

STOLEN ART AND THE ACT OF STATE DOCTRINE:
AN UNSETTLED PAST AND AN UNCERTAIN FUTURE

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I. INTRODUCTION

This paper will focus the application of the act of state doctrine, specifically in regards to works of art taken from individuals, galleries, and private museums through national expropriation laws. This area of the law is not well settled, due to changing U.S. foreign policy, inconsistent applications of the act of state doctrine, preclusion of the doctrine by various statutes of limitations, and the often-tangled factual web surrounding stolen works of art. As such, this paper seeks to provide an elucidating overview of the development and use of the doctrine, and to speculate as to its value in future stolen art cases.

The act of state doctrine stands for the proposition that United States courts will not question the legality of an official act taken by a foreign nation within its own territory.¹ The doctrine focuses generally on two concerns: “respecting the sovereignty of foreign states and the separation of powers in administering foreign affairs of this nation.”² Unlike the doctrine of Foreign Sovereign Immunity, act of state may be applied even if a foreign government is not a party in the case.³ It has been most relevant in recent years to expropriations of property through various nationalization laws.⁴ Contested property has often included business holdings, religious works, and works of art. Many of the modern cases dealing with expropriated artworks, the focus of this paper, stem from two major 20th Century conflicts: the rise of the Nazi Regime in Germany and the Russian Revolution. Cases dealing with art taken during the Holocaust have

¹ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

² *Doe v. Qi*, 349 F. Supp. 2d 1258, 1289 (N.D. Cal. 2004).

³ Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 345 (1986).

⁴ PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE AND THE LAW* 575 (3rd ed. 2012).

achieved more public recognition in the past 20 years, and will be the focus of the final portion of this paper.

II. THE ACT OF STATE DOCTRINE: HISTORY

Under the common law act of state doctrine, U.S. courts abstain from adjudicating claims where the relief sought requires the court to declare as invalid an official act of a foreign government taken within its own territory.⁵ Although the doctrine is relatively longstanding in Federal jurisprudence, its basis and policy implications have not been fully developed by courts, and it is applied with much variation throughout the Circuit Courts and in the Supreme Court.⁶ Most scholars agree that the doctrine “should be invoked to protect the separation of powers by allowing the Executive to control foreign policy, as well as protecting foreign states’ interest in avoiding judicial review of their acts in U.S. courts.”⁷ However, it is unclear if act of state is a doctrine of judicial abstention, political question, choice of law, or issue preclusion.⁸ Justice Scalia shed some light on this issue in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*, stating that the doctrine is a principle of decision, and that “act of state issues only arise when a court *must decide*-that is, when the outcome of the case turns upon-the effect of official action by a foreign sovereign.”⁹ In *Cassirer v. Kingdom of Spain*, the Ninth Circuit stated “Act of State is a substantive defense on the merits that is distinct from immunity.”¹⁰

It is important to note that act of state does not deprive the court of jurisdiction or the right to hear a case, but only precludes it from assessing the validity of the act of the foreign

⁵ Breana Frankel, *OY Vey! The Bernstein Exception: Rethinking the Doctrine in the Wake of Constitutional Abuses, Corporate Malfeasance and the ‘War on Terror’*, 41 GEO. WASH. INT’L L. REV. 67, 67 (2009-2010).

⁶ Bazyley, *supra* note 4 at 327.

⁷ Lucy Dunn Schwallie, *Acts of Theft and Concealment: Arguments Against the Application of the Act of State Doctrine in Cases of Nazi-Looted Art*, 11 UCLA J. INT’L L. & FOREIGN AFF. 281, 288 (2006).

⁸ *Id.* at 287.

⁹ *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int’l.*, 493 U.S. 400, 406 (1990).

¹⁰ *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1030 (9th Cir., 2010)

state, meaning that merits of the case are determined under the assumption that the act was valid.¹¹ In stolen property cases, however, it is very difficult for a claimant to win a replevin action if the court must necessarily assume that the expropriating acts of a foreign sovereign were valid. This point is demonstrated by tracing the history of the doctrine's varying uses and interpretations.

A. Early Cases

The act of state doctrine is derived from English common law, specifically as a corollary to sovereign immunity: "Sovereign immunity protected the sovereign government against lawsuit, while the act of state doctrine extended the same immunity to individual officials acting on behalf of their government."¹² The first recognition of the doctrine by the Supreme Court was in the 1812 case *The Schooner Exchange v. McFadden*.¹³ This dealt with an American schooner that was captured by Napoleon and re-commissioned as a French warship.¹⁴ It later sailed into Philadelphia where its previous owners filed a suit to seize the ship, claiming the French had taken it illegally.¹⁵ The Supreme Court, in dismissing the action, stated that, "all exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."¹⁶ The ship, being the property of a foreign nation with whom the United States had peaceful diplomatic relations, was held as exempt from United States jurisdiction.¹⁷

¹¹ Schwallie, *supra* note 8 at 288.

¹² Bazylar, *supra* note 4 at 331.

¹³ Bazylar, *supra* note 4 at 330.

¹⁴ *The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 117 (1812).

¹⁵ *Id.*

¹⁶ *Id.* at 136.

¹⁷ *Id.* at 147. This case is an example of how early jurisprudence conflated foreign sovereign immunity, the doctrine that a foreign nation cannot be sued in U.S. court, with the act of state doctrine. Although it was true here that Foreign Sovereign Immunity protected France from suit, the real cause of action was derived from France's official act of capturing the *Exchange* from its original owners, an early example of an act of state issue.

In *Underhill v. Hernandez*, the Supreme Court first treated the act of state doctrine independently from sovereign immunity.¹⁸ The court looked at actions taken by a Venezuelan commander, Hernandez, who led the anti-administration party during the 1892 Venezuelan Revolution.¹⁹ Eventually, Hernandez's party was formally recognized by the United States as the legitimate government of Venezuela.²⁰ Underhill, a citizen of the United States who had constructed waterworks for the city of Bolivar under a government contract, applied for a passport to leave Venezuela.²¹ Although Underhill eventually was given a passport and allowed to leave, he brought an action in U.S. court to recover damages for detention, confinement to his home, and assaults by Hernandez's soldiers.²²

The Supreme Court affirmed the Second Circuit's holding that "the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."²³ In the first clear declaration of the act of state doctrine, the court stated, "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."²⁴ The Court gave much deference to the State Department's official reading of the Venezuelan civil war, and the fact that it had chosen to recognize Hernandez's government as legitimate.²⁵ Also of note was that the reason for Underhill's detention was of no concern to the court, in that "it was not sufficient" that "the defendant was actuated by malice", even though the evidence at trial indicated that the purpose

¹⁸ Bazylar, *supra* note 4 at 331.

¹⁹ *Underhill v. Hernandez*, 168 U.S. 250, 250 (1897).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 252.

²⁵ *Id.* at 253.

was to “coerce the plaintiff to operate his waterworks and his repair works” for the benefit of the revolutionary forces.²⁶

In *Oetjen v. Central Leather Co.*, the Supreme Court further expanded the doctrine to exempt not only acts taken by foreign officials (as in *Underhill*), but also to acts of takings by foreign governments generally. The case involved two consignments of leather hides, which were taken by the revolutionary government of Mexico, sold in Mexico to a Texas corporation, and imported into the United States.²⁷ The United States recognized the revolutionary government of Carranza as the official government of Mexico in 1917.²⁸ The original owner of the Mexican hides, in suing for replevin, argued that the Mexican revolutionary government had violated the Hague Convention of 1907, constituting a treaty between the United States and Mexico, in seizing the hides.²⁹ The court rejected this argument, stating that, “Plainly this was the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and [. . .] such action is not subject to re-examination and modification by the courts of this country.”³⁰

B. The Russian Revolution

The Russian Revolution looms large in act of state doctrine jurisprudence, having been the focus of several suits involving works of art. Although the conflict was much more complicated than could be explained here, a brief summary will suffice as the background to several stolen art cases. Russia’s 1914 entrance into World War I³¹ proved disastrous for the

²⁶ *Id.* at 254.

²⁷ *Oetjen v. Central Leather Co.*, 246 U.S. 297, 300-301 (1918).

²⁸ *Id.* at 301.

²⁹ *Id.*

³⁰ *Id.* at 303.

³¹ Jonathan Smele, *War and Revolution in Russia 1914-1921*, BBC NEWS (last updated March 10, 2011), www.bbc.co.uk/history/worldwars/wwone/eastern_front_01.shtml.

country, as war, famine and disease killed over 9 million people in the next few years.³² In February of 1917, riots forced Czar Nicholas II to abdicate power to a provisional government of socialists and moderate liberals.³³ This government aimed for a resolution to the war, but due to the powerful influence of the Bolsheviks and Vladimir Lenin, lasted only a matter of months.³⁴ On October 24-25, 1917, the Bolsheviks staged a coup d'état and took control of the government.³⁵ The Bolshevik government signed the treaty of Brest-Litvosk in March of 1918 to end the war with Germany.³⁶ After defeating a challenge to power by a more conservative anti-Bolshevik party, the Bolsheviks under Lenin established the U.S.S.R. in 1922.³⁷

Lawsuits regarding expropriations of personal property from this period are largely centered on artistic and religious works. The Bolsheviks and Lenin were critical of organized religion and private wealth.³⁸ Several Russian decrees worked to expropriate personal property after the 1917 Bolshevik Revolution³⁹.

