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IAM v. OPEC: Acts of States and Passive Virtues

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IAM v. OPEC: "Acts of States" and "Passive Virtues"

I. INTRODUCTION

The Ninth Circuit's recent decision in *International Association of Machinists and Aerospace Workers (IAM) v. The Organization of the Petroleum Exporting Countries (OPEC)*[1] has rekindled the argument concerning the legitimacy of a court's use of its "passive virtues"[2] powers. In *IAM*, the court held that the "passive" act of state doctrine, admittedly a judge-made rule of law, supplanted a federal statute[3] which seemingly provided controlling principles for the decision.[4] Critics of this decision argue that the court should have reached an opposite conclusion on this issue, i.e., that the statute should have controlled the act of state doctrine. In so arguing, critics find themselves restating the arguments initially presented by commentators such as Herbert Wechsler and Gerald Gunther against analogous uses of the passive virtues powers. This note will first examine the case, then present, and ultimately answer, the criticism it has spawned. In doing so, the note will reflect on the continuing controversy over the courts use of the passive virtues powers.

In *IAM*, the court was asked to determine whether a foreign government-controlled commodity cartel violated United States antitrust laws. The plaintiff, a labor union, sued OPEC for treble damages[5] and injunctive relief[6] under the Sherman and Clayton Acts.[7] The plaintiff contended that OPEC violated these acts through its

1. 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

2. The term "passive virtues" has been used to describe various techniques used by the courts to avoid "on-the-merits" adjudication of certain types of "cases confessedly within [their] jurisdiction." *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1935) (Brandeis, J., concurring). The term was apparently coined by Alexander Bickel. Bickel, *The Supreme Court, 1960—Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). For the most part, the term has been used to describe the various devices used by the United States Supreme Court (standing, ripeness, political question and act of state doctrines) in refusing appellate adjudication of certain controversial issues of constitutional law. *Id.* at 42-51. *See, e.g.*, P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 656-62 (2d ed. 1973).

3. Sherman Anti-Trust Act, 15 U.S.C. § 1 (1973).

4. *IAM*, 649 F.2d at 1359.

5. The plaintiff claimed treble damages under 15 U.S.C. § 15 (1973 & Supp. 1982). Section 15 provides, in part, that "[a]ny person who shall be injured in his business or prop-

admitted price-fixing activities. The plaintiff asserted that United States antitrust laws applied to OPEC's price-fixing because those activities "substantially effected" United States commerce.[8] The fact that they were undertaken by foreign governments on foreign soil was, for the purposes of the acts, entirely irrelevant.

The district court, uncomfortable with the implications of the suit, found jurisdiction[9] lacking and dismissed under Federal Rule of Civil Procedure 12(b).[10] The Ninth Circuit (per Judge Choy[11]), sharing the district court's inhibitions,[12] affirmed, although on entirely different grounds. Unlike the district court, the Ninth Circuit did not rely on the doctrine of sovereign immunity in avoiding the suit. Instead, it premised its decision on the act of the state doctrine.

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erty by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold damages by him sustained . . . ."

6. Injunctive relief was claimed under 15 U.S.C. § 26 (1973 & Supp. 1982). Section 26 provides, in part, that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . ."

7. The Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1973); the Clayton Anti-Trust Act, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (1973).

8. The extent of the Sherman Act's extraterritorial reach is deemed dependent on a tripartite analysis:

> Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?

See Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 615 (9th Cir. 1976).

9. Subject matter jurisdiction under 28 U.S.C. § 1330(a) and personal jurisdiction under 28 U.S.C. § 1330(b).

10. International Assoc. of Machinists & Aerospace Workers (IAM) v. The Org. of the Petroleum Exporting Countries (OPEC), 477 F. Supp. 553 (C.D. Cal. 1979). The district court found the threshold question to be whether OPEC's price-fixing activities could be described as "commercial," thereby excepting OPEC's members from sovereign immunity. *Id.* at 567. This "commercial exception" to sovereign immunity is codified at 28 U.S.C. § 1605(a)(2) (1973 & Supp. 1982). Section 1605(a)(2) provides that foreign states shall not be immune in cases

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

11. Judge Choy is also responsible for the highly regarded opinion in *Timberlane*.

12. *IAM*, 649 F.2d at 1358 ("The district court was understandably troubled by the broader implications of an antitrust action against the OPEC nations").

