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Court of International Law  

I. INTRODUCTION  

In 1810 a warship in Napoleon's navy seized the American schooner Exchange on the high seas and escorted her into a French port where she was fitted out for war. In due course, the vessel came to anchor in the port of Philadelphia. Her American owners, seeking to recover what they believed theirs, filed a libel against the vessel in the Federal District Court of Pennsylvania. The Government of the United States filed with the court a "suggestion" that the schooner Exchange was a public vessel of the Emperor of France, the decree of Napoleon having divested the plaintiffs of their title. Accordingly, the United States requested that the vessel be released from custody on the ground that she was immune from the court's jurisdiction. The district court, without further proceedings, ordered the Exchange released and this action was affirmed on appeal to the United States Supreme Court in a noted opinion of Chief Justice Marshall.  

The apparently conclusive effect which was given to the executive "suggestion" in the case of The Schooner Exchange has survived global bipolarization and the development of thermonuclear weapons and remains today a guiding principle in ordering the relationship between the Department of State, representing the executive, and the courts. In the 156 years since the Exchange sailed out of Philadelphia, the conditions and extent of international intercourse and the position of the United States in the world have changed so extensively that the continuing vitality of a judicial attitude of deference to the executive in cases involving foreign parties is remarkable. This Note will examine the relationship between the State Department and the courts with a view toward determining whether

2. The actual degree of reliance by the Court on the executive "suggestion" is unclear in Chief Justice Marshall's opinion. He appears to have rested his decision on general principles of international law and an evaluation of the deleterious effect on Franco-American relations which a judgment in favor of plaintiffs would have. It is only in later cases that the executive suggestion is said to have been given conclusive effect by the Chief Justice. See, e.g., New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955).
contemporary international affairs and the national interest require a judicial shift from the present deferential attitude to a more neutral and independent posture. In the interest of analysis and practicality, the discussion will confine itself to the three broad classes of cases in which the State Department has displayed the greatest propensity for intervention: sovereign or diplomatic immunity, recognition and act of state, and treaty interpretation.

II. SOVEREIGN OR DIPLOMATIC IMMUNITY

The great majority of cases in which the State Department has directly or indirectly intervened in court proceedings have involved requests by foreign parties that they be held immune from the courts' jurisdiction. The doctrine of sovereign immunity, as its name implies, was born in an era when monarchy was the predominant form of government in Western civilization. At that time the separation of powers concept was unknown and the courts were dependent upon and subordinate to the royal will. The subjection of a monarch to the jurisdiction of an institution which he himself, or his foreign counterpart, had created and fostered was thought to be an intolerable affront to the dignity of the crown. In this context the practice of the executive “suggestion,” as seen in The Schooner Exchange v. McFadden, had its origin.

The era of the absolute monarchy has of course passed and with it, for many of the nations in which it once prospered, has gone the doctrine of sovereign immunity. In the United States

3. See generally W. Moore, ACT OF STATE IN ENGLISH LAW (1906). Despite this rigid attitude towards the immunity of the crown, it was clear that redress of some grievances was available through international arbitration or diplomacy.

4. 11 U.S. (7 Cranch) 116 (1812).

5. See W. Moore, supra note 3, at 18, in which the author quotes the following words of King James of England:

Encroach not upon the prerogative of the Crown. If there falls out a question that concerns my prerogative or mystery of State, deal not with it till you consult with the King or his Council, or both, for they are transcendent matters. . . . That which concerns the mystery of the king's power is not lawful to be disputed; for that is to wade into the weakness of princes, and to take away the mystical reverence that belongs to them that sit in the throne of God.

Id. at 18. It should be noted that this article is only concerned with sovereign immunity on an international, as opposed to an intranational, level although some of the historical background applies to both.

the pervasive reach which the doctrine once had has been circumscribed not by judicial recognition of the demise of absolute monarchy, but rather by executive policy.\footnote{Thus, in 1952 the State Department, speaking through its legal advisor Jack Tate, gave notice that in the future it would adhere to the restrictive theory of sovereign immunity. This theory distinguishes between the public acts (jure imperii) of a foreign nation and those of a private or commercial nature (jure gestionis). Immunity is granted only for litigation arising out of the former. 26 DEP'T STATE BULL. 984 (1952).} The lead of the executive branch in limiting the scope of sovereign immunity results from the consistent reluctance of American courts to involve themselves in cases requiring the application of international law. This reluctance, in turn, has been fostered partially by the willingness of the State Department to intervene and partially by the failure of both the State Department and the courts to make a serious and conscious effort to delineate their respective spheres of responsibility.\footnote{Contra, International Law in National Courts, Third Summer Conference on Int'l L. 4 (1960) (remarks of Mr. Yingling representing the State Department).} Cases involving requests for sovereign immunity eloquently illustrate this confusion.

In \textit{Ex parte Peru},\footnote{318 U.S. 578 (1943).} a Cuban sugar company filed a libel against a Peruvian vessel anchored in an American port. The dispute arose over the alleged breach by the Peruvian ship of a contract to haul a load of sugar for the Cuban company. The government of Peru, claiming that it owned and operated the vessel, asked the State Department to intervene on its behalf by suggesting to the court that it "recognize and allow" Peru's claim to immunity from jurisdiction.\footnote{When a foreign nation is being sued in a United States court and believes it is entitled to immunity from jurisdiction, it can simply write to the legal office of the Department of State requesting that office to inform the court that immunity should be granted. For a detailed description of this procedure, see Lyons, \textit{The Conclusiveness of the 'Suggestion' and Certificate of the American State Department}, 24 BRIT. YB. INT'L L. 116 (1947). \textit{See also Ex parte Muir}, 254 U.S. 522 (1921).} The State Department complied and filed its suggestion with the district court. That court, however, ignored the views of the executive and, holding that Peru had waived her immunity, proceeded to the merits. Peru then petitioned the Supreme Court for a writ of prohibition.

