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NOTES

COMPLICITY WITH THE ARAB BLACKLIST: BUSINESS EXPEDIENCE VERSUS ABRIDGMENT OF CONSTITUTIONAL RIGHTS

INTRODUCTION

In February, 1975, the Anti-Defamation League of the B'nai B'rith charged two federal agencies¹ and seven private companies² with "violating Government civil rights laws³ by discriminating against Jews, either under orders from Arab countries or voluntarily in the hope of obtaining business in Arab countries."⁴ Subsequently, Assistant Secretary of the Treasury Gerald Parsky said that United States companies which cooperated with the Arab blacklist against Israel "might be subject to legal action if their compliance was based on religious or ethnic discrimination."⁵ He went on to state that "[t]he Saudis said the boycott is not based on either race or religion . . . [but] on whether a firm is doing business with Israel."⁶ In December, 1975, the American Jewish Congress [hereinafter referred to as AJC] filed suit against Secretary of State Kissinger,⁷ charging that Jews had been excluded from programs supported by the United States in Saudi Arabia.⁸

1. The Overseas Private Investment Corporation and The Army Corps of Engineers. N.Y. Times, Feb. 26, 1975, at 1, col. 4.

2. Ashland Chemical Company, Bendix-Siyanco Company, Chase Manhattan Bank, Dresser Corporation, Guaranteed Mortgage Services, International Schools Service of Princeton, New Jersey, and Wizard Mortgage Banking Corporation. *Id.*

3. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (Supp. IV, 1974).

4. N.Y. Times, Feb. 26, 1975, at 1, col. 4. These alleged acts of discrimination were denied by all of the named parties except Bendix-Siyanco and Dresser, which could not be reached for comment. N.Y. Times, Feb. 26, 1975, at 6, col. 1. The Army Corps of Engineers acknowledged before the Senate Foreign Relations Subcommittee on Multinational Corporations that, in deference to the policy of Saudi Arabia, the Corps did not assign Jews to work there. N.Y. Times, Feb. 28, 1975, at 8, col. 1.

The Anti-Defamation League of B'nai B'rith has initiated a number of administrative proceedings, in state and federal agencies, as part of their effort to prevent alleged discriminatory practices by United States businesses. Anti-Defamation League of B'nai B'rith, Press Release, Jan. 30, 1976.

5. N.Y. Times, Feb. 28, 1975, at 8, col. 1.

6. *Id.*

7. American Jewish Congress v. Kissinger, Civil No. 75-2099 (D.D.C., filed Dec. 17, 1975).

8. N.Y. Times, Dec. 18, 1975, at 5, col. 3. Also named as defendants in the suit were Secretary of the Treasury William E. Simon, Assistant Secretary of the Treasury Gerald L. Parsky, Secretary of Commerce Elliot L. Richardson, Secretary of the Interior Thomas

Most recently, in January, 1976, the United States itself filed an antitrust action against the Bechtel Corporation.⁹ Bechtel was charged with conspiring to exclude companies blacklisted by the Arab nations from its construction projects.¹⁰

The Arab blacklist is aimed at companies which conduct business with Israel or which employ Jews.¹¹ The increased political and economic power of Arab countries, a result of petrodollar revenues and large sums of investment capital, have greatly enhanced their influence over corporations doing business with them. Such leverage can have a profound effect upon United States foreign and domestic policies¹² and upon the constitutional rights of United States citizens.¹³

This note will analyze instances in which a foreign nation's restrictive domestic policies have allegedly resulted in deprivation of the civil rights of United States citizens, as well as the remedies available to those discriminated against and the barriers to such remedies. Additionally, the role of the courts will be examined with regard to the choice between enforcing civil rights legislation and allowing the executive branch to formulate foreign policy.

S. Kleppe, and the Administrator of the Agency for International Development, Daniel Parker.

9. *United States v. Bechtel Corp.*, Civil No. 76-99 (N.D. Cal., filed Jan. 16, 1976).

10. N.Y. Times, Mar. 14, 1976, § 4, at 2, col. 3. This suit, although the only federally initiated action to date, is some indication that the federal government may prefer to challenge alleged discriminatory practices as antitrust violations rather than as civil rights issues. This approach might mitigate embarrassment to the executive branch in its relationships with Arab nations. *Id.*

11. See Brief for Petitioner-Respondent at 8, *American Jewish Congress v. Carter*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961). The brief discusses a 1952 proceeding before the New York State Commission Against Discrimination, *Shade v. Arabian American Oil Company*, Civil No. 3717-52 (1952), in which it was disclosed that Saudi Arabia refused to deal with companies which hired Jews, even if they were employed in the United States. Additionally, in 1953, the State Commission Against Discrimination ascertained that Saudi Arabia was systematically refusing to do business with any company which "in any way is influenced by Jewish management." Brief for Petitioner-Respondent, *supra* at 8. The Anti-Defamation League has published a list of domestic and foreign concerns which it believes have been boycotted by the Arab governments for doing business with Israel. N.Y. Times, Feb. 26, 1975, at 6, col. 1.

12. This note will confine itself to the domestic ramifications.

13. See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (due process clause of the fifth amendment prohibits unjustifiable discrimination based upon race); *United Workers v. Mitchell*, 330 U.S. 75, 100 (1947) (Court assumed, in dicta, that a classification based upon the fact that a person was Jewish would be unconstitutional).

I. ACTION IN STATE COURTS

United States state courts are viable forums for the litigation of cases where discriminatory practices of a foreign sovereign are at issue. This is particularly true in the context of employment and the use of services,¹⁴ areas which are generally protected from discrimination by state law.¹⁵ In states where statutes of this type exist, actions are normally initiated by complaint before an administrative agency.¹⁶

New York permits initial recourse to the courts by an action for damages or other relief,¹⁷ as well as actions subsequent to an administrative determination.¹⁸ Although New York's Human Rights Law¹⁹ is not unique, New York is the only state in which these issues have actually been litigated.

A. *The Aramco Litigation*

In 1959, the issue of the Arabian American Oil Company's [hereinafter referred to as Aramco] discriminatory policies against the hiring of Jews was presented before a New York state

14. *American Jewish Congress v. Carter*, 23 Misc. 2d 446, 190 N.Y.S.2d 218 (Sup. Ct. 1959), *modified*, 10 App. Div. 2d 833, 199 N.Y.S.2d 157 (1st Dep't 1960), *aff'd*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961); *South African Airways v. N.Y. State Div. of Human Rights*, 64 Misc. 2d 707, 315 N.Y.S.2d 651 (Sup. Ct. 1970). *See American Airlines, Inc. v. State Comm'n for Human Rights*, 29 App. Div. 2d 178, 286 N.Y.S.2d 493 (1st Dep't 1968), *noted in* 29 A.L.R.3d 1402 (1968). *See also New York Times Co. v. City of New York Comm'n on Human Rights*, 79 Misc. 2d 1046, 362 N.Y.S.2d 321 (Sup. Ct. 1974), *aff'd per curiam*, 49 App. Div. 851, 374 N.Y.S.2d 9 (1st Dep't 1975).

