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Ferdinand Marcos and the Act of State Doctrine: an Analysis of Republic of the Philippines v. Marcos

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COMMENTS

FERDINAND MARCOS AND THE ACT OF STATE DOCTRINE: AN ANALYSIS OF *REPUBLIC OF THE PHILIPPINES v. MARCOS*

I. INTRODUCTION

On October 21, 1988, former president Ferdinand Marcos and his wife, Imelda, were indicted in United States district court on fraud and racketeering charges.[1] The charges stemmed from allegedly illegal activities engaged in while Marcos was President of the Philippines and which continued subsequent to his arrival in the United States.[2] The indictment charged that after they were granted asylum in the United States in 1986, the Marcoses had violated a federal court order which prohibited the transfer of assets. Specifically, the New York federal grand jury charged that the Marcoses through their associates, Bienvenido Tantoco, Sr., former Philippine ambassador to the Vatican, and his wife, backdated documents purporting to show that certain properties in New York had been transferred to Saudi financier Adnan Khashoggi earlier than the date of the court order.[3] Reagan Administration officials stated that "there were no foreign policy considerations to prevent the indictment."[4]

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1. Marcus, *U.S. Indicts Marcos in $100 Million Plot*, The Washington Post, Oct. 22, 1988, at A1, col. 5.

2. The six count indictment alleges that Marcos and others extorted and embezzled millions of dollars from the Philippine government in a plan that involved bribes, kick-backs, and gratuities. The cash and stocks they received were converted from Philippine pesos to U.S. dollars for investment in the United States. *Id.*

3. The Marcoses and others were also charged with engaging in the interstate transport of stolen funds and art works. *Id.*

4. *Id.* The same week the indictment was handed down, the United States and the Aquino government reached an agreement that allowed two military bases to continue operations in the Philippines. *Id.*

Foreign policy implications, however, were raised in the federal district court that froze the Marcoses' assets in 1986.[5] In *Republic of Philippines v. Marcos*,[6] the Second Circuit unanimously held that the Republic was entitled to a preliminary injunction barring Marcos, his wife, and several other defendants from transferring or encumbering the New York properties despite the former president's act of state defense. The court ruled that the defendants had not met their burden of proof and had failed to show that defendants' acts were public acts to which the act of state doctrine applied.[7] Thus, the court never reached the merits of the Marcoses' defense, although the legal criteria used to evaluate the merits of the preliminary injunction expressly required such an evaluation.[8] A federal court in California had evaluated a similar request to freeze the former president's assets and concluded that the act of state doctrine did indeed preclude the issuance of such an order despite ostensible burden of proof problems.[9]

The court's ruling in *Marcos* has not stopped Marcos from claiming that "head-of-state immunity" still bars his prosecution in New York on the charges raised by the grand jury.[10] Since the court's actions in *Marcos* are at the center of the Marcos indictment, a review and analysis of the court's reasoning is instructive as to the uncertainties that plague judicial action when the act of state defense is invoked. Moreover, it provides a window to the future, indicating the potential arguments and counter arguments that may characterize the current litigation. The main question for review is a simple one, but it has important implications: To what extent can a former dictator be prosecuted in the United States for acts committed in a foreign country under martial law or for acts that stem from such activities?

II. Facts and Holding

In 1986 the Republic of the Philippines filed suit to enjoin and

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5. New York Land Co. v. Republic of the Philippines, 634 F. Supp. 279, 288 (S.D.N.Y. 1986), *aff'd sub nom.* Marcos v. Republic of the Philippines, 806 F.2d 344 (1986), *cert. denied*, 107 S.Ct. 2178 (1986).

6. 806 F.2d 344 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 2178 (1986). The original complaint in this action, filed March 2, 1986, was filed with the Supreme Court of New York, County of New York, prior to its removal to the United States District Court for the Southern District of New York. 806 F.2d at 347.

7. *Id.* at 359

8. *See infra* notes 89-96 and accompanying notes.

9. Republic of Philippines v. Marcos, 818 F.2d 1473 (9th Cir. 1987).

10. Marcus, *supra* note 1; Cannon & Marcus, *Indictment of Marcos Due Today*, The Washington Post, Oct. 21, 1988, at A1, col. 1.

restrain the transfer, conveyance, or encumbrance of five properties in and around New York City.[11] The complaint alleged that the properties had been purchased with assets stolen from the people and Government of the Philippines, and named the former President of the Philippines, Ferdinand Marcos, and his wife as the principal defendants.[12] Also named as defendants were the record holders of the properties and their principals and managers, who were allegedly the nominees for President and Mrs. Marcos.[13]

A temporary restraining order was issued when the action was brought barring defendants from taking certain actions with respect to the properties.[14] Before a preliminary injunction could be granted, the defendants, without President and Mrs. Marcos who had failed to appear, moved to vacate the order.[15] Defendants submitted no proofs in opposition to the preliminary injunction but relied on the act of state

