Konowaloff v. Metropolitan Museum of Art: How the Act of State Doctrine Saved the Cézanne in the Museum

I. OVERVIEW

Plaintiff Pierre Konowaloff is the sole heir to his great-grandfather Ivan Morozov's estate, which once boasted one of the most revered modern art collections in Europe.[1] Among Morozov's masterpieces was a Cézanne painting entitled *Madame Cézanne in the Conservatory* (Painting).[2] In 1917, the Bolshevik Party seized power from Russia's Provisional Government and formed the Russian Socialist Federated Soviet Republic (R.S.F.S.R.) and its successor the Union of Socialist Soviet Republics (U.S.S.R.) (Soviet Union).[3] Shortly thereafter, the Soviet government began issuing decrees to nationalize private property.[4] Among these decrees was an order "directed only at the art collections of Morozov and one other family [that] was tantamount to a bill of attainder."[5] Morozov was stripped of his property rights, receiving no compensation for the appropriation of the artwork.[6] In May 1933, a U.S. citizen, Stephen C. Clark, acquired the Painting through a transaction that Konowaloff alleged "may have violated Russian law."[7] Clark was a trustee of the Metropolitan Museum of Art (Museum) in New York City and bequeathed the Painting to the Museum when he died in 1960.[8]

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1. Konowaloff v. Metro. Museum of Art (*Konowaloff II*), 702 F.3d 140, 141 (2d Cir. 2012).
2. *Id.*
3. *Id.* at 142.
4. *Id.*
5. *Id.*
6. *Id.*; *see also infra* Part III (addressing whether the political party or sovereign government took the property).
7. *Konowaloff II*, 702 F.3d at 142.
8. *Id.* at 143.

Konowaloff first learned of the Painting in 2008, several years after becoming the official heir to Morozov's estate.[9] In 2010, the Museum refused Konowaloff's demand to return the Painting, and Konowaloff brought suit in the United States District Court for the Southern District of New York.[10] The district court granted the Museum's motion to dismiss, holding that the act of state doctrine applied to, and therefore precluded, Konowaloff's claims.[11] The district court concluded that because the Soviet government divested Morozov of his property rights through a valid act of state, neither he nor his heirs had a valid claim to the Painting.[12] The court rejected Konowaloff's claims that the seizure was an unlawful theft, refusing to inquire into the validity of the decree because such an inquiry was the exact analysis prohibited by the act of state doctrine.[13] On appeal, Konowaloff argued that the district court's finding that the Painting was taken by a valid act of state was in error and that his amended complaint stated factual allegations to the contrary.[14] The United States Court of Appeals for the Second Circuit *held* that Konowaloff's action was barred by the act of state doctrine and affirmed the district court's motion to dismiss. *Konowaloff v. Metropolitan Museum of Art* (*Konowaloff II*), 702 F.3d 140 (2d Cir. 2012).

II. BACKGROUND

A. The Act of State Doctrine

The act of state doctrine, which prohibits a court from questioning the actions of a foreign sovereign within its territory, is a well-settled and internationally recognized common law principle.[15] Early formulations of the doctrine in U.S. courts can be traced back as far as the late eighteenth and early nineteenth centuries.[16] Functionally, the act of state doctrine prohibits U.S. courts from hearing claims against a foreign sovereign government that was acting in its official capacity within its sovereign territory.[17] In the late nineteenth century, the United States Supreme Court articulated a concise statement of the doctrine in *Underhill v. Hernandez*:

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 144.
13. *Id.*
14. *Id.* at 145.
15. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964).
16. *Id.*
17. *Id.* at 401.

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[18]

Following this proscription, the Court declined to entertain the claims of a U.S. citizen regarding acts of the Venezuelan government that occurred in Venezuela, holding that a U.S. court was an improper venue to adjudicate such claims.[19]

The act of state doctrine has constitutional underpinnings that stem from basic principles of separation of powers.[20] The doctrine represents a judicial reluctance to impede upon the constitutional authority of the Executive and Legislative—the political[21]—Branches in the realm of foreign affairs.[22] The President's Article II powers vest in him the authority to make treaties and appoint ambassadors.[23] Indeed, he "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[24] The United States Constitution also confers on the Legislative Branch the power to regulate commerce with foreign nations.[25] With such express grants of constitutional authority vested in the political branches, the Judiciary avoids exercising jurisdiction to create law affecting foreign affairs.[26]

While the act of state doctrine serves to respect coordinate branches of the U.S. government, the doctrine's main function is to maintain the integrity of U.S. relations with foreign governments.[27] As Justice Clarke explained in *Oetjen v. Central Leather Co.*, the doctrine is founded "upon the highest considerations of international comity. To permit the validity of the acts of one sovereign State to be reëxamined and perhaps condemned by the courts of another would very certainly imperil the