15. *See, e.g., CAL. LAB. CODE ANN. § 1420* (West 1975); *CONN. GEN. STATS. ANN. §§ 31-122-28* (1975). For a discussion of situations in which state fair employment legislation is important as a supplement to federal legislation, see Elson & Schanfield, *Local Regulation of Discriminatory Employment Practices*, 56 *YALE L.J.* 431, 434 (1947).

16. In New York, the administrative agency is the State Division of Human Rights. *N.Y. EXEC. L. § 293* (McKinney 1972). *See Comment*, 34 *ST. JOHN'S L. REV.* 127, 129 (1959), where it is noted that because enforcement depended upon either prosecution by local officials or civil action by the individual claiming such discrimination, early state and municipal attempts to eliminate unfair discrimination in areas including employment proved ineffective. The administrative agency was thus established to avoid recourse to the courts in all but the most extreme cases. *See generally Carter, Practical Considerations of Anti-Discrimination Legislation—Experience under the New York Law Against Discrimination*, 40 *CORNELL L.Q.* 40 (1954).

17. *N.Y. EXEC. L. § 297(9)* (McKinney 1975).

18. *N.Y. CIV. PRAC. art. 78* (McKinney 1972).

19. *N.Y. EXEC. L. §§ 290-301* (McKinney 1972). *See also N.Y. CONST. art. 1, § 11* (McKinney 1972): "No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person . . . firm, corporation, or institution, or by the state or any agency or subdivision of the state."

court for the first time in *American Jewish Congress v. Carter*.²⁰ This is the only case dealing with foreign directed discrimination which has, as yet, reached the appellate level; it typifies the approach taken in subsequent cases. *Carter* was an Article 78 proceeding²¹ brought before the State Commission Against Discrimination²² [hereinafter referred to as SCAD]. Petitioner, AJC, sought to vacate Commissioner Elmer A. Carter's dismissal, for lack of probable cause, of charges of discriminatory hiring practices by Aramco.

The practices complained of were both unlawful pre-employment inquiries as to religion made by Aramco in its New York office for the purpose of ascertaining whether an applicant was Jewish,²³ and refusal to hire persons of Jewish ancestry for positions in New York state, the United States, and foreign countries.²⁴ Aramco maintained that the questions regarding religion were proper because religion constituted a bona fide occupational qualification for employment at its facilities in Saudi Arabia. This argument was based upon the claim that Saudi Arabia would not issue visas to persons of the Jewish faith or of Jewish ancestry, and that any employment opportunity with Aramco was contingent upon the ability to work in Saudi Arabia if the need arose.²⁵ In the administrative proceeding, Commissioner Carter and a majority of SCAD saw merit in this argument and

20. 23 Misc. 2d 446, 190 N.Y.S.2d 218 (Sup. Ct. 1959), *modified*, 10 App. Div. 2d 833, 199 N.Y.S.2d 157 (1st Dep't 1960), *aff'd*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961).

21. N.Y. CIV. PRAC. §§ 7801-06 (McKinney 1972).

22. Now the State Division of Human Rights. See N.Y. EXEC. L. § 293 (McKinney 1972).

23. 23 Misc. 2d at 447, 190 N.Y.S.2d at 220-21. Such inquiries would be violative of N.Y. EXEC. L. § 296(1)(d) (McKinney 1975), which reads in pertinent part:

1. It shall be an unlawful discriminatory practice:

(c) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color or national origin . . . unless based upon a bona fide occupational qualification.

24. Such a refusal would be violative of N.Y. EXEC. L. § 296(1)(a) (McKinney 1975), which reads in pertinent part: "It shall be an unlawful discriminatory practice (a) For an employer . . . because of the age, race, creed, color, [or] national origin . . . of any individual, to refuse to hire or employ . . . such individual . . ."

25. See Respondent-Appellants Memorandum [hereinafter cited as Carter Memorandum] at 36, *American Jewish Congress v. Carter*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961).

ruled that, under the circumstances, religion was indeed a bona fide qualification.²⁶ Aramco's contention was not without support. In the *Daytree* proceedings held by SCAD in 1950,²⁷ it had ruled that the International Agency, an employee recruiter for Aramco, would be

granted an exception to the general ruling that an individual cannot be asked his or her religion and is permitted as a *bona fide occupational qualification* to ask complainant his religion since the information was a prerequisite toward receiving a visa from the Arabian government in order for him to travel to Arabia.²⁸

With respect to Aramco, SCAD determined that it "was justified in presenting to the complainant an Arabian form of application for a visa containing questions as to the applicant's religion."²⁹

Commissioner Carter, in the *Daytree* proceedings, expressed his view that "the situation in Saudi Arabia is such that the entrance of Jewish American citizens in that country at the present time might result in international repercussions."³⁰ In his report to the Commission, SCAD Commissioner Robert E. Thayer noted a telephone conversation he had with Mr. Fraser Wilkins, Political Adviser for the Office of African and Near East Affairs of the Department of State, in which Mr. Wilkins

stressed the importance of not having anything interfere with the relations between the Arabian government and the Arabian American Oil Company, explaining that this relationship was the basis for the harmony between [our] governments and it would be very serious indeed to our international interests if anything was done to affect this relationship.³¹

This view was reaffirmed in 1956 in an interview between the then-Investigating Commissioner Carter and Mr. Lampton Berry of the State Department,³² and in 1957 by letters from the Assistant Secretary of State to the Investigating Commissioner "to the

26. American Jewish Congress v. Arabian American Oil Co., Civil No. 4296-56 (1956).

27. See *Daytree v. Int'l Placement Agency*, Civil No. 2438-50 (1950), and *Daytree v. Arabian American Oil Co.*, Civil No. 2451-50 (1950), both discussed in Carter Memorandum at 16.

28. Carter Memorandum at 17 (emphasis added).

29. *Id.*

30. *Id.*

31. *Id.* at 17-18.

