The Conundrum of Comity: How the Continued Application of the Act of State Doctrine Creates Tension on Government-Taken Art

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I. INTRODUCTION

At the turn of the 20th century, Ivan Morozov’s government decided to turn his house into a museum against his will. In 1917, the Bolshevik revolutionaries seized power in Moscow, a move that would lead to the foundation of the Soviet Union ("U.S.S.R."). The Bolsheviks forced Morozov to relinquish his house and the majority of his property to the government as part of their consolidation of ownership of property in the government. The Politburo, the governing body of the U.S.S.R., turned Morozov’s house into the “Second Museum of Western Art.” Several of the works of art in this museum eventually found their way into the collection of a wealthy New Yorker, and through him, several prominent museums located in the United States.

In Konowaloff v. Metropolitan Museum of Art, the court of the United States District Court for the Southern District of New York refused to allow Pierre Konowaloff, Ivan Morozov’s great-grandson, to reclaim one of Morozov’s paintings from the Metropolitan Museum of Art. The court barred his claim based on the act of state doctrine. The act of state doctrine is a doctrine of judicial deference with a long history in the United States. Its purpose is to prevent courts from interfering with the powers of the

2. Id.
3. Id.
4. Id.
5. Id. at *2-3.
6. Id. at *12
Executive Branch to conduct foreign affairs. In practice, application of the doctrine means that a court in the United States will not examine the legality of the actions of a foreign sovereign taken in its own territory. In effect, it provides a defense against claims of the descendants of refugees for property that eventually turned up in the hands of a party in the United States.

In Part II, this Note will look at the history of the act of state doctrine, its typical application, and the exceptions that may occur in certain circumstances. Part III will summarize the Konowaloff decision, highlighting the court’s reasoning for the application of the doctrine in this case. Part IV will explain how this decision is supported by the history of the doctrine. Part V examines the reasoning for continuing to apply the doctrine in similar circumstances. Part VI considers the impact of Konowaloff on descendants of Russian immigrants as well as others, and the some of the implications of setting aside the doctrine.

II. BACKGROUND

A. The Act of State Doctrine

The act of state doctrine is a judicially created principle of abstention: it requires courts to decline to hear cases on the legality of a foreign state’s action on its own soil or territorial holding. The origin of this doctrine stretches as far back as the 17th century, and has roots in English common law. One of the best-known early applications of the doctrine comes from a 19th

11. Sabbatino, 376 U.S. at 416. The Court in this case recognized that the origins of this doctrine stretch far back into the origins of common law as early as 1674. Id.
century case involving the detention of a United States citizen by a Venezuelan general. In Underhill v. Hernandez, Underhill brought suit in the United States against a general of the Venezuelan military for damages suffered as the result of his detention in Venezuela. His suit was denied by the United States Court of Appeals for the Second Circuit. The Supreme Court granted certiorari, ultimately affirming the court of appeals. In finding for the General, the Court decreed that:

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

The doctrine represents judicial recognition of the fact that U.S. courts lack authority to rule on the legality of takings by foreign sovereigns from its own citizens. It also represents a principle of comity, between the United States and foreign nations, which courts have defined as “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”

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13. Underhill v. Hernandez, 168 U.S. 250, 251-52 (1897). Underhill, a US machinery expert, applied for a passport in Venezuela so that he might be able to leave the country. Id. at 251. Hernandez denied the application, effectively trapping Underhill in the country for a period of time, until he was able to successfully gain a passport. Id. Courts prior to Underhill had applied the doctrine, such as Rose v. Himely, 8 U.S. 241 (1808) but this case involves the best, most clearly stated early version of the doctrine.

14. Id. at 251-252.

15. Id. at 252.

16. Id.

17. Sabbatino, 376 U.S. at 409 (citing Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (which defined international comity as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation”).

Published by Via Sapientiae, 2016
The Underhill ruling and its successors have been the source of a large amount of tension between the Judicial Branch and Executive. Applications of immunity typically fall to the State Department, and by refusing to hear a case in which one party is a foreign nation, a court, in a way, is providing immunity from prosecution. A provision of greater or lesser immunity than requested by the Executive Branch would be problematic. More specifically, if courts were able to sanction sovereign foreign states, it would undermine the authority of the State Department, in clear violation of the separation of powers. As a result, courts typically show a strong preference for leaving determination of the propriety of the acts of a foreign nation the responsibility of its own courts.

B. Application of the Act of State Doctrine and Sabbatino

Early interpretations of the act of state doctrine required only two factors to be considered: (1) the challenged action had to be taken by a foreign government, (2) on the nation’s own soil. These requirements persist, but additional factors are now

18. Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945). Justice Stone, writing for the majority, wrote: “recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our international interests and for recognition by other nations.” Id. at 36. Additionally, in Sabbatino, the court found that 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.” Sabbatino, 376 U.S. at 427-28.

19. Id.


21. The Supreme Court has recognized that an official’s acts can be considered the acts of the foreign state. See Samantar v. Yousuf, 130 S. Ct. 2278, 2290 (2010).

considered. 23 Over the years, the courts, particularly those in the Second Circuit, 24 have expanded the two factor analysis employed in *Underhill v. Hernandez* into a four factor analysis.

The four-factor test was first established in *Banco Nacional de Cuba v. Sabbatino*. 25 The *Sabbatino* case arose as the result of a Cuban law which gave the Cuban government the ability to nationalize the property of American-owned enterprises and companies. 26 The plaintiff company then brought charges for conversion in the Second Circuit. 27 Although the court found that the taking by the new Cuban government may be in violation of international law, it chose to apply the act of state doctrine, acknowledging the Cuban government’s right to take possession of any property on its own soil. 28 In reaching its decision, the *Sabbatino* court articulated the act of state doctrine requires that:

(1) the taking must be by a foreign sovereign government;

(2) the taking must be within the territorial limitations of that government;

(3) the foreign government must be extant and recognized by this country at the time of suit;

(4) the taking must not be violative of a treaty obligation. 29

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23. *Seeinfra* note 29 and accompanying text.
24. The majority of the cases referenced in this article were originally brought in the Second Circuit, typically because the plaintiffs alleged *in rem* jurisdiction, as in United States *v. Belmont*, 301 U.S. 324 (1936), or *Daventree Ltd. v. Republic of Azerbaiijian*, 349 F. Supp. 2d 736 (S.D.N.Y. 2004).
26. *Id.* at 403.
27. *Id.* at 406.
28. *Id.*
Each of these criteria is required and dispositive.  The court in *Sabbatino*, in considering the treaty issue, noted that in the absence of an “unambiguous” treaty or agreement it had no authority to judge the Cuban government’s actions on its own soil.  It therefore declined to make any distinction between expropriation by the foreign sovereign of the property of its own citizens and those of alien nationals when the property in question was within the foreign government’s territory.  The consternation this decision caused in Congress eventually led it to enact the Foreign Sovereign Immunities Act, which clarified certain issues regarding takings by countries from U.S. citizens versus its own.  Refinement of the criteria to be used in applying the doctrine does not directly address the question of when the invocation of the doctrine is justified. Courts tend to take a subjective, “common sense” approach that is sensitive to the potential to embarrass or hinder the executive branch in the realm of foreign relations.

Refinement of the criteria to be used in applying the doctrine does not directly address the question of when the invocation of the doctrine is justified. Courts tend to take a subjective, “common sense” approach that is sensitive to the potential to embarrass or hinder the executive branch in the realm of foreign relations. Courts determine the weight of the potential effect on foreign relations on a case-by-case basis.