II. THE ACT OF STATE DOCTRINE

The act of state doctrine precludes American courts from adjudicating the legality of "sovereign" acts undertaken by foreign states on their own territory.[13] The doctrine is grounded on the principles of international comity and the domestic separation of powers. The doctrine's comity considerations are evident in the following statement taken from a 1918 decision applying the doctrine: "To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."[14] The doctrine's separation of powers underpinnings can be identified in the following quote from the *IAM* decision:

> The doctrine recognizes the institutional limitations of the courts and the peculiar requirements of successful foreign relations. To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy. The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles.[15]

In practice, the doctrine acts as a "special rule modifying the ordinary rules of conflict of laws."[16] To illustrate: assume a foreign government issues a decree nationalizing the assets of an American corporation located in its territory. Assume further that this expropriation was accomplished without compensation, and the corporation felt compelled to seek redress in an American court.[17] If the act

13. Ricaud v. American Metal Co., Ltd., 246 U.S. 304, 309 (1918). It is claimed that the doctrine's roots extend back to the 1674 English decision in Blad v. Bamfield, 36 Eng. Rep. 992. *See* Note, *The Origin and Development of the Act of State Doctrine*, 8 RUT.-CAM. L.J. 595 (1977). One of the earliest, and probably the most influential, American decision applying the doctrine is Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("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").

14. Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918).

15. 649 F.2d at 1358.

16. Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178 (1967).

17. For the purposes of this illustration, one must also, of course, assume the nonexistence of the Hickenlooper Amendment to the Foreign Assistance Act of 1964, Pub. L.

of state doctrine was not available to the court in these circumstances, it would be forced to decide the case on ordinary "conflicts" principles: "It would first decide what law 'governed' the issues. If under accepted choice of law principles the foreign law should govern, the court could still refuse to apply that law if it were found to be contrary to the public policy of the forum."[18] Under ordinary conflicts principles, then, the court would eventually be required to determine either: 1) that the decree nationalizing the property of a United States corporation without compensation was violative of United States public policy (which, in turn, would call for the application of United States law); or 2) that the foreign government acted within its own laws in nationalizing the property. In either situation, the court would be sitting in judgment on the sovereign acts of a foreign government.

In the interests of comity and the separation of powers, the act of state doctrine modifies this "ordinary" rule of conflicts law. The doctrine dictates "that the foreign 'law' (i.e. the act of state) must govern certain transactions and that no public policy of the forum may stand in the way."[19] Further, the courts should "not examine the acts of a foreign sovereign within its own borders, in order to determine whether or not those acts were legal under the municipal law of the foreign state."[20] Inserted into the above hypothetical, the act of state doctrine would then dictate that the law of the expropriating country control, and that the court not examine the legitimacy of that expropriation under the local law. In effect, the court would

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No. 88-633, § 301, 78 Stat. 1009, 1013, *as amended* 22 U.S.C. § 2370(e)(2) (1970) (hereinafter cited as "the Hickenlooper Amendment"). The Hickenlooper Amendment provides, in part, that:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection . . . .

18. Henkin, *supra* note 16, at 178 (footnote omitted). *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1971).

19. Henkin, *supra* note 16. *But see* Comment, *The Act of State Doctrine—Its Relation to Private and Public International Law*, 62 COLUM. L. REV. 1278, 1293 (1962) ("[f]oreign decrees intended to confiscate property owned by nationals of the acting state, but situated within the jurisdiction of the forum at the time of the enactment, are uniformly denied extraterritorial effect if found to be inconsistent with the public policy of the forum") (footnote omitted).

