case because of its sensitive nature is found to be non-

68 nn. 99-100 (Southwestern Legal Foundation ed. 1981). For positive commentary, see L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 216-20 (1972).

38. 453 U.S. 654 (1981).

39. *Id.* at 688.

40. Declaration of the Government of the Democratic and Popular Republic of Algeria and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Iran-United States-Algeria, 81 DEP'T ST. BULL. No. 2047, 1-5 (1981) [hereinafter cited as Agreements].

41. *Dames & Moore v. Atomic Energy Organization of Iran*, No. 79-04918 LEW (Px) (C.D. Cal.), at ¶ 27, cited at 453 U.S. 654, 664 n.4 (1981).

42. 453 U.S. at 665.

43. *Id.* at 673.

44. *Id.* at 674 n.6. See the dissent of Justice Powell discussed *infra* note 337 and accompanying text. The Court did not decide whether the claim suspension constituted a fifth amendment taking. See 453 U.S. at 688-90.

45. See HOUSE REPORT, *supra* note 25, at 6607.

46. The Supreme Court has discussed the various aspects of these concepts in some detail in *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

47. *Sabbatino*, 376 U.S. at 428.

48. *I.A.M. v. O.P.E.C.*, 477 F. Supp. at 565.

justiciable under this doctrine.⁴⁹ Finally, the Supreme Court has held that when the President, operating with the acquiescence of Congress, seeks to resolve a foreign affairs crisis through an agreement, he may temporarily suspend the jurisdiction of the United States courts and transfer claims against the foreign state to an international tribunal.⁵⁰

Even though there is some consensus on the definitions given above, there continues to be confusion in their application.⁵¹ This has resulted in uncertainty in the minds of claimants as they seek adjudication of the issues.⁵² This uncertainty can only be compounded by episodic intervention by the Executive in the judicial process.

Finally, it is necessary to be aware that these problems in application, which can sometimes result in unjust decisions and confusion in the decision-making process, perhaps reflect not a failing of the American judicial process, but a strength. The Constitution with its enumerated and implied powers⁵³ has created a balance and a tension between the three branches of government. The Judicial Branch fulfills its constitutional mandate,⁵⁴ and operates for the good of the country, in advancing the rule of law. The Executive Branch fulfills its constitutional mandate,⁵⁵ and operates for the good of the country, by interjecting itself into the rule of law. The Legislative Branch fulfills its constitutional mandate,⁵⁶ and operates for the good of the country, by enacting legislation designed to clarify and delimit the boundaries of the functional powers possessed by the other branches. Although the full exercise of each branch's constitutional function is beneficial to the American legal process, there has nonetheless been conflict in the exercise of these powers. This conflict has inevitably led to unjust decisions and confusions in the application of law.

2. Roles of the Judicial, Executive and Legislative Branches

a. *The Sources of Judicial Authority*

The Supreme Court's authority⁵⁷ is delimited by the Constitu-

49. *Umm al Qaywayn*, 577 F.2d at 1203.

50. *Dames & Moore*, 453 U.S. at 688.

51. See *supra* note 30 and accompanying text.

52. See HOUSE REPORT, *supra* note 25, at 6607.

53. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

54. See U.S. CONST. art. III. See also *infra* note 58 and accompanying text.

55. See U.S. CONST. art. II. See also *infra* note 71 and accompanying text.

56. See U.S. CONST. art. I. See also *infra* text accompanying note 93.

57. See generally R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964); L. HENKIN, *supra* note 37; Bilder, *The Office of the Legal Advisor: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633 (1962); Leigh

tion,⁵⁸ but its strength comes from the concept of the rule of law.⁵⁹ The rule of law is the philosophical position, in the English common law system, that law should prevail over might.⁶⁰ Further, commentary contemporaneous with the Constitution has supported the role of the courts and the rule of law as opposed to the rule of men.⁶¹ Finally, this constitutional mandate has been given effect through the rules of judicial procedure.⁶²

The Supreme Court has from its earliest years enunciated its role under the Constitution. Chief Justice Marshall laid the foundation for the authority of the judiciary under the Constitution in the classic case

& Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States*, pts. 1 & 2, 21 *BUS. LAW.* 853 (1966), 22 *BUS. LAW.* 3 (1966); Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 *VA. J. INT'L L.* 9 (1970); NOTE, *The Relationship Between Executive and Judiciary: The State Department as the Supreme Court of International Law*, 53 *MINN. L. REV.* 389 (1968). The above cited material discusses not only the nature and extent of the Supreme Court's authority, but also potential and real conflicts between that authority and the powers of the other branches.

58. U.S. CONST. art. III, § 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id.

59. See *supra* note 8.

60. See *supra* note 9.

61. See generally *THE FEDERALIST*, *supra* note 29.

62. 28 U.S.C. § 1332(a) (1976).

The district courts shall have original jurisdiction of all civil actions . . . between—

. . . .

(2) citizens of a State and citizens or subjects of a foreign State;

(3) citizens of different States and in which citizens or subjects of a foreign State are additional parties; and

(4) a foreign State, . . . as plaintiff and citizens of a State or of different States.

Id.

of *Marbury v. Madison*.⁶³ "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."⁶⁴ Regarding the role of the Judiciary, Chief Justice Marshall stated that "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."⁶⁵

This jurisdiction has been strongly expounded by the Judiciary when a member of the bench believes that a court is shrinking from its constitutional mandate. "I start with what I thought to be unassailable propositions: that our courts are obliged to determine controversies on their merits, in accordance with the applicable law . . ."⁶⁶ In another instance, "[w]e are adjudicating legal issues and I certainly should not have to emphasize that legal issues are resolved by the judicial branch of our government, not the executive branch."⁶⁷ The Supreme Court, in addition to defining its own role under the Constitution, has expressly rejected the concept of the rule of man.⁶⁸

Yet in spite of the above constitutional language and judicial utterances, the courts have often refrained from deciding cases by deferring to executive power or actions in foreign affairs.⁶⁹ This process has been described by Professor Henkin as follows:

The courts have . . . established their final and "infallible" authority to impose their readings of the Constitution on the political branches of the federal government as well as on the States . . .

. . . .

. . . But foreign affairs make a difference. The courts are less willing than elsewhere to curb

63. 5 U.S. (1 Cranch) 137 (1803).

64. *Id.* at 163.

65. *Id.* at 177.

66. *Sabbatino*, 376 U.S. at 450-51 (White, J., dissenting).

67. *Chem. Natural Resources, Inc. v. Venez.*, 420 Pa. 134, 179, 215 A.2d 864, 886, *cert. denied*, 385 U.S. 822 (1966) (Musmanno, J., dissenting).

68. *See Marbury*, 5 U.S. (1 Cranch) at 163. For a more recent commitment to the rule of law, and a finding that even the President is not above the law, see *Nixon*, 418 U.S. at 708-16.

69. *See Dames & Moore*, 453 U.S. 654 (1981); *Umm al Qaywayn*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979); *Hunt (Mobil)*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

the political branches and have even developed doctrines of special deference to them.⁷⁰

These acts of "deference" arising in the conflict between the Judicial and Executive Branches are examined in this note. Before exploring them in detail, however, it is necessary to review the sources and limits of the Executive's power in foreign affairs.

b. *The Role of the Executive in Foreign Affairs*

The authority of the President in foreign affairs has its foundation in the enumerated powers of the Constitution.⁷¹ The present inquiry is concerned with whether the implied powers of the President sanction his actions as exceptions to judicial authority and the rule of law.

The concept of exceptions to judicial authority was clearly stated early in the 19th century by Chief Justice Marshall as he determined the validity of the judicial appointments in *Marbury v. Madison*.⁷² "It behooves us, then, to inquire whether there be in its [the case] composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress."⁷³

The courts have found the foreign affairs power of the President to be an "ingredient" which would prevent the full exercise of judicial authority.⁷⁴ The concept of foreign affairs as this type of "ingredient" was first formulated by the then Secretary of State Marshall. "The President is the sole organ in its external relations, and its sole repre-

70. L. HENKIN, *supra* note 37, at 205-06 (footnotes omitted).

71. U.S. Const. art. II, §§ 1-3.

The executive Power shall be vested in a President of the United States of America. [*Id.* § 1, cl. 1.]

The President shall be Commander in Chief of the Army and Navy of the United States . . . [*Id.* § 2, cl. 1.]

He shall have Power, by and with the Advice and Consent of the Senate to make Treaties . . . [*Id.* § 2, cl. 2.]
. . . [H]e shall receive Ambassadors . . . [*Id.* § 3.]

72. 5 U.S. (1 Cranch) 137 (1803).

73. *Id.* at 163.

74. See *Sabbatino*, 376 U.S. 398 (1964). The act of state doctrine's "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the government on matters bearing upon foreign affairs." *Id.* at 427-28.

The courts have relied on act of state and a variety of other rationales in finding foreign affairs to be an "ingredient" which would compel the nonadjudication of a case. For a discussion of these various rationales, see *infra* note 127 and text accompanying notes 127, 188, 275 & 331.

sentative with foreign nations."⁷⁵

The basic formulation was quoted with approval and expanded upon in *United States v. Curtiss-Wright Export Corp.*⁷⁶ In this case the President, pursuant to a congressional resolution⁷⁷ prohibited the sale of arms to Bolivia. Defendant Curtiss-Wright was prosecuted for violating that embargo.⁷⁸ The Supreme Court found that the President was dealing with sensitive and complex matters when he conducted foreign affairs. As a result, the President, with the authorization of Congress, was found to have validly instituted the embargo.⁷⁹

It is significant to note that in *Curtiss-Wright* the Court relied heavily on the authorization for action given to the President by Congress.⁸⁰ The courts in subsequent cases continued to evaluate the extent of congressional authorization for presidential actions.⁸¹ The Supreme Court made one of its broadest statements of deference to executive actions in foreign affairs in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*⁸² In holding that presidential regulations governing foreign air routes, made pursuant to congressional authorization, were "political," "complex" and ultimately nonjusticiable, the Court reached what may be the high water mark in deference to the Executive.⁸³

75. Secretary of State Marshall addressing the House of Representatives in 1800, 10 ANNALS OF CONG. 613 (1800), quoted in *Curtiss-Wright*, 299 U.S. at 319.