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11. *New York Land Co.*, 634 F. Supp. at 281. The properties included four New York office buildings and a large mansion on Long Island. *Id.*

12. *Id.* The Washington Post described Marcos as follows:

> A brilliant lawyer, shrewd politician and stirring orator, Marcos for years enjoyed popularity and prestige at home and the friendship and praise of five American presidents. He rose from power in 1965, promising social reforms in the former U.S. colony, and was initially hailed as a new kind of Asian leader.
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> But over time he led an administration marked by corruption, graft, authoritarianism and stagnation. During his rule, Marcos kept his archipelago pro-American but also dismissed the legislature, imposed martial law for more than eight years and jailed tens of thousands of opponents.
>
> Human rights groups accused him of widespread abuses. A communist insurgency flourished, drawing support from peasants opposed to Marcos. His credibility suffered to such an extent that his own claims of being a World War II hero was disputed.
>
> His downfall came in the 1986 "people's power" revolt, after he called presidential elections and then declared himself the winner despite independent tallies showing Aquino as the real victor. Amid talks with U.S. officials and demands for his removal by millions of ordinary citizens, Marcos and his family fled to live in exile in Hawaii. They left behind stark reminders of their ostentatious life-style, including Imelda Marcos' bulletproof boudoir with gold bathroom fixtures.

Richburg, *Manila Supports Marcos Indictment*, The Washington Post, Oct. 22, 1988, at A16, col. 4.

13. *New York Land Co.*, 634 F. Supp. at 281. The defendants included the Tantocos who were indicted with the Marcoses in New York. Marcus, *supra* note 1.

14. *Id.* The Philippine government stated a claim for relief under a theory of constructive trust and equitable lien. *Marcos*, 806 F.2d at 356. It was unclear whether a United States court was to eventually try the fundamental issues of unlawful takings or whether those issues would be tried in the Philippines. The appellate court stated that "the district court may either itself determine ownership or defer to Philippine proceedings, assuming they proceed with sufficient dispatch. . . ." *Marcos*, 344 F.2d at 356.

15. *New York Land Co.*, 634 F. Supp. at 281.

doctrine as a defense.[16] The district court conceded that the act of state doctrine might eventually bar the suit,[17] but concluded that in this instance it could not block the issuance of an otherwise appropriate injunction.[18] Personal acts of a sovereign, the court noted, were not protected by the act of state doctrine and defendants had not shown that their acts were public acts.[19] The court further stated that it had received no indication from the Department of State that the adjudication of the suit would embarrass the Executive in its conduct of foreign policy.[20] The preliminary injunction was granted.[21]

The Second Circuit affirmed the decision on the grounds that appellants had not met their burden of proof and had failed to show that the acts of Marcos were public acts, which could be protected under the act of state doctrine.[22] The court stated that even if this burden was met at a later date, the defense may still prove ineffectual because Marcos no longer held power and the potential for interference in the conduct of foreign policy was appreciably less than might otherwise have existed.[23] The court also noted that the act of state doctrine rested on the respect for foreign states.[24] Because the Government of the Philippines sought to try the suit in United States courts, respect for foreign states in this instance appeared to require the court to proceed with the adjudication, not prohibit the action as the doctrine would require. Neither the district nor appellate court actually reached the merits of the act of state defense, but the appellate court suggested that these factors that leaned against applying the doctrine should be examined when and if public acts were shown to be at issue.[25]

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16. In addition to the act of state defense, defendants relied on "the immunity of President Marcos under Philippine law, the Foreign Sovereign Immunity Act of 1976, 28 U.S.C. Secs. 1602 *et seq.*, the principle of *forum non conveniens*, and contention that plaintiff's proofs are conjectural and insufficient." *Id.*

17. *Id.* at 289.

18. *Id.* at 290.

19. The court stated that personal acts could be protected if the acts of conversion were done in the name of the foreign sovereign. *Id.* at 289.

20. The court also noted that defendants had not asserted that adjudication would hinder foreign policy. *Id.*

21. *Id.* at 290.

22. The court asserted that even acts illegal under Philippine law could be protected under the doctrine. *Id.* at 359.

23. *Id.*

24. *Id.*

25. Without such an examination the court suggested that the district court should consider deferring to a Philippine adjudication. *Id.*

III. DEVELOPMENT OF THE ACT OF STATE DOCTRINE

The act of state doctrine[26] has roots in the doctrine of sovereign immunity.[27] Both are grounded on respect for a sovereign's right to govern and attempt to eliminate legal confrontations between sovereigns.[28] Yet, while the common law doctrine of sovereign immunity could protect monarchs against suits in foreign countries, state officials that exercised sovereign powers were not provided similar immunity.[29] The judicially created act of state doctrine arose to protect these individuals.[30]

The United States Supreme Court first acknowledged the act of state doctrine as an independent source of immunity in *Underhill v. Hernandez*.[31] The suit involved a Venezuelan general who was accused of assaulting a U.S. citizen in Venezuela. In dismissing the suit the Court wrote "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."[32] Today this statement is considered to express the essence of the act of state doctrine;[33] however, some commentators view it as expanding the doctrine beyond its roots in sovereign and personal immunity.[34] Specifically, they argue that the breadth of

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26. Notable articles on the doctrine include: Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967); Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959); Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV., 325 (1986).

