No. 01-56003; 01-56398

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA V. ALTMANN, an individual,

Plaintiff-Appellee

v.

REPUBLIC OF AUSTRIA, a foreign state; and the AUSTRIAN GALLERY, an agency of the Republic of Austria,

Defendants-Appellants.

On Appeal from an Order of the United States District Court for the Central District of California

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BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION AND SUMMARY

The panel's decision in this case held that Austria is subject to suit in American courts for claims arising in Europe out of Nazi-era expropriations more than half a century ago. In so holding, the panel has created an exception to the general rule of foreign sovereign immunity never before recognized in our law. The panel reached this conclusion based upon an erroneous assessment of the principles of law that obtained in the first half of the last century, of the contemporaneous policy of the Executive Branch, and of the proper manner for analyzing retroactivity under the Foreign Sovereign Immunities Act.

The panel's belief that, without specific direction from the Executive Branch, American courts could historically exercise in personam jurisdiction over the foreign acts of unfriendly governments is without precedent. The language the panel cites in support of this conclusion derives from in rem cases, rather than in personam suits such as plaintiff's. Such an extension, without authorization under the FSIA or specific direction from the Executive, interjects the courts into matters of foreign policy in precisely the ways that the doctrine of immunity is intended to prevent. Nor, contrary to the panel's conclusion, had the Executive Branch made a determination to strip Austria of its immunity for suits arising out of Nazi atrocities. The panel's reliance on the so-called Bernstein Letter as evidence of such an exception is mistaken because that letter concerned the

act of state doctrine, not the doctrine of foreign sovereign immunity. While undeniably horrific, Nazi-era expropriations would have been immune from suit in the United States when they occurred. Therefore, the panel's exercise of jurisdiction pursuant to the expropriation exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) – an exception to immunity not recognized until some thirty years later – is impermissibly retroactive.

ARGUMENT

BECAUSE AUSTRIA WOULD HAVE BEEN IMMUNE FROM SUIT ON PLAINTIFF'S CLAIMS AT THE TIME THEY AROSE, THE FSIA'S EXPROPRIATION EXCEPTION DOES NOT RETROACTIVELY PROVIDE A BASIS FOR JURISDICTION.

A. The Foreign Sovereign Immunities Act ("FSIA") sets forth a general rule that foreign states are immune from suit in American courts. 28 U.S.C. § 1604. Courts may exercise jurisdiction over foreign states only if the suit comes within one of the specific exceptions to that rule established by Congress. See ibid. The expropriation exception, the only exception discussed by the panel, was not recognized at the time plaintiff's claims arose, and may not, therefore, be applied retroactively.

It is well-established that changes in the law that affect substantive rights do not, absent a clear congressional indication to the contrary, apply retroactively. See INS v. St. Cyr, 533 U.S. 289, 316 (2001). This presumption against retroactivity applies also to "jurisdictional" statutes that

affect substantive rights. See Hughes Aircraft Co. v. United States, 520 U.S. 939, 951 (1997). Where a new jurisdictional statute "eliminates a defense to * * * suit," the change affects "the substance" of the parties' rights and will not apply to conduct that predates the change, unless Congress explicitly provides to the contrary. Id. at 948.

The defense of foreign sovereign immunity, currently embodied in the FSIA, is a matter of "substantive federal law." See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983)(emphasis added). Thus, as the Second and Eleventh Circuits have previously held, if a particular exception to the FSIA's general rule of immunity was not yet recognized at the time of the challenged conduct, that exception cannot apply retroactively. See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics, 841 F.2d 26, 27 (2d Cir. 1988) (application of FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), to conduct pre-dating the adoption of that exception by the Executive in 1952 would be impermissibly retroactive); Jackson v. People's Republic of China, 794 F.2d 1490, 1497-98 (11th Cir. 1986) (same).

The definitive discussion of the United States' policy regarding foreign sovereigns' susceptibility to suit in the United States at the time plaintiff's claims arose is contained in the "Tate Letter" of May 19, 1952 from Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip B. Perlman. See

Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976) (reprinting Tate Letter). The Tate Letter explains that from the time of The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812), until 1952, the United States adhered to the "absolute theory of sovereign immunity." Alfred Dunhill, 425 U.S. at 711 (reprinting Tate Letter). Under this doctrine, as understood by the Department charged with its application: "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." Ibid. (emphasis added).