32. *Id.* at 21.

effect that the interest of the United States would be adversely affected by a determination which would disturb the existing relationship of Aramco with the Saudi Arabian government."³³

The Supreme Court of the State of New York, Special Term, was unpersuaded by these arguments and ruled against Aramco.³⁴ Citing a resolution of the United States Senate,³⁵ the court noted that "the State Department has not sought to override the Senate of the United States and Aramco cannot pretend that the State Department has done so."³⁶ Similarly, the court refused to accept Commissioner Carter's determinations regarding national security because there had been no formal State Department declaration to support his claims.³⁷ The court noted that the AJC did not question the authority of Saudi Arabia to decide that no Jews should enter that country, but stated that Aramco could not subordinate the law of New York to the dictates of a foreign country which violated New York's public policy.³⁸

The court took notice of the fact that of the 887 employees on Aramco's New York payroll few, if any, were Jews, and stated that even if such discrimination were due to the possibility that every employee might be sent to Saudi Arabia, New York public policy could not permit it.³⁹ The concept of a bona fide occupational qualification was clarified by limiting permissible inquiry into the religion of the applicant to situations in which a "failure

33. *Id.*

34. 23 Misc. 2d 446, 190 N.Y.S.2d 218 (Sup. Ct. 1959).

35. S. Res. 323, 84th Cong., 2d Sess. (1956) provides:

Whereas it is a primary principle of our nation that there shall be no distinction among United States citizens based on their individual religious affiliations and since any attempt by foreign nations to create such distinction among our citizens in the granting of personal or commercial access or any other rights otherwise available to United States citizens generally is inconsistent with our principles; Now, therefore, be it

Resolved, that it is the sense of the Senate that it regards any such distinctions directed against United States citizens as incompatible with the relations that should exist among friendly nations and that in all negotiations between the United States and any foreign state every reasonable effort should be made to maintain this principle.

36. 23 Misc. 2d at 449, 190 N.Y.S.2d at 222.

37. *Id.*

38. *Id.* at 451, 190 N.Y.S.2d at 224. For other cases holding that New York will not subordinate its public policy to that of a foreign State, see *Lederkremer v. Lederkremer*, 173 Misc. 587, 18 N.Y.S.2d 725 (Sup. Ct. 1940) (refusal to allow a defense based on Polish law in a proceeding to annul a marriage which took place in Poland); *Johnson v. Briggs*, 12 N.Y.S.2d 60 (Mun. Ct. of City of N.Y. 1939) (refusal to give local effect to confiscation of property in Germany by German government).

39. 23 Misc. 2d at 449, 190 N.Y.S.2d at 222.

to permit such a qualification might interfere with the functioning of a religious organization."⁴⁰ The determination of the Commissioner was annulled and the matter remitted to SCAD for action "not inconsistent with this opinion."⁴¹

On appeal by Aramco, the Appellate Division, First Department, modified the decision of Special Term and ordered remand of the matter to SCAD for proceedings in accordance with the Law Against Discrimination⁴² rather than with the conclusions reached by Special Term:

We are of the opinion that probable cause exists for further processing of this matter. The holding by the Commission to the contrary was arbitrary and capricious. Until a final determination on the merits, in accordance with the statute, we may not address ourselves, as did Special Term, to how the issue thereto may be ultimately resolved.⁴³

The Court of Appeals affirmed the decision of the Appellate Division,⁴⁴ directing the Investigating Commissioner to either "immediately endeavor to eliminate the unlawful employment practice complained . . . of . . . or refer the matter to the entire commission for a hearing."⁴⁵ After efforts at conciliation failed, a public hearing was held.⁴⁶ The Commission determined that Aramco had violated the law as charged and directed it to "cease and desist" from refusing to hire Jews and from making pre-employment inquiries concerning the religion of applicants.⁴⁷ Aramco applied to the Supreme Court, New York County, for an order annulling the Commission's order;⁴⁸ the Commission moved

40. *Id.* at 448, 190 N.Y.S.2d at 221. This was the first time that a court so limited the scope of the bona fide qualification. Prior to the *Aramco* decision, that requirement had been interpreted by state human rights commissions, including that of New York, as embracing "those attributes necessary for the proper performance of the work itself, although they have excluded such grounds as possible employee friction, loss of customer good will, or a traditional national or religious atmosphere in a business." Comment, 34 ST. JOHN'S L.R. 127, 129 (1959). See, e.g., *Holland v. Edwards*, 116 N.Y.S.2d 264 (Sup. Ct. 1952), *aff'd*, 282 App. Div. 353, 122 N.Y.S.2d 721 (1st Dep't 1953), *aff'd*, 307 N.Y. 38, 119 N.E.2d 581, *noted in* 44 A.L.R.2d 1130 (1954).

41. 23 Misc. 2d at 452, 190 N.Y.S.2d at 224.

42. Now the Human Rights Law, N.Y. EXEC. L. §§ 290-301 (McKinney 1975).

43. 10 App. Div. 2d 833, 199 N.Y.S.2d 157 (1st Dep't 1960).

44. 9 N.Y.2d 223, 226, 173 N.E.2d 788, 789, 213 N.Y.S.2d 60, 61 (1961).

45. *Id.*

46. 195 STATE DIV. HUMAN RIGHTS L. BULL. 8, 9 (1963).

47. *Id.* at 10.

48. *Arabian American Oil Co. v. Fowler*, Civil No. 17182-62 (Sup. Ct. 1962).

for an enforcement order,⁴⁹ but prior to argument the matter was terminated by a stipulation which provided:

in connection with applicants hired for work in Saudi Arabia and with respect to applicants for employment who are required during the course of their employment to travel to Saudi Arabia or any other country, *Aramco may advise such applicants that their employment is contingent upon such applicants' ability to obtain a visa from the Saudi Arabian government* or from any other country to which such applicants are required to travel during the course of their employment . . . and [such] a clause may be contained in employment applications for such employment . . . provided, however, that Aramco shall make no inquiries into such applicants' race, creed, color, national origin or ancestry in connection with the applicants' efforts to obtain such visa, nor inform or advise the Saudi Arabian government or any other government concerning such matters; and provided further, however, that no such inquiries shall be made . . . relating to recruitment, interviewing, evaluation, or hiring of applicants.⁵⁰

Thus, the final outcome of the case did not appear to seriously curtail the freedom of Aramco to discriminate because it allowed Aramco to give notice that employment was contingent upon ability to obtain a visa from Saudi Arabia. Since any of Aramco's employees might be required to work in Saudi Arabia, Jews as a class were automatically excluded and it could continue to engage in discriminatory hiring practices even where purely domestic employment was involved.⁵¹

B. *Limitations Upon State Actions*

Sovereign Immunity

The traditional doctrine of sovereign immunity prohibits the

49. See N.Y. EXEC. L. § 298 (McKinney 1972).

50. 195 STATE DIV. HUMAN RIGHTS L. BULL. 8, 10 (1963) (emphasis added).