27. First National City Bank v. Banco Nacionale de Cuba, 406 U.S. 759, 762-63 (1972) (plurality opinion) (noting the common origins of the doctrine).

28. *Id.* at 762.

29. Bazyler, *supra* note 26, at 331.

30. *Id.*

31. 168 U.S. 250 (1897). The court first discussed the two doctrines together in The Schooner Exchange v. M'Faddon, 11 U.S. (Cranch) 116 (1812).

32. *Id.* at 252.

33. Banco Nacionale de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964). The language is derived from Hatch v. Baez, 14 N.Y. Supp. Ct. 596, 599 (App. Div. 1876). Several commentators have viewed this "classic statement" as dicta since the case turns on principles of personal and sovereign immunity. Accordingly, the case could have been cited for the following: "The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact." Underhill v. Hernandez, 168 U.S. at 252. *See* Zander, *supra*, note 26, at 829; Bazyler, *supra* note 26, at 332-33; Note: *The Nonviable Act of State Doctrine: A Change in the Perception of the Foreign Act of State*, 38 U. PITT.L. REV. 725, 726-27 (1977).

34. *See* Bazyler, *supra* note 26, at 332-33.

the statement allowed other principles to serve as the basis for dismissing a suit under the doctrine; namely, the choice of law principle, the principles of comity and, more recently, the separation of powers principle.

Two Supreme Court cases provide support for this view. In *Oetjen v. Central Leather Company*,[35] the Court was asked to determine whether the Mexican revolutionary government had lawfully seized certain goods. The defendant was not a government official but a private corporation that had purchased the goods from an intermediary who in turn had purchased them from the Mexican government. Consequently, title to the goods was at issue. *Ricaud v. American Metal Company*[36] raised an identical issue with the exception that the party asserting the defense was a private foreign national. In both cases the Court refused to determine the lawfulness of the seizures because the actions were taken in a foreign territory by a government legally recognized by the United States. In *Oetjen* the Court rested its decision on principles of comity; specifically, it stated that a court must show deference to the acts of foreign governments, not because they are obligated to do so, but because it may otherwise "imperil the amicable relations between governments and vex the peace of nations."[37] In contrast, the *Ricaud* decision was based on a choice of law rationale in which the Court held that the actions of a foreign state were binding law and could not be questioned by courts in the United States.[38]

In *Bernstein v. N.V. Nederlandsche-Amerikannsche Stoomvaart-Maatschappij*[39] the separation of powers doctrine became a reason for upholding the act of state defense. This Second Circuit case involved the confiscation of property in Germany by the Nazi government. Faced with the act of state defense, the court at first refused to rule on the validity of plaintiff's claim without a statement by the political branches of government that the suit was justiciable.[40] Only after the State Department informed the court that it had no objection to adju-

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35. 246 U.S. 297 (1918).

36. 246 U.S. 304 (1918).

37. 246 U.S. at 304.

38. *Id.* at 304, 309. *See also* Note: *The Nonviable Act of State Doctrine*, *supra* note 33, at 727-28.

39. The litigation led to three separate decisions: Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947); Bernstein v. N.V. Nederlandsche-Amerikannsche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949); and Bernstein v. N.V. Nederlandsche-Amerikannsche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

40. Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).

dication did the court proceed to determine the validity of the acts of the German state.[41]

The modern era of the doctrine emerged from a trilogy of Supreme Court cases that concerned the confiscation of assets by the Cuban government. In *Banco Nacionale de Cuba v. Sabbatino*,[42] the agent for the Cuban government, Banco Nacionale, sued in a United States court to recover proceeds from the sale of assets it claimed belonged to Cuba as a result of the government's nationalization of American sugar interests in Cuba. In dealing with Cuba's title to the sugar, the district court held that the act of state doctrine did not prohibit judicial review since the confiscation violated international law; therefore, the doctrine was inapplicable.[43] The Second Circuit affirmed the decision but relied on the *Bernstein* exception, concluding that the Executive had no objection to a decision on the merits.[44] The Supreme Court reversed, rejecting the district court's conclusion that a violation of international law is relevant to the doctrine's application.[45] It also expressly declined to endorse the *Bernstein* exception.[46] Rather, the Court held that the lack of consensus on applicable legal standards barred the suit.[47]

The *Sabbatino* decision rested on the doctrine's perceived roots. The Court found that "[w]hile historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence."[48] The principles of comity were not viewed as dispositive either.[49] Instead, the doctrine had "constitutional underpinnings," and arose "out of the basic relationships between branches of government in a system of separation of powers."[50] The judiciary therefore must refuse to act when there is an "absence of a treaty or

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41. Bernstein v. N.V. Nederlandsche-Amerikannsche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

42. 376 U.S. 398 (1964).

