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The Marcos Cases: A Consideration of the Act of State Doctrine and the Pursuit of the Assets of Deposed Dictators

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I. INTRODUCTION

On February 25, 1986, dictator Ferdinand Marcos and his wife Imelda fled the Philippines for Hawaii, the result of a civilian uprising caused by discontent under his rule. His successor, President Corazon Aquino, has tried to institute various reforms to repair the years of neglect and corruption of the Philippine government created during Marcos' rule. Among these reforms is the Commission on Good Government.

The Commission, chaired by former Philippine Senator Jovito Salonga, has among its purposes "[t]he recovery of all ill-gotten wealth accumulated by former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates, whether located in the Philippines or abroad . . . ." To achieve the Commission's goals, the Philippine government has brought suits

in United States courts to recoup real property allegedly taken improperly by the Marcoses, their family and associates.\(^4\) Also, since the Marcoses' arrival in the United States, citizens of the Philippines and the United States have independently sued Marcos in American courts, alleging various human rights claims.\(^5\)

In this spate of litigation against Ferdinand and Imelda Marcos, two cases stand out. Recently two federal circuit courts reached conflicting decisions on similar claims initiated by the Philippine government to recover property allegedly usurped by the Marcoses through the abuse of their power as leaders of the Philippines.\(^6\) Specifically, the courts were inconsistent in their interpretation of the act of state doctrine. The implications of such a conflict are enormous. In a judicial context, this conflict leaves future courts in a precedential bind, unsure of the correct interpretation of the act of state doctrine. Moreover, the political and diplomatic consequences of the conflict are immeasurable. The relationship between the Philippine and American governments, which is of economic and strategic importance to both,\(^7\) is indirectly affected by the in-

\(^4\) Marcos, 806 F.2d at 344, Republic of Philippines v. Marcos, 818 F.2d 1473 (9th Cir. 1987), reh'g granted, 832 F.2d 1110 (9th Cir. 1987).

\(^5\) See e.g., Sison v. Marcos, No. 86-0225 (D. Hawaii 1986), appeal docketed, No. 86-2496 (9th Cir. 1986), Hilao v. Marcos, No. 86-390 (D. Hawaii 1986), appeal docketed, No. 86-2449 (9th Cir. 1986), and Trajano v. Marcos, No. 86-0207 (D. Hawaii 1986), appeal docketed, No. 86-2448 (9th Cir. 1986), where plaintiffs alleged that Marcos had approved acts of murder, torture, kidnapping and detention. These claims were dismissed by District Court Judge Harold Fong in Honolulu and have been appealed. Further action is pending the en banc decision of the Ninth Circuit in the Marcos case. Also, in Ortigas v. Marcos, No. C 86-0975 (N.D. Cal. 1987), appeal docketed, No. 87-1706 (9th Cir. 1987) and Clemente v. Marcos, No. C 86-1449 (N.D. Cal. 1987), appeal docketed, No. 87-1707 (9th Cir. 1987), plaintiffs alleged human rights abuse claims. District Court Judge Spencer Williams of the Northern District of California dismissed these claims. These cases have been linked to the above cases for appeal, since they have already been briefed. In Estate of Domingo v. Philippines, No. C 82-1055V (D. Wash. 1982), Marcos and Philippine intelligence agents were charged in a 1981 murder of two dissidents by their decedents. Although granted immunity from liability in 1982, Marcos has been deposed twice. The trial is scheduled for April, 1989. See also Alien Tort Claims Act — Act of State Doctrine — Act of State Doctrine Requires Dismissal of Human Rights Claims Brought Against Former Philippine President Residing in the United States, 27 VA. J. INT'L L. 433 [hereinafter Haron].

Marcos has also been indicted by a federal prosecutor on charges that he fraudulently acquired Manhattan real estate valued at hundreds of millions of dollars. N.Y. Times, October 22, 1988, at 1, col.4.


\(^7\) See Declaration of Michael H. Armacost, Under Secretary of State for Political Affairs, 25 INTERNATIONAL LEGAL MATERIALS 407–09 (1986).
consistency. The domestic strength of the Aquino government is also affected, along with the positions of Marcos loyalists and other Philippine dissenters.

This Note analyzes the legality and political importance of the Aquino government's pursuit of real property in the United States controlled by the Marcoses. First, the history of the act of state doctrine will be briefly discussed. Second, the use of the act of state doctrine in the Marcos cases will be examined, as well as the courts' interpretations of the doctrine in those cases. The reasons for the inconsistent interpretations of the doctrine and important legal issues not considered by the courts will then be raised. This Note concludes by reporting on and advocating suggestions for legislation or treaties, including the International Emergency Economic Powers Act, that may facilitate the pursuit of fleeing dictators' assets.

II. THE CASES BROUGHT BY THE AQUINO GOVERNMENT TO RECOVER PROPERTY

In the two principal actions brought by the Aquino government to recover property, the Philippines sought to stop the Marcoses from selling any of the contested property. In Republic of Philippines v. Marcos,8 the Second Circuit unanimously affirmed the district court's judgment granting a preliminary injunction in favor of the Philippine government.9 The injunction restrained the alienation of five pieces of real property located in New York. The defendants were corporations owning the properties in question as well as the Marcoses and some of their associates, who allegedly are the beneficial owners of the properties.10

The Aquino government alleged in its complaint that a conspiracy existed by which property was acquired by or for the Marcoses' benefit but placed in the names of others.11 Financing for the property purchases allegedly came from assets stolen from the Philippine government.12 The complainants further alleged that an injunction was necessary to restrict the defendants from liquidating the property and further dissipating the government's money.13 The
plaintiffs sought the injunction pending the determination of the true ownership of the land.\(^\text{14}\)

The district court granted the preliminary injunction, finding irreparable harm to the plaintiffs and probable ownership by the Marcoses.\(^\text{15}\) After finding federal jurisdiction over the matter, the Second Circuit affirmed, imposing a constructive trust on the property.\(^\text{16}\) The court rejected the defendants' defenses of a lack of standing or justiciability, the act of state doctrine, lack of due process, sovereign immunity and forum non conveniens.\(^\text{17}\) The defendants' petition for a writ of certiorari to the United States Supreme Court was denied.\(^\text{18}\)

In *Republic of the Philippines v. Marcos*,\(^\text{19}\) a similar complaint was brought by the Aquino government in the Ninth Circuit. Unlike the Second Circuit claim, this complaint did not seek the recovery of specific property exclusively but rather of all wealth allegedly obtained by the Marcoses through the commission of various depredations while in power.\(^\text{20}\) The complaint made eleven claims, three of which were based on the Racketeer Influenced and Corrupt Organizations Act (RICO).\(^\text{21}\) The other eight claims, which included fraud, theft, and expropriation, were pendent.\(^\text{22}\)

The plaintiffs claimed that the Marcoses abused their authority by converting government property to their family and associates.\(^\text{23}\) The complaint also alleged that the Philippine government under

\(^{14}\) Id. at 349.


\(^{16}\) 806 F.2d at 355.

\(^{17}\) Id. at 344–61.


\(^{19}\) 818 F.2d 1473 (9th Cir. 1987), reh’g granted, 832 F.2d 1110 (9th Cir. 1987).

\(^{20}\) Id. at 1475–76.

\(^{21}\) Id. at 1477. *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. § § 1961–68 (1982). The purpose of the statute as stated in Section 1 of Pub. L. 91-452 is “to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.”

\(^{22}\) 818 F.2d at 1476. The concept of pendent jurisdiction has to do with a party's simultaneous assertion of claims resting on both federal and state law. It is applied when a federal court's jurisdiction depends on the nature of the claim being asserted, i.e., a federal question. If such a claim is asserted the court also has jurisdiction to determine any claim by that party which is based on state law and arises out of the same fact situation. *See F. James & G. Hazard, Civil Procedure* 62 (3rd. ed. 1985).