United States v. Pink was the first case to address the act of state doctrine relative to an official agreement between the United States and a foreign nation, and was also the first to address the application of the act of state to Russian expropriations. In *Pink*, a New York branch of a Russian Insurance company sought to recover assets that had been nationalized by the

³² PBS, *World War I Casualty and Death Tables*, PBS.COM, (last visited March 19, 2014), www.pbs.org/greatwar/resources/casdeath_pop.html.

³³ Smele, *supra* note 32.

³⁴ Smele, *supra* note 32.

³⁵ History.com, *Russian Revolution*, HISTORY.COM, (last visited Marc 19, 2014), <http://www.history.com/topics/russian-revolution>.

³⁶ Smele, *supra* note 32.

³⁷ History.com, *supra* note 36.

³⁸ 17 Encyclopedia Judaica, *Russia*, 531–553 (2007).

³⁹ *see Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 21 (D.C.N.Y. 1976). Decree No. 111 of the Council of People's Commissars published on March 5, 1921 nationalized all movable property of citizens who had fled the Soviet Union, and Decree No. 245 of March 8, 1923, promulgated by the All Russian Central Executive Committee and the Council of People's Commissars, nationalized property housed in state museums. It is unclear whether all property in state museums was actually owned by the government, or whether some may have been on loan or previously illegally expropriated.

Bolshevik revolutionary government.⁴⁰ By Russian decree in 1918-1919, all debts and rights of shareholders in First Russian Insurance Co. had been discharged or cancelled, including those held by United States citizens.⁴¹ Pursuant to a decree from the Supreme Court of New York, the Superintendent of Insurance, Pink, seized the assets of the bank, and proceeded to pay off all domestic creditors, followed by foreign creditors.⁴² On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics and accepted an assignment of certain pre-nationalization assets to the United States government under the Litvinov Assignment.⁴³ The United States brought suit to recover the remaining assets of First Russian Insurance Co. from Pink.

The Supreme Court in *Pink* recognized that the “conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government.”⁴⁴ The Litvinov Assignment, representing “an international compact between two governments”, was an exercise of power “not open to judicial inquiry.”⁴⁵ The court was especially concerned with preserving the President’s sphere of foreign relations power, stating that the court would “usurp the executive function if we held that that decision was not final and conclusive in the courts.”⁴⁶ The court also saw the act of state doctrine in this case as being inherent to the Federalist system: “If state law and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted.”⁴⁷ The court, ultimately recognizing the legitimacy of the Russian decree, held that after Russia acquired the property of First Russian

⁴⁰ *United States v. Pink*, 315 U.S. 203, 203 (1942).

⁴¹ *Id.* at 210-11.

⁴² *Id.*

⁴³ *Id.* at 211.

⁴⁴ *Id.* at 222.

⁴⁵ *Id.* at 223.

⁴⁶ *Id.* at 230.

⁴⁷ *Id.* at 232.

Insurance, it legally passed this right to the United States under the Litvinov Assignment.⁴⁸ The United States was therefore entitled to the assets of First Russian Insurance as against the corporation's creditors.⁴⁹

C. World War II and the *Bernstein* Letter

The other major event to come into act of state litigation in the United States is World War II. Art collection, display, and use in propaganda, was integral to the Nazi ideals.⁵⁰ Hitler's first major public building project was the Haus der Deutschen Kunst, meant to house the art that the Nazis deemed worthy (mostly art that propagated Nazi and Aryan ideals).⁵¹ The Nazi overhaul of the once-booming German modern art scene included the firing of art directors and professors, closing of galleries, and unjust "sales" of Jewish and modern art.⁵² The Nazis staged a show of "Degenerate Art" in 1937, haphazardly displaying modern and Jewish art confiscated from German museums and galleries, and a few weeks later commenced a total purge of these works from public German collections, removing nearly 16,000 works.⁵³ This massive collection, which included some of the most important modern works, was sold, stored, or destroyed, and many works were lost forever.⁵⁴ These acts are particularly important in the later discussion of the Gurlitt Collection. The Nazis proceeded to plunder works from all over Europe, both from private and state-owned collections. Jewish property was especially targeted for expropriation under the Nuremberg Laws.⁵⁵ The Einsatzstab des Reichsleiter Rosenberg, a special unit separate from the German military, carried out much of the Nazi looting during the

⁴⁸ *Id.* at 234.

⁴⁹ *Id.*

⁵⁰ LYNN NICHOLAS, *THE RAPE OF EUROPA* 9 (1994).

⁵¹ *Id.* at 10.

⁵² *Id.*

⁵³ *Id.* at 22-23.

⁵⁴ *Id.* at 23-25.

⁵⁵ Schwallie, *supra* note 8 at 289.

war.⁵⁶ It is estimated that the Nazis stole 20 percent of Western Art in Europe,⁵⁷ or about three million objects.⁵⁸ After the war, Alfred Rosenberg, the director of the Einsatzstab, was indicted in the Nuremberg Trials for various crimes, including crimes against humanity, and sentenced to death.⁵⁹

The act of state doctrine poses a major obstacle to the repatriation of artworks taken by the Nazis during World War II. Arguably, the character of the Nazi takings, the fact that they were often executed outside of Germany, and the fact that the Nazi regime no longer exists, necessitate some exception to the rigid hands-off rule mandated by the act of state. As will be explored here and more so later in this paper, courts have wrestled with how to apply act of state to Nazi expropriations, a complicated moral and legal question compounded by a case in 1954 and the so called *Bernstein* exception.

In early cases dealing with Nazi expropriations, the courts were constrained to uphold the takings by the act of state doctrine.⁶⁰ In *Holzer v. Deutsche Reichsbahn-Gesellschaft*, a German Jew brought suit against a German corporation for breach of an employment contract after he was terminated from his job.⁶¹ The corporation countered that “subsequent to April 7, 1933, the government of Germany adopted and promulgated certain laws, decrees, and orders which required persons of non-Aryan descent, of whom plaintiff is one, to be retired” and that these events, over which it had no control, terminated the contract.⁶² The court refused to adjudicate the case, stating that however objectionable the court might find the German law, “every sovereign State is bound to respect the independence of every other sovereign State, and the

⁵⁶ GERSTENBLITH, *supra* note 5 at 574.

⁵⁷ Jennifer Anglim Kreder, *State Law Holocaust-Era Art Claims and Federal Executive Power*, 105 NW. U. L. Rev. 315, 317 (2011).

⁵⁸ Schwallie, *supra* note 8 at 282.

⁵⁹ GERSTENBLITH, *supra* note 5 at 574.

⁶⁰ Schwallie, *supra* note 8 at 289.

⁶¹ *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 14 N.E.2d 798, 799-800 (C.A.N.Y. 1938).

⁶² *Id.*

courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”⁶³

A major turning point in cases dealing with Nazi expropriations was *Bernstein v. Van Heyghen Freres Societe Anonyme*. The case dealt with the property of a German corporation, the Arnold Bernstein Line, which owned a ship, the *Gandia*.⁶⁴ Bernstein, a German Jew, was taken forcibly into custody by Nazi officials in 1937 and imprisoned in Hamburg, where he was forced to execute documents transferring his business to a German citizen, Marius Boeger, without adequate consideration.⁶⁵ This was part of the Nazi’s program of eliminating non-Aryans from German social and economic life.⁶⁶ Bernstein later sued in U.S. court for the return of his vessels, or their value, and damages.⁶⁷

The Second Circuit cited the long-standing history of the act of state doctrine as upheld by the Supreme Court in *Underhill* and *Oetjen*, and refused to pass judgment upon the validity of acts of officials of Germany.⁶⁸ Perhaps sensing that such a strict application of this rule would be unjust, the court also bolstered its rationale with a different approach to the act of state. It stated that the real issue was whether the executive “has declared that the commonly accepted doctrine which we have just mentioned, does not apply.”⁶⁹ The court first cited a “Declaration” made by the Allied Powers in 1945, assuming power over Germany and abolishing all Nazi laws that had provided the basis of Hitler’s regime or discriminated on the basis of race or religion.⁷⁰ It also noted Sec. 2 of Article 1 of Law 52, the United States legislation in regards to the defunct Nazi state mandated that “property which has been the subject of transfer under duress . . . is hereby

⁶³ *Id.* at 800 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. at 303).

⁶⁴ *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 247 (2d Cir. 1947).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 247-248.

⁶⁸ *Id.* at 249.

⁶⁹ *Id.*

⁷⁰ *Id.* at 250.

declared to be equally subject to seizure of possession or title . . . by Military Government.”⁷¹ The court concluded that these were simply preliminary laws by the United States, which were never fully resolved by a domestic Restitution law.⁷² Again however, the court repeated that “the only relevant consideration is how far our executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar.”⁷³ Claims for repatriation, it stated, should be dealt with in a treaty, as they were “obviously matters of international cognizance and must be left wholly within the control of our own Executive.”⁷⁴ Bernstein alternately argued that the judgment at the Nuremberg Trial, which recognized as crimes the acts of the Nazi regime, worked to extend criminal liability to the instant case.⁷⁵ The court responded that application of this law was reserved for adjudication specifically at the Nuremberg Trials as part of the final settlement with Germany, and could not be extended to a New York court.⁷⁶

In another attempt to gain compensation, Bernstein again filed suit, seeking damages for the conversion of his stock interest in the Arnold Bernstein Line.⁷⁷ This time, the appeal to the Second Circuit was drastically changed by an intervention of the executive branch. The State Department issued Press Release No. 296 on April 27, 1949 from Legal Advisor Jack Tate, relieving “American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.”⁷⁸ This so called “*Bernstein Letter*” stated the United States government’s “opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 251.