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18. 168 U.S. 250, 252 (1897).
19. *See id.* at 250-51, 254.
20. *Sabbatino*, 376 U.S. at 423.
21. *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).
22. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004); *Sabbatino*, 376 U.S. at 423; United States v. Belmont, 301 U.S. 324, 328 (1937).
23. *See* U.S. CONST. art. II, § 2, cl. 2.
24. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (internal quotation marks omitted).
25. U.S. CONST. art. I, § 8, cl. 3.
26. *See Oetjen*, 246 U.S. at 302 ("[T]he propriety of what may be done in the exercise of political power is not subject to judicial inquiry or decision.").
27. *See* United States v. Pink, 315 U.S. 203, 229-30 (1942); *Belmont*, 301 U.S. at 328; *Oetjen*, 246 U.S. at 304.

amicable relations between governments and vex the peace of nations."[28] More recently, the Supreme Court stated:

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.[29]

Questioning the acts of another sovereign risks severe insult to that state, jeopardizing U.S. foreign relations.[30] In *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court proscribed U.S. courts from examining the validity of a recognized foreign state's taking of property within its own territory, even when such an act allegedly violates customary international law or the laws of the foreign state.[31] Thus, the act of state doctrine helps to protect U.S. foreign relations because it can serve as a bar to courts adjudicating matters pertaining to the acts of recognized foreign governments altogether.

Courts afford absolute deference to the U.S. political branches in recognizing the sovereign government of a foreign territory.[32] When the Executive Branch recognizes a foreign government, that recognition conclusively binds the U.S. Judiciary.[33] To question this recognition in the courts would seriously erode the power of political recognition.[34] Issues of recognition of a foreign sovereign often arise when a new government seizes power through a revolt or revolution,[35] but when the Executive Branch recognizes the new government as the de jure or de facto government of a state, this recognition retroactively validates all actions of that government from the time of its inception.[36]

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28. *Oetjen*, 246 U.S. at 303-04 (internal quotation marks omitted).
29. Sosa v. Alvarez-Machan, 542 U.S. 692, 727 (2004).
30. *See id.*; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431-32 (1964).
31. *See Sabbatino*, 376 U.S. at 423, 428.
32. *See* Guar. Trust Co. v. United States, 304 U.S. 126, 137 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question."); Jones v. United States, 137 U.S. 202, 212 (1890).
33. *Jones*, 137 U.S. at 212. State courts are also bound by the Executive Branch's determination. *See* M. Salimoff & Co. v. Standard Oil Co. of N.Y., 186 N.E. 679 (N.Y. 1933) (noting the political branches' recognition of the Soviet Union and applying the act of state doctrine to bar claims against the Soviet Union).
34. *See* United States v. Pink, 315 U.S. 203, 230 (1942).
35. *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302-03 (1918).
36. *Id.*

B. Recognition of the Soviet Union, the Litvinov Assignment, and the Act of State Doctrine

The Russian Revolution commenced in March 1917 with the removal of Czar Nicholas II from the Russian throne.[37] Shortly thereafter, a Provisional Government was established and recognized by the United States.[38] By November 1917, following widespread riots, the Bolshevik Party overthrew the Provisional Government in the Bolshevik Revolution.[39] The Bolshevik Party instated the communist Soviet government and began issuing decrees to nationalize privately owned property.[40]

Among other international effects, these nationalization decrees caused many U.S. citizens to lose their interests in Russian assets.[41] Consequently, domestic creditors brought claims against Russian entities.[42] These confiscations and the resulting lawsuits contributed to diplomatic strife between the United States and the Soviet Union, and the United States refused to recognize the Soviet government for nearly fifteen years.[43]

Finally, in November 1933, President Franklin D. Roosevelt recognized the Soviet government as the de jure government of Russia.[44] In conjunction with this recognition, the United States accepted an assignment (the Litvinov Assignment) of certain claims.[45] The Litvinov Assignment was an agreement between President Roosevelt and Maxim Litvinov, the People's Commissar for Foreign Affairs, intended to settle the claims and counterclaims between the Soviet government and the United States definitively.[46] When President Roosevelt accepted the Litvinov Assignment and recognized the Soviet Union, he retroactively validated every action of the Soviet government.[47]

In *United States v. Belmont*, the first Supreme Court case concerning a Soviet nationalization decree after the Litvinov Assignment, the Court took judicial notice that the United States had officially

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37. Jeff Nemerofsky, *Litvinov Lives? U.S. Investors May Be Playing Russian Roulette*, 8 MICH. ST. U.—DCL J. OF INT'L L. 487, 488 (1999).