43. Banco Nacionale de Cuba v. Sabbatino, 193 F. Supp. 375, 381 (S.D.N.Y. 1961), *aff'd on other grounds*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964).

44. Banco Nacionale de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964).

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

46. *Id.* at 420, 436.

47. *Id.* at 428.

48. *Id.* at 421. *But see supra* notes 26-38 and accompanying text.

49. *Id.* at 421-22. *But see supra* note 37 and accompanying text.

50. The court stated, however, that the Constitution did not require the act of state doctrine and it did not remove judicial review of foreign acts of state. *Sabbatino*, 376 U.S. at 423.

other unambiguous agreement regarding controlling legal principles."[51] Yet the Court expressly refused to lay down an inflexible and all-encompassing rule for applying the doctrine.[52] Each case must examine all "relevant considerations."[53]

The second case in the trilogy, *First City National Bank v. Banco Nacionale de Cuba (Citibank)*[54] involved an expropriation of Citibank branches in Cuba. When Banco Nacionale filed suit to collect the excess proceeds from Citibank's sale of assets belonging to Banco Nacionale, Citibank counterclaimed, seeking damages for the expropriation.[55] Banco Nacionale defended using the act of state doctrine.[56]

The district court focused on the effect of the Hickenlooper Amendment to the Foreign Assistance Act of 1964,[57] an amendment which had been passed by Congress in the wake of *Sabbatino*. The amendment required courts to adjudicate claims for property confiscated in violation of international law.[58] The court found the amendment dispositive and held for Citibank.[59] The court of appeals reversed, holding that *Sabbatino* controlled and that the court could not examine the counterclaim.[60] The Supreme Court reversed the court of appeals.[61]

A majority of Justices agreed that the act of state doctrine did not foreclose a decision on the merits, but a majority opinion on the underlying reasons could not be reached. Attention focused on a letter from the State Department requesting that the act of state doctrine not be applied. Justice Rehnquist's plurality opinion, joined by Chief Justice Burger and Justice White, endorsed the *Bernstein* exception and held

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51. *Id.* at 428.

52. In addressing this point the Court stated that "[t]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." *Id.*

53. *Id.*

54. 406 U.S. 759 (1972).

55. *Id.* at 761.

56. *See generally id.*

57. Pub. L. No. 88-633, Sec. 301(d)(4), 78 Stat. 1009, 1012-13 (1964), 22 U.S.C. Sec. 2370(e)(2) (1982).

58. *Id.*

59. Banco Nacionale de Cuba v. First National City Bank, 270 F. Supp. 1004, 1007 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970), *vacated*, 400 U.S. 1019 (1971).

60. *First National City Bank*, 431 F.2d 399-402. The Second Circuit issued two separate opinions in this case. *See also* Banco Nacionale de Cuba v. First National City Bank, 442 F.2d 530 (2d Cir. 1971), *rev'd*, 406 U.S. 759 (1972) [hereinafter *Citibank*].

61. 406 U.S. at 770.

that letter to be dispositive.[62] The act of state doctrine, according to Rehnquist, was based on three propositions: international comity, deference to the Executive in foreign affairs, and fear of embarrassing the Executive.[63] Accordingly, when the Executive states that the doctrine's application would not advance United States interests, the doctrine should not be applied.[64]

The majority of Justices, however, strongly criticized Rehnquist's reliance on the *Bernstein* exception. Justice Douglas stated that "fair dealing" required the suit to be heard, not the Executive's directive.[65] Justice Powell argued that the Court should hear all cases like *Citibank* if it would not interfere with foreign relations as Justice Rehnquist's opinion claimed, but agreed with Justice Douglas that the Court, not the Executive, must make that determination.[66] Justice Brennan's dissent, joined by Justices Stewart, Marshall and Blackmun, criticized the *Bernstein* exception for its capacity to politicize judicial functions and "bring the rule of law both here at home and in the relations of nations into disrespect."[67] The dissent relied heavily on *Sabbatino* and interpreted it to mean that the question of whether or not an act of state was justiciable was in essence a "political question."[68] In accordance with *Sabbatino*, the dissent favored weighing all relevant factors before deciding if the act of state doctrine should apply.[69]

The final case in the trilogy was *Alfred Dunhill of London, Inc. v. Republic of Cuba*.[70] This action was brought by former owners of several expropriated Cuban cigar companies against Dunhill to recover payments made by Dunhill for cigar shipments made both before and after the property was confiscated by the Cuban government.[71] The dis-

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62. *Id.* at 768. The full text of the State Department's letter is appended to the second *Citibank* opinion. *See* 442 F.2d at 536-38.

63. *Citibank*, 406 U.S. at 765.

64. *Id.* at 768.

65. *Id.* at 773 (Douglas, J., concurring).

66. *Id.* at 773-76 (Powell, J., concurring).

67. *Id.* at 792 (Brennan, J., dissenting).

