Tilting at Reality

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American judges, seised of a case requiring them to appraise, under international law, a foreign government’s acts, have few attractive options. If they routinely agree to decide these cases, the political costs to the Executive of conducting foreign affairs could increase, sometimes critically. If they routinely refuse these cases, plaintiffs are denied judicial protection. If they follow Executive instructions on a case-by-case basis, judicial independence suffers. It is a dilemma for courts and a continuing uncertainty for users and students of international law. Nowhere has it been more searchingly—if not successfully—explored than in Banco Nacional de Cuba v. Sabbatino.¹

From the John Marshall era on,² judges have recognized that international politics may require ducking some cases. A unanimous decision of the Court elevated this to a doctrine of “Act of State”: “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.”³ As for those who suffered those acts, discretionary Executive espousal at the diplomatic level was to substitute for a day in court.

Sabbatino explored alternative architectural solutions to the problem arising when foreign governments violate international law. Writing for a majority of eight, John Marshall Harlan effectively refashioned Act of State. International law, in his view, was indifferent with respect to the doctrine. Neither reviewing nor giving effect to a foreign government’s act would violate international law, whether or not the act itself violated international law. Nor did the Constitution require an Act of State doctrine. There were, however, constitutional considerations stemming from the separation of powers between “dissimilar institutions”⁴ with different competencies to make and implement different kinds of international decisions. Harlan detected, in prior decisions, a “strong sense of


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the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."

These not entirely compatible policy considerations led Harlan to rest the role of the Court in cases calling for review of the lawfulness of foreign governmental acts on two tests: the degree of codification or consensus of the particular international norm to be applied and the degree of triviality of the foreign policy issue involved—*de maximis non curat praetor*. Henceforth,

the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.  

In *Sabbatino* the Court found, far from consensus, a profound ideological divergence between capital-importing and exporting states regarding expropriation and compensation. Courts could not contribute much to consensus formation, for their determinations would be at best occasional. But courts could impede negotiations by the Executive on behalf of all other members of the effected class. Whatever the courts decided would be unhelpful: approving the foreign action would undercut the State Department's position; condemning it might deprive the Department of bargaining flexibility; and deficits for the American role as a world trade entrepot might ensue.

Harlan was willing to accommodate Executive representations that judgment might impede United States diplomacy. But he recoiled from requiring explicit statements: "Adverse domestic consequences might flow from an official stand which could be assuaged, if at all, only by revealing matters best kept secret." As a result, foreign acts incompatible with international law could be treated as valid and plaintiffs were referred to the Executive for diplomatic action.

Byron White's solitary dissent actually shared many of Harlan's premises and conclusions. "[C]ourts," in White's view, "have never been bound to pay unlimited deference to foreign acts of state," though
he acknowledged a continuing "attitude of caution and self-imposed restraint in dealing with the laws of a foreign nation." Harlan would not have quarreled with this nor with White's general proposition that principles of international law—a "consensus among civilized nations on the proper ordering of relations between nations and the citizens thereof"—have been applied by U.S. courts "whenever international law is controlling." Harlan simply wanted black-letter confirmation that the foreign government was part of that consensus. He assumed no current consensus on rules regarding expropriation, while White felt that question should be investigated. But factual differences aside, White agreed that in "unsettled areas of international law," "[w]here a clear violation of international law is not demonstrated, . . . principles of comity underlying the act of state doctrine warrant recognition and enforcement of the foreign act."12

White demonstrated that Harlan's bias against custom and insistence on a written agreement expressing the governing rules was inconsistent and illogical, for much of Harlan's argument incorporated custom. But White did not come to grips with Harlan's reason for insisting on a prior written agreement; preexisting and independent authorizations for review of the foreign act obviated ad hoc Executive authorizations that, in themselves, subordinated the Judiciary.

This central difference between majority and dissent is narrower than it might appear, for White was at least as deferential to the foreign affairs responsibilities of the Executive Branch as Harlan. Indeed, White unequivocally superordinated an Executive's determination as to whether international law should be applied to a particular case. But "a blanket presumption of nonreview in each case is inappropriate and a requirement that the State Department render a determination after reasonable notice, in each case, is necessary."13

White specified three contingencies for non-review. One was wholly noncontroversial: a certification by the State Department that there was or soon would be an adequate *lis alibi pendens*. A second was wholly nonidealistic: "whether a friendly foreign sovereign is involved"14—as the Spanish adage puts it, "Para mis amigos, todo; para mis enemigos, la ley!" White's primary and significant contingency was entirely discretionary: "whether adjudication would 'vex the peace of nations.'"15 Because White would not require "a full statement of reasons," but would "accord

10. *Id.* at 442 (White, J., dissenting).
11. *Id.* at 453 (White, J., dissenting).
12. *Id.* at 458 (White, J., dissenting).
13. *Id.* at 468 (White, J., dissenting).
14. *Id.* (White, J., dissenting).
15. *Id.* (White, J., dissenting) (quoting Underhill v. Hernandez, 168 U.S. 250, 304 (1897)).
considerable deference" to partial reasons, the vexing of the peace of nations contingency seems to mean that whenever the Executive wishes, courts will abstain.

The difference between Harlan and White is thus very fine. The majority had been willing to discharge the Executive from making an explicit request because "[a]dverse domestic consequences might flow from an official stand." White was unwilling to extend the "vexing" exception to mean "that it might be politically embarrassing on the domestic front for the Department of State to interpose an objection in a particular case which has attracted public attention" because "it is not fair to allow the fate of a litigant to turn on the possible political embarrassment of the Department." But the breadth of White’s exception and the absence of rigorous review would cover any Executive concerns.

Harlan’s doctrine was supposed to avoid embarrassing the Executive while protecting the independence of the Court. Plaintiffs suffered. White, more concerned with providing opportunities for citizens to have their day in court, would still have suspended jurisdiction if the Executive murmured “vexatious.” He accepted, without discomfort, the superordination of the Executive in foreign affairs matters if that was the price of providing as much justice as possible in individual cases. Neither thought our courts had a proper international role that might hold the Executive to an international legal standard.

Sabbatino ignited angry responses and vigorous lobbying. Congress purported to overrule it, enjoining courts to take jurisdiction in Sabbatino-type cases and stipulating the international law standard. In subsequent cases, individual judges on the Court tried to slip from Harlan’s mortmain, but the most they could do was change the outcome of the cases at bar, without impairing Sabbatino.

16. Id. (White, J., dissenting).
17. Id. at 436.
18. Id. at 468-69 (White, J., dissenting).
With the collapse of Marxism and the virtual universalization of the market model under the not always benign supervision of the Bretton Woods agencies, there is much more consensus now on the law of expropriation. There is more and more foreign investment and many international conflicts. With the reduction of the scope of foreign sovereign immunity, more Act-of-State-type cases are likely to arise. The Court does not seem inclined to review Sabbatino. Are we left, then, with an approach that preserves a formal but empty judicial independence at the constitutional level, while substantially reducing the justice courts afford plaintiffs when foreign governments violate their rights?