\(^{23}\) 818 F.2d at 1476.
Marcos' rule constituted a RICO enterprise engaged in a pattern of racketeering activity, including mail and wire fraud and knowing transportation of stolen goods in foreign commerce.\(^{24}\) In contrast with the Second Circuit case, this complaint sought the freezing and eventual return of property located throughout the world.\(^{25}\)

The district court granted the plaintiffs' request for a preliminary injunction to freeze the property to prevent its liquidation, ruling that RICO established a basis for federal jurisdiction.\(^{26}\) The injunction was based on the plaintiffs' pendent claims for a constructive trust and accounting.\(^{27}\) The court held that the plaintiffs, as in the Second Circuit, had a substantial likelihood of prevailing on the merits, and that irreparable harm would be caused by not prohibiting alienation of the property.\(^{28}\)

The Ninth Circuit court overruled the district court. The court believed there was little likelihood of success on the merits and that the act of state doctrine precluded plaintiffs' claims.\(^{29}\) In dissent, Judge Nelson wrote that this case was indistinguishable from the Second Circuit case, and liberally borrowed from that case to support his argument.\(^{30}\) The plaintiffs petitioned for a rehearing en banc, and the petition was granted on November 16, 1987.\(^{31}\) The case was reargued before the Ninth Circuit on February 10, 1988.

III. LEGAL BACKGROUND TO THE MARCOS CASES: THE ACT OF STATE DOCTRINE

The act of state doctrine was succinctly announced by the United States Supreme Court in Underhill v. Hernandez.\(^{32}\) In Underhill, the plaintiff was an American citizen working in Venezuela as an engineer. After the revolution in Venezuela, he was prohibited for a short period of time by the new government from returning to America. When he did return, he brought suit in America against

\(^{24}\) Id.

\(^{25}\) Id. at 1475–76.

\(^{26}\) Id. at 1477.

\(^{27}\) Id. A constructive trust is a device used by courts to force someone who holds a property interest unfairly to transfer it to its rightful holder. It is a tool of equity to satisfy the demands of justice. As such, courts have broad discretion in its application and breadth. See generally G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES (2d ed. revised 1978).

\(^{28}\) 818 F.2d at 1477.

\(^{29}\) Id. at 1490.

\(^{30}\) Id. at 1492–1502.

\(^{31}\) 892 F.2d 1110 (9th Cir. 1987).

\(^{32}\) 168 U.S. 250 (1897).
the revolutionary government, which had been recognized by the United States. The Supreme Court refused to uphold Underhill's claim that he was unlawfully detained by the Venezuelan revolutionary government, reasoning that "[e]very 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." The doctrine's rationale was derived from the principle of comity between countries that is pervasive in international law.

Although the Supreme Court has modified the act of state doctrine somewhat since Underhill, the doctrine remains basically the same. For example, an exception was developed to the doctrine that implicitly recognized separation of powers issues that result from the use of the doctrine. In Bernstein v. Van Heyghen Freres Societe Anonyme, Judge Learned Hand applied the act of state doctrine in refusing to set aside the forced taking of the Jewish plaintiff's property by the Nazis during World War II. But, in a later case filed by the same plaintiff, Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij, the Second Circuit changed its position after the State Department informed it by letter that the United States' foreign relations did not require judicial abstention in cases involving Nazi confiscations. This case came to be known as the "Bernstein exception," a principle by which the State Department can explicitly indicate that the conduct of American foreign relations does not require the application of the act of state doctrine in a given case.

The Bernstein exception has been questioned by the Supreme Court in recent years. In First National City Bank v. Banco Nacional de Cuba, the Supreme Court agreed to adjudicate the legality of a
Cuban taking of American-owned property in Cuba when the State Department wrote to the Court that the act of state doctrine need not apply. Although a majority of the Court found the doctrine inapplicable, only a minority expressly recognized the Bernstein exception by treating the State Department's suggestion as conclusive.41

Other recent Supreme Court decisions have also altered the act of state doctrine. For example, in Banco Nacional de Cuba v. Sabbatino,42 the Supreme Court recognized the act of state doctrine as an element of federal common law designed to avoid interference with the executive's conduct of foreign relations while protecting the integrity of the judiciary.43 The Court acknowledged the caution expressed by Professor Philip C. Jessup by stating that "rules of international law [and, by implication, the act of state doctrine] should not be left to divergent and perhaps parochial state interpretations."44 Indeed, allowing all courts to comment and impact on America's international relations could have disastrous consequences as well as violate the domain of the legislative and executive branches of government. Therefore, the Sabbatino decision recognized that issues involving America's foreign relations must be exclusively treated under federal law and are justiciable in federal courts.

Sabbatino involved the use of the act of state doctrine by the Supreme Court to refuse to adjudicate the validity of an uncompensated taking of American-owned property in Cuba by the Cuban government.45 The Court noted that although the doctrine's rationale had "'constitutional' underpinnings," it was not explicitly required by the Constitution.46 The Court applied the doctrine be-

41 Id. at 768. Justices Rehnquist, White and Chief Justice Burger adopted and approved the Bernstein exception to the act of state doctrine. They reasoned that since the Executive Branch is charged with the conduct of our foreign affairs, an express statement to the Court concerning a foreign affairs issue should be followed. They stated that this was "no more than an application of the classical common-law maxim that '[t]he reason of the law ceasing, the law itself also ceases.'" Id. (quoting BLACK'S LAW DICTIONARY 288 (4th ed. 1951)). Justice Douglas, also part of the plurality, stated that the Bernstein exception did not apply because "[o]therwise, the Court becomes a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others." Id. at 773. Justice Powell, concurring in the judgment, refused to acknowledge the Bernstein exception because it conflicts with the separation of powers doctrine. Id.
43 Id. at 423–25.
44 Id. at 425.
45 Id. at 439.
46 Id. at 428.
cause the American government had already taken a position on the Cuban takings, so adjudication risked embarrassment to the executive branch.\textsuperscript{47} However, by limiting the act of state doctrine's application to takings of property by a foreign sovereign within its own territory, the Court did not completely forfeit its right to adjudicate takings issues involving foreign relations.\textsuperscript{48}

In a more recent decision, the Supreme Court questioned both the Bernstein exception as well as the act of state doctrine itself. In \textit{Alfred Dunhill of London, Inc. v. Republic of Cuba},\textsuperscript{49} a claim was made by former and current owners (the Cuban government) of a company nationalized by Cuba to recover payments for goods shipped by the company before the nationalization.\textsuperscript{50} The State Department wrote, in essence, two general Bernstein letters that questioned the need for the act of state doctrine in any circumstances and suggested that adjudication of cases such as this would not injure America's foreign relations.\textsuperscript{51} The Court retained the doctrine, but four justices argued that it did not apply to a foreign sovereign's commercial acts, including acts done within its own territory.\textsuperscript{52} These justices reasoned that embarrassment and conflict, the major underpinnings of the doctrine, would more likely result if the doctrine were used in this case to refuse to adjudicate the repudiation of a foreign government's debts which arose from its operation of a purely commercial business.\textsuperscript{53}

Because of these decisions, the status of the Bernstein exception is unclear. In \textit{Sabbatino}, the Court expressly avoided endorsing the exception, and a majority of the Court questioned its continued vitality in \textit{First National}. Also, the \textit{Dunhill} Court clouded the significance of the Bernstein letter by rejecting the executive branch's suggestion that the act of state doctrine was no longer necessary.

\textbf{IV. THE ACT OF STATE DOCTRINE AS USED BY THE MARCOSES}

The act of state doctrine is the most critical issue of both \textit{Marcos} cases. In both cases, the courts considered whether the doctrine

\textsuperscript{47} \textit{Id.} at 402-03, 425.
\textsuperscript{48} "... [W]e decide only 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 violated customary international law." \textit{Id.} at 428.
\textsuperscript{49} 425 U.S. 682 (1976).
\textsuperscript{50} \textit{Id.} at 685-86.
\textsuperscript{51} \textit{Id.} at 706-15.
\textsuperscript{52} \textit{Id.} at 695.
\textsuperscript{53} \textit{Id.} at 898 (Burger, C.J., Powell, White and Rehnquist, JJ.).
prevents American courts from adjudicating the claims of the Aquino government because they involve acts of a foreign sovereign. Although there are material differences between the two cases, the application of the doctrine is the same in both.

Intuitively, the Marcoses' situation seems to be ideally suited to the act of state doctrine because they were recognized foreign government leaders. However, the Aquino government's claims allege that the Marcoses obtained vast amounts of property and wealth through the abuse of their positions and actions beyond the scope of their authority. These actions, therefore, would not be recognized as those of a foreign power but rather as those of private individuals. The Marcoses claim that the act of state doctrine prohibits adjudication of these claims. That is, American courts would have to adjudicate the acts of a sovereign state (the Marcos government) in order to entertain this claim. If this claim was accurate, it would clearly be within the scope of the act of state doctrine; regardless of the illegality of the alleged acts, the act of state doctrine would apply.