76. 299 U.S. 304 (1936).

77. *Id.* at 311-12.

78. *Id.* at 311.

79. *Id.* at 319.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation

Id.

80. *Id.* at 320.

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exception of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations

Id. at 319-20.

81. See discussion of *Dames & Moore*, *infra* text accompanying notes 329-44; *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

82. 333 U.S. 103 (1948).

83. *Id.* at 111.

The nature and extent of any congressional authorization was subjected to an intensive analysis by the Supreme Court in a case involving a domestic matter, *Youngstown Sheet & Tube Co. v. Sawyer*.⁸⁴ In invalidating President Truman's takeover of the nation's steel mills during a labor conflict, the Court found that the President had exceeded his enumerated and implied powers and that he had operated not only without congressional authorization, but in a manner incompatible with congressional intent.⁸⁵ This was clearly stated in Justice Jackson's famous three part analysis.⁸⁶ This analysis, where presidential actions were either "pursuant to an express or implied authorization of Congress,"⁸⁷ "in absence of either a congressional grant or denial of authority,"⁸⁸ or "[w]hen the President takes measures incompatible with the expressed or implied will of Congress,"⁸⁹ has withstood the test of time and is part of the basis for the Court's decision in the recent Iranian settlement case.⁹⁰

c. *The Nature and Effect of Legislative Actions*

It has been seen that the competency of the President in foreign affairs extends significantly beyond those enumerated powers found in the Constitution.⁹¹ While this competence has sometimes been enhanced by a grant of power by Congress,⁹² on other occasions, however, Congress has acted to limit the President's role.⁹³

... vices whose reports are not and ought not to be published to the world. . . . But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id.

84. 343 U.S. 579 (1952).

85. *Id.* at 585-89.

86. *Id.* at 635-38 (Jackson, J., concurring).

87. *Id.* at 635.

88. *Id.* at 637.

89. *Id.* at 637.

90. *See Dames & Moore*, 453 U.S. at 668-69.

91. *See supra* text accompanying notes 71-90.

92. *See infra* text accompanying notes 94-96 and 196-205.

93. Congress has attempted to limit the Executive's action in armed conflict through the War Powers Resolution of 1973, Publ. L. 93-148, 87 Stat. 555 (1973). There was also an unsuccessful effort by Senator Bricker to limit the competence of a President in the treaty making area. *See* H. BUTLER, CONSTITUTIONAL AMENDMENT RELATIVE TO

Congress has twice acted in regard to the President's ability to affect matters which were before the Judiciary. In 1963, as part of the Sabbatino Amendment,⁹⁴ Congress authorized the President to intervene in act of state cases by making suggestions to the Judiciary.⁹⁵ While on its face a power granting provision prescribing the presidential power by statute, it, in reality, has the effect of making this heretofore implied power subject to congressional revocation. The act of state doctrine is currently under study by Senator Mathias. It is possible that this authorization will be reviewed and potentially curtailed by Congress.⁹⁶

Congress also acted specifically to limit the power of the President by the passage of the Foreign Sovereign Immunities Act of 1976.⁹⁷ Here, Congress expressly reasserted the preeminence of the rule of law and emphasized the role of the courts⁹⁸ as the body which says "what the law is."⁹⁹ In enacting this measure Congress ended the long-standing executive practice of suggesting sovereign immunity to the courts which almost invariably resulted in judicial deference to the Executive's position.¹⁰⁰

Although Congress has sporadically enacted legislation addressing the conflicts between the Executive and Judicial Branches, these efforts have not been frequent nor have they been uniform in effect. For example, it can be seen that the Sabbatino Amendment, which permits executive suggestion in act of state cases, can conflict with the F.S.I.A.

was also an unsuccessful effort by Senator Bricker to limit the competence of a President in the treaty making area. See H. BUTLER, CONSTITUTIONAL AMENDMENT RELATIVE TO TREATIES AND EXECUTIVE AGREEMENTS, S. JUD. REP. No. 412, 83rd Cong., 1st Sess. (1953).

94. Sabbatino Amendment, *supra* note 24. A discussion of the Sabbatino Amendment in the act of state context may be found in the text accompanying notes 196-205 *infra*.

95. The law in part provides:

Provided, That this subparagraph shall not be applicable . . .
 (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Sabbatino Amendment, *supra* note 24.

96. See S. 1434, 97th Cong., 1st Sess. (1981); see also *infra* note 203.

97. See *supra* note 23.

98. F.S.I.A., *supra* note 23, § 1602. "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." *Id.*

99. *Marbury*, 5 U.S. (1 Cranch) at 177.

100. For a discussion of sovereign immunity and its impact on the judicial process, see *infra* text accompanying notes 103-56.

grant of authority to the courts.¹⁰¹ It is clear that, while there is some awareness of the conflicting roles of the Executive and Judiciary, Congress has heretofore been unwilling or unable to effectuate a comprehensive solution and that this tension between the Executive and Judiciary will continue.¹⁰²

The question of balance is thus delimited as the essential right of an individual to seek remedy for an injury through the established judicial process weighed against the power of the Executive to preclude suits under its foreign affairs power. The following sections review attempts to decide these cases and to apply these sometimes conflicting legal principles, attempts which have met with varying degrees of success.

3. Review of Acts of Executive Suggestion and Judicial Deference

a. Sovereign Immunity

Although Chief Justice Marshall had, in an early opinion, stated that it is the "duty of the judicial department to say what the law is,"¹⁰³ it was, nevertheless, the same Justice Marshall who found an exception to that duty in the doctrine of sovereign immunity.¹⁰⁴

Sovereign immunity is "a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state."¹⁰⁵ It is significant to recognize, as stated in the above definition, that sovereign immunity is an international law doctrine that causes a court to relinquish jurisdiction. Such immunity

101. This might occur when a court is deciding a case under the exception to act of state formulated in *Dunhill*, 425 U.S. at 706, and the President makes a suggestion under the Sabbatino Amendment which would lead to the mandatory application of the act of state doctrine. See Sabbatino Amendment *infra* note 196.

102. See discussion of *Dames & Moore* *infra* text accompanying notes 329-44. The Supreme Court attempted to interpret some uncertain congressional signals in a case involving a conflict between executive and judicial powers.

103. *Marbury*, 5 U.S. (1 Cranch) at 177.

104. See generally Cardozo, *supra* note 31; Frank, *The Courts, The State Department and National Policy: A Criterion For Judicial Abdication*, 44 MINN. L. REV. 1101 (1960); Goodman, *Immunity of Foreign Sovereigns: A Political or Legal Question—Victory Transport Revisited*, 38 BROOKLYN L. REV. 885 (1972); Jessup, *supra* note 32; Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211 (1979); McDougal & Jasper, *supra* note 37; Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543 (1977); Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L. REV. 429 (1977).

105. HOUSE REPORT, *supra* note 25, at 6606.

takes a defendant outside the rule of law. This section reviews the conceptualization of this doctrine and its evolution in the American legal process.

Although the concept of sovereign immunity had been alluded to in prior cases,¹⁰⁶ its first full articulation was given by Justice Marshall in *The Schooner Exchange v. McFaddon*.¹⁰⁷ In this landmark case the Chief Justice articulated the fundamental issues which have infused not only the doctrine of sovereign immunity, but also the doctrines of act of state, political question and presidential claim transfer, from 1812 to the present day.¹⁰⁸

In *Schooner Exchange* Justice Marshall recognized that each of the actors was making a demand on the judicial process, some seeking an exception from it, and others expecting a decision which would recognize and protect the rule of law.¹⁰⁹ After analyzing the demands and the underlying policies in this case, sovereign immunity was brought forth as an exception to the rule of law by the Supreme Court, an exception which still has viable elements in the legal arena.

The *Schooner Exchange* had been owned by Maryland merchants until its seizure by the government of France.¹¹⁰ The *Schooner Exchange* was converted into a warship,¹¹¹ and as such, it sailed into the Philadelphia harbor where defendants brought suit for possession.¹¹²

In an extensive analysis Chief Justice Marshall first recognized the common interest in orderly commerce between nations.¹¹³ He rec-

106. See *DeMoitez v. The South Carolina*, 17 F. Cas. 574 (Adm. Ct. of Pa. 1781) (No. 9697).

107. 11 U.S. (7 Cranch) 116 (1812).

108. Compare *Schooner Exchange*, 11 U.S. (7 Cranch) 116 (1812) with *Dames & Moore*, 453 U.S. 654 (1981) (claim settlement), *Dunhill*, 425 U.S. 682 (1976) (act of state) and *Umm al Qaywayn*, 577 F.2d 1196 (5th Cir. 1978), cert. denied, 442 U.S. 928 (1979) (political question). In each of these cases, the court deciding the case had to balance the claims of the plaintiff, the claims and rights of the foreign states involved, the power of the Executive and the role of the Judiciary. Each of these factors had been recognized as important by Chief Justice Marshall in *Schooner Exchange*. See *infra* notes 113-20 and accompanying text.

109. 11 U.S. (7 Cranch) at 146-47. See *supra* notes 8-11 and accompanying text.

110. *Id.* at 117.

111. For a discussion of the seizure and conversion of the schooner *Exchange* into a French warship, see *id.* at 116-20, 135 & 147.

112. 11 U.S. (7 Cranch) at 118-19.

113. *Id.* at 136. Chief Justice Marshall recognized the interdependence of world commerce even in a nineteenth century world.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is prompted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxa-

ognized that there was a common demand and expectation that the wealth and respect of all the actors be protected.¹¹⁴ The demand by foreign states that their sovereignty be respected was also acknowledged.¹¹⁵ Chief Justice Marshall further recognized that the individual claimant was demanding that his claim be recognized and adjudicated.¹¹⁶

Chief Justice Marshall then meticulously evaluated the facts of the case, the principles to be applied, the need to balance the previously recognized common interest in orderly commerce and the demands for respect by the sovereign nations.¹¹⁷ In this analysis he distinguished those acts of the sovereign which were public acts from those acts which were commercial in nature, thus foreshadowing the *jure imperii—jure gestionis* distinction,¹¹⁸ before extending immunity to the warship.¹¹⁹

tion, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

Id.