⁷⁴ *Id.*

⁷⁵ *Id.* at 252.

⁷⁶ *Id.*

⁷⁷ *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954).

⁷⁸ *Id.*

controls” and stated that “it is this Government’s policy to undo the forced transfers.”⁷⁹ In view of this clear mandate from the executive branch, for whose benefit the act of state doctrine was developed, the Second Circuit reversed its earlier decision “by striking out all restraints based on the inability of the court to pass on the acts of officials in Germany during the period in question.”⁸⁰

The legacy and meaning of the *Bernstein* exception, both to the act of state doctrine and to Nazi era claims in general, have been contested and remain unsettled in courts.⁸¹ In *Banco Nacional de Cuba v. Sabbatino*, six justices seemed to reject it, stating, “we do not now pass on the Bernstein exception, but even if it were deemed valid, its suggested extension is unwarranted.”⁸² In *Banco Nacional de Cuba v. First City National Bank*, the Supreme Court was split as to whether the *Bernstein* exception did and should ever apply, and six of the nine justices thought the *Bernstein* exception should be rejected.⁸³ The Court noted that the *Bernstein* exception had been applied in other cases, on a case-by-case basis, especially when dealing with issues of international law.⁸⁴ Justice Powell’s concurrence stated that courts had a duty to hear cases like this unless it would interfere with foreign relations conducted by the executive branch, but rejected the *Bernstein* exception’s violation of separation of powers.⁸⁵ The dissent also refused to recognize the *Bernstein* exception, and stated that the act of state doctrine should be

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Frankel, *supra* note 6 at 68.

⁸² *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1964). This case, explained in more detail later in this paper, dealt with nationalization of sugar holdings by the Cuban government.

⁸³ *Banco Nacional de Cuba v. First Nat’l City Bank*, 406 U.S. 759, 759, 787-88 (1972). *First Nat’l City Bank* dealt with excess collateral that First National City had pledged to the Bank of Cuba to secure a loan. After the Cuban government nationalized and seized all of First National City’s holdings in Cuba, First National City sold the collateral securing the loan and kept the sale profits. The Bank of Cuba sued for the excess money realized from the sale above the value of the debt, and First National City asserted it was entitled to the money as damages stemming from the nationalization of its property in Cuba. As will be explained later, the Second Circuit and Supreme Court found that the Hickenlooper Amendment, which would have precluded the use of act of state, and therefore also of the *Bernstein* exception, did not apply to the facts of the case.

⁸⁴ *Id.*

⁸⁵ *Id.* at 775.

applied to all cases like *First National City Bank*, due to the nature of these types of issues as “political questions.”⁸⁶ The argument for maintaining the separation of powers seems most compelling for rejecting the *Bernstein* exception. The Supreme Court has maintained this separation through other judicial doctrines, the political question doctrine being the prime example, and as Justice Scalia stated in *W.S. Kirkpatrick & Co.*, “Courts in the United State have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.”⁸⁷

In *Alfred Dunhill of London v. Republic of Cuba*, however, the court relied heavily on an executive opinion issued to the court, analogizing *Bernstein* to the case at bar.⁸⁸ Justice Rehnquist’s plurality opinion in *Dunhill* would seem to support the application of the exception, as he noted that when the executive urges the act of state doctrine not to apply, one of the main rationales for the doctrine’s existence is eliminated.⁸⁹ Additionally, in *Republic of Austria v. Altmann*, the court hinted at act of state and the *Bernstein* exception, even though the case was decided on FSIA grounds: “Should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”⁹⁰

⁸⁶ *Id.* at 787-88.

⁸⁷ 493 U.S. at 409.

⁸⁸ *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 709 (1976). This case involved the Cuban government’s nationalization of business assets of five cigar manufacturers. The former owners of the cigar plants brought actions against international importers for the purchase price of cigars that had been shipped to them from the seized cigar plants.

⁸⁹ Frankel, *supra* note 6 at 77.

⁹⁰ *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004). This case was mainly concerned with the Foreign Sovereign Immunities Act, which the Supreme Court held could apply retroactively. The litigation surrounded a claim for the famous Gustav Klimt painting, *Portrait of Adele Bloch-Bauer*, which had been seized from its original owner by the Nazis, and held in an Austrian state museum.

Scholars also have noted that since the act of state doctrine deals with the ability of the court to adjudicate a claim, courts should not rely on executive pronouncements, as this “threatens to undermine the integrity and independence of the judiciary”⁹¹ and violates the separation of powers.⁹² Due to the confusion as to the doctrine’s application, lower courts have tended to defer unequivocally to the State Department’s assessment of the cases before them.⁹³ This not only confuses the position of the doctrine, but also produces inconsistent results across the circuits. Critics and proponents of the *Bernstein* exception readily await a crowning Supreme Court pronouncement when its application can be settled.

D. *Sabbatino* and The Cuban Revolution

The most widely accepted version of the act of state doctrine is derived from a case dealing with the nationalization of American assets after the Cuban Revolution.⁹⁴ Fulgencia Batista took power in Cuba in 1952 after a military coup and cancellation of the 1952 elections.⁹⁵ While the Cuban people were impoverished, the Batista government actively promoted United States business in Cuba.⁹⁶ In 1952, Fidel Castro, leading a group of dissidents, started to protest and fight the Batista government.⁹⁷ After Castro seized power on January 1, 1959, his regime began to expropriate United States property in Cuba.⁹⁸ The United States broke diplomatic ties in 1961, due in part to these expropriations.⁹⁹

⁹¹ Kathleen Karelis, Comment, *The Act of State Doctrine: Reconciling Justice and Diplomacy on a Case-by-Case basis*, 43 U. MIAMI L. REV. 1169, 1200 (1989).

⁹² Frankel, *supra* note 6 at 69.

⁹³ *Id.* at 97.

⁹⁴ Bazylar, *supra* note 4 at 334.

⁹⁵ The Guardian, *From the Archive, 11 March 1952: Batista’s Revolution*, THE GUARDIAN.COM (March 11, 2013), <http://www.theguardian.com/theguardian/2013/mar/11/cuba-batista-fifth-revolution-1952>.

⁹⁶ J.A. Sierra, *Fulgencio Batista*, HISTORYOFCUBA.COM (last visited March 19, 2014), <http://historyofcuba.com/history/funfacts/batist.htm>.

⁹⁷ Library of Congress Federal Research Division, *Country Profile: Cuba*, LIBRARY OF CONGRESS, 3 (Sept. 27, 2006), <http://lcweb2.loc.gov/frd/cs/profiles/Cuba.pdf>.

⁹⁸ *Id.*

⁹⁹ *Id.*

Banco Nacional de Cuba v. Sabbatino dealt with one of the trade embargos the United States imposed on Cuba after the 1959 Revolution. The United States Congress amended the Sugar Act of 1948 to reduce the sugar quota for Cuba, and the Cuban government responded by nationalizing and expropriating the property of several sugar companies that were controlled by United States citizens.¹⁰⁰ Proceeds from sugar shipments had been sold to an American company before the nationalization of the original Cuban corporation.¹⁰¹ Banco Nacional de Cuba was the financial agent of the Cuban government, and brought a suit to recover the proceeds, which it believed belonged to the Cuban government due to the nationalization law.¹⁰² The District Court found that the Cuban expropriation decree violated international law in that it was retaliatory, it discriminated against American nationals, and it failed to provide adequate compensation.¹⁰³

The Supreme Court, reversing the District Court and Court of Appeals, held that United States courts could not inquire into the validity of a decree by the Cuban government, even though the stock in the nationalized Cuban corporation had been owned principally by United States citizens.¹⁰⁴ In a partial reversal of earlier doctrine, the court stated that the act of state doctrine was not compelled by any notion of sovereign authority or international law.¹⁰⁵ Justice Harlan, writing the opinion, went so far as to state that, “the text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state,” before he conceded that nonetheless, the doctrine did have “constitutional underpinnings.”¹⁰⁶ This referred to the relationship between the executive and judicial branches, and the separation of powers regarding foreign affairs, as well as the

¹⁰⁰ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401-02 (1964).

¹⁰¹ *Id.* at 401

¹⁰² *Id.* at 405.

¹⁰³ *Id.* at 406-07.

¹⁰⁴ *Id.* at 439.

¹⁰⁵ *Id.* at 421.

¹⁰⁶ *Id.* at 423.

Federalist system, which, he feared, would not be left intact if courts were free to apply their own discretion to issues of Federal, national importance.¹⁰⁷ The most important contribution of the *Sabbatino* decision was its promulgation of factors used to determine when to apply the act of state doctrine. Justice Harlan stated that, “. . . 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.”¹⁰⁸

E. The Hickenlooper Amendment

In 1964, in response to the *Sabbatino* decision, Congress passed the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), which bars the use of the act of state doctrine for expropriations of property that occurred after January 1, 1959.¹⁰⁹ The Amendment contains two exceptions, however: first, in any case where the act of the foreign state was not contrary to law and was secured by an irrevocable letter of credit, and second, where the President requested application of the act of state doctrine in a letter filed with the court.¹¹⁰ However, courts have continued to adhere to the requirements set forth in *Sabbatino*, rather than this rule in the Hickenlooper Amendment, therefore leaving the influence of both the Amendment and the *Bernstein* exception unclear. Courts have generally interpreted the Hickenlooper Amendment narrowly, constraining its application to property that has a questionable title and is located in the United States.¹¹¹

¹⁰⁷ *Id.* at 423-24.