51. In 1952, Aramco supplied the Commission with information as to its domestic personnel who had work assignments in Saudi Arabia. This list indicated that there were 887 employees on the New York payroll of Aramco. Of these, 124 had permanently been transferred to Arabia, 210 had "in the past" worked in Saudi Arabia . . . and 130 were "definitely scheduled for temporary assignment or transfer" to Saudi Arabia. This amounted to a total of 464 employees. There still remained more than four hundred employees in Aramco's New York office not in any of these categories.

Brief for Petitioner-Respondent at 54, *American Jewish Congress v. Carter*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961).

courts of one sovereign from exercising jurisdiction over another sovereign without the latter's consent.⁵² The increased entry of governments into the realm of private commerce led to the development of a more restrictive theory, whereby public acts (*acta jure imperii*) would be accorded immunity from suit, while commercial acts (*acta jure gestionis*) would not.⁵³ In 1952, the United States Department of State announced that it would adhere to this restrictive theory in the Tate Letter.⁵⁴ But the larger underlying object of the absolute doctrine, *i.e.*, to "relieve the sovereign of the burdens and indignities of civil litigation in a foreign forum,"⁵⁵ has been maintained.

The problem facing courts since the adoption of the restrictive theory is to differentiate between public and commercial acts. The practice of the courts has been to defer to policy pronouncements of the State Department which grant immunity.⁵⁶ When there is no such advice from the State Department, however, the court must independently determine whether the

52. See generally Note, *Act of State - Sovereign Immunity*, 13 HARV. INT'L L.J. 132 (1972). See also *Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562 (1926); *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

53. See *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

54. Letter from Jack B. Tate, Acting Legal Advisor, United States Department of State, to Philip B. Perlman, Acting Attorney General, 26 DEP'T STATE BULL. 984 (1952). The restrictive doctrine received its earliest treatment in *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824). See also *The Uxmal*, 40 F. Supp. 258 (D. Mass. 1941); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929); *Ulen & Co. v. Bank Gospodarstwa Krajowego*, 261 App. Div. 1, 24 N.Y.S.2d 201 (2d Dep't 1940); *Hannes v. Kingdom of Roumania Monopolies Institute*, 260 App. Div. 189, 20 N.Y.S.2d 825 (1st Dep't 1940). See generally Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954).

55. Lowenfeld, *Litigating a Sovereign Immunity Claim - The Haiti Case*, 49 N.Y.U.L. REV. 377, 415 (1974).

56. The role of the State Department in suggesting the grant of sovereign immunity began with *Ex Parte Peru*, 318 U.S. 578 (1943). The Peruvian government, as owner of a merchant ship which had failed to deliver cargo, was granted a request for immunity by the State Department. Reversing the district court, which had rejected the immunity plea on the ground that Peru had waived immunity by taking preliminary steps in the litigation, the Court held that the suggestion of the State Department was conclusive.

Under this formulation, of course, the question of how the State Department had reached its determination did not come up. The court would not review a decision of the political arm of the government on a question considered to be political, but the lower court was commanded to comply with that decision, regardless of the character of the claim, any evidence of waiver of immunity, or other points that might be raised by the plaintiff.

Lowenfeld, *supra* note 55, at 383. See also *First Nat'l City Bank v. China*, 348 U.S. 356, 360-61 (1955); *Aerotrade, Inc. v. Haiti*, 376 F. Supp. 1281 (S.D.N.Y. 1974).

foreign sovereign is entitled to immunity "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations."⁵⁷ The Second Circuit has stated that in the absence of a suggestion it will deny a claim of sovereign immunity for all but five categories comprising those "strictly political or public acts about which sovereigns have traditionally been quite sensitive."⁵⁸

Defendant Aramco alluded to the doctrine of sovereign immunity in its argument, and claimed that enforcement of New York's public policy would embarrass the State Department in the Near East. The court dismissed this argument without explicitly analyzing the doctrine. Even if Saudi Arabia itself had been directly responsible for hiring, rather than a separate (albeit closely related) corporation,⁵⁹ it is doubtful that the doctrine would have been applied to deprive the court of jurisdiction. Assuming *arguendo* that Saudi Arabia acted pursuant to its visa

57. In *Mexico v. Hoffman*, 324 U.S. 30 (1945), a case involving a vessel owned by the Mexican government but operated by a private firm, the State Department declined to grant an opinion as to whether or not immunity should be granted. The Court examined its prerogatives when there is no suggestion:

In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist

[I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs.

324 U.S. at 34. The Court then decided that it should not grant immunity:

We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government . . . has not seen fit to recognize.

324 U.S. at 38. *Compare* *Ocean Transport Co. v. Ivory Coast*, 269 F. Supp. 703 (E.D. La. 1967) (although the State Department's finding that the transaction involved was a private, rather than public, act was not necessarily binding, it was highly persuasive and to be given great weight) *with* *Renchard v. Humphreys & Harding, Inc.*, 381 F. Supp. 382 (D.D.C. 1974) (a court "should show the same deference to a Department of State recommendation, regardless of whether it suggests or declines to suggest immunity") *and* *Aero-trade Inc. v. Haiti*, 376 F. Supp. 1281 (S.D.N.Y. 1974) (silence of State Department necessitated decision by court on issue of immunity, which it granted).

58. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (1964). The five categories are: "(1) internal administrative acts, such as expulsion of an alien, (2) legislative acts, such as nationalization, (3) acts concerning the armed forces, (4) acts concerning diplomatic activity, (5) public loans."

59. Saudi Arabia will obtain complete control of Aramco. *Wall Street Journal*, Mar. 4, 1976, at 14, col. 1. Even under these altered circumstances, the restrictive doctrine of sovereign immunity would not be applied to the commercial activities of Saudi Arabia.

policy and thus performed a public function, it is more likely that a court would find that through Aramco it acted in a commercial posture. Without a specific directive from the State Department, such acts should clearly fall within the category of *acta jure gestionis*.

Act of State

The Special Term opinion in the *Aramco* litigation briefly noted that the "petitioner does not question the authority of Saudi Arabia to decide that no Jews shall enter that country."⁶⁰ The act of state doctrine is related to sovereign immunity in that both are grounded in considerations of comity,⁶¹ but act of state concerns justiciability rather than jurisdiction. By precluding United States courts "from inquiring into the validity of acts committed by a foreign state within its own territory,"⁶² the doctrine insures that the judiciary does not infringe upon the authority of the executive over foreign relations:

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.⁶³

The act of state doctrine is largely one of judicial restraint.⁶⁴ It

60. 23 Misc. 2d at 451, 190 N.Y.S.2d at 224.

61. Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L.Q. 461, 476-77 (1963).

62. Note, *First Amendment - Act of State - Federal Foreign Affairs Power*, 16 HARV. INT'L L.J. 456, 466 (1975).

63. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The doctrine was subsequently reaffirmed in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). In that case the Court held that pursuant to the act of state doctrine, the Cuban government's retention of proceeds from the sale of expropriated sugar could not be overturned by the foreign owners. In a case now pending before the Supreme Court reargument was specifically requested with regard to the holding in *Sabbatino*. *Menendez v. Faber, Coe & Gregg, Inc.*, 345 F. Supp. 527 (S.D.N.Y. 1972), *aff'd sub nom.*, 485 F.2d 1355 (2d Cir. 1973), *cert. granted*, 416 U.S. 981, *reargued*, 44 U.S.L.W. 3427 (U.S. Jan. 19, 1976).

64. The . . . doctrine is compelled by neither international law nor by the Constitution but has "constitutional underpinnings" in that it attempts to preserve the proper relationships among the branches of government in a system of separation of powers. By declining to pass on the validity of acts of a foreign sovereign, a court is expressing its view that such an inquiry, if made at all, is

operates as a conflict of laws principle, and represents an exception to the general rule that a court of the United States will not decline to decide cases when jurisdictional requirements are met.⁶⁵ It is this doctrine which the court in *Carter* implicitly relied upon in refusing to pass judgment on Saudi Arabia's internal policies. The situation was perceived as one more appropriate for the sphere of diplomacy and negotiation.⁶⁶

The doctrine has been relied upon most often in the context of a foreign government's expropriation of property owned by United States citizens within its own borders.⁶⁷ It was implicitly applied in *South African Airways v. New York State Division of Human Rights*⁶⁸ to support a ruling that the Division was without jurisdiction to hear a complaint against the petitioner airline.⁶⁹ South African Airways was charged with systematically discriminating against United States citizens on the basis of race, pursuant to South Africa's visa restrictions. The issue of sovereign immunity was raised in the context of the absence of the Consulate of South Africa. The court considered the Consulate a necessary party to any proceeding since it was that office which issued visas,⁷⁰ although it concluded that "[t]he granting or denying of visas is not within the power of the petitioner, but rather a matter for decision by nations and their designated representa-

more properly the function of the political branches of government and that a judicial pronouncement on the topic might hinder the pursuit of foreign policy goals by the other branches. The doctrine also rests on a policy in favor of respecting a foreign government's right to rule within its own territory.

Note, *supra* note 62, at 466 (citations omitted).

65. See, e.g., *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972).

66. Cf. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart Maatschappij*, 210 F.2d 375 (2d Cir. 1954). The silence of the State Department cannot be interpreted as consent to a court's *non-application* of the doctrine; such consent must be affirmatively granted.

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

68. 64 Misc. 2d 707, 315 N.Y.S.2d 651 (Sup. Ct. 1970).

69. *Contra*, Herzog, *Conflict of Laws, 1971 Survey of N.Y. Law*, 23 SYR. L. REV. 435, 461-62 (1972). Professor Herzog considers that sovereign immunity was the basis for the decision, and that as such the case was correctly decided. This analysis is questionable, since the airline was a separate entity from the Republic of South Africa. See Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 825 (1964).

70. *But see* Note, *supra* note 52, at 133-34 n.12, where it is argued that while the Republic of South Africa was not designated as a necessary party pursuant to section 292 of the Executive Law, such a designation "would not, *ipso facto*, prevent a hearing on this complaint."

tives, in the fullest exercise of their sovereignty."⁷¹ The decision appears to confuse the doctrines of sovereign immunity and act of state, invoking sovereign immunity while employing reasoning more applicable to an act of state.⁷² Had the act of state doctrine been properly applied, the court would have concluded that the complaint concerned the activity of the airline, and that the visa activity of the South African government was collateral.⁷³

The court held that any action by the Division "would interfere . . . with the foreign policy of the United States, [because it] has seen fit to permit petitioner to operate in and out of the United States. . . . Foreign policy is a Federal concern, not amenable to State action."⁷⁴ *Carter* was distinguished because

[t]he actions of the oil company were in question, not those of a foreign sovereign. However abhorrent the discriminatory policies of the Republic of South Africa and its consulate in New York, no administrative or judicial remedy is here available against them. No facts are alleged showing that petitioner is engaged in implementing such policies.⁷⁵

The distinction between the two cases is not clear. It would seem more consistent that *Aramco* and *South African Airways*, both commercial entities violating New York public policy within New York's territorial jurisdiction, should be amenable to suit regardless of the degree of control exercised by a foreign sovereign.⁷⁶ Furthermore, in denying the New York Division of Human Rights jurisdiction to conduct hearings without first ascertaining the position of the State Department or the President, the court acted prematurely and without justification.⁷⁷ If there were no basis for the application of act of state or sovereign immunity, then the

71. 64 Misc. 2d at 710, 315 N.Y.S.2d at 653.

72. See *Hatch v. Baez*, 7 Hun. 596 (N.Y. App. Div. 1876), for a similar blurring of these two doctrines. This opinion did, however, antedate *Underhill v. Hernandez*, 168 U.S. 250 (1897).

73. See Note, 13 HARV. INT'L L.J. 132 (1972).

74. 64 Misc. 2d at 710-11, 315 N.Y.S.2d at 654.

75. *Id.* at 712, 315 N.Y.S.2d at 655.

76. Relevant considerations are that:

certain impingements on foreign affairs are excluded because national uniformity is required; infringements are barred if they discriminate against or unduly burden foreign relations; *the Courts will balance the State's interest in a regulation against the impact on American foreign relations.*

L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 241 (1972) (emphasis added). See Note, *supra* note 62, at 471, for a discussion of these competing interests.

77. See Note, *supra* note 52, at 150.

state could properly exercise jurisdiction pursuant to its police power.⁷⁸

The self-imposed limitations of a state court to adjudicate foreign acts of discrimination affecting state citizens were further enunciated in *New York Times Co. v. City of New York, Commission on Human Rights*.⁷⁹ The *Times* petitioned for review of the Commission's order⁸⁰ enjoining it from printing advertisements for employment in the Republic of South Africa. Although the question of South Africa's discriminatory policies affecting United States citizens was not directly at issue,⁸¹ the court invoked the act of state doctrine,⁸² citing *South African Airways v. N.Y. State Division of Human Rights*,⁸³ *Banco Nacional de Cuba v. Sabbatino*,⁸⁴ and *French v. Banco Nacional de Cuba*.⁸⁵ The court stated:

By its determination, the Commission, in effect was questioning the employment methods and practices of a foreign government.
 . . . Economic sanction should be adopted, whenever necessary, on a Federal level and not by a local anti-discrimination agency

78. See Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 297 (1965).

79. 79 Misc. 2d 1046, 362 N.Y.S.2d 321 (Sup. Ct. 1974), noted in Comment, 15 VA. J. INT'L L. 473 (1975), and Note, note 62 *supra*.

