A SEPARATION OF POWERS PERSPECTIVE ON *PINOCHET*

Frank Sullivan, Jr.[*, **]

INTRODUCTION

On October 16, 1998, the former Chilean dictator, Augusto Pinochet Ugarte, was in London undergoing medical treatment. He was arrested at the request of Spanish authorities who sought his extradition to Spain for trial on charges of human rights abuses (torture, murder, and hostage-taking) allegedly committed while he ruled Chile.

Prior to any decision having been made by the U.K. government as to extradition, Pinochet himself sought a writ of habeas corpus from the U.K. courts. Pinochet, supported by Chile, argued in part that he was entitled to immunity as a former head of state under U.K. statutory law. Spain responded in part that under principles of international law, Pinochet was not entitled to the statutory immunity he claimed.

On October 28, 1998, a three-judge divisional court held that he enjoyed immunity but refused to allow him to return to Chile pending appeal.[1] On November 25, 1998, the country's court of last resort, the Appellate Committee of the House of Lords, reversed the divisional court and held that Pinochet was not immune.[2] On December 17, 1998, however, the House of Lords reversed itself and vacated its first decision on grounds that one of the judges (Lord Hoffmann) who had participated in it had an impermissible conflict of

---

* Justice, Indiana Supreme Court. LL.M., University of Virginia School of Law (2001); J.D., Indiana University School of Law—Bloomington (1982); A.B., Dartmouth College (1972).

** This article is based on a thesis submitted to fulfill a portion of the requirements of the University of Virginia Law School's LL.M. program. I want to express my appreciation to my thesis adviser, Prof. David Martin, and another UVA law professor, Prof. Paul Stephan, whose class, International Law in the American Courts, was of enormous help in developing the final part of my argument. I also thank the many individuals in the United Kingdom and the United States who assisted and encouraged me in this project, especially Sir Christopher Staughton and Lord Windlesham. I offer particular thanks to Robert Stevens and John Brademas for some specific encouragement. Two works, THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS (Diana Woodhouse, ed., 2000), and Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Mich. L. Rev. 301, 310 (1999), were particularly helpful as references. And I am deeply grateful for the comments and suggestions of the participants in a faculty colloquium at the Valparaiso University School of Law, Valparaiso, Indiana, organized by Dean Jay Conison.

1. In re an Application for a Writ of Habeas Corpus ad Subjiciendum re: Augusto Pinochet Ugarte, 38 I.L.M. 68 (Q.B. Div'l Ct. 1998) [hereinafter Divisional Court Judgment].

2. Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, 4 All E.R. 897 (H.L. 1998), *available at* http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino01.htm (last visited Mar. 2, 2004) [hereinafter First Law Lords' Judgment] (parallel citation is [2000] 1 A.C. 61).

interest.[3] Then, in a decision rendered on March 24, 1999, the House of Lords again held Pinochet not immune although on completely different, and somewhat narrower, grounds than its first decision.[4]

The effect of the holding that Pinochet was not immune was that the matter was returned to the government for a decision as to extradition. On March 2, 2000, the U.K. government announced that it had concluded that Pinochet was too ill to stand trial and would be allowed to return to Chile, rather than be extradited. Pinochet returned to Chile the same day.

The extraordinary events and issues raised during the sixteen and one-half months between Pinochet's arrest in London and his departure from the United Kingdom make the *Pinochet* case an extremely interesting and important one:

(1) As mentioned briefly above, the U.K.'s court of last resort vacated its first decision in *Pinochet* when it found that one of the judges who participated in it had an impermissible conflict of interest, making *Pinochet* an important case on judicial bias and disqualification.

(2) As mentioned briefly above, the House of Lords' third decision found that Pinochet was not entitled to immunity for very different (and much narrower) reasons than the first, making *Pinochet* an important case regarding appellate procedure.

(3) As will be discussed in detail below, *Pinochet* required judicial construction of a "double criminality" requirement of the Extradition Act,[5] which required the government to make important determinations under §§ 7 and 12 of the Extradition Act and required a magistrate's court to make an important determination under § 9 of the Act. These facts make *Pinochet* an important case on extradition law.

(4) As will be discussed in detail below, *Pinochet* implicated important foreign relations considerations, including prior acquiescence by the U.K. government to Chilean government behavior under *Pinochet*, opposing positions taken by two allies of the United Kingdom (Chile and Spain), and extraterritorial recognition of domestic reconciliation amnesties. These facts make *Pinochet* an important case on foreign and diplomatic relations.

(5) As will be discussed in detail below, the *Pinochet* litigation featured a Spanish prosecutor pursuing in the United Kingdom a former head of state for human rights abuses alleged to have been committed in Chile.