20. Banco de España v. Federal Reserve Bank, 114 F.2d 438, 443 (2d Cir. 1940).

be forced to deny relief to the corporation, and dismiss the suit.[21]

The "leading modern statement"[22] of the act of state doctrine appears in the Supreme Court's 1963 decision, *Banco Nacional de Cuba v. Sabbatino*.[23] The *Sabbatino* case (whose facts served as a basis for the above illustration) arose in the context of a mini-"cold war" between the United States and Cuba following Cuba's 1959 revolution. In February and July of 1960, the defendant (Farr, Witlock & Co., an American commodity broker) contracted to purchase sugar from a Cuban subsidiary of an American-controlled Cuban corporation (C.A.V.). In August, as the sugar was being readied for shipping, C.A.V. was nationalized.[24] In order to remove the sugar from the country, Farr, Witlock was forced to contract with the Cuban government through its external commerce bank. Payment for the sugar on this new contract was to be made later in New York.

Before payment became due, however, Farr, Witlock and C.A.V. entered into another agreement. Under this agreement, Farr, Witlock was to refuse to pay the Cubans under the post-nationalization contract. In consideration for this, Farr, Witlock was

21. Dismissal would be warranted because "where the controlling issue is the legality of a sovereign act and where the only remedy sought is barred by act of state considerations dismissal is appropriate." 649 F.2d at 1361. Some commentators feel that courts assume "the validity of foreign acts of state" when they dismiss on the basis of the doctrine. This issue is discussed in Golbert & Bradford, *The Act of State Doctrine:* Dunhill *and other* Sabbatino *Progeny*, 9 SW. L. REV. 1, 22 (1977).

22. *Timberlane* 549 F.2d at 605.

23. 376 U.S. 398 (1963).

24. This nationalization came in retaliation to the United States' reduction of the sugar quota for Cuba (which itself came in retaliation to an earlier Cuban nationalization of the American controlled oil industry). The quota system was adopted in 1934, and, according to noted historian Hubert Herring, worked as follows: "Under this system the American Secretary of Agriculture sets the total requirement of sugar in the United States. After allowing for domestic production, the balance is allocated to the various sugar-producing countries, their quotas fixed by acts of Congress at irregular intervals amid a feverish spate of lobbying." H. HERRING, A HISTORY OF LATIN AMERICA 414 n.5 (1972). In the years 1934-1960, the Cubans were allocated approximately one-third of the United States' import requirements. Not only was this a substantial market for that sugar-dependent country, but an extremely lucrative one as well. The United States paid artificially high prices for the commodity. In fact, these inflated prices benefited the Cubans $150 million annually beyond the world market price. *Id.*

The loss of the quota would have been a spectacular blow to the Cubans, had not the Soviet Union stepped in and bought Cuba's surplus sugar. Indeed, in a 1965 interview Fidel Castro confessed: "The Cuban economy would have received a very hard blow. Maybe it would not have finished off the Revolution, but it would have forced us to live under almost primitive conditions for a long time." L. LOCKWOOD, CASTRO'S CUBA, CUBA'S FIDEL 213 (1969).

to be: 1) defended by C.A.V. in a suit by the Cubans; 2) indemnified against any possible adverse judgments; and 3) paid 10% of C.A.V.'s possible recovery in a suit.[25] Later, Farr, Witlock denied payment, and the external commerce bank brought suit for conversion.

The district court denied the bank's claim, finding the nationalization of C.A.V. violated international law.[26] While this finding was initially affirmed upon appeal,[27] the Supreme Court reversed on the basis of the act of state doctrine. The Court held that the act of state doctrine compelled United States courts not to "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. . .".[28] Accordingly, the legality of the Cuban nationalization and the contract which flowed from it were non-justiciable issues. Hence, the contract stood, and the bank, not C.A.V., was awarded the proceeds of the sugar sale.

In reaching this conclusion, the Court identified the strong comity and separation of powers interests behind the doctrine:

> Such decisions [concerning the sovereign acts of a foreign government within its own territory, made in the absence of the act of state doctrine] would, if the acts involved were declared invalid, often be likely to give offense to the country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached. Relations with third countries which have engaged in similar [expropriations] would not be immune from effect.[29]

The Court also identified the constitutional basis for the doctrine:

> The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.