114. *Id.* at 144.

When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country.

Id.

115. *Id.* at 137. Chief Justice Marshall stated that:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or his sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

Id.

116. *Id.* at 146-47. "Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a right to assert his title in those courts, unless there be some law taking his case out of the general rule." *Id.*

117. *Id.*

118. In the twentieth century the distinction between an act which embodied a state function, *jure imperii*, and an act which was private in nature, *jure gestionis*, was made. See *infra* text accompanying note 132.

119. 11 U.S. (7 Cranch) at 145.

Marshall also provided a possible mechanism for the Executive Branch to reveal that the warship entered United States waters under an implied promise of exemption from jurisdiction. "If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."¹²⁰

The foregoing comprehensive analysis was not, however, followed by subsequent courts as they adhered rigidly to the absolute theory of immunity which holds that a state has immunity whether its acts are *imperii* or *gestionis*.¹²¹ In *Berizzi Brothers Co. v. Steamship Pesaro*,¹²² a ship owned and controlled by the Italian government was sued for failure to deliver cargo. In this case the Supreme Court extended the concept of immunity to a ship engaged in commercial activity.¹²³

The Supreme Court further concretized its method of determining sovereign immunity as the possibility of executive suggestion offered by Chief Justice Marshall¹²⁴ became a talisman.¹²⁵ In *Ex Parte Republic of Peru*¹²⁶ where the Supreme Court extended immunity to a

Without indicating any opinion on this question, it may be safely affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do, with respect to any portion of that armed force, which upholds his crown, and the nation that he is intrusted to govern.

Id.

120. *Id.* at 147.

121. The absolute theory of immunity holds generally that a state has immunity whether its acts are *jure imperii* or *jure gestionis*. The United States moved away from this doctrine in the 1950's with the "Tate" letter. See *infra* note 133 and accompanying text.

122. 271 U.S. 562 (1926).

123. *Id.* at 574.

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are.

Id.

124. See *Schooner Exchange*, 11 U.S. (7 Cranch) at 147.

125. See *infra* notes 126-31.

126. 318 U.S. 578 (1943).

Peruvian ship following a State Department suggestion so as not to "embarrass" the Executive,¹²⁷ and in *Mexico v. Hoffman*¹²⁸ where a vessel, which returned part of its profits to the Mexican government, was sued for damage caused to an American vessel,¹²⁹ the Court articulated a position of extreme deference to the Executive.¹³⁰ The hardening of this concept of deference resulted in significant negative commentary.¹³¹

The next major change in sovereign immunity related to the adoption of the restrictive theory of immunity. This was prompted, to a significant extent, by the adoption of the restrictive theory by many

127. *Id.* at 588. The concept of embarrassment to the Executive was criticized by Monroe Leigh. Leigh, *New Departures in the Law of Sovereign Immunity*, 1969 AM. Soc'y INT'L L. Proc. 187.

Some will say, of course, that it is necessary for the State Department to intrude in certain cases where judicial action may embarrass the President in the conduct of foreign policy. I agree with Professor Lillich that this is "one of the most over-rated arguments in the annals of American legal history." It would be useful if someone would list the cases in which court action has embarrassed the Executive Branch in any significant way in the conduct of foreign affairs.

Id. at 192.

128. 324 U.S. 30 (1945).

129. *Id.* at 31.

130. *Id.* at 35. In neither *Peru* nor *Mexico* did the Court proceed through the sophisticated analysis that was done by Chief Justice Marshall in *Schooner Exchange*. The Court, in each case, while fully recognizing the demands of the defendant nation and the Executive Branch, did not review the subtle shadings of the demands and expectations of other actors. In *Peru* the Court states: "Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libellant to the relief obtainable through diplomatic negotiations." 318 U.S. at 588.

In *Mexico* the Court relied on a rigid interpretation of *Schooner Exchange* to establish a foundation for an extension of the concept of judicial deference.

And in *The Exchange*, Chief Justice Marshall introduced the practice, since followed in the federal courts, that their jurisdiction in rem acquired by the judicial seizure of the vessel of a friendly foreign government, will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General.

324 U.S. at 34.

Finally, in *Mexico* the Court extended the concept of deference to its limits: "It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35 (footnote omitted).

131. See, e.g., Jessup, *supra* note 32.

of the Western Nations.¹³² The adoption of the restrictive theory of sovereign immunity by the United States was accomplished through the "Tate" letter.¹³³ This letter, written by the Acting State Department Legal Advisor to the Acting Attorney General, stated the State Department's determination that the absolute doctrine was no longer applicable in a modern world.¹³⁴ In the future the State Department would follow the restrictive doctrine, recognizing sovereign immunity only for acts that were *jure imperii*, not *jure gestionis*.¹³⁵ Significantly, Tate recognized a more flexible standard for the concept of judicial deference than the courts themselves.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.¹³⁶

The years following the Tate letter saw confusion in the courts as they attempted to conform their decisions to State Department suggestions when they were made¹³⁷ and to arrive at their own determina-

132. See Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220 (1951). For further recognition of this trend in the "Tate" letter, see *infra* text accompanying notes 133-34.

133. Letter from Jack B. Tate, State Department Acting Legal Advisor, to Acting Attorney General Philip B. Perlman (May 19, 1952), 26 DEP'T ST. BULL. 984 (1952), reprinted in H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 647 (1976).

134. H. STEINER & D. VAGTS, *supra* note 133, at 647.

135. *Id.*

136. *Id.* at 649. Tate, in advocating the restrictive doctrine, was following a position first proposed by Secretary of State Lansing in a letter to Attorney General George in 1918. Although the Attorney General rejected this position, Lansing articulated the concept of judicial independence while recognizing the various demands and expectations of the concerned actors and the aggregate demands of the community. Letter from Secretary Lansing to Attorney General George (Nov. 8, 1918), reprinted in 2 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 429-30 (1941).

137. See, e.g., *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974); *Isbrandtsen Tankers, Inc. v. India*, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); *Rich*, 295 F.2d 24 (4th Cir. 1961); *Hellenic Lines Ltd. v. S. Vietnam*, 275 F. Supp. 860 (S.D.N.Y. 1967); *Weilmann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (N.Y. Sup. Ct. 1959); *Natural Resources*, 420 Pa. 134, 215 A.2d 864, *cert. denied*, 385 U.S. 822 (1966).

tions in the absence of a suggestion.¹³⁸ However, there began to emerge a line of thought which reasserted the independence of the Judiciary.¹³⁹

Despite these judicial utterances, the courts deferred to executive suggestions in cases which would, on their faces, seem to be under the restrictive doctrine. In *Rich v. Naviera Vacuba, S.A.*,¹⁴⁰ the crew of a Cuban ship defected and brought the ship to the United States where a libel claim was filed against the ship based on a previous consent judgment and other commercial actions.¹⁴¹ The court of appeals dutifully accepted the Executive's suggestion¹⁴² in a decision that has been characterized as political.¹⁴³ The State Department suggestion came in response to an agreement with Cuba providing for the return of hijacked vessels.¹⁴⁴ This process wherein foreign states would lobby with the State Department for favorable dispensations of immunity based on political considerations was harshly criticized.¹⁴⁵

In 1976 Congress, seeking to ensure that decisions would be made on purely legal grounds,¹⁴⁶ enacted the Foreign Sovereign Immunities Act of 1976¹⁴⁷ and reinforced the authority of the courts.¹⁴⁸ Congress, in passing this legislation, recognized the aggregate common interest first articulated by Chief Justice Marshall,¹⁴⁹ the demands and expectations of the claimants,¹⁵⁰ and the respect due the Judiciary,¹⁵¹ while

138. See, e.g., *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964).

139. See, e.g., *Nat'l City Bank v. Repub. of China*, 348 U.S. 356 (1955). "Unlike the special position accorded our states as party defendants by the Eleventh Amendment, the privileged position of a foreign state is not an explicit command of the Constitution. It rests on considerations of policy given legal sanction by this Court." *Id.* at 358-59.

140. 295 F.2d 24 (4th Cir. 1961).

141. *Id.* at 25.

142. *Id.* at 26.

143. *Leigh & Atkeson*, pt. 2, *supra* note 57, at 19.

144. *Id.* at 18.

145. *Id.* at 15-23.

146. HOUSE REPORT, *supra* note 25, at 6606.

147. See F.S.I.A., *supra* note 23.

148. *Id.* § 1602. "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." *Id.*

149. HOUSE REPORT, *supra* note 25, at 6605. "At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. . . . In a modern world where foreign state enterprises are everyday participants in commercial activities, H.R. 11315 is urgently needed legislation." *Id.*

150. *Id.* "These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary

it implicitly rejected the threat of executive embarrassment.

After passage of the F.S.I.A., the State Department stated that it would no longer send suggestions to the courts, but would appear "as amicus curiae in cases of significant interest to the Government."¹⁵² This stated position was followed in *Yessenin-Volpin v. Novosti Press Agency*,¹⁵³ where the State Department refused a request of the Soviet Embassy to suggest immunity to the courts.¹⁵⁴ It is significant that the State Department refused to continue its past practice of making suggestions of immunity to the courts; instead it allowed the courts to say "what the law is."¹⁵⁵

Thus, almost 170 years after *Schooner Exchange*,¹⁵⁶ the courts have been reestablished in their primary role in claim adjudication when the defense of sovereign immunity is raised. The next sections evaluate whether this primary role is recognized, or is limited, when other legal technicalities are at work.

b. Act of State

The act of state¹⁵⁷ doctrine, although it has its roots in English Law,¹⁵⁸ was given its first full articulation in the United States by the

legal disputes." *Id.*

151. *Id.* at 6606.

A principal purpose of this bill is to transfer the determination of Sovereign Immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

Id.

152. Letter from Monroe Leigh, Legal Advisor of the Department of State, to the Attorney General (Nov. 10, 1976), reprinted in 1976 DIG. U.S. PRAC. INT'L L. 323.

153. 443 F. Supp. 849 (S.D.N.Y. 1978).

154. *Id.* at 851 n.1.