\textit{Proceedings}, 31 \textit{Fordham L. Rev.} 277 (1962), in which the author points out that the courts in most countries of the Western hemisphere decide questions of sovereign immunity according to general principles of international law rather than on the basis of executive preference.
against further adjudication by the lower court. The Court granted the writ on the ground of what it termed "an overriding principle of law."\(^1\)

That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations.\(^2\)

The Court indicated that the State Department's "suggestion" of immunity was entitled to conclusive respect as it represented a determination by the government branch responsible for foreign affairs that further court proceedings would interfere with the discharge of that responsibility.\(^3\)

More recent decisions in lower federal courts have reaffirmed if not extended the approach to executive suggestions adopted in *Ex parte Peru*. In *New York and Cuba Mail Steamship Company v. Republic of Korea*,\(^4\) plaintiff contracted with defendant to ship a load of rice to Pusan, Korea. While unloading the cargo, plaintiff's vessel was allegedly damaged through the negligence of defendant's agents. Plaintiff sued out a writ of foreign attachment pursuant to which defendant's funds in New York banks were attached. Defendant, armed with a "suggestion" of immunity from the State Department,\(^5\) appeared specially and moved for dismissal. Following the executive's lead the court vacated the attachment and dismissed the complaint. The opinion tersely stated that a foreign nation's claim for immunity presents a political rather than a judicial question. The court continued:

Lest an untoward incident disturb amicable relations between the two sovereigns, it has long been established that the Court's proper function is to enforce the political decisions of our Department of State on such matters. This course entails no abrogation of judicial power; it is a self-imposed restraint to avoid embarrassment of the executive in the conduct of foreign affairs.\(^6\)

\(^1\) 318 U.S. at 588.
\(^2\) Id.
\(^3\) Id. at 589.
\(^5\) The State Department requested the Attorney General to inform the court that,

\[\ldots\] under international law property of a foreign government is immune from attachment and seizure, and that the principle is not affected by a letter dated May 19, 1952 [the "Tate letter," supra note 7] \ldots in which the Department of State indicated its intention to be governed by the restrictive theory of sovereign immunity in disposing of requests from foreign governments that immunity from suit be suggested in individual cases.

\(^6\) Id. at 685.
\(^16\) Id. at 686.
These two cases typify the degree to which American courts defer to the executive when confronted with unequivocal statements of State Department preference concerning the disposition of pending litigation.\(^7\) When faced with State Department communications which are equivocal or ambiguous, the courts strain to find an implied executive preference on which to base their decisions. Republic of Mexico v. Hoffman\(^8\) involved a suit by an American shipowner for damage to his vessel caused by the alleged negligence of a Mexican ship. The court was faced with a State Department “suggestion” to the effect that the Department had “accepted as true” the Mexican government's claim to ownership of the vessel. Mexico argued that this was enough to warrant dismissal on the ground of sovereign immunity. The Supreme Court of the United States, on the other hand, found within the State Department communication the implication that immunity should not be granted. In the course of its opinion the Court said:

More important, and we think controlling in the present circumstances, is the fact that, despite numerous opportunities like the present to recognize immunity from suit of a vessel owned and not possessed by a foreign government, this government has failed to do so. 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, although often asked, has not seen fit to recognize.\(^9\)


\(^{18}\) 324 U.S. 30 (1945).

\(^{19}\) Id. at 38. For further examples of the confused approach of courts to equivocal State Department suggestions, see Ocean Transport Co. v. Government of the Republic of the Ivory Coast, 269 F. Supp. 703 (E.D. La. 1967); The Beaton Park, 65 F. Supp. 211 (W.D. Wash. 1946); Stephen v. Zivnostenska Banka, Nat’l Corp., 23 Misc. 2d 855, 199 N.Y.S.2d 797 (Sup. Ct. 1960); United States of Mexico v. Schmuck, 234 N.Y. 265, 62 N.E.2d 64 (Ct. App. 1945); Lamont v. Travelers Ins. Co., 281 N.Y. 362, 24 N.E.2d 81 (Ct. App. 1939). See also Sullivan v. State of Sao Paulo, 36 F. Supp. 503 (E.D.N.Y. 1941) where the court was at such a loss to find guidance from a State Department communication that it took the initiative and requested direct clarification from that Department on the issue of whether sovereign immunity should be allowed.
It is clear from these decisions that the relationship between the courts and the State Department in cases involving requests for sovereign immunity is one of almost total subjugation to executive determinations. Support for this accommodation between the two branches is not confined to the courts. A number of respected commentators have voiced approval of such judicial deference. It is argued by some that as long as the executive bases its decision on legal principle rather than "shifting motives of policy," the question of sovereign immunity is best resolved in the State Department, where the bulk of expertise in international law is lodged. Others have found comfort in the fact that the preliminary determination of whether or not to retain jurisdiction over a party asserting immunity is in itself an exercise of judicial jurisdiction. The argument which is most often voiced in support of the present relationship between the courts and the State Department is that judicial subordination in this area is a natural offspring of the separation of powers. Those who favor this position contend that the American system

One commentator said of this decision:
It seems clear from this important . . . decision that the Court is reaching a stage where it is no longer accepting the bland disavowal of the Executive in matters of immunity. The State Department must lead and the Court will follow, the Court says in effect; and if the Department will not give a lead then the Court will find one somehow in the Department's own documents.

21. See, e.g. L. Jaffe, Judicial Aspects of Foreign Relations 51 (1933), in which the author says:
It is the general rule that courts will not decide cases against foreign states or sovereigns without their consent, and that in addition certain property, persons, and acts appertaining to sovereign states are withdrawn from the jurisdiction of the courts. . . . Here, then, is a true judicial incompetency. But even here there is an initial exercise of judicial jurisdiction, for the vital question of whether there is or is not immunity is decided by the court.

