

Republic of Austria v. Altmann
Foreign Immunity in a Shifting International Environment

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Governmental conflict always exists in international politics and law, as governments dispute treaties, control trade and economics and even try to impose one set of laws on a new country. Through the legal system of the United States of America, an interesting dilemma arises when dealing with other governmental bodies and individuals representing these foreign bodies. Legal action against such bodies and associated individuals could be a means of influence (either a threat of legal action, or a bribe in the form of forgiving certain actions). In more modern terms, such legal action could even be viewed as attempting to try to blame larger problems on individuals. For these very reasons, the United States government early in its legal development established international immunity for foreign states (through the case *Schooner Exchange v. M'Faddon*, 1812). Initially, this immunity was absolute, but with time restrictions, limitations and exceptions were piled on. It wasn't until 1976 though that the policies on international immunity were truly finalized and incorporated into the United States Code (the general and permanent federal law of the United States¹), in what was known as the Federal Sovereign Immunities Act.

A recent case brought up many new questions regarding the application of the recently codified exceptions. The case, entitled *Republic of Austria v. Altmann* (2004), which argued in front of the Supreme Court whether or not the new clause, known as the expropriation exception, could be retroactively applied to the actions of the Austrian government. The final outcome, following many levels of appeal and finalized by the Supreme Court, stated that the exception to international immunity could be applied to actions before its creation and even before the restrictive theory (an earlier approach to

¹ Wikipedia (2005). United States Code. Wikipedia Online Free Content Encyclopedia, February, 2005. <http://en.wikipedia.org/wiki/United_States_Code>.

international immunity). This *ex post facto* (Latin for “that which is done afterward”) application is important to understand overall as it really breaks certain law into a distinct category of purely procedural law. But in addition, the case creates interesting implications for international law where the absolute immunity that the United States introduced almost two hundred years ago, is crumbling rapidly. The case of the *Republic of Austria v. Altmann* represents the continual disintegration of international immunity, which is no longer feasible in a global society where the thin line, which separates international business and governmental interactions, is quickly vanishing.

In the case, Maria Altmann, an 88 year old woman living in Los Angeles, hoped to regain control of six of her uncle’s Gustav Klimt paintings, which were seized by the Nazis during World War II. Her uncle Ferdinand Bloch commissioned many expensive paintings of his wife, Adele Bloch-Bauer, to be painted by Klimt, an Austrian symbolist painter. His paintings are both historically significant (due to artistic shifts and movements that he was involved in) and therefore extremely valuable. The six that Maria is seeking to reclaim have an estimated value of more than \$150 million.² The notable delay in her action was in part due to many complexities involving the actions of the Austrian government, which stated initially that all Nazi transactions were void. This statement, although announced with good intentions, many felt was simply an act to try to put things right with the Allies³, and in the end, it came down to the fact that the transactions simply had the possibility of being voided. Initially, many other pieces were returned under the premise that the six paintings in question would be a “donation” to the

² Wikipedia (2005). Gustav Klimt. Wikipedia Online Free Content Encyclopedia, February, 2005. <http://en.wikipedia.org/wiki/Gustav_Klimt>.

³ Randy Schoenberg, Interview (4/5/05).

Austrian gallery (this practice was later declared illegal by the Austrian government). It was this key action of taking the paintings in exchange for other property being returned that is being questioned, not the actual seizing of the paintings by the Nazis (although equally illegal, there is much less clear evidence of this nor a representing body to blame). The idea of reclaiming the paintings was brought up when the Museum of Modern Art in New York refused to return certain works, which it had on loan from the Austrian gallery, whose ownership was under question. A committee was formed to advise the Minister of Education and Culture in Austria regarding which works should be returned and to whom. Although the legal title of the six Klimt paintings was unclear, the committee advised against returning them.

Following this, Maria felt that maybe the possibility of reclaiming the paintings hadn't been lost and tried to file suit in Austria, but their court system requires a filing fee that is a percentage of the recoverable amount (more than Maria had, in which case they asked for all her current assets). Upon hearing this, the Altmann family gave up their claim in the Austrian court system and turned next to the United States courts, choosing to file her claim against Austria and the Gallery in the Central District Court of California. In response, the Republic of Austria filed a motion asking for the dismissal of the case based on, primarily, improper venue, lack of subject matter (meaning that the court couldn't hear something on this subject, as it lacked control over it) and most importantly *inter alia*⁴ (the wrong doings wouldn't have been prosecutable at the time they were carried out). The case, Republic of Austria v. Altmann was simply the courts

⁴ Republic of Austria v. Altmann, 124 S. Ct. 2240 (2004).

determining whether the Altmann family's suite was filed in a court with proper jurisdiction and power to hear such claims.