---

3. Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, 1 All E.R. 577 (H.L. 1999), *available at* http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm (last visited Mar. 2, 2004) [hereinafter Law Lords' Hoffmann Judgment].

4. Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, 2 All E.R. 97 (H.L. 1999), *available at* http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm (last visited Mar. 2, 2004) [hereinafter Final Law Lords' Judgment] (parallel citation is [2000] 1 A.C. 147).

5. Extradition Act 1989, c. 33 (Eng.), 17 Halsbury's Statutes 682 (4th ed. 1999 Reissue).

These facts make *Pinochet* an important case on extraterritorial enforcement of human rights law.

(6) As will be discussed in detail below, *Pinochet* implicated important international human rights considerations: proper interpretation of the Genocide Convention,[6] the Hostage Convention,[7] and the Torture Convention;[8] the extent of universal jurisdiction over international human rights abuses; and the extent to which a former head of state is entitled to sovereign immunity. These facts make *Pinochet* an important case on substantive human rights law.

This article will discuss these topics but in the context of a uniquely American inquiry: the separation of powers implications of the U.K. courts assuming jurisdiction of Pinochet's case rather than allowing extradition proceedings to take their course.

While the principle of separation of powers is one of the bulwarks of the American constitutional pantheon,[9] the role of separation of powers in the United Kingdom at the time of *Pinochet* appeared at first glance to be completely different. The head of the executive branch and all of his or her cabinet were also members of the legislature. The head of the judiciary and members of the nation's final court of appeal were also legislators.[10] The head of the judiciary was also a cabinet member and head of a significant executive department—and often an active politician.[11] While the government advanced proposals during 2003 to modify several of these relationships in significant ways,[12] the bedrock tenet of Parliamentary supremacy would appear to prevent

6. Convention on the Prevention and Suppression of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951), *available at* http://www.unhcr.ch/html/menu3/b/p_genoci.htm (last visited Mar. 3, 2004) [hereinafter Genocide Convention].

7. International Convention against the Taking of Hostages of 1979, Dec. 17, 1979, 1316 U.N.T.S. 205 (1983), *available at* http://www.cns.miis.edu/pubs/inven/pdfs/hostage.pdf (last visited Mar. 3, 2004) [hereinafter Hostage Convention].

8. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (1987), *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm (last visited Mar. 3, 2004) [hereinafter Torture Convention].

9. *See* THE FEDERALIST NOS. 47, 48 (James Madison); THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

10. Robert Stevens, *The Independence of the Judiciary: The Case of England*, 72 S. CAL. L. REV. 597, 611 (1999) [hereinafter *Case of England*]; Robert Stevens, *A Loss of Innocence?: Judicial Independence and the Separation of Powers*, 19 OXFORD J. OF LEGAL STUD. 366, 387 (1999) (an adaptation of *Case of England* giving particular attention to the impact of *Pinochet* on judicial independence) [hereinafter *Innocence*].

11. *Case of England*, *supra* note 10, at 609; *Innocence*, *supra* note 10, at 385; Lord Steyn, *The Weakest and Least Dangerous Department of Government*, Public Law 85, 89 (1997).

12. On June 6, 2003, the U.K. government announced a "package" of constitutional reforms "[a]s part of the continuing drive to modernize the constitution and public services." Press Release, Prime Minister's Office, Modernizing Government - Lord Falconer Appointed Secretary of State for Constitutional Affairs (June 12, 2003), *available at* http://www.number-10.gov.uk/output/Page3892.asp (last visited Mar. 2, 2004). Effective immediately, the Lord Chancellor's Department was abolished and replaced by a new Department of Constitutional

the emergence of the judiciary as a co-equal branch of government. This structure has led many authorities to argue that separation of powers has no place at all in the U.K. Constitution.[13]

But even though the principle of separation of powers is not and may never be constitutionally mandated in the United Kingdom, its courts have regularly invoked the principle to justify decisions.[14] Indeed, there is authority for the proposition that separation of powers is an important feature of the unwritten U.K. Constitution.[15] Adherence to the principle of separation of powers in U.K. courts seems to be more stringent than the actual structure the U.K. government requires.