See also Deák, The Plea of Sovereign Immunity and the New York Court of Appeals, 40 Colum. L. Rev. 453, 462 (1940).
of government, as it has developed, has increasingly cast the burden of promulgating and executing national foreign policy on the executive branch. To discharge properly the responsibility which has devolved upon it, the executive must have a free hand, uncluttered by the spectre of judicial contradictions. It is further contended that the dynamics of world politics render insignificant the piecemeal, fortuitous adjudications by domestic tribunals.23

Those who oppose the present deferential attitude in the area of sovereign immunity argue that automatic acceptance of executive determinations deprives the wronged plaintiff of his day in court.24 It is also argued that the national interest would best be served by the development and application of substantive norms of international law by an independent judiciary.25 The development of consistent rules of conduct, it is urged, is vital to the preservation of world peace. The State Department is not the institution through which such a development can best be accomplished.26 Also, foreign parties denied immunity by the executive have no assurance that their assertions were accorded the kind of impartial consideration which proceedings in open court afford. Thus, the ability to predict

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23. See, e.g., Kaplan & Katzenbach at 14; Bilder, supra note 22, at 668.


Contra, Cardozo, Sovereign Immunity: The Plaintiff Deserves a Day in Court, 67 Harv. L. Rev. 608, 614 (1954):

The executive branch must, of course, be assiduous in avoiding trespass on the domain of the judiciary. Sovereign immunity, and its subordinate counterpart, diplomatic immunity, however, are part of the mechanism of carrying on amicable relations with other countries. They are among the elements that comprise the comity of nations. The Courts quite rightly should look to the executive branch for guidance on the political question of what is necessary in the interest of good relations with other friendly powers.


The normal exercise of jurisdiction of courts in actions against foreign states may in itself remove a frequent source of friction and resentment. From the point of view of securing a friendly atmosphere in international relations judicial remedies against foreign states may be preferable to diplomatic action necessitated by the refusal of those states to submit to jurisdiction.
the consequences of dealing with the United States or its citizens will be impaired, thereby reducing the confidence which is vital to international intercourse.27

The opposition to the present relationship seems warranted. In 1812 when Chief Justice Marshall was confronted with the first direct executive intervention,28 the United States was a new nation, uncertain of her international stature and anxious to make and preserve alliances with the established and powerful nations of Western Europe. It was clear in the context of The Schooner Exchange v. McFadden29 that the national interest in avoiding the slightest affront to Napoleon's France outweighed the loss of a vessel by an American citizen. Today, the stature and strength of the United States in the world community is unquestioned. Our enemies fear us and our allies to a large degree depend upon us. Yet the State Department and the courts continue to interact in a manner which suggests the same nervous uncertainty which quite understandably controlled Chief Justice Marshall's decision in The Schooner Exchange. The power of the United States logically compels the realization that the courts of this nation can bring foreign parties before them to answer for their wrongs. Indeed, the State Department must have taken this into consideration when it announced a shift to the restrictive policy of sovereign immunity.30 Yet the courts still look to the executive when foreign parties are before them, and the executive still responds with conclusive determinations.31 The anomalous nature of the present relationship is further evidenced by the criteria which the State Department claims to use in deciding whether to "recognize and allow" claims to immunity. In almost every case in which the State Department has seen fit to rationalize its decision, it has said that the result was reached by applying international law.32

28. See note 1 supra, and accompanying text.
29. 11 U.S. (7 Cranch) 116 (1812).
30. See note 7 supra.
31. See note 17 supra.
Nothing has been found either in the Constitution or any Act of Congress which empowers an executive agency to decide a case or controversy by application of international law. Indeed, the Supreme Court has explicitly stated that that is one of its functions.33

When viewed in light of the origins of the deferential attitude,34 the present relationship fails even more abjectly to pass muster. A close reading of the cases reveals not a single fact situation where, even if the court had utterly failed to ascertain and apply the proper international substantive norm of immunity, the damage to our foreign relations would have been of such proportions as to justify what is virtually a permanent removal of this class of cases from the courts.35 Furthermore, the nature of the judicial process, with its long delays, is such that the cases which could provoke international furor and crisis simply do not reach domestic courts.36 In light of the arguments of the commentators and the above considerations, the relationship between the State Department and the courts in the area of sovereign immunity is in serious need of readjustment.

III. RECOGNITION AND ACT OF STATE

A. Recognition

The same deferential attitude found in the sovereign immunity cases is also present, to a somewhat lesser degree, in cases involving recognition as it affects a foreign litigant.37 The

33. International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . . The Paquete Habana, 176 U.S. 677, 700 (1900).
34. See note 29 supra, and accompanying text.
35. See, e.g., note 63 infra.
36. See Kaplan & Katzenbach at 16. "But rarely can courts intrude into areas of political importance. Given a genuine political crisis, courts are likely to capitulate or to be bypassed." Id.
37. The term "recognition," although used in numerous contexts, generally connotes the acceptance by one state of the political existence of another, and the related decision to establish relations with it. It is universally conceded that the formal act of extending recognition to a nation or its government is a purely executive prerogative. See generally 1 G. Hackworth, Digest of International Law ch. 3 (1940). One commentator has suggested that there is a legal duty to recognize a state or government which meets certain specific prerequisites. H. Lauterpacht, Recognition in International Law passim (1947).
case of *The Maret* 38 concerned a vessel, owned by an Estonian shipping company, which was requisitioned by the United States government for national defense purposes. As compensation for the temporary loss of the ship, the United States set up a fund. Meanwhile, Russia had overrun Estonia and had nationalized her companies including the one which owned the Maret. Both the U.S.S.R. and the former directors of the Estonian company sought to recover the government fund. The State Department informed the court that it recognized neither the absorption of Estonia by the U.S.S.R. nor the legality of that government's nationalization decrees. The court awarded the fund to the former directors, saying:

Nonrecognition of a foreign sovereign and nonrecognition of its decrees are to be deemed to be as essential a part of the power confided by the Constitution to the Executive for the conduct of foreign affairs as recognition. 39

The court, faced with an unequivocal expression of preference by the executive, did not attempt to judge the validity of the nationalization under international law even though the executive's assertion of illegality implied the use of such law. 40

The degree of deference accorded the executive communication in *The Maret* is somewhat greater than that used in other recognition cases. The more common approach is illustrated by *The Ambrose Light*. 41 In that case, the American navy seized a vessel operated by parties in revolt against the government of Colombia. The vessel was escorted to port, where she was libelled on the ground of piracy. The rebel defendants, seeking the release of the vessel, claimed that the seizure was illegal because the State Department had recognized the existence of a

38. 145 F.2d 431 (3d Cir. 1944).
39. Id. at 442. See also Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000, 1003 (D.C. Cir. 1951) where the court said:

We are of opinion that when the executive branch of the Government has determined upon a foreign policy, which can be and is ascertained, and the non-recognition of specific foreign decrees is deliberate and is shown to be part of that policy, such non-recognition must be given effect by the courts.