As the Tate Letter makes clear, the United States did not recognize an expropriation exception to sovereign immunity prior to 1952. Nor, indeed, was it recognized under the "restrictive" theory that the Tate Letter adopted. See Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964) (under restrictive theory, foreign sovereigns continued to enjoy immunity with respect to suits challenging "strictly political or public acts about which sovereigns have traditionally been quite sensitive," including "internal administrative acts" and "legislative acts, such as nationalization" (emphasis added)). Rather, the expropriation exception was first recognized in American law as part of the FSIA. Because the expropriation exception was not recognized at the time plaintiff's claims arose, it cannot serve as the basis for jurisdiction in this suit.

The panel's opinion does not hold that the FSIA's expropriation exception applies retroactively to pre-1952 conduct generally, but only to Austria and, presumably, other countries allied with or occupied by Germany during World War II. There is no indication, however, that when Congress enacted the FSIA, and gave to the courts the responsibility to decide issues of immunity, Congress intended the courts to interject themselves into the arena of foreign policy by deciding, on a case-by-case basis, to deny a generally-available immunity to particular countries on the basis of their heinous conduct or the status of their relations with the United States. In fact, this Court and several others have specifically rejected such a role for the courts. See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718-19 (9th Cir. 1992); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir. 1997); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174-1175, n.1 (D.C. Cir. 1994). Such an approach is, moreover, contrary to one of Congress's chief purposes in adopting the FSIA: to ensure a more uniform application of sovereign immunity principles. See H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606.

The above-quoted language from the Tate Letter clearly demonstrates that under the practice and policy established for the courts Austria would have been entitled to immunity from suit on claims such as this. The panel erred in failing to address and give effect to this contemporaneous statement by the

Executive Branch of its practice regarding foreign sovereign immunity. The panel's contrary conclusion rests upon a misunderstanding of foreign sovereign immunity policy and practice during the pre-1952 period.

B. The panel's opinion relies upon the mistaken belief that, during the pre-1952 period, the courts were free to exercise in personam jurisdiction over foreign sovereign with respect to actions in its own territory if the United States did not have "friendly" relations with the sovereign at the time of the challenged conduct. The panel derived this view from the Supreme Court's statement in Verlinden that, prior to 1952, immunity was accorded "in all actions against *friendly* foreign sovereigns." Altmann v. Republic of Austria, 2002 WL 31770999, *7 (9th Cir. Dec. 12, 2002) quoting Verlinden, 461 U.S. at 486 (emphasis added by Altmann).[1] Verlinden's use of the word "friendly" does not support the weight the panel placed upon it.

To begin, even if there were an exception for "unfriendly" nations, it is not clear that the exception would properly apply to Austria. The United States was not at war with the State of Austria. To the contrary, the United States took the view that Austria was the first country to be occupied by Nazi Germany. See Declaration on Austria at Moscow, quoted in Sen. Exec. Rpt.

[1] The panel extended this perceived exception as well to acts committed while friendly relations admittedly existed if the act was "closely associated with the atrocities of the War." Altmann, 2002 WL 31770999, at *7.

No. G, 84th Cong., 1st Sess. at 3 (June 15, 1955). Such subtle distinctions in our nation's foreign relations highlight the problem with courts undertaking the kinds of assessments called for under the panel's decision. The panel's approach requires courts to establish their own definition of "friendly," to assess historical relationships of the United States under this definition, and to decide how to weigh changes in relations during the period when suit might have been brought. The responsibility for drawing such lines among foreign governments and determining when to strip them of immunity can only properly be exercised by the political branches.

Moreover, as a matter of law, Verlinden's reference to "friendly foreign sovereigns" does not support the proposition that our courts would have reached out to exercise in personam jurisdiction over foreign sovereigns for sovereign acts taken within their borders simply because the United States was not on "friendly" terms with that government during the period of the challenged conduct. The history of the phrase "friendly foreign sovereigns" is instructive. Verlinden borrowed the phrase from the Court's decisions in Ex Parte Peru, 318 U.S. 578, 588-89 (1943), and Mexico v. Hoffman, 324 U.S. 30, 34 (1945). See Verlinden, 461 U.S. at 486 (citing the same). These cases were in rem proceedings against foreign-owned ships, and, in turn, borrowed the "friendly" foreign government terminology from prior in rem cases, including the leading case, The Schooner Exchange.