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25. The above facts were taken from Banco Nacional de Cuba v. Farr, 383 F.2d 166, 169-71 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

26. Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375, 379-86 (S.D.N.Y. 1961).

27. 307 F.2d 845, 859-68 (2d Cir. 1962).

28. 376 U.S. at 428.

29. *Id.* at 431-32.

> The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers . . . [t]he doctrine . . . expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[30]

III. THE ACT OF STATE DOCTRINE IN *IAM*

Applying the above-mentioned principles, the Ninth Circuit affirmed the district court's decision in *IAM*. Determining that the OPEC countries' price-fixing activities were "sovereign acts"[31] undertaken by foreign governments within their own territory, the court held that the doctrine precluded it from judging the legality of those acts under United States law.[32] Accordingly, the court affirmed dismissal, for "in a case such as this where the controlling issue is the legality of a sovereign act and where the only remedy sought is barred by act of state considerations dismissal is appropriate."[33]

As in *Sabbatino*, the court considered issues of international comity and the domestic separation of powers in reaching its decision. Regarding comity, the court noted:

> The remedy IAM seeks is an injunction against the OPEC nations. The possibility of insult to the OPEC states . . . is apparent from the very nature of this action and the remedy sought . . . . [T]he granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources.[34]

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30. *Id.* at 423.

31. The doctrine precludes American courts from determining the legality of "sovereign" acts of a foreign state. Purely "commercial" acts by states, for example, are not entitled to the same deference. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698 (1976). According to the court in *IAM*, the OPEC nations' price-fixing activities, while having commercial elements, were not purely commercial acts: "The importance of the alleged price-fixing activity to the OPEC nations cannot be ignored. Oil revenues represent their only significant source of income. Consideration of their sovereignty cannot be separated from their near total dependence upon oil." 649 F.2d at 1358.

32. *Id.* at 1361.

33. *Id.*

34. *Id.*

In terms of the separation of powers, the court worried that "should the court hold that OPEC's actions are legal, this 'would greatly strengthen the bargaining hand' of the OPEC nations in the event that Congress or the Executive chooses to condemn OPEC's actions."[35] The court held that these two considerations supervened any possible benefits which might flow from a different decision in the case.

IV. A "CLASSICAL" CRITICISM

At first glance, it would seem that *IAM* was ripe for the application of the act of state doctrine. As the court correctly noted, a decision against OPEC in the suit would have, at the very least, insulted the nations of OPEC. Memories of colonialism and foreign economic domination have hyper-sensitized the OPEC nations (and the Third World as a whole) on the issue of sovereignty. Any impingement or slur on this sovereignty, especially by a country often accused of economic imperialism, would have been deeply resented. What better case, then, to be governed by a doctrine grounded on international comity?

Commentator Gerald Goldman, however, vehemently protests the invocation of the act of state doctrine in this case.[36] Goldman's criticism focuses on the fact that the doctrine is "judge-made;" it is neither constitutionally nor statutorily compelled. As such, he contends, it must yield in the presence of a federal statute which provides controlling principles for a case: "Although, to quote the Supreme Court, the doctrine has 'constitutional underpinnings,' it is not 'compelled by . . . the Constitution.' It therefore cannot stand in the way of enforcement of an applicable federal statute."[37] But, insists Goldman, in *IAM* the doctrine *was* used to supplant applicable federal statutes (the antitrust laws).[38] Surely the court erred in elevating the doctrine to such a status.

Goldman's position, that a court may not refuse to apply a federal statute which is neither unconstitutional nor inapplicable to the

35. *Id.*

36. Goldman, *Circuit Erred in Choice of Legal Rationales for "OPEC,"* Legal Times of Washington, September 7, 1981, at 13.

37. *Id.* (footnotes omitted).