68. Justice Brennan wrote:

> [T]he absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban government, the 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 to the existence of a "political question."

Id. at 787-88.

69. *Id.* at 788.

70. 425 U.S. 682 (1976).

71. *Id.* at 682-83.

trict court denied the former owners' recovery of sums due after the Cuban expropriation because the actions were protected by the act of state doctrine.[72] The court, however, held Dunhill liable for sums due for pre-expropriation shipments since these were not protected by the doctrine.[73] Dunhill then asserted its counterclaim against certain Cuban nationals who had intervened in the suit, along with Cuba, for the money Dunhill owed.[74] The Cuban nationals defended against the counterclaim by arguing that the situs of any debt owed Dunhill was in Cuba, and that a refusal to repay was an act of state.[75] The district court rejected this argument and held that the situs of the debt was in the United States, and that a refusal to honor the obligation was not an act of state.[76] The court of appeals held that the situs of the debt was in Cuba and the act of state doctrine applied.[77] The Supreme Court reversed and refused to apply the doctrine.[78]

The Court reached a consensus on only one narrow issue: The Cuban interveners had failed to meet their burden of proof and had not established that their refusal to repay was a "public act of those with authority to exercise sovereign powers."[79] Justice White's plurality opinion stated that "no statute, decree, order, or resolution of the Cuban government itself was offered into evidence indicating that" an act of state had occurred.[80] Justice Marshall, in dissent with Justices Brennan, Stewart and Blackmun, agreed that there was insufficient evidence that a public act was involved; however, they also concluded that a public act need not be expressed in any particular form and that passive as well as active conduct can be an act of state.[81]

Two other noteworthy issues were raised. Justice White's opinion

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72. Mendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527 (S.D.N.Y. 1972), *rev'd on other grounds modified sub nom.* Menendez v. Saks and Co., 485 F.2d 1355 (2d Cir. 1973), *rev'd sub nom.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

73. *Id.*

74. *Dunhill*, 425 U.S. at 682.

75. *Id.* The issue concerning the situs of the debt stemmed from a Second Circuit case in which the court held that United States courts should not give effect to foreign confiscations without compensation of property within the United States. *See* Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 383 U.S. 1027 (1966).

76. *Dunhill*, 425 U.S. at 682.

77. Menendez V. Saks and Co., 485 F.2d 1355 (2d Cir. 1973).

78. *Dunhill*, 425 U.S. at 690.

79. *Id.* at 694.

80. *Id.* at 695. Justice White's opinion consisted of three parts, the first two of which were joined by Chief Justice Burger and Justices Powell, Rehnquist and Stevens.

81. *Dunhill*, 425 U.S. at 719 (Marshall, J., dissenting).

held that the act of state doctrine, like the doctrine of sovereign immunity, did not apply to the purely commercial acts of sovereign nations.[82] Chief Justice Burger and Justices Powell and Rehnquist agreed with the proposition, but the majority of the Court declined to endorse a "commercial exception."[83] Secondly, while the State Department wrote a letter stating that the act of state doctrine should not apply in this case, the position of the executive branch was not discussed in the Court's opinion, although the letter was attached as an appendix to the decision.[84] Thus, the *Bernstein* exception was virtually ignored by the Court.

It is apparent that over the years the Court has become confused about the meaning and scope of the act of state doctrine. With its roots in personal and sovereign immunity, it has now being described as a doctrine of conflict of law, choice of law, separation of powers, judicial deference, and judicial restraint. Its inconsistent application has left parties unable to predict when the doctrine will arise to prevent the adjudication of certain claims. Moreover, the doctrine can now be used simply to avoid deciding difficult cases, as the *Marcos* case seems to suggest.

IV. ANALYSIS

In *Marcos*, the Second Circuit pointed to a number of weaknesses in defendants' act of state defense. First, the court applied *Dunhill* and held that defendants had failed to show that their acts were public acts and protected under the doctrine.[85] The court also questioned whether the doctrine could even be applied in the instant case. The typical act of state defense, the court explained, involved a foreign government defending against a suit in United States courts; yet in this case, the Philippine government was the plaintiff and the principal defendant was the former president of the country.[86] The court stated that these differences weighed against application of the doctrine, even if defendants

82. The Justice wrote "that the mere assertion of sovereignty as to a defense to a claim arising out of purely commercial acts by a foreign is no more effective if given the label 'Act of State' than if it is given the label 'sovereign immunity'." *Id.* at 705. For the commercial exception in the Foreign Sovereign Immunity Act see 28 U.S.C. Sec. 1605 (a)(2).

83. Rejecting the commercial exception were Justices Brennan, Stewart, Marshall, Blackmun and Stevens.

84. *Dunhill*, 425 U.S. at 706-07.

85. *Marcos*, 806 F.2d at 359.

86. *Id.*

could show the acts at issue were public acts.[87] The burden of proof problem, however, was the express reason why the court ignored the thorny issues raised by the defense.[88] Consequently, the court allowed the assets of the Marcoses to be frozen.