80. 79 Misc. 2d at 1047, 362 N.Y.S.2d at 322; see N.Y. CITY AD. CODE §§ B1-1-12.0 (1971), which codifies the function and powers of the Commission.

81. The precise issue was whether the *New York Times* had aided and abetted the discriminatory practices of South Africa by printing advertisements which, without overt language, discriminated indirectly because the positions were located in South Africa and could thus be read as automatically excluding blacks from eligibility. See Note, *supra* note 52, at 136-37, where the question of indirect discrimination in advertising is discussed in the context of South Africa's advertising campaign to encourage United States tourism in South Africa. The Appellate Division affirmed the lower court ruling on the basis that the *New York Times* was not discriminating in its advertising. *New York Times Co. v. City of New York Comm'n on Human Rights*, 49 App. Div. 2d 851, 374 N.Y.S.2d 9 (1st Dep't 1975).

82. The vivid description given by the complainant's witnesses at the hearing concerning the discriminatory manner of distributing recreational, sanitary and other facilities in South Africa, only emphasized the interest of the Commission in the governmental functions and practices of a foreign country.

79 Misc. 2d at 1050, 362 N.Y.S.2d at 325-26.

83. 67 Misc. 2d 707, 315 N.Y.S.2d 651. The court misconstrued the fact pattern in this case, stating that it involved advertisements for employment with South African Airways which were not available on a non-discriminatory basis.

84. 376 U.S. 398 (1964).

85. 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968). In this case, the New York Court of Appeals declined to examine Cuban currency laws which effectively confiscated property belonging to United States citizens. See generally Note, *Sabbatino Comes Full Circle: A Reconsideration in Light of Recent Decisions*, 4 N.Y.U.J. INT'L L. & POL. 260 (1971).

which at best can only become involved in international problems far removed from the scope of its limited jurisdiction.⁸⁶

The application of the act of state doctrine in *New York Times v. City of New York, Commission on Human Rights*, while not improper in light of its history and purpose, puts it to a novel use. The court unnecessarily attenuates the scope of the doctrine when it is actually superfluous to the holding.⁸⁷

In interpreting the doctrine in this fashion, the court makes it evident that certain acts and policies of foreign nations will, as a matter of practical necessity, be considered beyond the control of local administrative agencies and state judiciaries. State courts must defer to the executive branch of the federal government, which is more competent to deal with matters involving foreign relations, even when presented with an unequivocal violation of state public policy within the borders of the state. Such unfortunate judicial restraint results from a number of factors: the dearth of judicial precedent, the questions unanswered by the Supreme Court with regard to the breadth of the application of *Sabbatino*,⁸⁸ and the absence of effective legislative guidelines.⁸⁹

It is submitted that legislation specifically directed at acts of discrimination done pursuant to a foreign sovereign's domestic policy should be adopted in order to allow adequate remedies in

86. 79 Misc. 2d at 1050, 362 N.Y.S.2d at 325-26.

87. The court held that the *Times* had not violated any antidiscrimination statute because no reference to race or color was made directly or indirectly. 79 Misc. 2d at 1052, 362 N.Y.S.2d at 327, *aff'd*, 49 App. Div. 2d 851, 374 N.Y.S.2d 9 (1st Dep't 1975). See Comment, *supra* note 79, at 480, where it is considered an unwarranted application of the doctrine to extend it beyond the expropriation of foreign property within the border of a sovereign state.

88. The Court stated that:

we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

376 U.S. at 429. Some of these questions may, however, be answered in the near future. See note 63 *supra*.

89. The Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1970), prohibits courts from applying the act of state doctrine without permission from the executive. The Amendment has generally been ignored. In *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), six Justices concurred in rejecting the view that the courts must follow such an executive order to rule on the merits, without deciding independently whether the act of state doctrine should apply. The Hickenlooper Amendment was not mentioned in the majority opinion, and only discussed in a footnote of the dissenting opinion, 406 U.S. at 780 n.5, in which Justice Brennan stated that he agreed with the Court that the Hickenlooper Amendment was inapplicable.

state administrative agencies and courts.⁹⁰ The New York state legislature has not yet addressed itself specifically to an Aramco or South African Airways situation. An aggrieved party who wishes to litigate this type of employment discrimination in a New York state court would have to rely upon the general language of the Human Rights Law.⁹¹ However, an amendment to the Human Rights Law making unlawful any boycott or refusal to deal because of "race, creed, color, national origin, or sex" and providing sanctions and penalties for noncompliance, was signed into law on August 6, 1975, and became effective on January 1, 1976.⁹² New York is the only state to have enacted such legisla-

90. Granting such power to the states would avoid decisions such as *New York Times Co. v. City of New York Comm'n on Human Rights*, 79 Misc. 2d 1046, 362 N.Y.S.2d 321 (1970), where the court determined that the Commission, in enjoining advertising, was effectively levelling an economic sanction against the Republic of South Africa.

Such a reallocation of powers would not represent an infringement upon protected constitutional rights, because "both the law and theory of government of the United States prohibits the Executive from exercising the foreign affairs power under a treaty or agreement if its exercise violates the constitutional rights of American citizens." Note, *supra* note 52, at 150.

91. N.Y. EXEC. L. § 296(1)(a), (d) (McKinney 1972).

92. N.Y. EXEC. L. §§ 296(13), 298-a (McKinney Supp. 1975). § 296(13) provides:

It shall be an unlawful discriminatory practice (i) for any person to discriminate against, boycott, or blacklist, or to refuse to buy from, sell to or trade with, any person, because of the race, creed, color, national origin or sex of such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendants, agents, employees, business associates, suppliers, or customers, or (ii) for any person willfully to do any act or refrain from doing any act which enables any such person to take such action. This subdivision shall not apply to:

- (a) Boycotts connected with labor disputes; or
- (b) Boycotts to protest unlawful discriminatory practices.

§ 298-a provides in pertinent part:

Application of article to certain acts committed outside the state of New York.

1. The provisions of this article shall apply as hereinafter provided to an act committed outside this state against a resident of this state or against a corporation organized under the laws of this state or authorized to do business in this state, if such act would constitute an unlawful discriminatory practice if committed within this state.