38. *Id.*; *see also* Konowaloff v. Metro. Museum of Art (*Konowaloff I*), No. 10 Civ. 9126(SAS), 2011 WL 4430856, at *1 (S.D.N.Y. Sept. 22, 2011).

39. Nemerofsky, *supra* note 37, at 488.

40. *Id.*

41. *Id.*; *see also* United States v. Pink, 315 U.S. 203, 210-11 (1942); United States v. Belmont, 301 U.S. 324, 326 (1937).

42. *See, e.g.*, *Pink*, 315 U.S. at 210-11; *Belmont*, 301 U.S. at 326-27.

43. *See* Nemerofsky, *supra* note 37, at 488.

44. *Id.*; *see also Pink*, 315 U.S. at 211.

45. Nemerofsky, *supra* note 37, at 488-89; *see also Pink*, 315 U.S. at 211.

46. Nemerofsky, *supra* note 37, at 488-89; *see also Belmont*, 301 U.S. at 326.

47. *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302-03 (1918).

recognized the Soviet government and that diplomatic relations had been established as a result of the Litvinov Assignment.[48] The Court concluded that the consequence of such recognition was validation of all previous and current actions of the Soviet government.[49] In *Belmont*, the plaintiff, the United States acting on behalf of the Soviet Union in accordance with the Litvinov Assignment, sought to recover a sum of money deposited by a Russian corporation into the account of a private New York banker, August Belmont.[50] The defendants, the executors of Belmont's will, refused to release the funds.[51]

The deposit, which was made prior to 1918, was a target of a 1918 Soviet nationalization decree.[52] The decree liquidated the corporation and appropriated all of its property and assets worldwide, including the money in Belmont's New York account.[53] Despite the lower court's finding that enforcing the nationalization decree would amount to an act of confiscation that violated domestic public policy, the Supreme Court reversed.[54]

Noting the Soviet government's continuing interest in the collection of claims, the Court recognized that *Belmont* presented "a question of public concern, the determination of which well might involve the good faith of the United States in the eyes of a foreign government."[55] The Court accepted the nationalization decree as an act of a recognized foreign sovereign and under the act of state doctrine, declined to declare the appropriation an unlawful confiscation and reversed.[56] Central to this decision was the Court's finding that the defendants' interest in the case was merely custodial, and thus no American's Fifth Amendment rights were implicated in the matter; the issue was purely between a foreign sovereign and its citizens.[57]

There is perhaps no U.S. court case more iconic of the application of the act of state doctrine to the Litvinov Assignment than *United States v. Pink*.[58] Approximately five years after the Supreme Court decided *Belmont*, the United States once again brought a claim on behalf of the Soviet Union to collect appropriated assets from a Russian corporation—

48. 301 U.S. at 330.
49. *Id.*
50. *Id.* at 325-26.
51. *Id.* at 326.
52. *Id.*
53. *Id.*
54. *Id.* at 327, 333.
55. *Id.* at 327.
56. *Id.* at 332-33.
57. *See id.*
58. 315 U.S. 203 (1942).

the First Russian Insurance Company's New York branch.[59] The assets, which were Soviet property under the 1918 decree, remained in the hands of defendant Louis Pink, Superintendent of Insurance for New York; other named defendants were foreign creditors with claims against the Russian corporation.[60] Under the Litvinov Assignment, the assets should have been returned to the Soviet Union after all payments to domestic creditors were settled.[61] However, the defendants denied that the decrees had extraterritorial effect and instead argued that the assets were unaffected by the Litvinov Assignment.[62] The defendants alleged:

> [U]nder Russian law the nationalization decrees in question had no effect on property not factually taken into possession by the Russian Government prior to May 22, 1922; that the Russian decrees had no extraterritorial effect, according to Russian law; that if the decrees were given extraterritorial effect, they were confiscatory and their recognition would be unconstitutional and contrary to the public policy of the United States and the State of New York.[63]

Addressing the respondent's argument that the Russian decrees did not have extraterritorial effect, the Court first noted that the issue raised a nonjusticiable federal question because questions of foreign law, upon which the asserted federal right was based, were not cognizable by domestic courts.[64] The Court relied upon a declaration by the Commissariat for Justice to interpret the scope of the Russian law.[65] The declaration stated, "[T]he funds and property of former insurance companies, constitute property of the State, irrespective of the nature of the property and irrespective of whether it was situated within the territorial limits of the R.S.F.S.R. or abroad."[66] The Court upheld this construction, acknowledging the decrees' extraterritorial effect and concluding that the decree encompassed the New York assets of the First Russian Insurance Company.[67]