The principal concern with *Marcos* is that the court ordered relief without even a cursory evaluation of the merits of the act of state defense.[89] Use of the defense raises the fundamental question of whether the suit is justiciable and can be heard by United States courts.[90] Resolution of that question logically precedes any court action.[91] Moreover, the form of the relief requested appears to have required some minimal examination of the merits of the defense. Preliminary injunctive relief presupposes that a trial will be held on the merits.[92] If no trial ultimately can be held because of the defense, court action would be premature notwithstanding the merits of plaintiff's claims. It initially appears, therefore, that some consideration of the act of state defense is required. Yet both the lower court and appellate court avoided an evaluation of the defense before imposing judicial relief.[93] This holding is particularly troubling given that the appellate court itself expressed concern that the act of state defense could later bar the suit.[94]

The court evidently believed that it need not reach the act of state defense because defendants had failed to meet their burden of proof; but the decision begged the questions of whether the suit ultimately was justiciable, and whether the court should have proceeded without some examination of the potential merits of the defense. Furthermore, the court seemed to have gone out of its way not to treat the merits of the defense when the criteria for issuing the preliminary injunction raised the issue for consideration.

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87. *Id. See infra* notes 96-105 and accompanying text.

88. *Marcos*, 806 F.2d at 359.

89. Beyond a discussion of the background of the act of state doctrine and its burden of proof requirements, the court avoided further treatment.

90. A significant difference between a sovereign immunity defense and the act of state defense is that the former deprives the court of personal jurisdiction over the suit; the latter asserts that the details of the action cannot be questioned. *See* Comment, *The Jurisdictional Immunity of Foreign Sovereign*, 63 YALE L.J. 1148 (1974); Comment, *Act of State and Sovereign Immunities Doctrine: The Need to Establish Congruity*, 17 U.S.F. L. REV. 91 (1982).

91. That is, if the details of the suit cannot be questioned because the suit is not justiciable, the case will be dismissed. Any judicial action prior to dismissal would be improper if at the outset it can be determined that the suit will likely be dismissed.

92. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE Sec. 2947 (1973).

93. *See supra* notes 17-25 and accompanying text.

94. *New York Land Co.*, 634 F. Supp. at 289; *Marcos*, 344 F.2d at 357.

The lower court held that a preliminary injunction could be granted if plaintiff showed "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."[95] Thus, the court's own criteria raised the question of whether the suit would survive the defendants' challenge, criteria that ostensibly required overlooking the burden of proof problem if correction of the problem was probable. The court, however, ignored an evaluation of the merits and chose to employ (b)(2) instead.[96]

If the court had considered the merits of the defense, the evaluation could have relied on plaintiff's own characterization of the defendants' acts; in effect, the complaint itself admits certain facts that could have been used to meet the Marcoses' burden of proof. Marcos is described in the complaint as the former President of the Philippines who became its dictator pursuant to a declaration of martial law.[97] The complaint alleges that funds used to buy the New York properties were illegally obtained by the commission of certain acts, such as the expropriation of private property, the diversion of loans intended for use by the Philippine government, the raiding of the public treasury, and the creation of public monopolies.[98]

These allegations support the defendants' claim that the acts in question "were public acts of those with authority to exercise sovereign power."[99] Dictatorial powers under martial law arguably provide the broadest authority under which an official may act and still remain within the scope of his or her duties. Presumably nearly any activity can be characterized as a public act when civil law has been suspended, and law becomes merely an extension of the will of the person wielding power.[100] Moreover, the activities named above could only have been

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95. *New York Land Co.*, 634 F. Supp. at 281 (quoting Jackson Dairy v. Hood, 596 F.2d 70, 72 (2d Cir. 1979)).

96. The court wrote that the "the standards for issuance of a preliminary injunction have been satisfied. Plaintiff has amply shown sufficiently serious questions going to the merits to make them a fair ground for litigation." *Id.* at 290. The court of appeals did not examine the choice of criteria. *See Marcos*, 344 F.2d at 352.

97. *Marcos*, 806 F.2d at 348.

98. *Id.*

99. *Dunhill*, 425 U.S. at 694.

100. Martial law is defined as a

> system of law, obtaining only in time of actual war and growing out of the exigencies thereof, arbitrary in character, and depending only on the will of the commander of the army,. . .and which suspends all existing civil laws, as well as the authority and the ordinary administration of justice.

undertaken pursuant to sovereign powers, for only through them could the alleged activities - the expropriations, the creation of public monopolies and the like - be performed in the first place. To the extent that the complaint alleges seemingly private acts, such as the receipt of bribes and kickbacks in exchange for governmental privileges,[101] the charge that government favors were involved in any way may be enough to characterize even these acts as public acts under martial law.