30. For example, if a court finds that the taking was not performed by a sovereign government, and therefore, that the “state” portion of the doctrine does not apply, it need not consider the question of territoriality. See *Menzel v. List*, 267 N.Y.S.2d 804, 815 (N.Y. Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (1967), *rev’d*, 24 N.Y.2d 91 (1969). The court in *Menzel* found that the defendant’s reliance on the act of state doctrine was misplaced, as the defendant’s predecessor in title, the Einsatzstab, was not acting as a foreign sovereign government. *Id.* However, the court still went on to consider the three other factors, assuming, *arguendo*, that they could be wrong. *Id.* at 813-17.


32. *Id.* at 429


35. *Id.*

C. The Second Hickenlooper Amendment and the International Law Question

After the decision in Sabbatino, Congress was put in a difficult position regarding immunity, as the ruling established precedent for allowing foreign states to expropriate the property of U.S. citizens.\(^{37}\) In response to a fear of greater incursion on the rights of American citizens, Congress passed the Second Hickenlooper Amendment, ("Hickenlooper Amendment") designed to prohibit federal courts from applying the act of state doctrine in cases involving takings by a sovereign state that may be "in violation of the principles of international law."\(^{38}\) The definition of a taking "in violation of international law" includes the "nationalization or expropriation of property without payment of . . . prompt adequate and effective compensation."\(^{39}\) The legislative history of the Hickenlooper Amendment shows that Congress intended it to legislatively overturn the decision in Sabbatino.\(^{40}\)

However, courts do not apply the Hickenlooper amendment broadly and its uses are not comprehensive in scope.\(^{41}\) The Amendment still does not apply to takings prior to 1959, nor to any action the President determines requires the application of the doctrine to protect foreign policy interests.\(^{42}\)

The Hickenlooper Amendment did not consider the question of whether a foreign state should enjoy judicial deference if it were to


\(^{38}\) Id. (citing 22 U.S.C. § 2370(e)(2) (2006)).


\(^{40}\) S. REP. NO. 88-1188, at 24 (1964), reprinted in 1964 U.S.C.C.A.N. 3829, 3852 ("The [Hickenlooper] amendment is intended to reverse in part the recent decision of the Supreme Court in Banco Nacional de Cuba v. Sabbatino.").

\(^{41}\) The language of the Hickenlooper Amendment is silent as to property seized by foreign governments from its own citizens that ultimately ends up in the United States. The Foreign Sovereign Immunities Act attempts to rectify some of these problems, but only by creating limited exceptions to the application of the doctrine. 28 U.S.C. §§ 1602 to 1611 (1976).

\(^{42}\) Id.
nationalize the property of its own citizens. However, subsequent treatment of the Hickenlooper Amendment would find that takings by foreign sovereigns from non-U.S. nationals would still enjoy immunity, even if the victims of the taking became U.S. nationals subsequent to the taking. Thus, courts have found that a foreign sovereign state has almost complete immunity when it institutes a taking from its own citizens, as it does not implicate international law.

One important result of the Hickenlooper Amendment was that it laid the foundations for the Foreign Sovereign Immunities Act ("FSIA"). The FSIA resulted in a grant of immunity, rather than deference, to the actions of certain foreign sovereigns. Rather than rely upon simple judicial deference based on the act of state doctrine, the FSIA, with certain exceptions, granted foreign sovereigns immunity from any judicial consideration for actions taken on their own territory. However, this has not resulted in a

43. See Hunt v. Coastal States Gas Producing Co., 570 S.W.2d 503, 508 (Tex. Civ. App. 1978) (holding that the Amendment applies only if the property in dispute comes within U.S. territorial jurisdiction, is a question of title, and the taking was in violation of international law).

44. See Rong v. Liaoning Provincial Gov’t, 362 F. Supp. 2d 83, 103 (D.D.C. 2005). In Rong, the government of the People’s Republic of China nationalized property belonging to the chairman of a Hong Kong company. Id. at 86-89. At the time, both the chairman and his wife were Chinese nationals, though the chairman’s wife did eventually naturalize as a U.S. citizen. Id. The court in Rong found that the status of the chairman and his wife as Chinese nationals at the time of the taking precluded the court from having subject matter jurisdiction over the issue, as no violation of international law occurred. Id. at 103.

45. See, e.g., M. Salimoff & Co. v. Standard Oil Co., 186 N.E. 679, 682 (N.Y. 1933) (holding that under the “the law of nations,” the Soviet Republic of Russia “did no legal wrong when it confiscated the oil of its own nationals and sold it in Russia to the defendants.”).


47. An extremely important exception is the “takings” exception, codified at §1605(a)(1)-(3), which provides that takings in violation of international law are
decreased application of the act of state doctrine, as it has still been consistently applied.

D. Menzel v. List and the Nazi Regime "Exception"

Following the decision in Sabbatino, it seemed likely that a blanket application of the act of state doctrine would always result in judicial deference to foreign, government-sanctioned takings, at least from its own citizens.48 This view was somewhat altered following the Second Circuit’s decision in the holocaust-looted art case, Menzel v. List, which created a certain definitional loophole in regards to takings by the Nazi Regime.49

The plaintiffs in Menzel were the victims of Nazi persecution in Germany during the time of the Second World War.50 While fleeing Nazi persecution, they abandoned a Chagall painting in their apartment.51 The painting was seized by the Einsatzstab des Reichsleiter Rosenberg (“Einsatzstab”), Hitler’s Center for National Socialist Ideological and Educational Research established by Adolph Hitler.52 The Einsatzstab was a special “task force” which was exempt from the German military’s stated policy against art looting.53

The court in Menzel declined to find the Einsatzstab’s taking of the painting immune from its consideration.54 The court found that

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48. See Verlinden B.V. v. Cent.Bank of Nigeria, 461 U.S. 480, 486 (1983). This is not to suggest that the act of state doctrine allows a foreign sovereign to expropriate property from the citizen of another foreign sovereign. In such a case, courts have found that they may consider the question of whether a suit may be brought against the foreign sovereign. Id. Additionally, such a taking would be precluded by the Second Hickenlooper Amendment. See supra, n. 40 and accompanying text.
50. Id. at 806.
51. Id.
52. Id.
54. Menzel, 267 N.Y.S.2d at 813.
the first prong of the act of state doctrine had not been met, because the Einsatzstab’s seizure of the painting was not the action of a sovereign state. The court reasoned, based on its research into the records of the Nuremberg Trials and other documents, that the Einsatzstab was not acting as the agent of a foreign sovereign nation. Instead, the court determined the Einsatzstab was an organ of the Nazi party, and the takings it effected were not conducted by a foreign sovereign government. This finding established that for purposes of the act of state doctrine, the Nazi takings of Jewish art were not the act of a state. This allows victims of Nazi persecution to pursue claims against the takings of their government in U.S. courts.