40. In fact, the status of nationalizations under international law is highly uncertain. Those nations whose citizens are injured by foreign nationalizations usually claim that such acts are illegal unless accompanied by compensation and unless they are nondiscriminatory and nonretaliatory. On the other hand, the nationalizing state, especially if underdeveloped, is prone to contend that its act is valid notwithstanding failure to compensate, if it serves the national interest. *See generally* W. BISHOP, *INTERNATIONAL LAW, CASES AND MATERIALS* 677-95 (2d ed. 1962).

41. 25 F. 408 (S.D.N.Y. 1885). See also Guaranty Trust Co. v. United States, 304 U.S. 126 (1938).
state of belligerancy between the Colombian government and the faction of which defendants were members. In support of this contention, defendants introduced a letter from the State Department recognizing that a state of war existed in Colombia. The court, taking pains to weigh the significance of the executive communication, concluded that recognition of a state of war, as a matter of law, confers upon each party to the conflict the status of a belligerent. After determining this the court continued: "[T]he conclusion of law follows that their vessels of war cannot be regarded as piratical." Accordingly, the seizure was held illegal and the vessel was ordered released. It will be observed here that the court reached the result desired by the executive branch without abandoning its duty to apply law to facts. The court considered the contents of the State Department letter as a fact relevant to the disposition of the case. It is, of course, likely that the implications of the letter had considerable influence on the outcome, but the fact remains that the opinion evidences a genuine attempt to apply ascertainable norms of the international law of belligerency to particular facts.

Where State Department communications on matters of rec-

42. The formal recognition of the existence of a state of belligerency carries with it a number of important legal consequences. For example, it confers upon the parties recognized the rights of blockade, visitation, and search and seizure on the high seas. The Three Friends, 166 U.S. 1 (1896).

43. 25 F. 408, 447 (S.D.N.Y. 1885).

44. See also Russian Reinsurance Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925). The New York court has been known to take an independent and even contentious view of State Department communications. In Anderson v. Transandine Handelmaatschappij, 289 N.Y. 9, 43 N.E.2d 502 (1942), the issue was the effect to be given a decree of the Netherlands government in exile purporting to freeze its citizens' assets in the United States pending the end of World War II. The State Department filed a "Suggestion of Interest" with the court stating that it was the policy of the United States government to give full effect to the decrees of the recognized government in exile, and that if given effect, that policy should be dispositive of the issues involved in the case. The court replied:

We need not consider now whether the Department of State by "formulation" of its public policy as to the effect of the decree could change the judicial question determined by the court below into a "political question" which the courts are not empowered to decide or whether the Department of State can in that manner create a public policy of the United States which supersedes and renders immaterial any public policy of a State. 289 N.Y. at 20; 43 N.E.2d at 507. See also Upright v. Mercury Business Machs. Co., 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1962). Contra, Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933).
ognition are equivocal or evidence executive indifference to the outcome of pending litigation, courts display the same tendency to grope for executive preference as was observed in the sovereign immunity cases. In Republic of Iraq v. First National City Bank, the issue was title to funds in defendant bank deposited by King Faisal II of Iraq. In 1958 a revolution overthrew the royal family and King Faisal was executed. The revolutionary government, duly recognized by the United States, passed a decree purporting to confiscate all royal assets including those on deposit in defendant bank. Pursuant to the decree plaintiff sought to withdraw the funds. Defendant, uncertain about the validity of the confiscatory decree and desirous of avoiding double liability threatened by the claims of Faisal's heirs, resisted. The State Department communicated to the court:

While the recognition of and maintenance of diplomatic relations with a foreign government are political matters within the province of the executive department of the Federal Government, questions regarding the administration of estates and the determination of rights and interests in property in the United States ordinarily are matters for the determination by the courts of competent jurisdiction.

The court, in holding for the defendant, looked long and hard at the State Department's communication. It came to the conclusion that the act of recognition alone was not a manifestation of executive desire that the confiscatory decree be given extra-territorial effect. Accordingly, the court gave controlling effect to the principle that "[c]onfiscation without repayment is repugnant to our fundamental concept of justice." The opinion reveals no attempt to inquire into the nature of the funds on deposit in defendant bank. Thus the possibility that they represented public moneys deposited by the King for the purpose

45. See note 17 supra, and accompanying text. See also Land Oberoesterreich v. Gude, 109 F.2d 635 (2d Cir. 1940).
47. 241 F. Supp. at 573.
48. Id. The court continued as follows:
Where, as here, there is no such specific agreement, and where the Department of State has expressly left the question open for decision by the court, it cannot be said that there is any federal executive policy in favor of enforcing the title acquired by confiscation.
Id. at 574. This case can be distinguished from the Act of State cases discussed below because the Iraqi decree attempted to affect property located outside the territorial boundaries of Iraq. The Act of State doctrine applies only to foreign decrees which affect purely internal property or rights. See note 51 infra, and accompanying text.
49. Id. at 574.
of discharging Iraqi obligations, although seemingly relevant, was not alluded to by the court.