As the Supreme Court has affirmed that the Altmann family's claim can proceed (in a 6 to 3 decision⁵), the case to determine the fate of the six paintings is set for fall of 2005. Although the large hurdle has been overcome, many additional challenges exist in the future of the case, as there are questions regarding the statute of limitations and analyzing the interpretation of the wills of Ferdinand and Adele Bloch. This brief overview of the case serves sufficient understanding of the initial case and the pertinent rules of law being addressed (specifically, whether the United States courts can apply exceptions to foreign immunity in this case). It is important though to keep in mind that there are greater levels of complexity to the case beyond what is described here, primarily regarding conflicting wills of both Ferdinand and Adele.

Before continuing an in-depth analysis of the arguments presented, a greater understanding of the evolution of immunity must be established. The precedent began in 1812 with the case of *Schooner Exchange v. M'Faddon*, in which Justice Story stated, "it is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty."⁶ This was a case where a US schooner named Exchange was captured by the French and turned into a ship of war. When forced to land in a port in Philadelphia, the original owners sued to regain their lost property. The courts decision granting the foreign entity immunity set a precedent of near absolute immunity.

⁵ Ibid.

⁶ *The Schooner Exchange v. M'Faddon* 11 U.S. (7 Cranch) 116 (1812).

This precedent lasted only until 1926, when in a similar case called *Berizzi Bros. v. The Pesaro* (also regarding the control of a ship), the district court chose to withhold immunity based on the fact that the ship *The Pesaro* was engaged in commercial activities.⁷ Although this decision was reversed by the Supreme Court, this represents the first appearance of a restrictive approach to sovereign immunity, “which distinguished acts of the government in its capacity as a sovereign from those of a commercial nature, and granted immunity in the former, but not in the latter.”⁸ It wasn’t until end of the Great Depression/World War II era that the government began to give up on a laissez-faire approach to business. As the government came increasingly more invested in the marketplace, the flaws of the absolute immunity were clearer: making foreign governments unaccountable for commercial ventures could become disastrous. The official policy change was aided by Jack Tate, the Acting Legal Adviser to the State Department, who issued a letter (now referenced as the “Tate Letter”) in which he stated, “It will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.”⁹ The executive branch continued to make recommendations on the handling of immunity cases, sometimes even deferring to political influences¹⁰ rather than the

⁷ *Berizzi Bros. v. The Pesaro*, 271 U.S. 562 (1926).

⁸ David Mackusick (1996). Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act, Emory International Law Review, Winter.

⁹ Letter from Jack B. Tate, Acting Legal Adviser to Philip B. Perlman, the Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 (1952).

¹⁰ David Mackusick (1996). Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act, Emory International Law Review, Winter.

message set forth in the Tate Letter, causing the courts to often defer such decisions to the recommendations of the other branches of the government.¹¹

Finally, in an effort to remove this dependence on outside influence, the Department of State prompted the enactment of the Foreign Sovereign Immunities Act by the congress.¹² This addition to the United States Code was in title 28, which deals with judiciary law and judicial procedure.¹³ This is important to note, because it is clearly just a clarification of procedure, not a change in what is considered legal or illegal. The FSIA didn't even really introduce a new approach to immunity, but simply served to officially codify the ideas set forth in the Tate letter and the generally accepted restrictive theory. The document begins with granting immunity to all foreign sovereignties, but then just as quickly it begins cutting back on this immunity by listing a series of exceptions, "including waivers of immunity, commercial activities, expropriation claims, property claims, noncommercial torts, maritime liens, counter claims, and international agreements."¹⁴ Through the FSIA, all the burden of proof lies in the hands of the defense (in this case, the Republic of Austria). First, the defense must proof that they are either an agency or instrumentality of a sovereign state¹⁵ (which, in one case where the parent company of the defendant was primarily owned by the government, can be more of a challenge than initially thought, but in this case was rather straight forward). Following this, the plaintiff must highlight what exception the defendant falls into (in this case, the exception was the expropriation exception having to do with seized goods). Finally, the

¹¹ Joseph Sweeney (1963). The international law of sovereign immunity: policy research study. Washington DC: External Research Staff, Bureau of Intelligence and Research, U. S. Dept. of State.