38. By calling the antitrust laws "applicable," Goldman is not contending that they necessarily extended to regulate the activity complained of in this case. Indeed, considering the tripartite analysis declared in *Timberlane*, it is fairly certain that the laws would not reach OPEC. *Timberlane*, 549 F.2d at 615.

situation before it, is not a novel one. Indeed, professor Alexander Bickel has deemed this position "classical":

> If a case is offered by a conventional plaintiff who has standing in the pure sense, this [classical] position maintains, the question whether or not the Court must hear it is answered by the federal law of remedies; that is, by jurisdictional statutes plus standard rules of the law of equity, themselves subject to statutory change. There is no judicial discretion to decline adjudication, no such attenuation of the duty.[39]

Goldman's argument seems sound. Generally speaking, when a judge-made rule of law directly conflicts with a constitutional federal statute, that judge-made rule will fall. But, as Goldman fails to note, this general rule is not without exceptions. Note, for example, the exception recently defined by the Supreme Court in *Doe v. Delaware*.[40] The *Doe* case involved a custody fight between the Delaware Department of Health and Social Services and the natural parents of five children over the custody of those children. The Department declared the parents (a half-brother and sister) unfit, and took the children from them. Later, the Department determined that the children should be put up for adoption, and consequently filed suit (pursuant to a Delaware statutory scheme) to terminate the parent's "parental rights."

In an attempt to maintain those rights, the parents challenged the constitutionality of the statutory termination proceedings. These challenges were properly raised, and consequently were specifically addressed by both the Delaware Superior and Supreme Courts.[41] Both courts rejected the challenges, and judged the termination of parental rights under the statute valid.[42] Accordingly, the parents appealed to the United States Supreme Court pursuant to

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39. A. BICKEL, THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS 122 (1962). This position is apparently designed as "classical" because it derives from Chief Justice Marshall's opinion in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). In *Cohens*, the Court held that:

> It is most true that this Court will not take jurisdiction if it should not: but *it is equally true, that it must take jurisdiction if it should*. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever difficulties, a case may be attended, we must decide it, if it be brought before us (emphasis added).

40. In re Five Minor Children, 407 A.2d 198 (Del. 1979), *appeal dismissed sub nom.*, Doe v. Delaware, 450 U.S. 382 (1981) (per curiam).

41. 450 U.S. at 383 (Brennan, J., dissenting).

42. *Id.* at 384.

Section 1257(2) of Title 28 of the United States Code, which provides, in part, that:

> Final judgments or decrees rendered by the highest court of a State in which a decision may be had may be reviewed by the Supreme Court as follows . . . By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Despite the fact that the federal issues presented in the case were both clear[43] and raised in conformance with Delaware's procedural requirements, the Court dismissed the appeal "for want of a properly presented federal question."[44] The Court chose to ignore the mandate of section 1257 in favor of a judicially-created abstention policy. Justice Brennan, writing in a "classical" mode, dissented:

> The appellate jurisdiction of this Court is not discretionary . . . . Having raised a federal constitutional challenge to the [Delaware "termination" proceedings] under which their parental rights were terminated, and having received a final judgment from the highest court of the State upholding the statute and affirming the termination order, appellants have a *right* to appellate review. I can discern no basis for dismissing this appeal for want of a properly presented federal question. . . .[45]

If a judicial abstention policy could supervene application of section 1257 in *Doe*, it seems that a similar policy (the act of state doctrine) could justify the action taken by the court in *IAM*.

Goldman, however, might argue that the decision in *Doe* is inapposite. The supervened statute in *Doe* concerned jurisdiction.[46] It was not one where "controlling principles" were provided. Goldman insists that "the act of state doctrine has never before been held to permit the judiciary to refuse to enforce a relevant rule of

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43. This was not a case where it was contended that the "inadequacy of the record . . . prevent[ed] the constitutional issue . . . being considered 'in clean cut and concrete form.'" *See* Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, *vacated*, 350 U.S. 891 (1955), *on remand*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956) (citing Rescue Army v. Municipal Court, 331 U.S. 549, 584 (1947)).

44. 450 U.S. at 382.

45. *Id.* at 392. (footnote omitted) (italics in original).