The key difference between the Ninth and Second Circuits' interpretations of the act of state doctrine concerns whether the disputed actions of the Marcoses were acts of the sovereign state or were private acts for personal gain.

A. The Public/Private Dichotomy

The differentiation between public and private acts in the realm of the act of state doctrine is best illustrated by the case of Jimenez v. Aristeguieta. The former president of Venezuela was charged by the then existing Venezuelan government with financial crimes and involvement in a murder. The Venezuelan government brought these charges in American federal courts to extradite Aristeguieta, who was living in the United States. Aristeguieta's defense included a claim that the contested acts were not justiciable by the United States courts because they were in exercise of sovereign authority or acts of state. The circuit court rejected this act of state doctrine defense, stating that the doctrine only applies when offi-
cials having sovereign authority act in an official capacity.60 The acts "constituted common crimes committed by the Chief of State [Ar

istemeguieta] done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an 'Act of State.'"61 The Jimenez court thus suggested that an act not commonly recognized as an act of state done for public benefit is not protected by the doctrine.

The Supreme Court affirmed a distinction analogous to the distinction between public and private acts under the act of state doctrine in Alfred Dunhill of London, Inc. v. Republic of Cuba.62 The Court distinguished between the public acts of a foreign sovereign and commercial acts of sovereigns committed in the course of their purely commercial operations.63 The Court ruled that the act of state doctrine did not protect such commercial acts.64 The Court reasoned that embarrassment would more likely result if the doctrine were used to prohibit the Court from adjudicating the operation of a purely commercial business by a foreign government.65 The Court underscored language from the Sabbatino and Underhill opinions to develop this distinction.66

While Dunhill's public/commercial distinction is not altogether identical to the Philippines' public/private distinction in the Marcos cases, it lends credence to the Philippine claims by acknowledging a distinction between public and private acts. Arguably, the public/commercial distinction is precisely the focus of the Philippines' RICO claims in the Ninth Circuit, since RICO entails an organization engaged in a pattern of commercial, racketeering activity. That is, in order to satisfy the Dunhill distinction, it could be argued that the alleged actions of the Marcoses were commercial actions distinct from public actions.

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60 Id. at 557.
61 Id. at 558.
62 425 U.S. at 682. See supra text accompanying notes 49–53.
63 Id. at 695.
64 Id. However, only four Justices concurred in that portion of the opinion which refused to allow the act of state doctrine to be applied to commercial acts of a foreign sovereign. Thus, the weight of this distinction is arguable.
65 Id. at 698.
66 The Court stated "[i]n describing the act of state doctrine in the past we have said that it 'precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign power committed within its own territory.' Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 401 [emphasis added by Court], and that it applies to 'acts done within their own States, in the exercise of governmental authority.' Underhill v. Hernandez, 168 U.S. at 252 [emphasis added by Court]."
Additionally, courts have been careful to emphasize that the legality of the contested acts under foreign law is irrelevant to the determination of the application of the doctrine. In doing so, they have highlighted the semantic difficulty in determining what is a public or sovereign act. For example, in *Banco de Espana v. Federal Reserve Bank of New York*,[67] the doctrine was used to bar an action to recover silver allegedly diverted from the Spanish government by deposed government officials, allegedly by means of illegal secret decrees.[68] The court held that the act of state doctrine is not limited to acts which are valid under foreign law[69] and that it was irrelevant that the new government itself requested the adjudication in our courts.[70] Further, the court reasoned that "so long as the act is the act of the foreign sovereign it matters not how grossly the sovereign has transgressed his own laws."[71]

This holding creates semantic difficulties because it is unclear what constitutes an "act of the foreign sovereign." At least two meanings are possible. First, it could mean that any action taken by a government official is an act of the sovereign. Second, the phrase could refer to only those acts within the realm of duty of the sovereign, as distinguished from private acts. The *Banco de Espana* court adopted the former, broader perspective. It stated that "by a 'governmental act' is meant no more than a step physically taken by persons capable of exercising the sovereign authority of the foreign nation."[72] This definition appears to conflict with the *Jimenez* court's implicit definition of a public governmental act as an act within recognized parameters of official behavior.

In the *Marcos* cases, the Second Circuit adopted the *Jimenez* interpretation of the public/private act dichotomy. However, the court stated that *Banco de Espana* supported *Jimenez* by interpreting acts of a foreign sovereign as a reference to acts done within the realm of duty of the sovereign.[73] The *Marcos* court in the Second Circuit conveniently overlooked the *Banco de Espana* court's broad interpretation of governmental acts, a point brought up by the defendants in their appeal to the Supreme Court.[74] However, the

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[67] 114 F.2d at 438.
[68] Id. at 443.
[69] Id. at 444.
[70] Id.
[71] Id.
[72] Id.
[73] 806 F.2d at 358–59.
Banco de Espana case was distinguished by the New York Federal District Court that adjudicated the Marcos case. District Court Judge Pierre Leval stated that Banco de Espana was "barely applicable" to the Marcos case since that case concerned the legitimacy of acquisition of property in a foreign country, and not the issue of whether to give effect to Philippine governmental decrees. Judge Leval reasoned that Banco de Espana is probably more helpful to the plaintiffs than to the defendants since it instructed American courts to honor foreign governmental decrees altering ownership of property of foreign subjects. The Second Circuit did not refer to this distinction in its opinion.

The Second Circuit equivocated in holding that an official act is an act of a foreign sovereign. The court reached this conclusion by stating that Jimenez and Banco de Espana are in concert, an improper decision in light of the fact that the cases conflict. Although the Second Circuit stated its support of the Jimenez precedent, its actual holding is less clear. Instead of equivocating, the court should have developed a benefit test for acts to determine whether acts are public or private. The Jimenez court implicitly articulated a benefit test by emphasizing that acts for personal benefit are not immunized from judicial review by the act of state doctrine. A benefit test avoids the semantic difficulties created in trying to determine "acts of a foreign sovereign," "official capacity," and other phrases used by the Jimenez and Banco de Espana courts. Thus, a benefit test does not merely rephrase the public/private act question but rather simplifies it.

In light of all of this precedent, the Ninth Circuit's interpretation of this issue in Marcos is curious. The court admitted that the alleged acts of Marcos and Jimenez were similar, but reasoned that Jimenez is distinguishable on the grounds that judicial review in that case was based on an extradition treaty in which the political branches "expressly contemplated judicial review of the official's actions." In dissent, Judge Nelson criticized the majority's distinction of the Jimenez case by noting the irrelevance of the grounds on which

75 Republic of the Philippines v. Marcos, No. 86-2294 (S.D.N.Y. July 7, 1986) (order denying stay of discovery). The Banco de Espana opinion was distinguished by the district court during the defendants' motion to suspend discovery while the original preliminary injunction decision was appealed to the Second Circuit.

76 Id.

77 Id.

78 818 F.2d at 1485 n.12.
it was made.\textsuperscript{79} The relevance of \textit{Jimenez} to the \textit{Marcos} cases is simply its articulation of a distinction between the public and private acts of a sovereign leader. Indeed, as Judge Nelson pointed out, "the existence of a treaty [as in \textit{Jimenez}] is [only] relevant to the separate question of embarrassment of our executive branch ..."\textsuperscript{80}

The factual similarities between the \textit{Jimenez} case and the \textit{Marcos} cases compel an application of the \textit{Jimenez} public/private act distinction to the Philippine claims. Since Judge Kozinski, writing for the majority in \textit{Marcos} in the Ninth Circuit, admitted that if Marcos "entered the public treasury at gunpoint and walked out with money or property belonging to the Philippines, he would not be protected by the act of state doctrine,"\textsuperscript{81} it follows that actions which were apparently taken by the Marcoses for personal gain should have been considered as unofficial as those defined in \textit{Jimenez}. This analysis is especially true when considering the fact that the proceedings were only at the preliminary injunction stage. Thus it would be premature to apply the act of state doctrine before the discovery stage proceeded and facts could be obtained to determine fairly the applicability of the act of state doctrine.