¹² Tessitore, Michael A (1999). Immunity and the Foreign Sovereign. Thomson Find Law, November 1999.

¹³ Wikipedia, "United States Code".

¹⁴ David Mackusick (1996). Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act, Emory International Law Review, Winter.

¹⁵ Michael A Tessitore (1999). Immunity and the Foreign Sovereign. Thomson Find Law, November 1999.

ultimate burden of proof lays in the hands of the defendant as they must show why that exception does not apply to them.

Parts of the FSIA represent a whole new approach not really considered in the previous restrictive theory. When Randy was discussing it, he suggested that many of the new provisions and exceptions in the FSIA that are not present in the previous Tate letter/restrictive theory, might stem from relations with Cuba.¹⁶ As business/trade relations were going downhill just a decade before (early sixties) with the rise of Castro, increasing levels of trade embargos were placed on Cuba.¹⁷ The new exceptions that appear in FSIA probably represent fears that were highlighted during the period with Cuba when business/individuals began to fear about lost economic contracts and the possibility of seized goods. When the time for drafting the FSIA came around, these ideas were still fresh in the minds of the legislators.

In *Republic of Austria v. Altmann*, the plaintiff had the huge challenge of trying to convince the court that the relatively new and codified approach should be applied retroactively to Austria's action. The attorney, Randy Schoenberg, who represented Maria Altmann, tackled this challenge through five key arguments.¹⁸ First was that the change brought by the FSIA was simply a procedural change, but does not change what the court considers right or wrong. Furthering this, it can also be claimed that the FSIA didn't even consist of a change to the law, but rather a clarification of existing policy. The third argument was based on the wording in the FSIA, which clearly states

¹⁶ Joseph Sweeney (1963). *The international law of sovereign immunity; policy research study*. Washington DC: External Research Staff, Bureau of Intelligence and Research, U. S. Dept. of State.

¹⁷ Wikipedia (2005). *United States embargo against Cuba*. Wikipedia Online Free Content Encyclopedia, March, 2005. <http://en.wikipedia.org/wiki/United_States_embargo_against_Cuba>.

¹⁸ Randy Schoenberg, Interview (4/5/05).

“henceforth all claims by foreign states to sovereign immunity will [be handled in this way].”¹⁹ This can clearly be interpreted to mean that all cases, whether or not the subject matter occurred before the enactment of the FSIA, should be handled using the protocol specified. Next, the argument was present that the United States Code is automatically retroactive, unlike common law. And finally, the argument was presented that there was no unsettling of expectations by the FSIA, which only extends where a case could be brought to court.²⁰ This is based on the idea that the case could have just have easily been brought to an Austria court (overlooking the processing fee).

After providing this reasoning for the retroactive application of the FSIA, Randy (the attorney representing Maria Altmann) had to show that the Austrian gallery met the statutory nexus exception (the core exception that all cases must prove before further exceptions can even be applied to the immunity)²¹ of the FSIA, which is known as the commercial activity exception. This exception is integral to the FSIA, because it ensures that there is a true financial connection between the activities at hand and the United States, which is really the core of the restrictive theory (applying immunity to noncommercial activities). This is based on three possible conditions:

“(1) upon a commercial activity carried on in the United States by the foreign state; or (2) upon the act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (3) 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”²²

¹⁹ 28 U.S.C. § 1330, 1602-11.

²⁰ Randy Schoenberg, Interview (4/5/05).

²¹ Anthony D'Amato (2004). Republic of Austria v. Altmann. International Law Journal.

²² 28 U.S.C. § 1605(a)(2).