See Ex Parte Peru, 318 U.S. at 588; Hoffman, 324 U.S. at 34. In The Schooner Exchange, the Court started with the general principle that "the person of the sovereign [is immune] from arrest or detention within a foreign territory" if he enters "with the knowledge and license of its sovereign." 11 U.S. (7 Cranch) at 137. The Court then went on to discuss in what circumstances this immunity extended to a foreign sovereign's warship that had entered an American harbor. The Court observed that "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace," id. at 141, and held, therefore, that immunity also extends to "national ships of war, entering the port of a friendly power open for their reception." Id. at 145-46.

This implicit indication that the United States would not refrain from seizing a belligerent nation's warships if they enter its ports during a war says nothing about whether, in the absence of specific direction from the Executive Branch, U.S. courts could exercise in personam jurisdiction over a non-consenting, unfriendly government with respect to acts committed within its own territory, including after normal relations are resumed. See Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 373-74 (N.Y. 1923) (distinguishing between proceedings respecting "title to property situated within the jurisdiction of our courts" and suits where "[t]he government itself is sued for an exercise of sovereignty within its own

territories" and rejecting argument that in personam jurisdiction could be exercised over Russia because it was not "friendly").

We are aware of no cases prior to 1952 in which a court asserted in personam jurisdiction over a foreign government for claims arising during a war between that nation and ours. Nor had the Executive Branch adopted any such blanket exception. Indeed, such an exception would likely cause the very type of "embarrass[ment] ... to the government in conducting foreign relations" that the doctrine of immunity was intended to avoid. See Ex parte Peru, 318 U.S. at 588. In personam suits such as plaintiff's can, as a practical matter, only be pursued once the war is concluded and friendly relations resumed. But by that time, the foreign sovereign's presence in this country is again "with the knowledge and license of" our government, in which case comity would require recognition of the sovereign's immunity. See The Schooner Exchange, 11 U.S. (7 Cranch) at 137. If the conclusion of war on the battlefield signaled the start of the battle in the courtrooms, it would be far more difficult, if not impossible, for former adversaries to put their antagonisms behind them.

In the absence of precedent or a definitive statement of the Executive Branch creating such an exception, the courts during the period when plaintiff's claims arose would not have created such an exception on their own. See Hoffman, 324 U.S. at 34-35 (in the absence of a specific recommendation from the Executive,

courts must decide question of immunity "in conformity with the principles accepted by the department of the government charged with the conduct of our foreign relations").

Finally, the panel's opinion creates the anomaly of imputing to the "absolute" theory an exception to immunity that does not exist under either the restrictive theory of immunity or the FSIA, neither of which recognizes a general exception to immunity for acts committed while another country is "unfriendly" with the United States. See 28 U.S.C. § 1604 ("a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607"); Princz, 26 F.3d at 1171-75 (Germany's conduct during World War II immune under FSIA). Cf. Saudi Arabia v. Nelson, 507 U.S. 349, 362 n.5 (1993) (observing that, under Tate Letter regime, the State Department "recognized immunity with respect to claims involving the exercise of the power of the police or military of a foreign state"). Had an exception for "unfriendly" governments existed under the "absolute" theory, such an exception would presumably have continued to be recognized as subsequent changes narrowed the scope of immunity. Thus, the absence of such an exception today is strong evidence that no such exception existed in the 1930s and 40s.

C. The panel's belief that the Executive Branch had in fact adopted a policy after the war to deny Germany and Austria immunity from Nazi-era claims rests upon a misreading of the

historical evidence. The panel's opinion rests largely on a second letter by Mr. Tate, the so-called "Bernstein Letter," submitted to the Second Circuit in Bernstein v. N.V. Nederlandshe-Amerikaansche, 210 F.2d 375, 376 (2d Cir. 1954)("Bernstein II"). The Bernstein Letter stated that the State Department's policy was "to relieve American courts of any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." April 13, 1949 letter of Jack B. Tate, reprinted in Bernstein II, 210 F.2d at 376. The Bernstein Letter did not, however, address the doctrine of foreign sovereign immunity. Rather it concerned the act of state doctrine, i.e., a court's ability to pass on the validity of a foreign government's acts in a case that is properly within its jurisdiction.