In concert with the public/private act dichotomy of the act of state doctrine is the principle advanced by the Supreme Court that the justification for the doctrine grows weaker when the administration that is challenged in court is no longer in power.\textsuperscript{82} The Supreme Court, in announcing its holding in \textit{Sabbatino} that it could not examine any Cuban expropriation of property in Cuba, stated that conditions can change this principle. These conditions include the importance of the action to our foreign relations and the continued reign of the accused government.\textsuperscript{83}

Taking these conditions into consideration, there is ample justification for refusing to apply the act of state doctrine to the Marcoses. Since the Marcoses are no longer in power, there is little danger of interference with United States foreign relations in adjudicating claims against them. Indeed, American relations with the Philippines would be strengthened by hearing the Aquino government’s claims.\textsuperscript{84} The Second Circuit recognized this consequence of

\textsuperscript{79} Id. at 1494 n.4.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 1485.
\textsuperscript{82} \\textit{Sabbatino}, 376 U.S. at 428.
\textsuperscript{83} Id.
\textsuperscript{84} 25 \textit{INTERNATIONAL LEGAL MATERIALS} 409 (1986).
the Marcos litigation,85 yet the Ninth Circuit did not.86 The Ninth Circuit rejected this point for fear that it would raise foreign relations concerns. As an example, the Ninth Circuit suggested that the Philippine political balance and the American foreign policy process could suffer if the Aquino government’s claims were to be adjudicated.87 Such a presumption is contrary to the Supreme Court’s discussion of conditions of the act of state doctrine in Sabbatino. This presumption also defeats the doctrine’s purpose of removing political acts from judicial consideration by engaging in political prediction.88 The Ninth Circuit should have taken the facts as they existed in considering this point rather than engaging in political postulation. The fact that the Marcoses are not in power weakens the grounds on which the Marcoses can claim the act of state doctrine as a defense.

B. Embarrassment, Foreign Relations and the Act of State Doctrine

1. Introduction

Although the subissue of embarrassment of American foreign relations has been infrequently discussed in act of state doctrine case history, it is important because it strikes at the reason for the doctrine’s existence. While the rationale for the doctrine has been changed by the Supreme Court from one of comity to one of separation of powers,89 the principal purpose for the doctrine, that the government speak with one voice concerning foreign relations, has remained the same.90 However, it should be noted that most of the cases applying the doctrine concern nationalization.91 Thus, the applicability of the cases to the embarrassment issues in the Marcos cases is unknown. A court could reasonably rule that principles developed in nationalization cases are inapposite to issues raised in the Marcos cases.

85 806 F.2d at 359.
86 818 F.2d at 1485–86.
87 Id. at 1486–87.
88 See supra text accompanying notes 32–36.
89 Chow, supra note 35, at 412–16. This reasoning has come under recent criticism. Id. at 421–30.
91 Haron, supra note 5, at 438–39.
The conduct of American foreign relations is entrusted to the executive and legislative branches under the Constitution. Because of this separation of powers, the act of state doctrine developed to prevent judicial interference with the foreign affairs duties of the other two branches of government. The doctrine expresses the Supreme Court’s belief “that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.” Thus, it is important for the American government to speak with one voice concerning its foreign relations. The judicial branch should be precluded from interfering in America’s foreign relations at inopportune moments.

With this doctrine in mind, courts must necessarily consider the impact of their decisions on American foreign relations. Improperly timed decisions can severely damage sensitive international relations, perhaps irreparably. However, courts are clearly not precluded from deciding claims with foreign relations consequences. Since the text of the Constitution does not require the act of state doctrine, the judiciary’s capacity to review the validity of the acts of a foreign sovereign state is not irrevocably removed by the doctrine. In short, the doctrine acts as a brake but not as an impediment to judicial review of foreign acts of state.

The Bernstein exception to the act of state doctrine allows courts to be more sensitive to foreign relations concerns. By accepting policy statements from the State Department, courts can make more informed decisions and defer to the executive branch when necessary. However, recent Supreme Court decisions have
questioned the importance and relevance of the exception, consequently leaving it as an optional consideration. 99

2. The Embarrassment Subissue in the *Marcos* Cases

Despite its statements to the contrary, 100 the Ninth Circuit considered the embarrassment of American foreign relations a major issue in its analysis of the *Marcos* case, as did the Second Circuit in its opinion. Their differing views highlight the judicial restraint the Ninth Circuit exhibited in prior litigation, 101 as well as the Ninth Circuit’s serious misinterpretation of America’s relationship with the Philippines. 102

An important difference between the two cases is the involvement of the Justice Department and the State Department in the Second Circuit case but not in the Ninth Circuit case. In the Second Circuit the Justice Department, with the concurrence of the State Department’s Office of the Legal Advisor, argued "with respect to the act of state doctrine the burden is on the party asserting the applicability of the doctrine, that [the] defendants [Marcoses] have to date not discharged their burden of proving acts of state, and that, as to the allegations of head of state immunity, the defendants do not have standing to invoke the doctrine." 103 This argument, in essence, functions as a Bernstein letter instructing the courts that the act of state doctrine should not apply because there is no danger to America’s foreign relations. 104

The Second Circuit also referred to a statement made by Michael Armacost, the Undersecretary of State for Political Affairs. 105 The Armacost declaration was made on March 15, 1986 and submitted to the United States Court of International Trade for a suit before that court. 106 The statement is a thorough declaration of the

99 See supra notes 40-41 and accompanying text.
100 Marcos, 818 F.2d at 1488 n.20.
102 See infra text accompanying notes 105-30.
103 Marcos, 806 F.2d at 356-57.
104 Id. at 357.
105 Id. at n.3. See 25 INTERNATIONAL LEGAL MATERIALS 407-09 (1986). The statement was not submitted by the State Department for this case, but was included as part of the court record.
106 Id. It was also submitted in the case of Azurin v. von Raab, 803 F.2d 993 (9th Cir. 1986). That case concerned a dispute over the ownership of currency, jewelry and other valuables seized by the U.S. Customs Service upon the arrival of Ferdinand Marcos and his
economic, political, military and social ties between the Philippines and the United States. The declaration also refers to the Aquino government's Commission on Good Government. Undersecretary Armacost stated:

it is in the foreign policy interests of the U.S. Government to honor the Philippine Government's request and our commitment to fulfill it at the earliest possible time. I believe the Aquino Government will view our actions on this matter as an important indicator of the future course of our bilateral relations. I believe that the favorable development of these relations is vital to the foreign policy of the United States. Since the Armacost declaration falls within the boundaries of the Bernstein exception, the court was within its bounds when denying the Marcoses the act of state doctrine. The declaration serves as a Bernstein exception because it is an express comment of the State Department on litigation affecting American foreign relations.

The Ninth Circuit received no such statements from the Justice Department or the State Department. Yet despite the strong similarity between the two cases, the Ninth Circuit refused to apply the Armacost declaration to its case. The court explained at length its reasoning for not accepting the declaration. Fearful of handing down a decision in the future that could injure American foreign policy at that time, the court said it would not "embark upon such an endeavor" absent express encouragement from the appropriate government voice. The court also said it would not accept the "generalization" that the Armacost declaration applies to litigation similar to that in the Second Circuit. The court believed that the reference to the Armacost declaration by the Second Circuit was

entourage in Hawaii on February 26, 1986. The Aquino government requested that the property not be released until its ownership could be determined. Azurin brought suit against the Customs Service, seeking a writ of mandamus compelling Customs to release the property. District Court Judge Harold M. Fong granted the writ, but was overruled by the Ninth Circuit. See United States Customs Service's Authority to Detain Property Claimed by Former Philippine President Marcos: Azurin v. Von Raab [sic], 23 STANFORD J. INT'L L. 683 (1987). The declaration also refers to the historical relationship between the two countries, the $3.7 billion in bilateral trade between the two countries, as well as cultural exchanges, agreements, and military cooperation existent between the Philippines and the United States.

108 Id.
109 818 F.2d at 1487.
110 Id. at 1487–88.
111 Id.
112 Id. at 1487.
113 Id.
“far too nebulous to permit sweeping inferences about the position of the executive branch.”114

In this decision the Ninth Circuit relied in part on a case it had previously decided that also invoked the act of state doctrine.115 In *International Association of Machinists v. OPEC*,116 a labor union brought suit against the Organization of Petroleum Exporting Countries (OPEC) seeking monetary and injunctive relief for alleged price fixing of crude oil prices in violation of the Sherman Act. Although the *Machinists* case deals with a different factual situation than the *Marcos* cases, it offers a persuasive argument for judicial caution in deciding matters affecting America’s foreign relations that is remarkably similar to the argument advanced in the Ninth Circuit *Marcos* case.117 The *Machinists* court strongly emphasized the need for the judiciary to refrain from interfering in political affairs, specifically recognizing the courts’ limited focus and the necessity of making decisions on the basis of legal principles.118

This line of reasoning forms the basis of the Ninth Circuit’s claims in the *Marcos* case that the potential for embarrassment precludes a decision for the Aquino government.119 Yet, ironically, Judge Nelson, the only justice to participate in both decisions, was part of the unanimous *Machinists* court but dissented in the *Marcos* case. Stating that the Armacost declaration and the facts of the case precluded any sense of judicial overlapping into the political realm, Judge Nelson emphasized the importance of the Armacost declaration and speculative nature of the majority opinion.120

Indeed, the Ninth Circuit’s majority opinion in *Marcos* is unduly arbitrary and conclusory concerning the subissue of embarrassment to the United States executive branch. The following paragraph is indicative of the court’s confused view of the issue.