The Court held that the creditors of the Russian corporation, whom the Court assumed were not U.S. citizens and did not have any claims arising out of transactions with the New York branch, were without a

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59. *Id.* at 210.
60. *Id.* at 211, 213.
61. *See id.* at 212-13.
62. *Id.* at 214.
63. *Id.*
64. *Id.* at 218.
65. *See id.* at 218-20.
66. *Id.* at 220 (internal quotation marks omitted).
67. *Id.* at 221.

means of redress in domestic courts.[68] Because U.S. citizens were not affected by the controversy, the Court applied the act of state doctrine and concluded that neither the federal courts nor the New York courts could sit in judgment on the acts of the Soviet government against its own nationals.[69] Following *Belmont*, the Court reasoned that when President Roosevelt officially recognized the Soviet government, he validated all the actions of the government from the commencement of its existence in 1917.[70] Under the act of state doctrine, such validation was binding upon the courts, and the date that the Soviet government appropriated the assets was immaterial.[71]

Finally, addressing the defendants' claim that enforcement of the decrees would be contrary to public policy, the Court stated that objections to foreign policy and recognition of the Soviet government were grievances for the political branches, not the courts.[72] The Court noted that the Litvinov Assignment and settlement of claims was the means the Executive Branch chose to rehabilitate relations between the United States and the Soviet Union and that the Court "would usurp the executive function if we held that that decision was not final and conclusive in the courts."[73] Further, the Court concluded that the Supremacy Clause of the Constitution defeated any state objections to the Executive's decisions on public policy.[74] Ultimately, the Supreme Court held that the assets had been appropriated by the Soviet government and the rights had passed to the United States under the Litvinov Assignment and reversed and remanded to the Supreme Court of New York.[75]

The Soviet Union collapsed in December 1991.[76] Since the Soviet dissolution, only one other case has challenged an act of Soviet confiscation in a U.S. court.[77] In *Agudas Chasidei Chabad of United States v. Russian Federation* (*Chabad I*), the plaintiff, a nonprofit Jewish

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68. *Id.* at 227-28.
69. *Id.* at 233.
70. *See id.* at 223.
71. *Id.*
72. *Id.* at 229.
73. *Id.* at 230.
74. *Id.* at 230-31.
75. *Id.* at 234.
76. *See* James F. Clarity, *After the Soviet Union; Russians Greet Raising of New Flag with Expressions of Pride and Relief*, N.Y. TIMES (Dec. 27, 1991), http://www.nytimes.com/1991/12/27/world/after-soviet-union-russians-greet-raising-new-flag-with-expressions-pride-relief.html.
77. *See* Agudas Chasidei Chabad of U.S. v. Russian Federation (*Chabad I*), 528 F.3d 934 (D.C. Cir. 2008).

organization under the laws of New York, alleged its collection of religious books was taken by the Soviet Union—or its successor, the Russian Federation—in violation of international law.[78] The defendant moved to dismiss the claim under the act of state doctrine, the Foreign Sovereign Immunities Act (FSIA), and other grounds.[79] The takings at issue in *Chabad I* have a complex history that includes an initial seizure of a portion of the collection of religious books by the Bolsheviks in Moscow during the 1917 Revolution and a subsequent seizure of the remainder of the collection in Poland in 1945.[80] For years, the collection remained in the Russian State Military Archive, and the members of Chabad fought vigorously for its return.[81] The plaintiff initiated a suit in the Russian courts against the Soviet Union in 1991, but the government dissolved midway through litigation, and negotiations with its successor, the Russian Federation, failed.[82]

On appeal, one of the issues before the United States Court of Appeals for the District of Columbia Circuit was whether the act of state doctrine applied to the takings.[83] Though the plaintiffs argued that the change in the Russian government and the dissolution of the Soviet Union should bar application of the doctrine, the court was not convinced.[84] Instead, the court concluded it was not its province to determine the effect of the change of political regime, because that is precisely the type of political determination the doctrine sought to avoid.[85] Nonetheless, the court found the doctrine was inapplicable on other grounds; the 1945 seizure, though effectuated by the Soviet Union, occurred outside of Russia and thus was not precluded by the doctrine.[86]

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78. *Id.* at 938.

79. *Id.* at 939.

80. *Id.* at 938. The *Chabad I* plaintiff's cause of action arose from two distinct takings: one in 1917 and one in 1945. Though it was undisputed that the 1917 seizure took place within Russia's sovereign territory, and thus a claim based on this taking would be barred by the act of state doctrine, the plaintiffs alleged that the failed negotiations with the Russian government in 1991-92 constituted a new taking of the same collection. Thus, the plaintiffs rooted their prayer for relief for that portion of the collection in the alleged retaking of 1991-92. The court found that the latter taking was not precluded by the doctrine under the Second Hickenlooper Amendment, which normally bars application of the act of state doctrine to seizures occurring after January 1, 1959. *See id.* at 952-53; *see also* 22 U.S.C. § 2370(e)(2) (2012). The Second Hickenlooper Amendment is beyond the scope of this Recent Development, and the remainder of the discussion will focus solely on the 1945 taking.