In Bernstein, the plaintiff sued to recover commercial property that the Nazis had confiscated from him without compensation. See Bernstein v. N.V. Nederlandshe-Amerikaansche, 173 F.2d 71, 72 (2d Cir. 1949) ("Bernstein I"). Significantly, however, the defendant in Bernstein was not a foreign government, but a Dutch corporation. Ibid. The Second Circuit had initially applied the act of state doctrine, pursuant to which it refused to "pass on the validity of acts of officials of the German government." Bernstein II, 210 F.2d at 375. The Bernstein Letter addressed solely that issue. The Bernstein Letter does not speak to the susceptibility of the German government to suit

in our courts, but instead concerns only the courts' "jurisdiction to pass upon the validity of the acts of Nazi officials." Bernstein II, 210 F.2d at 376 (reprinting letter) (emphasis supplied). See also Nov. 26, 1975 Letter of Legal Adviser Monroe Leigh to the Solicitor General (characterizing Bernstein Letter as "advis[ing] that the act of state doctrine need not apply to a class of cases involving Nazi confiscations" (emphasis added)), reprinted in Alfred Dunhill, 425 U.S. at 706, 708.

The Supreme Court has recognized that "[t]he act of state doctrine, ... although it shares with the immunity doctrine a respect for foreign states," is distinct from it. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 438 (1964) (applying act of state doctrine, though foreign government instrumentality had waived immunity by invoking the court's jurisdiction). The significance of this distinction was recognized at the time of the Bernstein and Tate letters by the Second Circuit. In Zwack v. Kraus Bros., 237 F.2d 255 (2d Cir. 1956), plaintiff sued to stop an American company from using a trade name that the Hungarian government had expropriated. The defendant sought to have the suit dismissed both on act of state grounds and for plaintiff's failure to join Hungary as an indispensable party. With respect to the act of state doctrine, the Second Circuit declined to recognize the validity of Hungary's uncompensated expropriation, citing the United States' policy declared in

Bernstein II. See id. at 260-61. At the same time, however, the Second Circuit recognized that the Hungarian government itself was "not subject to the jurisdiction of the court below unless its should voluntarily appear." Id. at 259.

Here, in contrast, the panel's decision confuses these distinct concepts. The panel's extension of the Bernstein Letter policy from the act of state context to the field of sovereign immunity is especially untenable in light of the author's own implicit rejection of such an interpretation. The Bernstein Letter was authored by the same person who wrote the Tate Letter only three years later. The panel's reading creates a conflict between the two letters that did not exist and has never been thought to exist.

Contemporaneous conduct concerning the redress of Nazi-era wrongs further supports the conclusion that foreign governments, including Austria, were recognized to be absolutely immune from private litigation in U.S. courts on claims arising out of the Holocaust. The United States committed considerable energy to obtaining the return of property and some measure of compensation for the victims of the Holocaust both during the occupation and thereafter. In post-war treaties with both Germany and Austria, the United States obtained promises on the part of those governments to provide for the return of confiscated property, and in some cases the United States negotiated agreement for the payment of certain claims. See, e.g., State Treaty for the Re-

establishment of an Independent and Democratic Austria, 6 U.S.T. 2269, Art. 26 (May 15, 1955) (providing for return by Austria of all property confiscated on account of the racial origin or religion of the owner); Dept. of State Bulletin, July 9, 1956 at 66 (announcing procedures adopted under Austrian law for compensation of persecutees who had fled Austria); Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, 10 U.S.T. 1158 (May 22, 1959) (establishing administrative settlement fund for certain property claims); Convention on the Settlement of Matters Arising out of the War and the Occupation, as amended, 6 U.S.T. 4411 (October 23, 1954) (Germany).

The common theme of these arrangements is that they envision restitution or compensation under schemes adopted as part of domestic German or Austrian law or through diplomatic arrangements. In none of these agreements is there any statement that private parties could sue the governments of Germany or Austria in foreign courts as an alternative means of redress. Cf. Argentine Republic v. Amerada Hess Shipping, 488 U.S. 428, 442 (1989) (holding that even a treaty "stat[ing] that compensation shall be paid for certain wrongs" by foreign government does not imply an abrogation of immunity from private suit). Likewise, it does not appear that prior to 1992, any plaintiff even attempted to sue Germany or Austria in American courts for Nazi-era atrocities. And, significantly, prior to this litigation, the two courts of appeals to consider such suits

dismissed them for lack of jurisdiction. See Princz, 26 F.3d at 1176; Sampson v. Federal Republic of Germany, 250 F.3d 1145 (7th Cir. 2001). The absence of any reference to private litigation in American courts against the German or Austrian governments in the United States' extensive diplomatic efforts to obtain compensation for the victims of Nazism and the similar absence of any attempt by a private party to sue Austria or Germany for Nazi-era atrocities during the period immediately following the war evidence a common understanding during the contemporaneous period that these governments were immune from such suit in the courts of the United States.