As the cases discussed above indicate, the question of the effect to be given an executive act of recognition almost invariably arises in cases involving title to property in the United States as affected by the decrees or act of foreign sovereigns or parties. Thus, cases involving recognition deal mainly with the issue of whether extraterritorial effect should be accorded foreign acts. Cases involving the act of state doctrine differ only in the fact that they involve the issue of whether foreign acts or decrees should be recognized as effective within the territorial boundaries of the enacting state. Because of the similarity of the issues involved in these two bodies of cases, many of the comments and criticisms apply equally to both. Thus evaluation of the area of recognition will be withheld and discussed in conjunction with the act of state doctrine.

B. ACT OF STATE

The so-called act of state doctrine was given its classic expression by Chief Justice Fuller in Underhill v. Hernandez:

> 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 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.

The cases involving application of the act of state doctrine reveal that it was originally conceived as an accommodation with the executive to be employed in cases where that branch's policy preference was either unexpressed or unascertainable. In such cases the judiciary took a hands-off attitude and left the aggrieved party to seek a remedy through direct appeal to the executive. In a manner entirely consistent with the defer-

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50. 168 U.S. 250 (1897).
51. Id. at 252.
53. Thus in Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), the court said:

> It was because of apprehension that decisions on the merits concerning acts of confiscation by foreign governments might embarrass the political branches in conducting foreign relations and adversely affect the national interests in that area that the court adopted the policy of abstention.

Id. at 975.
ential nature of the doctrine, an exception to act of state was forged by Judge Learned Hand in *Bernstein v. Van Heyghen Frères Société Anonyme*. In that case, plaintiff was attempting to recover property which had been seized from him by the Nazi government of Germany. The State Department offered no policy guidance. Judge Hand held that no relief could be granted because the executive silence could not be construed as "positive evidence" of a desire not to employ the act of state doctrine. Several years later, the plaintiff, following his property into different hands, brought another action. In this case the State Department broke its silence, by informing the court that it was the policy of the United States to free the judiciary from any restraint in exercising its jurisdiction. The court, although finding for the defendant, forged the so-called *Bernstein* exception, stating that the executive's letter relieved the court from the compulsion of the act of state doctrine.

The principle of deference illustrated by the *Bernstein* cases has recently been judicially extended in the much discussed case of *Banco Nacional de Cuba v. Sabbatino*. There, the issue was the effect to be given a Cuban nationalization decree. The Court, although confronted with unequivocal statements

54. 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947).
55. In order to do justice to Judge Hand's decision, it should be noted that as a further rationale for the result, it was observed that reparations proceedings against Nazi confiscations were underway, and that it was not clear that plaintiff would be denied compensation in those proceedings. *Id.* at 250.
57. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of acts of Nazi officials. *Id.* at 376. It was clear when this letter was written that the reparations proceedings had failed to compensate plaintiff for his loss. See note 55 supra.
from the State Department that the Cuban decrees violated international law.\textsuperscript{59} held that the act of state doctrine precluded examination of the acts of Cuba.\textsuperscript{60} In effect, the \textit{Sabbatino} Court went to such lengths to stay out of the field of foreign affairs that the result was a refusal to effectuate an ascertainable State Department preference. It is not surprising that the decision was poorly received both by commentators\textsuperscript{61} and the Congress. The latter responded with the so-called Hickenlooper Amendment\textsuperscript{62} to the Foreign Assistance Act of 1964\textsuperscript{63} providing:

\begin{quote}
\ldots no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title \ldots is asserted by any party \ldots based upon \ldots a confiscation \ldots in violation of the principles of international law \ldots .\textsuperscript{64}
\end{quote}

The State Department, which had apparently been satisfied in its relationship with the judiciary prior to \textit{Sabbatino},\textsuperscript{65} vocally opposed passage of this Amendment. Secretary of State Rusk told the Senate Foreign Relations Committee that the bill would do little for the great majority of victims of foreign expropriations since their property rarely comes within the jurisdiction of domestic courts. Furthermore, he argued, the piecemeal ad-

\begin{footnotes}
\item 59. 376 U.S. at 402-03. The State Department's expression of preference came in the form of two letters to the Court of Appeals. The letters described the expropriation as "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory." \textit{Id.}
\item 60. In the course of its opinion the Court said:
The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. \textit{Id.} at 423.
\item 61. \textit{See}, e.g., Henkin, \textit{supra} note 58, at 823, where the author asks: Despite Justice Harlan's reliance on "the basic relationships between branches of government in a system of separation of powers," would not a judicial power rooted in the fact that foreign relations are in the federal domain, i.e., principally the President's domain, be subordinate to policy as determined by the President? \textit{Id.}
\item 62. The amendment was named after its sponsor, Sen. Bourke B. Hickenlooper, R.-Iowa.
\item 64. \textit{Id.} This passage was qualified by a provision to the effect that courts should refrain from acting under the amendment if the State Department so indicated.
\item 65. \textit{See} 6 M. \textit{Whiteman, Digest of International Law} 1 (1968).
\end{footnotes}
judications might very well compromise the State Department's position in negotiating with the foreign expropriator for mass compensation of American victims.\textsuperscript{66} However, Secretary Rusk's pleas for the retention of the alleged flexibility which had characterized the relationship with the courts before \textit{Sabbatino} fell on deaf ears and the amendment became law.\textsuperscript{67}

The relationship between the judiciary and executive, illustrated by the recognition and act of state cases discussed above, shares most of the characteristics of the relationship as it has developed in the sovereign immunity area.\textsuperscript{68} This consistency, if not desirable, is at least understandable. In dealing with recognition and acts of foreign states, the courts have tended to regard their position as potentially disruptive to the conduct of foreign affairs. This view has been fostered, in large part, by the frequency of executive intervention and the ease with which inferences of State Department preference can be drawn. The courts, above all else, wish to avoid embarrassing the executive in its conduct of foreign relations, and their sensitivity to this possibility is evident notwithstanding the apparent pettiness of the stakes involved.\textsuperscript{69} To avoid such embarrassment, the court has developed broad rules of self-limitation in the case of recognition and of abstention in the case of foreign acts or decrees.\textsuperscript{70} The promulgation of such rules is more understandable in these areas than in the field of sovereign immunity because there is no widespread international agreement as to the legal consequences of recognition of foreign decrees.\textsuperscript{71} Faced with this uncertainty, the courts have taken the fork in the road leading to abdication rather than creation. Some believe the choice has been wisely made:

\begin{quote}
When sovereign power exercised within one's own territory is
\end{quote}