This exception for Nazi-looted art was cemented in the opinion of the court overseeing the appeal of the pre-Menzel case, Bernstein v. Van Heyghen Freres Societe Anonyme. In Bernstein, Judge Learned Hand, speaking for the Second Circuit, initially affirmed the dismissal of a restitution claim based on the act of state doctrine. Judge Hand condemned the “universal execration” of the Nazi state and noted that though it had perished in a ruinous total war, Germany had directly caused Bernstein’s harm by acting in its sovereign capacity through its agent, the Gestapo. The Gestapo had forced Bernstein to sign away his company to a Belgian Nazi sympathizer, and he brought claims for damages and restitution of his property after the war. On appeal, however, the Court of Appeals reversed the previous decision, after Bernstein proffered a statement from the Department of State’s Acting Legal Adviser, Jack Tate, saying:

55. Id. at 813-15.
56. Id. The court indicated that it had done independent research into the infamous Nuremberg trials, which were the trials conducted by the Allies in World War II of those members of the Nazi party they believed responsible for the atrocities committed in the Holocaust Id. at 813.
57. Id. at 815.
58. Id.
59. 163 F. 2d 246 (2d Cir. 1947).
60. Id. at 246-47.
61. Id. at 248.
62. Id. at 247.
[I]t is this government’s policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and . . . to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.\textsuperscript{63}

Jack Tate’s involvement gave rise to what is now known as “The Bernstein exception,” which allows courts to avoid application of the act of state doctrine.\textsuperscript{64} This exception is applied on a case-by-case basis, as the State Department must review the potential impact of each case on U.S. foreign relations.\textsuperscript{65} In practice, this exception allows the Executive Branch to provide letters informing courts as to whether the foreign policy of the United States requires the application of the act of state doctrine or not.\textsuperscript{66}

\textbf{E. Repudiation}

With the exception of Nazi looting by the Einsatzstab, foreign states continue to enjoy judicial deference in invoking the act of state doctrine, and takings by both the Soviet government in Russia and the Castro regime in Cuba have enjoyed full protection in the 20th century.\textsuperscript{67} Courts have typically granted deference to

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\textsuperscript{63} Bernstein \textit{v. N. V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij}, 210 F.2d 375, 376 (2d Cir. 1954).
\textsuperscript{64} Michael Thad Allen, \textit{The Limits of Lex Americana: The Holocaust Restitution Litigation As A Cul-De-Sac of International Human-Rights Law}, 17 \textit{Widener L. Rev.} 1, 15 (2011).
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\end{flushright}
these types of takings, with few exceptions. However, there is one important exception to the application of the doctrine that exists when the sovereign that performed the taking of the property has repudiated its actions. In *Bigio v. Coca-Cola Co.*, the court found that an Egyptian taking from its Jewish citizens was not protected by the act of state doctrine when the new Egyptian government effectively repudiated the act by attempting to return similar property to Jewish citizens. Generally, a court can reject the act of state doctrine on the basis of repudiation when such a rejection would not “embarrass or hinder” the Executive Branch in the realm of foreign relations. This was the legal backdrop for the consideration of *Konowaloff v. Metropolitan Museum of Art*.

III. THE DISTRICT COURT’S DECISION IN *KONOWALOFF*

A. Facts

Pierre Konowaloff (“Konowaloff”) is the great grandson of Ivan Morozov (“Morozov”), a wealthy Russian textile merchant in the beginning of the 20th Century. Over the course of many years, Morozov accumulated an extensive collection of modern art, including a painting by Paul Cézanne, *Madame Cézanne in the Conservatory*, or *Portrait of Madame Cézanne* (“The Painting”).

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69. See Agudas Chasidei Chabad v. Russian Fed’n, 466 F. Supp. 2d 6, 10-14 (D.D.C. 2006) overruled on other ground. (finding that the act of state doctrine does not apply to expropriations by the Soviet government when the taking is done outside of the nation’s borders).


71. 239 F.3d 440, 453 (2d Cir. 2000).

72. Id. (citing Allied Bank Int’l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 520 (2d Cir. 1985)).


74. Id.
In December of 1917, Vladimir Lenin and his Bolshevik army took power from the Provisional Government, and established the Russian Socialist Federated Soviet Republic ("RSFSR"). As part of their series of decrees nationalizing private property, the Bolsheviks singled out the art collections of two families, the Morozovs and Ostroukhovs, for seizure. These families were ostensibly singled out because they belonged to a religious group of schismatics from the official Orthodox church that the Bolsheviks persecuted. The collections were transferred to the ownership of the People’s Commissariat of the Enlightenment ("Narkompos"), which then seized Morozov’s home. Morozov, along with his wife and daughter, fled into exile to England and then France, where he died in 1921.

In order to raise funds for the new government, the U.S.S.R. began to gradually sell off nationalized property through covert operations. These activities came to the attention of Stephen C. Clark ("Clark"), heir to the Singer Manufacturing Company fortune, who was a "sophisticated art collector" and lifelong New York State resident. In the 1930’s, Clark, through a connection, secretly arranged for the purchase of the Painting, along with three others, for an aggregate sum of approximately $260,000. On May 1933, over the written protests of the head of several Soviet

75. Id.
76. Id.
77. Id.
78. Id.
80. Id. at *2. Leonid Krasin, a man who had previously worked with the Morozov family, became the Commissar of Foreign Trade under the Bolshevik regime. Id. This position allowed him to establish the Soviet Trade Delegation in Berlin, which was to serve as a "transit point for confiscated art being sold abroad." Id.
81. Id. Clark helped to open the Museum of Modern Art (MOMA) in 1929 and became a trustee of the Metropolitan Museum of Art in 1932. Id.
82. Id. Clark acquired numerous paintings from the New York gallery Colnaghi and Knoedler under the advisement of Alfred Barr, who became the first director of the MOMA. Id. In 1928, Barr had visited Moscow's Museum of Modern Art, which housed the Painting at the time. Id.
officials, the Politburo approved the sale of the Painting. The Cézanne painting then hung in Clark’s house until his death in 1960, when it was subsequently bequeathed to the Metropolitan Museum of Art in New York ("Museum").

After the fall of the USSR, Morozov’s heirs were able to return to Russia and piece together the history of their family’s collections. In January 2002, Konowaloff became the official heir to the Morozov collection, and began to investigate the inventory previously held by his ancestor. After being notified of the ownership history of the Painting hanging in the Museum by the heir to another collection that had been nationalized by the Bolsheviks, Konowaloff issued a demand for its return, which the Museum refused. Konowaloff then brought suit against the Museum to secure the return of the painting. The Museum counter-pled for a motion to dismiss, as it claimed the Painting came to them with good title as a result of the act of state doctrine.

83. *Id.* The Politburo was the executive arm of the Communist Party of the Soviet Union ("CPSU"). *Id.* at *3. It consisted of five members and was the ultimate decision making body of the CPSU. *Id.* Konowaloff alleged that the Politburo may have violated a 1918 Decree entitled “Concerning the Ban on the Export and Sale Abroad of Items of Particular Significance.” *Id.* This decree prohibited the export of objects of particular and historical importance without permission of Narkompos and ordered the preservation and registration of artworks and antiquities. *Id.*

84. *Id.* At the time of the bequest, the U.S. State Department had put the Museum on notice to avoid acquisition of any Nazi era looted art- The Allies had listed the Matthiesen gallery in Berlin as a chief fence for the laundering of art, because the Narkompos used it as a transit point for many works of art it had expropriated. *Id.* It is likely the Painting came to the United States through the Matthiesen. *Id.*

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
B. The District Court's Discussion of Konowaloff's Claims

1. The Bolshevik Seizure of the Painting Was a Legitimate Act of State

Applying Sabbatino, the district court found that the act of state doctrine precluded an examination of the Bolshevik taking because of its potential effect on foreign relations.\(^{90}\) The court found that there were two relevant interests to balance in deciding whether or not to invoke the act of state doctrine: (1) the degree of codification or consensus concerning a particular area of international law, and (2) the strength or weakness of the effect on our foreign relations.\(^{91}\) Additionally, the court noted that the balance could shift if the foreign government is no longer in existence.\(^{92}\)

The court granted the Museum summary judgment on its motion to dismiss, noting that it has consistently held Bolshevik/Soviet nationalization decrees to be official acts accepted as valid for the purpose of invoking the act of state doctrine.\(^{93}\) The court also emphasized that this opinion is consistent with the Supreme Court and the Second Circuit.\(^{94}\) In explaining its decision against Konowaloff, the court examined five of his claims in turn.