81. *See Chabad I*, 528 F.3d at 943-45.

82. *Id.* at 945.

83. *Id.* at 954.

84. *Id.*

85. *Id.*

86. *Id.* at 952. On remand, the district court awarded a default judgment to Chabad under the FSIA exception to sovereign immunity and did not reach the merits of the act of state

Courts frequently apply the act of state doctrine to preclude hearing claims that arise out of the actions of foreign sovereigns and avoid meddling in the political branches' role in foreign affairs.[87] Cases concerning the recognition of the Soviet government, the nationalization decrees, and the Litvinov Assignment have consistently followed the examples of *Pink* and *Belmont* and held that the act of state doctrine proscribes judicial inquiry into such matters.[88] Though the diplomatic relationship between Russia and the United States has varied greatly over recent years, marked by a high point under President Dmitry Medvedev and a recent decline under President Vladimir Putin, the steadfast application of the doctrine has avoided judicial decisions based on the political landscape.[89]

III. THE COURT'S DECISION

In the noted case, the Second Circuit relied on *Pink* and *Belmont* to conclude that Konowaloff's claims, which originated from a Soviet nationalization decree appropriating his great-grandfather's Painting, were barred by the act of state doctrine.[90] The court first noted the separation of powers principles underlying the doctrine and that judicial interference into the political sphere may hinder the United States' goals in foreign affairs.[91] To avoid such turmoil, the court recognized the necessity that once the Executive Branch recognizes a foreign government, such recognition applies retroactively to acts undertaken prior to official U.S. recognition, which, in the instant case, applied to the 1918 nationalization decree.[92] Rejecting Konowaloff's claims that a political party—not a foreign sovereign—effectuated the appropriation, the court found the language in his own amended complaint supported a

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doctrine. *See* Agudas Chasidei Chabad of U.S. v. Russian Federation (*Chabad II*), 729 F. Supp. 2d 141, 148 (D.D.C. 2010).

87. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 409 (9th Cir. 1983); Hunt v. Mobil Oil Corp., 550 F.2d 68, 79 (2d Cir. 1977).

88. *See, e.g.*, Stroganoff-Scherbatoff v. Weldon, 420 F. Supp. 18, 22 (S.D.N.Y. 1976) (granting the defendants' motion for summary judgment under the act of state doctrine in a suit to recover a work of art appropriated by a Soviet nationalization decree); M. Salimoff & Co. v. Standard Oil Co. of N.Y., 186 N.E. 679, 680, 683 (N.Y. 1933) (holding the act of state doctrine preclusive of the plaintiffs' claims for title to oil lands in Russia that the Soviets seized in a nationalization decree).

89. *See* Peter Baker, *Syria Crisis and Putin's Return Chill U.S. Ties with Russia*, N.Y. TIMES (June 13, 2012), http://www.nytimes.com/2012/06/14/world/europe/putins-return-brings-rapid-chill-to-us-russia-ties.html?_r=0.

90. *Konowaloff II*, 702 F.3d 140, 146 (2d Cir. 2012).

91. *Id.* at 145.

92. *Id.* at 146.

finding that a recognized foreign sovereign seized the Painting.[93] The court found that because Morozov did not own the Painting after the 1918 nationalization decree, Konowaloff had no rights to the Painting and thus no standing.[94] Finally, the court spurned Konowaloff's contention that the doctrine should not be applied because the Soviet government no longer existed.[95] The court held that because the current Russian government has not repudiated the acts of the Soviet Union, the doctrine still applied in full force.[96] Ultimately, the Second Circuit affirmed both the holding and the reasoning of the district court's motion to dismiss Konowaloff's claims.[97]

The court began its discussion with an analysis of the act of state doctrine's constitutional underpinnings.[98] Noting that the Judiciary's role in the division of powers does *not* encompass foreign affairs, the court posited the unfortunate consequences that could result from disrupting the status quo.[99] In support of this assertion, the Second Circuit relied on the Supreme Court's application of the doctrine in *Sabbatino*.[100] The court implied that questioning the validity of sovereign acts in domestic courts disrespects the foreign state.[101] From this assertion arises the presumption that such disrespect will cause undue strife in the foreign relations between that state and the U.S. political branches.[102] Under the same rationale, the court declared that recognition of precisely *who* is a foreign government is a question for the Executive Branch.[103] That determination, which retroactively validates all actions of that "*government so recognized from the commencement of its existence*," is binding upon the courts.[104]