\textsuperscript{66} Id. at 28.
\textsuperscript{67} See \textit{Hearings on H.R. 7750 Before the House Comm. on Foreign Affairs, 89th Cong., 1st Sess.} 1239 (1965).
\textsuperscript{68} See notes 4-36 supra, and accompanying text.
\textsuperscript{69} Cf. \textit{Oetjen v. Central Leather Co.}, 246 U.S. 297 (1918), where the opposite result would have deprived Mexico's vendee of a load of animal hides.
\textsuperscript{70} The effect of the attempted abrogation of the rule of abstention by the Hickenlooper Amendment, note 63 supra, is not yet clear. In \textit{Banco Nacional de Cuba v. Farr}, 243 F. Supp. 957 (S.D.N.Y. 1965), decided after passage of the amendment, the court refused to make an independent determination as to the effect of a Cuban confiscatory decree. Instead, it stayed the case and sought express guidance from the State Department. This approach seems likely to be the wave of the future in act of state cases.
brought into question elsewhere, sensibilities are offended. The power value is at stake for the national community concerned, and, in terms of precedent, for those who question it as well. To undo what another state has officially done obviously involves inter-sovereign relationships, and can be justified—if at all—only where fundamental standards of substantive or procedural due process have been violated. Absent diplomatic guidance, there is a real question of judicial competency.\textsuperscript{72}

It is further argued that the present relationship is justified in this area because of the overriding importance of the principle that the United States should speak with one voice in foreign affairs.\textsuperscript{73} It is also said, as it is in the sovereign immunity cases,\textsuperscript{74} that the piecemeal, fortuitous nature of the judicial process is unsuited to the development of universally respected norms of international law.\textsuperscript{75} An active, developmental role for the courts, it is urged, is unnecessary because the long-term self-interest of all members of the world community militates in favor of internationally lawful conduct. Thus, the disruptions that could be caused by judicial attempts to create substantive norms should be avoided pending the development of new legal principles and law-applying institutions by political leaders.\textsuperscript{76}

The force of the considerations enumerated above lends an air of rationality to the relationship between the executive and the courts in the areas of recognition and act of state which was notably absent in the sovereign immunity field.\textsuperscript{77} Yet, it seems those considerations suffer from shortsightedness and over-sensitivity. The present relationship between the State Department

\textsuperscript{72} Katzenbach, \textit{Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law}, 65 \textit{Yale L.J.} 1087, 1153 (1956). The same author, in oral argument in \textit{Sabbatino} made the following statement:

\textit{The external arena of politics is a much better forum in which to effect changes in international law. . . . Judicial decisions would be a "deadening weight" on the development of international law.}\textsuperscript{32}

\textsuperscript{32} U.S.L.W. 3157 (Oct. 29, 1983). The contention that politics provide a more “external arena” than open court seems at best questionable.


\textsuperscript{74} See note 23 \textit{supra}, and accompanying text.

\textsuperscript{75} Kaplan & Katzenbach at 14; Bilder, \textit{The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs}, 56 \textit{Am. J. Int’l L.} 633, 668 (1962).

\textsuperscript{76} Kaplan & Katzenbach at 10, 29.

\textsuperscript{77} See notes 21-38 \textit{supra}, and accompanying text.
and the judiciary denies to the latter any significant role in the creation of substantive norms. Such a denial is adverse to what must admittedly be the ultimate objective of all our efforts in the international sphere—self-preservation. Much has been written, and many words spoken, to the effect that thermonuclear holocaust can only be averted by the development of norms of conduct by which men and nations can live in peace. Those who contend that the judicial process is too piecemeal and fortuitous to be an effective vehicle for the development of norms seem to forget that the courts are among a very small number of institutions to which there is a relatively steady flow of international legal problems. It is easy to say that the promotion of such rules is for the executive; but history bears witness to the paltry success of that branch. The development of norms is the responsibility of all men and all institutions to whom or to which an opportunity is presented. The courts are obviously such institutions. Indeed, the relatively dispassionate and analytic nature of court proceedings would seem an ideal setting for the promulgation of relatively nonpartisan norms. Courts do not shy away from the balancing of competing policies in domestic cases; they attempt to ascertain and promote the national interest. Yet in the international realm, the courts, with the encouragement of the executive, have virtually declared themselves incompetent. Such a distinction seems anomalous in a contemporary international context which logically compels a merger of the national with the international interest.

Turning, as we did in the discussion of sovereign immunity, to a less philosophical and more pragmatic approach, it can be seen that the very nature of the cases that reach domestic courts is such that their independent resolution would result in no short or long range harm to the national interest. The power of domestic courts is necessarily limited by territorial boundaries. Unless a foreign party has property within the confines of the United States he cannot be affected by domestic court decrees. The cases show that the type and value of foreign-owned property located in the United States, the title or right to which has

78. . . . how decisions by American courts may be viewed abroad should be irrelevant; it should not lightly be assumed that the courts will not make “dispassionate applications of neutral international principles. . . .” While the acting state is not likely to regard such a decision as purely objective, other states surely cannot be insensitive to the justness of a decision disallowing effect to confiscations which are retaliatory, discriminatory, and without adequate compensation.

been litigated, is relatively insignificant.\textsuperscript{79} It therefore seems apparent that both the courts and the executive grossly overestimate the impact which independent adjudication would have on foreign affairs.