155. See *Marbury*, 5 U.S. (1 Cranch) at 177.

156. 11 U.S. (7 Cranch) 116 (1812).

157. See generally Delson, *The Act of State Doctrine-Judicial Deference or Abstinence?*, 66 AM. J. INT'L L. 82 (1972); Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967); Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Note, *The Act of State Doctrine: A History of Judicial Limitations and Exceptions*, 18 HARV. INT'L L.J. 677 (1977); Note, *Rehabilitation and Exoneration of the Act of State Doctrine*, 12 N.Y.U. J. INT'L L. & POL. 590 (1980).

158. Singer, *The Act of State Doctrine of the United Kingdom: An Analysis with Comparisons to United States Practice*, 75 AM. J. INT'L L. 283 (1981).

Supreme Court in *Underhill v. Hernandez*.¹⁵⁹ In this case the plaintiff sued the commander of a revolutionary army for damages resulting from detention.¹⁶⁰ The Court uttered the now classic definition of act of state, "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the court of one country will not sit in judgment on the acts of the government of another done within its own territory."¹⁶¹ This case and its famous statement have had the effect of creating, after a limited analysis of applicable legal principles,¹⁶² a judicial exception to the rule of law. First, the Court did not find itself devoid of jurisdiction, but rather chose to forgo an adjudication out of respect for the sovereignty of the foreign state.¹⁶³ Recent research has found this language to be nearly identical with a leading British case¹⁶⁴ basing immunity on the unassailable position of royalty, which more closely parallels the American doctrine of sovereign immunity.¹⁶⁵ Second, the Court did not justify its judgment as a requirement of either international or municipal law.¹⁶⁶ There is no evidence that the Court proceeded through an in-depth analysis of the various factors as was done in *Schooner Exchange*.¹⁶⁷ Rather it appears to rest, *sub silentio*, on a judicially created doctrine of deference and on the rigid application of a static rule.¹⁶⁸ Third, the Court acknowledged a role for the Executive in the judicial process. "That these were facts of which the court is bound to take judicial notice, and for information as to which it may consult the Department of State, there can be no doubt."¹⁶⁹ This act of state doctrine, with its silent reliance on sovereign immunity, became a talisman for future courts.¹⁷⁰

In the years following *Underhill* the courts continued to apply an act of state doctrine which had its roots in sovereign immunity and international law principles.¹⁷¹ In *Oetjen v. Central Leather Co.*,¹⁷²

159. 168 U.S. 250 (1897).

160. *Id.* at 250.

161. *Id.* at 252.

162. See *infra* text accompanying note 167.

163. 168 U.S. at 252.

164. Duke of Brunswick v. King of Hanover, 9 Eng. Rep. 993 (1848), cited in Singer, *supra* note 158, at 284, 291.

165. See Singer, *supra* note 158, at 291.

166. 168 U.S. at 252.

167. See *supra* notes 107-20 and accompanying text.

168. See 168 U.S. at 252.

169. *Id.* at 253.

170. See *Ricaud v. Am. Metal Co.*, 246 U.S. 304 (1918); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918).

171. See *id.*

172. 246 U.S. 297 (1918).

where the suit was in replevin for hides which were confiscated in Mexico by General Villa for governmental purposes during the Mexican Revolution and eventually transported to the United States, the Supreme Court held for the defendant on the basis that the confiscation was an act of state even when the acts were by a revolutionary group which later came to power.¹⁷³ The Court expanded the rationale for its decision, finding that it "rests upon the highest considerations of international comity and expediency."¹⁷⁴

The concept of an executive suggestion which would assert that the act of state doctrine did not apply developed in *Bernstein v. Van Heyghen Freres Societe Anonyme*¹⁷⁵ and *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*,¹⁷⁶ the *Bernstein* cases. The plaintiff, who sought to recover property which had been expropriated by Nazis during World War II, had been frustrated by the courts' application of the act of state doctrine which resulted in the courts' refusal to pass judgment on the validity of the Nazi seizures.¹⁷⁷ Jack B. Tate, Acting State Department Legal Advisor, wrote a letter "as a matter of general interest"¹⁷⁸ to the district court which originated the "*Bernstein* exception" wherein the Executive suggested that the court not apply act of state.¹⁷⁹

The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or du-

173. *Id.* at 303-04.

174. *Id.*

175. 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947).

176. 173 F.2d 71 (2d Cir. 1949), *modified*, 210 F.2d 375 (2d Cir. 1954).

177. 163 F.2d at 246. Judge Learned Hand, speaking in the first *Bernstein* case, broadly hinted that act of state might not apply if the Executive stated that it would not be appropriate. *Id.* at 249.

178. 210 F.2d at 376.

179. *Id.* The court in this case, and in the previous *Bernstein* cases, did not undertake an analysis which took into account the various demands and expectations. Obviously not deferred to was the common demand that expropriations by Nazis not be honored through the application of the act of state doctrine. The Court in *Sabbatino*, 376 U.S. 398 (1964), observed that:

[r]ecognizing the odious nature of this act of state, the court, through Judge Learned Hand, nonetheless refused to consider it invalid on that ground. Rather, it looked to see if the Executive had acted in any manner that would indicate that United States Courts should refuse to give effect to such a foreign decree. Finding no such evidence, the court sustained dismissal of the complaint.

Id. at 419.

ress 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.¹⁸⁰

The court followed this suggestion and held for the plaintiff.¹⁸¹

The *Bernstein* exception brings the Executive into the middle of the judicial process in a manner which is nearly identical to the suggestion mechanism which had existed in the area of sovereign immunity.¹⁸² Heretofore, act of state, while an exception to the rule of law, was nonetheless basically a judicial decision.¹⁸³ While it is true that the result of *Bernstein* cannot be criticized, it is important to note that it came with great cost to the independence of the Judiciary.¹⁸⁴

The landmark act of state case, *Banco Nacional de Cuba v. Sabatino*,¹⁸⁵ explicitly did not rule on the *Bernstein* exception.¹⁸⁶ The Supreme Court instead found that act of state was not rooted in international law,¹⁸⁷ but in the constitutional separation of powers.¹⁸⁸ The

180. 210 F.2d at 376.

181. *Id.*

182. See *supra* text accompanying notes 124-45.

183. See *Underhill*, 168 U.S. at 253, where the Court states that it may "consult" with the State Department.

184. The courts here did not state what law was to be employed, but rather waited for the Executive Branch to indicate to the Judiciary what law should be applied. There was no interest of either the Executive Branch or the government of the United States which would have precluded adjudication of this case by the courts. The courts instead took a rigid view of the act of state doctrine and deferred to executive findings and suggestion. This acceptance of suggestion blurs the concept of an independent Judiciary and instead moves the courts into a role later characterized as an "errand boy." See *infra* note 210.

185. 376 U.S. 398 (1964).

186. 376 U.S. at 420. "This Court has never had occasion to pass upon the so-called *Bernstein* exception, nor need it do so now." *Id.*

187. *Id.* at 421. "We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply . . . or by some principle of international law." *Id.* Justice Harlan's conception of international law and act of state was supported by the current commentary which stated that the act of state doctrine was "a principle of judicial self-restraint and deference to the role of the executive or political branch of government in the field of foreign affairs." INTERNATIONAL LAW ASSOCIATION, REP. FIFTIETH CONF. 155 (Brussels 1962), quoted in Lillich, *supra* note 57, at 28-29.

188. 376 U.S. at 423. "The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationship between branches of government in a system of separation of powers." *Id.* Later in the opinion Justice Harlan stated:

If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither inter-

Court, with Justice Harlan speaking for the majority, found that the courts should avoid deciding the validity of foreign acts so as to not embarrass the Executive.¹⁸⁹

In arriving at this decision, Justice Harlan fundamentally changed the nature of the act of state doctrine from a doctrine of non-justiciability rooted in elements of international law¹⁹⁰ to a doctrine of nonjusticiability which was a hybrid form of political question.¹⁹¹ Justice Harlan's reliance on the possibility that the Executive Branch might be hindered by judicial actions parallels the language of *Baker v. Carr*,¹⁹² the current statement of the political question doctrine.

Justice White dissented in an opinion which clearly stated that the rule of law should apply, especially in a case where a violation of

national law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.

Id. at 427.

189. *Id.* at 431-33.

Judicial determinations of invalidity of title can, on the other hand have only an occasional impact, since they depend on the fortuitous circumstance of the property in question being brought into this country. Such decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached.

Id. at 431-32.

190. See discussion of *Underhill*, *supra* text accompanying notes 165-68.

191. This shift towards a political question analysis was immediately recognized by Justice White in his dissent, 376 U.S. at 461, and Justice Brennan in his dissent in *First Nat'l City Bank*, 406 U.S. 759, 787-88 (1972).

192. *Baker v. Carr*, 369 U.S. 186 (1962). Compare the Court's statement in *Baker*, "[p]rominent on the surface of any case held to involve a political question is . . . the potentiality of embarrassment from multifarious pronouncements by various departments on one question," *id.* at 217, with Harlan's determination that "[s]uch a decision now would require the drawing of more difficult lines in subsequent cases and these would involve the possibility of conflict with the Executive view. Even if the courts avoided this course . . . the very expression of judicial uncertainty might provide embarrassment to the Executive Branch." 376 U.S. at 433. Compare also Justice Harlan's language, *supra* note 188 with Justice Brennan's full exposition of political question, *infra* note 274 and accompanying text. This comparable language underscores Justice Harlan's subtle but substantial shift in defining the nature of act of state.

international law is alleged.¹⁹³ Justice White's opinion, in contrast to the majority, analyzed the demands of all the actors, both parties and nonparties, in attempting to formulate a decision within the rule of law.¹⁹⁴

Congress, concerned with the ruling in *Sabbatino*, sought to "reverse"¹⁹⁵ it with the Hickenlooper or Sabbatino Amendment,¹⁹⁶ sometimes referred to as the Rule of Law Amendment.¹⁹⁷ The stated purpose of the amendment, which was greatly concerned with the demands of the claimant,¹⁹⁸ was to provide for a process where "the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy."¹⁹⁹

193. 376 U.S. at 339-40.