¹⁰⁸ *Id.* at 428.

¹⁰⁹ GERSTENBLITH, *supra* note 5 at 577.

¹¹⁰ 22 U.S.C. § 2370(e)(2).

¹¹¹ GERSTENBLITH, *supra* note 5 at 577.

In *Banco Nacional de Cuba v. First National City Bank*, the District court found that the Hickenlooper Amendment had overruled *Sabbatino*,¹¹² while the Second Circuit found that in some cases, *Sabbatino* still barred judicial intervention into all acts of foreign states.¹¹³ The Second Circuit analyzed both the original policy reasons surrounding the enactment of the Hickenlooper Amendment, and the House hearings regarding its application.¹¹⁴ Given that the amendment was “designed to be invoked by American firms in order to afford them ‘a day in court’ – presumably monetary recovery”, the court held that there was no basis for First National City, which had already offset its claims, to be allowed to bring suit under the Hickenlooper Amendment.¹¹⁵ The Supreme Court upheld this narrow reading stating, “In arriving at this conclusion, the [Second Circuit] court found inapplicable the Hickenlooper Amendment to the Foreign Assistance Act of 1961, 78 Stat. 1013, as amended, 22 U.S.C. s 2370(e)(2). I agree with my colleagues in leaving that determination undisturbed”.¹¹⁶ The Supreme Court held that the act of state doctrine did not bar the claim of First National City for assets expropriated by Banco Nacional of Cuba, and focused on a letter from the Legal Advisor of the Department of State directing the court that it had discretion not to apply the doctrine.¹¹⁷ Applying the *Bernstein* exception, the Court therefore relied on this statement by the executive branch, not the Hickenlooper Amendment, to bar the use of the act of state doctrine.

¹¹² *Banco Nacional de Cuba v. First Nat'l City Bank*, 270 F. Supp. 1004, 1007 (S.D.N.Y. 1969), *rev'd*, 431 F.2d 394 (2nd Cir. 1970), *vacated*, 400 U.S. 1019 (1971).

¹¹³ *Banco Nacional de Cuba v. First Nat'l City Bank*, 431 F.2d 394, 400-402 (2nd Cir. 1970), *vacated*, 400 U.S. 1019 (1971).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 780 (1972)

¹¹⁷ *Id.* at 764.

III. APPLICATION OF THE ACT OF STATE DOCTRINE IN ART CASES

There have been many cases dealing with expropriations of artworks by foreign governments. The limited scope of this paper only leaves room to discuss the few most pertinent to the act of state doctrine as it relates to art. The application of act of state in these cases gives some understanding to how a court may apply the doctrine in a future case, specifically involving something like the Gurlitt Collection, discussed in the third part of this paper.

A. *Menzel v. List* and the “Treaty Exception”

Menzel v. List was the first case litigated to involve art stolen during World War II.¹¹⁸ Menzel claimed to be the rightful owner of a painting, *Le Paysan a L’echelle* by Marc Chagall, which was discovered in 1962 in the possession of Albert List.¹¹⁹ Menzel and her husband had fled Brussels in 1941 before the occupation of the Nazi army, and had left the painting in their apartment.¹²⁰ The painting was taken by the Einsatzstab der Dienststellen des Reichsleiters Rosenberg, the organization authorized by Hitler to seize cultural heritage.¹²¹ After it was taken in for “safekeeping”, the painting was lost from 1941 to 1955 until List purchased it at the Perls Galleries in New York.¹²² Menzel properly demanded the return of the painting within the applicable statute of limitations and was denied by List.¹²³

The court held that the act of state doctrine did not apply in this case, due to the fact that the taking at bar failed to satisfy all four factors of the test set out in *Sabbatino*.¹²⁴ The court first looked into the relationship between the Einsatzstab and the German government, concluding

¹¹⁸ Gerstenblith, *supra* note 5 at 565.

¹¹⁹ *Menzel v. List*, 267 N.Y.S.2d 804, 807 (Sup. 1966).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 808.

¹²³ *Id.* at 807.

¹²⁴ *Id.* at 813.

that the operations of the Einsatzstab were financed by the National Socialist Party, not by the German government.¹²⁵ Secondly, the site of the expropriation was not within the territory of the foreign government since it occurred in Belgium, not in Germany.¹²⁶ Even if it could be argued that Belgium was occupied by Germany, the court held that the government of Belgium continued to exist during occupation.¹²⁷ Thirdly, the Third Reich was not longer a recognized government at the time of trial.¹²⁸ Lastly, the court held that the seizure of the painting was in violation of treaty obligations to the United States.¹²⁹ Specifically, the court examined the 1899 Hague Convention and the 1907 Hague Convention Respecting the Laws and Customs of War and Land.¹³⁰

The last basis for denying act of state, that the taking was in violation of the 1899 and 1907 Hague Conventions, involves the so called “treaty exception” to the act of state. This is derived from the phrase “in the absence of a treaty or other unambiguous agreement” in the *Sabbatino* decision.¹³¹ The so called “treaty exception” is not well developed, and was not the main basis for denial of act of state in *Menzel*, but may nonetheless be helpful in cases dealing with Nazi-era claims. After *Menzel* and *Sabbatino*, discussion of the “treaty exception” did not arise again until *International Group v. Islamic Republic of Iran*.¹³² There, an American Corporation with assets in Iranian Insurance companies filed suit regarding the 1979 “Law of Nationalization of Insurance Companies” passed in Iran, by which Iran seized control of all the corporation’s holdings.¹³³ However, at the time of nationalization, there was a Treaty of Amity

¹²⁵ *Id.* at 815.

¹²⁶ *Id.*

¹²⁷ *Id.* at 816.

¹²⁸ *Id.*

¹²⁹ *Id.* at 817.

¹³⁰ *Id.*

¹³¹ *Sabbatino*, 367 U.S. at 428.

¹³² Schwallie, *supra* note 8 at 294.

¹³³ *American Intern. Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 523 (D.C.D.C., 1980).

between the United States and Iran.¹³⁴ In a short paragraph about the applicability of the act of state doctrine, the court stated that “the act of state doctrine does not preclude judicial review where, as here, there is a relevant, unambiguous treaty setting forth agreed principles of international law applicable to the situation at hand.”¹³⁵

In a later case, *Kalamazoo Spice Extraction Co. v. Provisional Military Gov’t of Socialist Ethiopia*, dealing with a Treaty of Amity between the United States and Ethiopia, the court again found “that this is a controlling legal standard in the area of international law.”¹³⁶ There, the court allowed adjudication on the merits of a claim of expropriation by the Ethiopian government. It cautioned, however, that “it should be apparent that the 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”, therefore potentially leaving room for certain treaties with less “consensus” to be less influential in overriding act of state. This would seem a dangerous notion, however, that the judiciary is equipped to pass judgment on the influence of certain treaties or areas of international law. Indeed, this is precisely the kind of judicial inquiry that the act of state seeks to avoid.

This was the situation of the Fifth Circuit case *Callejo v. Bancomer*, where two Americans claimed that the Mexican exchange control regulations of 1982, which significantly decreased the strength of their Mexican investments, violated the Articles of Agreement of the International Monetary Fund to which Mexico was a party.¹³⁷ The court stated:

Although *Sabbatino* refers merely to “treat[ies] or other unambiguous agreements,” treaties are not all of a piece; they come in different sizes and

¹³⁴ *Id.* at 524.

¹³⁵ *Id.* at 525.

¹³⁶ *Kalamazoo Spice Extraction Co. v. Provisional Military Gov’t of Socialist Ethiopia*, 729 F.2d 422, 425-26 (6th Cir. 1984).

¹³⁷ *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1106 (5th Cir. 1985).

shapes, ranging from the Convention for the Unification of Certain Rules Relating to International Transportation by Air (“Warsaw Convention”) [. . .]to the United Nations Charter [. . . .]For this reason, the treaty exception was not stated in *Sabbatino* as “an inflexible and all-encompassing rule,” [. . .] instead, its application depends on pragmatic considerations, including both the clarity of the relevant principles of international law and the potential implications of a decision on our foreign policy.¹³⁸

This statement brings in the next phrase from *Sabbatino*, namely that the act of state doctrine will be applied “even if the complaint alleges that the taking violates customary international law.”¹³⁹ The Fifth Circuit in *Callejo* recognized the ambiguity involved in reconciling these two phrases: the first allows a broad exception while the second seems to negate or circumscribe it. *Callejo* stands for the proposition that not all treaties or agreements may be leniently applied to strike down the application of the act of state doctrine, without the addition of some “customary international law” violation. It is unclear what the status of this “customary international law” must be to pass muster. While the Supreme Court of New York in *Menzel* gave deference to two international conventions, the initial Second Circuit decision in *Bernstein* did not give deference to either a declaration promulgated by the United States, nor the judgments of the Nuremberg trials.¹⁴⁰

B. The Russian Art Cases

The *Stroganoff-Scherbatoff* litigation dealt with ramifications of expropriations during the Russian Revolution. Count Alexander Sergevitch Stroganoff was the original owner of two

¹³⁸ *Callejo*, 764 F.2d at 1118.