If U.K. courts adhere to the principle of separation of powers without it being a constitutional mandate, it must be because the courts have found guidance in the values that animate the principle. My argument is not so much concerned with the extent to which the principle of separation of powers is or is not honored in the United Kingdom. My argument is certainly not that the United Kingdom should incorporate the U.S. principle of separation of powers as some type of mandatory constitutional norm. Rather, my argument is that

---

Affairs. *Id.* The government also announced that further reforms would be forthcoming, including an end to the previous role of the Lord Chancellor as a judge and Speaker of the House of Lords and creation of a new Supreme Court to replace the existing system of Law Lords operating as a committee of the House of Lords. *Id.* Since making the initial announcement of proposed reforms, the Department of Constitutional Affairs has published "consultation papers" on reforming the office of the Lord Chancellor (Sept. 18, 2003), *available at* http://www.dca.gov.uk/consult/lcoffice/index.htm (last visited Mar. 2, 2004), appointing judges, (July 14, 2003), *available at* http://www.dca.gov.uk/consult/jacommission/judges.pdf (last visited Mar. 2, 2004), a Supreme Court for the United Kingdom (July 14, 2003), *available at* http://www.dca.gov.uk/consult/supremecourt/supreme.pdf (last visited Mar. 2, 2004), and the future of Queens Counsel (July 14, 2003), *available at* http://www.dca.gov.uk/consult/qcfuture/qc.pdf (last visited Mar. 2, 2004). The Constitutional Affairs Committee of the House of Commons held hearings in late 2003 and early 2004 on the proposals. *See* Constitutional Affairs Committee: Reports and Publications, *available at* http://www.parliament.uk/parliamentary_committees/conaffcom/conaffcom_reports_and_publications.cfm (last visited Mar. 2, 2004).

13. O. Hood Phillips, *A Constitutional Myth: Separation of Powers*, 93 LAW Q. REV. 11 (1977).

14. *See* Regina v. Sec'y of State for the Home Dep't, ex parte Fire Brigades Union, [1995] 2 A.C. 513, 567 (Lord Mustill), stating:

> It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each of their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.

Id. See also Nottinghamshire County v. Sec'y of State for Env't, A.C. 240, 250 (1986) (Lord Scarman) (declining judicial review of a decision of the Environment Secretary on separation of powers grounds).

15. *See, e.g.*, Duport Steels Ltd. v. Sirs, 1 W.L.R. 142, 157 (H.L. 1980) (Lord Diplock) "[I]t cannot be too strongly emphasized that the British Constitution, though largely unwritten, is firmly based on the separation of powers." *Id.*

the values of institutional competence and democracy[16] that animate the principle of separation of powers would have been useful to judges in the United Kingdom in the particular context of the *Pinochet* sovereign immunity claim.[17]

I will argue that *Pinochet* presented the U.K. courts with two discrete questions that we in the United States would consider to be separation of powers issues:

(1) Would the court impinge upon the prerogatives of the executive if it decided a case with such significant foreign relations implications without statutory authority? *Pinochet* carried with it a number of significant implications for U.K. foreign relations, the most obvious of which was choosing between the interests of mutual U.K. allies. In both the United Kingdom and the United States, courts have, at times, invoked the "political question" and "act of state" doctrines to justify abstaining from deciding questions with significant foreign relations implications. This article will review the application of the political question and act of state doctrines in cases with foreign relations implications in both countries (the appellate decisions in each country makes liberal use of the precedents of the other). And while conventional formulations of neither doctrine were precisely applicable in *Pinochet*, both suggest a separation of powers rationale for the U.K. courts to have abstained from deciding the sovereign immunity claim. I will conclude that this rationale dictated that Pinochet's sovereign immunity claim was not justiciable, or at least not ripe, when presented. I will refer to this as my "abstention argument."

My abstention argument, however, is limited in the following respect. As just noted, Pinochet did not wait for the U.K. government to make a decision on extradition; he immediately took his claim for discharge to the courts. Under the Extradition Act 1989,[18] once the government has decided to proceed with extradition, the accused has several opportunities explicitly provided by statute for judicial review of the government's decision. My abstention argument is that the courts should have abstained from making any decision in *Pinochet* that was not before them pursuant to explicit statutorily

16. The value of judicial independence also animates the principle of separation of powers. *See* THE FEDERALIST NO. 78, at 230 (Alexander Hamilton) (Robert Maynard Hutchins ed., 1952) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution."). Master Stevens has ably examined the relationship of separation of powers and judicial independence in the context of *Pinochet* and I give it little additional attention here. *See Innocence*, *supra* note 10. For a particularly vivid example of *Pinochet*'s impact on judicial independence, see Letter from Lord Irvine, Head of the Judiciary, to Lord Browne-Wilkinson, Lord of Appeal in Ordinary (Dec. 16, 1998), *available at* http://www.newsrelease-archive.net/coi/depts/GLC/coi9442e.ok (last visited Feb. 14, 2004) [hereinafter Press Notice]. The letter is fully set out *infra* note 128.