194. *Id.* at 462. "And it cannot be contended that the Constitution allocates this area to the exclusive jurisdiction of the executive, for the judicial power is expressly extended by that document to controversies between aliens and citizens or states, aliens and foreign states and American citizens or states." *Id.* See also McDougal & Jasper, *supra* note 37, at 62-67.

195. S. REP. NO. 1188, Part 1, 88th Cong., 2nd Sess. 24, reprinted in 1964 U.S. CODE CONG. & AD. NEWS 3829, 3852 [hereinafter cited as SENATE REPORT].

196. Foreign Assistance Act of 1964, § 301(d)(4), 22 U.S.C. § 2370(e)(2) (1976). The Sabbatino Amendment states:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Id.

197. Leigh & Atkeson, pt 1, *supra* note 57, at 858.

198. *Id.* at 868-69.

199. SENATE REPORT, *supra* note 195, at 3852.

It is interesting to note that by codifying a method by which the President could suggest act of state Congress was paralleling the contemporary sovereign immunity process.²⁰⁰ Although the sovereign immunity process of suggestion has been eliminated by the F.S.I.A.,²⁰¹ and the *Bernstein* exception has been under attack,²⁰² this vestigial characteristic of executive suggestion remains.²⁰³ It should also be noted that the Sabbatino Amendment has been found not to be applicable in some cases²⁰⁴ with results which have stirred significant controversy.²⁰⁵

The *Bernstein* exception was severely attacked in *First National City Bank v. Banco Nacional de Cuba*.²⁰⁶ In this case the petitioner counterclaimed in a suit for excess payments stating that the value of the confiscated property should be used as a set-off.²⁰⁷ The Supreme Court found, in a plurality decision, that the counterclaim was not barred by the act of state doctrine. The plurality rested its rationale upon a communication from the State Department stating that the act of state doctrine should not apply.²⁰⁸ Although the plurality opinion of Justice Rehnquist supported the *Bernstein* exception,²⁰⁹ six other justices, two concurring and four dissenting, rejected *Bernstein*.²¹⁰ This

200. See *supra* text accompanying notes 124-45.

201. See *supra* text accompanying note 147.

202. See *infra* text accompanying notes 206-10.

203. Senator Charles M. Mathias has introduced a bill which, if enacted, would preclude the courts from applying act of state. See S. 1434, 97th Cong., 1st Sess. (1981) [hereinafter cited as Mathias Bill].

204. See *Buttes Gas & Oil*, 331 F. Supp. 92 (C.D. Cal. 1971), *cert. denied*, 409 U.S. 950 (1972); *Hunt (Coastal States)*, 583 S.W.2d 322, *cert. denied*, 444 U.S. 992, *reh'g denied*, 444 U.S. 1103 (1979), both discussed *infra* text accompanying notes 227-36.

205. See criticism in McDougal & Jasper, *supra* note 37, at 44 n.68.

206. 406 U.S. 759 (1971).

207. *Id.* at 761.

208. *Id.* at 768.

209. *Id.* at 768. "In so doing, we of course adopt and approve the so-called 'Bernstein' exception to the act of state doctrine." *Id.*

210. Justice Douglas, concurring in the result, stated, "[i]t is that principle [recognition of counterclaim], not the *Bernstein* exception, which should govern here. Otherwise, the Court becomes a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others." *Id.* at 772-773.

Justice Powell, concurring in the judgment, also rejected the *Bernstein* exception:

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

case had the effect of moving the Court toward a position where it would be able to adjudicate a claim against a foreign state on the merits. In so moving the adjudication process, the Court explicitly recognized and balanced some of the competing demands.

The act of state doctrine, as reflected in the cases culminating in *Sabbatino*, is a judicially accepted limitation on the normal adjudicative processes of the courts, springing from the thoroughly sound principle that on occasion individual litigants may have to forego decision on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy. 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.²¹¹

This movement away from the rigid application of act of state toward a presumption of justiciability continued in *Alfred Dunhill of London, Inc. v. Cuba*.²¹² There, Justice White borrowed a concept from the sovereign immunity cases and refused to apply act of state "to acts committed by foreign sovereigns in the course of their purely commercial operations."²¹³ In so holding the Court tended to follow the State

. . . .

Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to hear cases such as this.

Id. at 774-76.

Justice Brennan, joined by Justices Stewart, Marshall and Blackmun in dissent, stated:

As six members of this Court recognize today, the reasoning of that case [*Bernstein*] is clear that the 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.

Id. at 790.

211. *Id.* at 769-70.

212. 425 U.S. 682 (1976).

213. *Id.* at 706.

Department's suggestion contained in a so called "*Bernstein*"²¹⁴ letter.²¹⁵ The Court refused, however, to follow the final State Department suggestion that *Sabbatino* be overruled and that act of state questions be adjudicated under international law.²¹⁶ We thus have the incongruous situation of the Executive Branch interjecting itself into the judicial process through the letter,²¹⁷ suggesting to the Judiciary that it ought to decide future cases by the rule of law, and the Judicial Branch hesitating.²¹⁸

Yet perhaps even more significant is Justice White's recognition that in both act of state and sovereign immunity cases, a balancing test is applicable.²¹⁹ The test which Justice White used evaluated the potential injury to the rule of law against possible damage to the Executive's foreign policy.²²⁰ The consistent recognition and application of such a balancing test, with an understanding and evaluation of all pertinent factors, would do much to advance the rule of law.

In spite of this progressive movement, the courts have recently narrowed the *Dunhill* decision and the liberalizing theories it represents. The courts have found support for narrowing these theories in the traditional political question²²¹ and sovereign immunity²²² concepts by finding potential embarrassment to the Executive Branch as a rationale for nonadjudication.²²³ In *Hunt v. Mobil Oil Corp.*²²⁴ the court

214. This letter was characterized by Justice Marshall in his dissent as a "*Bernstein*" letter. *Id.* at 724.

215. For the text of this "*Bernstein*" letter, see *id.* at 706.

216. *Id.* at 697 n.12. "The letter also takes the position that the overruling of *Sabbatino*, so that acts of state would hereafter be subject to adjudication in American Courts under international law, would not result in embarrassment to the conduct of United States foreign policy. We need not to resolve this issue either." *Id.*

217. The letter was written by Monroe Leigh, Legal Advisor to the State Department. *Id.* at 711.

218. *Id.* at 697 n.12.

219. *Id.* at 705 n.18.

It cannot be gainsaid, however, that the proper application of each [act of state and sovereign immunity] involves a balancing of the injury to our foreign policy, the conduct of which is committed primarily to the Executive Branch, through judicial affronts to sovereign powers, . . . against the injury to the private party, who is denied justice through judicial deference to a raw assertion of sovereignty, and a consequent injury to international trade.

Id.

220. *Id.*

221. See *infra* text accompanying note 275.

222. See *supra* text accompanying note 127.

223. See, e.g., *Hunt (Mobil)*, 550 F.2d at 77.

224. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

of appeals held that an antitrust claim would require an examination of a Libyan act of expropriation.²²⁵ The court found that Hunt's claim did not come under the commercial activities exception to act of state as the acts were of a political nature.²²⁶

In *Hunt v. Coastal States Gas Producing Co.*,²²⁷ Hunt tried again, this time in a case alleging conversion of his Libyan oil.²²⁸ The Texas Supreme Court found that Hunt did not fall within the Sabbatino Amendment²²⁹ exception to the act of state doctrine as a contractual right, not a property right, was expropriated.²³⁰ This determination was made in spite of State Department policy supporting Hunt and cited by the dissent.²³¹

Two cases similar to the Hunt litigation, *Occidental Petroleum Corporation v. Buttes Gas & Oil Company*,²³² and *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo*,²³³ involved an antitrust suit regarding an oil concession agreement and a later suit for conversion of the oil, respectively. The courts again found the act of state doctrine to be significant.²³⁴ In the first case the district court found that the alleged conspiracy regarding the establishment of the Trucial State Sharjah's boundary, which embraced the concession area, was a political question²³⁵ the adjudication of which was barred by the act of state doctrine.²³⁶ In the second case, the court of appeals relied primarily on the political question doctrine,²³⁷ recognizing potential embarrassment to and hindrance of the Executive Branch²³⁸ and noting the Executive Branch's letter of suggestion to that effect.²³⁹ In an incredible step away from the rule of law, the court interpreted recent Supreme Court decisions as showing that the federal courts "are becoming more amenable to receiving opinion by the Executive branch."²⁴⁰

225. *Id.* at 72.

226. *Id.* at 73.

227. 583 S.W.2d 322 (Tex.), *cert. denied*, 444 U.S. 992, *reh'g denied*, 444 U.S. 1103 (1979).

228. *Id.* at 323.

229. *See supra* note 196.

230. 583 S.W.2d at 325-26.

231. *Id.* at 334-35.

232. 331 F. Supp. 92 (C.D. Cal. 1971), *cert. denied*, 409 U.S. 950 (1972).

233. 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979).

234. *See Buttes Gas & Oil*, 331 F. Supp. at 113; *Umm al Qaywayn*, 577 F.2d at 1201.

235. 331 F. Supp. at 103.

236. *Id.* at 108.

237. 577 F.2d at 1201.

238. *Id.* at 1204.

239. *Id.* at 1204 n.13.

240. *Id.* at 1204 n.14. It is interesting to note that this case, *Umm al Qaywayn*,

Recently, in *International Association of Machinists v. Organization of Petroleum Exporting Countries*,²⁴¹ the court of appeals again relied on that dubious concept of hindrance of executive function²⁴² in applying act of state. The appellate court applied the political question aspect of act of state in determining that the potential violation of antitrust laws by O.P.E.C. was nonjusticiable.²⁴³

We have seen, therefore, two act of state doctrines emerge. The first is the traditional approach, where the courts will not judge a foreign sovereign's acts within its own territory.²⁴⁴ The second is more expansive and rests on the political question foundation by proposing that the courts will not adjudicate when the act might be political²⁴⁵ or might interfere with the functioning of the Executive.²⁴⁶ It is unfortunate that courts do not consistently utilize the balancing test articulated and applied by Justice White in *Dunhill*.²⁴⁷ If they did apply that test, they would move toward a rule of law which would be in step with

has been litigated in the English courts. The House of Lords recently found it to be nonjusticiable, not because of embarrassment to Her Majesty's Government, but because of a lack of judicial standards. *Buttes Gas and Oil Co. v. Hammer*, slip op. at 16 (House of Lords, Oct. 1981) [hereinafter cited as *Hammer*]. *But see* discussion of concurring and dissenting opinions in *First Nat'l City Bank*, *supra* note 210.