IV. TREATY INTERPRETATION

As has been shown, the relationship between the State Department and the courts in cases involving sovereign immunity, recognition, and act of state is predominantly characterized by a deferential attitude of the judiciary. It has been observed that most of the cases in these areas require the courts to adjudicate, either directly or indirectly, the rights or obligations of foreign sovereigns. In cases involving treaty interpretation,\textsuperscript{80} on the other hand, the courts are often asked to adjudicate what must be considered as purely private rights. In addition, the Constitution of the United States expressly extends the judicial power to cases arising under treaties.\textsuperscript{81} These two factors, which distinguish treaty interpretation from sovereign immunity, recognition and act of state, have significantly contributed to a modification of the executive-dominated relationship observed in the latter areas.

A study of the cases, however, reveals that the deferential attitude toward the executive, although modified, is by no means abandoned in the area of treaty interpretation. A number of cases have taken the view that acts of the executive with respect to the meaning of treaties should, when ascertainable, be given nearly conclusive effect.\textsuperscript{82} Other cases take a different view of judicial responsibility and take pains to employ legal reasoning.

\textsuperscript{79} Thus, in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), all the statements about the pernicious effect on foreign relations, which a denial of validity of the Cuban decree would have, were made with reference to a fund amounting to less than $150,000. See also note 69 supra.

\textsuperscript{80} This discussion will confine itself to judicial interpretation of treaties and will not deal with executive agreements. The latter are entered into without the consent of the Senate and only infrequently come before the courts for interpretation. One reason may be that the executive agreement seldom attempts to set up a detailed scheme of legal rights unless it is executed pursuant to the provisions of a general treaty or act of Congress.

\textsuperscript{81} U.S. Const. art. III § 2.

to reach the correct result. This inconsistency is clearly revealed by comparison of two cases involving the same legal issue. *Gallina v. Fraser* raised the question of whether the extradition treaty of 1885 with Italy had been abrogated by World War II. In the course of holding that the treaty was still in force the court said:

Oftentimes the intrinsic nature of an agreement made by the political department of one government with that of another nation is revealed only by subsequent conduct and relations between those political departments, for the nature lies not in the bare words of the treaty but in the gloss put on those words by the authorities bound thereto. Our courts have always acknowledged the pre-eminent role of the political departments in interpreting the obligations of this nation or a contracting nation under a treaty or other type of international agreement.

The contrasting approach was taken in *Clark v. Allen*, a case which also questioned the effect of war on a treaty. One Wagner died in California leaving his real and personal property to German nationals. When World War II commenced the property was seized by the Alien Property Custodian pursuant to the Trading With The Enemy Act. The Custodian brought an action to have the German legatees declared ineligible to participate in the estate. The Custodian based his petition on the theory that the 1923 treaty with Germany, at least as far as it pertained to reciprocal inheritance rights, was abrogated by the war. The Supreme Court, speaking through Justice Douglas, disagreed and held that the treaty remained in force. The Court

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83. See Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948); Factor v. Laubenheimer, 290 U.S. 276 (1933); United States v. Rauscher, 119 U.S. 407 (1886) (the Court looked to the views of "publicists and writers" to determine the substantive rule of international law); Smiths America Corp. v. Bendix Aviation Corp., 140 F. Supp. 46 (D.D.C. 1956). See also United States ex rel. Casanova v. Fitzpatrick, 214 F. Supp. 425 (S.D.N.Y. 1963), where the court, called upon to interpret the U.N. Headquarters Agreement and faced with a State Department interpretation, said:

Whether, upon the facts presented by both the Government, and the individual involved or his government, immunity exists by reason of the agreement, is not a political question, but a justiciable controversy involving the interpretation of the agreement and its application to the particular facts. *Id.* at 433.

84. 177 F. Supp. 856 (D. Conn. 1959), aff'd, 278 F.2d 77 (2d Cir. 1960).


86. 177 F. Supp. at 863-64.

87. 331 U.S. 503 (1947).


89. 44 Stat. 2132 (1923).
drew from prior decisions the principle that war does not automatically abrogate all treaties between the parties to the conflict.\textsuperscript{90} Reasoning from that principle, the Court examined the compatibility of the inheritance provisions with the fact of war:

Where the relevant historical sources and the instrument itself give no plain indication that it is to become inoperative in whole or in part on the outbreak of war, we are left to determine... whether the provision under which rights are asserted is incompatible with national policy in time of war.\textsuperscript{91}

The difference in approach illustrated by the two cases above is testimony to the difficulty the courts have had in forging a consistent role for themselves in treaty interpretation. The difficulty may be due in part to the lack of widely accepted norms of interpretation. Thus in the examples above, it is generally agreed that the compatibility of a treaty with a state of war is an important factor in determining its continued vitality; but there is no such agreement concerning the kinds of factors that tend to establish compatibility.\textsuperscript{92} As we have seen, the dearth of norms in the field of recognition and act of state triggered judicial deference to the State Department. The same reaction, different only in degree,\textsuperscript{93} is present in treaty interpretation. The somewhat less extensive degree of deference may perhaps be explained by the involvement in many of the cases of essentially private rights.\textsuperscript{94} But the presence of this

\textsuperscript{90} Society for the Propagation of the Gospel v. New Haven, 21 U.S. (8 Wheat.) 464 (1823). The Court in this case said:
There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war.

\textit{Id.} at 494.

\textsuperscript{91} 331 U.S. at 513-14.


\textsuperscript{93} It should be noted in the passage quoted that Justice Douglas sought the compatibility of the treaty with national policy, rather than with general international practice.