Using definitions from the subsequent section regarding what counts as commercial activity and the important fact that the Austrian Gallery is run by the Austrian government, the plaintiff convinced the appellate court that the marketing and publication of information regarding the exhibition where the paintings were being showed satisfied the commercial activity exception. In this way, a satisfactory connection was drawn showing that the Austrian government had a vested financial interest in the property under question which extended to the American market (and more specifically the Californian market, where the case was initially filed), and therefore did not deserve immunity. The only remaining step was to show that the expropriation exception applied, which was a relatively easy step that involved giving adequate evidence of the Austrian government's unfair bartering tactics. The expropriation exception simply specifies an exception for the purpose of reclaiming goods that were seized by a foreign state in a manner not permitted by international law.²³

The Austrian government's lawyer, Scott Cooper, response mainly targeted the arguments about the retroactive application of the FSIA and sought dismissal based an argument of *inter alia* (Latin for "among other things"). This argument for dismissal is built around the idea that since at the time of the action, it wouldn't have been prosecutable, then it shouldn't be able to proceed today. This idea, a very logical response, simply implies that regardless of the fact that it was a policy or procedural change, at the time of the expropriation, immunity would have been granted (and that knowledge might have factored into the Austrian governments action). By changing the rules on immunity, this would undermine the expectations of the Austrian government.

²³ 28 U.S.C. § 1605 (1994).

This argument is very convincing, with one exception, being that the action in question (Austria requiring the donation of the paintings in exchange for returning other property) was deemed illegal by the Austrian government (although after the fact), but it still shows that their actions being illegal wasn't outside expectations. Other arguments seeking the dismissal of the case claimed improper venue (that it shouldn't be tried in California, although Randy suggested they would have presented the same argument in Austria²⁴).

The idea of this retroactive application was clearly controversial. Most notably were the prominent nations that filed amicus briefs on behalf of the petitioner (in this case, the Austrian government as they were seeking immunity), which included Japan²⁵, France, United Mexican States and the United States²⁶ itself. In addition to reiterating many of the points made by Scott Cooper (representing Austria), all four of the amicus briefs focus heavily on two key topics. The first topic was Congress's intent when passing the FSIA. Wherever this is brought up, the briefs suggest that it was the intent that the FSIA only be applied to new cases. In addition, all of the briefs heavily emphasize the danger to American international relations if this case succeeds in approving the retroactive application of the new exceptions in the FSIA. In a political/business setting where stability is key, all the countries submitting amicus briefs expressed fear of the potential damage caused if people felt that stolen property as far back as World War II (or even further) could be recovered. Such an action by the court, they said, could damage foreign countries' relations with the United States, as they would

²⁴ Randy Schoenberg, Interview (4/5/05).

²⁵ Craig Hoover (2004). Brief for Amicus Curiae Japan in Support of Petitioners. United States Supreme Court. 03-13.

²⁶ Theodore B Olson (2004). Brief for the United States As Amicus Curiae Supporting Petitioners. United States Supreme Court. 03-13.

feel cheated by this unexpected change. Japan made a very convincing argument on this topic, suggesting that their postwar success was contributed to by both immunity for their actions during World War II as well as the strength of a stable, predictable relationship with the United States.²⁷ Amicus briefs were also written in favor of the plaintiff, although these were not submitted by such prominent entities. They include the Austrian Jewish Community, the American Jewish Community and Rabbi Michael Berenbaum (a writer/historian whose most well known work is “After Tragedy and Triumph: Modern Jewish Thought and the American Experience”).²⁸

There is something interesting to be gained by looking at the authors of the amicus briefs filed in relation to the case. First, the most obvious thing to see is that even with the United States and three allies filing briefs in favor of the petitioner stating the intentions of the US Congress and pointing out a key international relations argument, the court still decided in favor of the plaintiff. This offers a reassuring reminder that the separation of power in the government remains strong and that the court’s decision was independent of the influence of the executive/legislative branch of the government. Secondly, the amicus briefs filed in favor of the plaintiff come from sources that are much more strongly based on memorials/relations that are purely sympathetic to the victims of World War II rather than having a vested interest in the actual nature of the law. Because of this, they have a much higher investment in the case as they would benefit from a ruling in favor of the plaintiff, which would strength other attempts to achieve restitution for actions during World War II.

²⁷ Craig Hoover (2004). Brief for Amicus Curiae Japan in Support of Petitioners. United States Supreme Court. 03-13.

²⁸ D’Amato, Anthony (2004). Republic of Austria v. Altmann. International Law Journal.