2. The Act of State Doctrine May Apply Even When Property is "Seized For No Legitimate Governmental Purpose or Operation"

Konowaloff alleged that the singling out of Morozov collection was highly unusual, as the traditional expropriation decrees of the

\(^{90}\) Id. at *4-8. In Bigio, the court clarified that the appropriate method of weighing the individual issues was by its effect on foreign relations: "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." Bigio, 239 F.3d at 452.

\(^{91}\) Konowaloff, 2011 WL 4430856, at *4.

\(^{92}\) Id.

\(^{93}\) Id. at *8.

\(^{94}\) Id.
Soviets were broad, sweeping nationalization decrees. Konowaloff claimed, therefore that the seizure of his family’s property was not an “official” act of the government, and the act of state doctrine should not apply. The court found this argument to be in conflict with the doctrine that American courts should not be in the business of determining the validity of the action taken by foreign sovereign States.

3. The Act of State Doctrine Applies to Non-extant Regimes

Konowaloff argued that the dissolution of the U.S.S.R. should preclude the Museum from invoking the act of state doctrine, one of the four criteria in Sabbatino test, analogizing the vast difference between the U.S.S.R. and Russian Federation to the current German government and the Nazis. The court found the comparison to the Nazi party to be inapt, instead choosing to follow the decision of Menzel, which held that the actions of the Nazi party were merely the behavior of an “organ” of the government, and not a legitimate state actor.

The court also found that, despite Konowaloff’s attempts to characterize certain actions of the current Russian Federation as repudiating the former RFSFR, no such action occurred. The court suggested that for the act of state doctrine to not apply, the Russian Federation would need to fully repudiate all actions by the

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95. Id. at *6.
96. Id.
98. Id.
100. Konowaloff, 2011 WL 4430856, at *7. Konowaloff argued that “[s]ince December 2008, a Russian Federation commission appointed by President Dmitry Medvedev has been investigating art sales abroad of 1928–33 as incompatible with prevailing Soviet law,” and “[t]he Constitution of the Russian Federation protects the right of private ownership of property and prohibits the uncompensated taking of private property.” Id.
former regime, not just potentially condemn certain actions taken by the RFSFR.\textsuperscript{101}

4. The Act of State Doctrine Does Not Require an Affirmative Statement of Interest by the State Department

Konowaloff also argued that the invocation of the act of state doctrine was incorrect because "the United States, the Russian Federation, and the Commonwealth of Independent States have not indicated any interest in these proceedings."\textsuperscript{102} The court declined to require a state party to affirmatively demonstrate an interest in a case, opting instead to apply the Museum's proposed standard: "whether any decision this Court renders could affect U.S. relations with the foreign government."\textsuperscript{103}

5. The Act of State Doctrine Applies Even if International Law Has Been Violated

Konowaloff alleged that "the taking of the Painting violated prevailing, as well as contemporary, customary, and conventional international law."\textsuperscript{104} The court found this argument lacking for two reasons: (1) the act of state doctrine applies even when international law has been violated,\textsuperscript{105} and (2) it is not contrary to international law for a sovereign to take the property of its own nationals.\textsuperscript{106} The court concluded that the act of state doctrine bars judicial review of "the validity of a taking of property within its own territory by a foreign sovereign government."\textsuperscript{107}

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\footnotesize\textsuperscript{101} Id.
\footnotescript{102} Id.
\footnotescript{103} Id.
\footnotescript{104} Id. at *8.
\footnotescript{105} Konowaloff, 2011 WL 4430856, at *8.
\footnotescript{106} Id. (citing Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) ("[G]enerally speaking, confiscation of property without just compensation does not violate the law of nations.").
\footnotescript{107} Id. (citing Braka v. Bancomer, S.N.C., 762 F.2d 222, 224 (2d Cir.1985) (quoting Sabbatino, 376 U.S. at 428)).
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6. The Act of State Doctrine is Applied Without Inquiry into Motives

Konowaloff’s final argument was that the taking of the Painting was religiously motivated, as Morozov belonged to a religion that was persecuted by the Bolsheviks. The court found this argument failed because Konowaloff had failed to allege any specificity between the 1918 nationalization decree and Morozov’s religion. The court further declined to inquire into the motive of the Bolshevik regime, as such an inquiry would require courts to begin ranking violations of international law on a spectrum, “dispensing of the act of state doctrine for the vilest.”

Accordingly, the court found that the U.S.S.R.’s expropriation of Morozov’s Painting was not subject to judicial scrutiny. As a result, Konowaloff’s claim failed, and the Museum secured its ownership interest in the work.

IV. Analysis

The district court’s decision in Konowaloff is consonant with that of Sabbatino. Additionally, the ruling has significant implications for the future of other disputes. Part A of this section will explore the district court’s deference to the Executive branch in its application of the act of state doctrine. Specifically, it will focus on the court’s application of the doctrine in light of the transfer of ownership from the Narkompos to the Museum. It will then discuss the nature the specific type of public taking the U.S.S.R. effected. Finally it will examine how this case further emphasizes tradition of courts’ deference to takings by foreign governments from their own citizens.

108. Id.
109. Id.
110. Id. (citing Chabad, 528 F.3d at 955).
In Konowaloff, the defending party was the Metropolitan Museum of Art, not a foreign sovereign. However, the Museum was able to successfully invoke the act of state doctrine in its defense, and, by doing so, successfully defended its title to the work. The U.S.S.R.’s actions allowed the Museum to invoke the act of state doctrine in defense of its ownership of the Painting. The court in Konowaloff was forced to admit, by inference, that if it decided to allow the suit to proceed against the Museum that it would be ruling on the legality of a Soviet taking almost a century prior. Despite the fact that the Soviet state is no longer extant, this was the appropriate application of the doctrine. If courts were able to strip immunity from state actors whose regimes still recognize the validity of their predecessors’ actions, then it would surely raise concerns in the State Department over its relations with that country.