¹³⁹ *Sabbatino*, 367 U.S. at 428.

¹⁴⁰ *See Bernstein*, 163 F.2d at 250-52.

works, the painting *Portrait of Antoine Treist, Bishop of Ghent*, and a bust of Diderot.¹⁴¹ Stroganoff-Scherbatoff, a descendent and heir of Count Stroganoff, brought suit against the present owners, three private collectors and the Metropolitan Museum of Art, to recover the works.¹⁴² Both the portrait and the bust had been sold by order of the Trade Consulate of the U.S.S.R. in 1931 at the Lepke Kunst Auctions Hause in Berlin and had made their way through various owners to New York and London.¹⁴³ Both defendants argued that even if Stroganoff-Scherbatoff could prove ownership of the works through lineage, the act of state doctrine barred relief.¹⁴⁴

The court traced the evolution of the act of state doctrine through *Underhill*, *Oetjen*, and *Sabbatino*, giving deference to the multi-factor test set out in *Sabbatino*.¹⁴⁵ It recognized that the works were clearly appropriated by the Soviet Government pursuant to either the 1921 or 1923 decrees, which effectively nationalized much of the moveable property in the country.¹⁴⁶ However, Stroganoff-Scherbatoff argued that the illegal taking actually occurred in Berlin at the Lepke Auction, rather than in Russia, making the act of state doctrine inapplicable as a defense.¹⁴⁷

Interestingly, the court in *Stroganoff-Scherbatoff* looked to an English decision, *Princess Paley Olga v. Weisz*¹⁴⁸, of the British Court of Appeal.¹⁴⁹ The *Princess Paley Olga* case had nearly analogous facts, and the British court held, “Our Government has recognized the present Russian Government as the de jure Government of Russia, and our Courts are bound to give

¹⁴¹ *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 19 (S.D.N.Y., 1976).

¹⁴² *Id.*

¹⁴³ *Id.* at 20.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 21.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ (1929) 1 K.B. 718.

¹⁴⁹ *Stroganoff-Scherbatoff*, 420 F. Supp. at 22.

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.”¹⁵⁰ The District Court in *Stroganoff-Scherbatoff* applied similar logic, noting that the Soviet Government was recognized by the United States in 1933 and that the taking had been carried out under official direction from the government, both factors leading it to hold that act of state precluded the suit.¹⁵¹ The court differentiated this case from *Menzel*, due to the fact that the taking in that case was by the Nazi party, not a foreign state, and that the taking was outside the territorial boundaries of the expropriating nation.¹⁵²

The next case, *Agudas Chasidei Chabad v. Russian Federation*, is one that is ongoing to this day. It involved a collection of religious books, manuscripts, and other documents compiled by the spiritual leaders of Chabad, a Jewish spiritual movement started in Russia in the 18th Century.¹⁵³ The Russian Bolshevik government had seized a portion of the collection (the “Library”) during the 1917 Revolution and stored it in the Lenin Library, and then the Russian State Library.¹⁵⁴ A second portion of the collection (the “Archive”) was brought by one of the spiritual leaders to Poland in 1933 after he was exiled from the Soviet Union.¹⁵⁵ The Archive was taken first by the Germans, then by the Soviets, and was brought to the Russian State Military Archive.¹⁵⁶ After Agudas Chasidei Chabad became incorporated in New York in 1940, the organization tried unsuccessfully for 70 years to recover both collections and then filed suit against the Russian Federation.¹⁵⁷

¹⁵⁰ *Id.* (quoting Princess Paley Olga, 1 K.B. at 725).

¹⁵¹ *Id.* at 22.

¹⁵² *Id.*

¹⁵³ *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 938 (C.A.D.C. Cir. 2008).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 939.

One of Russia's claims in the litigation was the act of state defense.¹⁵⁸ The D.C. Court of Appeals denied the defense as to the Archive, but accepted it as grounds for dismissal for the Library.¹⁵⁹ The court first addressed the Archive, holding that Russia had not met its burden.¹⁶⁰ It noted that one of the requirements for the application of act of state was that the expropriation took place in the expropriator's sovereign territory.¹⁶¹ Russia attempted to argue that because the Archive was seized in German territory that was occupied by the Soviet Union, this fulfilled the requirement.¹⁶² However, after examining the records surrounding the expropriation, the Appellate court concluded that the Archive was actually seized in Poland, not Germany.¹⁶³ The court did not go into any further depth on this basis for denial of act of state, nor did it address Russia's theory that occupation of a territory constitutes sovereignty enough to fulfill the requirement (a position clearly refuted in *Menzel*).

As to the Library, the court noted that it could not give the requested relief to Chabad without having to invalidate the 1917-1925 events that occurred within Russia.¹⁶⁴ It cited several passages from *Sabbatino*, which it said "might militate against the application of the doctrine here."¹⁶⁵ Most notably, the court looked to a passage that suggested that the relevant considerations underlying the act of state doctrine might shift "where the taking government has been succeeded by a radically different regime."¹⁶⁶ However, because the Russian government in this case was actively defending its right to keep the Library, the court stated that the "application of *Sabbatino*'s invitation to flexibility would here embroil the court in a seemingly

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 950.

¹⁶⁰ *Id.* at 953.

¹⁶¹ *Id.* at 952.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 953.

¹⁶⁵ *Id.* at 954.

¹⁶⁶ *Id.*

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.”¹⁶⁷

Chabad attempted to counter that because the takings were religiously motivated, and not for a bona fide governmental purpose, they were violations of *jus cogens* norms, making it more acceptable for the Appellate court to render a decision.¹⁶⁸ The court rejected this argument for two reasons: first, because it would require the court to develop a ‘hierarchy’ of violations of international law in order to apply the doctrine, and second, because the *Sabbatino* court had already refused to apply an exception to act of state simply for violations of international law.¹⁶⁹ However, the court ultimately vacated the judgment in regards to the Library and remanded.¹⁷⁰ On remand, the District Court did not specifically address the act of state doctrine, focusing instead on the Foreign Sovereign Immunities Act as the basis for denial of Russian claims.¹⁷¹ Although the District Court ordered the return of the manuscripts, Russia has yet to return them, and has been issued sanctions for contempt of court in the amount of \$50,000 per day until it complies with the July 30, 2010 order.¹⁷²

Konowaloff v. Metropolitan Museum of Art is one of the most recent cases to apply the act of state doctrine to a case dealing with stolen art during the Russian Revolution. Konowaloff sued the Metropolitan Museum of Art for the return of Paul Cezanne’s *Portrait of Madame Cezanne*, to which he claimed rightful ownership.¹⁷³ Konowaloff was the great grandson and

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 955.

¹⁷⁰ *Id.*

¹⁷¹ *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 729 F. Supp. 2d 141, 144 (D.D.C., 2010). Russia refused to participate any further in the litigation after the Appellate decision. Because it could not therefore again raise the act of state defense, the District Court here did not address it.

¹⁷² *Chabad v. Russian Federation*, 915 F.Supp.2d 148, 155 (D.D.C., 2013).

¹⁷³ *Konowaloff v. Metropolitan Museum of Art*, 2011 WL 4430856, No. 10 Civ. 9126, at *1 (S.D.N.Y. Sept. 22, 2011), *aff’d* 702 F.3d 140 (2d Cir. 2012).

sole heir of Ivan Morozov, a Russian merchant and modern art collector.¹⁷⁴ Pursuant to a December 19, 1918 decree by the Bolshevik government, Morozov's art collection was deemed to be state property of the Russian Socialist Federated Soviet Republic, and his works, including the Cezanne, were taken from his possession without compensation.¹⁷⁵ Morozov and his family fled to France, where he died in 1921.¹⁷⁶

Through one of its trustees, Stephen C. Clark, the Metropolitan Museum of Art came into possession of the Cezanne work. Clark was active in the art trade following the Russian Revolution, and was alleged to have purchased the painting in secret through the Knoedler Gallery in New York.¹⁷⁷ The work hung in Clark's residence until his death in 1960, at which time it was bequeathed to the Metropolitan Museum of Art.¹⁷⁸ Due to the Morozov family's exile, lack of financial resources, and difficulties traveling to Russia, Konowaloff was prohibited for decades from discovering the true ownership of the painting.¹⁷⁹ However, after the opening of Russia under Perestroika and the death of his father in 2002, Konowaloff had the opportunity to start cataloguing his family's possessions, and learned about the Cezanne.¹⁸⁰

In its decision barring Konowaloff's claim due to the act of state doctrine, the Southern District of New York extensively cited previous jurisprudence and policy considerations, including *Underhill* and *Sabbatino*. However, the court granted much deference to previous decisions, namely *Pink* and *Stroganoff-Scherbatoff*, that "have consistently held Bolshevik/Soviet nationalization decrees to be official acts accepted as valid for the purpose of

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at *2.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at *3.