It seems unlikely, furthermore, that plaintiff could have succeeded with an argument alleging that only lawful acts are public acts within the meaning of the act of state doctrine. The argument was preempted, in part, by *Underhill v. Hernandez*.[102] The Supreme Court in that case held that the act of state doctrine cannot "be confined to lawful or recognized governments."[103] This point was addressed more directly by the Second Circuit in *Banco de Espana v. Federal Reserve Bank*.[104] There the court held that it

> make[s] no difference whether the foreign act is, under local law, partially or wholly, technically or fundamentally, illegal. No such distinction may be gleaned from the cases. So long as the act is the act of a foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws.[105]

Consequently, even if plaintiff could have succeeded in establishing that the acts of Marcos were unlawful, the acts likely would have remained characterized as public acts.

This reasoning suggests that the burden of proof problem in *Marcos* could have been cured, and that defendants could have shown that public acts were at issue. Had the court reached this point, it would have been forced to assess the merits of the act of state defense and to confront the questions raised as to the doctrine's application; namely, whether it applied to Marcos, a former head of state, when the Aquino government was seeking judicial relief in the United States. The *Marcos* court speculated that the danger of interference with the Executive's conduct of foreign policy probably was reduced when a current government such as the Aquino government was a plaintiff rather than a defendant,[106] an element undermining reasons to apply the doc-

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BLACK'S LAW DICTIONARY (5th ed. 1979).

101. *Marcos*, 344 F.2d at 348.

102. 168 U.S. 250 (1897).

103. *Id.* at 252.

104. 114 F.2d 438 (2d Cir. 1940).

105. *Id.* at 444.

106. *Marcos*, 344 F.2d at 359. *See supra* notes 23-25 and accompanying text.

trine. The court also noted that the Supreme Court itself had raised the question of whether the doctrine applied to those no longer in power.[107] *Sabbatino* had stated that the "balance of relevant considerations [could be] shifted if the government which perpetrated the challenged act of state [was] no longer in existence."[108]

Both of these points have certain force. If the current government is the party bringing the action as it was in *Marcos*, honoring the act of state defense could itself interfere with foreign policy goals rather than help promote them. It is the policy of the United States to support the Aquino government,[109] thus, to allow the defense would be contrary to one of the purposes of the doctrine: to avoid interfering with the conduct of foreign policy. Simultaneously, denying the defense shows that the United States honors the principles of comity that arguably also underlie the act of state doctrine.

Yet, these arguments can be undermined as easily as new political alliances can be formed in the Philippines. The fact that Marcos is no longer in power or that the plaintiff was the Aquino government does not automatically relieve judicial action against the former president of its capacity to interfere with foreign relations. While today the United States is a friend and supporter of the Aquino government, until 1986 the United States supported Marcos, and in the future it may be forced to support another, quite different government than the one now in power; specifically, one that supported or still favors the former president. Indeed, the fragile Aquino government still contends with coup threats from Marcos's right-wing supporters and their allies in the armed forces.[110] The Aquino government is so concerned about the Marcoses' effect on the status quo that it refused to allow Marcos to attend his mother's funeral while his supporters refuse to allow her burial without him in the Philippines.[111] Thus, the court's decision in *Marcos* could avoid interfering in foreign policy only if the Aquino government remained in power, and there was no guarantee in 1986, nor is there one in 1989, that actions against Marcos would not be considered a diplomatic liability before the suit was resolved.

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107. *Id.* The Washington Post reported that the Aquino government has waived "head-of-state" immunity for Marcos with regard to the current prosecution of the former president. Cannon & Marcus, *supra* note 10.

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

109. State Dept. Bull., Dec. 1987 (statement of Gaston Sigur, Assistant Secretary for East Asian and Pacific Affairs, before the Subcommittee on East Asian and Pacific Affairs of the Senate Foreign Relations Committee, Oct. 8, 1987).

110. Richburg, *supra* note 12.

111. *Id.*

The executive branch did not state a position with regard to the suit in *Marcos*,[112] although the court did refer to a letter, submitted to the United States Court of International Trade, in which a State Department official urged the Court of International Trade to proceed with a suit by the Aquino government for the sake of United States foreign policy interests.[113] The court concluded that the letter to the Court of International Trade implied that the action in *Marcos* before the district court would not intrude into the management of foreign affairs.[114]

In this matter too, the court's inference was unfounded and, as recent events have shown, premature because the suit before the Court of International Trade evidently did not involve Marcos.[115] While it was clear that during the *Marcos* suit the United States supported the Aquino government, it did not follow that the State Department endorsed judicial action against Marcos. The former president was a long-time ally and friend of the United States and one who was granted asylum by this country based on that friendship. Two years after *Marcos*, when Marcos was indicted in New York in October of 1988, President Reagan called Marcos a friend with whom he had "personal sympathy."[116] At that time it was also reported that the Justice Department and the State Department had been divided as to the wisdom of prosecuting the former president.[117] Officials in both departments expressed concern that actions against Marcos might establish harmful precedents and make it more difficult to persuade dictators to step down.[118] Consequently, there could have been no resolve in the executive branch to support or endorse judicial actions in 1986 against the former president, only months after he had been granted asylum, as the court in *Marcos* suggested.