The rationale for determining whether a change in government warrants immunity is that “the danger of interference with the Executive’s conduct of foreign policy is surely much less than the typical case where the act of state is that of the current foreign government.” Thus, courts must decide whether or not the character of the successor government is such that foreign policy could be implicated by ruling on the action. If the ruling would have a negative effect on foreign relations, then deference to the foreign sovereign is appropriate in the absence of intervention by the State Department. However, a country’s current regime has repudiated the actions of its predecessor, then the danger of interference with the conduct of foreign policy would surely be much less. Any finding of repudiation requires courts to determine

112. Id. at *8.
113. Bigio v. Coca-Cola Co., 239 F.3d 440, 453 (2d Cir. 2000) (citing Republic of the Phil. v. Marcos, 806 F.2d 344, 359 (2d Cir. 1986)).
114. See id. (The potential for embarrassment to a foreign sovereign is limited where the actions of the former regime have been repudiated).
115. The State Department has offered that judgments on sovereign acts taken abroad that tend to produce “unique embarrassment” for the sovereign can qualify as invoking of the act of state doctrine. See Envt’l Tectonics v. W.S. Kirkpatrick & Co., 847 F.2d 1052, 1061 (3d Cir. 1988).
if the decision could serve to embarrass the Executive office, requiring close scrutiny to the ramifications of the court’s decision.\textsuperscript{116}

In the case of \textit{Konowaloff}, it seems highly likely that such a ruling would have an effect on foreign relations, based on the recent case \textit{Agudas Chasidei Chabad v. Russian Federation}.\textsuperscript{117} In \textit{Chabad}, the trial court initially rejected a claim for the application of the doctrine in defense of two collections of Jewish manuscripts taken by Russia in the Second World War.\textsuperscript{118} The first collection, located in Moscow, was expropriated by the Russian government.\textsuperscript{119} The second collection, located in Poland, was taken during the Soviet occupation of Warsaw in the Second World War.\textsuperscript{120} The decision was ultimately reversed on appeal, in part because the court found that there were questions of whether or not the first collection, nationalized in Russia, was protected by the act of state doctrine.\textsuperscript{121} Before the case could proceed, Russia withdrew from litigation, stating: “The Russian Federation views any continued defense before this Court and, indeed, any participation in this litigation as fundamentally incompatible with its rights as a sovereign nation.”\textsuperscript{122} A second appeal on the decision prompted a ban on all Russian traveling exhibits to the United States.\textsuperscript{123} The impact of this ban raised concerns with the
Department of State, which then filed a statement of interest with the court.\textsuperscript{124}

If Konowaloff had been allowed to proceed with his suit, it seems likely that it would cause a problem similar to that which arose following Chabad. A judicial ruling that invalidates the action of a sovereign state, when that state has not repudiated the actions of its predecessor, could have incredibly negative consequences on U.S. foreign relations. Thus, it seems that without some form of Bernstein letter from the State Department allowing such a case to go forward, the court in Konowaloff properly found that a taking by the Bolshevik government must be granted immunity from judicial review in the United States.

\textit{B. National Decrees Still Constitute Public Takings}

An important distinction between cases of Soviet takings and Nazi takings is that typically, the Soviet takings occurred by public acts qualifying as acts of state, while Nazi takings did not.\textsuperscript{125} Courts have spent a significant amount of time determining what constitutes a taking by a government official that is “public” in nature versus one that is “private.”\textsuperscript{126} Typically, courts require that for the “act” portion of the act of state doctrine to apply, there must be affirmative action on behalf of the state.\textsuperscript{127} The most


\textsuperscript{125} Menzel, 267 N.Y.S.2d at 806.

\textsuperscript{126} See Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322, 338 (D.D.C. 2007) (the taking of a painting by city official did not constitute a public act necessary to invoke immunity).

\textsuperscript{127} See United States v. Portrait of Wally, No. 99 Civ. 9940(MBM), 2002 WL 553532 (S.D.N.Y. Aug. 12, 2002) (finding against an application of the act of state doctrine). In Portrait of Wally, the painting in question was accidentally shipped as part of a collection restituted to the family of Jewish victims of the Holocaust, in violation of the state of Austria’s treaty-agreement to assist in the return of such works. \textit{Id.} at *2-3. The Second Circuit found that this constituted neither an “act” by any “state” required for the application of the act of state doctrine. \textit{Id.} at *9.
famous non-public taking comes from *Menzel*, where the Einsatzstab’s actions were found to not be sufficiently public to invoke the act of state doctrine.\textsuperscript{128} What is important about this distinction is that in takings effected by public decree, courts have found that the act of state doctrine protected the action even when the legality in the United States may come into question.\textsuperscript{129} Thus, when Ivan Morozov’s paintings were nationalized by public decree,\textsuperscript{130} the public nature of the act was irrefutable, making it nearly impossible for Konowaloff to argue that a situation similar to *Menzel* existed. The only way around this obstacle would be by a Bernstein letter; the State Department would have to file a letter allowing the court to set aside the act of state doctrine.

\textbf{C. International Law Does not Protect Foreign Citizens When the Taking Occurs in the Boundaries of Their Own Country By Their Government}

The Second Hickenlooper Amendment was designed to prohibit federal courts from applying the act of state doctrine in cases involving takings by a sovereign state that may be “in violation of the principles of international law.”\textsuperscript{131} The Second Hickenlooper Amendment was intended to protect American citizens, and did not apply when a foreign government nationalized the property of its own citizens.\textsuperscript{132} As time would tell, courts would find that a foreign sovereign state has complete immunity to affect a taking from its own citizens.\textsuperscript{133} This is because when foreign nationals

\begin{itemize}
\item \textsuperscript{128} *Menzel*, 267 N.Y.S.2d at 806.
\item \textsuperscript{130} See Konowaloff, 2011 WL 4430856, at *1.
\item \textsuperscript{131} Grabarsky, supra note 40, at 247.
\item \textsuperscript{132} Id.(citing Hunt v. Coastal States Gas Prod. Co., 570 S.W.2d 503, 508 (Tex. Civ. App. 1978) (holding that the Amendment applies only if the property in dispute comes within U.S. territorial jurisdiction)).
\item \textsuperscript{133} Id. at 247-48 (citing M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 227 (1933) (holding that under the “the law of nations,” the Soviet Republic of Russia “did no legal wrong when it confiscated the oil of its own nationals and sold it in Russia to the defendants”)).
\end{itemize}
bring suit in the United States against their home country the suit
does not implicate international law, and courts are barred from
ruling on the propriety of an action taken outside of the United
States when it does not affect a U.S. citizen. Even questions of
public policy in the United States are precluded when the taking
occurs outside of the United States.

Thus, Konowaloff represents a continuation of this rationale. Morozov was a Russian citizen at the time of the expropriation of
his property by the government in Russia at the time of the
taking. The expropriation occurred as the result of a public act
by the government of Russia. Although the Bolshevik state was
no longer extant, its actions have not been repudiated by the
current Russian government. No treaties had been violated, and no
Bernstein letter was on file from the State Department. Ruling
against the Russian government would likely have foreign policy
implications.

V. IMPLICATIONS

Pierre Konowaloff has filed an appeal of the district court’s
decision. On appeal, he must demonstrate to the court’s
reasoning was in error when it applied the act of state doctrine to
the Politburo’s nationalization of the Painting. In doing so, he
might argue any one of the five arguments he originally had made
was valid, such as that the nationalization really was a violation of
international law, or that the current Russian regime has repudiated
the U.S.S.R.’s actions.

134. See Jafari, supra, note 32 at 215 (finding that immunity is acceptable for
a foreign sovereign’s actions against its own citizens, even if that action might
violate international law abroad).

135. The Restatement of Foreign Relations Law expressly states that upon
invocation, the act of state doctrine precludes courts from considering U.S.
public policy. Restatement (Third) of Foreign Relations Law of the United


137. Konowaloff v. Metropolitan Museum of Art, No.11-4338-cv (N.Y.
Dec. 9, 2011).
The first part of this section will explore four potential issues that may affect the application of the act of state doctrine to objects nationalized after the Russian Revolution. First, it will examine the possibility that the current government has repudiated or will repudiate the actions of the Bolshevik regime. Then, it will examine whether a determination of corruption might be used to overturn the act of state doctrine. Third, it will look at whether or not the changes that have occurred in the Russian government might soften the application of the act of state doctrine. Finally, it will consider whether or not foreign relations would be implicated if the court declines to apply the doctrine, as Russia no longer owns the Painting.