The court then turned to Supreme Court precedent and noted its long-standing application of the act of state doctrine to cases involving nationalization decrees ordered by the Soviet Union that appropriated the

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93. *Id.* at 146-47.
94. *Id.* at 147.
95. *Id.*
96. *Id.* at 148.
97. *Id.*
98. *See id.* at 145.
99. *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423, 428 (1964)).
100. *Id.*; *Konowaloff I*, No. 10 Civ. 9126(SAS), 2011 WL 4430856, at *7-8 (S.D.N.Y. Sept. 22, 2011) (quoting *Sabbatino*, 376 U.S. at 423, 428, 431).
101. *See Konowaloff II*, 702 F.3d at 145-46.
102. *See id.*; *see also Konowaloff I*, 2011 WL 4430856, at *7 ("[T]he question is . . . whether any decision this Court renders could affect U.S. relations with the foreign government.").
103. *Konowaloff II*, 702 F.3d at 146.
104. *Id.* (quoting Oetjen v. Cent. Leather Co., 246 U.S. 297, 302-03 (1918)).

property and assets of various Russian corporations.[105] Consistent with *Oetjen*, the Court's precedent supported application of the doctrine to such claims, although formal recognition of the Soviet government did not occur until years after the decrees.[106] Following *Pink* and *Belmont*, the *Konowaloff II* court declared that the Executive Branch's decision to recognize the Soviet government continues to bind courts today.[107] Thus, it was not within the Second Circuit's province to entertain Konowaloff's claims and determine whether the Soviets unlawfully confiscated his great-grandfather's Painting.[108] Lawful or not, it was confiscated by a foreign sovereign recognized by the Executive Branch, and any inquiry into its validity is prohibited by the doctrine and reinforced by precedent.[109]

Corollary to this rule, the court rejected Konowaloff's contention that the Bolshevik *Party* effectuated the confiscation of the Painting, not the Bolshevik *government*.[110] Konowaloff meagerly attempted to persuade the court that the doctrine was not applicable here because the 1918 decree was the act of a political party, not a sovereign state.[111] However, the Second Circuit agreed with the district court that Konowaloff's amended complaint could not survive a motion to dismiss because it expressly alleged that the Painting was confiscated by the Soviet government in 1918 and was placed under the supervision of a political commissar.[112] In other words, because Konowaloff's alleged injury was caused by an act of a foreign sovereign government in its own territory, the doctrine automatically precluded his claim.[113] Konowaloff's cries that the taking of the Painting was "*an act of theft*" fell upon deaf ears; the court found that the allegations were legal assertions that it was not obligated to accept.[114] Questioning the legality of the taking by the Soviet government is the exact inquiry barred by the act of state doctrine; it is beyond the jurisdiction of the courts.[115]

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105. *Id.*
106. *Id.*
107. *See id.*
108. *See id.* at 146-47.
109. *See* United States v. Pink, 315 U.S. 203, 230-33 (1942); United States v. Belmont, 301 U.S. 324, 326, 330 (1937).
110. *Konowaloff II*, 702 F.3d at 147.
111. *Id.*
112. *Id.* at 146-47.
113. *See id.*
114. *Id.* at 147 (quoting Plaintiff's Amended Complaint ¶ 57, *Konowaloff II*, 702 F.3d 140 (No. 11-4338-CV)).
115. *Id.*

The court concluded that because Morozov was deprived of his property rights to the Painting when it was confiscated in 1918, Konowaloff, as his heir, had no standing to bring a claim for any sale or handling of the Painting after 1918.[116] Even if the later sale of the painting to Clark violated Russian law, "in light of the Soviet government's appropriation of the Painting in 1918, the court[s have] no need to consider any alleged legal defects in the sale of the Painting in 1933."[117]

Finally, the court rejected Konowaloff's assertion that the doctrine did not apply in the instant case because the Soviet government no longer existed, and thus, there was no risk of upsetting diplomatic relations.[118] The court held the dissolution of the Soviet government was irrelevant because Russia's current government has not repudiated the 1918 appropriations.[119] Konowaloff's reliance on two prior Second Circuit cases proved futile because in both instances the current government had repudiated the acts of the former government that deprived plaintiffs of their property.[120] In contrast, although the current Russian government does not appear inclined to engage in further appropriations of private property and has investigated the 1930s art sales, it has not expressly repudiated the 1918 nationalization decree that divested Morozov, and thus Konowaloff, of his rights to the Painting.[121] The court held that it is of no consequence that the Soviet government is no longer extant, and unless the current Russian government repudiates the 1918 nationalization decree, the court will not adjudicate Konowaloff's claims under the act of state doctrine.[122]