2. If a resident person or domestic corporation violates any provision of this article by virtue of the provisions of this section, this article shall apply to such person or corporation in the same manner and to the same extent as such provisions would have applied had such act been committed within this state except that the penal provisions of such article shall not be applicable.

3. If a non-resident person or foreign corporation violates any provision of this article by virtue of the provisions of this section, such person or corporation shall be prohibited from transacting any business within this state A person or corporation who or which transacts business in this state in violation of any such order is guilty of a class A misdemeanor

tion, as it appears to be the only state to have been concerned with this issue to date.⁹³ There is in existence at this time federal legislation directed to the issue of boycotts,⁹⁴ although, as discussed below,⁹⁵ it is questionable whether its wording is strong enough to result in meaningful enforcement.

Federal Supremacy

Constraints upon state action are imposed by the federal system itself. Although the various state human rights laws are protected by the tenth amendment of the United States Constitution,⁹⁶ the supremacy clause⁹⁷ and the treaty clause⁹⁸ dictate that foreign policy is exclusively within the domain of the federal government.⁹⁹ In *United States v. Belmont*,¹⁰⁰ the Supreme Court held that state policy must yield when it adversely affects international relations:

Governmental power over external affairs is not distributed, but is vested exclusively in the national government

. . . .

Plainly, the external powers of the United States are to be exercised without regard to state law or policies.¹⁰¹

Similarly, in *United States v. Pink*,¹⁰² the Court stated:

If state laws and policies did not yield before the exercise of external powers of the United States, then our foreign policy might be thwarted The nation as a whole would be held to answer if a State created difficulty with a foreign power.¹⁰³

93. For a discussion of fair employment statutes, both state and federal, see Annot., 44 A.L.R.2d 1138 (Supp. 1975).

94. Export Regulation Act, 50 U.S.C. §§ 2401-13 (1970).

95. See text accompanying notes 114-121 *infra*.

96. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. See *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945); *Cooney v. Katzer*, 41 Misc. 2d 236, 245 N.Y.S.2d 548 (Sup. Ct. 1963); *American Jewish Congress v. Carter*, 23 Misc. 2d 446, 190 N.Y.S.2d 218 (Sup. Ct. 1959).

97. U.S. CONST. art. I, § 8: "The Congress shall have the Power . . . to regulate Commerce with foreign Nations"

98. U.S. CONST. art. II, § 2: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties"

99. See HENKIN, *supra* note 76, at 242.

100. 301 U.S. 324 (1937).

101. *Id.* at 330-31.

102. 315 U.S. 203 (1942).

103. *Id.* at 232.

In *Pink*, Mr. Justice Frankfurter's concurring opinion relied upon *Russian Republic v. Cibrario*,¹⁰⁴ in which the New York Court of Appeals denied Russia access to New York state courts in order not to "thwart the policy which the United States had adopted."¹⁰⁵

More recently, in *Zschernig v. Miller*,¹⁰⁶ the Court held that states cannot question the political and social ideology of foreign sovereigns; anything more than a routine reading of foreign laws constitutes an improper intrusion into the field of foreign affairs.¹⁰⁷ Without further guidance, the scope of this permissible routine reading is difficult to determine.¹⁰⁸ When dealing with transnational situations, the capacity of states to pursue their own policy goals is limited.¹⁰⁹ The Court did not address itself to the question of whether a state's public policy, even if in complete harmony with the United States Constitution (and judicial interpretation of federal civil rights legislation), would nevertheless be struck down as intruding upon exclusively federal territory¹¹⁰ because a collateral question of foreign affairs was involved. These issues aside, *Zschernig* continues the pattern of restriction on state action *vis-à-vis* foreign policy begun by *Belmont* and *Pink*.

II. REMEDIES AT THE FEDERAL LEVEL

As a result of the passage of the Civil Rights Act of 1964,¹¹¹

104. 235 N.Y. 255, 139 N.E. 259 (1923).

105. *Id.* at 263, 139 N.E. at 262. This case was decided prior to the United States recognition of the Union of Soviet Socialist Republics.

106. 389 U.S. 429 (1968). *Zschernig* declared unconstitutional as applied an Oregon statute which prohibited a non-resident alien from inheriting local property unless citizens of Oregon enjoyed a reciprocal right in the alien's country.

107. See generally Comment, note 79 *supra*.

108. See HENKIN, *supra* note 76, at 239. For a list of decisions after *Zschernig* in which states construed their alien inheritance statutes as constitutional, see Comment, *supra* note 79, at 477 n.26.

109. *Id.* at 477. Professor Henkin comments that:

It may be, then, that *Zschernig v. Miller* excludes only state actions that reflect a state policy critical of foreign governments and involve "sitting in judgment" on them. Even if so limited, the new doctrine might cast doubts on the right of the States to continue to invoke their own "public policy" in transnational situations.

HENKIN, *supra* note 76, at 240-41 (citations omitted).

110. See HENKIN, *supra* note 76, at 243. See also *Hines v. Davidowitz*, 312 U.S. 52 (1941).

111. 42 U.S.C. § 2000e-2 (1964) provides:

- (a) It shall be an unlawful employment practice for an employer
 - (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin . . .

an individual refused employment because of religious practices or ancestry may bring an action in federal court. To date, the Act has not been litigated on these grounds. In 1975, however, the ADL filed charges with the Equal Opportunity Employment Commission accusing Aramco and three other United States corporations of discriminatory practices in violation of the aforementioned Act.¹¹² The charge before the Commission is a prerequisite for suit in federal district court, as permission of the Equal Opportunity Employment Commission is required before such a suit may be instituted.¹¹³

The problem of preventing the acquiescence of United States businesses to the pressure created by foreign blacklists received congressional attention in section 2402 of the Export Regulation Act.¹¹⁴ The Act contains a statement of policy¹¹⁵ which the President is granted extensive power to effectuate.¹¹⁶ As the Act reads now, however, it is rather vague and difficult to enforce.

The mechanics of enforcement depend upon the reports of those domestic corporations receiving requests to sign agreements from foreign entities,¹¹⁷ and aggressive enforcement by the Secretary of Commerce is essential.¹¹⁸ If the conduct of former Secre-

(b) (2) It shall be unlawful employment practice for an employment agency to fail or refuse to refer for employment . . . any individual on the basis of his race, color, religion, sex, or national origin.

112. N.Y. Times, June 11, 1975, at 10, col. 5.

113. 42 U.S.C. § 2000e-5(f) (Supp. IV, 1974).

114. 50 U.S.C. §§ 2401-13 (1970).

115. 50 U.S.C. § 2402(5) (Supp. IV, 1974) provides:

It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States, (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States, and (C) to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.