The second part of this section will briefly discuss the possible consequences for piercing the traditional protections sovereign states enjoy as a result of the doctrine by either judicial decree or legislative act. It will discuss how attempts to force a political solution to the problem of government takings can result in international outrage if done inexpertly. It will then focus on the two foreseeable options for future cases similar to Konowaloff and their possible consequences, based on recent court decisions.

A. Objects From the Russian Revolution Remain Within the Scope of the Doctrine

For the reasons set out below, the current Russian Federation’s continued recognition of the validity of the expropriations carried out under the Bolsheviks will most likely continue to be considered valid acts of state.

1. Repudiation and the Act of State Doctrine

As discussed above, if a government repudiates either its own actions or that of its predecessor regime, courts may decline to apply the act of state doctrine to those actions. Such repudiation

138. "[A]n act that would otherwise be immune from judicial inquiry may lose its privileged status if the government repudiates it.” Bigio v. Coca-Cola Co., 239 F.3d 440, 453 (2d Cir. 2000).
might take the form of a clear statement by a head of state or national leader in favor of the plaintiff. While it is possible that the Russian government could repudiate the Bolshevik takings, the current political climate suggests this is not likely to be the case. The Russian government’s strong reaction to the Court of Appeals’ decision in *Chabad* indicates that the Russian Federation continues to regard the Bolshevik property expropriations as legitimate acts of state.\(^{139}\)

However, details of the circumstances surrounding a government taking require extremely close scrutiny. It has already been established that courts might decide the regime was not a legitimate taking by a foreign sovereign, as in *Menzel*. In addition, acts by a government official other than the head of state may result in repudiation.

2. Government Officials

*Bigio v. Coca-Cola Co.* came about after the Egyptian government, under the direction of President Nasser, nationalized real estate and a factory belonging to the Bigio family as part of a series of actions targeting the country’s Jewish citizens in the 1960’s.\(^{140}\) Seven years after the death of President Nasser, the Egyptian Minister of Finance sent a letter to the government holding company that had taken possession of the property, directing that it be returned to the family.\(^{141}\) This did not happen. Instead, the property was sold in part to the Coca-Cola company as part of a privatization program.\(^{142}\) Members of the Bigio family living in the US brought suit.\(^{143}\) The U.S. court found that the language of the letter of the Minister of Finance was clear in its intent to repudiate the nationalization of the Bigios’ land, despite

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139. See Tillman, *supra* note 125.
140. *Bigio*, 239 F.3d at 444.
141. *Id.* at 445.
142. *Id.* The lands remained in the possession of the holding company until 1993, when the Coca Cola company came to own a majority of shares sold in the privatization of the lands and factories. *Id.*
143. *Id.* at 446.
the government's failure to return it to them.\textsuperscript{144} As a result, the court found that the act of state doctrine was not an applicable defense to the Bigio's suit.\textsuperscript{145}

Konowaloff's painting, like the factories in \textit{Bigio}, is now in the hands of a third party instead of the government responsible for its nationalization. The Painting was sold over the objections of several government officials responsible for overseeing the Morozov collection.\textsuperscript{146} These factual similarities suggest that if one of these objections was because the sale violated Morozov's rights to the work, that a court might find the act was effectively repudiated, even in the absence of a formal statement from the current Russian government. However, facts of the \textit{Chabad} case suggest that such an action would require courts to balance an application of the doctrine's potential to embarrass the current regime against its actions.\textsuperscript{147}

Courts have ruled that the act of state doctrine does not prevent a court from examining the validity of a government action if it was

\begin{flushleft}
\textsuperscript{144} Bigio v. Coca-Cola Co., 239 F.3d 440, 453 (2d Cir. 2000). The court stated:

There is little ambiguity on the face of the Ministry of Finance letter; it appears to reflect a determination that the property in question rightfully belongs to the Bigios and not [the holding company]. As pointed out in the affidavit of Ahmed G. Abou Ali, an Egyptian lawyer, which the defendants submitted to the district court, the Ministry of Finance letter states in clear terms, "Mr. Josias Raphael Nessim Bigio is the owner of the shares pertaining to the real estate properties [in Heliopolis listed below] . . . which have previously been sold to [the company]."

\textit{Id.}

\textsuperscript{145} Bigio, 239 F.3d at 453.

\textsuperscript{146} On May 19, 1933, "the Politburo secretly approved the sale [of the Painting] over the written protests of Andrei Bubnov, head of Narkompros and other Soviet museum officials, who specifically requested that the Painting not be sold." Konowaloff, 2011 WL 4430856, at *3.

\textsuperscript{147} In the \textit{Chabad} case, the appellate court noted that there had previously been several comments made in favor of the plaintiff's case by former Russian President Boris Yeltsin. \textit{Chabad}, 528 F.3d at 954. On applying the doctrine, however, it noted that the current regime's aggressive pursuit of the case suggested that a finding of repudiation of the expropriation would be inappropriate. \textit{Id.}
the taken by corrupt government officials. This rule, however, is applied with some trepidation, and usually only to help the court measure damages. Generally, the question of whether to apply the corruption exception turns on whether or not the court's decision would result in embarrassment of the foreign sovereign. However, the exception has been applied even in the face of potential embarrassment, as long as the embarrassment is limited, such as where there is no chance of extraterritorial application.

The appellate court would have to avoid considering the possibility of corruption involved in the passing of the nationalization decree for Morozov's collection or run the risk of examining the legality of the action.

148. See Dominicus Americana Bohio v. Gulf & Western Indus., 473 F. Supp. 680, 690 (S.D.N.Y. 1979). In Dominicus, the plaintiff company sued its neighboring resort for damages for engaging in anticompetitive behavior by bribing and corrupting government officials to hinder, if not destroy, its plans to develop a resort on its own beachfront property. Id. at 685. Several plans involved discussions of nationalizing the property to turn it into a public park. Id. The court held that the doctrine was not implicated even if the nationalization of the property had occurred by public act. Id. The reason it gave was that "government actions were procured by fraud and coercion thus suffice to preclude application of the act of state doctrine even to the expropriation issue at this stage of the litigation." Id. at 690.


150. Sage Int'l Ltd. v. Cadillac Gage Co., 534 F. Supp. 896, 910 (E.D. Mich. 1981). The plaintiff, a manufacturer of armored cars, alleged that the defendant conspired with domestic and foreign sales agents to exclude plaintiffs from the market. Id. at 898. The defendant had engaged in anticompetitive behavior to get illegal kickbacks. Id. Although the plaintiff did not allege a conspiracy on the part of the government itself, the sovereign's acts were implicated because government officials made all of the purchasing decisions. Id.

151. Id. at 909.

152. If it is necessary to inquire into the motivation of an act of a foreign government harmful to the plaintiff in order to establish that that decision was instigated by a private defendant, the act of state doctrine will apply. Hunt v. Mobil Oil Corp., 550 F.2d 68, 74 (2d Cir. 1977).
3. The Balance of the Prongs of the Sabbatino Test

Konowaloff argued that the act of state doctrine should not apply because the Soviet Union is “not presently an extant and recognized regime.” While the court disagreed with this interpretation, this argument, based on a strict interpretation of the Sabbatino test, has some merit. There are several cases in which courts have declined to apply the doctrine due, at least in part, to a change in regime. However, the weight most courts accord this factor in the application of the doctrine has been slight, at best.

153. “The Soviet Union collapsed in 1991 and was dissolved and replaced by 15 post-Soviet states and a Commonwealth of Independent States; and that the Russian Federation is one of these 15 post-Soviet States.” Konowaloff, 2011 WL 4430856, at *6.