¹⁸⁰ *Id.* at *4.

invoking the act of state doctrine.”¹⁸¹ The court struck down Konowaloff’s attempt at distinguishing acts of the Soviet state from acts of Politburo, the executive arm of the Communist Party of the Soviet Union, which had engaged in the illegal sale of the work.¹⁸² It stated that because it was precluded by precedent from questioning the acts of the Soviet state in confiscating the work, it declined to decide whether Konowaloff had ownership interest in the painting, and therefore the legality of the sale abroad was of no consequence.¹⁸³ The court recognized that it was “being asked to “decide the legality of [an] official act of a sovereign”—precisely the sort of inquiry precluded by the act of state doctrine.”¹⁸⁴

Konowaloff’s second argument is especially pertinent for a discussion of Holocaust-era looted art, as will be discussed in regards to the Gurlitt Collections. He argued that due to the collapse of the Soviet Union in 1991, it was not a “presently extant and recognized regime” as to mandate application of the act of state doctrine.¹⁸⁵ The court stated that this reasoning would only apply where the previous government “has been completely rejected by the community of nations . . . or where the subsequent government has actively repudiated the acts of the former regime.”¹⁸⁶ The distinction between the Nazi and Soviet governments, the court stated, had also already been dealt with in *Stroganoff-Scherbatoff*, where the court had differentiated between an official act of the government and an act taken by an organ of a political party.¹⁸⁷ The District Court in *Konowaloff*, seemingly realizing that this was a potentially contradictory and

¹⁸¹ *Id.* at *5.

¹⁸² *Id.* at *3.

¹⁸³ *Id.* at *5.

¹⁸⁴ *Id.* at *6.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *7. It is notable that in *Konowaloff*, *Chabad*, and *Stroganoff-Scherbatoff*, the court refused to decide whether the Russian Federation was the successor in interest to the Soviet Union. This failure was most apparent in *Konowaloff* when the plaintiff brought forth evidence of Russia’s investigations into the illegal Soviet sales of 1928-1933. The court there stated, “Neither fact leads to the conclusion that the current Russian government has repudiated the ubiquitous nationalization of property under the Communist Regime.” *Id.* at *7.

unsatisfying basis, ultimately rejected Konowaloff's first argument on the grounds that it was not qualified "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."¹⁸⁸

The *Stroganoff-Scherbatoff*, *Chabad*, and *Konowaloff* holdings therefore narrowly avoided conflict with each other.¹⁸⁹ Although all three suits involved takings of art by the Russian Government during the Revolution, the factual differences work to differentiate the holdings of the cases. Three things can be noted after these cases with respect to takings by the Russian Government during the revolution: First, takings from private Russian citizens within Russia seem to be protected under the doctrine. Second, takings from Russian occupied territory during WWII (possibly not including Germany) seem not to be protected under the doctrine. And third, takings that were motivated by religious persecution may be exempted from act of state protection.¹⁹⁰ This last point is unclear, as the *Chabad* court alluded that evidence of selective persecution, while it would not necessarily bear on the ultimate ruling, would be helpful in determining the validity of Chabad's *jus cogens* argument.¹⁹¹ The *Konowaloff* litigation skirted the issue entirely. However, both courts did defer to the *Sabbatino* court's statement that the act of a foreign state would not be challenged even if it violated customary international law. It is therefore unclear what weight is given to evidence of systematic and targeted religious persecution, if held to be in violation of both customary international law and treaties.

¹⁸⁸ *Id.* (quoting *Chabad*, 528 F.3d at 954).

¹⁸⁹ Konowaloff was involved in another suit with Yale University involving a similar set of facts to the Metropolitan Museum of Art case. The District Court decision resulted in no new judicial pronouncements on the act of state, and closely paralleled the previous case. *See Yale U. v. Konowaloff*, 2014 WL 1116965, No. 3:09CV466 (D. Conn. March 20, 2014).

¹⁹⁰ *See Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (S.D.N.Y., 1976); *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 729 F. Supp. 2d 141 (D.D.C., 2010).

¹⁹¹ *Agudas Chasidei Chabad*, 729 F. Supp. 2d at 955.

C. *De Csepel* Case

Another recent art case dealing with act of state was *de Csepel v. Republic of Hungary*, ruled on by the D.C. Circuit Court of Appeals in 2013.¹⁹² Baron Mor Lipot Herzog was a Jewish art collector in Hungary who amassed one of the largest collections in Europe, known as the “Herzog Collection.”¹⁹³ After the Baron’s death in 1934, his three children inherited the collection, and it remained in Hungary until March 1944 when German troops were sent into the country.¹⁹⁴ The Hungarian government, collaborating with the Nazis, confiscated the Herzog Collection, some of which was transported to Germany and some of which was housed in the Hungarian Museum of Fine Arts.¹⁹⁵ After the end of the war, the Herzog family tried for decades to locate their stolen artworks, some of which were located and returned to them through lawsuits in Hungary.¹⁹⁶ De Csepel, a United States citizen and heir to Baron Herzog, filed in U.S. District court against the Republic of Hungary, as well as various Hungarian museums, primarily asserting a claim for bailment.¹⁹⁷

The Republic of Hungary had several arguments in its defense, one of which was that the claim was barred under act of state.¹⁹⁸ The court noted language from *McKesson Corp v. Islamic Republic of Iran*, noting that act of state could only be applied to official conduct that was undertaken by a sovereign, not by a private individual acting in a commercial capacity (even if the individual was a government).¹⁹⁹ The court in *de Csepel* concluded that because this case

¹⁹² *De Csepel v. Republic of Hungary*, 714 F.3d 591 (C.A.D.C., 2013).

¹⁹³ *Id.* at 594.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 595.

¹⁹⁶ *Id.* at 596.

¹⁹⁷ *Id.* De Csepel alleged that Hungary, a national university, and several museums had breached a bailment agreement, whereby they had agreed to hold possession, but not legal title, to the artworks, and to return them upon demand. The defendants had refused to return the works, thus allowing de Csepel to raise a claim.

¹⁹⁸ *Id.* at 604.

¹⁹⁹ *Id.* (quoting *McKesson Corp v. Islamic Republic of Iran*, 672 F.3d 1066, 1073 (D.C. Cir. 2012)). *McKesson* was one of several cases that have dealt with the act of state doctrine in relation to commercial activity. The court in that case held that the act of state doctrine did not shield Iran from liability after it expropriated an American company’s

dealt with breaches of bailment agreements (commercial acts), as opposed to sovereign acts, the doctrine did not apply.²⁰⁰

D. *Von Saher* Case

The most recent art case to touch on the act of state is *Von Saher v. Norton Simon Museum of Art at Pasadena*, a Ninth Circuit opinion from June 6, 2014.²⁰¹ Although the main issue in the case was not the act of state doctrine, but foreign affairs pre-emption, the court remanded for further development on several issues, including act of state.²⁰² The case dealt with two panels of *Adam* and *Eve* painted in the sixteenth century by Lucas Cranach the Elder.²⁰³ The Plaintiff, Marei Von Saher, claimed to be the rightful owner of the panels, which she alleged were taken illegally from her husband's family by the Nazis, and now hang in the Norton Simon Museum.²⁰⁴ The works had passed through several hands, most notable of which was their 1961 sale from the Dutch government to George Stroganoff Scherbatoff, who claimed the paintings had been wrongly seized by the Soviet Government from his family in the early 20th Century.²⁰⁵

In its discussion of the foreign affairs doctrine, the Ninth Circuit touched on several issues intimately related to act of state, including the federal government's policies toward Nazi-

interest in dairy stock. The court found that Iran did not issue any formal governmental edict or law, but took control of the corporation's board of directors and used its majority shareholder position to freeze out the corporations board members and stop paying dividends, all acts of private citizens within a corporation.

²⁰⁰ *de Csepel*, 714 F.3d at 604. The court additionally addressed an issue in connection with the "expropriation exception" to the FSIA, which harkens back to the Russian art cases. The "expropriation exception" abrogates sovereign immunity in any case where "rights in property taken in violation of international law are in issue." 28 U.S.C. §1605(a)(3). While the court recognized that takings by the Hungarian government from its own citizens were not in violation of international law, it also noted that, due to the "host of anti-Semitic laws passed by Hungary during WWII", the *de Csepel* family was no longer considered by the government to be citizens. 714 F.3d at 597. This important distinction was not ultimately relevant to the case, since the "taking" at issue was for a bailment breach occurring after WWII, but it could be important for future act of state cases. *Id.* In both *Stroganoff-Scherbatoff* and *Chabad*, the court had left unclear whether religious persecution would offend some "customary international law" under act of state.

²⁰¹ *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 12-55733, 2013 WL 2535473, at *1 (9th Cir. June 6, 2014).

²⁰² *Id.* at *11.

²⁰³ *Id.* at *1.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at *4.

looted art as embodied in the London Declaration and policy of external restitution following World War II, the 1998 Washington Conference on Holocaust Era Art Assets, and the 2009 Prague Holocaust Era Assets Conference resulting in the Terezin Declaration.²⁰⁶ Perhaps most interesting was its attitude towards a brief filed by the United States, via the Solicitor General, urging a denial of a petition for writ of certiorari in an earlier version of the *Von Saher* case.²⁰⁷ Although the District Court below had put much emphasis on the statement in this brief that “[t]he United States established a deadline to ensure prompt submission of claims and achieve finality in the wartime restitution process,” and the United States has a “continuing interest in that finality when appropriate actions have been taken by a foreign government concerning the internal restitution of art,” the Ninth Circuit found many reasons why giving serious weight to executive pronouncements was not warranted in this case.²⁰⁸ What effect this renouncement of a *Berstein*-esque executive policy statement will have on the future act of state doctrine is hard to tell.