241. 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981).

242. 649 F.2d at 1358-59. It is also interesting to note that the English courts found that potential embarrassment was not a barrier to adjudication. *See Hammer*, slip op. at 16.

243. 649 F.2d at 1360-61.

244. Although the courts do not blindly adopt the *Underhill* language, modern cases have shown some strained analyses. *See Hunt (Coastal States)*, 583 S.W.2d 322 (Tex.), *cert. denied*, 444 U.S. 992, *reh'g denied*, 444 U.S. 1103 (1979), where the court followed the classic interpretation of act of state, see *supra* note 161 and accompanying text, while acknowledging, but not addressing, the political question aspects of act of state. It is interesting to note that the court adopted the act of state finding of *Hunt (Mobil)*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), without adopting the embarrassment to the Executive political question rationale. This may be because the State Department supported *Hunt*, in *Hunt (Coastal States)*, undermining the potential for political embarrassment. *Hunt (Coastal States)*, at 334. Thus, if the embarrassment foundation which supported the prior finding of act of state is removed, the *Hunt (Coastal States)* court would appear to be forced to rely heavily on the traditional act of state rationale.

245. *Cf. Hunt (Mobil)*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), where the court uttered language closely paralleling the political question doctrine in finding that the case was controlled by act of state. "Another inquiry could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the doctrine in issue [act of state]." *Id.* at 77-78.

246. *See supra* text accompanying note 238.

247. *See supra* note 219 and accompanying text.

both the expressed demands of the actors²⁴⁸ and progressive commentary.²⁴⁹

c. Political Question

The political question doctrine²⁵⁰ will generally²⁵¹ be applied when the courts determine a particular case raises issues which are too complex for adjudication;²⁵² when an issue should properly be decided by the Executive Branch;²⁵³ or when it might impair the function of the Executive.²⁵⁴ Although this concept is, in its most narrow exposition, a constitutional imperative,²⁵⁵ it has nonetheless been expanded through judicial decision.²⁵⁶

The political question traces its heritage to the classic case of *Marbury v. Madison* in which Chief Justice Marshall described potential questions which could be constitutionally committed to the Executive.²⁵⁷ He thus created, through the force of the following language, an exception to the rule of law which he had so energetically advocated in the opinion.²⁵⁸

The province of the court is, solely, to decide on
the rights of individuals, not to inquire how the

248. See the Sabbatino Amendment, *supra* note 196; Mathias Bill, *supra* note 203.

249. See generally McDougal & Jasper, *supra* note 37.

250. See generally Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Scharph, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

251. See L. HENKIN, *supra* note 37. "That there is a constitutional 'political question' doctrine is not disputed, but there is little agreement as to anything else about it—its constitutional basis; whether abstention is required or optional; how the courts decide whether a question is 'political,' and which questions are." *Id.* at 210.

252. See *Chicago & S. Air Lines*, 333 U.S. at 111; see also text accompanying notes 267-68.

253. *Umm al Qaywayn*, 577 F.2d at 1204; see *supra* notes 237-240 and accompanying text.

254. *Umm al Qaywayn*, 577 F.2d at 1204.

255. See *Marbury*, 5 U.S. (1 Cranch) 137, 170. See also *Baker v. Carr*, 369 U.S. 186 (1962), which both adopted and built upon the theory advanced in *Marbury*, discussed *infra* text accompanying notes 271-81.

256. See *infra* text accompanying notes 271-81.

257. *Marbury*, 5 U.S. (1 Cranch) at 170.

258. *Id.* at 163. Chief Justice Marshall, prior to his exception-creating language, had clearly articulated the rule of law: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*

executive or executive officers, perform duties in which they had a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.²⁵⁹

Chief Justice Marshall, by defining an area of legal questions to be political and nonjusticiable, enunciated the parameters of a legal doctrine into which future cases would wander with uncertainty of result.²⁶⁰

The concept of a constitutionally mandated political question was used by the Supreme Court in resolving cases concerning the sovereignty of disputed islands²⁶¹ including *Jones v. United States*.²⁶² In *Jones*, the Court held that the determination of an island's sovereign was an executive function,²⁶³ and a political question was found. In these cases the Court stayed within the parameters of Chief Justice Marshall's declaration that a political question is one which deals with an executive function delimited by the Constitution.²⁶⁴

The concept of a political question was expanded by Justice Jackson in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*²⁶⁵ wherein the certification of foreign air routes was held to be a political question.²⁶⁶ The Court paid homage to constitutional considerations while broadening the criteria for deciding whether an issue was a political question with statements about delicate, complex problems.²⁶⁷

But even if the courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to

259. *Id.* at 170.

260. *See infra* text accompanying notes 282-92.

261. *See, e.g., Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). "And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department?" *Id.*

262. 137 U.S. 202 (1890).

263. The Court stated, "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by legislative and executive departments of any government conclusively binds the judges . . ." *Id.* at 212.

264. The recognition of a foreign sovereign is an executive function enumerated in the Constitution, the President "shall receive Ambassadors." U.S. CONST. art. II, § 3.

265. *Chicago & S. Air Lines*, 333 U.S. at 111.

266. *Id.* at 114.

267. *Id.* at 111.

the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.²⁶⁸

This opinion departs from the implied criteria of Chief Justice Marshall by suggesting that complexity, information availability and elective position should be criteria for judicial abstention. By incorporating these new elements, which in part reflect the "embarrassment"²⁶⁹ arguments from sovereign immunity, the Court was failing to evaluate the totality of demands and expectations which were within the judicial process. Among the ignored demands was the common expectation that the courts will adjudicate claims which come before them on the merits.²⁷⁰

The modern exposition of the doctrine of political question was made in *Baker v. Carr*.²⁷¹ The Court, in deciding the justiciability of a legislative apportionment case, formulated a number of situations in which a political question could arise. The first criteria was Chief Justice Marshall's constitutional commitment.²⁷² Justice Brennan then stated other categories:²⁷³

It is apparent that several formulations which vary slightly according to the settings in which the questions rise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable

268. *Id.*

269. *See supra* note 127 and accompanying text.

270. *See supra* note 258; HOUSE REPORT, *supra* note 25, at 6607.

271. 369 U.S. 186 (1962).

272. *See supra* text accompanying note 259.

273. 369 U.S. at 217.

and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁷⁴

Later in the opinion, while specifically discussing foreign affairs, Justice Brennan recognized that a number of factors could influence the determination of a political question:

There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.²⁷⁵

Although this decision has been criticized as failing to distinguish various types of political questions,²⁷⁶ it stands as the latest and fullest

274. *Id.*

275. *Id.* at 211-12 (footnotes omitted).

276. *See, e.g.,* L. HENKIN, *supra* note 37, at 212.

But the Court's selection and summary of the precedents did not reduce the confusion which they had engendered, for it failed to recognize that 'political questions' had been used in different cases in different senses to describe different kinds of questions as to which the functions of the courts were different.

definition of the political question doctrine.

The Court has not, in *Baker v. Carr*, adopted a narrow definition of political question focusing only on Chief Justice Marshall's constitutional commitment.²⁷⁷ Rather, it has expanded the doctrine to include Justice Jackson's suggestion of complexity as a basis for a political question²⁷⁸ and other elements which in part reflect the "embarrassment" arguments from sovereign immunity.²⁷⁹ It is interesting to note that the concept of political question deference has not been limited during recent decades by judicial and legislative actions as have the act of state,²⁸⁰ and sovereign immunity²⁸¹ doctrines. The political question doctrine is, in theory, at its broadest level, with a potential for abuse as an exception to the rule of law.

Recent years have seen the courts apply, or attempt to apply, the concept of political question in a variety of circumstances.²⁸² Justice Brennan found the concept of political question dispositive in *First National City Bank v. Banco Nacional de Cuba*²⁸³ where he dissented from the majority finding that the counterclaim was outside the restrictions of act of state.²⁸⁴ "[T]he sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed all point toward the existence of a 'political question.'"²⁸⁵ Justice Brennan is, as his

Id. at 212-213. Henkin described his concept of a political question in Henkin, *supra* note 250, at 622.

I see its proper content as consisting of the following propositions: 1) The courts are bound to accept decisions by the political branches within their constitutional authority. 2) The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any. 3) Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties. 4) The courts may refuse some (or all) remedies for want of equity. 5) In principle, finally, there might be constitutional provisions which can properly be interpreted as wholly or in part "self-monitoring" and not the subject of judicial review.

Id.

277. See *supra* text accompanying note 259.

278. See *supra* text accompanying note 267.

279. See *supra* text accompanying note 127.

280. See *supra* note 196 and accompanying text.

281. See *supra* text accompanying notes 147-51.

282. See *infra* text accompanying notes 283 & 288 for illustrations of judicial interpretations of the political question doctrine.

283. 406 U.S. 759 (1972).

284. *Id.* at 788.

285. *Id.*

footnotes and other language suggest, articulating the *Sabbatino* act of state/political question position.²⁸⁶

The shadow of executive suggestion appears in *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo*.²⁸⁷ There the court of appeals found the adjudication of an international boundary dispute to be a political question.²⁸⁸ The question regarding this case comes not from the end result, which seems reasonable given the lack of judicial standards,²⁸⁹ but rather from the court's reliance on executive suggestion²⁹⁰ found in a State Department letter.²⁹¹ The court said:

Just as the judiciary will follow an executive determination as to which nation has sovereignty over a disputed area . . . so must the judiciary refuse to decide the dispute in the absence of executive action because of the absence of that direction. Additionally, we are persuaded that a judicial determination would reflect a lack of respect for the executive branch, particularly the State Department.²⁹²

The movement in recent years has been away from executive suggestion²⁹³ as it has been criticized as a response to political pressures, not an attempt to further the rule of law.²⁹⁴ Thus, an acceptance of a suggestion of political question as seen in *Umm al Qaywayn*²⁹⁵ may lay the foundation for the deprivation of remedy for a claimant on a broad and possibly unjustified basis. There are three reasons why the practice of accepting suggestions is particularly fraught with danger in the area of political question. First, the tradition in the Judiciary has been to

286. *Id.* at 787-88. See also *supra* text accompanying note 191 regarding the evolution of the political question within act of state.