D. The various "additional reasons" that the opinion gives in support of its conclusion are also flawed and not relevant to determining whether an FSIA exception should apply retroactively. For example, it is irrelevant to the sovereign immunity inquiry that, as the panel observes, certain of the individuals responsible for Nazi atrocities were prosecuted criminally at Nuremberg. See Altmann, 2002 WL 31770999, at *9. The fact that individual Nazi officials could be criminally prosecuted in an international tribunal does not in any way suggest that the Austrian government was subject to suit by private plaintiffs in American courts. Indeed, individual officials are frequently subject to suit in circumstances where the sovereign retains its immunity. See, e.g., Alden v. Maine, 527 U.S. 706, 757 (1999). Neither the Executive nor the Congress has ever established a

"war-crimes" exception to state immunity. See Siderman de Blake, 965 F.2d at 718-19.

Nor is it relevant that Austria adopted the restrictive theory of immunity in the 1920s. Cf. Altmann, 2002 WL 31770999, at *8. The panel does not cite any instance in which a foreign sovereign was denied immunity because it applied the restrictive theory of immunity in its own courts, and we are aware of none. Indeed, although, according to the Tate Letter, Peru was one of the countries that had previously accepted the restrictive theory of immunity, see Alfred Dunhill, 425 U.S. at 713, the United States certified, in 1942, the immunity of a Peruvian commercial vessel, see Ex Parte Peru, 318 U.S. at 579-81. The panel's analysis makes a foreign government's susceptibility to suit turn on "the defendant country's acceptance of the restrictive principle of sovereign immunity." Altmann, 2002 WL 31770999, at *9 (indicating that Russia, China, and Mexico, which had not accepted the restrictive theory, would be immune from suit for conduct during the pre-1952 era). But, as we previously noted, one of Congress's purposes in adopting the FSIA was to ensure a more uniform application of sovereign immunity principles. See H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606. It would not have wanted application of the FSIA to vary among countries, especially since the Executive Branch had never previously established such a rule.

Even if such distinctions were appropriate, Austria's adoption of the restrictive theory in the 1920's would still be inapposite to assessing Austria's immunity with respect to plaintiff's claim because, as noted above, the restrictive theory did not permit jurisdiction over a foreign government's sovereign or public acts, such as expropriations of property within its territory. See Verlinden, 461 U.S. at 486-87; Victory Transport, 336 F.2d at 360 (under restrictive theory foreign sovereigns retained immunity with respect to suits challenging "internal administrative acts" and "legislative acts, such as nationalization" (emphasis added)). See also Saudi Arabia v. Nelson, 507 U.S. at 361 (citing same with approval).

Finally, the panel asserts that, even if Austria had an expectation of immunity from suit for discriminatory expropriations, such an expectation "would be due no deference," Altmann, 2002 WL 31770999, at *10. This assertion is contrary to the Supreme Court's holding in Hughes. In Hughes, there was no question that the defendant's alleged fraud against the United States was wrongful at the time it was committed, and that the conduct was even subject to suit by the federal government. 520 U.S. at 948. Nonetheless, the Court held that the presumption against retroactivity applied to a statute that allowed a new plaintiff, a private person, to bring the suit on behalf of the United States. Id. at 951. Thus, there is no basis for the panel's assertion that the presumption against retroactivity

applies only to fields of law such as "contracts ... in which courts have traditionally deferred to the 'settled expectations' of the parties." Altmann, 2002 WL 31770999, at *10.

CONCLUSION

For the foregoing reasons, the petition for rehearing and suggestion for rehearing en banc should be granted.[2]

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January 13, 2003

[2] Because of space constraints, the United States has limited its arguments in this brief to the question of the Executive Branch's sovereign immunity practice prior to 1952, an issue as to which the government has a unique ability to speak. If the Court does grant rehearing, and calls for a new round of briefing, the United States reserves its right to address as well the other points raised in Austria's petition.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(5) and Ninth Circuit Rules 35-4(a) and 40-1(a) that the foregoing Brief for the United States as Amicus Curiae is monospaced, has 10.5 or fewer characters per inch and contains 4,167 words, according to the count of Corel Wordperfect 9.

_____
Douglas Hallward-Driemeier

STATUTORY ADDENDUM

28 U.S.C. § 1605(a)(3).

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

* * * * *

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2003, I caused to be dispatched the original and fifty (50) copies of the foregoing Brief for Amicus Curiae the United States of America in Support of Petition for Rehearing and Suggestion for Rehearing En Banc to the Clerk of this Court by Federal Express. On the same date, I served two copies of the brief on the following counsel by Federal Express:

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