154. Id. at *6-7 (citing Stroganoff;Scherbatoff v. Weldon, 420 F. Supp. 18, 22 (S.D.N.Y. 1976)). The court, citing Stroganoff, recognized that the United States government has the “present Russian Government as the de jure Government of Russia, and our Courts are bound to give effect to the laws and acts of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts.” Id.;Stroganoff, 420 F. Supp. at 22.

155. Two of these decisions involve suits by the current government of the Philippines against its former President, Ferdinand Marcos, seeking to recover property acquired by him in office. Republic of the Phil. v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988); Republic of the Phil. v. Marcos, 806 F.2d 344 (2d Cir. 1986). “No guarantee has been granted that immunity may be acquired by an ex-chief magistrate invoking the magic words ‘act of state’ to cover his or her past performance.” Marcos, 862 F.2d at 1360. A third case would be Bigio, where the court found that the current Egyptian regime’s actions in regards to its Jewish citizens had changed enough from an earlier regime to no longer warrant an application of the doctrine. See Bigio, 239 F.3d at 443-56.

156. “Our Government has recognized the present Russian Government as the de jure Government of Russia, and our Courts are bound to give effect to the laws and acts of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts.” Stroganoff, 420 F. Supp. at 22. The classification might, it may be supposed, be used to prevent judicial challenge in our courts to many deeds of a dictator in power, at least when it is apparent that sustaining such challenge would bring our country into a hostile confrontation with the dictator. Once deposed, the dictator will find it difficult to deploy the defense successfully. The “balance of considerations” is shifted. Sabbatino, 376 U.S. at 428.
Despite the standard set in *Sabbatino*, the *Sabbatino* court itself warned against a strict interpretation of its test.\(^{157}\) Instead, courts tend to apply the elements with a strict eye towards the underlying rationale of the doctrine: avoiding intruding on foreign relations powers by embarrassing a foreign sovereign. If a plaintiff is to prevail on the basis of a regime change, he must demonstrate that the change is significant enough not to implicate the foreign policy power inherent in other branches of the government.\(^{158}\) Thus, a court's strict interpretation of the third prong of the *Sabbatino* test still tends to be weighed in balance with its tendency to implicate foreign relations.

This is the most pragmatic view of the application of this part of the *Sabbatino* test.\(^{159}\) In the *Chabad* case, the district court applied the act of state doctrine to the Bolshevik taking of the library collection in its own territory, but declined to consider the prong at all for fear of implicating foreign relations issues.\(^{160}\) Thus, while courts may consider a regime change to add weight to an argument against the application of the act of state doctrine, it tends to only

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157. *Id.* ("The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the Bernstein case, for the political interest of this country may, as a result, be measurably altered.").

158. *See Marcos*, 806 F.2d at 359 ("The Marcos government is no longer in power. Thus, the danger of interference with the Executive's conduct of foreign policy is surely much less than the typical case where the act of state is that of the current foreign government.").

159. *Sabbatino*, 376 U.S. at 428 ("The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the Bernstein case, for the political interest of this country may, as a result, be measurably altered.").

160. *Chabad*, 528 F.3d at 954.

[A]pplication of *Sabbatino*'s invitation to flexibility would here embroil the court in a seemingly rather political evaluation of the character of the regime change itself-in comparison, for example, to de-Nazification and other aspects of Germany's postwar history. . . . [O]ur plunging into the process would seem likely, at least in the absence of an authoritative lead from the political branches, to entail just the implications for foreign affairs that the doctrine is designed to avert.

*Id.*
be applied in light of its potential for embarrassment of the current regime.

4. The Fact that a Third Party Now Holds the Property is no Guarantee Against the Application of the Act of State Doctrine

The underlying rationale of the act of state doctrine is the Judicial branch’s deference to the Executive and Legislative’s ability to impact foreign relations. Thus, as the time and distance between the nationalized property and its the regime responsible for taking it grows, it seems logical that the potential for embarrassment to the foreign government might diminish. There is some merit to the idea that the application of the act of state doctrine should be lessened after a certain degree of distance from a sovereign’s actions. However, the doctrine’s purpose is to avoid embarrassment to the government of the United States, not the foreign sovereign.

161. See Marcos, 862 F.2d at 1360 (citing Sabbatino, 376 U.S. at 428) (“The purpose of the [act of state doctrine] is to keep the judiciary from embroiling the courts and the country in the affairs of the foreign nation whose acts are challenged. Minimally viewed, the classification keeps a court from making pronouncements on matters over which it has no power; maximally interpreted, the classification prevents the embarrassment of a court offending a foreign government that is “extant at the time of suit.”).

162. See Braka v. Bancomer, 762 F.2d 222, 224 (2d Cir. 1985) (“the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.”). The court in The Gul Djemal v. Campbell & Stuart, Inc., found mere assertion of sovereignty by a Turkish naval officer using a government-owned vessel in the ordinary course of trade was insufficient to qualify as an act of state, without further ratification by a governmental entity. 264 U.S. 90, 95 (1924). Similarly, in one of the two Marcos cases, the court determined that private purchases by a government official are not protected acts of state. Marcos, 862 F.2d at 1370. Additionally, courts have found that official acts of government passed in Chile receive no deference in the courts when the acts cause tortious harm in the United States. De Letelier v. Republic of Chile, 488 F. Supp. 665, 674 (D.D.C. 1980).

163. W.S. Kirkpatrick & Co. v. Envt’l. Tectonics Corp., Int’l, 493 U.S. 400, 409 1990) (“The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their
When a court must examine a nearly 100-year-old taking, the potential impact seems far less than when the action is only a few years removed. However, there is no guarantee that a court’s decision to not apply the doctrine in such a case would result in minimal embarrassment to the foreign sovereign. Where, as in Konowaloff and Chabad, expropriations by a government were part of a long series of actions involving title to property, both the number of potential plaintiffs and the potential for upsetting the foreign sovereign only grows as time passes.

Between the two cases, Konowaloff more closely resembles the facts in Chabad than those in Bigio. In Chabad, the Russian government retained much of the property it had originally expropriated, whereas in Bigio, the government retained at most a minimal property interest in the bottling factory it had nationalized. The Narkompros nationalized the Painting as part of a series of acts that expropriated a large number of works of art. While the Russian government has “re-privatized” them in some cases through commercial sale, it has never effectively repudiated the original act of nationalization. As such, if Konowaloff were to succeed on appeal, it would raise questions of the validity of title to many works of art, some of which may still be in the possession of the Russian government. Thus, it is likely that if the court were to decline to apply the act of state doctrine, the Russian government’s would react in a manner similar to the court’s decision in Chabad, and there would be another ban on all Russian travelling art exhibitions.

As a result, even when the current owner of a painting is no longer the government that nationalized the piece, the implications of foreign policy issues may still be present, and strong, indicating a need for the act of state doctrine.

own jurisdictions shall be deemed valid.”). While the position taken by the Executive is a relevant factor, it is not dispositive. First Nat’l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 n.4 (1972).