In regards to the act of state, the Ninth Circuit in *Von Saher* decided that “we cannot decide that issue definitively on the record before us” and remanded for further development.²⁰⁹ The main issue, it concluded would be “whether the conveyance to Stroganoff constituted an official act of a sovereign, which might trigger the act of state doctrine.”²¹⁰ It stated that “[i]f on remand, the Museum can show that the Netherlands returned the Cranachs to Stroganoff to satisfy some sort of restitution claim, that act could ‘constitute a considered policy decision by a government to give effect to its political and public interests ... and so [would be] ... the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of

²⁰⁶ *Id.* at *7.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at *10.

²⁰⁹ *Id.* at *11.

²¹⁰ *Id.* at *12.

international affairs.”²¹¹ Issues on remand would, the Court hinted, include public versus private interests, the “commercial acts” exception, the Hickenlooper Amendment, and the treaty exception.²¹²

III. GURLITT COLLECTIONS

On February 28, 2012, German Customs officials discovered a treasure trove of 1,406 artworks in the Munich flat of Cornelius Gurlitt, the son of German art dealer Hildebrand Gurlitt.²¹³ The stash included works by many renowned artists including Marc, Durer, Kirchner, and Kokoschka, totaling about \$1.3 billion dollars.²¹⁴ Nearly two years later on February 10, 2014, about 60 more works, including several by Renoir and Monet, were discovered at Gurlitt’s home in Salzburg.²¹⁵ Cornelius Gurlitt had sold several of the works prior to the initial raid, including a Beckmann painting, *Lion Tamer*, which was sold at a Cologne auction house in 2011.²¹⁶ The descendants of Alfred Flechtheim, a Jewish art dealer and collector who lived in Germany, have already claimed the painting, and other families have come forward to claim works found in the stash.²¹⁷ The Gurlitt Collection is currently undergoing scrutiny to discover which works were stolen and may be subject to restitution, and will likely largely go to the Kunstmuseum in Bern, which Cornelius Gurlitt designated as the sole beneficiary of his estate.²¹⁸

²¹¹ *Id.* at *12, citing *Clayco Petrol. Corp. v. Occidental Petrol. Corp.*, 712 F.2d 404, 406-07 (9th Cir. 1983).

²¹² *Id.* at *12-13.

²¹³ Phillip Oltermann, *Picasso, Matisse and Dix among works found in Munch’s Nazi art stash*, THE GUARDIAN (November 5, 2013), <http://www.theguardian.com/artanddesign/2013/nov/05/picasso-matisse-nazi-art-munich>.

²¹⁴ *Id.*

²¹⁵ *Salzburg art stash ‘more important than Munich’*, BBC NEWS (February 14, 2014), <http://www.bbc.co.uk/news/world-europe-26187296>.

²¹⁶ Oltermann, *supra* note 205.

²¹⁷ Oltermann, *supra* note 205.

²¹⁸ Mary M. Lane and Bertrand Benoit, *Inside the Death Bed Deal With Cornelius Gurlitt to Return Art Looted by Nazis*, THE WALL STREET JOURNAL (May 14, 2014), <http://online.wsj.com/news/articles/SB10001424052702304908304579561840264114668>.

In the meantime, it provides the perfect model on which to speculate as to the legality and efficacy of the act of state doctrine on stolen art cases.

A. History

Hildebrand Gurlitt was an art historian and dealer who, under the Nazi regime, was appointed as a dealer for the Fuhrermuseum in Linz.²¹⁹ Gurlitt was also one of four dealers appointed by the Nazi leadership to the Commission for the Exploitation of Degenerate Art, which marketed confiscated art abroad during World War II.²²⁰ Originally a museum director, Gurlitt had been fired due to his sales of modern “degenerate” art and his Jewish heritage.²²¹ However, because of his renown as a dealer and contacts both inside and outside of Germany, he proved invaluable to the Nazis in their art thefts and dealings.²²² In his new role with the Nazi regime, Gurlitt had access to a wide breadth of confiscated art, much of which he kept for himself. After the war, Gurlitt told Americans that his collection had been destroyed in the 1945 firebombing of Dresden.²²³ His Jewish heritage and noted dislike of Nazi principles convinced the allies to let him go free.²²⁴ When he died in a car crash in 1956, Gurlitt’s son Cornelius presumably inherited the works his father had secretly kept.²²⁵

It is unclear how many of the works found in the stash were bought by Hildebrand Gurlitt legally, in his profession as an art dealer, and how many were derived from his trades and

²¹⁹ *Hildebrand Gurlitt - der Sachse hinter dem Münchner Kunstschatz*, FREIE PRESSE (in German) (November 5 2013), <http://www.freiepresse.de/NACHRICHTEN/TOP-THEMA/Hildebrand-Gurlitt-der-Sachse-hinter-dem-Muenchner-Kunstschatz-artikel8592544.php>.

²²⁰ Christopher Dickey, *The Man Who Hoarded Art for the Nazis*, THE DAILY BEAST (November 5 2013), <http://www.thedailybeast.com/articles/2013/11/05/the-man-who-hoarded-art-for-the-nazis.html>.

²²¹ *Id.*

²²² *Ibn haul of art treasures seized by Nazis found in squalid Munich flat*, DAILY MAIL UK (November 3, 2013), <http://www.dailymail.co.uk/news/article-2486251/1bn-haul-art-Picasso-Renoir-Matisse-squalid-Munich-flat.html>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Dickey, *supra* note 212.

dealings in confiscated art with the Nazis.²²⁶ Although Cornelius claims that his father legally acquired all of the works, experts have strongly questioned this presumption.²²⁷ It is estimated that at least 300 of the works were exhibited at the Degenerate Art Exhibition, held in Munich in 1937.²²⁸ These “degenerate” works were taken from German public museums and galleries around the country.²²⁹

One of the essential questions in any suit to return these works to their original owners will be: Were the works legally bought and sold by Hildebrand Gurlitt? For many of the works, this may never be known. Other works were likely sold to Nazi dealers under duress or bribery as a way of escaping persecution. Still others were summarily taken from museums and galleries under no legal pretense. The difficulty arises in determining which of these sales were forced, which were legal under German law at the time, and which were expropriations.

The primary laws that allowed Hitler and the Nazi party to “legally” pass much of the 1930s and 40s legislation were the 1933 Reichstag Fire Decree and the Enabling Act.²³⁰ The Reichstag Fire Decree was enacted following the burning of the Reichstag, the building that housed the German legislative body.²³¹ The Decree suspended the civil liberties guaranteed by the Weimar Constitution and centralized power in Berlin.²³² The Enabling Act was an amendment to the Weimar Constitution that gave the German Cabinet, run by Hitler, the power to enact laws without the involvement of the Reichstag.²³³ Following this, Hitler’s cabinet was able to “legally” commence its reign of rule by decree.

²²⁶ Oltermann, *supra* note 205.

²²⁷ *Nazi-looted art: German collector says he owns pictures*, BBC NEWS (November 17, 2013), <http://www.bbc.co.uk/news/world-europe-24977814>.

²²⁸ *Supra* note 214.

²²⁹ DAVID CLAY LARGE, BERLIN 283 (2000).

²³⁰ *Id.* at 262.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

B. Application of the Act of State Doctrine

Application of the act of state doctrine depends largely on the approach any given court chooses to take. Although there is clearly much debate surrounding the correct application (and even application at all) of the act of state doctrine, most courts defer to the four-factor test set out in *Sabbatino*. However, *Sabbatino* itself was not clear about whether this four factor standard really applied, and named several other “considerations” that a court might take into account.²³⁴ In addition, some courts have incorporated the exceptions, the “treaty exception” and the *Bernstein* exception, as factors to consider when determining whether to apply act of state.²³⁵ Act of state will be an issue for any of the works in the Gurlitt Collection that were privately owned. This includes works taken from private individuals, galleries, or collections, or any works that were taken while on loan to museums. A large part of the Gurlitt Collection consists of works from the 1937 Degenerate Art Exhibit, which were all taken from public German museums. These works, because they were publicly owned by the German state at the time of their removal, are not subject to restitution claims, unless it can be shown that they were privately owned. It should therefore be noted that in this hypothetical act of state assessment, much depends on the specific facts surrounding the works, as will doubtless become more clear as the collection is sorted and catalogued.

The Gurlitt Collection works should first be assessed against the factors set out in *Sabbatino*. First is the issue of whether the expropriations occurred within the foreign nation’s own sovereign territory. Here, many of the works held in the collection were amassed from inside Germany; from German museums or private collections located within the country. Were this found not to be the case, in the situation where it was clear that a work was taken from an

²³⁴ Restatement (Third) of Foreign Relations Law § 443 (1987).