We cannot shut our eyes to the political realities that give rise to this litigation, nor to the potential effects of its conduct and resolution. Mr. Marcos and President Aquino represent only two of the competing political factions engaged in a struggle for control of the Philippines. While the struggle seems to be

114 Id.
115 Id., (citing *International Association of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981).)
116 649 F.2d 1354.
117 Id. at 1358–59.
118 Id. at 1358.
119 818 F.2d at 1486–87.
120 Id. at 1496–98.
resolving itself in favor of President Aquino, this may not be the end of the matter. Only four years ago, the tables were turned, with Mr. Marcos in power and Mrs. Aquino and her husband in exile in the United States. While we are in no position to judge these things, we cannot rule out the possibility that the pendulum will swing again, or that some third force will prevail. What we can say with some certainty is that a pronouncement by our courts along the lines suggested by plaintiff would have a substantial effect on what may be a delicate political balance, as would a contrary pronouncement exonerating Mr. Marcos. 121

While thoughtful issues are raised in this statement, its basis is contrary to the act of state doctrine and the facts of the case. In addition, its conclusions are arbitrary. First, President Aquino has been recognized by the United States as the leader of the Philippine government, 122 and has received political, economic and military support for the government. 123 Second, although there has been political strife in the Philippines (mostly after this decision and involving communists, not Marcos loyalists), 124 there is no "struggle" in the anarchic sense the court suggests. Third, while the court says "we are in no position to judge these things . . . ," it nevertheless arbitrarily states that since Marcos may return to power it should abstain from the matter. 125 This is precisely the reason that the act of state doctrine exists. The doctrine precludes courts from having to adjudicate foreign relations matters of a sovereign state. 126 The court did not have to predict the future as it did here, because potential embarrassment would have been a sufficient reason to invoke the doctrine. Instead, the court tenuously engaged in political prediction by saying that the "pendulum" might swing again, resulting in a decision of this subissue for the Marcoses.

The weakness of the majority opinion is highlighted in Judge Nelson's dissent. Regardless of the probability that the predictions made by the majority might actually occur, Judge Nelson observed that "it is not clear why the majority believes that such potential embarrassment would outweigh the certain, immediate embarrass-

121 Id. at 1486.
122 25 INTERNATIONAL LEGAL MATERIALS 408 (1986).
123 Id. Armacost's statement indicates that the Philippine government received $251 million in military assistance in 1980–85 as well as $226 million in economic aid in 1985.
125 806 F.2d at 1485–86.
ment in our relations with the current Philippine government if our courts were to shut the door to the Philippines' request for adjudication of the claims."[emphasis added] The majority is guilty of just such questionable decisionmaking. It overlooked the present relationship between the Philippines and the United States by interpreting future Philippine political conditions. This interpretation is contrary to the purpose of the act of state doctrine, which is based on the relations between countries and not the instability of sovereign states.

In addition, the Ninth Circuit used an incorrect analysis of the act of state doctrine by considering what it thought to be Philippine "political realities." Instead of having to predict the course of Philippine government, the court had a thorough, relevant statement of relations between the American and Philippine governments available in the Armacost declaration. Even though the Armacost declaration was made in the course of another case, it nonetheless is a statement from both governments of the political realities between the two countries. To the extent that the court found it necessary to consider political realities in balancing the political interests at hand, the Armacost declaration was a far superior source than any factual interpretation it could develop on its own.

In reasoning that the lack of a Bernstein letter or other statement from the State Department weighed against its adjudication of plaintiff's claims, the Ninth Circuit relied too heavily on the Bernstein exception and ignored Supreme Court criticism of the exception. In one case, a majority of the Supreme Court questioned the continuing use of the Bernstein exception, and in another case the Court expressly avoided endorsing it. Thus, the Bernstein exception is far from a mandatory requirement in cases involving foreign relations issues. At most, it is a persuasive, optional consideration. The Ninth Circuit exaggerated its importance, however, by refraining to adjudicate this matter because of the lack of a statement from the executive branch. The substantial similarities between the Ninth Circuit and Second Circuit cases, along with the expansive liberal statements of the State Department in these prior, similar instances point towards an acceptance of them by the Ninth.

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127 818 F.2d at 1496.
128 See supra text accompanying notes 32–36.
129 818 F.2d at 1485–86.
130 See supra notes 105–06 and accompanying text.
Circuit. Even though the court refused these statements, the optional status of the Bernstein exception does not serve as grounds for rejecting a case solely because a Bernstein-type statement was not made.

V. Other Important Issues in the Marcos Cases

A. The Standard for a Preliminary Injunction

In both its Second and Ninth Circuit claims, the Aquino government sought a preliminary injunction to prevent the transfer of the property in question. Aside from the differences in the two complaints, the injunction issue highlighted confusion amongst the federal judges in the Ninth Circuit, each of whom prescribed a different test for the injunction. The proper test is clear, given the differences in the claims advanced.

In the Ninth Circuit, Judge Kozinski adopted a “conduct” test in which he concluded that the act of state doctrine precluded the Philippine government from showing a likelihood of success on the merits. Judge Hall, concurring in the judgment but dissenting on this issue, adopted an “effect” test from RICO litigation. RICO was the basis for federal jurisdiction in the case, and its language is concerned with the effects of activity prohibited by the statute in the United States. Judge Hall concluded that since the effect of the Marcoses’ conduct in the United States was not a significant element of the plaintiffs’ claim, an injunction was unavailable. In dissent, Judge Nelson adopted an equitable balance test based on the pendant claims since the RICO claims were not the basis for the district court’s preliminary injunction. The Second Circuit, which denied the application of the act of state doctrine to the defendants, also developed an equitable balance test in which the probability of harm to the plaintiffs and their likelihood of success were both weighed.

A comparison of the Second and Ninth Circuit tests reveals two fundamental differences. First, regardless of which test is used, the application of the act of state doctrine to these claims makes a

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133 818 F.2d at 1490–91, 1500–02.
134 Id. at 1490.
135 Id.
136 Id. at 1490–91.
137 Id. at 1491.
138 Id. at 1500–01.
139 See 806 F.2d at 355–56.
preliminary injunction a foregone conclusion. The doctrine, for reasons discussed supra, allows the Marcoses to evade a large part of the plaintiffs’ claim. The second difference between the Circuits concerns the location of property in question. Whereas only New York property was involved in the Second Circuit case, property located throughout the world was at issue in the Ninth Circuit. While Judge Nelson persuasively argues in his dissent for the injunction, and in doing so draws from the Second Circuit’s reasoning, he misses this distinction in location of the contested property. For example, the Second Circuit concludes that the suit “was brought in the Southern District [of New York] only because the real estate is located here,” implying that property located elsewhere may have been beyond its jurisdiction. In the Ninth Circuit, much of the property was in California, but some was also located abroad. This point was raised by the majority as a reason for invoking the act of state doctrine. However, the injunction could have been limited by the court to property over which it believed it had jurisdiction to avoid this concern.

Judge Nelson pointed out a basic weakness in the analyses of Judges Hall and Kozinski. The majority limited their analyses to the RICO claims, yet RICO was not used as a basis for the district court’s preliminary injunction. Judge Nelson based his injunction analysis instead on the pendent claims only. A test for injunctive relief based on RICO is improper here since RICO was only used to establish subject matter jurisdiction.