46. As the court noted in *IAM*, "[t]he act of state doctrine is not jurisdictional . . . Rather, it is a prudential doctrine designed to avoid judicial action in sensitive areas." 649 F.2d at 1359 (citation omitted). Indeed, most of the statutes which have not been followed by the courts have been jurisdictional. *See, e.g.*, Ohio v. Wynadotte Chemicals Corp., 401 U.S. 493, 499 (1971) (where the Court refused to accept original jurisdiction under 28 U.S.C. § 1251(b)(3) (1973)).

decision that Congress has directed be applied to the circumstances before the court."[47]

This assertion, however, is quite incorrect. There is ample precedent for the *IAM* court's conclusion that the act of state doctrine can serve to supplant an applicable federal statute which supplies controlling principles for a decision. In fact, there is authority for the specific proposition that the doctrine can serve to supervene application of the antitrust statutes. The doctrine was used in this manner in the Supreme Court's 1909 decision in *American Banana Co. v. United Fruit Co.*[48]

The Ninth Circuit itself has held, in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,[49] that the act of state doctrine can act to supervene application of the antitrust statutes. The *Occidental* case involved a fight between two oil companies over offshore rights in the Persian Gulf. One, Occidental, discovered oil on territory granted to it by one Persian shiekdom. Upon this discovery, Occidental claimed, the other oil company (Buttes) incited two Gulf countries (Iran and Sharjah) to claim sovereignty over the area of the strike. This, according to Occidental, led to a cessation of drilling, and a loss of substantial profits.[50] Accordingly, Occidental brought an unfair competition suit against Buttes under the antitrust statutes.

The court held that act of state considerations barred a determination of whether Buttes had conspired in violation of the statutes. According to the court:

> [T]o establish their claim as pleaded plaintiffs must prove, *inter alia*, that Sharjah issued a fraudulent territorial waters decree, and that Iran laid claim to the [territory of the strike] at the behest of the defendants . . . . [S]uch inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert.[51]

Hence, despite the antitrust statutes "controlling principles," the

47. *Goldman*, *supra* note 36, at 13.

48. 213 U.S. 347 (1909). *See also* Hunt v. Mobil Oil Corp., 550 F.2d 68, 77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

49. 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

50. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 98-101 (C.D. Cal. 1971).

51. *Id.* at 110 (footnote omitted).

court applied the act of state doctrine and dismissed the suit.[52]

Considering the conclusion of the courts in *Doe* and *Occidental*, it seems that the *IAM* court acted within its power in dismissing the suit on the basis of the act of state doctrine. Goldman's argument, based on "classical" notions of the role of the courts in our system of government, fails to take account of changed realities. The reality is that the courts will abstain from adjudicating under certain federal statutes in a number of situations. It is this reality that the court recognized in *IAM*.

V. CONCLUSION: THE PASSIVE VIRTUES

Gerald Goldman's criticism of the decision in *IAM* reflects the continuing controversy over the court's use of its "passive virtues." While it seems that the courts' discretionary power to refuse adjudication under certain federal statutes is now well established, the arguments asserting the non-existence of such a power continue. Professor Herbert Wechsler has declared a specific exercise of the "passive virtues" power "wholly without basis in the law."[53] Professor Gerald Gunther declares the power to be a "law-debasing" principle of judicial expediency.[54] He feels that this principle will have serious ramifications: "Expediency as to avoidance devices is contagious; the effort to shield the integrity of adjudication on the merits from infection fails."[55]

Despite these criticisms, courts continue to act "passively" and refuse adjudication under certain federal statutes. Perhaps, as one commentator declares, there has been no "satisfactory" explanation as to the basis of the "passive virtues" powers.[56] The lack of a clearly defined basis has certainly contributed to the numerous attacks on the exercise of the power. Still, as evidenced by the decision in *Doe*, the courts continue to avail themselves of this "passive"

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52. *Id.* at 113.

53. H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 47 (1961). *Accord*, *Doe*, 450 U.S. at 387 n.11 (Brennan, J., dissenting).

54. Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 13 (1964).

55. *Id.* at 14.

56. Note, *The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts*, 63 COLUM. L. REV. 688, 706 (1963). *Accord* Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135, 1178-79 (1970) (concluding that no satisfactory rationale exists for refusal to adjudicate under the "passive" political questions doctrine).

power. Considering this precedent, the decision in *IAM* seems entirely justified.

Michael Robert Tyler