Looking at the effects of the amicus briefs provides a good introduction to an impact study of the case, because, by looking at the parties and arguments presented in the amicus briefs, it's possible to gain a clear understanding of the vested interests of outside groups. It's clear from the prominent states that submitted briefs that this case has the potential to seriously impact international relations. As many countries have felt secure in their immunity for past actions (especially with World War II in the not-so-distant past), this could be upsetting to them as they might suddenly feel vulnerable to law suites. Now with a new precedent established, allowing for retroactive application of exceptions, a series of new suites could arise where individuals/parties might try to seek revenge or place blame for previously unaccounted for actions. More specifically to this case, the outcome could be damaging to Austria whose actions and intentions up until this case have been simply out of good will (forming the committee to return other art, etc). Now that their sovereign power is being questioned by the United States courts, this could mar future interactions between the countries. And with the possibility of this happening in other cases involving different foreign states, the reputation of the US judicial system could be severely hampered among the international community. Of course, the ultimate negative impact of this case would for it to snowball and result in other laws to fall under question, as people would be persuaded by the success of Maria Altmann to take advantage of retroactive application of other laws (although this is much less realistic).

The more positive reproductions of the case are simply the ability for people who lost property (or who fall into other categories not formally introduced as exceptions until the FSIA) to submit claims to try to regain control of the lost property. With this victory,

people (whether or not they actually need to retroactively apply the law) who previously were not knowledgeable on the topic of submitting claims to foreign states, may be encouraged to take up their claims. Comparing the negatives (the potential for very negative consequences in existing strong international relations) with the positive (opening up a new window for individuals to restore possessions that were unfairly taken) is extremely difficult, due both to the very different circles of effect as well as to the fact that the negatives are only a theoretical possibility. The decision really asks people to weigh the importance of individual happiness/possessions against fragile international relations. In America, a strongly individual oriented society, it would seem logical to favor the individual and that's what the Supreme Court felt as well.

Finally, when speaking about the impact of the case, it would be improper not to discuss the implications of this whole matter being over the ownership of art. Although this seems to be something that might not be extremely strong in the general American public, there exists an idea that in some way art belongs to the public. Many very prominent arguments have arisen over people who wanted to have priceless pieces buried in their grave with them.²⁹ The fact that this case is about a woman wanting to reclaim paintings that are extremely valuable begs the question of whether or not there exists any responsibility to keep art available to the public, in such a pristine and caring setting as the Austrian gallery. Although such an idea would be a radical change to the current approach to buying and selling art, it is important to keep this mind when looking at a

²⁹ Raphael Rubinstein (2003). Supreme Court to Consider Klimt Lawsuit. [Art in America](#) v91 i11 184.

case like this, where Maria Altmann is trying to reclaim ownership of paintings whose value has skyrocketed due to the fame of Klimt.³⁰

In conclusion, the case of the *Republic of Austria v. Altmann* represents a balance between conflicting ideals. On the one hand, there is the importance of international public relations and setting a general precedent for immunity which has the potential for negative consequences. On the other hand though, the case is seeking permission for Maria Altmann to regain ownership of a precious family artwork that was unfairly seized following World War II (it was actually seized during World War II, but due to the technicalities of the case, it is the postwar negotiations that are under question). In the end, the court chose to vote six to three in favor of the individual and applied the Foreign Sovereign Immunities Act retroactively. This Act represents the shifting international politics and more specifically an evolution in the history of immunity to take into account the more central role of the government in trade and economics. Yet the court decided that the new standard which exists only to take into account the more recent changes in international relations and politics should be retroactively applied to a period before the changes even occurred – a decision, which many prominent governments including the United States itself felt could have disastrous effects on foreign nature, because it unsettled their expectations. Whether or not these feared consequences will come to pass, there is definitely a strong argument to be made about how policy that shifts to reflect cultural changes shouldn't be used against actions before the change even occurred. That isn't to say that Maria Altmann should be denied her attempts to reclaim the Klimt paintings, which are truly priceless possessions to her family and a recording of her

³⁰ Wikipedia (2005). Gustav Klimt. Wikipedia Online Free Content Encyclopedia, February, 2005. <http://en.wikipedia.org/wiki/Gustav_Klimt>.

families past. Overall, this case came to the court asking that two conflicting but equally valid arguments be reconciled; the courts response was to ignore the advise of prominent states who were trying to protect themselves from being held accountable for previously immune actions (and also protect relations with the United States), and rather reach out and help the individual who otherwise might have been unable to reclaim a family heirloom.

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