287. 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979).

288. *Id.* at 1201.

289. In a parallel case the House of Lords found the question to be nonjusticiable relying in part on the rationale of *Umm al Qaywayn* in finding a lack of judicial standards. See *Hammer*, slip op. at 16.

290. 577 F.2d at 1204.

291. Letter from Herbert J. Hansell, Legal Advisor, to James W. Moormen, Assistant Attorney General, reprinted in 1978 DIG. U.S. PRAC. INT'L L. 926. "It is the position of the United States that the determination of boundary disputes between foreign nations frequently raises a nonjusticiable political question and that, in any event, the determination of the boundary dispute in this case raises such a question." *Id.*

292. 577 F.2d at 1203-04.

293. See *supra* notes 147-51 & 206-11 and accompanying text.

294. See Leigh & Atkeson, pt. 2, *supra* note 57, at 19; HOUSE REPORT, *supra* note 25, at 6606.

295. See *supra* text accompanying notes 287-92.

defer to executive suggestions when they are made.²⁹⁶ Second, the criteria for deference given in *Baker v. Carr*²⁹⁷ are broad, providing for potential determination on constitutional,²⁹⁸ lack of judicial standard²⁹⁹ and prudential³⁰⁰ bases. Third, there have been no congressional attempts to limit the use of judicial application of political question as there have been in the act of state³⁰¹ and sovereign immunity areas.³⁰²

If "political question" becomes the catch all description for the discarded bogeymen of doctrines past, such as embarrassment of the Executive in sovereign immunity³⁰³ and respect for foreign sovereignty in the *Underhill* days of act of state,³⁰⁴ and if there are numerous suggestions from the Executive on a broad base of criteria, then the dilemma might become not which cases are nonjusticiable political questions, but which cases are not.

As a partial solution, the courts in considering political question cases might borrow the balancing test of the kindred act of state doctrine.³⁰⁵ The extensive and intensive analyses of the demands of the various actors as suggested by this test would help to ensure that those cases which are truly nonjusticiable political questions will be left adjudicated, while those which can be fully evaluated, and which are not constitutionally committed to another branch, are decided according to the rule of law.

d. *The Settlement of Claims by Presidential Action*

The settlement of the claims of nationals against a foreign state by agreement between states has been cited as established international practice.³⁰⁶ This practice, where a nation such as the United States espouses the claim of its injured national to the foreign state,

296. See *Dunhill*, 425 U.S. 682 (1976); *First Nat'l City Bank*, 406 U.S. 759 (1972); pre-F.S.I.A. sovereign immunity cases: *Mexico*, 324 U.S. 30 (1945), *Peru*, 318 U.S. 578 (1943); *Umm at Qaywayn*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979).

297. 369 U.S. 186 (1962).

298. *Id.* at 210.

299. *Id.*

300. *Id.*

301. See *supra* note 196 and accompanying text.

302. See *supra* notes 147-51 and accompanying text.

303. See *supra* note 127 and accompanying text.

304. See *supra* text accompanying note 163.

305. For a discussion of Justice White's balancing test, set out in *Dunhill*, 425 U.S. at 705 n.18, see *supra* notes 219-20 and accompanying text.

306. L. HENKIN, *supra* note 37, at 262. "International agreements settling claims by nationals of one state against the government or nationals of another are established international practice reflecting traditional international theory." *Id.*

has been a traditional method of remedy when the individual has been powerless to protect his own interests.³⁰⁷ In the United States this practice has been formalized in the Foreign Claims Settlement Commission.³⁰⁸ We recently witnessed an almost bizarre twist to this practice when the President vacated a valid judgment against a foreign state, removed an attachment of property and transferred the claim from the American courts to a settlement tribunal.³⁰⁹ This action by the Executive is the opposite of a judicial settlement. The question discussed in this section is when, if ever, does this practice of claim settlement intrude upon the authority of the Judiciary? When, if ever, does a practice, which developed originally to further the rule of law by providing a remedy for an injured party, actually disrupt the rule of law by imposing a political settlement?

The ability of a President to transfer claims and judgments which are validly within the American judicial process to a settlement tribunal is a recent phenomenon.³¹⁰ Prior to this time, cases concerning claims against foreign states focused on the relationship between the government and the individual. When the individual had no remedy in United States courts, the individual invoked the protection of the government and its espousal of his claim.³¹¹ Upon full examination, however, it can be seen that the right and demand of an individual to an adjudication of a claim on the merits, and the fulfillment of a judgment, if any, presupposes the existence of an authoritative forum where adjudication can take place.³¹² The process of claim settlement and transfer involves the invocation of many demands and expectations. Two such demands are the demand of an individual to a hearing on the merits³¹³ and the common demand that the courts of the United

307. *Id.*

For while a private claimant may be able to recover under the laws of his own country or that of the debtor (or even of some third country), in international law the individual and his debt have no independent existence: his claim is only a right of his government against that of the debtor.

Id.

308. 22 U.S.C. §§ 1621-1645 (1976 & Supp. 1980).

309. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

310. As discussed in text accompanying *infra* note 311, the Executive had previously engaged in claim settlement on behalf of individual claimants. *Dames & Moore* is the first case where the Executive sought to transfer a claimant's judgment to a settlement tribunal over the protests of the claimant.

311. See, e.g., *Gray v. United States*, 21 Ct. Cl. 340 (1886).

312. *Id.* at 393. "A right often exists where there is no remedy, and a most frequent illustration of this is found in the relation of the subject to his sovereign, the citizen to his Government." *Id.*

313. See *Marbury*, 5 U.S. (1 Cranch) at 163, where the Court stated that: "The

States be allowed to fulfill their constitutional function.³¹⁴

Traditionally in international law, a claimant, often because of his inability to secure jurisdiction over the foreign state, has been forced to rely on the government to secure a settlement of his claim.³¹⁵ After settlement, payments to the claimants have been described as "payments as of grace and not right."³¹⁶ Yet there have been a number of cases which concerned the question of whether the settlement of a claim constituted a taking of property requiring compensation under the fifth amendment.³¹⁷

In a famous advisory opinion the Court of Claims reported to Congress on the liability of the United States to individual claimants against France, whose claims had been an element of treaty negotiation. The Court of Claims discussed this concept:

It seems to us that this "bargain" . . . by which the present peace and quiet of the United States, as well as their future prosperity and greatness were largely secured, and which was brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation.³¹⁸

The Supreme Court examined the "taking" question in two cases³¹⁹ arising out of the Litvinov Assignment.³²⁰ In these cases the United States was seeking to enforce claims against the holders of property seized by the Soviet government, claims which had been transferred to the United States as part of the settlement. The Court

very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*

314. This demand was most strongly articulated by the Hon. Herbert J. Stern who posed and answered his own question, "When should the courts defer to the foreign policy needs of the United States? Never!" Address by Hon. Herbert J. Stern (U.S. Dist. Ct. Judge, N.J.), International Law Association, Annual International Law Weekend (Nov. 13, 1981).

315. L. HENKIN, *supra* note 37, at 262.

316. *Blagge v. Balch*, 162 U.S. 439, 457 (1896).

317. See *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). See also *United States v. Caltex (Phil.) Inc.*, 344 U.S. 149 (1952); *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955).

318. *Gray*, 21 Ct. Cl., at 393.

319. *Pink*, 315 U.S. 203 (1942); *Belmont*, 301 U.S. 324 (1937).

320. Litvinov Assignment, Nov. 16, 1933, *United States-U.S.S.R.*, reprinted in 11 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1248 (C.I. Bevans ed. 1974).

found that the claims had been properly assigned by the Soviet Union to the United States.³²¹ The Court also found that there was no fifth amendment question and emphasized the fact that the United States Constitution did not protect aliens abroad from the practices of their own country. In *Belmont* the Court stated:

[T]he answer is that our Constitution, law and policies have no extraterritorial operation, unless in respect of our own citizens. . . . The substantive right to the moneys, as now disclosed, became vested in the Soviet Government as the successor to the corporation; and this right that government has passed to the United States. It does not appear that respondents have any interest in the matter beyond that of a custodian. Thus far no question under the Fifth Amendment is involved.³²²

In *Pink*, also, the Court found that there was no taking:

By the same token, the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors.³²³

Through this interpretation of the Constitution, and by relying on executive powers exercised in the recognition of a foreign state, the Court ratified the ability of the United States to settle the claims of aliens against a foreign state without subjecting the United States to liability under the takings clause³²⁴ of the Constitution.

A citizen claimant has, however, been able to successfully bring a claim for a taking of property, independent of a claim settlement. In *Seery v. United States*³²⁵ a naturalized citizen brought a claim for an alleged taking of her foreign property by United States troops. The court, implicitly distinguished the constitutional protection of a citizen vis-a-vis the noncitizens in the Litvinov cases, and found that an agreement regarding claim settlement could not nullify the plaintiff's constitutional rights.³²⁶

321. *Pink*, 315 U.S. at 229-30; *Belmont*, 301 U.S. at 330.

322. *Belmont*, 301 U.S. at 332.

323. *Pink*, 315 U.S. at 228.

324. U.S. CONST. amend. V states "nor shall private property be taken for public use without just compensation." *Id.*

325. 127 F. Supp. 601 (Ct. Cl. 1955).

326. *Id.* at 608.