The *Marcos* court also failed to consider the choice of law problem, a problem that certainly confronts the current prosecution as well.

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112. *New York Land Co.*, 634 F. Supp. at 289.

113. *Marcos*, 344 F.2d at 357 n.3.

114. *Id.*

115. The court asserted that the United States had made it clear that it has no "fear of embarrassment if the courts of this country were to take jurisdiction of this and other disputes between" Marcos and the Philippines. *Id.* at 356. As for the letter to the United States Court of International Trade, it was not appended to the court's opinion but its contents are described in detail. There is no express indication that this letter supported the court's claim that the State Department approved suits against Marcos. *See id.* at 357 n.3.

116. Cannon & Marcus, *supra* note 10; Marcus, *supra* note 1.

117. *See generally* Cannon & Marcus, *supra* notes 10.

118. Marcus, *supra* note 1.

The allegations made by the grand jury and by the Philippines in *Marcos* suggested that funds that were illegally obtained in the Philippines were used to purchase the New York properties. Proof of those allegations requires an inquiry into Philippine law. The competency of the court to engage in an evaluation of foreign law is limited, as the Supreme Court observed in *Ricaud v. American Metal Co.*[119] Furthermore, the court must inquire not only into the civil law of the Philippines but into martial law as well, since civil law had been suspended in 1978.[120] Under martial law the demarcations separating legal from illegal acts are considerably blurred. The presence of controlling legal standards in such circumstances raises serious questions as to where they might be found, and even more compelling questions as to whether a United States court is the appropriate forum for their consideration.[121] In *Sabbatino* the absence of controlling legal standards was enough to dismiss the suit.[122] The same confusion over applicable law seemingly confronts any adjudication of the charges against Marcos in the United States.

V. CONCLUSION

Reagan Administration officials stressed that the current indictment against Marcos focused on activities allegedly committed since he came to the United States; specifically, those taken in violation of the federal court order that was affirmed in *Marcos*.[123] In this way the Justice Department evidently hoped to evade some of the defenses that might be raised by the former president, but the indictment does indeed discuss Marcos's conduct as president; in fact, eight of the nine racketeering charges brought by the United States involve activities that took place in the Philippines.[124] "Head-of-state" immunities such as the act of state doctrine will therefore be important to the outcome, and the court will be asked to wade more deeply into some of the issues that evaded the *Marcos* court in 1986.

The *Marcos* decision remains at the center of the present litigation. Had the court accepted Marcos's act of state defense, no court order freezing the assets could have been possible. Marcos would not

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119. *See supra* notes 36-38 and accompanying text.

120. *See generally* Richburg, *supra* note 12.

121. *See supra* notes 100-101 and accompanying text.

122. The implication is that martial law transforms most, if not all, acts of the commander into public acts. *See supra* notes 44-46 and accompanying text.

123. Marcus, *supra* note 1; Cannon & Marcus, *supra* note 10.

124. Marcus, *Marcos Case Illustrates Longer Reach of U.S. Law*, Washington Post, Oct. 26, 1988, A4, col. 5.

now be under indictment for violating the court order which, despite allegations of misconduct in the Philippines, is at the heart of the present action against him.[125] Yet, the *Marcos* court side-stepped the real issues raised by the case and refused to consider the defense because Marcos had failed to show that his acts were the public acts of a head of state. The criteria used to issue the injunction, however, required that the merits of the case be heard despite temporary burden-of-proof problems. In any case, the Philippine government admitted certain facts in their complaint and these facts established that Marcos's acts were public acts. A decision on the act of state defense as it applied to Marcos in 1986 was therefore warranted, and now it will be raised again over virtually the same matters.

It is interesting to note that the Ninth Circuit dismissed a similar suit against Marcos brought by the Philippine government when the act of state doctrine was raised.[126] There, plaintiff sought to adjudicate charges that Marcos had unlawfully acquired certain holdings. The Aquino Government prayed for the return of the property and asked for an award of $50 billion in punitive damages.[127] As in the suit before the Second Circuit, the defendants in the Ninth Circuit case had not carried their burden of proof to show that the acts were public acts.[128] The court, however, overlooked the problem and evaluated whether the issues were justiciable, given the act of state doctrine.[129] It concluded that the suit was not justiciable and cited the difficulty that a United States court would have in interpreting Philippine law.[130] The case portends that a similar fate may await the United States' case against Marcos.

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125. White House spokesman Marlin Fitzwater, in commenting on the fact that the indictment focuses on the Marcoses' alleged activities subsequent to their arrival in the United States, stated that "[h]ad Marcos behaved himself, he probably wouldn't have been indicted." Marcus, *supra* note 1.

126. Republic of Philippines v. Marcos, 818 F.2d 1473 (9th Cir. 1987).

127. *Id.* at 1475.

128. *Id.* at 1482 n.6.

129. The court used plaintiff's own characterization of the former president's acts to assess whether plaintiff could prevail on the merits.

130. *Id.* at 1490.