17. The argument is similar to that made by the Government in the litigation currently before the United States Supreme Court concerning whether U.S. courts lack jurisdiction to consider challenges to the detention of foreign nationals at the Guantanamo Bay Navel Base. *See* Brief of Petitioner at *41, Rasul v. Bush, 124 S. Ct. 534 (2003).

18. Extradition Act 1989.

authorized procedure. But had the court been called upon to decide Pinochet's sovereign immunity claim pursuant to the judicial review procedures of the Extradition Act, the separation of powers objections to deciding the claim would largely be eliminated. First, the executive would have had an opportunity to resolve to its satisfaction the foreign relations implications of the extradition request. Second, because the habeas and judicial review procedures are explicitly established by statute, the political legitimacy of the court to rule in this regard is unambiguous. I will attempt to justify why I find abstention appropriate with respect to Pinochet's claim but unnecessary, if not inappropriate, had the same claim been brought under the judicial review procedures of the Extradition Act.

It is to the standards for deciding Pinochet's sovereign immunity claim in that context that I now turn.

(2) Would the court impinge upon the law-making prerogatives of the legislature if it held that principles of international law take precedence over a statutory grant of immunity? In fact, the U.K. courts, to the extent they considered the question at all, found no justiciability barrier to addressing the sovereign immunity claim. And, as just noted, even if the sovereign immunity claim when first presented by Pinochet had been found to be nonjusticiable, it is possible that the courts would have been subsequently forced to deal with it in the context of judicial review of an extradition decision. As indicated in the preceding paragraph, I believe the court should address the merits of the claim when the claim is before it in such a context.

The State Immunity Act 1978[19] extended immunity from prosecution to former heads of state in a way that appeared to include Pinochet's situation. The principal argument advanced by Spain was that, under prevailing international law norms, a former head of state was not entitled to immunity from prosecution for the international crimes of torture, hostage-taking, or murder. One rationale for such an argument could be that international law norms circumscribe the immunity provided by the State Immunity Act. But such a rationale would be in tension with the separation of powers notion of legislative supremacy in law-making.

I will review U.K. and U.S. authority on the relationship of international law principles to statutory enactments, each of which indicates that international law norms have been adopted by the courts of both countries as part of their respective common law. I will also refer to the work of Professors Bradley and Goldsmith and their argument that such incorporation in the United States constitutes an unconstitutional violation of separation of powers.[20] I will then argue that separation of powers considerations counsel against the approach of those Law Lords who analyzed Pinochet's immunity

---

19. State Immunity Act 1978, c. 33 (Eng.); 10 Halsbury's Statutes 757 (4th ed. 1999 Reissue).

20. Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816 (1997).

claim as a matter of customary international law. More defensible was the approach of those Law Lords who analyzed the immunity claim by reconciling statutory and treaty provisions in a matter similar to statutory construction. I will refer to this as my "statutory construction" argument.

Summary.

My principal claims are (1) that it would have been in the best interest of the U.K. judiciary to have employed separation of powers principles in the *Pinochet* judgments; (2) the abstention argument—that when first presented with Pinochet's claim of sovereign immunity, the courts should have held the claim to be nonjusticiable on grounds that it was a question with significant foreign relations implications that should be addressed first by the executive; and (3) the statutory construction argument—that to the extent later called upon to decide a properly presented sovereign immunity claim, the courts should have employed principles of statutory construction and not customary international law to decide the claim.

PART I: *PINOCHET* CHRONOLOGY

A. *Chilean Prologue.*

Augusto Pinochet Ugarte came to power in Chile in a military coup in September 1973. It is well beyond the scope of this article to assess the events in Chile that preceded the coup or Pinochet's record in power thereafter. There is much debate about both, which I will attempt to summarize using two opposing viewpoints—those of Hugh O'Shaughnessy, a journalist who was working in Chile in 1973 and who has remained intensely interested in Chilean affairs, and of Henry Kissinger, the former U.S. National Security Advisor and Secretary of State.

Chile had held presidential elections in the fall of 1970. The leftist candidate, Salvadore Allende Gossens, emerged as President with 36.2% of a three-way vote.[21] O'Shaughnessy portrays Allende as a champion of a

---

21. Results of 1970 Chilean presidential election:

Candidate	*Party*	*Percent*
Salvadore Allende Gossens	Popular Unity (coalition of Communists, Socialists, Radicals, etc.)	36.2%
Jorge Alessandri	National Party (fusion of Conservative Party and, no less conservative, Liberal Party)	34.9%
Radomro Tomic	Christian Democratic (incumbent)	27.8%

HUGH O'SHAUGHNESSY, PINOCHET: THE POLITICS OF TORTURE 31, 34 (2000); HENRY KISSINGER, YEARS OF UPHEAVAL 374 (1982).