The “effect” and “conduct” tests employed by the majority also fail to consider the probability of harm to the plaintiffs to a proper extent. The Second Circuit in its analysis used the constructive trust as an equitable tool to balance the harm that would come to the Philippines’ case if the Marcoses were allowed to transfer the property in question. By contrast, the majority in the Ninth Circuit case considered the alleged harm the plaintiffs may suffer to be

140 See supra text accompanying notes 54–55.
141 806 F.2d at 347.
142 818 F.2d at 1476.
143 Id. at 1500–02.
144 806 F.2d at 361.
145 818 F.2d at 1476.
146 Id. at 1490.
147 Id. at 1477.
148 Id. at 1500.
149 806 F.2d at 355.
barred from relief by the act of state doctrine.\textsuperscript{150} Given the political realities contained in the Armacost declaration,\textsuperscript{151} an equitable perspective is the proper test and is especially important in cases with such important political ramifications as these. At this stage of the litigation, a preliminary injunction would not hurt the Marcoses,\textsuperscript{152} nor would it preclude the district court from bowing to Philippine courts in the future.\textsuperscript{153} It also allows the court to take into account new facts as the proof develops, including the issue of whether these suits do rest on official acts.\textsuperscript{154}

It is also important to note that many courts have held that the merits of an act of state doctrine defense should not be decided in reviewing a grant of preliminary relief.\textsuperscript{155} This principle was made clear in the case of \textit{Ramirez de Arellano v. Weinberger}.\textsuperscript{156} In \textit{Ramirez}, the district court had dismissed on act of state grounds a complaint alleging the unlawful seizure and destruction of a private cattle ranch in Honduras. The circuit court reversed because the factual record was insufficient to permit dismissal at the pleading stage. In doing so, the circuit court observed:

To the extent crucial facts pertaining to the defense are disputed, or not fully developed in a complete record, the reviewing court must be certain that it does not leap to conclusions arguable under the unelaborated pleadings but which could be refuted through the ordinary process of discovery and factfinding in the district court. To do otherwise is to deny the claimant an opportunity to prove his case.\textsuperscript{157}

Thus, the act of state doctrine is usually considered as a defense applicable only in a case with a well developed record.

The Ninth Circuit did not adhere to this principle in its decision. The Ninth Circuit instead went beyond the factual record as

\textsuperscript{150} 818 F.2d at 1490.
\textsuperscript{151} See \textit{supra} text accompanying notes 105–08.
\textsuperscript{152} 818 F.2d at 1502. This conclusion is based on facts disclosed in Judge Nelson's dissent. Judge Nelson observed that the Marcoses objected to the forum and not the freezing of their assets. Also, the District Court's injunction allowed the Marcoses to obtain funds for legal fees and living expenses. A bond was also secured by the Philippine government to reimburse the Marcoses in the event that the injunction was wrongfully given. Therefore, the Marcoses would suffer little if at all from such an injunction.
\textsuperscript{153} 806 F.2d at 356, 360.
\textsuperscript{154} Id. at 361.
\textsuperscript{156} 745 F.2d 1500 (D.C. Cir. 1984), \textit{judgment vacated on other grounds}, 471 U.S. 1113 (1985), \textit{on remand}, 788 F.2d 762 (D.C. Cir. 1986).
\textsuperscript{157} 745 F.2d at 1534.
it existed to discuss and apply the act of state doctrine to the case on the behalf of the Marcoses. Thus, the Ninth Circuit's reasoning in Marcos concerning the act of state doctrine at the preliminary injunction stage is at odds with the precedent in many circuits, including the Ninth. By contrast, the New York Federal District Court in its Marcos case followed precedent and ruled that the act of state defense was no bar to preliminary relief. The Ninth Circuit's improper invocation of the act of state doctrine as a defense therefore clouded its perspective of the test and grounds for a preliminary injunction.

B. Forum Non Conveniens and the Situs of Property

The issue of forum non conveniens in the Ninth Circuit Marcos case was to be ruled on by the district court at a later date. It was raised without success as a defense in the Second Circuit litigation but is of greater relevance to the Ninth Circuit case.

*Forum non conveniens* is a principle that "where, in a broad sense, the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, jurisdiction should be declined and the parties relegated to relief to be sought in another forum." The principle similarly applies when litigation can more appropriately be conducted in a foreign tribunal. Thus the courts in the Marcos cases had the discretion to refrain from adjudicating the cases on *forum non conveniens* grounds.

This is especially true of the Ninth Circuit, particularly in light of *Islamic Republic of Iran v. Pahlavi*. In Pahlavi, the Iranian government brought suit to recover the assets of the deposed Shah, charging him with years of misrule. Specifically, the in personam action against the Shah and his wife, who were living in New

158 See Northrop v. McDonnell Douglas, 705 F.2d 1030 (9th Cir. 1983).
160 818 F.2d at 1497 n.7.
164 An in personam action is an action having the objective of a judgment against the person, as distinguished from a judgment against property; it is an action to enforce personal rights and obligations brought against the person and based on jurisdiction of the person, notwithstanding that it may involve his/her right to, or the exercise of ownership of, specific property, or seek to compel him/her to control or dispose of it in accordance with the mandate of the court. BALLANTINE'S LAW DICTIONARY 632 (3d ed. 1969).
York, alleged that they had accepted bribes, misappropriated funds, and either embezzled or converted billions of dollars that belonged to the national treasury. The United States had agreed in the Algerian Accords to inform American courts that these defenses were precluded in litigation between Iran and the Shah’s estate.

The court dismissed the suit on *forum non conveniens* grounds. The court stated that the burden was on the defendant to show relevant public and private interest factors for the principle to apply. The court also identified five factors to consider in weighing the application of *forum non conveniens*: the burden on New York courts, the potential hardship for the defendant (such as in gathering witnesses and evidence), the unavailability of an alternative forum, the residency of both parties, and the location of the transaction. In light of these factors, the plaintiff’s claims invited dismissal because they sought, in essence, “a sweeping review of the political and financial management of the Iranian government during the several years of the late Shah’s reign with the object of accounting for and repossessing the nation’s claimed lost wealth wherever it may be located throughout the world.” In short, the plaintiff’s claims, which did involve property located throughout the world, provided too small a nexus with the New York forum to allow the suit to continue.

A strong dissent in the case argued that in weighing the *forum non conveniens* principle the availability of an alternative forum must be a requirement and not just a consideration, as the majority indicated. The dissent cited the Second Restatement of the Conflicts of Laws as well as prior case history to support its contention that an alternative must be available to the plaintiffs before *forum non conveniens* can be applied. In the *Pahlavi* case, New York was

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165 62 N.Y.2d at 477–78, 478 N.Y.S.2d at 599.
167 *Id.*
168 62 N.Y.2d at 487, 478 N.Y.S.2d at 605.
169 62 N.Y.2d at 479, 478 N.Y.S.2d at 600.
170 *Id.*
171 62 N.Y.2d at 483, 478 N.Y.S.2d at 602.
172 *Id.*
174 *Id.* See *Restatement (Second) of Conflicts of Laws* § 84 (1971).
perhaps the only available forum because of a confluence of some of the property, witnesses and evidence there and nowhere else.

A sequel to the *Pahlavi* case reaffirmed its holding. Also titled *Islamic Republic of Iran v. Pahlavi*, the second case involved a reformulation of Iran's complaint from the first case to focus on specific New York property as well as other worldwide assets. The court also dismissed this suit on *forum non conveniens* grounds, stating the fact that some of the Shah's assets were in New York was not enough to distinguish the instant case from the prior one.

The *Pahlavi* cases were used to support a *forum non conveniens* defense advanced by the defendants in the Second Circuit *Marcos* case. The Second Circuit court distinguished the first *Pahlavi* case by noting that the questioned assets in that case were located throughout the world, not just in New York as in the *Marcos* case. The Second Circuit concluded its opinion by stating that "[t]his action is merely ancillary to an eventual Philippine decree or judgment and was brought in the Southern District only because the real estate is located here." The *Marcos* court also approvingly cited District Court Judge Leval's opinion in *Marcos* that the Philippines only sought a recognition of its decree freezing various assets, and that the district court would not have to try the basic issues of the Marcoses' alleged wrongdoings.

Since the Second Circuit did not address the second *Pahlavi* case, Judge Leval's distinction cited by the Second Circuit presumably distinguishes the second *Pahlavi* case sufficiently. The Second Circuit's failure to address the second *Pahlavi* case was asserted as error by the defendants in their appeal to the Supreme Court. However, Judge Leval's distinction shows that both *Pahlavi* cases considered the alleged crimes as part of the claim before the court, yet in the case before the Second Circuit, the alleged crimes were ancillary.