\textsuperscript{94} Irving Moskovitz expressed his concern with this factor in the following way:
It would give me some concern to think that the rights of a private person can be influenced by the creation of a kind of a precedent of authority merely by the assertion of a position. My recollection, from personal experience, is that in the course of the performance of one's function as a representative of the executive, one tends to argue one's position as if it were almost an Act of Congress.

factor has not deterred the courts from stating in almost every case that the interpretation placed on a particular treaty by the State Department is entitled to great weight.\textsuperscript{95} When the court is referring to a course of interpretation consistently adhered to by both contracting parties, this statement seems entirely proper.\textsuperscript{96} When the court looks to a unilateral statement of interpretation, however, there is serious doubt about the degree of reliance which is called for. Under the Constitution, a treaty must receive the advice and consent of the Senate as well as the signature of the executive before it becomes a part of the law of the land.\textsuperscript{97} Thus, when a court looks to the executive for an interpretation, it cannot accurately be said that it is looking to the United States' interpretation. It is not inconceivable that the meaning placed on a treaty by the executive might differ materially from that placed upon it by the consenting Senators.\textsuperscript{98} Thus, in looking at a State Department interpretation, the courts should logically give it no more weight than they give such things as administrative regulations.

The confusion in the relationship between courts and executive in the treaty interpretation area has been compounded by a recent decision of the Supreme Court of the United States. In the case of \textit{Zschernig v. Miller},\textsuperscript{99} a resident of Oregon died intestate leaving both real and personal property located in that state. Defendants, decedent's sole heirs and residents of East Germany, sought to inherit the property under the provisions of the 1923 treaty with Germany.\textsuperscript{100} Plaintiffs, officials of the government of Oregon, petitioned the probate court for escheat of the proceeds of the estate on the theory that an Oregon statute\textsuperscript{101} prohibited the devolution of the estate to the East German nationals. The state law conditioned the ability of aliens to inherit Oregon property on the presence of a reciprocal right for United States citizens, and the ability of the foreign heirs to take the property without confiscation. The Oregon Supreme Court held that the conditions of the statute had been

\textsuperscript{96} It is elementary contract doctrine that the meaning which the parties to a contract have placed upon the instrument by their subsequent conduct is entitled to great weight. \textit{Restatement of Contracts} § 235(e) (1932).
\textsuperscript{97} U.S. Const. art. II, § 2, cl. 2.
\textsuperscript{98} The recent controversy over the scope of the Gulf of Tonkin resolution, although not a treaty, is evidence of such a contingency.
\textsuperscript{99} 389 U.S. 429 (1968).
\textsuperscript{100} 44 Stat. 2132 (1923).
\textsuperscript{101} Ore. Rev. Stat. § 111.070 (1965).
The judicial independence exhibited by the Court's refusal to be swayed by the State Department's communication with regard to the scope of the 1923 treaty, although susceptible to misinterpretation, is not surprising; nor is it likely to foreshadow a change from the somewhat deferential attitude which has been noted above. In reality, the Court's holding was not based on an interpretation of the 1923 treaty at all; but rather on a relatively detached evaluation of the Oregon statute as an entirely unconnected piece of legislation. The Court, in effect, held that regardless of any treaty commitments, the state law was an impermissible intermeddling into a field reserved for the federal branches. The Court, in a somewhat questionable fashion, was merely adopting its traditional posture as umpire of the federal system. These considerations lead to the conclusion that Zschernig v. Miller, although perhaps adding more confusion to an area already fraught with it, is not authoritative precedent for a readjustment of the relationship between executive and judiciary in matters of treaty interpretation.

102. The court's decision limited the aliens' right of inheritance to the proceeds from the realty. This result was dictated by the Supreme Court's interpretation of the 1923 treaty in Clark v. Allen, 331 U.S. 503 (1947).

103. 389 U.S. at 434-35.

104. This approach was vigorously condemned by the concurring opinions of Justices Harlan and Stewart (joined by Justice Brennan) and the dissenting opinion of Justice White.

105. The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. 389 U.S. at 440. Notice here that the Oregon law is said to impair the nation's policy although the State Department unequivocally said that this was not the case.
It has been observed that the trend of the future is likely to be characterized by a decreasing role for the treaty as a device for setting up substantive rules of conduct. The treaty is simply too ponderous a vehicle for the effective accomplishment of this goal. Instead, it is said, the treaty will increasingly be employed to establish broad, constitutional procedures through which such rules can be promulgated by use of the executive agreement and other forms of negotiation. Although such an approach seems clearly desirable, it is not at hand and the courts are still frequently faced with the problem of enforcing international rights and obligations under treaties. In discharging this responsibility, it is submitted, that the courts' acquiescence to the State Department's preference should be conditioned on the results of an independent legal appraisal. There is no justification for behaving in a deferential manner when the issue is whether the United States or other party to a treaty has complied with the terms of the instrument, and then turning around to assert judicial independence when predominantly private rights are concerned. Such a pattern of behavior must naturally call into question the objectivity of United States courts in foreign eyes. It is also, as the cases show, unnecessary and even deleterious to the effective conduct of foreign relations.

V. CONCLUSION

As the relationship between the courts and the State Department has been traced through the areas of sovereign immunity, recognition and act of state, and treaty interpretation, one overriding characteristic has come to light. Whenever there is any possibility, however remote, of embarrassing the executive in its conduct of foreign affairs or of giving offense to a foreign nation, the courts of the United States will look to the executive branch for guidance, and will consider themselves essentially bound by that branch's expressions of preference. Down through the years there have been indications from the State Department itself that it does not seek to play the role which has devolved upon it. Yet its own intervention in cases

106. Kaplan & Katzenbach at 246.
where it was patently unnecessary, and judicial oversensitivity to the requirements of amicable intercourse between nations, have combined to forge the relationship as it stands today. That the relationship is unsatisfactory, both from the standpoint of the national interest in fostering the growth of international law and from the standpoint of the foreign litigant in a domestic court, has already been argued. The possibility of altering the present relationship in the direction of judicial independence seems remote. Deference to the executive has become enshrined in the courts and it is highly unlikely that any change will come from them. The only practical means of achieving a significant alteration appears to be a State Department declaration of and strict adherence to a policy of avoiding the judicial role. Such a policy, of course, could not and should not prevent the executive from interceding, in the unlikely event that a truly sensitive case reached a domestic court. But the State Department should look long and hard at the overall picture before taking such a step.