IV. ANALYSIS

In the noted case, the Second Circuit unsurprisingly avoided potential political backlash with one of the United States' most volatile allies, the Russian Federation. The common law act of state doctrine is a self-imposed restraint on the Judiciary; it is not constitutionally mandated nor is it found in any statute. It is not a bright-line rule without exceptions; it is a policy rule that requires a balancing of multiple factors to determine whether its application is warranted. Nonetheless,

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 148 (citing Bigio v. Coca-Cola Co., 239 F.3d 440, 453 (2d Cir. 2011); Republic of Philippines v. Marcos, 806 F.2d 344, 359 (2d Cir. 1986)).
121. *Id.*
122. *See id.*

precedent reveals a nearly per se rule that when the actions of a foreign sovereign that occurred in its territory are contested, courts will decline to question the validity of such acts.[123] The doctrine's most basic tenets facilitate international comity by demonstrating respect to the sovereign and ensuring the Judiciary does not become ensnared in the Executive's realm of foreign affairs. When viewed against the political background of a strained U.S.-Russian relationship, perhaps the noted case best exemplifies how the act of state doctrine operates to avoid creating tension amongst two major world powers. The ramifications of granting Konowaloff his requested relief would not only upset hundreds of years of precedent of U.S. and international law, but also likely cause "[t]he ownership of tens of billions of dollars of art and other goods [to] be thrown into doubt";[124] the court had little difficulty in making its decision.

Chabad I and *Konowaloff II* are the only two reported cases to challenge a Soviet nationalization decree in U.S. federal courts since the dissolution of the Soviet Union in 1991. However, *Chabad I* is distinguishable from the noted case for a myriad of reasons. The critical distinction is that the 1945 taking was effectuated in Poland, and the act of state doctrine only applies to acts committed within the territory of the sovereign. Thus while this fact alone seemingly foreclosed application of the act of state doctrine, brief comparison between *Chabad I* and the noted case serves to further exemplify the operation and practical considerations of the doctrine.[125] For example, in *Chabad I*, the plaintiff was a U.S. organization.[126] In contrast, the U.S. interest in the noted case was that of the defendant.[127] The defendant Museum is an iconic emblem of U.S. culture that attracts as many as three million visitors annually.[128] With such a beloved and high-profile U.S. entity standing to lose a coveted work of modern art, it is unsurprising that the court was

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123. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); Oetjen v. Cent. Leather Co., 246 U.S. 297 (1918); Underhill v. Hernandez, 168 U.S. 250 (1897).

124. *Van Gogh Artwork Sparks Lawsuit*, WASH. TIMES (Jan. 1, 2010), http://www.washingtontimes.com/news/2010/jan/01/van-gogh-artwork-sparks-lawsuit/.

125. *See Chabad I*, 528 F.3d 934, 939 (D.C. Cir. 2008). The district court in *Konowaloff I* interpreted the complications that arose in *Chabad I* to indicate that an analysis of the Soviet nationalization decrees would "entail just the implications for foreign affairs that the doctrine is designed to avert." *Konowaloff I*, No. 10 Civ. 9126(SAS), 2011 WL 4430856, at *7 (S.D.N.Y. Sept. 22, 2011). The Second Circuit did not consider *Chabad I* in its analysis. *See Konowaloff II*, 702 F.3d 140.

126. *Chabad I*, 528 F.3d at 938.

127. *See Konowaloff II*, 702 F.3d at 141.

128. Erica Orden, *MoMA Attendance Hits Record High*, WALL ST. J. (June 29, 2010, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748703964104575335301840480246.

disinclined to disturb long-standing jurisprudence at the behest of a Russian heir residing in France.

The consequences of not applying the doctrine would extend well beyond the noted case. In a recent comment analyzing how the doctrine safeguards much of the art adorning U.S. museum walls, Kevin Prewitt postulated that return of collections such as Morozov's to their private owners would have a widespread effect.[129] Because "[t]he facts of the Bolshevik nationalization of Morozov's collection are nearly identical to previous litigation that applied the act of state doctrine both internationally and in the United States,"[130] a different outcome in the noted case would have opened the floodgates to copious claims once barred by the doctrine. Attorneys have suggested that a ruling in Konowaloff's favor would cast doubt upon the ownership of nearly twenty billion dollars' worth of art worldwide.[131] Many of these works are housed in U.S. museums and are part of the cultural heritage of the United States.[132]