In contrast to the Second Circuit's *Marcos* proceedings, the *forum non conveniens* principle and the *Pahlavi* cases were barely

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176 Id. at 802. The defendant was the Shah's sister in the second case and not his wife as in the first case.
177 Id.
178 806 F.2d at 361.
179 Id.
180 Id.
182 806 F.2d at 361.
discussed in the Ninth Circuit Marcos opinion, as this issue was to be heard by the district court at a later date. The Pahlavi cases are strong precedent for an outright dismissal of the Ninth Circuit Philippine claim on forum non conveniens grounds.

The similarities between the Pahlavi cases and the Marcos case in the Ninth Circuit are remarkable. In both cases, new governments sought to recover private property located throughout the world by proving that the property was unlawfully taken or obtained by corrupt rulers.183 While the Pahlavi cases do not necessarily dictate dismissal of the Philippine claims, they persuasively support such a decision. Applying the five part test for forum non conveniens advanced in the first Pahlavi case to the Ninth Circuit Marcos case, it is arguable whether the principle should apply to the Marcoses, as strong arguments can be made on both sides of the issue.

For example, the availability of an alternative forum depends on the location of a majority of the property and the location of witnesses and evidence. Also, the administrative burden on the California courts created by the Marcos case would be great, but it would be on any court for such complex litigation. The hardship for the defendants could be great, depending on the location of witnesses and evidence. Also, since many of the transactions occurred in foreign jurisdictions, the court may have a difficult time controlling witnesses and evidence concerning these transactions. An argument for jurisdiction of these claims could rely on the Second Restatement of the Conflicts of Laws and precedent to show that an alternative forum must be made available to the plaintiffs before forum non conveniens can be applied. Thus, in short, the use of forum non conveniens here would be a subjective but reasonable decision. As in the Pahlavi cases, there are strong reasons for dismissing the case on this ground. However, if no alternative forum exists, the court could adopt the opinion of the dissent in the first Pahlavi case and accept jurisdiction.

The situs of property is an issue that pervades both application of the forum non conveniens principle as well as the act of state doctrine. Because it is especially important in nationalization disputes, most of the precedent in this area concerns nationalization. Regardless, these cases are relevant to the Marcos proceedings because they highlight the relationship between jurisdiction and the location of property.

183 Pahlavi, 62 N.Y.2d at 477–78, 478 N.Y.S.2d at 599, Marcos, 818 F.2d at 1474–76.
The relationship is clearest in the case of *Bandes v. Harlow & Jones, Inc.*\(^{184}\) The plaintiff was the owner of a business in Nicaragua that was nationalized by the Sandinistas. The plaintiff ordered and paid for goods from the American defendant that were never delivered because of the revolution. The plaintiff sought return of his money. The Nicaraguan government also sought the money, claiming it was now the operator of the plaintiff’s business. In addressing the jurisdiction issue, the court relied on precedent to distinguish between property inside and outside of the jurisdiction.\(^{185}\) The court noted that when the property at issue is within the jurisdiction of a foreign government, the act of state doctrine counsels a hands-off approach to the matter.\(^{186}\) By contrast, when the contested property is in the United States, courts can exercise control over the property and the issues arising from it.\(^{187}\)

This distinction is also evident in the case of *Republic of Iraq v. First National City Bank (Citibank).*\(^{188}\) In *Citibank*, the Iraqi government brought suit to recover alleged assets of deposed King Faisal II that were allegedly obtained illegally. The court adjudicated the claim because the property involved was located in the United States. The court, however, refused to give effect to the claim, observing that confiscation was contrary to American policy and laws.\(^{189}\) The court also emphasized that the discretionary issue of whether foreign acts of state should be honored is closely tied to our foreign affairs, therefore requiring national uniformity.\(^{190}\)

This requirement emphasizes the importance of the location of the disputed property to jurisdiction. Since the property in *Citibank* was in the United States, that court was able to define parameters and requirements by which the property could have been transferred. If the property in *Citibank* were abroad, the court would have been precluded from adjudicating the matter because of the lack of contacts with the forum and the act of state doctrine.

While the *Marcos* proceedings did not involve confiscation decrees per se, the distinction between local and foreign property was apparent. In the Second Circuit *Marcos* case, all the contested property was in the forum, so *forum non conveniens* and unfairness con-

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\(^{185}\) Id. at 960. See infra text accompanying notes 186–87.

\(^{186}\) Id. (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431 (1964)).

\(^{187}\) Id. (citing Republic of Iraq v. First National City Bank, 353 F.2d 47, 51 (2d Cir. 1965)).

\(^{188}\) 353 F.2d 47 [hereinafter Citibank].

\(^{189}\) Id. at 51.

\(^{190}\) Id. at 50.
cerns were not raised. In the Ninth Circuit *Marcos* case, some of the contested property was abroad, so that court’s jurisdiction could be questioned. Clearly, then, the situs of the property is, and has been, a legitimate concern in establishing jurisdiction in cases like the *Marcos* cases.

VI. PURSUING THE ASSETS OF FLEEING DICTATORS

While the *Marcos* proceedings may appear to be unusual upon initial consideration, they are merely two incidents in a developing area of law and history. Some of the cases discussed previously, such as *Jimenez*, *Citibank* and *Banco de Espana*, for example, illustrate that the pursuit of assets of fleeing dictators is a recurring historical phenomenon. Indeed, in the past ten years alone the Shah of Iran, Anastasio Somoza and Jean-Claude Duvalier preceded the Marcoses as fallen leaders under legal siege. 191

The increasing frequency with which the assets of deposed dictators are sought emphasizes the need for the legal system to develop the adequate means to handle such litigation. The *Marcos* cases, although strong examples of skilled, highly creative lawyering, highlight the need for more expansive laws and doctrines to deal with such cases.

Commentators are beginning to take notice of the problem. The American Society of International Law brought together experts to discuss the pursuit of assets of deposed dictators at its 1987 conference. 192 Richard Falk, professor at Princeton University, noted that crimes such as those that the Marcoses were accused of are an ancient practice. 193 Whereas in ancient times stolen wealth was recycled in the community, today wealth has great mobility, and is often transferred to distant countries. 194 Thus, what was once a problem limited to politically unstable areas is now a problem for all countries, especially those attracting investment.

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194 Id. As an example, Falk described how graverobbers of the Egyptian pyramids only circulated their wealth in the immediate area and not worldwide as contemporary thieves often do.
Falk noted that in addition to billions of dollars being involved, the dignity of those who suffer from these crimes is similarly at stake.\textsuperscript{195} Actions such as the Marcoses' involve entire societies because these crimes remove billions of dollars from victimized societies where median incomes are only a few hundred dollars. This observation was reflected in the comments of Peter Weiss, a lawyer for the Philippines in the Marcos cases.\textsuperscript{196} Weiss stated that the Marcos cases were not property disputes but human rights cases.\textsuperscript{197} As such, Weiss saw the cases as an extension of the Filartiga principle, which applies international law to violations of human rights principles in domestic courts.\textsuperscript{198} Weiss considered the alleged depredations of the Marcoses as "the rape of an entire nation" and therefore appropriate to the Filartiga principle.\textsuperscript{199}

While Weiss' observations may be considered extreme, they nevertheless highlight the need for new law to be developed for these types of cases. The charges in the Marcos cases, although affecting human rights, have greater repercussions. Weiss suggested that a confluence of human rights and economic theory is necessary in any future law for the pursuit of deposed dictators' assets.\textsuperscript{200} Weiss also suggested that new law must be a "third generation of rights": rights of people to their collective wealth, to economic development, and a right not to be exploited.\textsuperscript{201} Abram Chayes, professor at Harvard Law School and an advisor to the Philippine Commission on Good Government, generally suggested that there is room for an international treaty or convention concerning deposed dictator's assets, even though some countries with dictators presumably would not sign.\textsuperscript{202}

Whatever new laws, treaties or conventions arise in this area, the Marcos proceedings will certainly have some effect. It is too soon to say what that effect will be. As attorney Weiss stated, the "Marcos principle" is presently "written in invisible ink."\textsuperscript{203} However, that

\textsuperscript{195} Id.
\textsuperscript{196} P. Weiss, Remarks at the American Society of International Law 1987 Conference (April 9--11, 1987).
\textsuperscript{197} Id.
\textsuperscript{198} Id. See Filartiga v. Pena-Irala, 630 F.2d 876, 888--889 (2d Cir. 1980).
\textsuperscript{199} P. Weiss, Remarks at the American Society of International Law 1987 Conference (April 9--11, 1987).
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} A. Chayes, Remarks at the American Society of International Law 1987 Conference (April 9--11, 1987).
\textsuperscript{203} Id. (statement of Peter Weiss.)
principle should reveal itself when the next dictator falls and is sued for allegedly stealing a nation’s assets.