²³⁵ Frankel, *supra* note 6 at 89.

occupied country, the court would have a similar situation to the *Menzel* case, and given that precedent, the expropriation would likely not be protected under act of state. As research on the collection continues, there is some indication that many works may have been taken from Poland and France, and these works would fall into this category.²³⁶

The second and third issues established in *Sabbatino* can here be discussed concurrently. They state that the taking must have been by a foreign sovereign government, extant and recognized at the time of suit.²³⁷ The Nazi government was doubtless a foreign government in the 1930s and 1940s, and Germany is doubtless a foreign government in the present day. The Nazi government, however, is no longer recognized by the United States. Obviously, the counter argument to this is that the German government is recognized (and an ally). However, one could argue that due to the total suspension of the Weimar Constitution by Hitler and the Nazi party and the complete regime change after World War II, the Nazi government was a separate government that is no longer in existence. This is what the *Sabbatino* court recognized when it stated, “The balance of relevant considerations may also be shifted if the government which perpetuated 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.”²³⁸ Again, in *First City National Bank*, the court distinguished *Bernstein* on the basis that the taking in *Bernstein* was perpetrated by a foreign government no longer in existence.²³⁹ This was a sentiment echoed in *Konowaloff*, where the court stated that it may be relevant that the expropriation was carried out by an entirely different regime where the previous government “has been completely rejected by the community of nations . . . or where the subsequent government has actively repudiated the

²³⁶ Annika Zeitler, *Better networking to improve provenance research*, DEUTSCHE WELLE (March 2, 2014), <http://www.dw.de/better-networking-to-improve-provenance-research/a-17465363>.

²³⁷ *Sabbatino*, 367 U.S. at 428.

²³⁸ *Id.*

²³⁹ Frankel, *supra* note 6 at 76.

acts of the former regime.”²⁴⁰ Although a majority of the court in *First City National Bank* rejected the application of the *Bernstein* exception, it can be argued that this rejection was limited to the facts of that case, which dealt with assets expropriated by the Cuban government, and the exception may be applied to another Nazi-era case for precisely that reason.

The “treaty exception” can also be helpful in the case of the Gurlitt Collection. Several treaties or conferences that establish customary international law were in force during World War II. However, application of the “treaty exception” may be limited, due to the previously discussed disagreement between the circuits about its application. Nonetheless, the 1907 Hague Convention respecting the Laws and Customs of War on Land was signed by both the United States and Germany.²⁴¹ Article 56 provided that property of municipalities, charities, and arts and sciences institutions was to be treated as private property.²⁴² Further, seizure of this property was forbidden, and would be subject to adjudication in court.²⁴³ The argument to be made here would be similar to that made in *Menzel*, which proved part of a winning argument for plaintiffs.

In addition to the 1907 Hague Convention, other applicable declarations would lend more weight to the “treaty exception” to act of state. The 1998 non-binding Washington Principles called for nations to facilitate the identification of Nazi looted art and to search for “just and fair” solutions for repatriation.²⁴⁴ The establishment of these principles, and their subsequent reinforcement in the Terezin Declaration of 2009²⁴⁵ can be seen as “an international obligation to provide claimants a means to seek restitution.”²⁴⁶ Because the Washington Principles were not

²⁴⁰ Konowaloff, 2011 WL 4430856, at *6.

²⁴¹ Schwallie, *supra* note 8 at 300.

²⁴² GERSTENBLITH, *supra* note 5 at 544.

²⁴³ *Id.*

²⁴⁴ U.S. State Dep’t, *Washington Conference Principles on Nazi-Confiscated Art*, in WASHINGTON CONFERENCE ON HOLOCAUST-ERA PROCEEDINGS 971, 971-72 (1998), available at <http://www.state.gov/p/eur/rt/hlcst/122038.htm>.

²⁴⁵ U.S. DEPT. STATE, TEREZIN DECLARATION (June 30, 2009), available at <http://www.state.gov/p/eur/rls/or/126162.htm>.

²⁴⁶ Kreder, *supra* note 61.

binding, it is unclear whether this can be held to be a controlling legal standard, although it is of note that the Ninth Circuit in *Von Saher* gave them some weight in dealing with the foreign affairs doctrine.²⁴⁷

There are many problems with relying on the *Bernstein* exception for cases involving works like the Gurlitt collections. One is that the State Department, presumably, must issue a letter. If no letter is issued to the court, there is no indication that it can *sua sponte* request one or proceed on the merits as if one had been issued. This holds true even though the policy expressed in the original *Bernstein* letter very likely still applies to subsequent Holocaust-related cases. Indeed, some courts view the absence of a Bernstein letter as an implied mandate to apply act of state.²⁴⁸ This brings up a second issue, which is the confusion as to its application among the courts, as evidenced in *First City National Bank, W.S. Kirkpatrick, and Riggs National Corp. v. Commission*, and described earlier in this paper.²⁴⁹ Even if the State Department were to issue a letter, there is no guarantee that it would be controlling. Many of the same policy considerations that arose in *Bernstein* still exist today (religious persecution, change of regime, strong U.S. policy towards holocaust-era repatriation), and would seem to warrant acceptance of the letter. However, the Supreme Court, especially in *First City National Bank*, has been wary (to say the least) about whether these considerations should apply.

Another problem with applying the *Bernstein* exception may be that United States and German relations have changed dramatically since 1954. As stated above, there is a good argument that the Nazi government does not fulfill the “sovereign government extant and

²⁴⁷ Bert Demarsin, *The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer- The limitation and Act of State Defenses in Looted Art Cases*, 28 *Cardozo Arts & Ent. L.J.* 255, 309. (2010).

²⁴⁸ Frankel, *supra* note 6 at 90; see *Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co*, 652 F.2d 231, 233 (2d Cir. 1981).

²⁴⁹ See *Riggs National Corp. v. Commission*, 163 F.3d 1363, 1367 n.6 (D.C. Cir. 1999), (“While not yet endorsed by a majority of the Supreme Court, some justices have suggested an exception to the doctrine for cases in which the executive branch has represented in a so-called ‘Bernstein’ letter”).

recognized” prong of the *Sabbatino* test, but this is not dispositive of current foreign relations with Germany. At the time *Bernstein* was decided, the United States government, as the recent victor of war, may have felt more power to interfere in German affairs, but this is not currently be the case.²⁵⁰ This may especially be true in the case of the Gurlitt Collection where the German government insists that it is handling repatriation requests. On April 7, 2014, Cornelius Gurlitt came to an agreement with the Bavarian State Ministry and the German Federal Commissioner for Culture and Media to allow provenance and restitution research to be carried out on the trove of works.²⁵¹ The agreement included the cooperation of a taskforce called “Schwabinger Art Trove”, set up specifically to deal with Gurlitt’s collection, as well as the lostart.de database, the Limbach Commission, and Berlin’s Center for Provenance Research.²⁵² Given Germany’s large investment in the case, it seems clear that adjudication of one of these claims by a United States court may serve to undermine German efforts and cause tension. In addition, it would seem better policy to allow provenance and art history experts, not the court, to carry out research regarding the history of these works, especially considering the wealth of information that continues to be discovered.²⁵³ This kind of judicial interference in both foreign relations and matters outside the court’s area of expertise area exactly what the act of state doctrine seeks to avoid.

²⁵⁰ Schwallie, *supra* note 8 at 303.

²⁵¹ Bayerisches Staatsministerium der Justiz, Joint Press Release 64/2014, “*Schwabinger Art Trove*”: *Agreement between the Free State of Bavaria, the Federal Government and Cornelius Gurlitt: Provenance research to continue and restitution in accordance with the Washington Principles on a voluntary basis for the Schwabinger Art Trove; Unproblematic works belonging to Mr. Gurlitt will be returned*, (available at www.gurlitt.info/files/07-04-2014-EN.pdf).

²⁵² Zeitler, *supra* note 228.

²⁵³ See, eg. Melissa Eddy, *Victoria and Albert Museum to Publish Nazi-Era ‘Degenerate Art’ Inventory Online*, THE NEW YORK TIMES (January 17, 2014), artsbeat.blogs.nytimes.com/2014/01/17/victoria-and-albert-museum-to-publish-nazi-era-degenerate-art-inventory-online/. This is now available at: <http://www.vam.ac.uk/content/articles/e/entartete-kunst/>.

IV. CONCLUSION

Although the act of state doctrine has a long history in United States jurisprudence, there is debate over whether the doctrine is even good policy, given that so many transactions in our modern world are international and involve some act by a foreign government. Some courts agree with this assessment, arguing that the power of the judiciary to adjudicate claims should be sovereign and not bound by executive pronouncements.²⁵⁴ Others, such as that in *Dunhill*, see the doctrine as unnecessary, stating, “Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.”²⁵⁵

There is also a strong and longstanding United States policy aimed at redressing Holocaust-era claims, from the *Bernstein* letter to the Washington Conference and the Holocaust Victim Redress Act.²⁵⁶ To many scholars, these agreements “demonstrate that there is a clear agreement on applicable law for situations of Nazi-appropriated art. . . . [and] the judiciary should feel comfortable examining the validity of Nazi takings in claims for the restitution of art without hindrance by the act of state doctrine.”²⁵⁷ Until a clear pronouncement from the Supreme Court about the place of act of state in our modern world, or legislative action to cure this ambiguity, international repatriation claims will be plagued with uncertainty.

²⁵⁴ See *First Nat'l City Bank*, 406 U.S. at 790-92 (Brennan, J., dissenting).

²⁵⁵ *Alfred Dunhill of London, Inc.*, 425 U.S. at 710-11.

²⁵⁶ Holocaust Victims Redress Act, Pub. Law 105-158, February 13, 1998, available at <http://www.gpo.gov/fdsys/pkg/PLAW-105publ158/pdf/PLAW-105publ158.pdf>.

²⁵⁷ Schwallie, *supra* note 8 at 305.