Whatever may be the true doctrine as to formally ratified treaties which conflict with the Constitution, we think that there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair Constitutional rights.³²⁷

In the already controversial³²⁸ *Dames & Moore v. Regan*,³²⁹ the Supreme Court found that the President had the power to nullify attachments, to transfer assets and to transfer claims to an arbitral panel as per the Iranian Agreements.³³⁰ The Court relied on the traditional notions of executive power in foreign affairs, statutory authorization and congressional approval through acquiescence in reaching its conclusion.³³¹

The Court analyzed the case in two parts. It first addressed the nullification of attachments and the transfer of assets³³² and then the transfer of claims from the courts of the United States to a Claims Settlement Tribunal.³³³

In regard to the first question, the Court applied the tripartite test from *Youngstown Sheet & Tube Co. v. Sawyer*³³⁴ finding that the President's actions had been authorized by statute,³³⁵ and that the use of the assets as a "bargaining chip"³³⁶ was not constitutionally impermissible.³³⁷

The Court found no such statutory authorization for the suspen-

327. *Id.* at 606. See also *Reid v. Covert*, 354 U.S. 1 (1957).

328. See *McDougal & Jasper*, *supra* note 37, at 73 n.112.

329. 453 U.S. 654 (1981).

330. See *Agreements*, *supra* note 40.

331. 453 U.S. at 688.

332. *Id.* at 669-74.

333. *Id.* at 675-88.

334. 343 U.S. 579 (1952). See *supra* text accompanying notes 86-89.

335. 453 U.S. at 662. The President had acted under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 (1976 & Supp. IV 1980).

336. 453 U.S. at 673.

337. *Id.* at 674.

Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon anyone who might attack it." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

Id. Justice Powell, dissenting, stated that "[t]he decision [regarding the attachments] may well be erroneous, and it is certainly premature. . . ." *Id.* at 690 (footnote omitted).

sion of claims.³³⁸ The Court relied, however, on congressional acquiescence to the power of the President to settle claims³³⁹ and the nature of the case³⁴⁰ to find this action constitutional.³⁴¹ The Court also found that the President did not divest the courts of authority. In an attempt to address the demand of the courts for respect and the common demand for authoritative decisions, the Court stated:

In the first place, we do not believe that the President has attempted to divest the federal courts of jurisdiction. Executive Order No. 12294 purports only to "suspend" the claims, not divest the federal courts of "jurisdiction." As we read the Executive Order, those claims not within the jurisdiction of the claims tribunal will "revive". . . .³⁴²

The Court went on to state that although a fifth amendment question arising from the suspension of claims was not ripe, it nonetheless would be within the jurisdiction of the Court of Claims.³⁴³

338. *Id.* at 675.

339. *Id.* at 682.

340. *Id.* at 688.

341. *Id.*

But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

Id.

342. *Id.* at 684. This language seems inadequate on its face. It would seem that when a claim is transferred, it is gone, not "suspended," regardless of any future potential for resurrection. The President has removed the claims from the United States courts, threatening petitioner's judgment and damaging the rule of law. The flow of decisions, and the F.S.I.A., have tended to expand the ability of the courts to adjudicate claims on the merits free from political influence, no matter how well intentioned. This case, unfortunately, has held contrary to this trend based on a seemingly semantic distinction.

343. *Id.* at 688-90. *But see* the dissent of Justice Powell where he stated:

The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts (footnote omitted). The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.

Id. at 691.

It remains to be seen whether *Dames & Moore* becomes a leading case justifying Presidential intervention in the judicial process, or if it is just a minor fibrillation in response to the stress of a crisis situation. It also remains to be seen whether the majority reasoning in regard to a fifth amendment taking question prevails or whether proper consideration is given to the rule of law as advanced by the dissent.³⁴⁴

CONCLUSION

Through the course of this note there has been an examination of the courts' acceptance of executive suggestions based on quasi-constitutional principles,³⁴⁵ traditional legal theories,³⁴⁶ and various attempts at statutory solutions.³⁴⁷ The result has been that claimants have, for one reason or another, been denied adjudication on the merits of their claims. It might be productive for the courts to adopt an analysis of each case which would recognize the necessary role of the Executive, the expectation of the claimant that his case will be adjudicated on the merits, and the function of the courts under the Constitution. This analysis might include:

1. A presumption that it is the constitutional role of the courts, and the expectation of the people, the President, the Congress, and the litigants that the courts will decide those cases which come before them on the merits unless there is a clear, significant and convincing reason for deferring or refusing an adjudication.
2. A reduction in the emphasis given to the traditional theories called act of state and sovereign immunity based on the modern day realization that the massive and voluntary injections of nation states

344. *Id.* Mr. Justice Powell has recognized the trend in decisions which protect the rights of a defendant to have just compensation when the government takes his property. This case may be distinguished from *Pink*, 315 U.S. 203 (1942), and *Belmont*, 301 U.S. 324 (1937), in that the claimant is an American national and the taking occurred in the United States.

In addition the F.S.I.A. has provided the mechanism for claims against foreign states, which has greatly increased the possibility of recovery by a claimant against a foreign state, without reliance on governmental claim negotiations. Indeed in the present case the petitioner had secured a judgment. There would seem to be convincing support for Justice Powell's contention that the "taking" claims should have been left "open for resolution on a case-by-case basis in actions before the Court of Claims." 453 U.S. at 690.

Interestingly, the government did not raise the defense that the taking was for the public good in an emergency and, therefore, did not require compensation. *See, e.g., Caltex*, 344 U.S. 149 (1952).

345. *See, e.g., Umm al Qaywayn*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979) (relying on the political question doctrine).

346. *See, e.g., Underhill*, 168 U.S. 250 (1897).

347. *See, e.g., F.S.I.A., supra note 23.*

into the stream of world commerce has lessened the applicability of these doctrines. It can no longer be validly and steadfastly asserted, as it was over ninety years ago, that the courts will not judge the acts of a foreign state undertaken within their own boundaries.³⁴⁸ The obvious modern day rejoinder is "why not?" Although the traditional answers of deference to sovereignty, comity between nations and possible embarrassment to the Executive, might be offered, they are, in the latter part of the twentieth century, less than persuasive. It seems evident that, in the face of rapidly changing demands and expectations, any doctrinaire application of static rules, whether they are labeled act of state, sovereign immunity, or are given another name, will not consistently advance the rule of law, but rather will result in a lack of just and authoritative decisions.

3. Any deviation from an adjudication on the merits should be permitted only after an extensive analysis utilizing the balancing test that was employed by Justice White in *Dunhill*.³⁴⁹

Any executive suggestion, whether direct or indirect, made through letter, amicus brief or taken by judicial notice, should be examined for its sufficiency in both authority and competence. Authority means the source of presidential power, derived from the Constitution, statutes, or case precedent, to suggest deference in any given situation. Competence means the appropriateness of the suggestion in the specific situation. In order to be sufficient in authority, the President must be operating on the basis of his constitutional authority or in conjunction with the authority of Congress. An appropriate analysis would employ the spectrum of authority test that Justice Rehnquist utilized in *Dames & Moore*: Is the President acting within his own constitutional authority, with congressional consent, against congressional intent, or with congressional silence?³⁵⁰ After determining the adequacy of the President's ability to act, the court must review his competence to inject himself into the judicial process and circumvent the rule of law. An appropriate question might be whether the presidential act is *jure imperii*. Does it embody the sovereignty of the nation, and is it done for reasons of national imperative? Or is it a political reaction to foreign stimuli?

The result of this analysis will be that any presidential action will be within one of four grades of sufficiency:³⁵¹

348. See *Underhill*, 168 U.S. 250 (1897).

349. See *supra* notes 219-20 and accompanying text.

350. 453 U.S. at 668-69.

351. If the individual steps are analyzed in more detail, such as in Justice Jackson's three part test for authority used in *Youngstown Sheet*, see *supra* text accompanying notes 86-89, the number of grades will increase.

(a) High Authority/High Competence—An example of this highest grade of sufficiency can be seen in a hypothetical case with facts similar to the *Buttes Gas & Oil* case where the boundary of a foreign state was at issue.³⁵² The President would operate with the highest authority, under his constitutional power to receive ambassadors,³⁵³ and with the highest competence, as the recognition of sovereignty is an act which is of great national importance,³⁵⁴ if he suggested the sovereignty of the disputed territory or suggested that the court forego adjudication.

(b) High Authority/Low Competence—A hypothetical case demonstrating this possibility can be seen in a situation where the President, relying on the statutory authorization of the Sabbatino Amendment,³⁵⁵ suggests to the court that act of state be applied, yet the decision is highly political in nature involving little of national interest.

(c) Low Authority/High Competence—The suspension of the claim in *Dames & Moore*³⁵⁶ illustrates this category. There the President, operating with high competence, was effecting national policy of the greatest magnitude. The Supreme Court, however, was hard pressed to find a base of authority for this action.

(d) Low Authority/Low Competence—The controversial *Rich v. Naviera Vacuba, S.A.* case,³⁵⁷ a decision criticized as highly political,³⁵⁸ and resting on the now rejected practice of suggestion in sovereign immunity cases,³⁵⁹ stands as an example of this grade.

Based on this comprehensive two-step analysis the court can establish whether the Executive has met the requirements of authority and competence that are needed to overcome the presumption in favor of adjudication on the merits.

4. In the case of the settlement or transfer of claims, the courts should apply the two-part test outlined above. The court should decide whether the forced settlement or forced transfer constituted a taking of property under the fifth amendment. This act can be examined, in the last part of this suggested test, as to whether the taking was for the "public good"³⁶⁰ when compensation would be unnecessary.

352. See discussion of *Buttes Gas & Oil*, *supra* text accompanying notes 232-36.

353. See U.S. CONST. art. II, §§ 1-3.

354. See *Pink*, 315 U.S. at 230.

355. See Sabbatino Amendment, *supra* note 196.

356. See *supra* text accompanying notes 330-31.

357. See *supra* text accompanying notes 140-42.

358. See *Leigh & Atkeson*, pt. 2, *supra* note 57, at 19.

359. See *supra* text accompanying note 146.

360. See, e.g., *Caltex*, 344 U.S. 149 (1952) (where the Court refused to find a taking when property was destroyed through war).

The analysis outlined above will tend to systematize the process of adjudicating a claim against a foreign state with the result that a claimant will have a greater certainty of an adjudication on the merits, or, in the alternative, the claimant will find some solace in the knowledge that adjudication was deferred after an in-depth review of twentieth century concerns and progressive constitutional and statutory interpretation.

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