Additionally, the political landscape between Russia and the United States was quite dissimilar in 2008 and 2012. Because the policy underlying the doctrine aims to maintain foreign relations, perhaps this shift in diplomatic relations influenced the courts' respective approaches to issues concerning the Soviet government. Vladimir Putin was elected President of Russia in March 2012, succeeding Dmitry Medvedev.[133] Prior to his departure from office, Medvedev boasted, "[T]hese were perhaps the best [few] years of relations between Russia and the United States over the last decade."[134] U.S. President Barack Obama and Medvedev often worked together to further their nations' diplomatic goals.[135] In contrast, Putin's presidency ushered in a "frostier relationship" between the two international superpowers.[136] The year of 2012 was marred by divergent views on the impending Syrian crisis, and "fundamentally different sets of values and interests" led to mistrust between the nations.[137] By June 2012, Aleksei Pushkov, the head of

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129. Kevin Prewitt, Comment, *The Wisdom of the Precedents: The Act of State Doctrine's Role in Protecting the Cultural Heritage of the United States*, 80 U. MO. KAN. CITY L. REV. 855, 875 (2012).

130. *Id.*

131. *See Van Gogh Artwork Sparks Lawsuit*, *supra* note 124.

132. Prewitt, *supra* note 129, at 875.

133. *See Vladimir Putin: Biography*, VLADIMIR PUTIN, http://eng.putin.kremlin.ru/bio (last visited Mar. 20, 2014).

134. *See* Baker, *supra* note 89 (internal quotation marks omitted).

135. *See id.*

136. *See id.*

137. *Id.*

Russia's Parliamentary Foreign Affairs Committee, declared there was "a crisis in the Russian-American relationship."[138]

The noted case was decided four years after *Chabad I*, and the political climate had cooled significantly in the interim. The *Konowaloff II* court applied the act of state doctrine to avoid engaging beyond granting a motion to dismiss. Any analysis or judgment of the lawfulness of alleged Soviet actions may have hindered already strained U.S.-Russia relations.[139] The Second Circuit made it abundantly clear it had no interest in meddling in Russian affairs.[140] Noting that although the act of state doctrine is an affirmative defense for which the Museum bore the burden, the court could properly grant a motion to dismiss when applicability of the doctrine is evident on the face of the complaint.[141] Accordingly, the court quickly dismissed the case.[142] It would be an ill-fated day for the Second Circuit to defy well-settled precedent, disrespect an ally and international superpower, and deprive U.S. museums of the opportunity to showcase the works that define our culture in one fell swoop. Unsurprisingly, the Second Circuit instead conducted a straightforward application of Supreme Court precedent and used the act of state doctrine to dismiss Konowaloff's claim and avoid upsetting the status quo.

V. CONCLUSION

The Second Circuit properly dismissed Konowaloff's claims under the act of state doctrine. Ruling on the merits of his claim would have violated the long-standing precedent of U.S. and international law and

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138. *Id.* Relations between the United States and Russia have become increasingly strained since the noted case was decided. In August 2013, Russia granted U.S. whistleblower Edward Snowden asylum, which incited frustration and anger from the White House. Luke Harding et al., *Edward Snowden Asylum: US 'Disappointed' by Russian Decision*, GUARDIAN (Aug. 1, 2013, 5:15 PM), http://www.theguardian.com/world/2013/aug/01/edward-snowden-asylum-us-disappointed. In February 2014, Russia hosted the Winter Olympics in Sochi, an event that many considered marred by "[c]orruption, terrorism, human rights protests, [and] high-level no-shows." Stephen Sestanovich, *Russia After Sochi*, DIPLOMAT (Feb. 8, 2014), http://the diplomat.com/2014/02/russia-after-sochi/. Although President Obama was not in attendance for the opening ceremonies, the United States was fully represented in the Olympic games. Filip Bondy, *Winter Olympics: Barack Obama, Many World Leaders Will Not Attend Opening Ceremony in Sochi*, N.Y. DAILY NEWS (Feb. 7, 2014, 12:18 AM), http://www.nydailynews.com/sports/olympics/bondy-missing-leaders-games-behin-olympic-games-article-1.1605471. Nonetheless, the Sochi Olympics did little to mend the estranged relationship between the United States and Russia.

139. *Konowaloff II*, 702 F.3d 140, 145 (2d Cir. 2012).

140. *See id.* at 147-48.

141. *Id.* at 146.

142. *See* FED. R. CIV. P. 12(b)(6).

risked aggravating the United States' mercurial relationship with Russia. Further, a victory for Konowaloff would inundate U.S. courts with a barrage of claims for billions of dollars in seized assets. It would also likely cause U.S. institutions to lose invaluable works to alleged distant heirs. Thus, to Konowaloff's dismay, the Second Circuit made the unsurprising decision to grant the Museum's motion to dismiss.

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