B. Legislative Attempts to Pierce the Act of State Doctrine

In 1996, Senators Jesse Helms and Dan Burton co-sponsored a bill they called the Cuban Liberty and Democratic Solidarity ("LIBERTAD") Act of 1996.\textsuperscript{166} Also known as the Helms-Burton Act, this law granted any U.S. citizen with claims to Cuban nationalized property the right to sue foreign corporations and nationals using that property in U.S. courts for damages.\textsuperscript{167} The Helms-Burton Act provided U.S. citizens the right to bring their claim even if the taking occurred against a foreign national at the time, provided the amount in controversy was at least $50,000.\textsuperscript{168} The Act also attempts to skirt the problem of the applicability of the act of state doctrine by explicitly exempting courts from applying it to suits involving Cuban-expropriated property.\textsuperscript{169} While the Act provides specifically for damages, rather than replevin actions, it was a clear piercing of the protections recognized for sovereignty.

1. The Helms-Burton Act and the Consequences of Derailing the Doctrine

The act of state doctrine is an attempt by the Judicial branch to respect the powers of the Legislative and Executive Branches' to affect foreign policy.\textsuperscript{170} The Helms-Burton Act is the legislative branch's attempt to impinge on the powers of the Judicial Branch. The Executive Branch may, on a case-by-case basis, request that a court apply the act of state doctrine.\textsuperscript{171} However, even in the case of the Executive's decision, the outcome has never been explicitly

\begin{itemize}
  \item 166. 22 U.S.C. § 6082 (2012).
  \item 167. \textit{id.} § 6082(b).
  \item 168. \textit{id.}
  \item 169. \textit{id.} § (a)(6).
  \item 170. \textit{See Sabbatino}, 376 U.S. at 427–28 (stating that the “continuing vitality” of the doctrine depends on “its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.”).
  \item 171. The Bernstein Letters represent such a request. \textit{See Bernstein}, 210 F.2d at 376.
\end{itemize}
ruled to be binding. And yet, the Legislative branch has not shown similar sensitivity to the court’s application of the doctrine. This attempt to get around the application of the act of state doctrine resulted in an international uproar. The piercing of sovereignty resulted in the European Union, Mexico, and Canada passing retaliatory legislation against the Helms-Burton Act. Effectively, these laws precluded any application of the Helms-Burton Act in the borders of the three parties, either by supplying a party with the right to sue for damages for the application of the Act, or by refusing to enforce any judgments under it in their own borders. In response to these measures, every President since 1999 has waived the provision of the Helms-Burton Act that allows a party to get around the act of state doctrine.

172. The Court in Sabbatino, indicated that while it recognized the validity of the Bernstein letters, it need not consider a letter alone to be dispositive on the issue. Sabbatino, 376 U.S. at 420.

173. The European Union (EU) has found that the Helms-Burton Act is extraterritorial and, therefore, violates international law. Anthony M. Solis, The Long Arm of U.S. Law: The Helms-Burton Act, 19 LOY. L.A. INT’L & COMP. L.J. 709, 726 (1997). In October 1996, the EU approved legislation that “would allow Europeans to bring suit to recover damages assessed in U.S. courts pursuant to the Helms-Burton Act.” Id.

174. On October 23, 1996, Mexican President Ernesto Zedillo signed the Law for the Protection of Trade and Investment from Foreign Regulations Which Infringe Upon International Law. Id. at 731. “The law directs Mexican courts to refuse to recognize U.S. decisions or judgments rendered pursuant to the Helms-Burton Act and has a countersuit provision.” Id. at 732. “Violation of the Mexican law can result in fines ranging from $3,000 to $300,000.” Id.

175. “After several condemnations of U.S. policy, the Canadian government introduced legislation to amend the 1984 Foreign Extraterritorial Measures Act to include retaliatory provisions against the Helms-Burton Act § 7.” Id. at 729-30. “The law expressly indicates: “Any judgment given under the law of the United States entitled Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 shall not be recognized or enforceable in any manner in Canada.”” Id. at 30 n.124.

176. Title III of the Helms-Burton Act includes a waiver that allows the US President to suspend the extraterritoriality provision of the Act. 22 U.S.C.A. § 6085(b)(1) (2012). US Presidents have exercised this right to grant a waiver under Title III to alleviate the concerns of foreign sovereigns. See Shoshana Perl, Whither Helms-Burton? A Retrospective on the 10th Year Anniversary, 6
The international reaction to the Helms-Burton Act underscores the importance of the act of state doctrine. If one state refuses to recognize the sovereignty of another, it poses the question of whether it will refuse to recognize the sovereignty of any state. Additionally, the drafting of the legislation opened up the pool of defendants to non-Cuban parties who had purchased goods in Cuba that had previously been nationalized. As a result, the governments of those nationals were forced to take action to protect their own citizens. Thus, it is clear that not even Congress is immune from the consequences of ignoring the underlying rationale for the doctrine, further emphasizing the importance it plays in issues of international comity.

2. Going Forward

The act of state doctrine is a principle of judicial abstention that has been in existence and applied for hundreds of years. Even in the face of a potentially unfair result to the plaintiffs, courts will continue to defer to the actions of the Executive branch in matters implicating foreign relations. As a result, victims of the communist regimes of Russia must overcome an extremely


177. 22 U.S.C. §6082(a)(3)(A) provides that any person who traffics in confiscated property is liable for damages under the Helms Burton Act. The wording of this section clearly provides causes of action against foreign citizens for receiving, selling, or otherwise dealing in property that was once expropriated by a foreign sovereign, thus drastically increasing the number of potential defendants available to the injured party.

178. See supra, notes 174-176.
difficult obstacle in their pursuit of the property taken from their predecessors.

In the wake of the massive amount of property seized by the Nazis during the Second World War, a large number of plaintiffs emerged to file class action lawsuits against the multinational corporations that received property from the Nazis. Their lawsuits prompted the U.S. government, as well as Germany and Switzerland toward large settlements. This was an example of what Anne-Marie Slaughter and David Bosco have identified as "Plaintiff’s Diplomacy." Plaintiff’s Diplomacy involves a series of class action lawsuits used to directly shape the foreign affairs of states and bypass the traditional political branches. This process has been described as the effort of private litigants to take their activism in foreign policy to the courthouse, bypassing the political representatives of States. Plaintiff’s Diplomacy necessarily bypasses the comity concerns raised by the State Department in regards to the piercing of immunity for sovereigns.

If Konowaloff were able to encourage a larger number of plaintiffs to file class action lawsuits against these regimes, it is possible that the State Department might be convinced to abstain from granting immunity to these takings. This is not necessarily a hard and fast rule, as there have been several examples of similar class actions that have prompted the Executive to take action in courts in favor of a ruling against the plaintiff. Ideally, the purpose of engaging a larger class action suit would convince the Executive that a court’s decision to not apply the act of state doctrine would not carry the risk of embarrassment or an infringement of its foreign relations power.

179. See Allen, supra note 66, at 35.
180. See id. at 37.
181. Id.
182. Id.
183. In the case of In re Nazi Era Cases Against German Defendants Litigation, the Executive Branch issued an “anti-bernstein letter,” asking the court to find some legal reason to rule against the plaintiff. 129 F. Supp. 2d 370, 382 (C.D. Cal. 2001).
VI. CONCLUSION

As Konowaloff illustrates, the act of state doctrine still firmly protects Bolshevik takings of art from suits in the United States. The court correctly applied the act of state doctrine to grant the Museum’s motion to dismiss, as to do otherwise would have forced the court to impede on the Executive Branch’s powers. As disappointing as this might be for Konowaloff, it further emphasizes the tensions that will continue to occur as more documentation allowing for the specific identification of property seized by the Bolsheviks becomes available to the public. Until a sufficient number of suits begin to appear, pushing the State Department to ask courts to waive the application of the act of state doctrine, it seems unlikely that the conclusions of these suits will see a different result.

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