VII. USING THE IEEPA AGAINST DEPOSED DICTATORS

The International Emergency Economic Powers Act (IEEPA)\textsuperscript{204} was passed in 1977 because of concerns that economic powers rightfully belonging to the Congress had been usurped by the Presidency.\textsuperscript{205} However, because the statute broadly and amorphously delegates powers to the President, it has been applied in a variety of circumstances.\textsuperscript{206} Because of its breadth, the IEEPA could have been used to freeze the contested American property in the Marcos cases,\textsuperscript{207} and could be used in future instances when the assets of deposed dictators are at issue.

In substantive terms, the IEEPA grants the President broad powers. Section 1702(a) allows the President to, among other things, regulate or prohibit transactions in foreign exchange, transactions to banks involving foreign countries, the import or export of currency or securities, and virtually any use or transaction of property in which a foreign country or national has an interest. The President is only precluded from regulating and prohibiting postal, telegraphic or telephonic communications of a personal nature not involving property transfers and charitable donations to alleviate human suffering.\textsuperscript{208} Section 1701 allows the President to use these wide ranging powers “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States.” Section 1701 requires that a national emergency be declared by the President to invoke the IEEPA.

Taken together, sections 1701 and 1702 provide the President with virtually unrestrained powers. For example, the limitations of

\textsuperscript{204} 50 U.S.C. § 1701–06 (1982).
\textsuperscript{207} This was suggested by Sevarina Rivera, counsel to the Republic of the Philippines, at the 1987 American Society of International Law conference.
\textsuperscript{208} 50 U.S.C. 1702(b) (1982).
section 1701 are virtually meaningless, since almost any world event affects the United States' national security, foreign policy or economy. The interdependence of world economics and politics is the reason for this. Similarly, the requirement of 1701 for a national emergency to be declared serves more as a formality than an impediment, and exists merely for "conceptual tidiness." The declaration of a national emergency is a simple matter, and when declared for the purposes of the IEEPA it has no other effect. Thus, a national emergency declared under the IEEPA does not mean that emergency conditions necessarily exist in the United States. Rather, it is limited to the United States' relations with a foreign country.

Section 1702 provides the President with an expansive list of powers. This is a necessity, since any statutory attempt to define an emergency must be broad, and, more importantly, the realm of national emergencies and foreign affairs is uniquely suited to the executive branch. The Supreme Court affirmed this position in interpreting the IEEPA. In Dames & Moore v. Regan, the Court held that the President was authorized by the IEEPA to order the transfer of Iranian assets as part of the Iranian hostage agreement. The plaintiffs in Dames & Moore sought to prevent the enforcement of the executive orders and agreement with Iran for the release of the hostages. Specifically, the plaintiffs alleged that the executive orders and agreements were unconstitutional because they adversely affected the plaintiffs' final judgment awarding writs of execution and garnishment against the Iranian government and the Atomic Energy Organization of Iran. As well as relying on the IEEPA to reject this claim, the Supreme Court held that the action was not a taking under the fifth amendment. The Court also held that the President was authorized to suspend claims pursuant to executive orders because of the history of congressional

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209 IEEPA note, supra note 205, at 1115.
210 Id.
211 However, the IEEPA is not exempted from § 201(b) of the National Emergencies Act, 50 U.S.C. § 1621(b) (1976), which applies to all emergency declarations unless explicitly exempted.
214 Id. at 669–74.
215 Id. at 666–67.
216 Id. at 667.
217 Id. at 674 n.6.
acquiescence in executive claims settlements. Thus, with this approval from the Supreme Court, sections 1701 and 1702 of the IEEPA provide the Presidency with a powerful tool in foreign affairs that will in most cases be deferred to by the judiciary.

Procedurally, the IEEPA does place some limitations on the President. However, as in sections 1701 and 1702, these limitations are minor. For example, section 1703 requires that the President consult with the Congress "in every possible instance" before acting under the IEEPA, and provide the Congress with immediate and follow-up reports of his or her action. However, this requirement is problematic, since it allows the President to determine when prior consultation with Congress is possible, and does not specify who in Congress is to be consulted. Thus this provision is more of a request than a requirement for consultation. The other procedural requirement of the IEEPA is presumably no longer a requirement because a similar provision in another statute has been found unconstitutional. Section 1706(b) provides that a legislative veto by Congress can overturn the national emergency under the IEEPA. The Supreme Court however, in *Immigration and Naturalization Service v. Chadha*, declared a similar legislative veto provision unconstitutional on various grounds. Thus the procedural demands of the IEEPA on the President, along with the substantive demands of the statute, are minor, allowing the President broad discretion to determine when to apply the IEEPA and to what extent.

Taking these broad powers into consideration along with the facts of the *Marcos* cases, it appears that the IEEPA should have been applied for two reasons. First, the importance of American-Philippine relations strongly weighs in favor of applying the IEEPA. The Armacost declaration clearly sets out the military, economic

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218 *Id.* at 675–88.
219 IEEPA note, supra note 205, at 1118–19.
220 *Id.* at 1119.
222 The Court in *Chadha* struck down the provision in § 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2), which authorized a house of Congress, by resolution, to invalidate an Executive Branch determination of an alien's status. The majority held that the legislative veto violated the presentment clause of the Constitution as well as the principle of bicameralism. *Id.* at 946–59. However, in the IEEPA a concurrent resolution is required for the veto, so the bicameralism argument is not applicable. In his concurring opinion in *Chadha*, Justice Powell ruled that the Executive Branch determination was an adjudication, consequently violating the separation of powers doctrine. *Id.* at 960–67. This argument is also not applicable to the IEEPA. Nevertheless, it seems that the legislative veto provision of the IEEPA would fail a constitutional test because of its infringement on foreign affairs, an area traditionally within the auspices of the executive branch.
and social ties between the two countries and the strong interest of the United States in maintaining these ties. Since the Marcos litigation is vitally important to the Aquino government for monetary and credibility reasons, the cooperation of the American government in the litigation would enhance Philippine-American relations. By applying the IEEPA to the Marcos litigation, the chances of Philippine success in the litigation would have been enhanced as the contested property could have been more easily frozen pending determination of ownership. Second, the symbolic importance of the IEEPA would have had some effect as well, since the Ninth Circuit in the Marcos case based its decision against the Aquino government in part on the silence of the American government in the case. Since the Aquino government has had some domestic difficulties in asserting its authority and establishing its effectiveness, the application of the IEEPA to the Marcos cases could have heightened the Aquino government's domestic and international credibility.

However, it must be remembered that the application of the IEEPA is a policy decision. The Departments of State and Justice are in a unique position to consider and evaluate the merits of a wealth of information before recommending the application of the IEEPA to the President. Since there is little publicly available information to evaluate fully the Marcos cases, it is difficult to judge the government's position concerning the cases.

What can be derived from the Marcos experience is that the IEEPA can and should be used in future instances of the pursuit of property of fallen third world dictators. The unique political and economic pressures that the statute can create make it a valuable tool in foreign affairs. While the fall of Ferdinand and Imelda Marcos and subsequent rise of Corazon Aquino were unique events, the abuse of governmental power by third world dictators is not. The IEEPA is not a panacea, but it can, under the proper circumstances, facilitate both the transfer of power from dictatorship to democracy as well as the pursuit of stolen assets.

VIII. Conclusion

The Marcos cases are important for several reasons. The Second Circuit case revealed the need for a benefit test in determining the application of the act of state doctrine to deposed leaders. The Ninth Circuit case contained an incorrect interpretation of the act of state doctrine that highlighted the difficulty in distinguishing
between public and private acts of political leaders. The case also failed to develop a proper test for a preliminary injunction.

The Marcos cases also illustrate the difficulty of recovering assets stolen by deposed dictators. Principles such as the act of state doctrine and forum non conveniens can, in certain circumstances, preclude the recovery of stolen assets. Moreover, the great mobility of wealth today can preclude a court from having jurisdiction in an action to recover assets.

On a larger scale, the cases reveal that the pursuit of the assets of a deposed dictator is not an isolated occurrence, but an increasingly common phenomenon deserving of some treaty, convention or legislation. In the future, the IEEPA could be used to freeze the property of deposed dictators located in the United States in order to facilitate the adjudication of its ownership. The contribution of the Marcos cases to this developing body of law is uncertain, but will hopefully be a positive development.

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