116. 50 U.S.C. § 2403(b)(1) (Supp. IV, 1974) provides:

To effectuate the policies set forth in . . . this Act . . . the President may prohibit or curtail the exportation from the United States, its territories and possessions, of any articles, materials, or supplies, including technical or any other information . . . [A]ll domestic concerns receiving requests for the furnishing of information or the signing of agreements as specified in . . . [50 U.S.C. § 2402(5)] must report this fact to the Secretary of Commerce for such action as he may deem appropriate to carry out the purposes of that section.

117. 50 U.S.C. § 2403(b) (Supp. IV, 1974).

118. 50 U.S.C. § 2403 (Supp. IV, 1974).

tary of Commerce Morton, who refused to disclose to the House Subcommittee on Oversight and Investigations the names of those companies contacted by the Arabs with regard to boycotting Israeli trade,¹¹⁹ is indicative of the position of the executive branch with regard to this policy, it is questionable whether the Act will have any power whatsoever.¹²⁰ To strengthen the Act, an amendment was proposed in the House of Representatives which would expressly prohibit the support of restrictive trade practices or boycotts imposed by a foreign country.¹²¹ Such an amendment would unfortunately not vitiate lack of cooperation by the executive branch.

Additionally, H.R. 5246 of 1975,¹²² a bill to amend the Federal Criminal Code,¹²³ was introduced in the House of Representatives on March 20, 1975, and referred to the House Judiciary Committee. This bill expressly addresses itself to economic coercion designed to effectuate discrimination and the failure or refusal to employ target groups as a result of such coercion. It establishes penalties for violation of its provisions, and grants a remedy to

119. N.Y. Times, Sept. 23, 1975, at 4, col. 4.

120. On September 22, 1975, the American Jewish Congress filed suit against the Secretary of Commerce in the United States District Court for the District of Columbia, *American Jewish Congress v. Richardson*, Civil No. 75-1541 (D.D.C., filed Sept. 22, 1975), to compel him to make public the names of those companies. The suit, brought under the Freedom of Information Act, sought "an injunction to bar Commerce Department officials from withholding their files on United States firms that were asked to comply." N.Y. Times, Sept. 23, 1975, at 4, col. 4.

121. H.R. 4967, 94th Cong., 1st Sess. (1975):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That section 4(b)(1) [50 U.S.C. 2403(b)(1) (Supp. IV, 1974)] of the Export Administration Act of 1969 is amended by adding at the end thereof a new sentence as follows: Such rules and regulations shall prohibit, in furtherance of the policy set forth in section 3(5)(A) and (B) [50 U.S.C. 2402(5) (Supp. IV, 1974)] of any actions, including the furnishing of information or the signing of agreements, by domestic concerns engaged in the export of articles, materials, or supplies, including technical data, from the United States which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States: *Provided*, That nothing contained in this sentence shall be construed to authorize the imposition of any sanction against any business concern in a country friendly to the United States which is engaged in the export of articles, materials or supplies, including technical data, to the United States and to any foreign country fostering or imposing such restrictive trade practices or boycotts: *Provided further*, That this paragraph shall not apply to any action authorized by an international organization in which the United States concurred.

122. H.R. 5246, 94th Cong., 1st Sess. (1975).

123. 18 U.S.C. §§ 241-45 (1970).

an aggrieved party.¹²⁴ Although this bill, if enacted, would undoubtedly constitute the most comprehensive remedial and preventative legislation in this area, it is questionable whether even such legislation would have an appreciable effect on employment practices of United States corporations doing business in foreign countries. Despite the apparent attempt of this bill to enable courts to avoid applying the act of state doctrine, the fact remains that no legislation of the United States can affect a foreign sovereign's power to issue visas or exclude any person on whatever grounds it wishes.

III. CONCLUSION

The commitment of state legislatures and Congress to civil rights has been demonstrated by the enactment of state human rights laws and the Civil Rights Act of 1964. The effectiveness of this legislation, however, depends upon its enforcement by the courts, and this is particularly true in the context of discrimina-

124. The text of H.R. 5246 reads in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That title 18 of the United States Code is amended by inserting immediately after section 245 the following new section:

' § 246. Economic coercion based on religion, race, national origin, sex, or certain other factors

'(a) It shall be unlawful for any business enterprise or person acting on behalf of or in the interest of a business enterprise to coerce by economic means, or to attempt to coerce by economic means, another person, where an object of such coercion is to cause such other person to fail to do business with, to fail to employ, to subject to economic loss or injury, or otherwise to discriminate against, any United States person, or any foreign person with respect to its activities in the United States, by reason of -

'(1) the religion, race, national origin, or sex of such United States or foreign person, or of any officer, director, employee, or creditor of, or any owner of any interest in, such United States or foreign person; or

'(2) direct or indirect support for any foreign government, or dealing with or in, any foreign country by such United States or foreign person, or by any officer, director, employee, or creditor of, or any owner of any interest in, such United States or foreign person, when such support or dealing is not in violation of the laws of the United States.

. . . .

'(e) The Attorney General may institute an action in rem or in personam, on behalf of the United States, in an appropriate United States district court, to collect a civil penalty against any person who violates subsection (a).

tory practices which are the result of foreign influence. The recent decisions of New York state courts do not give cause for optimism: a South African corporation has been permitted to deny the use of its facilities to black citizens of the United States¹²⁵ and a United States corporation has been permitted to deny employment to Jewish citizens of the United States solely upon the basis of an assertion that corporate employees might be required to work in Saudi Arabia.¹²⁶ Without question, the discriminatory policies of foreign nations, particularly the blacklisting by Arab countries, have resulted in the violation of the constitutional rights of United States citizens.

The passage of new federal legislation specifically aimed at economic coercion by foreign nations is crucial because it would provide direction and guarantee uniformity not attainable by individual state legislation.¹²⁷ It is submitted that the courts must play an active role in enforcing such laws. The consequence of unimpeded discriminatory practices will be the erosion of United States constitutional safeguards. The need for such protection is manifest; discrimination must not be permitted in the name of business expedience.

Charles M. Sporn

125. *South African Airways v. N.Y. State Div. of Human Rights*, 64 Misc. 2d 707, 315 N.Y.S.2d 651 (Sup. Ct. 1970).

126. *American Jewish Congress v. Carter*, 23 Misc. 2d 446, 190 N.Y.S.2d 218 (Sup. Ct. 1959).

127. The need for federal legislation is underscored by the fact that since January 1, 1976 (the date upon which the anti-blacklist provisions of the Human Rights Law took effect), a substantial amount of shipping has been diverted to ports located in states other than New York. *N.Y. Times*, Mar. 22, 1976, at 1, col. 7. See note 92 *supra*.